Constitutionalisation and Democratisation of Foreign Affairs: The Case of Switzerland

Raffaela Kunz and Anne Peters

Abstract The Swiss Constitution is unique in Europe in the way it organises international co-operation. Three features stand out: the very strong democratisation of foreign policy-making (through Parliament and through involvement of the people by virtue of referendums and popular initiatives), the relatively reluctant judicial review of measures based on international legal acts against the benchmark of fundamental rights, and, finally, the federal elements in conducting international relations. The Swiss case underscores both the desirability and the difficulties of compensatory constitutionalism as a normative programme. Switzerland, with its strong direct-democratic tradition, has started to react early to the impact of all types of global governance measures. However, major reforms, mainly with a view to strengthening the element of democratic control through domestic democratic institutions, have so far not succeeded in soothing popular aversion to 'foreign' and undemocratic international law and institutions. With regard to the second main element of contemporary constitutionalism, namely fundamental rights protection and judicial review, the reluctance of the Swiss Federal Tribunal to assume a role in

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protecting constitutional (or European) fundamental rights when implementing international law has led to conflicts with the ECHR. It is likely that the ECtHR, in compelling Switzerland to exercise such review, might in the end work more in favour of compensatory constitutionalism through the pressure it creates.

Keywords The Constitution of Switzerland · The Swiss Federal Tribunal ECHR · Absence of constitutional review · Parliamentary participation in foreign policy · Direct democracy and international law · Democratic legitimacy Primacy of international law · Judicial review of targeted sanctions Compensatory constitutionalism · Conflict of law · Constitutional tolerance

1–2 An Overview of the Swiss Constitution

1.1 The Swiss Constitution and system of government are often portrayed as a 'special case'. This has to do with several particular features. These include direct democratic rights of citizens' participation, a strong federal element and a collective government composed of seven members vested with equal rights (directorial system). Unlike in parliamentary or presidential systems, typical instruments of checks and balances between the Parliament and the Government, such as a motion of censure or the possibility to veto legislative acts, do not exist. Conversely, the people have a say on many important matters, through referendums and popular initiatives.

The Constitution of the Swiss Confederation[1] belongs to the category of 'rigid' constitutions, amendable only by a qualified procedure: any modification of the Constitution is mandatorily put to a vote by the people and the Cantons (i.e. the member states of the Swiss Confederation; Art. 140(1)(a) of the Constitution, as will be further explored in Sect. 3.1).[2] Nonetheless, in practice the Swiss Constitution has proven to be of a rather dynamic nature and has often been amended.

The constitutional cornerstones are democracy, the rule of law, solidarity and federalism.[3] The overarching objectives of the Constitution are first, the organisation of the state, secondly the protection of individuals' constitutional rights and liberties, the rule of law and the separation of powers with due checks and balances,

[1] *Bundesverfassung der Schweizerischen Eidgenossenschaft* of 18 April 1999 (SR 101). The official English translation is available at https://www.admin.ch/opc/en/classified-compilation/19995395/index.html.

[2] The Constitution *may be totally* (Art. 193*) or partially* (Art. 194) *revised at any time* (Art. 192 (1)). There is no specific procedure for revising the Constitution; it generally follows the legislative process (Art. 192(2)).

[3] *Botschaft des Bundesrates über eine neue Bundesverfassung* of 20 November 1996, BBl 1997 1, pp. 14–17.

and thirdly the definition of the overall aims and directions of the state.[4] The instrument of the popular initiative, which allows citizens to suggest new *constitutional* provisions that are not, however, limited to proposals of constitutional value, leads to the insertion of provisions that by their nature rather belong to the level of ordinary laws into the Constitution.[5]

There is no constitutional court designated as such in Switzerland, but the Federal Tribunal, which functionally is a supreme court with general jurisdiction, also exercises constitutional control. This control, however, has an important limit: the Federal Tribunal cannot review and quash federal acts (i.e. statutes). Art. 190 of the Constitution, which states that federal acts and international law are to be *applied* by the Federal Tribunal and the other judicial authorities, 'immunises' federal statutory law (but not cantonal law) from judicial review. Nonetheless, in practice, the Federal Tribunal at times scrutinises the constitutionality of federal acts, which is understood as an invitation to Parliament to take the necessary steps. The court interprets Art. 190 as a duty to apply federal acts, but not as a prohibition to examine their constitutionality. Because international law is mentioned together with federal acts in Art. 190, the Federal Tribunal, based on the principle of primacy of international law in the Swiss legal order, can refuse to apply federal acts that contradict international law. International law in practice thus compensates for the lack of a mechanism of constitutional review, which is in this sense introduced 'through the backdoor'.

Overall, from a comparative perspective, the Swiss Constitution is not a particularly 'sacred' document. It contains more than just important and general provisions, and includes neither a separate constitutional court to uphold constitutionality nor specific principles for constitutional interpretation (as opposed to the interpretation of laws).[6]

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1–2.1.3 The first, relatively comprehensive, chapter of the second title of the Constitution (Arts. 7–36) is dedicated to fundamental rights and is clearly influenced by the European Convention on Human Rights (ECHR).[7] The Constitution contains a general provision on the restriction of fundamental rights. Any restriction requires a legal basis, must be justified by the public interest or the protection of the fundamental rights of others, and must be proportionate. The essence of a fundamental right may never be impaired (Art. 36(1)–(4)).

[4] Biaggini 2007, pp. 49–50.

[5] Hangartner 2000, para. 816. Examples include Art. 73(3), prohibiting the construction of minarets, and Art. 75b on second domiciles.

[6] BGE 116 Ia 359 (1990), E. 5.; more recently 131 II 13 (2004), E. 7.1.

[7] European Convention on Human Rights of 4 November 1950 (213 UNTS 221); Keller 2011, para. 4.

Different aspects of the rule of law are enshrined in the Constitution in the form of constitutional principles which are generally only enforceable in courts in connection with a constitutional right (Art. 5).[8] International law is explicitly mentioned as one element of the rule of law: Art. 5(4) provides that the Confederation and the Cantons 'shall respect international law'.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 Ratification of treaties by Parliament and the Government The Swiss Constitution contains specific provisions on the ratification of treaties, but not on the transfer of powers to international organisations (IOs). The only provision dealing with IOs concerns the participation of *citizens* ('the people'): the accession to certain IOs is subject to a referendum, as will be discussed below.
Because Switzerland is a federal state, the 'vertical' separation of powers is important with regard to the conclusion of treaties. The overall responsibility in matters of foreign relations lies with the federal level (Art. 54(1) of the Constitution). However, the powers of the Cantons 'shall be respected' and their 'interests protected' (Art. 54(3)). The Cantons may, in matters lying within their powers, conclude treaties (Art. 56(1)); but due to the general federal powers, these cantonal powers are only subsidiary and may be superseded. By way of compensation, the Cantons participate in the conclusion of treaties (Art. 55).[9]

In terms of the 'horizontal' separation of powers, the Federal Council (hereinafter the Government) and the Federal Assembly (hereinafter Parliament) share the power to assume international legal obligations; they exercise their competences *jointly*.[10] The Government holds the overall responsibility in foreign relations, subject to the participatory rights of Parliament (Art. 184(1)). Parliament 'participates in shaping foreign policy and supervises the maintenance of foreign relations' (Art. 166(1)). Accordingly, the Government is competent to *sign* and *to express the will to be bound on the international plane* in the sense of Art. 14 of the Vienna Convention on the Law of Treaties[11] (VCLT) (Art. 184(2)), but needs the *approval*

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[8] *Botschaft BV*, n. 3, p. 133; BGE 130 I 388 (2004), E. 4.

[9] Peters 2016a, p. 198. Cantonal participation in foreign politics is further spelt out in a federal act; see *Bundesgesetz über die Mitwirkung der Kantone an der Aussenpolitik des Bundes (BGMK)* of 22 December 1999 (SR 138.1).

[10] *Botschaft BV*, n. 3, pp. 392–393.

[11] VCLT of 23 May 1969 (1155 UNTS 331).

of Parliament (Art. 184(2) and Art. 166(2)). Additionally, the citizens and the Cantons are involved in the conclusion of certain treaties by way of referendum, as will be discussed below.

If a treaty is subject to a referendum, Parliament can include the domestic amendments necessary to implement the treaty already in its decision on approval of the treaty (Art. 141a of the Constitution, allowing for so-called 'package votes').

The Government may *provisionally apply* a treaty before approval by Parliament 'in urgent circumstances or when it is necessary to safeguard important Swiss interests' (Art. 7b(1) of the Government and Administration Organization Act).[12] In such case, it shall first consult the parliamentary committees for foreign affairs (Art. 152(3bis) of the Parliament Act).[13]

The Constitution foresees exceptions to the requirement of parliamentary approval which permit the Government to conclude treaties independently from Parliament in certain cases (Art. 166(2)); this is known as the 'simplified procedure'. These powers are substantiated in the Government Act: a delegation norm in a federal act or treaty approved by Parliament is required, and the treaties may only be of *limited scope* (Art. 7a(1)–(2)). Moreover, the Government has to provide Parliament with an annual report on treaties entered into under the simplified procedure (Art. 48a(2) of the Government Act). Based on this report, Parliament can request the *ex post* submission of a treaty for approval.[14]

Popular rights in connection with the conclusion of treaties Importantly in the case of Switzerland, certain treaties are subject to a referendum. This instrument allows for popular participation in the form of a veto right (control function), and thus ensures legitimacy through the mere possibility of popular involvement. Due to structural differences between law-making on the national and international planes, however, the referendum encounters particular challenges when applied to the international context. On the national level, the use of this instrument may lead to a dialogue between the different actors involved and contribute to a more acceptable and balanced solution. On the international level, however, when a treaty is rejected by one side, new negotiations might be precluded. The referendum thus bears the risk of impairing Switzerland as an actor on the international plane, and was disputed for that reason, as will be discussed below. At the same time, due to the special nature of law-making on the international level (negotiations, package deals, the important role of the executive branch), the main function of the referendum – the involvement of the people in decision-making – arguably cannot be

[12] *Regierungs- und Verwaltungsorganisationsgesetz (RVOG)* of 21 March 1997 (SR 172.010); hereinafter 'Government Act'.

