

## SOVEREIGNTY, DEMOCRACY, MAJORITY – THE CATCHPHRASES OF AUTOCRATIC ENDEAVORS?

*On Responsibility, the Separation of Powers, Law and Ethics\**

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### Preliminary Notes

This series of lectures pays homage to the distinguished diplomat Carl Lutz (1895–1975) who, alongside the likes of Raul Wallenberg (1912–19?) and others, saved the lives of thousands of Jewish people from their Nazi persecutors.<sup>1</sup> I dedicate the following thoughts to his activity, as well as the millions of victims of the war and right and left-wing dictatorships.

### 1. Family Dynasties, Corruption, Populism: Nothing New Under the Sun

1. 2080 years ago, when Marcus Tullius Cicero (106–44 BC) joined the political fray against the candidates of the Populares – the party of the populists – for the shared rulership of the Roman Empire, his youngest brother Quintus (102–43 BC) wrote him a letter on elections enumerating astonishingly timeless campaign tricks. He suggested that to succeed in the battle of elections, one must be a master of intrigue and move in the mainstream, making himself a subject of conversation, displaying his care for the people with handshakes, memorizing names and showing flattery, and continuously adjusting his mimicry and manner of speech to the expectations of those he happened to meet.<sup>2</sup> Cicero became Consul in 63 BC, thwarting the attempted coup

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\* Carl Lutz lecture at the Andrassy University, Budapest, 21 October 2016.

<sup>1</sup> Rolf STÜCHELI: Art. Carl Lutz. In: *Historisches Lexikon der Schweiz (HLS)*. Vol. VIII. Basel, 2009. 123., <http://www.hls-dhs-dss.ch/textes/d/D14866.php>

<sup>2</sup> Quintus Tullius CICERO: *De petitione consulatus ad Marcum Tullium fratrem* (64 BC) (Commentariolum petitionis = On running for the Consulship), Oxford, 1902. no. 9. and no. 11.,

of Lucius Sergius Catilina (108–62 BC), later living through the populist dictatorship of Gaius Julius Caesar (100–44 BC) and, following his brutal murder, the bloody persecution of the Caesar's pupil, Marcus Antonius (86–30 BC).<sup>3</sup>

2. There is nothing new about populism. The ancient tricks are still valid to this very day; there is merely a wider range of available techniques: *TV sets, mass e-mail, databases, cyber warfare*, etc. In the background, influential advisers shape the features of candidates to conform to a façade of sympathy based on public opinion research, forgoing the ancient maxim never to take a stand in substantive matters so as not to scare off voters with different ideas.<sup>4</sup>

3. However, as opposed to the institution of a monarchy or a dictatorship, *democracy should be based on the ability to change*: it assumes trust for a limited period of time. However, family dynasties are by no means limited to dictatorships.<sup>5</sup> The G20-

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available in Latin at <http://www.thelatinlibrary.com/cicero/compet.shtml> or [https://www.hs-augsburg.de/~harsch/Chronologia/Lsante01/CiceroQuintus/ciq\\_comm.html](https://www.hs-augsburg.de/~harsch/Chronologia/Lsante01/CiceroQuintus/ciq_comm.html), available in English at [https://en.wikisource.org/wiki/On\\_running\\_for\\_the\\_Consulship](https://en.wikisource.org/wiki/On_running_for_the_Consulship) Quintus Tullius Cicero For more on this, in general Wolfgang SCHULLER: *Korruption in der Antike*. In: Ulrich VON ALEMANN (ed.): *Dimensionen politischer Korruption. Beiträge zum Stand der internationalen Forschung*. [Politische Vierteljahresschrift, Sonderheft 35]. Wiesbaden, 2005. 50–58.

<sup>3</sup> Klaus BRINGMANN: *Der Prozess gegen die Caesarmörder. Von der Amnestie zum politischen Schauprozess*. In: Uwe SCHULZ (ed.): *Grosse Prozesse. Recht und Gerechtigkeit in der Geschichte*. München, 1996. 32–40.

<sup>4</sup> Bernhard LINKE: *Politik und Inszenierung in der Römischen Republik. Aus Politik und Zeitgeschichte APuZ*, no. 7. (2006), 33–38., in particular 33.

<sup>5</sup> As an example: *North Korea*: The Kim family, in power for the past three generations: state founder Kim Il Sung (1948–1994), Kim Jong-Il (1994–2011) and Kim Jong-Un (since 2011); *Cuba*: Fidel Aelhandro Castro Ruz (1959–2008) and Raúl Modesto Castro Ruz (since 2008) siblings; *Syria*: father Hafez (1970–2000) and son Bashar Al-Assad (since 2000); *Azerbaijan*: father Heidar Aliyevich Aliyev (1993–2003) and son, Ilham Heidar Aliyev (since 2003), whose plebiscite in September 2016 intended to ensure succession within the family (by eliminating the president's age limit).

members, the USA,<sup>6</sup> Japan,<sup>7</sup> Canada,<sup>8</sup> India,<sup>9</sup> Argentina<sup>10</sup> and Greece<sup>11</sup> (via the EU and as part of the G20) make up 26% of the world's population and produce 35.6% of our planet's GDP. Since World War II, a total of 12 families led these six nations for an average 2/5<sup>ths</sup> of this time period. This fact, however, is not all-encompassing.<sup>12</sup>

<sup>6</sup> In *The United States of America*, in 20 of the past 30 years, the presidents were recruited from two families: the Bush family (George Bush 1989–1993; George Walker Bush 2001–2009) and Bill Clinton (1993–2001), which will perhaps be continued (by Hillary Rodham Clinton running for the presidency in 2017), which goes against the wise self-restraint of the first great president, George Washington (1787–1795) who willingly resigned after 2 periods in office. Yet even the Kennedy family, President John Fitzgerald Kennedy (1960–1962), his brother and Attorney General Robert Francis Kennedy who was murdered during the 1968 pre-election campaign and the youngest brother Senator Edward Kennedy who was compromised during the fatal 1969 *Chappaquiddick* case, attempted (unsuccessfully) to turn the presidency into a family 'business'. Previously, even the second and sixth President of the United States, father John Adams (1797–1801) and son John Quincy Adams (1825–1829) as well as the 9<sup>th</sup> and 23<sup>rd</sup> presidents, grandfather William Henry Harrison (1841, who passed away after one month in office) and grandson Benjamin Harrison (1889–1893) were also from the same family and although Theodore Roosevelt (1901–1909) and Franklin Delano Roosevelt (1933–1945) didn't support the same party, they were fifth cousins. From the 44 Presidents of the United States, 8 were from a total of 4 families, leading the USA for a total of 44 of its 228-year history.

<sup>7</sup> *The 54 administration in Japan* since 1945 were led by a total of 34 Prime Ministers, 10 of whom were from 4 families (namely Fukuda 1976–1978 and 2007–2008, Yoshida/Suzuki/Aso 1946–1954, 1980–1982 and 2008–2009, Kishi/Abe 1957–1960, 2006–2007 and since 2012, as well as Hatoyama 1954–1956 and 2009–2010), who led the democratic Japan for a total of 25 years.

<sup>8</sup> In *Canada*, the previous Prime Minister, Pierre Trudeau's (1968–1984) son, Justin Trudeau has headed the government since 2015.

<sup>9</sup> In *India*, 3 generations of the same family were in power (father Jawaharlal Pandit Nehru 1947–1964, daughter, Indira Gandhi 1966–1977 and 1980–1984 grandson Rajiv Gandhi 1984–1989) from the independence of 1947 to 1989, for 37 of the 42 years.

<sup>10</sup> In *Argentina*, since World War II and before and after the military dictatorship (1976–1983) two couples monopolized the state government for nearly a quarter of a century: Juan and Isabel Perón during the period of 1946–1955 and 1973–1975, followed by Nestor and Cristina Kirchner-Fernandez in 2004–2015.

<sup>11</sup> In *Greece*, from 1973 to 2010, with the exception of 3 periods in office (the periods of Konstantinos Mitsotakis (1990–1993) and Kostas Simitis (1996–2004)) a total of 2 families (uncle Konstantinos Karamanlis representing the Nea Dimokratia party from 1974–1980 and nephew Kostas Karamanlis from 2004–2009 as well as father Andreas Papandreou representing the Panhellenic Socialist Movement (PASOK) from 1981–1989 followed by his son Georgios Papandreou from 1993–1996) were in power. Prior to the military dictatorship (1967–1973) Konstantinos Karamanlis headed the government from 1955–1963 along with his grandfather Georgios Papandreou in 1945 and from 1964–1965.

