

## JUDICIALISATION AND DIRECT DEMOCRACY

Switzerland's Ban on Minaret Construction

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*Translated by Sarah-Louise Raillard*

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# JUDICIALISATION AND DIRECT DEMOCRACY

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SWITZERLAND'S BAN ON MINARET CONSTRUCTION

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Hervé Rayner and Bernard Voutat  
*Translated by Sarah-Louise Raillard*

An “umbrella” term<sup>1</sup> with many meanings, “judicialisation” refers to a number of very different realities, which are “largely autonomous with respect to each other”.<sup>2</sup> Various described as legislative and regulatory inflation entailing the increased involvement of courts and jurists in societal regulation,<sup>3</sup> an extension of administrative law,<sup>4</sup> the criminalisation of politics,<sup>5</sup> the internationalisation of the law,<sup>6</sup> the rise of transitional justice<sup>7</sup> and constitutional jurisdiction,<sup>8</sup> or the judicial activism of social protest movements,<sup>9</sup> judicialisation is said to signal the emergence of a new regime of political regulation.<sup>10</sup> Ran Hirschl has identified three facets of this phenomenon: first, an earlier perspective that refers to the law’s ever-growing regulation of social relations; second, a more recent facet concerning the mounting influence of the courts on public policy outcomes; and third, the emerging involvement of the courts in the treatment of fundamental political questions. This latter dimension can be “intuitively” differentiated from the previous one on the basis of a “qualitative evaluation” that leads to the conclusion that a “juristocracy” is emerging.<sup>11</sup> For the most part, however, studies on judicialisation have

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1. To use the term coined by Ran Hirschl, “The new constitutionalism and the judicialization of pure politics worldwide”, *Fordham Law Review*, 75(2), 2006, 721-4 (723).
  2. Antoine Vauchez, “Le pouvoir judiciaire”, in Antonin Cohen, Bernard Lacroix, Philippe Riutort (eds), *Nouveau manuel de science politique* (Paris: La Découverte, 2009), 242-59 (248).
  3. Jacques Commaille, Laurence Dumoulin, “Heurs et malheurs de la légalité dans les sociétés contemporaines. Une sociologie politique de la judiciarisation”, *L'Année sociologique*, 59(1), 2009, 63-107.
  4. Jean-Gabriel Contamin, Emmanuelle Saada, Alexis Spire, Katia Weidenfeld, *Le recours à la justice administrative. Pratiques des usagers et usages des institutions* (Paris: La Documentation française, 2008); Thierry Tanquerel, Frédéric Varone, Arun Bolkensteyn, Karin Byland, *Le contentieux administratif judiciaire en Suisse. Une analyse empirique* (Geneva: Schulthess, 2011).
  5. For a critical perspective, cf. Hervé Rayner, *Les scandales politiques, l'opération “Mains propres” en Italie* (Paris: Michel Houdiard, 2005); Antoine Vauchez, *L'institution judiciaire remotivée. Le processus d'institutionnalisation d'une “nouvelle justice” en Italie (1960-2000)* (Paris: LGDJ, 2004); Violaine Roussel, *Affaires de juges. Les magistrats dans les scandales politiques en France* (Paris: La Découverte, 2002).
  6. C. Neal Tate, Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).
  7. Cf. the two issues of *Actes de la recherche en sciences sociales*, “Pacifier et punir”, 173 and 174, 2008.
  8. Torbjörn Vallinder, “The judicialization of politics. A world-wide phenomenon: Introduction”, *International Political Science Review*, 15(2), 1994, 91-9.
  9. Liora Israël, *L'arme du droit* (Paris: Presses de Sciences Po, 2009).
  10. Jacques Commaille, “La judiciarisation. Nouveau régime de régulation politique”, in Olivier Giraud, Philippe Warin (eds), *Politiques publiques et démocratie* (Paris: La Découverte, 2008), 305-19.
  11. R. Hirschl, “The new constitutionalism...”, 728; cf. also *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

stemmed from a generally shared<sup>1</sup> – though occasionally debated<sup>2</sup> – notion that power is being *transferred* from the political arena to the judicial arena: the question remaining, therefore, is if this shift is the result of judges appropriating certain prerogatives or, on the contrary, if this constitutes agreed divestment by political bodies, sometimes in order to instrumentalise the judiciary. In either case, however, the majority of studies examine the role (or function) of jurisdictions with regard to public policy development and content. This role is alternately praised for embodying the rule of law or criticised for illustrating how democracy has been seized by “the power of the judges”.<sup>3</sup>

### For a relational and process-based approach to judicialisation

**B**eyond the – undoubtedly legitimate – normative dimension of such a line of enquiry, we must nonetheless point out its blind spot: the hypothesis that issues that were “normally” the purview of political authorities in the past are now being transferred to the judicial arena has led to a focus on judicial activities and rulings in isolation. And yet, to follow in the footsteps of Alec Stone Sweet, it would be more appropriate to view judicialisation from a *relational* perspective, examining the effects caused in the parliamentary sphere by the involvement of judicial bodies in political controversies (viewed in terms of *politicisation*). Stone Sweet’s analytical model<sup>4</sup> is bi-directional and emphasises the overlap between politics and the judiciary: since judges “coproduce” the law alongside parliamentarians, the latter in turn behave somewhat like judges.<sup>5</sup> The reception and even *anticipation* of legal verdicts in the parliamentary arena thus prompts the judicialisation of political arguments, consequently strengthening the role of the judicial sphere in political exchanges. This perspective is less interested in the “role” of judges than in the effects of their intervention on political exchanges: “Under certain conditions, politicization [of constitutional justice] produces judicialization [of law-making]; we do not expect to find one without the other.”<sup>6</sup> Although Stone Sweet stipulates that the degree of judicialisation varies depending on institutional context, how judges wield their power, and the types of public policies involved – which this article will confirm – it remains the case that the intervention of judges, whether real or virtual, at a given moment of a political process, contributes to the *juridification*<sup>7</sup> of how political issues are categorised and perceived.

1. Among others: “Over the last few decades the world has witnessed a profound transfer of power from representative institutions to judiciaries, whether domestic or supranational” (R. Hirschl, “The new constitutionalism...”, 721).

2. Laurence Dumoulin, Violaine Roussel, “La judiciarisation de l’action publique”, in Olivier Borraz, Virginie Guiraudon (eds), *Politiques publiques 2* (Paris: Presses de Sciences Po, 2010), 243-63.

3. Carlo Guarneri, Patrizia Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002). For an overview of controversial topics, cf. in particular Yannis Papadopoulos, *Democracy in Crisis. Politics, Governance and Policy* (Basingstoke: Palgrave Macmillan, 2013), 203-13.

4. This model of “constitutional politics” is called “triadic dispute resolution”: Alec Stone Sweet, “Judicialization and the construction of governance”, *Comparative Political Studies*, 32(2), 1999, 147-84.