[13] *Bundesgesetz über die Bundesversammlung (Parlamentsgesetz, ParlG)* of 13 December 2002 (SR 171.10); hereinafter 'Parliament Act'.

[14] *Bericht der Staatspolitischen Kommission des Nationalrates, 'Parlamentarische Initiative Geschäftsverkehrsgesetz. Anpassungen an die neue BV'* of 7 May 1999, BBl 1999 4809, p. 4830; for the latest report, see *Bericht über die im Jahr 2016 abgeschlossenen völkerrechtlichen Verträge* of 24 May 2017, BBl 2017 4573.

fulfilled for questions related to foreign policy. For this reason, so the argument runs, popular rights are increasingly being 'eroded' in the course of the growing importance of international regulation.[15] An example is the political decision of the Government and Parliament to continue the agreement between Switzerland and the EU on the free movement of persons and at the same time to extend it to Bulgaria and Romania. These two questions were jointly submitted to a referendum, so that the people could only accept or reject them together.[16]

There are three types of referendums:

- mandatory treaty referendums;
- optional treaty referendums; and
- unwritten, extraordinary treaty referendums.

It is mandatory to hold a referendum for Switzerland's accession to 'organizations for collective security or to supranational communities' (Art. 140(1)(b) of the Constitution). Such decisions must be put to a vote of the people *and* the Cantons. A referendum vote is passed if a majority of the citizens *and* a majority of the Cantons approve the proposal (Art. 142(2)), with the position of each Canton determined by its internal majority. Mandatory referendums thus create a twofold legitimacy, consisting of a democratic and a federal element. Their rationale is the legitimisation of the areas of foreign relations that are considered to be the most important and far-reaching.[17] So far, the only actual vote conducted has concerned the Swiss accession to the UN in 1986, which was rejected by a clear majority of 75.7% of the people and by all of the Cantons. UN accession took place only in 2002 following a popular initiative under Art. 140 of the Constitution.

The involvement of the people is *optional* for certain treaties, and this is regulated in Art. 141 of the Constitution. An optional referendum means that a vote only takes place if it is actively *requested* by at least 50,000 citizens within 100 days of the official publication of the underlying act. Then, only a majority of the people (and not the Cantons as well) have to accept the treaty in a vote.

Three types of treaties fall in the scope of an optional referendum: (a) treaties of 'unlimited duration and that may not be terminated' (which do not contain a withdrawal clause); and (b) treaties that foresee the 'accession to an international organization', the primary criterion thus being the *duration* of an international obligation; and since a reform in 2003 also (c) treaties which contain 'important legislative provisions' or whose 'implementation requires the enactment of federal legislation'.

[15] For a detailed overview, see Diggelmann 2005, pp. 35–61; see also Linder 2012, p. 324. On current challenges for direct democracy generally, see Auer 2013.

[16] Accepted by popular vote on 8 February 2008.

[17] *Botschaft des Bundesrates über die Neuordnung des Staatsvertragsreferendums* of 23 October 1974, BBl 1974 1133, p. 1156.

In practice, optional referendums have rarely been called for, and never has a treaty been rejected in a vote sought bottom-up by the citizens. This suggests that Switzerland is not overly handicapped by this instrument when acting on the international plane. Since its introduction in its current form in 1977,[18] 28 treaties of unlimited duration, including e.g. the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, have been in the scope of the first alternative of the optional referendum, but the necessary threshold of 50,000 signatures has never been reached so as to request that a vote actually take place.[19] Thirty-eight treaties have fallen under the second alternative in Art. 141(1)(d) (accession to an IO) since 1977, including the Rome Statute of the International Criminal Court (2001) and the agreement establishing the European Bank for Reconstruction and Development (1990). A referendum vote has been held only once, in 1992, concerning accession to the institutions of Bretton Wood, which was approved.

Since the introduction of the option to hold a referendum on treaties containing important legislative provisions (141(1)(d)(3)) in 2003, 182 treaties have been declared by Parliament to fall under this form of referendum (as of July 2014), as compared to only 37 treaty-related referendums in all of the preceding years together. A referendum has, however, been requested by the citizens only eight times since 2003 and only once previously (in 2000 with regard to the bilateral treaties between Switzerland and the European Community); the necessary number of signatures was attained five times, including for the single referendum before the 2003 reform. All of the referendums have concerned bilateral treaties with the EU, and in all five cases, the citizens approved the treaties in the referendum vote.[20]

The third type of referendum is possible under a somewhat disputed unwritten rule ('extraordinary referendum'): Parliament may submit *further* treaties to a popular vote. Such referendum would be 'mandatory' in the sense that no signatures would need to be collected by citizens to request it. It is thus ordered top down. This last happened in 1992 regarding the Swiss accession to the European Economic Area, which was rejected.

Values in, and limits to, international co-operation The provisions on the conclusion of treaties do not contain explicit references to objectives sought or values to be upheld in international co-operation. Neither are there provisions with regard to specific international organisations. Nevertheless, the state bodies entering into international obligations can only act within the limits of the law (the principle of legality, Art. 5(1)) and within the framework of the Constitution. They therefore

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[18] On the legal history of the treaty referendum, see Sect. 3.1.2.

[19] For statistics on the use of popular rights in Switzerland, see c2d.ch. Data on the use of popular rights is available under https://www.bk.admin.ch/bk/de/home/politische-rechte/gebrauch-der-volksrechte.html. See further the study on the use of the referendum by Kübler et al. 2012, pp. 6–10.

[20] The votes were held in May 2009, February 2009, September 2005, June 2005 and May 2000.

have to respect the formal requirements (procedure, form, etc.) as well as substantive standards set out by the Constitution. The latter include respect of the general aims of the Swiss Confederation, as spelt out in Art. 2 of the Constitution,[21] as well as fundamental rights. The state institutions also have to respect the objectives of foreign policy, which are as follows (Art. 54(2)):

> The Confederation shall ensure that the independence of Switzerland and its welfare is safeguarded; it shall in particular assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful coexistence of peoples as well as the conservation of natural resources.

For treaties concluded by the Cantons, explicit limitations exist: they 'must not conflict with the law or the interests of the Confederation, or with the law of any other Cantons' (Art. 56(2)).

A so-called 'eternity clause' does not exist, and in principle, any provision of the Constitution could be amended, although some authors have argued that certain constitutional core values like democracy and federalism should be resistant to amendments.[22] Except with regard to these values, the Constitution could thus be modified in order to allow the conclusion of treaties that would otherwise contradict the Constitution (on the limits for the revision of the Constitution, see below Sect. 3.2.1).

3.1.2 In order to adapt to new realities and to the growing importance of international law, the Swiss Constitution has undergone major amendments concerning three areas since the 1990s. The first set of amendments concerned *parliamentary participation* in foreign policy. Reforms were undertaken first in 1992, and again with the complete revision of the Constitution in 1999. Smaller adjustments have also been undertaken later at the level of ordinary legislation. The second set of amendments aimed at extending the possibility of *popular participation* with regard to treaties in order to bring direct democratic rights in line with the growing number of concluded treaties. An even further extension, proposed through a popular initiative, was rejected in 2012.[23] Thirdly, with the complete revision of the Constitution in 1999, two new provisions were inserted in order to strengthen the position of the *Cantons* regarding foreign policy in response to losses of cantonal autonomy due to the growing internationalisation (Arts. 55 and 56).

Parliamentary participation in foreign policy With the complete revision of the Constitution in 1999, the relationship between Parliament and the Government in the area of foreign policy was fundamentally redefined. According to Art. 166(1) of

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[21] These include, inter alia, the liberty and rights of the people, the independence and security of the country, common welfare, equality of opportunity among citizens and the preservation of natural resources. *Neutrality* is not an aim, but a means to reach independence and security.

[22] See for references Ziegler and Odendahl 2014, para. 36.

[23] Popular initiative *'Für die Stärkung der Volksrechte in der Aussenpolitik (Staatsverträge vors Volk!)'*, rejected by popular vote on 17 June 2012.

the Constitution, Parliament 'shall participate in shaping foreign policy and shall supervise the maintenance of foreign relations'. While the former Constitution had already allowed for participation in foreign policy, the role of Parliament in this regard had been rather passive, limited to approving treaties; the executive branch had almost 'monopolised' the conduct of foreign relations.[24] During the GATT negotiations of the Uruguay Round (1986–1994), the power shift from Parliament to the Government resulting from the growing importance of international law-making was for the first time clearly perceived.[25] Soon after, Parliament undertook steps to strengthen its role in foreign policy.[26] Express mention was made of the changed circumstances: 'The legislative function of Parliament underwent some major changes, leading to a loss of influence.'[27] According to one of the initiators, the growing importance of foreign policy, engendering an incremental overlap of internal and external affairs, required the adaptation of Parliament to the new realities.[28] Further driving factors were the accessions of Switzerland to the European Economic Area and to the European Union, which were under discussion in the 1980s and early 1990s.

In 1992, a new provision was inserted into the former Parliament Act[29] (Art. 47^{bis}a), strengthening the role of Parliament in the stage of treaty negotiations.[30] The second step followed at the occasion of the complete revision of the Constitution in 1999. The aim was to codify the achievements of the 1992 reform also on the constitutional level. The definition of the relationship between the executive and legislative branches in this area, however, led to major debate.[31] The most far-reaching proposal was made by two parliamentary committees, and would have given Parliament the powers to 'determine the fundamental aims in the area of

[24] *Bericht der Kommission des Nationalrates zur Parlamentsreform* of 16 May 1991, BBl 1991 617, p. 649, citing Aubert J.-F. (1967) Traité de droit constitutionnel Suisse, vol I. Dalloz, Paris, para. 188.