<sup>12</sup> Naturally, there are many other cases: For example, over the course of three decades and since its independence, *Sri Lanka* has been under the rule of a single family: the father Solomon Bandaranaike (1956–1959) was Prime Minister, followed by his widow, Sirimavo Bandaranaike (1960–1965, 1970–1977 and 1994–2000), while their daughter Chandrika Bandaranaike Kumaratunga (1994–2005) served as the President. *Singapore* was ruled under even stronger family ties since 1959 – with the exception of 14 years – by father Lee Kuan Yew (1959–1990) and since 2004, by his son Lee Hsien Loong. Since the disintegration of the artificially established state, *Pakistan* (the Bhutto/Zardari families) and *Bangladesh* (the Rahman, Hayeed and Zia families) have been ruled by a small number of feuding families. *Malaysia's* 6<sup>th</sup> Prime Minister, Najib Abdul Razak (in office since 2009) is the

Still, the examples of Japan, Canada and the United States of America show that the trend remains undiminished. The USA<sup>13</sup> and Argentina<sup>14</sup> literally comply with the constitutional term limits, rendering them meaningless. However, this differs from the Russian technique of gaining office<sup>15</sup> in that it shares the power amongst multiple family members. Is the the fate of politician dynasties tied to such *democratic wisdom*?<sup>16</sup>

4. The noble families of Ancient Rome, and of various monarchies over the centuries, were also dominated by the elite, or the so-called ‘Optimates’. Another intriguing matter is the appearance of such dynasties in *democracies*. It seems that their precise enumeration, analysis and critical evaluation is still yet to come; nevertheless, this phenomenon serves as the base for the proliferation of the branding of established political circles as ‘classe politique’. A *coincidental* selection of news-items over the past six years from three dozen different nations with regular elections – thus not dictatorships or constitutional monarchies – documents legal proceedings on the violation of party financing regulations<sup>17</sup> and the illegal acceptance of advantages<sup>18</sup> of office holders.

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son of the 2<sup>nd</sup> Prime Minister, Tunku Abdul Razak (1970–1976). *Indonesia*’s 5<sup>th</sup> President, Megawati Sukarnoputri (2001–2004) followed his father’s footsteps, the state founder President ACHMED SUKARNO (1945–1967). This phenomenon was known in other democracies, such as in the *Philippines* (during the presidencies of mother Corazón Aquino 1986–1992 and son, Benigno Aquino 2010–2016), *Chile* (during the office periods of President Eduardo Frei Montalva from 1964–1970 and his son, Eduardo Frei Ruiz-Tagle from 1994–2000), *Uruguay* (father Lorenzo Cristóbal Manuel Batlle y Grau (1868–1872), son José Pablo Torcuato Batlle y Ordóñez (1903–1907 and 1911–1915), great-grand nephew Luis Conrado Batlle Berres (1947–1951 and 1955–1956) as well great-great grand nephew Jorge Luis Batlle Ibañez (2000–2006) and *Belgium*: Prime Minister Gaston Eyskens (1949–1950, 1958–1961 and 1968–1973) followed by his son Mark Eyskens in 1981.

<sup>13</sup> The Twenty-Second Amendment of the United States of America (ratified in 1951), available in English at [http://www.archives.gov/exhibits/charters/constitution\\_amendments\\_11-27.html](http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html).

<sup>14</sup> Argentina’s Constitution, Article 90, available in English at [https://www.constituteproject.org/constitution/Argentina\\_1994.pdf?lang=en](https://www.constituteproject.org/constitution/Argentina_1994.pdf?lang=en).

<sup>15</sup> In the year 2000, upon assuming office as the President of the Russian Federation, Vladimir Putin declared the „Dictatorship of Law” and literally observed the Russian Constitution (Article 81 Section 3, available in English at [https://www.constituteproject.org/constitution/Russia\\_2014?lang=en](https://www.constituteproject.org/constitution/Russia_2014?lang=en)), which does not allow for more than two subsequent periods in office for the President. Putin thus established the previously unknown position of Prime Minister, which he assumed in 2008, reassuming the office of President in 2012 by swapping positions with his successor, Dmitry Medvedev.

<sup>16</sup> After his mentor, Socrates was mistakenly sentenced to death, Plato lost trust in democracy. For more on the matter, see Christian MEIER: Ein Anschlag der Demokratie auf die Philosophen? Verurteilung und Tod des Sokrates. In: SCHULZ op. cit. 21–30. As a *dissenter* of democracy, Plato stated the following: *Republic* III 415a-d, available in Greek at <https://bit.ly/2TWEGvg>; available in English at <https://bit.ly/2K2LbwL> and is thus out-and-out a family dynasty.

<sup>17</sup> Thus „classe politique” has a negative connotation. In ancient Athens, those who *assumed no public role* were dubbed as idiotai (laymen), amateurs, citizens who assumed no office, who finally became idiots. It seems that the connotation has since taken a 180-degree turn.

<sup>18</sup> For more on a few *previous* party financing scandals, such as the ones in Belgium (Willy Claes, PS), Germany (Helmut Kohl, CDU), France (Henri Emmanuelli, PS), Great Britain (Peter Mandelson,

Table 1 Party Financing: newspaper reports on ongoing corruption proceedings

Nation	Politician	Party	Year
Angola	President José Eduardo dos Santos and daughter Isabel (the biggest investor in Portugal)	Communist	2015
Argentina	President Cristina fernandez de Kirchner and surroundings	Peronist	2015
Australia	Ian Macdonald	Socialist	2013
Brazil	Petrobras/multiple ministers  President Lula da Silva President of the Chamber of Deputies Eduardo Cunha President of the Senate Renan Calheiros President José Sarney Minister Romero Jucá	Socialist and right-wing Partido do Movimento Democrático Brasileiro Socialist PMDB  PMDB PMDB PMDB	2014–2016
Chile	Union Democratica Independiente UDI Sebastian Davalos	Right-wing party Socialist	2014 2015
China	Zhou Yongkang and Bo Xilai	Communist	2014
Germany	Bayern: Landtag MP Christine Haderthauer	CSU CSU	2014 2014
Finland	Prime Minister Matti Vanhanen	Centre Party	2009
France	Minister Jérôme Cahuzac Minister Eric Woerth President Nicolas Sarkozy Aquilino Morelle	Socialist UMP UMP Socialist	2013 2010 2014 2014
Greece	Akis Tsochatzopoulos, Minister for National Defence Joannis Skobos, Minister for National Defence	Socialist Socialist	1996– 2001 and 2014
Greenland	Prime Minister Aleqa Hammond	Socialist	2014
Great Britain	various Members of Parliament; new rules for financing; David Mills (husband of Tessa Jowell, Secretary of State for Culture, Media and Sport and Minister for Women)	Socialists and Tories	2010 2012
Guatemala	President Otto Pérez Molina and La Linéa	Partido patriota	2015
India	Lalu Prasad Yadav	Congressional Party	2013
Ireland	Prime Minister Charles Haughey	Fianna Fail	1970; 2012
Italy	Prime Minister Silvio Berlusconi Minister Umberto Bossi	Forza Italia Lega Nord	2009–2014 2012
Japan	Prime Minister Yukio Hatoyama Naoki Inose	Democrats Liberal democrats	2010 2013
Canada	Prime Minister Stephen Harper	Tory	2013
Kenya	election commission	Governing party	2014
Columbia	Minister of the Interior Sabas Pretelt De La Vega, Uribes	Governing party	2012
Croatia	Prime Minister Ivo Sanader	Nacionalist HDZ	2013
Malaysia	Prime Minister Najib Razak Plundering of 1Malaysia Development Berhad state funds	UMNO	2015
Mexico	All PRI Presidents until 2000	PRI (governing party)	–2000
Montenegro	Prime Minister Milo Djukanovic Clientelism and corruption	Socialist	2000– 2015
Austria	Governor of Carinthia Jörg Haider Finance Minister Karl-Heinz Grasser Chancellor Werner Faymann Minister of Interior Ernst Strasser Werner Amon	FPÖ FPÖ SPÖ ÖVP ÖVP	2013 2013 2013 2014 2014

Labour), Italy or the USA (Diebold machines, Enron scandal), see Schweizerisches Bundesblatt 1993. vol. III. 526.

Portugal	Prime Minister José Socrates	Socialist	2014
Romania	Prime Minister Adrian Nastase Daniel Chitoiu Elena Udrea Prime Minister Victor Ponta night club fire	Socialist National liberal Liberal-democrat Socialist	2011 and 2014 2014 2015 2015
Russia	Prosecutor General Yury Chaika	Our Home – Russia	2015
Serbia	Minister of Foreign Affairs and First Deputy Prime Minister Ivica Dacic, Mafia ties	Socialist	2015
Slovakia	Prime Minister Mikulas Dzurinda	Christian-Democrat	2010
Slovenia	Prime Minister Janez Jansa	Democrat	2013
Spain	Luis Barzenas Rodrigo Rato Ana Mati	Partido Popular Partido Popular Partido Popular	2014 2014–2015 2014
South Africa	President Jacob Zuma	ANC governing party	2013
The Czech Republic	Jana Nagyova Jan Fischer Miloslav Ransdorf Member of the European Parliament, attempted to withdraw 350 million € from Swiss ZCB	Civic Democratic Party Non-party Communist	2013 2013 2015
Ukraine	President Viktor Yanukovych	Socialist	2014
Venezuela	President Nicolas Maduros, anti-corruption campaign	Socialist	2014

## 2. Reaction

5. All around the world, *populist* movements promise to help. What should we make of this? As a nation with a solid public law background, *Switzerland* has witnessed a number of examples which can serve as *judgement criteria*.