5. Martin Shapiro, Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002); Alec Stone Sweet, “Constitutional courts and parliamentary democracy”, *West European Politics*, 25(1), 2002, 77-100, and “The politics of constitutional review in France and Europe”, *International Journal of Constitutional Law*, 5(1), 2007, 69-92.

6. Alec Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 195.

7. Chapter 7 of *Governing with Judges* was translated into French in Guillaume Drago, Bastien François, Nicolas Molfessis (eds), *La légitimité de la jurisprudence du Conseil constitutionnel* (Paris: Economica, 1999), 117-40 (118). Emblematic of a certain vagueness with regard to terminology, the expression “judicialization” is translated

As Bastien François has observed, this analytical model dismisses any hypothesis that *a priori* concerns the behaviour of actors.<sup>1</sup> Breaking with the traditional (and positivist) notion of the separation of powers, François rejects any kind of substantialism: it is less important to determine whether judges make “political” decisions couched in “legal” arguments or whether certain issues are “purely political”,<sup>2</sup> than it is to objectively identify the effects associated with the autonomy of the highly specialised realms in which both legal and political professionals operate, in order to ascertain the power of the legal repertoire in the political sphere.<sup>3</sup> Yet, Alec Stone Sweet remains excessively focused on polity. On the one hand, as we shall show regarding the controversy that arose in Switzerland in 2007 when a popular initiative sought to ban the construction of minarets, this model does not take into account other actors involved in the process, such as public law experts, journalists, citizen associations, etc., which nonetheless help to define its legal substance as soon as, willingly or unwillingly, such actors must have recourse to the language of the law. In other words, judicialisation should be analysed less in terms of the “transfer” of power from one sphere to another than as an effect of the social differentiation and extension of interdependencies between public action actors who are inclined to mobilise the legal repertoire and have recourse to the judicial arena.<sup>4</sup>

Furthermore, Alec Stone Sweet’s model does not sufficiently take into account the resistance to the influence of judges; the process analysed here is thus a rather new manifestation of this phenomenon. By questioning the respect of fundamental rights and, as a result, the position of national (Federal Supreme Court) and international (European Court of Human Rights, ECHR) judges, the popular initiative was a means to determine who had the final (legal) say in the public regulation of religious affairs. The movement was started to counteract the Federal Supreme Court’s decision to allow the construction of a minaret. For its supporters, introducing a general ban on minaret construction into the Constitution was designed to cancel out this legal ruling, thus muzzling the Federal Supreme Court and politicising any potential intervention by the ECHR, by re-examining the issue of the content, scope and limits of religious freedom as guaranteed by the Federal Constitution (under Article 15), the European Convention on Human Rights (under Article 9), and other international treaties.

The institutional configuration – here defined as the set of rules governing politics – amidst which this controversy unfolded nevertheless possessed a certain number of characteristics that also conditioned the dynamics of the affair. First of all, direct democracy plays a central

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into French as “*juridicisation*” and not “*judiciarisation*”. Another example of this lack of precision: the concept of the “judicialization of politics” examined in the different articles contained in volume 15 of the *International Political Science Review* in 1994 is translated into French by the neologism “*judicialisation*”. The title of Martin Shapiro’s article in the same volume uses the English term “judicialization” which is sometimes found elsewhere in the literature, alongside “juridification” (in German: *Verrechtlichung*). For example: Lars C. Blichner, Anders Molander, “Mapping juridification”, *European Law Journal*, 14(1), 2008, 36-54. Jacques Commaille, Laurence Dumoulin, and Cécile Robert titled their volume *La juridicisation du politique* (Paris: LGDJ, 2010), addressing similar problems to those examined here. Beyond these issues of translation, the problem of floating semantics stems from a certain confusion regarding the empirical realities referred to by these different concepts. We believe that, in French, “*juridicisation*” best expresses the theoretical shift described by Alec Stone Sweet.

1. For a critical presentation of this model, cf. Bastien François, “Le Conseil constitutionnel et la Cinquième République. Réflexion sur l’émergence et les effets du contrôle de constitutionnalité en France”, *Revue française de science politique*, 47(3-4), 1997, 377-403 (398).

2. Ran Hirschl, “Juristocracy. Political, not juridical”, *The Good Society*, 13(3), 2004, 6-11.

3. Pierre Bourdieu, “La force du droit”, *Actes de la recherche en sciences sociales*, 64, 1986, 3-19.

4. L. Dumoulin, V. Roussel, “La judiciarisation de l’action publique”, 244 and 258.

role in political exchanges in Switzerland.<sup>1</sup> Popular initiatives, viewed as almost sacred mechanisms, authorise and legitimise a number of different uses: challenging certain rulings handed down by parliamentary or judicial authorities, prompting public debate, influencing symbolic power relations, and orienting the public agenda. Second, the role of the courts in Switzerland is ambivalent. Similar to the American model of judicial review, Swiss constitutional jurisdiction is complex, simultaneously circumscribed and highly developed.<sup>2</sup> Acting as the highest court in the land, the Federal Supreme Court of Switzerland [FSC] must apply all federal laws, which are immune to constitutional review but whose conformity with international human rights law the FSC must establish, according to the body of case law which it has progressively established. Moreover, the Federal Supreme Court exercises significant constitutional control over cantonal law (with the exception of the cantons' Constitutions, which are subject to guarantee procedures before the federal parliament), as well as over the regulatory texts enacted by the government (the Federal Council). The Supreme Court does not have jurisdiction to confirm the validity of popular initiatives, in particular their compliance with international law. This is the prerogative of Switzerland's federal parliament which, among other conditions, must verify that initiatives do not violate the "binding" norms of international law (*jus cogens*), which in principle excludes the Federal Supreme Court from ruling on the compliance with international law of a constitutional provision adopted by popular vote, in particular with the European Convention on Human Rights (hereafter, the Convention). This is the precise question at the heart of the controversy provoked by the minaret construction initiative. Third, the federal structure of the Swiss state grants wide-ranging powers to its cantons, in particular with regard to religious matters, whose regulation operates according to a polycentric model similar to that implemented in Germany.<sup>3</sup> The Federal Constitution in fact stipulates that relations between church and state (Article 72) are the purview of the cantons, whose duty it is to adopt the measures necessary to maintain peace between the members of diverse religious communities. Consequently, the regulation of religious communities displays relatively significant diversity, with the conditions and requirements for recognition, relationship to the state, funding, ecclesiastical tax liability, and legal status of religious communities varying from one canton to the next.<sup>4</sup>

These three characteristics work together: to the extent that it influences cantonal legislation, the federal court's case law concerning the respect for religious freedom is abundant and

1. Bernard Voutat, "À propos de la démocratie directe. L'expérience helvétique", in Marie-Hélène Bacqué, Yves Sintomer, Henry Rey (eds), *Gestion de proximité et démocratie participative* (Paris: La Découverte, 2005), 197-216.