[25] Diggelmann 2005, p. 9; the 1991 report concerning the reform of the Parliament mentioned in n. 24 expressly refers to those negotiations (p. 649). Already in a 1978 report on the 'future of Parliament', a parliamentary committee had noted the growing importance of treaty law and had demanded a stronger involvement of Parliament during treaty negotiations. See *Schlussbericht der Studienkommission der Eidgenössischen Räte, 'Zukunft des Parlaments'* of 29 June 1978, BBl 1978 996, pp. 1018, 1097.

[26] Parliamentary initiatives Rhinow, *Amtliches Bulletin der Bundesversammlung* IV 1990, p. 653, and Petitpierre, *Amtliches Bulletin der Bundesversammlung* IV 1990, p. 1624; motion Portmann, *Amtliches Bulletin der Bundesversammlung* IV 1991, p. 1508.

[27] *Bericht NR Parlamentsreform*, n. 24, p. 650.

[28] R. Rhinow, explanation in an e-mail of 25 September 2014, on file with the authors, available upon request.

[29] *Bundesgesetz über den Geschäftsverkehr der Bundesversammlung sowie über die Form, die Bekanntmachung und das Inkrafttreten ihrer Erlasse (Geschäftsverkehrsgesetz)* of 23 March 1962 (SR 171.11) (abolished on 1 December 2007).

[30] *Bericht NR Parlamentsreform*, n. 24, pp. 649–650.

[31] Ehrenzeller 2014, para. 4.

foreign policy and to participate in their design'.[32] The authors argued that in the light of progressing internationalisation, a modification of the existing balance of power between the branches with regard to foreign policy was necessary, and proposed giving Parliament the *lead* in determining the basic guidelines.[33] They expressly referred to the recommendation of a scholar asking for the extended participation of Parliament with binding effect in the area of foreign policy.[34]

This parliamentary proposal was successfully opposed by the Government, arguing that it would imply a *paradigm shift*, leaving only marginal and executory powers to the Government, and render the conduct of foreign affairs too inflexible.[35] Both chambers of Parliament in the end voted for the 1996 draft of the Government. A remnant of the discussion is reflected in Art. 184(1) of the Constitution, which expressly subjects the responsibility of the Government for foreign relations to the participatory rights of Parliament.[36]

The new provision did not lead to fundamental changes, but established more clearly that the democratically elected Parliament shall play an important and active role in the area of foreign relations.[37] The new Constitution thus does not merely allow parliamentary participation, it rather commands it.[38] Indeed, it has been noted that parliamentary participation is no longer a *right*, but a *duty*.[39]

More recently (2015), two provisions concerning the powers of the Government vis-à-vis Parliament with regard to treaties were revised: the provisions on the conclusion of treaties without the approval of Parliament ('simplified procedure', Art. 7a of the Government Act) and on the consultation of Parliament in the course of the provisional application of yet to be approved treaties (Art. 7b of the Government Act and Art. 152(3bis) of the Parliament Act).[40]

Two incidents involving the problematic exercise of governmental powers gave rise to these adjustments. First, a politically controversial agreement of 2001 between Switzerland and Germany on airport noise was applied provisionally by the Government, but later Parliament refused to give its consent to the treaty. In consequence, Switzerland could not ratify the treaty and had to re-enter into difficult negotiations. The incident revealed the risk that the provisional application of

[32] *Zusatzbericht der Staatspolitischen Kommissionen der eidgenössischen Räte zur Verfassungsreform* of 6 March 1997, BBl 1997 245, p. 313.

[33] Ibid., p. 281.

[34] Ibid., p. 282, referring to Ehrenzeller 1993, pp. 570–571. Ehrenzeller had argued for a stronger parliamentary involvement on the basis of the 'old' Constitution.

[35] *Stellungnahme des Bundesrates zum Zusatzbericht der Staatspolitischen Kommissionen der eidgenössischen Räte zur Verfassungsreform* of 9 June 1997, BBl 1997 1484, pp. 1496–1497.

[36] Zellweger 2001, p. 262, fn. 32.

[37] Ehrenzeller 2014, para. 19 speaks of a 'shift of emphasis' (our translation).

[38] Ibid., para. 16.

[39] Diggelmann 2005, p. 173, fn. 50.

[40] AS 2015 969 (in force as of 1 May 2015). The reform goes back to two parliamentary motions: *Nr. 10.3354 der Aussenpolitischen Kommission des Ständerates (APK-S)* of 27 May 2010 and *Nr. 10.3366 der Kommission für Wirtschaft und Abgaben des Nationalrates (WAK-N)* of 2 June 2010.

treaties by the Government could leave Parliament with a *fait accompli*, given that non-approval would lead to legal uncertainty and damage the credibility of Switzerland as a treaty partner.[41] As a consequence, in 2004 the powers of the Government to provisionally apply treaties were codified and more clearly defined.[42]

A further adjustment took place in the aftermath of a dispute between the United States and Switzerland regarding the handing over of client data of the Swiss bank UBS (the 'UBS case'). In 2009, the Federal Council signed an agreement to resolve the issue. It did so under the simplified procedure, i.e. without the involvement of Parliament. However, the Federal Administrative Tribunal subsequently prohibited the handing over of data based on the 2009 agreement.[43] This led the Government to conclude an adaptation protocol to the agreement. Despite the negative statements of Parliament, which had been consulted under Art. 152(3bis) of the Parliament Act, the Government provisionally applied the politically disputed instrument, arguing that important interests of Switzerland were at stake in an emergency situation.[44] Ultimately, in 2010, Parliament approved the 2009 agreement adapted by the protocol without submitting it to a referendum.[45]

In reaction to this incident, the powers of the Government were limited by law. First, the list of treaties that can be concluded without parliamentary approval was narrowed down further, and secondly, the possibilities to prevent the provisional application of treaties were strengthened by granting Parliament an actual veto right.

Regarding the first point, certain treaties are now explicitly excluded from the simplified procedure. These include, inter alia, those fulfilling the conditions of the optional treaty referendum (Art. 141(1)(d)) and those with considerable financial implications.[46] The aim of the reform was to circumscribe the powers of the Government more clearly without overly narrowing them, in order not to overload Parliament with questions of minor importance. Furthermore, and in line with the idea of bringing democratic oversight at the national and international levels in line ('principle of parallelism'), which will be further discussed below, the aim was to

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[41] *Bericht der Staatspolitischen Kommission des Ständerates*, '*Parlamentarische Initiative Vorläufige Anwendung von völkerrechtlichen Verträgen*' of 18 November 2003, BBl 2003 761, p. 764 and 769.

[42] *Botschaft zum Bundesgesetz über die Kompetenz zum Abschluss völkerrechtlicher Verträge von beschränkter Tragweite und über die vorläufige Anwendung völkerrechtlicher Verträge (Änderung RVOG)* of 4 July 2012, BBl 2012 7465, pp. 7477–7478.

[43] Federal Administrative Tribunal, *A. gegen Eidgenössische Steuerverwaltung*, A-7789/2009, Decision of 21 January 2010.

[44] *Botschaft zur Genehmigung des Abkommens zwischen der Schweiz und den Vereinigten Staaten von Amerika über ein Amtshilfegesuch betreffend UBS AG sowie des Änderungsprotokolls* of 14 April 2010, BBl 2010 2965, pp. 2988–2989.

[45] *Bundesbeschluss über die Genehmigung des Abkommens zwischen der Schweiz und den Vereinigten Staaten von Amerika über ein Amtshilfegesuch betreffend UBS AG sowie des Änderungsprotokolls* of 17 June 2010, AS 2010 2907.

[46] See *Botschaft Änderung RVOG*, n. 42, p. 7481.

exclude the conclusion of treaties containing significant provisions without parliamentary involvement.[47]

In the second amendment concerning the provisional application of treaties, the tension between the demand for more parliamentary involvement on the one hand and for safeguarding the necessary flexibility of the executive branch on the other hand was mirrored in the parliamentary debate. In the end, both chambers of Parliament agreed on a form of veto right for the parliamentary committees in charge of these questions.[48]

Popular participation in the ratification of treaties Attempts to strengthen the participation of citizens in the making of international law started as early as 1921.[49] The constitutional clause of 1921 subjected treaties of 'unlimited duration' (not containing a withdrawal clause) or concluded for 'more than 15 years' to an optional referendum. Moreover, the Government and Parliament submitted certain treaties to referendum without any explicit constitutional basis, e.g. the accession to the League of Nations in 1920 (accepted) and a free trade agreement with the European Community in 1972 (accepted).

Relying on the duration of a treaty as the decisive factor, however, was soon considered to be unsatisfactory because this excluded the people from having a say on the majority of treaties, no matter how far-reaching and important they were, if they contained a withdrawal option. Neither the accession to UNESCO in 1946, to the OECD in 1948, to EFTA in 1960, to the Council of Europe in 1963 nor to the ECHR in 1974 fell within the scope of the referendum.[50] Only approximately five percent of all treaties were subject to the possibility of a referendum, and only on three occasions was a referendum actually requested by citizens.[51]

As a consequence, a major reform was undertaken in 1977, extending the possibility for citizens to request a referendum. Those new rules on the referendum essentially remained the same during the complete revision of the Constitution in 1999. The aim was to achieve more popular participation, enhancing democratic legitimacy in the area of foreign policy without overly restricting the executive branch.[52]

A further extension followed in 2003. The reason was that many treaties, especially bilateral treaties, still did not fall within the scope of the referendum, which led to a gap between the national and the international level. In light of the growing number of treaties, this was considered problematic.[53] As a consequence,

[47] Ibid., pp. 7480–7481.