6. *Switzerland* is still facing the burden of several past and future referendums. These were devised by a party which, in 86 of the past 87 years had representation in the Swiss *consociational government* and, over the past 25 years, has grown from the *smallest to the greatest governing party*:

- a) In 2010, the people and the cantons accepted the so-called ‘*Popular initiative for the deportation of criminal foreigners*’ (*Ausschaffungsinitiative*), according to which foreign criminals are to be deported without hesitation.<sup>19</sup> At the same time, however, the ‘*Popular initiative for the effective expulsion of foreign Criminals*’ (*Durchsetzungsinitiative*), a rigid motion to eliminate the elbow room in the judicial decision-making process, was clearly rejected by the people and the cantons in 2016.<sup>20</sup>

<sup>19</sup> For all resources on the text and procedure of the referendum and the results of the ‘*Popular initiative for the deportation of criminal foreigners*’ (*Ausschaffungsinitiative*), cf. <https://www.admin.ch/ch/d/pore/vi/vis357.html>

<sup>20</sup> For all resources on the text and procedure of the referendum and the results of the ‘*Popular initiative for the effective expulsion of foreign criminals*’ (*Durchsetzungsinitiative*), cf. <https://www.admin.ch/ch/d/pore/vi/vis433.html>

- b) Conversely, in 2014, the people and the cantons *accepted the so-called 'Popular initiative against mass immigration' (Masseneinwanderungsinitiative)*.<sup>21</sup> The initiative affects the Agreement on the Free Movement of Persons between the European Union and Switzerland. The time-based provisions in the text put a massive constraint on decisions made by Swiss authorities. Whether the EU is willing and able to accept the limitation of one of the Four Freedoms of European existence, the Free Movement of Persons, is yet to be read from the stars of the Flag of Europe.
- c) The same party submitted the popular initiative of *'Swiss law instead of foreign judges' (Selbstbestimmungsinitiative)*, which intends to establish the precedence of the country's laws over international law.<sup>22</sup> The acceptance of the popular initiative could force Switzerland to annul the European Convention on Human Rights.<sup>23</sup> The referendum on the matter will most likely take place in the period of 2018–2020.

### 3. Populism and Suffrage

7. The main reason for the appeal of *populist* efforts, lies – today – in the *main* achievement of modern democracy: Never over the course of history has suffrage been within reach for such a *wide* range of social classes as it is in the current age. Over the centuries, slaves, Jews, Sinti and Roma, the middle-classes and women belonging to all social classes were forced to fight hard for their suffrage right.<sup>24</sup> In fact, the struggle for inclusion is still ongoing, which is clearly evidenced in expressions such as 'under 21', 'foreign citizens', or 'foreigners'. Populism is built on the fear of the loss of suffrage in those with such rights. This is tied to their *self-pity* or *sense of helplessness* induced by their real or perceived failures, which is the breeding ground of *resentment*.

8. This serves as the foundation for the creation of a need for *exclusivity*: „We are the people” institutes the following: *We alone represent „the people”*. The people consist only of individuals. Jan-Werner Müller<sup>25</sup> came to the following conclusion: „Not only is populism anti-elitist, it is fundamentally anti-pluralist.”

<sup>21</sup> For all resources on the text and procedure of the referendum and the results of the 'Popular initiative against mass immigration' (Masseneinwanderungsinitiative), cf. <https://www.admin.ch/ch/d/pore/vi/vis413.html>

<sup>22</sup> For all resources on the text and procedure of the referendum 'Swiss law instead of foreign judges' (Self-determination initiative), cf. <https://www.admin.ch/ch/d/pore/vi/vis460.html>

<sup>23</sup> Available in English at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>

<sup>24</sup> For more details on this, see Nadja BRAUN – Hans-Urs WILF: Die ersten werden die letzten sein and Die Frau soll in der Versammlung schweigen. Direkte Demokratie und Frauenstimmrecht. In: Lars P. FELD – Peter M. HUBER – Otmar JUNG – Hans-Joachim LAUTH – Fabian WITTECK (eds.): *Jahrbuch für direkte Demokratie*. Vol. 4. 2012. Bern–Wien, 2013. 9–40.

<sup>25</sup> Jan-Werner Müller: *Was ist Populismus?* Berlin, 2016.

9. Oversaturation, caused by a flow of information focusing on *sensational news and scandals* heightens the sense of helplessness and the need for simplification, giving way to the ‘terrible simplifiers’ and legitimizing ‘gut decisions’ based on prejudice.

10. In fact, with such rich breeding grounds, populism offers entirely different opportunities than a façade of sympathy based on public opinion research: poles and frontlines instead of a lack of profile – all of this *without* risks for their own election endeavors: The harsh struggle against the rights of minorities and aliens amounts to gaining the votes of the losers of progress. This is how populists subject „*juridified*” issues, such as *universally equal human rights*, to the decision of a territorially limited majority.<sup>26</sup> Ethnic, religious and cultural (linguistic) minorities are concerned with precisely those subjects which most often – empirically – lead to innerstate conflict and civil war.<sup>27</sup>

11. Nowadays, democracy isn’t *eliminated* as during the March on Rome in 1922 or the Reichstag Fire in 1933, but is rather *devoured from inside*. In recent time, autocrats make themselves out as the sole champions of the preservation of *democracy*. The loudest outcries against the elite are voiced precisely by the populist *elite*.<sup>28</sup>

12. At the same time, however, *discourse* is the essence of democracy. The various social concepts for dealing with major complexes of problems with opposing approaches not only lend a *profile* to the various *parties*, but also *provide* voters with a *choice*. Thus conducting a discourse such as *this* would be the true criterion for democracy. On a personal level, it should be about *competition* and not *hostility*. They should regard citizens with different views as fellow human beings. Branding

<sup>26</sup> They are withdrawn from the circle of „juridified” or „politics-free” or politically arbitrary decisions, in the sense that their extent is determined by the courts instead by plebiscites.

<sup>27</sup> Of the 101 inner-state conflicts between 1989 and 1996, 95 erupted over racial, ethnic, religious and linguistic matters: cf. Nicholas HAYSOM: Constitution Making and Nation Building. In: Raoul Joseph BLINDENBACHER – Raoul BLINDENBACHER – Arnold KOLLE (eds): *International Conference on Federalism 2002: Federalism in a Changing World – Learning from Each Other. Conference Reader*. St. Gallen 2002. 261–297., in particular 262. and 267.; Thomas FLEINER – Walter KÄLIN – Wolf LINDER – Cheryl SAUNDERS: Federalism, Decentralization and Conflict Management in Multicultural Societies. In: *International Conference on Federalism 2002*. op. cit. 229., 259.; Stephan HOBE – Otto KIMMINICH: Einführung in das Völkerrecht. [Universitäts-Taschenbücher, UTB, 469.] Tübingen–Basel, 2004. 420.; Thomas FLEINER–GERSTER: *Allgemeine Staatslehre*. Berlin–Heidelberg – New York, 1980. 135.; Lorenz LANGER: Populismus. Man muss die Spannung aushalten. Gastkommentar. *Neue Zürcher Zeitung*, 8 September 2016. 10.

<sup>28</sup> DESIDERIUS ERASMUS OF ROTTERDAM (~1466–1536): *Moriae encomium/Laus stultitiae* (Praise of Folly) no. 7. (1509), available in Latin at <http://www.thelatinlibrary.com/erasmus/moriae.shtml>; available in English at <https://archive.org/details/erasmusinpraise00erasiala> Folly is originated from the illegitimate relationship between the god of wealth and the god of youth. Aristophanes (approx. 446–386 BC) offered one of his last bittersweet comedies, *Plutus*, available in Greek at <https://bit.ly/2HXvvoz>, available in English at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.01.0040> to the god of wealth. Thus there is again, nothing new about this.



them as an object of hatred exploits the aminosity of the helpless and risks developing the preliminary stage of cold or hot civil war.

13. The loud cries of protest against corruption of the elite in power are no guarantee for a democratic-constitutional mentality, long proven by the corrupt cesspool of right and left-wing powers that exist on multiple continents.<sup>29</sup> Rashly made *instant* decisions increase the risk of creating incalculable, deficient processes. Populists have a tendency to back out of the actual realization after their victory in self-initiated referendums.

14. A great deal of problems can only be resolved *with long-term grand scale* projects. Brief election periods possibly combined with the simultaneous limitation of terms in office seem to merely heighten the prioritization of problems which can only be solved in the *short term*. There is a danger that the strength of democracy – assuming trust for a limited period of time – will become its weakness. Namely, long-term problems, such as democracy and the financial security of the elderly, are repeatedly fended off by populists without a solution. Instead, populists in power are exposed by their remarkably frequent attempts to successively increase the terms in office and weaken the checks and balances.