2. For an analysis that integrates the perspective of comparative law, cf. Maya Hertig Randall, "L'internationalisation de la juridiction constitutionnelle. Défis et perspectives", *Revue de droit suisse*, 2, 2010, 221-381; on institutional wariness with regard to the power of judges, cf. Walter Kälin, Christine Rothmayer, "The judicial system", in Ulrich Klöti *et al.* (eds), *Handbook of Swiss Politics* (Zurich: NZZ Verlag, 2008), 171-94; Christine Rothmayer, "The judicialisation of Swiss politics?", *West European Politics*, 24(2), 2001, 77-94.

3. On this subject, cf. Claire de Galember, "La gestion publique de l'islam en France et en Allemagne. De l'improvisation de pratiques *in situ* à l'amorce d'un processus de régulation nationale", *Revue internationale et stratégique*, 52(4), 2003, 67-78.

4. The models exhibit a preference for Christian religions and vary depending on whether the cantons are traditionally Catholic, Reform, or mixed. Some cantons confer public status to the so-called "national" churches, which means state funding and the integration of ecclesiastical personnel into public service, while others differentiate statuses depending on the religion in question. Two cantons have established the separation of church and state. Non-Christian communities are sometimes recognised as being of public interest, but are organised according to private law.

allowed, from the end of the nineteenth century, for its multiple dimensions to be defined.<sup>1</sup> In this respect, we should highlight the significant delegation of this matter – a particularly delicate one in Switzerland – to the Swiss judiciary. Granting the Federal Supreme Court wide jurisdiction over this matter was preferred to uniform federal legislation, whose elaboration would likely have been politically unpredictable. Moreover, direct democracy also plays a significant role here, both at the national and various cantonal levels.<sup>2</sup> Consequently, the addition to Article 72 of the Federal Constitution of a paragraph prohibiting the construction of minarets holds symbolic weight, as underscored by public law experts, who, at the beginning of the 1990s, could still celebrate the easing of interfaith conflicts.<sup>3</sup> Illustrating just how quickly circumstances can change, the latest edition of a constitutional law text now indicates the fragility of the religious peace achieved.<sup>4</sup>

Drawing on a number of different sources,<sup>5</sup> we shall present a relational and process-based analysis of a controversy whose outcome as yet remains uncertain, by paying specific attention to the expectations harboured by actors regarding possible judicial intervention. The minaret conflict spans several different domains (the political, judicial, religious and media spheres) and several levels (the municipal, cantonal and federal levels), as a result of the different rulings invoked by plaintiffs (the right to construction, “religious peace”, fundamental rights, jurisdiction of parliament and the courts, right of initiative, etc.), ultimately leading to interwoven and overlapping arguments. With its initiative, the Union démocratique du centre (UDC – Centre Democratic Union)<sup>6</sup> pitted direct democracy (“the people” and not just their “representatives”) against fundamental rights, and pressured the other political parties by playing with rules that, as we shall see below, excluded the courts from the game (at least temporarily), while placing severe political constraints on parliament. By opposing these two fundamental registers of the legitimacy of liberal democracies, the minaret construction controversy carries a strong normative connotation – a dimension that largely structures research on political judicialisation – for which we hope to account by identifying the *practical* configurations within which actors were working. By reviewing the sequences at the start of this process – its actors, mobilisations, arenas, and defining moments – we shall better be able to understand the motivations and obstacles involved, the resistance encountered, and the alternatives to the judicialisation of public religious regulation; a political issue which, as elsewhere in Europe (though assuming a particular shape in Switzerland),

1. For example, as early as 1875, the Federal Supreme Court was asked to rule on a cantonal law from Geneva banning the wearing of ecclesiastical robes in public (ATF I 278).

2. Adrian Vatter (ed.), *Vom Schärt zum Minarett Verbot* (Zurich: NZZ Verlag, 2010). This volume analyses more than twenty popular referenda on the status of religious communities. The first federal popular initiative presented was accepted in 1893; it addressed the tiny Jewish minority, banning ritual slaughter. In 1980, the electorate massively rejected a federal initiative demanding the separation of church and state.

3. Ulrich Häfelin, *Commentaire de la Constitution fédérale du 29 mai 1874*, art. 49 and 50, Basel, 1991. The author references the 1973 repeal of the articles of exception (referring to religious denominations), adopted in the nineteenth century in the context of the *Kulturkampf*, which had banned the Jesuits and established new religious convents and religious congregations. These measures were ultimately deemed to present an obstacle to Switzerland's accession to the Convention. Other anti-clerical articles have also been repealed: in 2000, the ineligibility of clergymen for federal judicial and political positions; in 2001, the federal authorisation required for the creation of dioceses.

4. Andreas Auer, Giorgio Malinverni, Michel Hotelier, *Droit constitutionnel suisse* (Bern: Staempfli, 2013), 218ff.

5. Systematic review of print media, official sources (*Feuille fédérale*, *Bulletin officiel*), and legal documents (rulings of the federal court and the ECHR), public law doctrine and secondary literature.

6. Represented in the Swiss government since 1929, the Agrarian Party (*Parti des paysans, artisans et bourgeois*, PAB – Party of Farmers, Artisans and Bourgeois) changed its name in 1971, thus becoming the UDC (SVP in German, *Schweizerische Volkspartei*, the Swiss People's Party).

has an impact on the law and thus on the prerogatives of the various actors required to produce, interpret and apply the law.

### The popular initiative as an alternative to judicialisation

The process that resulted in a ban on minaret construction originated in a series of local controversies, the legal arena being only one of the multiple domains involved. In January 2005, the authorisation request for a minaret project by an association of Turkish residents in the small town of Wangen (in Solothurn canton) came up against a petition (381 signatures collected by a UDC activist) and a rejection from the community's construction committee. When the association appealed this decision was annulled in July 2006 by the cantonal administration, then by Solothurn's administrative court, and finally by the federal court, the latter ruling on the grounds of the rules of procedure for construction law, without addressing the edifice's religious dimension.<sup>1</sup> Widely publicised by the media,<sup>2</sup> this very technical verdict was subject to a highly politicised interpretation, in which the only conclusion publicly retained was that construction authorisation had been given.

Combining politicisation, judicialisation and media coverage, the "Wangen controversy" was not an isolated affair: anti-minaret committees emerged in other cantons (Valais, Bern, St. Gallen, Zurich). These collective actions were much more than expressions of NIMBY neighbourhood relations, and they resonated with the broader public as a result of real political efforts to frame a public problem<sup>3</sup> undertaken by officials from the UDC, town councillors, judges, jurists, journalists, clergy, and intellectuals – some lamenting the "ideologisation of construction law", others alarmed at "rampant Islamisation". As in many other European states, the context was also influenced by local controversies regarding headscarves, requests for exemption from physical education classes, time slots for public swimming pools, and reserved areas in cemeteries; issues that likewise wound up before the courts and divided jurists, as attested to by the growing role played by the Federal Supreme Court and the volume of public law texts on the subject.<sup>4</sup>

At the end of 2006, as attempts to ban minarets had either been defeated or were about to be, anti-minaret advocates began to view the federal initiative as a potential solution to circumvent cantonal political, administrative and judicial bodies, and to open up the legal dispute. This was a particularly appealing option as popular initiatives and referenda have been part of the UDC's action repertoire since 1990. The UDC's "Zurich wing", a new and increasingly radicalised element, used them to change the party's internal power relations, to the detriment of its historical "agrarian" element; the latter was more firmly anchored in the Bern chapter. The methods imported from the economic sector by the Zurich wing's leaders – several of whom are billionaires – helped to redefine the rules of the political game and made extensive use of marketing, unprecedented verbal violence, and significant financial resources. This unique ability to raise funds considerably increased the volume of

1. Verdict from 4 July 2007: ATF 1P.26/2007. The minaret was finally inaugurated in 2009.

2. Between 2006 and 2007, there were more than 1,500 articles in Swiss daily newspapers that addressed various issues related to minarets. Cf. A. Vatter (ed.), *Vom Schärt zum Minarett Verbot*, 199.