[48] The modified provisions entered into force on 1 May 2015.

[49] See *Botschaft Staatsvertragsreferendum*, n. 17, pp. 1135–1136; see also NZZ of 9 April 2013, *Ein Lösegeld für den Gotthard*.

[50] Lombardi and Thürer 2002, para. 4.

[51] *Botschaft Staatsvertragsreferendum*, n. 17, p. 1140.

[52] Ibid., p. 1153.

[53] *Bericht der Staatspolitischen Kommission des Ständerates zur parlamentarischen Initiative 'Zur Beseitigung von Mängeln der Volksrechte'* of 2 April 2001, BBl 2001 4803, p. 4825.

Parliament proposed to strengthen the role of citizens in the approval of treaties and to align the possibility of a veto by the citizens on the national and the international plane.[54] On the national level, all 'important' provisions that establish binding legal rules must be enacted in the form of a federal *legislative* act by Parliament, subject to an optional referendum (as opposed to ordinances which can also be adopted by the Government and which are *not* subject to a referendum). It was proposed that the same criterion should also be decisive for popular involvement regarding treaties – all *important* treaties should become subject to a referendum. It was argued that this 'parallelism' would furthermore reduce the risk of a referendum against subsequent domestic legislation implementing a treaty. Hence, the idea was to guarantee both popular participation and Switzerland's credibility as a partner on the international plane.[55]

The Government objected to the proposal, arguing that it would lead to a myriad of possible referendums and endanger Switzerland's credibility as a treaty partner.[56] The wording finally adopted in 2003 nonetheless corresponds to the more extensive parliamentary proposal. As has been shown above (Sect. 3.1.2), the number of treaties that have since been open to popular participation has significantly increased without at the same time leading to a similar increase in requests for a treaty referendum. The fears of the Government have therefore not materialised in practice, and the reform can – in quantitative terms – be qualified as a success.[57]

At the same time, the provision on 'package votes' (Art. 141a of the Constitution) was adopted. It allows Parliament to write down the text of the domestic amendments necessary to implement a treaty already in its decision on approval of the treaty. The aim is to avoid contradictory popular votes, a risk that has increased after the extension of the referendum.[58] This time, the Government got its way, relying successfully on the importance of such a provision for the enhanced credibility of Switzerland as a treaty partner, against the resistance of Parliament.[59]

3.1.3 A number of studies have been conducted on the impact of the internationalisation of the law on the fundamental principles of the Constitution, especially with regard to democratic legitimation in the area of foreign policy, the separation of powers between Parliament and the Government, and on the federal structure.[60]

[54] Ibid., pp. 4804 and 4826.

[55] Ibid., p. 4825.

[56] Ibid., p. 4826.

[57] A 2012 study finds that the current system is coherent and balanced. See Ehrenzeller 2012, p. 50.

[58] *Botschaft BV*, n. 3, p. 443.

[59] *Stellungnahme des Bundesrates zur parlamentarischen Initiative 'Beseitigung von Mängeln der Volksrechte'* of 15 June 2001, BBl 2001 6080, p 6093; for the position of Parliament, see *Bericht SPK-S*, n. 53, p. 4827.

[60] Diggelmann 2005; Ziegler 2004; Baumann 2002; Cottier et al. 2001; Sturny 1998; Saladin 1995; Ehrenzeller 1993.

The Government also, in detailed reports, has addressed issues that have arisen due to the changed circumstances in foreign policy. Mention is to be made of the reports on the continued relevance of Swiss neutrality,[61] on the relationship between national and international law[62] and on the Swiss-EU relationship.[63] No major reforms are currently under discussion.[64]

3.1.4 See Sect. 3.7.

3.2 The Position of International Law in National Law

3.2.1 Switzerland has traditionally been a (moderate) monist state. The Constitution is silent on this matter; however, the Federal Tribunal's case law follows the monist scheme.[65] Consequently, provisions of international law form part of the Swiss legal order without any act of transformation. In addition, a treaty norm is considered to be self-executing (directly applicable by domestic authorities and courts) if it contains rights or duties of individuals, is phrased in an unconditional and concrete way, and is therefore suited to form the legal basis of, and be applied in, an individual case, i.e. it is not addressed to the legislative branch.[66] Within the domestic hierarchy of norms, the Constitution is the highest-ranking source of law, followed by federal acts and finally federal ordinances. Cantonal law is subordinate to all federal law (Art. 49(1)). With regard to *treaties*, no clear hierarchy exists. Several constitutional provisions make reference to international law and are relevant for the determination of its position in the internal legal order. Viewed together, they display a considerable openness towards international law.

First, the Constitution explicitly states that 'the Confederation and the Cantons shall respect international law' and names international law as one aspect of the rule of law (Art. 5(4)). Furthermore, *ius cogens* forms a material limit to partial or complete revision of the Constitution (Arts. 139(2), 193(4) and 194(2)). Finally, the

[61] *Bericht des Bundesrates zur Neutralität, Anhang zum Bericht über die Aussenpolitik der Schweiz in den 90er Jahren* of 29 November 1993, BBl 1994 153.

[62] *Bericht des Bundesrates 'Das Verhältnis von Völkerrecht und Landesrecht'* of 5 March 2010, BBl 2009 2263, complemented by the additional report *Zusatzbericht des Bundesrats zu seinem Bericht vom 5. März 2010 über das Verhältnis von Völkerrecht und Landesrecht* of 30 March 2011, BBl 2011 3613.

[63] *Europabericht 2006* of 28 June 2006, BBl 2006 6815 and *Bericht des Bundesrates über die Evaluation der schweizerischen Europapolitik* of 17 September 2010, BBl 2010 7239.

[64] For a parliamentary initiative regarding the extension of parliamentary participation with regard to the OECD, see below, Sect. 3.3.1; for the discussion on the position of international law within the Swiss legal order and a shift to a dualist system, see below, Sect. 3.2.2.

[65] Since BGE 7 782 (1881).

[66] BGE 120 Ia (1994), E. 5b; for a recent example, see BGE 138 II 42 (2012), E. 3.1. See further *Bericht Völkerrecht und Landesrecht*, n. 62, p. 2303.

Federal Tribunal and other judicial authorities are bound to apply federal acts and international law (Art. 190).

Due to the lack of an absolute rule, many questions regarding the position of international law remain disputed, especially with regard to its position vis-à-vis the Constitution.[67] It is uncontroversial that *ius cogens* takes precedence over any conflicting Swiss law. Furthermore, international law has primacy over all *cantonal law* and over federal *ordinances*.[68] Concerning conflicts between treaty law and *federal acts*, the Federal Tribunal has developed a differentiated approach. The more recent jurisprudence suggests that the Federal Tribunal in principle proceeds from the primacy of international law over all domestic law, including the Constitution.[69]

Conflicts between international law and federal acts Article 190 of the Constitution does not give an answer to the question of what happens in the event of a conflict between international law and federal (parliamentary) acts. It names both international law and federal acts as 'decisive' and thereby leaves the choice to the organs applying the law.[70] The Federal Tribunal takes the idea of the primacy of international law as a starting point, invoking Arts. 26 and 27 VCLT as well as Art. 5(4) of the Constitution.[71] The *lex posterior* rule does not apply to the relationship between international and national law.[72] However, an exception applies: if the federal legislator deliberately contradicts a treaty and thus accepts a conflict with an existing international provision, the newer legislation prevails (the so-called *Schubert* rule).[73] Later, the Federal Tribunal created a counter-exception: *Schubert* does not rule when international norms for the protection of human rights are at stake (the so-called *PKK* rule).[74] In 2007, the Federal Tribunal gave precedence to an agreement on the free movement of persons (with the EU) over a provision of a federal act explicitly adopted to implement that agreement.[75]

Conflicts between international law and the Constitution There is also no clear rule for conflicts between international law and the Constitution. This constellation has become practically relevant in the last years due to a proliferation of popular initiatives that contradict international law and especially the European Convention on Human Rights (ECHR).[76] The most frequently used variant of this direct

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[67] See for references Ziegler and Odendahl 2014, para. 55.

[68] *Bericht Völkerrecht und Landesrecht*, n. 62, p. 2306.

[69] BGE 139 I 16 (2012), E. 5.1; BGE 142 II 35 (2015), E. 3. See already 125 II 417 (1999), E. 4d; 135 II 243 (2009), E. 3.1; 138 II 524 (2012), E. 5.1.

[70] *Bericht Völkerrecht und Landesrecht*, n. 62, p. 2310.

[71] See BGE 139 I 16 (2012), E. 5.1 and 138 II 524 (2012), E. 5.1; BGE 142 II 35 (2015), E.3.1.

[72] BGE 122 II 485 (1996), E. 3a; repeated in 138 II 524 (2012), E. 5.1.

[73] BGE 99 Ib 39 (1973) (*Schubert*) E. 3-4; repeated in 139 I 16 (2012), E. 5.1.

[74] BGE 125 II 417 (1999) (*PKK*), E. 4d.

[75] BGE 133 V 367 (2007), E. 11.6; see also BGE 142 II 35 (2015), E.3.1.

[76] E.g. popular initiative on preventive detention ('*Verwahrungsinitiative*'), accepted on 8 February 2004; on the ban of minarets ('*Minarettverbotsinitiative*'), accepted on 29 November 2009; deportation initiative ('*Ausschaffungsinitiative*'), accepted on 28 November 2010; initiative

democratic instrument allows 100,000 signatories to submit a concrete proposal for a constitutional provision that is, if valid under the conditions provided for in the Constitution, voted upon and adopted in its exact wording (Art. 139 of the Constitution). The Constitution contains only few limitations to this instrument. Peremptory norms (*ius cogens*) build the only substantial limitation. Initiatives violating *ius cogens* norms must be declared invalid by Parliament and are not brought to vote (Art. 139(3)). The constitutional term 'peremptory norms of international law' is interpreted broadly and includes norms at the margins of the international concept, such as the non-derogable rights under the ECHR. It follows that initiatives that are not in conformity with international law, outside the nationally determined circle of peremptory norms, can become constitutional norms.