15. Populists don't solve problems; instead, they *wheel and deal with them*. They do so through *symbolic politics* with their very own methodology: instead of terminating the resentment of the dissatisfied, they *cultivate* it. Accordingly, they take „*necessary measures*“: Burqa ban,<sup>30</sup> Minaret ban,<sup>31</sup> etc. Symbolic politics divert attention from the *real* problems. Just one example: one must adopt a critical approach in evaluating and interpreting the current messages of power from the followers of the radical-

<sup>29</sup> It is sufficient to cite Juan Peróns, Néstor and Cristina Kirchner-Fernandez (Argentina), Silvio Berlusconi (Italy) or Jörg Haider (Kärnten/Austria) as examples, who remind us of their financial dealings which were personally profitable, yet catastrophic for the state in question. Alberto Fujimori (Peru) exposed the embezzlement of Italian tax funds by Prime Minister Bettino Craxi to the benefit of his predecessor, the socialist Arpa Alan Garcia in Peru, only to surpass manifold this „achievement“ when in power with the head of the intelligence service, Vladimiro Montesinos (cf. <http://www.n-tv.de/politik/Wieder-Haft-fuer-Fujimori-article419920.html> and [http://www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2002/ref\\_2002-08-20.html](http://www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2002/ref_2002-08-20.html)). The most all-encompassing and perfected corrupt regime was established by the national socialists, cf. Gerd R. UEBERSCHÄR – Winfried VOGEL: *Dienen und Verdienen. Hitlers Geschenke an seine Eliten*. [Fischer-Taschenbuch, 14966.]. Frankfurt am Main 2000.; Frank BAJÖHR: *Parvenüs und Profiteure. Korruption in der NS-Zeit*. Frankfurt am Main, 2001.

<sup>30</sup> For example, the public initiative to „a ban on face covering“ submitted for the collection of signatures in Switzerland on 15 March 2016. *Schweizerisches Bundesblatt* 2016. 1669., available at <https://www.admin.ch/ch/d/pore/vi/vis465.html>.

<sup>31</sup> The federal public initiative to „ban on the construction of new minarets“ passed by the people and the cantons of Switzerland on 29 November 2009. *Amtliche Sammlung der eidgenössischen Gesetze = Official Compilation of Federal Legislation*. 2010. 2161.; *Schweizerisches Bundesblatt = Federal Gazette*. 2007. 3231., available at <https://www.admin.ch/ch/d/pore/vi/vis353.html>

Salafist<sup>32</sup> state of Sunni Islamic Mohammed Abd al-Wahhab who, as a part of their ultra-reactionist efforts, urge – amongst other things – the installment of Sharia law (Example: Sudan, 1983) and reinstalling the capital punishment of stoning (Example: Brunei, 2014), and funding the establishment of mosques in Europe through Salafist institutions (Saudi-Arabia), mainly through the assistance of the Organisation of Islamic Cooperation (56 member states with headquarters in Jeddah). For years, Salafist states have been thwarting the discussion of the practice of human rights in the United Nations Human Rights Council. At the same time, however, these states have been violating human rights far more frequently than the rightfully criticized People's Republic of China. The universal nature of globally defined identical human rights, agreed on by UN members in 1948 in The Universal Declaration of Human Rights in Paris<sup>33</sup> and in 1993 at the World Conference on Human Rights in Vienna have thus become void of meaning.<sup>34</sup>

16. There is much to learn from the *chain of arguments* presented by populists which remain unchallenged by their opponents. Is this a case of the „Entrenchment of democracy” (Martin Booms)?<sup>35</sup> I wish to discuss this in relation to the following three considerations:

- a) in relation to national law and international law – *based on the question of sovereignty,*
- b) in relation to politics and justice – *based on the question of the separation of powers,*
- c) in relation to the protection of national and *minority law* – as well as *potential from a legal point of view and freedom from a ethical point of view.*

#### 4. On the Subject of Sovereignty

17. Allegedly, Switzerland's '*Popular initiative against mass immigration*' brings up the theme of *sovereignty*. How openly they flaunt this attempted reasoning!

18. 600 years ago, the concept of *sovereignty* was endorsed by monarchs and cities who contrasted it with medieval division as a *territorially limited demand with a comprehensive meaning* for the exclusive right of exercising power. Through external sovereignty, they *demand independence from international law*, thus a control over

<sup>32</sup> Salafiya = tenets of the predecessors.

<sup>33</sup> Available in English at <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>.

<sup>34</sup> On the primacy of Sharia, cf. the Organisation of Islamic Cooperation's Declaration on Human Rights in Islam on 5 August 1990 in Cairo (currently: Organisation of Islamic Cooperation, OIC), available in English at <http://hrlibrary.umn.edu/instree/cairodeclaration.html>; Cf. on the entire matter Toni STADLER: Salafistischer und radikaler Islam: Eine gefährlich unzeitgemässe Ideologie. Gastkommentar. *Neue Zürcher Zeitung*, 7. September 2016. 10.

<sup>35</sup> Martin BOOMS: Die halbierte Idee der Demokratie. *Neue Zürcher Zeitung*, 29. August 2016.. 8.

the conclusion of international contracts. Yet not even Jean Bodin (1529–1596),<sup>36</sup> the forerunner of French absolutism, dared to stake the claim that sovereignty would relieve its bearer of his obligations under *international law*. Sovereignty can be interpreted as competence which in turn dispenses competencies through the way of legislation. The competence of legislation is *limited to the sovereign territory of the state*.

19. What should be applicable on the other side of the national borders? Only international agreements can help against absolutism and unlawfulness over borders. These differ from national legislation in that they are to be developed and accepted by more than one state. The agreement may be *denounced* by one of the member states, yet they may not unilaterally violate or modify it. It is not the *external* powers which place themselves above national sovereignty, but rather it is the state itself which enters into agreement. Thus the concept of the *loss of sovereignty* is simply false in relation to international agreements.

20. Apart from the formal demands of validity (the unity of form and content), the only *material limit* of the Popular initiatives of *Switzerland* is peremptory norm or *jus cogens*,<sup>37</sup> thus the prohibition of wars of aggression,<sup>38</sup> genocide,<sup>39</sup> slavery<sup>40</sup> and torture<sup>41</sup> as well as the principle of the non-refoulement of asylum rights<sup>42</sup>

21. *Official* constitutional amendments are also tied to *peremptory norms (jus cogens)*; however, only the infringement of popular initiatives was sanctioned with (partial

<sup>36</sup> Under the influence of schism and the St. Bartholomew's Day Massacre (Paris blood wedding) (1572), Bodin attempted, in the first of the Six Books of the Republic (1576), to grant the rule of the state to the king through the theoretical reasoning of the highest right to final decisions.

<sup>37</sup> Multilateral Vienna Convention on the law of treaties concluded at Vienna on 23 May 1969 (VCLT) art. 53, Effective for Switzerland since 6 June 1990, available in English at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

<sup>38</sup> Charter of the United Nations concluded on 26 June 1945, art. 39 and art. 42, available in English at <http://www.un.org/en/sections/un-charter/chapter-vii/index.html>.

<sup>39</sup> United Nations International Covenant on Civil and Political Rights concluded on 16 December 1966 (Covenant II), art. 6 sec. 1–3, available in English at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>40</sup> United Nations Covenant II, art. 8, art. 11 and art. 16; European Convention on Human Rights concluded on 4 November 1950 (ECHR) art. 4 sec. 1, available in English at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>41</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on 10 December 1984, art. 2 secs. 2 and 3 and art. 3, available in English at <http://www.ohchr.org/en/ProfessionalInterest/pages/cat.aspx>; ECHR art. 3; United Nations Covenant II, art. 7.

<sup>42</sup> Convention relating to the Status of Refugees adopted on 28 July 1951 by the United Nations Conference art. 33, available in English at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx> – Furthermore, the Swiss practice recognizes the guarantees of international laws of war on states of emergency (cf. United Nations Covenant II, art. 4 and art. 15) as *autonomous jus cogens* (the limitation used by Switzerland). It is *autonomous* insofar as this national legal limitation can theoretically be modified, which would go against the concept of *jus cogens*.

or complete) annulment.<sup>43</sup> The norms set forth in the Popular initiative for „*Sound asylum policy*”,<sup>44</sup> which were annulled in 1996 due to their violation of international law (*jus cogens*), were still legaslatively discussed and put to vote the previous day by the National Council at the Vienna Convention on the Law of Treaties<sup>45</sup> on 23 May, 1996 *without* even a single member requesting the omission of the point of order and requesting a vote on the matter.<sup>46</sup> It is precisely in the preservation of such highly defensible legal assets that the authorities should set a *good* example.