3. Joseph Gusfield, *La culture des problèmes publics. L'alcool au volant: la production d'un ordre symbolique* (Paris: Economica, 2009).

4. Andreas Kley, "Kutten, Kopftücher, Kreuze und Minarette. Religiöse Symbole im öffentlichen Raum", in René Pahud de Mortanges (ed.), *Religion und Integration aus der Sicht des Rechts* (Zurich: Freiburger Veröffentlichungen zum Religionsrecht, vol. 24, 2010), 229-57.

resources needed to win elections and referenda, thus contributing to the nationalisation and professionalisation of politics. This was an effort to rationalise a partisan endeavour seeking to conquer “public opinion” such that “the people” could be pitted against “the establishment”, which was accused of limiting the scope of citizens’ rights as a result of its increasing recourse to international human rights law. The initiative “For democratic naturalisations” was moreover explicitly designed to pose an obstacle to two rulings handed down by the Federal Supreme Court.<sup>1</sup> More generally, the minaret controversy revealed the UDC’s hostility towards the judiciary, both federal and international, its sovereigntist leaders multiplying attacks on the judicial system, “left-wing” jurists, and foreign judges. Christoph Blocher,<sup>2</sup> the minister of justice between 2003 and 2007, as well as the leader of the UDC and the president of the Association pour une Suisse indépendante et neutre (ASIN – Campaign for an Independent and Neutral Switzerland), had several times publicly criticised the decisions of the Federal Supreme Court with regard to immigration and asylum matters.

### The controversy goes national

The conflict’s shift to the national stage changed the stakes by generalising the issue and bringing in constitutional issues: it was no longer merely about rejecting a minaret project here or there, but about preventing the construction of minarets throughout the Swiss territory via a constitutional provision. On 6 September 2006, the politicians and activists against the construction of minarets, who had been working together for over a year, met up at Egerkingen (in Solothurn canton) to found the Egerkingen Committee and “coordinate the massive opposition that has been observed in all communities faced with minaret construction projects’ (at the time, Switzerland only had three minarets). This was not a huge movement of concerned citizens: in reality, the meeting was composed of sixteen political activists (fourteen elected officials, five of whom were members of the National Council), fourteen of whom belonged to the UDC and two to the Union démocratique fédérale (UDF – Federal Democratic Union), a small party created in 1975 by conservative, fundamentalist-leaning Protestants. Ulrich Schlüer, the Zurich-based founder and editor-in-chief of the ultra-conservative magazine *Schweizerzeit*, served as a sort of leader and ideologue. A UDC National Council member since 1995, Schlüer is also the former secretary of the Republicans, an extreme right-wing party led by James Schwarzenbach; during the 1970s, the latter was the spokesperson for a number of popular initiatives seeking to combat “the foreign menace”.

The committee’s members strove to publicise and dramatise the issue, as they would need more than 100,000 signatures to present their initiative – a relatively accessible admission price for elected officials who could count on the support of the sovereigntist movement. In 2007, the Egerkingen Committee officially launched its popular initiative in Bern, relying

1. Andreas Auer, Bénédicte Tornay, “Aux limites de la souveraineté du constituant. L’initiative Pour des naturalisations démocratiques”, *Pratique juridique actuelle*, 6, 2007, 740-7.

2. The son of a pastor, the billionaire owner of the EMS group, and a UBS board member, Blocher used the campaign against Switzerland joining the European Economic Area (EEA) as a launching pad for his political career, asserting himself as the leader of the “no” camp. The 6 December 1992 referendum saw the country’s accession to the EEA rejected by 50.3% of voters, the result of unprecedented mobilisation and polarisation stemming from the reshaping of political cleavages marked by the rise of what would ultimately become a “sovereigntist” camp. Cf. Hervé Rayner, Andrea Pilotti, “L’européanisation d’un système de partis en dehors de l’Union européenne. Le cas suisse 1990-2010”, in Mathieu Petithomme (ed.), *L’européanisation de la compétition politique nationale* (Grenoble: Presses Universitaires de Grenoble, 2011), 267-85.



heavily on symbols: the public announcement took place on 1 May in the capital, at the Hotel Kreuz Bern. In a symbolic coup, the committee members proposed adding a third paragraph to Article 72 of the Federal Constitution, which entrusted the Confederation and the cantons with the task of ensuring religious peace; the paragraph would specify that “the construction of minarets is prohibited”. Anticipating criticism, the committee’s members argued that the initiative did not violate the constitutional principle of religious freedom. Given their socio-political trajectories, these individuals were particularly willing, in a political climate marked by an obsession with consensus, to play the provocation game by opposing popular sovereignty to judicial institutions in order to better challenge the supremacy of international law. As the advocates for a self-avowedly controversial cause, they were required to identify the problem (the minaret as threat to Swiss identity), name the guilty parties (Muslims) and offer a solution (banning minaret construction).<sup>1</sup>

From the outset, the committee managed to obtain media coverage in both the national and international press. What initially seemed like a political move became a “popular initiative” thereby offering the potential to solicit “the people’s” participation. It was during a select committee meeting that these representatives decided to muster “the people” to their cause, to motivate them so that they could more effectively speak on their behalf; in other words, the usual forms of self-consecration and usurpation at the basis of all political work undertaken by elected officials in order to claim the authority to speak on their constituents’ behalf. Launched in May 2007, the campaign to collect signatures unfolded in a context favourable to partisan mobilisation, since it was an election year. Condemning the judicial, administrative and political decisions that had refused local demands to ban minaret construction, the movement’s initiators presented a popular initiative as the only recourse possible against “these symbols of politico-religious power that threaten our country’s religious peace”.<sup>2</sup> They also fanned the fire of the “moral panic” that was slowly spreading. A number of newspapers, including some of the least sensationalist like the *Neue Zürcher Zeitung* (NZZ), the paper of reference for the German-speaking business community, were already alluding to the risk of Islamist terrorist attacks. From the beginning, the campaign “created a good deal of noise”, thanks to the coverage provided by the media, a campaign budget of 250,000 Swiss francs augmented by the funds provided by regional committees, and a pamphlet with a print run of 1.3 million copies. These financial resources far exceeded those generally enjoyed by the leaders of a popular initiative, and were enormous when compared to the opposition’s resources: the three largest parties (radical, Christian Democrat, and Socialist – respectively, the PRD, PDC and PS) only managed to pool together a few tens of thousands of francs.