The implementation and application of such provisions has led to considerable difficulties, leaving the organs concerned and especially Parliament with the situation that either the Constitution or conflicting international obligations have to be disregarded. This Catch-22 has led to an extensive debate on possible limitations of direct democratic rights in the name of the rule of law.[77] However, attempts to tackle the problem have hitherto failed.[78] In 2012, confronted with a constitutional provision introduced through a popular initiative on expulsions that foresaw far-reaching restrictions of the fundamental rights of foreigners, the Federal Tribunal, by way of *obiter dictum*, pronounced itself on the matter and stated that international law and in this case especially the ECHR would prevail over the conflicting constitutional provision.[79] It reached this conclusion by applying Art. 190, which mentions only federal acts and international law as being 'decisive' for the authorities applying the law. The Tribunal concluded *e contrario* that the Constitution (not explicitly mentioned) must cede to international law. Importantly, the Tribunal did not apply the *Schubert* exception to this constellation, which would have allowed a deliberate popular initiative to supersede pre-existing international law. The consequence of this far-reaching decision is that conflicts between constitutional norms and international law are now in principle to be resolved in favour of international law, granting it a quasi-supra-constitutional status. This leads to a restriction of the instrument of the popular initiative 'through the backdoor'.

This triggered a heated political debate. The populist party, author of the successful popular initiatives of the last years, launched a new initiative, which aimed

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against mass immigration ('*Masseneinwanderungsinitiative*'), accepted on 9 February 2014. For an academic assessment, see e.g. Auer 2013, pp. 158–160.

[77] For an overview of the reform proposals, see *Zusatzbericht Verhältnis von Völkerrecht und Landesrecht*, n. 62.

[78] See regarding the most recent attempts, *Bericht des Bundesrates zur Abschreibung der Motionen 11.3468 und 11.3751 der beiden Staatspolitischen Kommissionen über Massnahmen zur besseren Vereinbarkeit von Volksinitiativen mit den Grundrechten* of 19 February 2014, BBl 2014 2337.

[79] BGE 139 I 16 (2012), E. 5.3. See already (less clear) 133 II 450 (2007), E. 6; 133 V 233 (2007), E. 3.5.

to explicitly endorse the primacy of the Constitution over international law (with the exception of *ius cogens*). The proposal also foresaw that conflicting international obligations were to be re-negotiated or even terminated. The core argument brought forward was that international law and 'foreign judges', i.e. particularly the judges in Strasbourg, impinge too much on the 'will of the people' as expressed in direct democratic votes. In the end, the proposal was clearly rejected.[80] An approval would probably have had far-reaching consequences for Switzerland, one of them being a withdrawal from the ECHR. Most of all, the majority of the citizenry would then have been in the position to make laws with an almost unfettered discretion, to the detriment of minority rights.[81]

While it is certainly true that internationalisation and the greatly increased activity of international bodies in times of global governance constitute challenges to direct democracy, we think that the proposed solution missed the point. It first of all projects the debate on the proper balance between direct democracy and rule-of-law-induced limits of democracy, which is an inherently *constitutional* debate, onto international law and especially onto the ECHR. Furthermore, the supposedly simple solution proposed, granting the Constitution priority in any case, would have led to a myriad of new problems, while the rigid priority granted to the Constitution would not have provided the flexibility needed in the face of the pluralistic and complex legal reality.

3.2.2 A move to a dualist system has been repeatedly discussed in Parliament,[82] with emphasis on state sovereignty and legitimacy concerns.[83] The Government has consistently refused to shift to dualism.[84] Its argument is that the leeway for legislative implementation of international law is not greater in dualist states, because Arts. 26 and 27 VCLT bind those states as well. Furthermore, the Government has pointed to the fact that direct democratic participation has been extended (see Sect. 3.1.2), and nearly parallel conditions for popular involvement in the adoption of national and international norms have been established.[85] A shift to dualism would not contribute to the resolution of pending problems, namely with regard to the position of international law in the Swiss legal order, the implementation of popular initiatives or the discontent in Switzerland about the role of 'foreign' judges.

[80] The initiative which was named 'popular initiative on self-determination' ('*Selbstbestimmungsinitiative*') was voted upon on 25 November 2018 and rejected by a majority of 66 percent of the voters and all the Cantons.

[81] See for an overview *Botschaft zur Volksinitiative 'Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)'* of 5 July 2017, BBl 2017 5355.

[82] The most recent request, *Motion 14.3221 (Reimann), 'Dualismus statt Monismus'* of 21 March 2014 was rejected by the first chamber of Parliament in March 2016.

[83] As in the reasoning of the *Motion Reimann*, n. 82.

[84] *Bericht Völkerrecht und Landesrecht*, n. 62, pp. 2285–2286, 2302–2303, 2320–2321; statement of the Government of 28 May 2014 regarding *Motion 14.3221 ('Dualismus statt Monismus').* http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20143221.

[85] See statement of the Government regarding Motion 14.3221, n. 84.

3.3 Democratic Control

3.3.1 In Switzerland, as in most other states, Parliament is involved in the conclusion of treaties (see above Sect. 3.1) The Swiss Constitution, however, does not confine its participation to the ratification stage. It rather contains a provision that opens the door for parliamentary participation already prior to the approval of a treaty. Parliament partakes in the negotiation phase, but also beyond ratification, e.g. in subsequent negotiations within IOs. The intensity of parliamentarisation seems to be unique in a comparative perspective.[86]
The starting point for parliamentary involvement in foreign policy is Art. 166(1) of the Constitution which states that the Federal Assembly 'shall participate in shaping foreign policy and shall supervise the maintenance of foreign relations'. The Constitution itself does not define the term 'participation'. The Parliament Act specifies that Parliament 'shall follow international developments' and 'participate in the decision-making process on important foreign policy issues' (Art. 24(1)). Additionally, Parliament shall 'participate in international parliamentary conferences and cultivate relations with foreign parliaments' (Art. 24(4)).

Parliament disposes of several instruments to this end: on the one hand, general parliamentary instruments and, on the other, instruments specifically designed for the area of foreign policy. The first group includes federal legislation concerning the area of foreign policy (marginal in practice), the parliamentary supervisory powers (Art. 169 of the Constitution) and finances (Art. 167), as well as the different types of procedural requests under the Parliament Act.[87] Several important legal developments, including the 1992 reform of parliamentary participation in foreign policy, go back to the use of these instruments. Of great practical importance for foreign policy are so-called *motions*, whereby Parliament can request that the Government submit a bill to the Federal Assembly or take certain action (Arts. 120 et seq. of the Parliament Act).

Examples of the use of the general parliamentary instruments include two parliamentary initiatives (Art. 160(1) of the Constitution and Art. 107 of the Parliament Act) regarding regulatory activities within the OECD. Both requested a stronger parliamentary involvement, arguing that OECD recommendations often lead to international standard-setting, ultimately resulting in international law with no democratic legitimation and control at all.[88] An example is the OECD approach to combatting tax avoidance by multinational enterprises as part of the organisation's

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[86] Ehrenzeller 2014, para. 14.

[87] Tripet 2012, pp. 23–25 offers some examples.

[88] *Parlamentarische Initiative Nr. 14.424*, '*Parlamentarische Einflussnahme bei Regulierungsaktivitäten durch die OECD'* of 18 June 2014. Another initiative requests in the same vein consultation with Parliament in OECD matters. See *Parlamentarische Initiative Nr. 14.433, 'Empfehlungen und Beschlüsse der OECD und ihrer Sonderorganisationen. Pflicht zur Information und Konsultation der zuständigen Legislativkommissionen'* of 20 June 2014. Both initiatives were rejected by Parliament.

action plan on 'base erosion and profit shifting' (BEPS), which in Switzerland has contributed to the launch of a corporate tax reform.[89]

Parliamentary 'acts of general principle and planning' are another general instrument. These are acts stating that 'certain goals must be achieved, principles and criteria must be observed or measures must be planned' (Art. 28(2) of the Parliament Act). This instrument is strong in legal terms – the Government may refuse to follow these decisions only if it provides justification (Art. 28(4)) – but of marginal practical relevance.[90]

The specific instruments relating to foreign policy are mainly instruments of *information* and *consultation*. First, the Government shall regularly report to Parliament on Switzerland's foreign policy (Art. 148(3) of the Parliament Act). Since 2011, the Government must submit an *annual report* providing a general overview of all activities in the area of foreign policy.[91] Further reports may be explicitly required by law (Art. 148(1) of the Parliament Act). Examples include the 'Foreign Economic Policy Reports' based on Art. 10 of the Federal Act on Foreign Policy Measures.[92] In these reports, the Government explains its main focus in the preceding year and the activities pursued to this end; furthermore, it provides information about foreign economic activities during this period, including the status of ongoing negotiations as well as the conclusion of negotiations.[93] Additionally, the Government may submit reports whenever it deems appropriate (Art. 148(1)).

Although reports are usually issued only for the information or attention of Parliament (Art. 148(1) of the Parliament Act), Parliament can, on its own or on the initiative of the Government, adopt an above-mentioned 'act on principle and planning' in reaction to important plans and reports (Art. 148(2) and (4)). So far, the Government has never submitted a report together with an invitation to take such a decision. Observers note that Parliament discusses the annual foreign policy reports less intensely than it did the more general pre-2009 reports. Furthermore, only few

[89] OECD press release of 16 September 2014, 'OECD releases first BEPS recommendations to G20 for international approach to combat tax avoidance by multinationals'; Federal Department of Finance press release of 22 September 2014, 'Federal Council launches consultation on third series of corporate tax reforms'.