22. On the other end of the spectrum, we find democratic decisions which take primacy over international decisions.<sup>47</sup> *Vox populi – vox Dei?*<sup>48</sup> The purely mechanical interpretation of majority decisions degrades the protection of the rights of minorities to a precarious concession. The Swiss ‘*Self-determination initiative*’ targeted, amongst other things, the „European Convention on Human Rights”. What else is the ECHR than the charter of *our own freedom*?<sup>49</sup> How could regaining our sovereignty result in the loss of freedom!?<sup>50</sup>

<sup>43</sup> Art. 139 sec. 3 and, art. 173 sec. 1 (f) opp. art. 193 sec. 4 and art. 194 sec. 2 of the Federal Constitution (Bundesverfassung), available in English at <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html> The background of the various regulations is that only the Federal authorities and not the opposition authors of the public initiatives are responsible for the lack of any contradictions of the constitutional order.

<sup>44</sup> Available at <https://www.admin.ch/ch/d/pore/vi/vis223.html>.

<sup>45</sup> Cf. the previous fn. 38,

<sup>46</sup> *Amtliches Bulletin (=Official Bulletin) 1990*. Bern, Nationalrat (= National Council) 1990. 823. and 833. (proposals of Scherrer and Ruf National Council representatives). The debate took place *subsequent* to the ratification of the VCLT by Switzerland. Where can we find any criticism on the way the debate and voting took place without any hindrances?

<sup>47</sup> For an example of a failed public initiative, see „Deathpenalty in murder with sexual abuse”, available at <https://www.admin.ch/ch/d/pore/vi/vis392.html>.

<sup>48</sup> From the Age of Antiquity, see: Lucius Annaeus SENECA the Elder (The Rhetorician 54 BC– 39 AD) *Rhetorum controversiae 1,1,10*, available only in Latin at <http://www.thelatinlibrary.com/seneca.contrl.html>; previously in HESIOD: *Works and Days*. Cambridge, MA., Harvard University Press; London, William Heineman, 1914., available in Greek at <https://bit.ly/2TVA9ZZ>, available in English at <https://bit.ly/2TVA9ZZ>

<sup>49</sup> Two Swiss men active in Libya, Rashid Hamdani and Max Göldi were arrested by the order of the revolutionary leader Muammar Al-Gadhaffi and imprisoned for 19 and 23 months, respectively between 2008 and 2010, after the Police Department of Geneva placed Gadhaffi’s son, Hannibal under temporary custody following a report of domestic violence. Cf. INSTITUT FÜR POLITIKWISSENSCHAFT DER UNIVERSITÄT BERN: *Année politique suisse*, vol. 44. (2008), 76., vol. 45. (2009),75. and vol. 46. (2010), 90. What could we hope to gain if the above-mentioned people would face the same fate in the future in the cities of Europe? This thought should be sobering for everyone.

<sup>50</sup> 3 decades ago, the loud proponents of direct democracy, deeply devoted to sovereignty, stood up for the limitation of public initiatives: the parliamentary initiative of the SVP faction (87.224), 4 June 1987 (*Amtliches Bulletin 1989*, Bern, Nationalrat, 1989. 409–412.; *Schweizerisches Bundesblatt 1991*. Vol. III. Bern, Bundesrat, 1991. 56–868.; *Amtliches Bulletin 1991*. Bern, Nationalrat, 1991. 1617–1624.). For criticism on this, see Alfred KÖLZ – Tomas POLEDNA: Die „Einheitsinitiative”– Ei des Kolumbus oder Trojanisches Pferd? *Zeitschrift für Schweizerisches Recht Neue Folge*, no. 107. (1988), I. Halbband, 1–21.

## 5. On the Separation of Powers

23. For years, the populists in Switzerland have been warning the population of „foreign judges”<sup>51</sup>. The ‘Self-determination initiative’ attempts to hinder the development of arbitration, based on national claims, reaching the level of the European Convention on Human Rights. In relation to critical judicial decisions, the populists love referring to the ‘*will of the people*’ which is manifested in the form of the majority developed during parliamentary elections of the referendums. This questions the sense of the *separation of powers*.

24. In China, Confucius (551–479 BC) deemed good state administration to be *dependant on the character of those in power*.<sup>52</sup> 200 years later, Han Fei (280–234) discovered the mediocre cross-section of the people in the state leaders of China. In order to preserve his power the prince was forced, as a contingency, to draw on mutual control through the intelligent sharing of competencies against the loyalty of bureaucrats.<sup>53</sup>

25. In ancient Athens, Plato (~428–348 BC) felt state administration is best served by men *of the same nature*.<sup>54</sup> This approach is less typical of other ancient philosophers and is more a kin to postmodern politicians. Aristotle (384–322 BC) assumed a more differentiated and detailed view than Confucius: Those *in power* who seek *their own advantage* will *pervert* monarchy into tyranny and aristocracy into oligarchy. This was what urged Aristotle to be the first to separate state authorities into *three branches*: the first for *deliberation*, the second for the *executive branch* and the third for the *judiciary*.<sup>55</sup>

26. Nearly two millennia later, the Chinese initiative and Aristotle’s analysis were taken up in John Locke’s (1632–1704)<sup>56</sup> *Separation of Powers* and sixty years later

<sup>51</sup> The Federal Charter of 1291 established entirely different conditions, in which the three original Swiss cantons established a self-elected court to avoid the interference of foreign judges. Federal Charter of 1291, clauses 3 and 4. The original Latin version is available at [https://la.wikisource.org/wiki/Foedus\\_pactum](https://la.wikisource.org/wiki/Foedus_pactum)

<sup>52</sup> Cf. Lin YUTANG (ed.): *Konfuzius*. [Fischer-Bücher, 154.] Frankfurt am Main – Hamburg, 1957. 135. with multiple quotes from Kung. Cf. the subsequent fn. 75.

<sup>53</sup> HAN FEI (280–234 BC): *Art of Rulership*. *Brainy Quote online*, English language excerpts are available at [http://www.brainyquote.com/quotes/authors/h/han\\_fei.html](http://www.brainyquote.com/quotes/authors/h/han_fei.html)

<sup>54</sup> PLATO: *Republic*. VII. *Perseus Digital Library*, 535a–540c, available in Greek at <https://bit.ly/2TUPie7>, in English at <https://bit.ly/2ulC4XL>, cf the previous fn. 16,

<sup>55</sup> ARISTOTLE: *Politics*. IV. *Perseus Digital Library*, 1297b 9–10. and 36-40. and 1298a 1–3., available in Greek at <https://bit.ly/2YSiaHR> and <https://bit.ly/2HZwSaH>, available in English at <https://bit.ly/2KfdTei> and <https://bit.ly/217GxeB> – This thought was adapted by Arab philosophers (such as Walī ad-Dīn Ibn Chaldūn [1332–1406]) and further developed which subsequently spread through Spain to Europe and, after 1492, via the Conquistadores to Latin America.

<sup>56</sup> JOHN LOCKE: Two treatises of Government (1689). *johnlocknet*, II chapter 12 sect. 144., available in English at <http://www.johnlocke.net/two-treatises-of-government-book-ii/> Even in the year of the

continued by Charles-Louis de Montesquieu's (1689–1755)<sup>57</sup> brilliant analysis of the English constitutional reality focusing on the concept of the separation of the branches of power: In order to guarantee *freedom, the abuse of power must be prevented by the separation of powers*. This set the stage for the French National Constituent Assembly to draft the *Declaration of the Rights of Man and the notion of Constitution* between 1789 and 1791.<sup>58</sup>

27. Shortly before this, apart from the separation of the branches of power, James Madison (1750–1836) postulated *institutional Checks and Balances*, which subsequently determined the drafting of the US Constitution.<sup>59</sup> This *practically* concerns the same *checks and balances* which autocratic populists detest so much.

28. The courts aren't protected against erroneous verdicts either. Freedom of speech extends to the *objective* criticism of such verdicts, which actually facilitates discourse: Were all the essential elements taken into consideration and thoroughly compared? Criticism such as this contributes to improving the quality of the justice system. On the other hand, for the people, the bitterness tied to the *independence of the courts* bears witness to an uninhibited lust for power. Even the erroneous verdicts of an independent court have the advantage of curtailing power and may keep the legislator in check by forcing them to specify the laws in the future, which can limit the powers of the courts. Conversely, courts which get too close to the government are merely backdrops to dictatorial absolutism.

29. Alexis de Tocqueville (1805–1859) pointed out that the separation of powers provides the best form of guarantee for *the citizens of the nations to truly* practice their rights.<sup>60</sup> Only *independent* courts can guarantee that the government will not abuse the trust that the qualified majority of voters place in them for a previously determined time period and that the Parliament can't make irreversible amendments

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Glorious Revolution (1989), Locke was forced to publish his work anonymously in Great Britain.