While the federal elections in October 2007 marked the rise of the UDC, the leading party in the National Council with 29% of the vote, Christoph Blocher, following a parliamentary manoeuvre, lost his seat in the Federal Council to Eveline Widmer-Schlumpf, also a UDC representative, who was immediately ostracised. This incident marked the beginning of a difficult period for the UDC, which was menaced by factions: one part of the “moderate wing” was expelled or defected, and the Parti bourgeois-démocratique (PBD – Conservative Democratic Party) was created. The leaders of the UDC, who, until that point, had had the wind in their sails, gave the impression of strategic disarray in relation to the effectiveness of an oppositional stance linked to citizens’ rights – especially since their initiatives “For democratic

1. William Felstiner, Richard Abel, Austin Sarat, “The emergence and transformation of disputes. Naming, blaming, claiming”, *Law and Society*, 15(3-4), 1981, 631-54.

2. Ulrich Schliuer quoted in the article “Le Tribunal fédéral “sauve” les minarets”, *Le Temps*, 12 July 2007.

naturalisations” and “For the people’s sovereignty without government propaganda” were widely rejected on 1 June 2008 by 73.7% and 75.2% of voters, respectively. It was during this slump that Oskar Freysinger, an elected member of the National Council and one of the two co-presidents of the Egerkingen Committee, set himself apart by challenging the strategy of his party’s president, Toni Brunner, who had often been seen as the heir to Blocher. A defector from the PDC, and the founder and president of the UDC chapter in Valais, this high school teacher made successive appearances on television programmes on channels representing all three major linguistic regions. Overshadowing Schlüer and his anti-minaret campaign, Freysinger argued that “the goal is not winning referenda, but the election in 2011”,<sup>1</sup> a comment that embodied how UDC representatives tend to use the institutions of direct democracy, which they see as a means to occupy the political and media terrain in the hopes of strengthening their positions in the institutions of representative democracy.

In a rite of passage of all popular initiatives, on 8 July 2008 the movement’s members filed their petition with Bern’s federal Chancellery, accompanied by 114,895 signatures. Almost two-thirds of these signatures were obtained in the areas where the movement’s leaders had influence: the five cantons where minaret controversies had occurred (Zurich, with 29,600 signatures; Bern, 18,600; St. Gallen, 11,700; Solothurn, 6,000; and Valais, 2,250). Less than 5% of the signatures came from French-speaking Switzerland. In a rare occurrence, the Federal Council chose this same day to express its opposition to the initiative, via a press release signed by Pascal Couchepin (PRD), the president of the Confederation, who had previously described the movement as “ridiculous” and “culturally aberrant”, while claiming to have faith in the “good sense of the Swiss people”. The transition from individual signatures into popular initiative was far from over, however: the members of Parliament still had to validate the thousands of initialled sheets.

### Between politics and the law: Parliament’s “legal function” in practice

From the moment it was launched, the initiative provoked numerous debates in the media and the field of public law, especially regarding its compliance with international law and the Federal Assembly’s ability to invalidate it.<sup>2</sup> According to the Federal Constitution (Article 139, paragraph 2), it falls to the Parliament (on the government’s proposal), and not to the Federal Supreme Court, to declare initiatives invalid which, among other formal reasons, are seen as contrary to the *binding* rules of international law, and then to adopt a position in the guise of a voting recommendation. In fact, cases of invalid initiatives are rare, since it is very costly for parliamentarians to limit the exercise of direct democracy. Only one precedent concerning binding international law can be found. In 1996, Parliament had ruled that the strict application of the (far right-wing) Swiss Democrats’ initiative “For a reasonable asylum policy” would have led the authorities to deport, without appeal, illegal immigrants back to countries that practised torture. Such as it was interpreted by the federal authorities,<sup>3</sup> this concept of binding international law – or *jus cogens* – encompassed a very

1. “Quand l’UDC a peur de perdre”, *Le Temps*, 3 June 2008.

2. For example, the former president of the Federal Supreme Court, Giuseppe Nay, commented in the press on the same day that the initiative was launched and envisioned Switzerland being sanctioned by the ECHR.

3. This restrictive interpretation of the notion was elaborated several times by the Federal Council: cf. in particular the Council’s Message to the Federal Assembly Concerning the Swiss Democrats’ Initiative (*Feuille fédérale* 1994 III 1480 ss.) and its Message from 20 November 1996 relating to a new Federal Constitution, wherein this interpretation is enshrined.

small number of laws (the core of international humanitarian law, the prohibition of genocide, torture and slavery), *but not the fundamental rights recognised by the European Convention on Human Rights*. In recent years, other popular initiatives have posed questions regarding their compliance with international law,<sup>1</sup> provoking a number of responses from public law experts.<sup>2</sup>

These different elements influenced parliamentary debates. Made public on 27 August 2008, the Federal Council's Message<sup>3</sup> presented a highly detailed legal analysis of the text of the initiative, using case law and doctrine to support it. Ultimately, the Council asked the Federal Chambers to send the initiative to a popular referendum, and recommend its rejection. Reasserting its restrictive interpretation of *jus cogens*, the government deemed that the conditions allowing the initiative to be null and void were not met, despite the violation of several international treaties. The appeal to respect case law established by Parliament, though mentioned in several previous messages, remained fragile, as such case law was really only based on a single precedent; this appeal was no doubt less a manifestation of legalism than the pragmatic expression of a kind of realism imposed by the situation. Speculating that the initiative would be rejected and careful to avoid a clash with the main national political force over the taboo represented by the institutions of direct democracy, the government adopted a highly legalistic stance, imbued with the distance and neutrality typical of legal discourse. The overlap between legal and political arguments and registers was a key trait of the parliamentary debates.<sup>4</sup>

On the one hand, two parties (the Christian Democratic Party and the Free Democratic Party) supported the government's position, and thus its underlying political realism, out of respect for the Constitution and direct democracy. *In dubio pro populo*: this expression coined by the Christian Democrat Urs Schwaller encapsulated this confidence in the people and political institutions of Switzerland. On the other hand, the Socialist and Green Parties, advocates for invalidating the initiative, sought to alter jurisprudence whilst still positioning themselves within the realm of the law. According to these parties, fundamental rights must be included in the provisions of binding international law, as Andreas Gross (Socialist Party) declared when urging Parliament "to take its role as constitutional judge seriously" and thus to not "only think in political terms". Gross, a member of the National Council and representative for Switzerland at the Council of Europe, who generally maintained a "participation-based" position, called for the initiative's annulment. Citing the doctrine produced by constitutionalists, he then condemned the government's "political opportunism". Ada Mara, also a Socialist, expressed similar sentiments: the Federal Council was accused of seeking to validate the initiative "for highly debatable political reasons", whereas it would be appropriate to redefine the "mythical *jus cogens*" that was a constant source of conflict among judges and politicians. In conclusion:

1. "Naturalisation put to the vote" (rejected in 2008), "Deportation of foreign criminals" (accepted in 2010), "Life imprisonment of dangerous delinquents" (accepted by referendum on 8 February 2004) and "Reintroducing the death penalty" (launched in 2010, but rapidly withdrawn).