[90] Tripet 2012, p. 18. The only instance (under the former law) so far is a draft federal decree with regard to a popular initiative proposing accession to the European Union. See *Entwurf Bundesbeschluss über Beitrittsverhandlungen der Schweiz mit der Europäischen Union*, BBl 1999 3830, p. 3839 (rejected by the second chamber of Parliament).

[91] *Aussenpolitischer Bericht 2009* of 2 September 2009, BBl 2008 6291, p. 6293. Before 2009, the reports were issued on an irregular basis. The reports are available at https://www.eda.admin.ch/dea/de/home/dienstleistungen-publikationen/berichte/berichte-aussenpolitik.html.

[92] *Bundesgesetz über aussenwirtschaftliche Massnahmen* of 25 June 1982 (SR 946.201).

[93] In 2014, these included i.a. the entry into force of a bilateral free trade agreement with China, the conclusion of free trade agreements with Costa Rica and Panama, as well as the commencement of negotiations regarding a Swiss-EU institutional framework. See *Bericht zur Aussenwirtschaftspolitik 2014* of 14 January 2015, p. 3.

requests (in the form of the general instruments) have been submitted by members of Parliament to the Government in reaction.[94]

Further specific instruments are the information and consultation mechanisms in concrete situations which address not the parliamentary plenum but the Foreign Affairs Committees (FAC) of both chambers of Parliament (Art. 152 of the Parliament Act). The Government shall *inform* the presidents of the chambers and the FACs 'regularly, comprehensively and in good time of important foreign policy developments' (Art. 152(2)). If the information is classified, the recipients are bound by official secrecy (Art. 8). The FACs or other relevant committees can *request* to be informed or consulted (Art. 152(5)). The initiative to request information is, contrary to Art. 152(2) of the Parliament Act, mainly taken by the committees themselves.[95] An example is the request for information about the conclusion of negotiations concerning the multilateral Anti-Counterfeiting Trade Agreement (ACTA).[96]

The *consultation* mechanism is one of the most important instruments of participation in foreign policy, allowing Parliament to exercise influence *prior* to negotiations: the Government shall 'consult the FACs on important plans as well as on the guidelines and directives regarding mandates for important international negotiations before it decides on or amends them'. In the same vein, the Government 'shall inform these committees of the status of its plans and of the progress made in negotiations' (Art. 152(3) of the Parliament Act).

The term 'important international negotiations' not only encompasses treaty negotiations but, more generally, all important foreign policy plans. It may also apply to soft law as far as it is important for the international standing of Switzerland.[97] Parliament can actively influence such negotiations by making statements during the consultation procedure.[98] The Government is not obliged to follow the statements, but must take them into account.[99]

In the last four-year legislative period (2011–2015), 39 consultations took place, including on the aviation agreement between Germany and Switzerland and the UN Conference on Sustainable Development (Rio+20). Furthermore, the FACs were consulted on the mandate for negotiation concerning the WTO Ministerial Conferences in Bali and Nairobi. Another consultation concerned the mandate for

[94] Graf 2014, paras. 19–20.

[95] Tripet 2012, p. 46; Tripet Cordier 2014, para. 24.

[96] See *Bericht der Aussenpolitischen Kommission des Nationalrates*, '*Rückblick 1. Hälfte der 49. Legislaturperiode 2011–2013*', p. 8, http://www.parlament.ch/d/dokumentation/berichte/berichte-legislativkommissionen/aussenpolitische-kommission-apk/Documents/legislaturrueckblick-apk-n-2011-2013-d.pdf.

[97] See *Notiz des Sekretariats der Aussenpolitischen Kommissionen, 'Mitwirkungsrechte der eidgenössischen Räte im Bereich Aussenpolitik'*, p. 3, http://www.parlament.ch/d/organe-mitglieder/kommissionen/legislativkommissionen/kommissionen-apk/Documents/mitwirkung-aussenpolitik-apk-d.pdf.

[98] See *Bericht der Staatspolitischen Kommission des Nationalrates zur Parlamentarischen Initiative Parlamentsgesetz* of 1 March 2001, BBl 2001 3467, p. 3604.

[99] Lanz 2014, p. 27.

negotiations with the EU to resolve institutional questions. Both committees approved the mandate, while adding a clarification.[100]

The FACs usually approve proposed mandates; only in exceptional cases do they propose amendments or ask that negotiations be abandoned.[101] A study finds a growing tendency to consult with Parliament.[102] The Government seems to recognise the importance of the instrument of consultation, and Parliament actively exercises its powers.[103]

It can thus be concluded that the reforms regarding the stronger involvement of Parliament in foreign policy have been successful – Parliament has assumed its role and proactively engages in foreign policy. This strong parliamentary involvement in Swiss foreign policy must be seen against the backdrop of some particular features of the Swiss system: the prevailing model of 'consensus democracy' as opposed to 'majoritarian democracy', and the far-reaching popular participation in treaty approval ('threat' of a referendum). While it is generally acknowledged that parliamentary involvement might negatively impact on flexibility during international negotiations, involving Parliament already in the stage of the framing of mandates for negotiations arguably has a positive impact on the acceptance of treaties, thus reducing the risk of a referendum. This might even strengthen the position of the Government during international negotiations.[104] Therefore, parliamentary involvement and especially consultation already during the shaping of mandates would be worth considering also in systems with no direct democratic participation, as this helps mitigate the power shift from the legislative to the executive branch and leads to a more legitimate and acceptable result.

3.3.2 See above, Sect. 3.1 on popular rights in connection with the conclusion of treaties, and Sect. 3.1.2 on the 2003 amendments on referendums.

3.4 Judicial Review

3.4.1 Rules on judicial review Treaties and acts of international organisations are not challengeable in Swiss courts. Several authors as well as a governmental report have claimed, however, that the essence of constitutional fundamental rights should form a limit to the application of international law.[105]

[100] For an overview, see the report *Die Aussenpolitische Kommission des Nationalrates in der 49. Legislaturperiode, 2011–2015*, https://www.parlament.ch/centers/documents/de/legislaturrueckblick-apk-n-2011-2015-d.pdf.

[101] Tripet 2012, p. 62.

[102] Ibid., p 96: 12 consultations in the legislative period 2003–2007; 24 consultations in 2007–2011.

[103] Lanz 2014, p. 27.

[104] Ibid., pp. 27–28; Tripet Cordier 2014, para. 30.

[105] *Bericht Völkerrecht und Landesrecht*, n. 62, p. 2322; Schindler and Tschumi 2014, para. 87 for more references.

The object of judicial review is normally an individual act; federal legislative acts (statutes) are not challengeable.[106] As foreign relations lie in the responsibility of the Confederation (Art. 54(1) of the Constitution), most acts in the area of foreign relations emanate from the federal sphere. Federal administrative acts are usually first challengeable before a federal complaint authority, and then before the Federal Administrative Tribunal, with the Federal Tribunal as a last instance.

In the so-called administrative procedure, acts can, inter alia, be challenged for violation of *federal law*, which also includes the Constitution and international law (Art. 49(a) of the Federal Act on Administrative Procedure).[107] Before the Federal Tribunal, the benchmark will mainly be *federal law* as well as *international law* and the rights of persons derived from the *cantonal Constitutions* (Art. 95(a)–(c) Act on the Federal Tribunal).

The jurisdiction of both the Federal Administrative Tribunal and the Federal Tribunal is limited with regard to 'acts of government', i.e. acts considered to be mainly political and non-justiciable.[108] This means that appeal is precluded with regard to 'rulings relating to the internal and external security of the country, neutrality, diplomatic protection and the other matters relating to external relations' (Art. 32 (1)(a) Act on the Federal Administrative Tribunal[109] and Art. 83(a) Act on the Federal Tribunal[110]). Nevertheless, a counter-exception provides again for an appeal: if 'international law confers the right to have the matter judged by a court', judicial review is granted (last sentence of both provisions). This counter-exception was introduced in 2005 in order to comply with the obligations of Switzerland under Art. 6(1) of the ECHR.[111] In cases not falling under this counter-exception and thus not subject to *judicial* review, the Federal Council serves as a non-judicial appeal authority (Art. 72 of the Federal Act on Administrative Procedure).

An obstacle to setting aside international legal acts is contained in Art. 190 of the Constitution. This provision states that both federal acts and international law are '*decisive*' for the Federal Tribunal and for other law-applying authorities (see above Sect. 3.2.1). The term 'international law' which is 'decisive' and therefore must be

[106] Article 44 in conjunction with Art. 5 of the Administrative Procedure Act (*Bundesgesetz über das Verwaltungsverfahren [Verwaltungsverfahrensgesetz]* of 20 December 1968 (SR 172.021)). Federal *ordinances*, however, can be subject to an ancillary control together with the challenged individual act. If a court finds that they are incompatible with a higher norm, it may refuse to apply them (but not invalidate them). Furthermore, acts of the Cantons may be challenged before the Federal Tribunal (Art. 82(b) Act on the Federal Tribunal).

[107] See e.g. BGE 130 I 312 (2004).

[108] *Botschaft zur Totalrevision der Bundesrechtspflege* of 28 February 2001, BBl 2001 4202, p. 4387; BGE 1A.157/2005 (2005), E.3.

[109] *Bundesgesetz über das Bundesverwaltungsgericht (Verwaltungsgerichtsgesetz)* of 17 June 2005 (SR 173.32).

[110] *Bundesgesetz über das Bundesgericht (Bundesgerichtsgesetz)* of 17 June 2005 (SR 173.110).