<sup>57</sup> MONTESQUIEU: *De l'esprit des lois (The Spirit of Laws)*. Geneve, 1748. Livre XI., chapitre 4., available in French at <https://bit.ly/2K6eOh3>, available in English at [http://www.constitution.org/cm/sol\\_11.htm](http://www.constitution.org/cm/sol_11.htm)

<sup>58</sup> Declaration of the Rights of Man and of the Citizen passed by France's National Constituent Assembly, 26 August 1789, 3 November 1789 und 3 September 1791, *art. 16*, available in French at <https://bit.ly/2bmQi87> available in English at <https://en.wikisource.org/?curid=1530>

<sup>59</sup> James MADISON: The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts. *New York Packet*, 30 January 1788., *Federalist papers*, no. 47. (1787), available in English at [https://en.wikisource.org/wiki/The\\_Federalist\\_\(Dawson\)/47](https://en.wikisource.org/wiki/The_Federalist_(Dawson)/47)

<sup>60</sup> Alexis de TOCQUEVILLE: *De la démocratie en Amérique (Democracy in America)*. Paris, 1848. Vol. II, 2d part. Chapter VIII., available in French at <https://bit.ly/2u115Cv>, available in English at <http://oll.libertyfund.org/titles/tocqueville-democracy-in-america-historical-critical-edition-vol-2>

to acts such as the Enabling Act of Adolf Hitler (1889–1945)<sup>61</sup> or introduce election reforms which provide a mathematical guarantee of reelection<sup>62</sup>.

## 6. On National Rights

30. Since the fall of the Iron Curtain, various forms of referendums initiated by the population were introduced in dozens of countries. Thus, since 1990 the *United Kingdom* held 2, *Hungary* 13, *The Principality of Liechtenstein* 32 and *Italy* 56 nation-level referendums – whilst *Switzerland* held over double the total of the previously listed states combined (248).<sup>63</sup> The difference is even more striking when examining nation-level referendums held since the French Revolution: including Switzerland (622 referendums = 36.6%) there have been 1040 referendums in Europe since the French Revolution until 21 October 2016, which constitutes 61.2% of a total of 1700 referendums.

Table 2 National referendums by continent 1789 – 21.10.2016

Continents	Number of referendums from 1789–2016	
	absolute	percentage
Asia (including the Middle East)	110	6.5
Middle East	103	6.1
Africa	158	9.3
Australia and Oceania	113	6.6
North and South America	176	10.4
Europe without Switzerland	418	24.6
Switzerland	622	36.5
Total	1700	100.0

<sup>61</sup> Gesetz vom 24. März 1933 zur Behebung der Not von Volk und Reich ( Enabling Act of 1933, „Law to Remedy the Distress of People and Reich”) announced as: *Deutsches Reichsgesetzblatt 1933*. Berlin, Reichsministerium des Innern, 1933. Teil I. 141., The original German text is available at [http://www.1000dokumente.de/index.html?c=dokument\\_de&dokument=0006\\_erm&object=facsimile&l=de](http://www.1000dokumente.de/index.html?c=dokument_de&dokument=0006_erm&object=facsimile&l=de) available in English at [https://en.wikipedia.org/wiki/Enabling\\_Act\\_of\\_1933](https://en.wikipedia.org/wiki/Enabling_Act_of_1933)

<sup>62</sup> This can affect, for example, the election system and the distribution of voting districts: In relation to the election system, it is sufficient to mention some of the decisions passed by the Federal Constitutional Court and the Second Senate – 2 BvE 9/11 – from 25 July 2012., available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2012/07/fs20120725\\_2bvf000311.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2012/07/fs20120725_2bvf000311.html) and the Federal Supreme Court of Switzerland. BGE, 129. vol. I. 185–206. (Zürich), 131. vol. I. 74–85. (Aargau), 136. vol. I. 352–364. (Nidwalden) and 376–388. (Zug), 139. vol. I. 195–205 (Zug), 140. vol. I. 107–113. (Wallis) and 394–407. (Appenzell Ausserrhoden) and finally 1C\_511/2015 (Uri), all available at <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm> In Switzerland, since 1848 – until the constitutional definition of cantons as election districts in 1918 – voting districts were „randomly” distributed. For more details on this, see Hans-Urs WIL: Jux Populi – vox Dei? 100 Jahre eidgenössische Volksinitiative auf Partialrevision der Bundesverfassung. *Zeitschrift für Schweizerisches Recht Neue Folge*, no. 110. (1991), I. Halbband, 485–521., here: 516. fn 86. For the latest example of the election struggles, see the ruling of the Constitutional Court of the Republic of Austria WI 6/2016-125, 1 July 2016., available at [https://www.vfgh.gv.at/cms/vfgh-site/attachments/5/7/8/CH0003/CMS1468412977051/w\\_i\\_6\\_2016.pdf](https://www.vfgh.gv.at/cms/vfgh-site/attachments/5/7/8/CH0003/CMS1468412977051/w_i_6_2016.pdf)

<sup>63</sup> For details, see [http://www.c2d.ch/inner.php?table=dd\\_db&link\\_id=61&parent\\_id=61](http://www.c2d.ch/inner.php?table=dd_db&link_id=61&parent_id=61)

31. In 1975, the *British* referendum concerned joining the European Economic Community (EEC), while in 2016 it concerned Great Britain's withdrawal from the European Union and the Alternative Vote in 2011. The British constitution – not a uniform written code, but rather a sum of laws and unwritten principles spanning multiple centuries – does not recognize the concept of the referendum. Instead, three ad hoc referendums were held in the United Kingdom over the past five decades, which were promised and later held by the governments at the time. For the Swiss, these aren't truly referendums, but rather plebiscites. What's the difference?

32. *Referendums* are initiated by non-governmental citizens with a right to vote, while *plebiscites* are *graciously authorized by the holders of governmental power*. In the case of referendums, the constitution and law define when and according to what rules an initiative will result in a referendum; they create a need for the *execution* of their own binding expression of opinion. Referendums pose a threat to governments, whilst plebiscites are precarious in nature: The people depend on the „grace“ of the government: they have the right to celebrate them.

33. As opposed to England, the referendums in *Hungary* and *Switzerland* become *binding* when achieving a certain threshold of signatures. In Hungary, this threshold is the signature of 200,000 people (approx. 2.8%),<sup>64</sup> and in Switzerland 100,000 people (approx. 1.8%)<sup>65</sup> with the right to vote.

Table 3 National Rights: Comparison of Hungary/the United Kingdom/Switzerland

Institution	United Kingdom	Fundamental Law of Hungary <sup>65</sup>	Swiss Federal Constitution <sup>66</sup>
National-plebiscite	legally declaratory	legally binding upon reaching the threshold of participation (Article 8, paragraph 1)	–
Referendum	–	–	Constitution: obligatory (Article 140); Law: 50 000 signatures (Article 141); legally binding in all cases, no threshold of participation (Article 142)
Civil initiative	–	100 000 signatures: elective (Article 8, paragraph 1); 200 000 signatures: binding (Article 8, paragraph 1); legally binding in all cases (Article 8, paragraph 1) upon reaching the threshold of participation (Article 8, paragraph 4); Limitations (Article 8, paragraph 3): it cannot concern the Fundamental Law, the central budget, central taxes, obligations arising from foreign treaties, state of war or emergency, military operations or granting of general pardons	no threshold of participation (Article 142); obligatorily binding; Limitations (Article 139, paragraph 2): unity of form and content, obligatorily binding international law, absolute non-executability

<sup>64</sup> The English translation of the Hungarian Constitution is available at [https://www.constituteproject.org/constitution/Hungary\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Hungary_2013.pdf?lang=en)

<sup>65</sup> The unofficial English translation of the Swiss Federal Constitution is available at [https://www.constituteproject.org/constitution/Switzerland\\_2014.pdf?lang=en](https://www.constituteproject.org/constitution/Switzerland_2014.pdf?lang=en)



34. *At the same time, however, in Hungary* referendum initiatives can be submitted which failed to achieve 200 000 signatures, yet achieved 100 000 signatures. This provides the government and the Parliament with *free elbow room*.<sup>66</sup> Referendum initiatives which fail to achieve the signature quota cannot be announced in Switzerland as a referendum. *In Switzerland, all referendums are legally binding* regardless of the turnout.<sup>67</sup> Finally, the Hungarian General Assembly may announce a referendum at the initiative of the President of the Republic or the government; yet is not required to do so.<sup>68</sup> This is where – now explicitly allowed by the constitution – the *plebiscite* comes into the picture: the referendum as a *precarial* concession on the behalf of the government or the Parliament. In Switzerland, the Swiss Federal Constitution does not recognize referendums announced „by the grace” of the authorities since the establishment of the Swiss Confederation in 1848.

35. Nevertheless, there have been *two plebiscites in Switzerland!* The so-called „obligatory” referendums of 1920, on Switzerland joining the League of Nations and of 1973 on the Free Trade Agreement in the European Economic Community were unjustifiable crimes. How could they subsequently change norms which were voted on *against* the people via a contradictory act *without* a referendum? The populist „blessing” becomes a legal curse: *Short term success-oriented politicians ignore the long-term effects of precarial plebiscites*. This is clearly demonstrated through the example of Switzerland.

36. According to the preamble of the prebliscites of 1920 and 1973, such fundamental *changes* in the foreign policy of Switzerland as joining the League of Nations or the Free Trade Agreement with the European Economic Community require the blessings of the people.<sup>69</sup> Both initiatives *received* the approval of the people. The Swiss Federal

<sup>66</sup> In the end, governing parties only have to gather *half as many* signatures as other groups.