2. See, for example, Alex Dépraz's analysis of the intervention of expert jurists in the debate: "In an exceptional turn of events, the highly respected *Revue de droit suisse* published in its last 2007 issue an almost [sic] political editorial, despite usually dedicating its columns to authoritative articles. If the eminent professors who make up the journal's editorial staff picked up their pens, it's because they believed that the rule of law was in danger in our country" (*Domaine public*, 1771, 10 March 2008).

3. *Feuille fédérale*, 2008, 6923.

4. *Bulletin officiel* (BO), National Council session, 4 March 2009; BO, Council of States session, 5 June 2009. The excerpts that follow are found in these two documents.

“In Switzerland, the body that can adjudicate the validity of an initiative, the body that plays the role of a constitutional court in other European countries, that's us, that's Parliament. It is perhaps time [...] to act politically and to invalidate initiatives that violate these fundamental rights...”

The Green senator Luc Recordon reiterated this argument at the Council of States: “Our constitutional order is so designed that Parliament must assume its role and judge the constitutionality of a popular initiative” – a delicate question legally, which would mean moving away from a “narrow” interpretation of *jus cogens*.

On the flipside, the supporters of the initiative – all UDC representatives – framed the issue very differently as the Islamisation of Switzerland, and were thus more reluctant to engage with the law. This, for example, is how one of the Zurich-based leaders of the UDC, Hans Fehr, expressed it:

“You can repeat it a hundred times, this initiative violates neither religious freedom nor fundamental rights. When you, Mr. Gross, as a theoretician of constitutional law, constantly praise the European Convention on Human Rights, international law, the law of nations, allegedly binding international law [...] and truly binding citizens' rights, you should not overlook Switzerland's national law, which, for a true democrat, should be supreme – though subject to binding international law, which is violated God only knows how by this initiative. In fact, neither religious freedom nor fundamental rights are threatened, but this initiative is a strong sign against the rampant Islamisation occurring in our country. You can try to deny it over and over again, there are plenty of examples to prove you wrong. I freely admit that this initiative does not solve everything, but minarets are clearly a symbol of a rise in Islamic power; they represent the bayonets of militant Islam against the infidels.”<sup>1</sup>

UDC representatives spoke out against the left's attempts to keep the initiative from being debated. Felix Müri asked: “What are you afraid of? Keep the discussion going in the electoral campaign!” This call for a democratic vote was reiterated by Ulrich Schlüer, one of the initiative's leaders:

“Clearly, some people have a problem with democracy. They make reference to all sorts of principles [...] Could it be because you're afraid that citizens will be able to question you regarding what's behind your noble principles? But you're right to be afraid, given the problems that this initiative for a ban on minarets poses, problems that concern respecting existing laws in Switzerland.”<sup>2</sup>

In the end, the “realist” position won by joining forces with the UDC, against advocates for invalidation (128 votes against 53 in the National Council; 24 votes against 16 in the Council of States). Conversely, however, once the initiative was validated, the two houses recommended rejection to the electorate; this time, UDC representatives were in the minority (132 votes against 51 in the National Council and 39 against 3 in the Council of States). Paradoxically, the arguments wielded oscillated between the political and legal dimensions of the decision. Sometimes the law would be interpreted as ordering political bodies to validate the initiative, and at other times to nullify it, but always under the guise of exercising a “judicial function”; one camp always viewing the position adopted by the opposition “in the name of the law” as a political stance, and vice versa. In fact, on the one hand the government

1. *BO*, National Council session, 4 March 2009.

2. *BO*, National Council session, 4 March 2009.

and a fraction of parliamentarians, though hostile to the initiative, made reference to respect for the rules of law in order to limit the leeway that Parliament could *de facto* use to declare the text null and void. On the other hand, those advocating for the initiative's invalidation urged parliamentarians to exploit the room for interpretation that they possessed *de jure* in that regard. As for the supporters of the initiative, they were not unduly worried by such legal constraints, which they viewed as negligible since they went against the popular will. In all cases, the parliamentarians' relationship with institutions and the law was largely conditioned by their perception of political power relations.

### Campaigning: polarising the issue

A number of different positions could be observed during the campaign leading up to the referendum, but the main interpretative frameworks, centred on an “identity-based” argument, varied little. Although the initiative's founders remained isolated – since the government, Parliament, and most of the parties, trades unions and special interest groups called for the initiative's rejection – on the other hand, their level of engagement far outstripped that of their feebly mobilised opponents. They continually framed the issue in binary terms, pitting the people against the elites, and attacked the positions adopted by the federal councillors who, during official visits in Muslim countries, took care to remain diplomatic, repeating that the initiative did not stem from the government itself and offering reassurances that it was unlikely to succeed.

On paper, the “no” camp brought together the vast majority of all the parties, an impression that we must nevertheless further nuance. The Socialist Party and the Greens were firmly opposed to the initiative, but they focused mainly on the parliamentary debate. Due to a lack of sufficient resources and mobilisation, they went largely unheard during the campaign. While the majority of the radicals decided to oppose the initiative, albeit in a fairly discreet manner, they were also scattered across two different, emerging camps. As for the Christian Democrats, they firmly condemned the initiative in a press release (as “anti-constitutional, dangerous and stupid”), but seemed torn, certain cantonal chapters revealing particularly strong cleavages (the Glarus chapter, for example, supported the “yes” camp). Special interest groups, which are sometimes very present during campaigns, here held back. The main group, Economiesuisse, an employers' umbrella organisation, merely made a few announcements in the press, highlighting the risks to export businesses associated with the initiative's potential victory. With the exception of the Union suisse des paysans (Swiss Farmers' Union), which had long rallied around the UDC, and which left its supporters “free to vote” however they liked, all of the major socio-professional organisations and all of the large faith-based groups declared their support for the “no” vote. Here again, without sufficient mobilisation to back them up, these declarations were mere rhetoric.

Although they were frequently contacted by the media, spokespersons from Muslim associations and the 300 odd local groups representing the 350,000 Muslims in Switzerland (4% of the total population, 15% to 20% of whom were said to be practising) were hardly visible during the campaign. Lacking in financial resources, maintaining a distant relationship to politics, unfamiliar with the institutions of direct democracy, not yet fluent in one of the national languages, and coming from states with vastly dissimilar cultural traditions (from ex-Yugoslavia, whence half of Switzerland's Muslims originate, to North African states),

these representatives spanned the range from secular to fundamentalist Islam,<sup>1</sup> were highly divided, and had to settle for individual interventions in the media and small-scope collective action. The most notable of these actions was an open house day at mosques, which took place on a Saturday four weeks before the referendum. These groups could of course count on the support of the Commission fédérale contre le racisme (Federal Committee Against Racism), of intellectuals (theologians, Islamic studies specialists, writers, jurists and sociologists), NGOs (including Amnesty International), and the spokespersons for the main religious groups (Protestant, Catholic and Jewish), in particular those who, since 2006, make up the Conseil suisse des religions (CSR – Swiss Council of Religions). Subject to intense media coverage, the “Muslim community” – an expression that overlooks the vast diversity contained therein – was spoken about more than it spoke out.