[111] *Botschaft zur Totalrevision der Bundesrechtspflege* of 28 February 2001, BBl 2001 4202, p. 4388.

applied encompasses not only treaty law, but also customary international law, the general principles of law as well as the decisions of IOs binding on Switzerland.[112]

This provision does not prohibit the courts from reviewing and criticising the legal acts under scrutiny.[113] However, even when an international legal act is incompatible with the Constitution and with constitutional fundamental rights, the judiciary is bound to *apply* the conflicting legal act, e.g. the domestic act on implementation of a UN Security Council (SC) resolution.[114]

Judicial review in practice The issue of (direct or indirect) judicial review of acts of international organisations has arisen in Switzerland several times regarding national measures implementing targeted sanctions against individuals. Such measures are generally based on the Federal Act on the Implementation of International Sanctions[115] and issued by the Federal Council in the form of ordinances (Art. 2(3) of that Act).

In the leading case of 2007 (*Nada*), the Federal Tribunal decided that the appeal of a targeted individual against the authorities' refusal to remove him from a list annexed to the Swiss ordinance[116] implementing UN SC Resolution 1267 on sanctions against the Taliban,[117] resulting in a travel ban and the freezing of the applicant's assets, was admissible. Although formally, the issue was not the review of an individual act, but the modification of an *ordinance*,[118] the Tribunal held that the inclusion in a list with the effect of restricting the exercise of individual rights had the same effect as an individual *ruling* affecting fundamental rights. Therefore judicial review should be allowed.[119] As the rights of the applicant under Art. 6(1) ECHR were affected, the Tribunal applied the counter-exception to the act-of-government exception and found the complaint admissible.[120] On the merits, however, the Court held that scrutiny of such measures with regard to their conformity with constitutional rights and international human rights guarantees was not allowed. First, *constitutional guarantees* could not serve as benchmarks. While the Federal Tribunal expressly acknowledged that judicial review was lacking at the UN level,[121] the Tribunal considered itself unable to remedy the situation. The reason was the Swiss authorities' constitutional obligation 'to apply' international

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[112] Botschaft BV, n. 3, pp. 428–429; BGE 133 II 450 (2007), E. 6.1.

[113] See BGE 129 II 249 (2003), E. 5.4.

[114] BGE 133 II 450 (2007) (*Nada*), E. 6.1; 2A.783/2006 (2008) (*Al-Dulimi*), E. 7.1.

[115] *Bundesgesetz über die Durchsetzung von internationalen Sanktionen (Embargogesetz)* of 22 March 2002 (SR 946.231).

[116] *Verordnung über Massnahmen gegenüber Personen und Organisationen mit Verbindungen zu Usama bin Laden, der Gruppierung 'Al-Qaïda' oder den Taliban* of 2 October 2000 (SR 946.203).

[117] SC Resolution 1267 (1999) of 15 October 1999.

[118] See on the justiciability of ordinances n. 106.

[119] BGE 133 II 450 (2007) (*Nada*), E. 2.1.

[120] Ibid., E. 2.2–2.3.

[121] Ibid., E. 8.3.

law (Art. 190 of the Constitution).[122] The Tribunal therefore felt bound by its obligation under Art. 25 of the UN Charter to implement the UN resolution which – according to the Federal Tribunal – left no leeway.[123] With regard to the *international obligations* to respect human rights under the ECHR and the ICCPR, the Tribunal applied Art. 103 of the UN Charter, according to which 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.[124] The Tribunal held that *ius cogens* would, however, constitute a limit to the duty to apply SC resolutions.[125]

In 2012, the ECtHR decided that by prioritising the SC resolutions over respect for ECHR rights, Switzerland had violated Arts. 8 and 13 of the ECHR. It did not accept the defence that Switzerland had had no discretion when implementing the SC resolutions, but rather examined whether Switzerland had done everything in its power to minimise the conflict between the UN SC resolutions and the obligations arising from the ECHR, and concluded that this had not been the case.[126]

In the *Al-Dulimi* case concerning the implementation of Iraqi sanctions resulting from UN SC Resolution 1483,[127] the ECtHR again found Switzerland to be in breach of the Convention.[128] The Federal Tribunal had, in three judgments rendered on the same date,[129] repeated its previous stance that it was not entitled to examine the merits of the complaints, because Switzerland was bound to apply international law due to Art. 190 of the Constitution,[130] and because Security Council resolutions enjoy priority over potentially conflicting treaty norms due to Art. 103 UN Charter (except for *ius cogens*).[131] Given the fact that SC Resolution 1483 contained a *strict* obligation, and because the right of access to an independent and impartial court does not belong to the body of international peremptory norms, the Federal Tribunal refused to examine the applicants' listing in substance, arguing that to do so would potentially deprive Art. 25 UN Charter of its *effet utile*.[132] As Switzerland was not in a position to achieve the de-listing of the applicants, the Federal Tribunal

[122] Ibid., E. 6.1.

[123] Ibid., E. 8.1.

[124] Ibid., E. 6.2.

[125] Ibid., E. 7.

[126] *Nada v. Switzerland* [GC], no. 10593/08, § 185–199, ECHR 2012.

[127] Resolution 1483 (2003), adopted by the SC at its 4761st meeting on 22 May 2003. The implementing legislation is the *Verordnung über Wirtschaftsmassnahmen gegenüber der Republik Irak* of 7 August 1990, amended on 20 May 2003 to adapt to UN SC resolution 1483 (BBl 2003 1887).

[128] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, ECHR 2016.

[129] BGE 2A.783/2006; 2A.784/2006; 2A.785/2006 (*Al-Dulimi*); all of 23 January 2008. In these cases, the challenged act was an *individual* ruling (an administrative decision on confiscation of 16 November 2006).

[130] BGE 2A.783/2006 (2008) (*Al-Dulimi*), E. 7.1.

[131] Ibid., E. 7.2.–7.3.

[132] Ibid., E. 9.2; 10.1.

considered that Switzerland's behaviour neither violated the Swiss Constitution nor Arts. 6 and 13 of the ECHR.[133]

The Grand Chamber did not accept this defence. It found that although the Swiss courts' refusal to review the complaint pursued the legitimate objective of maintaining international peace and security, the denial of any substantive review was disproportionate and therefore impaired 'the very essence of the applicant's right of access to a court'.[134] According to the ECtHR, SC resolutions must be interpreted as allowing for an appropriate review by domestic courts unless the resolution explicitly rules this out: '[w]here a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention.'[135] The ECtHR then found that before freezing the assets 'the Swiss authorities had a duty to ensure that the listing was not arbitrary. … The applicants should … have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary.'[136] Because the Swiss authorities, including the Swiss Federal Tribunal, completely refused to examine the complaint, they violated the Convention. Even though the ECtHR sought to strike a compromise and to avoid the hard consequences of Art. 103 UN Charter, it still leaves the ECHR member states that now have to apply an undefined arbitrariness test in a Catch-22 between the ECHR and the UN Security Council.[137]

Experts' view The procedural elements of constitutionalism may be more important than the substantive ones; what counts are not only material guarantees but even more so the mechanisms to implement them, including judicial review. If such mechanisms exist only on the domestic plane, they need to be exploited. However, diverging interpretations and application of international primary and secondary law will persist in any case.

National courts play an important role at the intersection of legal orders: they are 'servants' to international law within the domestic realm and act as pivotal safeguards for the effectiveness of international law. At the same time, they remain answerable to the dictates of domestic law and act as gatekeepers for the protection of national values, as often enshrined in the constitution. In this dual function, national courts may be faced with the dilemma of obeying either national (constitutional) law or international law. As shown, the Swiss Federal Tribunal has so far proved reluctant to assume a role in protecting constitutional (or European) fundamental rights against encroachment by international legal acts, but rather has implemented measures prescribed by international law faithfully.

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[133] Ibid., E. 11.2.

[134] *Al-Dulimi* [GC], n. 129, para. 151.

[135] Ibid., para. 140.

[136] Ibid., paras. 150–151.

[137] See for a critical appraisal of the case Peters 2016b.

In Switzerland as in other states, courts have so far been confronted with conflicts between international law and constitutional law mainly with regard to targeted sanctions, which arise less from a conflict of values and more relate to a lack of judicial review of the acts of the Security Council.

In other constellations, international and domestic (constitutional) standards diverge only in nuances rather than pointing in opposite directions. Here, harmonising approaches by national courts seem adequate. They should take international law into consideration in good faith and should interpret the domestic constitution in the light of international law.

If a normative conflict cannot be interpreted away, courts need to decide which norm should prevail. It is submitted here that priority should be given not by pointing to the formal sources, i.e. whether a norm is codified on the constitutional level or based in international law, but on the basis of their substance. Accordingly, less significant provisions in state constitutions would have to give way to important international norms. Inversely, fundamental rights guarantees should prevail over less important norms (independent of their locus and type of codification). Within such a flexible scheme, the practical outcome would greatly depend on *who* interprets and applies the law.

Arguably, if the application of international law risks violating the core principles of the domestic constitution, the 'constitutional identity', (some) domestic courts (maybe only courts of last instance) might exceptionally and temporarily be released from their duty to apply international law. However, they should exercise this emergency power in the spirit of pressing for international legal reform.[138] Also, such domestic judicial review seems to be warranted only 'as long as' adequate review of international acts is lacking on the international plane and must be abandoned once the international level has been sufficiently constitutionalised.

3.5 The Social Welfare Dimension of the Constitution

No significant issues arise.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

On individuals affected by UN terrorist blacklists, see Sect. 3.4.1. Regarding other rights, in 2014, the ECtHR found that Switzerland, in applying the Dublin

[138] See Peters and Preuss 2013, pp. 41–42 for a more detailed reasoning.

Regulation,[139] had violated Art. 3 of the ECHR by sending an asylum seeking Afghan family with small children back to Italy.[140] Italy was the country of their registration in Europe, but had a problematic reception system.