<sup>67</sup> In the existence of the participation threshold, Hungary shares the fate of other countries within the sphere of influence of the former Soviet Union. This is an institution which was adapted to the Italian abrogative referendum (Constitution of Italy art. 75 sec. 4., available in English at [https://www.constituteproject.org/constitution/Italy\\_2012?lang=en](https://www.constituteproject.org/constitution/Italy_2012?lang=en)) *The concept behind this institution: Democracy is based on majority vote. Thus the majority which does not express its opinion doesn't count.* A noble thought – tempting and poorly executed. Italy proved this for decades. A Japanese tsunami washed this logic away in 2011, along with Silvio Berlusconi, who voiced this approach for years. For more details on this, see Hans-Urs WIL: Daten zu den nationalen abrogativen Referenden in Italien 1970–2011. In: FELD–HUBER–JUNG–LAUTH–WITTECK op. cit. 130–144. (cf. the previous fn. 25.). The participation threshold interprets abstinence from voting as rejection, thus falsifying referendums and punishing those participating in the vote. Calls for abstaining from voting produce voting „results”, making the non-involvement in voting acceptable which in turn negatively affects subsequent elections. Wherever it is used for elections, it is sure to backfire at once: The state will not have fewer tasks just because state bodies cannot be appointed due to a lack of participation.

<sup>68</sup> Thus the parties in power can thus save themselves the effort of collecting signatures.

<sup>69</sup> *Schweizerisches Bundesblatt 1919*. Vol IV. 541–680., in particular 629–634. and 649., 1920. Vol III. 791–800., in particular 791.; *Stenographisches Bulletin 1919*. Bern, Nationalrat, 1919. 759–761., 773–995. and 1000–1004., in particular 946.; *Ständerat*. 554–626., in particular 620.; *Schweizerisches*

authorities show how *worthless* this reasoning was: if joining the League of Nations was such a fundamental change of Swiss foreign policy that it required the consent of the people, then the same should have been required for Switzerland's secession from the League of Nations, however, to this very day, we Swiss are yet to vote on the secession. Luckily so! Just imagine the NS-agitation from the Swiss National Frontists and the struggle of the referendum on Switzerland leaving the League of Nations in the heated period subsequent to Austria's annexation by Germany! Since barely two decades later, the Bundesrat „forgot” to present its justification from 1920, Switzerland fortunately escaped the fate of Hungary in World War II.

37. Although the preamble of the 1920 plebiscite was known by all to be *mistaken*, the Swiss Federal Authorities resorted to it yet again in 1973 in relation to the Free Trade Agreement with the European Economic Community. This is something we are still brooding over to this very day:<sup>70</sup> *What* reasoning should we use to make it clear for those with a right to vote that it is entirely lawful for Switzerland to ratify the European Convention on Human Rights, yet this does not require the support of the people? *What argumentation* should we use to make it clear to them that *international law* cannot be modified through a referendum, since it is based on agreements which concern *other* states – *Pacta sunt servanda* (= „*agreements must be kept*”)?<sup>71</sup> The plebiscites of 1920 and 1973 still have a residual effect. The former precarious concessions resulted in subsequent demands for the right to alter legal relationships (*'Self-determination initiative'*), which no state could apply to international agreements.

38. Populist temptations urged the government, in the case of plebiscites, and the initiating groups of people in the case of referendums, to *ensure their success through legislative changes which afflict minorities yet do not disturb the majority*.

39. *In Switzerland*, in the current century alone, supporters and objectors of referendums initiated by the people have fell into the same trap on five separate occasions: they restricted the fundamental laws of minorities, yet previously – in 1892 – they only did so on one occasion from a total of 210 referendums initiated by the people.

## 7. Aporias – or: What Can Democracy Stand For?

40. Based on this reasoning, should popular initiatives affecting fundamental rights be annulled on the grounds that democracy is more than purely majority decisions

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*Bundesblatt* 1972. Vol. II. 734–740., in particular 737.; *Amtliches Bulletin* 1976. Bern, Nationalratm 1976. 1574–1579., in particular 1577.

<sup>70</sup> Comparable with Greek tragedies, such as AESCHYLUS: *Agamemnon* v 758–760. or Friedrich SCHILLER: *Wallenstein Trilogy. The Piccolomini*. Act 5, scene 1, v 190f (Octavio).

<sup>71</sup> VCLT Ingress and art. 26. Cf. no. IV mn. See the previous fn. 18 and 19.

and comprise fundamental rights as well (Booms)<sup>72</sup>? Unfortunately, this doesn't sound too convincing: even the Federal Constitution explicitly states that it can be amended at any time with the approval of the people and the cantons.<sup>73</sup> The creation of a committee adjudicating referendum initiatives would simulate Plato's Philosopher's expertocracy, dividing citizens into the simple-minded establishers of majority and the smart elite with a right to vote. Who decides on the membership of the groups? However, democracy does not guarantee the „correctness“ of the decisions, it merely qualitatively minimizes the dissatisfaction of those with a right to vote according to law. Where in legal history can we find an autocracy – regardless of its form – which could guarantee for a wide range of people the „correctness“ of its decisions itself outside the autocratic elite? Those who declare the golden rules applying to the cultures of the 8<sup>th</sup> century BC<sup>74</sup> as the constituents of democracy simply limit the capacity of those with a right to vote to their freedom, stripping them – in the name of democracy – their democratic freedom of voting and paradoxically realizing – according to Ulrich K. Preuss<sup>75</sup> – „the self-destructive potential of democracy“. Democracy cannot terminate itself with democratic methods (not even if it could

<sup>72</sup> Cf. the previous fn. 36. Conversely, TOCQUEVILLE op. cit. (cf. the previous fn. 61), Chapter VII stood up to pressure in the analysis of the constitution of the United States of America, available in French at [https://fr.wikisource.org/wiki/De\\_la\\_d%C3%A9mocratie\\_en\\_Am%C3%A9rique/%C3%89dition\\_1848](https://fr.wikisource.org/wiki/De_la_d%C3%A9mocratie_en_Am%C3%A9rique/%C3%89dition_1848); available in English at <http://oll.libertyfund.org/titles/tocqueville-democracy-in-america-historical-critical-edition-vol-2>

<sup>73</sup> Art. 192 sec. 1 BV, available in English at <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>

<sup>74</sup> „Don't do unto others what you don't want others to do unto you.“ This thought can be found in numerous cases from approx. 700 BC to 650 AD, chronological order, from HOMER: *Odysey*. 188–191.; CONFUTIUS: *Analects*. 15,23.; HERODOTUS OF HALICARNASSUS: *Historia*. III 142. and VII 136.; *Leviticus* 19,18.; *Mahabharata*. XIII,114.8.; ISOCRATES: *oratio XIX ad Aiginetikon* 50; *oratio II an Nikokleas of Cyprus* 24, 49 and 61; *oratio IV Panegyrikos* 81; ARISTOTLE: *Rhetoric* 1364b; PSEUDO-ISOCRATES: *ad Demonikon* 21; *Tobit* 4,15 (Septuaginta); *Jesus Sirach* 31,15 (Septuaginta); *Samyutta Nikaya* V,353.35-354.2.; *Letter of Aristeas* 207; *Testamentum Naphtali hebraicum* 1,6 in fine; PHILO OF ALEXANDRIA: *Hypothetica*; *Babylonian Talmud Tractate Shabbat* 31a (Rabbi Hillel); *The Sentences of the Syriac Menander* 39; Publius Ovidius NASO: *Ex Ponto* 3,1,71; Lucius Annaeus SENECA: *Epistulae morales ad Lucilium* 47,11, further 94,25 and 43 and 108,9; *Slavonic Enoch* 61,1; *Gospel of Matthew* 7,12; *Gospel of Luke* 6,31; *Didache* 1.2-3; Justin MARTYR: *Dialogus cum Tryphone* cap. 93,2f; *Digestae* 2,2 *Rubrik* (Edikt des römischen Prätors) § 8.; Severus Alexander AUGUSTUS: *Scriptores Historiae Augustae, vita Alexandri Severi* 51,8; *Targum Yerushalmi I Lev* 19,18; *Words of Ahikar in Aramaic* B 53; ORIGEN: *Commentarii in epistulam ad Romanos* II.9 ad Rom 2,14-16; *Papyrus Oxyrhynchos* 654 no. 5; Cassius Dio COCCIANUS: *Roman History* 52,34.39; DIOGENES LAERTIOS: *Lives and Opinions of Eminent Philosophers* I,36 and V,21; *Acts of the Apostles* 15,20.29 (V Codex Bezae Cantabrigiensis); MUHAMMAD: 40 *hadiths of an-Nawawi* 13.