### For or against minarets: the controversy gains hold

The polarisation of public opinion regarding minaret construction was confirmed as thousands of individuals otherwise not associated with the initiative’s leaders began to appropriate the cause for their own ends. As more and more people adopted a position, the controversy gave the performative impression of “taking hold”,<sup>2</sup> which in turn produced constraining effects urging actors, especially political representatives, to take a stance among the very limited range of available options, which were in turn extremely simplified by the initiative. Actors could only choose to say “yes” or “no” to a ban on minaret construction, and consequently fuel the growing polarisation. At the beginning of the campaign, at the end of September 2009, attention was focused on the posters put up by the initiative’s supporters; for over ten years, the supporters of popular initiatives had been using this traditional medium to deliberately provoke.<sup>3</sup> Using images designed to shock, the posters strove to gain media visibility and frame the debate, attempting to shift the limits of what was legitimate and what could be said. This time, the “litigious” poster in question showed a woman in a burqa, with, in the background, seven minarets (which many people misconstrued as missiles) piercing the Swiss flag – an image which, immediately after being posted, prompted many news articles and commentary.

From this point on, the initiative’s leaders could stand back and let the controversy take off, while remaining at the centre of the debate. Newspaper publishers, the directors of bill-posting companies and the national railway company, town councillors, intellectuals, and federal councillors publicly questioned whether the poster should be authorised or not. Some cities banned it, some banned it only on public roads, while others allowed it outright, especially in German-speaking regions of the country. Often reprinted in print media, “the infamous poster” engendered a feedback loop that guaranteed free publicity.<sup>4</sup>

1. Christophe Monnot, “Associations musulmanes de Suisse. Diversité, précarité, respectabilité”, and Samina Mesgardazeh, Sophie Nedjar, Mounia Bennani-Chraïbi, “L’organisation des musulmans de Suisse. Dynamiques endogènes et injonctions de la société majoritaire”, in Christophe Monnot (ed.), *La Suisse des mosquées, derrière le voile de l’unité musulmane* (Geneva: Labor & Fides, 2013), 27-52 and 53-76.

2. As an indication of the controversy’s scope, one can look at its media coverage: in 2009, no fewer than 4,400 articles appeared in Swiss daily newspapers regarding the minaret issue, 1,700 of which were linked to the UDC. Cf. A. Vatter (ed.), *Vom Schärt zum Minarett Verbot*, 199.

3. Alexandre Dézé, Michaël Girod, “Le *Sonderfall* en péril. Les figures de la menace dans les messages graphiques de l’UDC”, in Oscar Mazzoleni, Cécile Péchu, Philippe Gottraux (eds), *L’Union démocratique du centre. Un parti, son action, ses soutiens* (Lausanne: Antipodes, 2007), 107-20.

4. One of many examples of full-page articles: “Les CFF oseront-ils interdire les affiches anti-minarets?”, *Le Matin Dimanche*, 11 October 2009.



At the same time, by their own admission, the opponents to this initiative led a very discreet campaign.<sup>1</sup> They used almost no posters and, most importantly, did not present a united front,<sup>2</sup> apart from a joint appeal by the leaders of the PDC, PRD, PS, PDB and the Greens to reject the initiative, ten days before the referendum. The president of the PS organised this announcement at the last minute, probably due to a lack of faith in the reliability of opinion polls.<sup>3</sup> Since their projections seemed to match up, journalists convinced themselves that a “yes” victory was impossible; an editorial writer for *L'Hebdo* went so far as to talk about “a broad consensus on the initiative’s rejection”.<sup>4</sup> Another position that seemed to stem from this sort of collective autosuggestion was adopted by the editor-in-chief of *24 Heures*, who tried to appear reassuring and build consensus, drawing on the institutional discourse of Swiss exceptionalism (*Sonderfall*):

“The results from our exclusive nation-wide poll show once again the extraordinary calm of a Swiss population highly invested in religious neutrality and respect for minorities, as well as concerned with harmonious integration.”<sup>5</sup>

These projections generally curbed the worrying impression that opponents to the initiative had that the highly polarised campaign was dominated by initiative leaders, and thus served to reduce cognitive dissonance. In autosuggestion mode, commentators latched on to the *Sonderfall* perspective, in part because they had been socialised to believe in the wisdom of the Swiss people. The last poll, which offered stable projections, was commented on three days before the vote by the head of the Department of Foreign Affairs, Micheline Calmy-Rey (PS) on the front page of a major newspaper:

“53% saying no, this shows that the Swiss population is mature and responsible [...] I would be proud of my country if the ‘nos’ win out. I was happy that this debate took place. It’s the beauty of our system. The issue feeds on something irrational inside all of us. When we don’t know the Other, we’re afraid of them. And these fears and worries that UDC plays on, they have to get expressed somehow. [...] This kind of vote allows for public opinion to form. It also has an identity-based function.”<sup>6</sup>

When the results were announced on Sunday 29 November 2009, they stunned both opponents and proponents of the initiative, and even a large number of those who had abstained. The initiative was supported by 57.5% of voters and had a majority in 22 out of 26 cantons; the participation rate (52.7%) was relatively high. Thus, in the immediate aftermath, various disconcerted commentators were forced to explain the result, which outraged or galvanised so many people. Some tried to appropriate the result, like the president of the PDC, Christophe Darbellay, who stated that the people had been heard and used this to move onto the “question of the burqa”. Surprised by their victory (some admitted that they would have been happy with winning only 45% of the vote), initiative leaders adapted to the

1. “Minarets: les opposants au texte musclent leur faible campagne”, *Le Temps*, 16 October 2009.

2. “Les opposants à l’initiative feront campagne en ordre dispersé”, *24 Heures*, 16 October 2009; “Initiative anti-minarets: opposition dispersée”, *Le Temps*, 21 October 2009.

3. Thus, according to Christophe Darbellay, the president of the PDC: “We feel that there’s a certain discrepancy between the polls, which are not very alarmist, and what we’re being told in public” (quoted in “Appel des présidents de parti contre l’initiative anti-minarets”, *Le Temps*, 18 November 2009).