The primary objective of the Dublin Regulation is to determine which state bears responsibility for examining an asylum application in order to avoid multiple applications and to ensure that only one state deals with any single case (Art. 3 and Chapter III of Regulation No. 604/2013). It therefore establishes a nearly automatic procedure. The Federal Administrative Tribunal had previously held that 'while there [were] shortcomings in the reception and social welfare arrangements …', there was no evidence in the file capable of 'rebutting the presumption that Italy complie[d] with its obligations under public international law'.[141]

The ECtHR, however, considered that Switzerland was obliged to undertake a further examination. It argued that the current situation in Italy was not comparable to the situation in Greece which the Court had examined in the case of M.S.S.[142] However, in light of the current state of the reception system in Italy and the fact that children are a particularly vulnerable group, it was incumbent on Switzerland to obtain assurances from the Italian authorities that the family would be received in facilities and conditions adapted to the age of the children.[143]

The decision to return the applicants to Italy did not strictly fall within Switzerland's international legal obligations, because the Dublin II Regulation left some leeway and allowed a state to examine applications for asylum lodged with it, even if the particular state is not obliged to do so under the Dublin criteria.[144] Consequently, the *Bosphorus* presumption did not apply in the present case, and Switzerland remained fully responsible under the ECHR.

Taking into account the need to coordinate different legal regimes, this ECtHR judgment might be viewed critically. The Dublin system is based on the principle of mutual confidence and on the presumption that the participating states respect the

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[139] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50/1. The Dublin Regulation is applicable to Switzerland under the terms of the association agreement of 26 October 2004 with the European Community regarding criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in a Member State or in Switzerland, [2008] OJ L 53/1.

[140] *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts).

[141] Federal Administrative Tribunal, *A. et al. contre Office fédéral des migrations (ODM)*, Judgment of 9 February 2012, D-637/2012, p. 7, in the translation of *Tarakhel*, n. 140, para. 18. The judgment related to the previous Dublin II regulation (Regulation 343/2003)

[142] *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

[143] *Tarakhel*, n. 140, paras. 120–122.

[144] Under the 'sovereignty clause', Art. 3(2) of the Dublin II Regulation of 2003 and Art. 17 'discretionary clauses' of the Dublin III Regulation of 2013.

fundamental rights laid down in the ECHR. According to the Court of Justice of the European Union, this presumption is only rebutted in the event of systemic flaws. The judgment of the ECtHR introduced a stricter standard of scrutiny, obliging Member States to deviate from the principle of mutual confidence and to examine individual cases beyond extreme cases of systemic deficits. This could undermine the balance and the effectiveness of the Dublin system. However, it leads neither to a Catch-22 for the Member States, nor does it preclude the application of the Dublin Regulation. It rather obliges Member States to use the exception clause foreseen in the Regulation and to ask for 'detailed and reliable information' concerning the reception conditions when particularly vulnerable categories, including children, are involved.[145] The *Tarakhel* judgment provides a more effective protection of human rights *within* the existing EU regime and thus allows harmonisation of the two different regimes (ECHR and EU law). Such an approach is in line with the idea of the maximum standard as expressed both in Art. 53 of the EU Charter of Fundamental Rights and in Art. 53 of the ECHR.

We submit that as long as there are no sufficient institutions and procedures on the international level to compensate for the 'hollowing out' of constitutional principles and processes ('compensatory constitutionalisation'), national actors (courts and parliaments) should continue to play an important role in upholding such principles. However, they need to practice constitutional tolerance. This means that they should not demand identical standards on every level of governance, should employ techniques of accommodation (conflict-avoiding clauses, harmonious interpretation, etc.), and not reify fixed normative hierarchies established between different legal orders.

The Swiss debate about the meaning of the constitutional reference to 'international peremptory norms' (see Sect. 3.2.1) illustrates the relevance of mutually adjusting domestic (constitutional) and international standards. This reference is unique in setting an international law-conscious limit to constitutional amendment. It is in principle legitimate to 'domesticate' the *ius cogens* standard, as long as domestication works immediately or indirectly in support of international coordination and co-operation. This is the case here, since the domestic interpretation has so far extended the range of international legal norms to be respected in amending the Constitution.

The institutional setting (procedures for constitutional amendment, jurisdiction of courts, etc.) needs to be designed so as to allow such accommodation and tolerance. For example, in Switzerland, the right to initiate a popular initiative could be further restricted, so as not only to stop short of international peremptory norms (in their 'extended' Swiss interpretation) but also to respect all or a core set of international (or European) human rights guarantees.

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[145] Cf. *Tarakhel*, n. 140, para. 121.

3.7 Conclusions

Overall assessment The Swiss Constitution is unique in Europe in the way it organises international co-operation. Three features stand out: the very strong democratisation of foreign policy-making (through Parliament and through the involvement of the people), the relatively reluctant judicial review of international legal acts against the benchmark of fundamental rights and, finally (less importantly), the federal elements in conducting international relations. This constitutional design for accommodating international law and for acting on the international plane may have several reasons.

First, it appears to be an outgrowth of the internal constitutional design in which democracy (including the strong elements of direct popular participation) stands in the foreground and is only weakly checked by constitutional review. The relatively far-reaching cantonal competences in international relations mirror the strong Swiss federalism.

Importantly, the spectre of a popular referendum adds to the usual power struggle between the Government and Parliament in the conduct of international relations. As in probably all other democratic states, the Swiss Government time and again points to the need for reacting swiftly and flexibly, and to speak with one voice in order to justify its own competences in foreign affairs, unencumbered by too much parliamentary involvement. The current Swiss Constitution accommodates this concern but allows more room for Parliament than other European constitutions. The reason is that Parliament's involvement is apt to forestall the people from calling for a referendum which in turn would risk slowing down and confusing foreign affairs even more. Thus, overall, the purely 'internal' aspect of the Constitution and the outward-looking structures and mechanisms fit together.

Secondly, Switzerland as a small country surrounded by powerful neighbours has a long and strong tradition of investment in international law in order to pursue its national interests (host state of numerous IOs; depositary of the International Humanitarian Law Geneva Conventions; neutrality in war). Thirdly, the relevant constitutional provisions (and accompanying statutory law) date from the 1990s and the first decade of this millennium. This period was characterised by an increased awareness of globalisation and global interdependence, by a belief in the merits of international co-operation, and by the expectation that international governance would continuously become stronger and was in principle necessary and beneficial.

Overall, the Swiss constitutional reforms mirrored the zeitgeist and, at the same time, the result reflects four Swiss idiosyncrasies, namely the country's proactive use of international law for its own benefit, the extremely elaborate and far-reaching democratic procedures, strong federalism, and the country remaining outside the EU (in contrast to most other Western European states).

The importance of the tension between the rule of (undemocratic) international law and domestic democracy has been fully realised only in the past decade. The resulting scepticism towards the incorporation, accommodation, implementation and prioritisation of international law in the domestic legal order is an attitude

which Switzerland shares with other states. This Europe-wide trend is not least a consequence of the increased practical relevance and reach of international legal acts which is felt within nation states. However, the backlash seems to be more intense in Switzerland than in other states because of the high value placed on the sovereignty of the (Swiss) people.

The seeming inconsistency between the current phenomenon of Swiss constitutional reforms triggered by popular initiatives in disregard of international standards on the one hand, and the faithful implementation of SC resolutions (in disregard of domestic constitutional fundamental rights and ECHR rights) on the other, is not a real contradiction. To the contrary, it precisely follows the internal order of constitutional values, namely the priority of democracy ('peoples' rights') over fundamental rights and judicial review. The Swiss courts' (relative) neglect of ECHR rights in this picture reflects Swiss ambivalence towards Strasbourg: although the constitutional catalogue of fundamental rights was copied from the text of the ECHR in 1999, the ECtHR's adjudicatory authority is viewed with scepticism, notably when it threatens to undo laws adopted not only by the democratic legislature but by the people itself.

Lessons for compensatory constitutionalism The Swiss case underscores both the desirability and the difficulties of compensatory constitutionalism as a normative programme.[146] On the triple premise that economic globalisation and global problems will persist, that these require a global or at least harmonised governance response (as opposed to isolated national responses), and that constitutional achievements reached within nation states should be preserved, the constitutionalisation of international (primary and secondary) law and its institutions indeed seems the only way forward.

The alternative strategy, namely to stop or cut back international law-making, is revealed as unfeasible, *inter alia*, by Swiss discussions such as on denouncing the ECHR. Also, the Swiss Parliament's demand to be involved not only in the elaboration of hard international law but also of soft law (OECD acts in the field of taxation) illustrates the impact felt by all types of international governance measures which in turn triggers the quest for creating a democratic basis for them.

As regards the difficulties of compensatory constitutionalism, it is worth noting that the important Swiss reforms, mainly with a view to strengthening the element of democratic control (Sect. 3.3) through domestic democratic institutions, have so far not succeeded in soothing popular aversion to 'foreign' and undemocratic international law and institutions. However, the way out, namely the democratisation of international law- and policy-making directly within the international institutions themselves, is fraught with normative and practical problems and will in the end only marginally be able to accommodate the (democratic) decision-making processes within very small sub-units (such as the Swiss people) feeding into the global law-making process.

[146] Peters 2006.

With regard to the second main element of contemporary constitutionalism, namely the rule of law (fundamental rights protection and judicial review (Sect. 3.4)), the Swiss case also provides lessons. At first sight, the Swiss readiness to implement SC resolutions, sacrificing fundamental rights (below *ius cogens*) and judicial review, might be praised for its acknowledgment that the constitutional standards need not be identical on the international and domestic levels of governance. However, this Swiss stance might be much less a manifestation of 'constitutional tolerance' towards international governance than it appears to be at first glance, but rather the result of a parochial scepticism towards judicial review. The ECtHR, in compelling Switzerland to exercise such review, might in the end work more in favour of compensatory constitutionalism through the pressure it creates (deployed through an ECHR member state) to reform the UN sanctions system.

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