<sup>75</sup> Ulrich K. PREUSS: Der Begriff der Verfassung und ihre Beziehung zur Politik. In: Ulrich K. PREUSS (ed.): *Zum Begriff der Verfassung. Die Ordnung des Politischen. With the articles of Ernst-Wolfgang Böckenförde, Erhard Denninger, Ronald Dworkin, Jon Elster, Ute Gerhard, Dieter Grimm, Jürgen Habermas, Louis Henkin, Stephen Holmes And Karl-Heinz Ladeur*. [Fischer Taschenbuch, 12246]. Frankfurt am Main, 1994. 7–33.; cf. Maximilian ZECH: Das demokratische Dilemma. Der Rechtsstaat kann sich mit seinen eigenen Mitteln nicht vor seinen Feinden schützen. *Neuer Zürcher Zeitung*, 29 August 2016. 29.

do so!) and cannot protect itself with anti-democratic methods. Thus the attempt to confine ethical issues to legal boundaries will not improve the democratic rule of law; on the contrary, it will *impair* it, just as politicizing legal issues.

41. The experiment *transcends* the possibilities of the rule of law. According to Niklas Luhmann's *Analyse von der Legitimation durch Verfahren*,<sup>76</sup> direct democracy can be interpreted as a form of state based on relatively broad egalitarian rights and processes. Nowadays, in democracies, the *majority decides*.<sup>77</sup> In itself, *no legal form can prevail against it*.<sup>78</sup> The protection of democracy based on the rule of law cannot be delegated to the constitution.<sup>79</sup>

## 8. Summary

42. It is no coincidence that the concepts expounded above play a key role in populism: *Majority decision and democracy* are intended to eliminate checks and balances embodied in the burdensome independent courts, whilst the use of *sovereignty* against international agreements will isolate them. The shared feature of the appropriation of such key words as *sovereignty* or *majority decisions* is their *obfuscated redefinition*. However, doesn't this explicitly exempt the head of state

<sup>76</sup> Niklas LUHMANN: *Legitimation durch Verfahren*. [Suhrkamp taschenbuch wissenschaft, 443.]. Frankfurt am Main, 1983., on certain issues of politics, political elections and the democratization of legislation, in particular 151–200.

<sup>77</sup> Egon FLAIG: *Die Mehrheitsentscheidung. Entstehung und kulturelle Dynamik*. Paderborn–München–Wien–Zürich, 2013. shows that today's concept of majority is less than a thousand years old, since only in the 11–13<sup>th</sup> century did the concept of *major pars* appear to contest the prevailing *senior pars* concept as the sole decisive criterion. – As a result of the comprehensive and random distribution of offices, democracy failed in ancient Athens. For more on this from Aristotle, see ARISTOTLE: *Athenian Constitution* 3,10.13; 6,9.11.13f.16; 19,10; 23,29; 25,2; 28,4.17; 39,12.16; 40,33; 42,9.14; 43,13.24f; 45,11.13.25; 46,1.4.11.14.23; 47,7; 48,18; 49,3.9.13.15.22.25; 50,1.5; 51,22; 55,8.10; 57,4f.7.24; 59,2-4; 60,16.20; 61,7; 65,19., available in Greek at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3atext%3a1999.01.0045> available in English at [http://classics.mit.edu/Aristotle/athenian\\_const.html](http://classics.mit.edu/Aristotle/athenian_const.html) who provided a detailed account of this. Passing decisions purely through a draw remained as an old institution in smaller states in the case of equal votes rendered to one of the more candidates.

<sup>78</sup> The best parts of the Weimar Constitution from 1919 (the original German text is available at [https://de.wikisource.org/wiki/Verfassung\\_des\\_Deutschen\\_Reichs\\_\[1919\]](https://de.wikisource.org/wiki/Verfassung_des_Deutschen_Reichs_[1919])), the Fundamental Rights, were not maintained for even a single day when – after the burning of the Reichstag – Adolf Hitler issued on 27 February 1933 the cynically titled „Decree of the Reich President for the Protection of People and State” (*Deutsches Reichsgesetzblatt 1933*. Part I. 33.) in which he suspended the fundamental rights only to reinterpret the formally democratic Nazi seizure of power on 31 January 1933 according to his own tastes. Cf. the previous fn 29 and 62).

<sup>79</sup> Institutional guarantees could only be envisioned in partial matters – with the condition of a majority decision – such as, in the case of elections, the introduction of *deducted votes*. Further ideas and mechanics for the integration of negative votes in proportional representation can be found in the work of Annemarie HUBER-HOTZ: *Olivenblätter – Landsgemeinde – Urne – Vote électronique... Hin zur Möglichkeit aktiven Abwählens im Proporzwahlssystem?* In: Uwe SERDÜLT – Thomas WIDMER (eds.) *Politik im Fokus. Festschrift für Ulrich Klöti*. Zürich, 2003. 209–225., in particular described on 218.

from his or her obligation of reliability and trustworthiness, mentioned as early as in the writings of Plato? Of course, yet typically only when they belong to the same social group.<sup>80</sup> Even Niccolò Machiavelli (1469–1527) *demands* unfairness, cruelty, disgrace and disingenuousness from the ruler when „the safety of the country is at stake”.<sup>81</sup> This brings us to what Alois Riklin refers to as the „trap of the common good”.<sup>82</sup> Burdened by a national socialist past, Carl Schmitt (1888–1985) brings us to the end of the vicious circle by declaring those „above the State of Exception” as sovereign and thus granting the sacrament of a norm to the raw power of reality.<sup>83</sup> The late Aristotle has scruples over the covering up of facts in the *Nicomachean Ethics*<sup>84</sup> along with other writers of the traditional school,<sup>85</sup> including the protagonist of our introductory tale, Marcus Tullius Cicero, in his treatise entitled *De officiis*.<sup>86</sup> In another treatise, *Laelius on Friendship*,<sup>87</sup> Cicero comments on the energetic intervention of a fellow colleague directed at the populist deceiver of the people, six years prior to being appointed consul: „on the platform, where there is the greatest opportunity for deception and disguise, truth yet prevails, provided it is made plain and brought into the light of day [...]”. As opposed to *autocracies*, the citizens of *democracies* still have the means to maintain the rule of law through their own efforts – that is, if they are willing to undertake this task.

<sup>80</sup> PLATO op. cit. II 382 b-e, III 389 b/c and 414 b-e and V 459c/d, available in Greek at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3atext%3a1999.01.0167>, in English at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.01.0168>

<sup>81</sup> Niccolò MACHIAVELLI: *Il principe. (The Prince)*. Wikisource, Chapter XVIII, available in Italian at [https://it.wikisource.org/wiki/II\\_Principe/Capitolo\\_XVIII](https://it.wikisource.org/wiki/II_Principe/Capitolo_XVIII), available in English at <https://ia802304.us.archive.org/27/items/princemac00machuoft/princemac00machuoft.pdf>. Cf. Niccolò MACHIAVELLI: *Discorsi. (Discourses)*. Wikisource, III 41., available in Italian at [https://it.wikisource.org/wiki/Discorsi\\_sopra\\_la\\_prima\\_Deca\\_di\\_Tito\\_Livio/Libro\\_terzo/Capitolo\\_41](https://it.wikisource.org/wiki/Discorsi_sopra_la_prima_Deca_di_Tito_Livio/Libro_terzo/Capitolo_41), available in English at <http://www.constitution.org/mac/discliv3.htm>

<sup>82</sup> Alois RIKLIN: *Die Führungslehre von Niccolò Machiavelli*. [Kleine politische Schriften, 1]. Bern–Wien, 1996. 134–138.

<sup>83</sup> Carl SCHMITT: *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*. Berlin, 1922. 13.

<sup>84</sup> ARISTOTLE: *Nicomachean Ethics IV*. *Perseus Digital Library*, 1127a, 31ff., available in Greek at <https://bit.ly/2I84thU>, available in English at <https://bit.ly/2YPSzUw>

<sup>85</sup> Thomas AQUINAS OP (1225–1274): *Summa theologiae. (Summa Theologica)*. Fribourg, Bibliothek der Kirchenväter, II–II quaestio 110 articulus 2 argumentum III., available in Latin at <http://www.unifr.ch/bkv/summa/kapitel625-1.htm>, available in English at <http://www.newadvent.org/summa/3110.htm>, and consequently, Aegidius Romanus OESA (1243–1316) as well: *De regimine principum Pars II Liber I Capitulum XXIX*, available in English: David C. FOWLER – Charles F. BRIGGS – Paul G. REMLEY (eds.): *John Trevisa: The Governance of Kings and Princes. John Trevisa's Middle English Translation of the 'De Regimine Principum' of Aegidius Romanus*. Vol. I. New York, 1997.

<sup>86</sup> Marcus Tullius CICERO: *De officiis*. I. *Perseus Digital Library*, 159., available in Latin at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:2007.01.0047>, available in English at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:2007.01.0048>

<sup>87</sup> Marcus Tullius CICERO: *Laelius de amicitia. (Laelius on friendship)*. *Perseus Digital Library*, 95–97., available in Latin at <http://www.thelatinlibrary.com/cicero/amic.shtml#96>; available in English at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:2007.01.0041> For more on this, see LANGER op. cit. (the previous fn. 28).