4. Alain Jeannot, “Sonderfall”, *L’Hebdo*, 29 October 2009.

5. Thierry Meyer, “N’ayons pas peur, de part et d’autre”, *24 Heures*, 12 November 2009.

6. “Le débat sur l’islam devait avoir lieu”, *Le Matin*, 27 November 2009.



circumstances and began to overplay their “populist” beliefs. More than ever, Oskar Freysinger was front and centre in the media and asked for his opinion by many different media outlets, including international ones. He adopted a form of heroic self-presentation as the “sole defender” of the cause.<sup>1</sup> As for the secretary-general of the UDC, he warned:

“Instead of simply accepting the people's decision, the threat of international law is bandied about. People dare to suggest that the final say doesn't belong to the people, but to the Federal Supreme Court, even to the European Court of Justice [...]. If the courts were presumptuous enough to overturn the popular decision by referring to the European Convention on Human Rights or the United Nations International Convention on Civil and Political Rights, Switzerland would have no choice but to abrogate the treaties involved.”<sup>2</sup>

In editorial offices, everyone was stunned and the most common interpretation of the results was that they stemmed from fear, irrationality, and the “resurgence of repressed instincts”. A handful of article titles that appeared in the French-language press on 30 November illustrate the tone: “Un vote, la peur au ventre” (“A vote cast out of fear”, *Le Temps*); “La révélation des peurs inavouées” (“Revealing unacknowledged fears”, *La Liberté*); “La victoire de la peur” (“The victory of fear”, *Le Matin*); “Affrontons les peurs” (“Let's face our fears”, *Le Matin*); “La peur de l'autre l'a emporté” (“The fear of the other won out”, *L'Impartial*); “L'autogoal de la peur” (“The own goal of fear”, *Journal du Jura*). For the political leaders and journalists who had taken a stand against the initiative, it thus became difficult to resist adopting the framework proposed by the movement's leaders. The minister Éveline Widmer-Schlumpf was thus asked: “How can you explain the gap between the political elites and the rest of the population?”<sup>3</sup> The “divide between the people and the elite” dominated most of the media's narratives, whether these concerned laying the blame at the doors of the polling institutes, or stories on the “ordinary folks” who voted “yes”. From this chorus of reactions emerged the question of the initiative's legitimacy, a definition of the situation that opened up debate on the legal, and possibly judicial, framing of the “passions” engendered by citizens' rights.

### The popular initiative, fundamental rights and the “power of judges”

Are “the people” always right? Should the use of citizens' rights be “monitored”? Lawsuits for “violation of the right to vote” were immediately filed, and rapidly rejected, by the Federal Supreme Court, on the grounds that “no legal channel exists against the content of a federal initiative accepted by the people and the cantons”.<sup>4</sup> Public law experts nevertheless pointed to the possibility that the Federal Court might be appealed to in the future, once a concrete prohibition ruling occurred, but they were divided on the outcome of such a measure of recourse, as the Federal Constitution did not clearly establish the jurisdiction of the Supreme Court with regard to the compliance of one of its provisions

1. “In a country where all the parties participate in government, including UDC, where is the opposition to the political class? It's the people. And I can feel the frustrations of the people”; “I'm instinctive, I can feel the messages” (*24 Heures*, 1 December 2009). He also adopted this register in a volume of interviews written with an editor and friend: “That day, the Swiss people showed their attachment to certain values”. Slobodan Despot, *Oskar et les Minarets* (Lausanne: Favre, 2010), 26.

2. Martin Baltisser, press release from the UDC secretariat, 30 November 2009.

3. “Je crains les conséquences économiques”, *Le Temps*, 30 November 2009.

4. Ruling from 14 December 2009 (case no. 1C\_529/2009).

with international law. The possibility of an immediate referral to the ECHR likewise divided public law experts. Some believed that the ECHR could immediately proceed with an appeal, on the grounds that the provision discriminated against a very defined and limited subset of the population. Others were more sceptical, arguing that the Court would only rule, like the Federal Supreme Court before it, on the concrete application of the litigious measure. In this scenario, several minority opinions were expressed, stating that the ECHR might decide, in a few years' time, that the Swiss ban on minaret construction was justified for reasons of "public order" – as it had done in France regarding wearing headscarves in school, and in Turkey regarding wearing headscarves at university. In general, however, jurists were almost unanimous in predicting Switzerland's condemnation and the ensuing requirement that the Federal Supreme Court issue a ruling complying with the ECHR's decision, which would *de facto* nullify the initiative. When asked for his opinion, the French president of the ECHR Jean-Paul Costa admitted his discomfort in a situation with no precedent, where the Court would be shouldering a huge responsibility in ruling on a popular referendum.<sup>1</sup> Ultimately, the ECHR received two appeals on 16 December 2009: one from Switzerland's League of Muslims, the Geneva Muslim Community, the Neuchâtel Muslim Cultural Association and the Geneva Muslim Association; the other from Hafid Ouardiri, former spokesperson for the Geneva mosque. The government refused to consider the matter and additionally stated that the constitutional amendment violated neither religious freedom nor the principle of non-discrimination, arguing that "one cannot assume that the Swiss people wished to violate the religious freedom of Muslims or discriminate against them".<sup>2</sup> The media highlighted this rhetorical "pirouette" with regard to the positions expressed beforehand by the Federal Council. Eighteen months later, however, the ECHR declared the cases inadmissible, amounting in its opinion to "class action lawsuits" seeking to control a constitutional provision *in abstracto*. It added that the plaintiffs could not be considered victims, even potentially, so long as there was no application of the controversial provision that the Swiss authorities should first concretely examine.<sup>3</sup>

### Judicialisation in limbo

The Court's decision thus *provisionally* put an end to the controversy's judicialisation, strictly speaking, prolonging the state of legal uncertainty facing the initiative's opponents.<sup>4</sup> Mobilisations around the law multiplied and public law specialists were solicited more than ever in highly technical debates, with academic publications and conferences numbering in the dozens. The anticipation of future judicial rulings in turn generated many discussions in the media, as well as in the academic world of learned law and the political and parliamentary spheres. The controversy's multi-sector impact was particularly evident when members of the "Club Helvétique" from the political, academic, judicial, literary and media spheres, announced that they "supported all interventions seeking to ensure that all popular initiatives that violated intangible human rights were not subjected to popular referendum".<sup>5</sup> Some parliamentarians proposed changing the rules regarding the validity of popular initiatives and a number of statements were made condemning the UDC's "populism" and its

1. "La Suisse dans le collimateur de la Cour de Strasbourg", *Le Temps*, 2 December 2009.

2. "Minarets. La Suisse plaide l'irrecevabilité à Strasbourg", *Le Temps*, 16 September 2010.

3. *Ouardiri v. Switzerland and Swiss League of Muslims and others v. Switzerland* from 28 June 2011.

4. On this topic, see Jean-François Flauss's analysis, "L'interdiction des minarets devant la Cour européenne des droits de l'homme: petit exercice de simulation contentieuse", *Recueil Dalloz*, 8, 2010, 452-5.

5. "Les intellectuels font un retour remarqué dans le débat politique", *Le Temps*, 22 December 2009.

“instrumentalisation” of citizens’ rights, which “adulterated” democracy to the detriment of the rule of law and fundamental freedoms. For example, shortly after the vote, a Romansh-language weekly ran an article titled “Democracy in peril”, insisting on the fact that “democracy is not the tyranny of the majority, but respect for the rule of law”.<sup>1</sup> The theme of “peril” became recurrent and propositions to reform citizens’ rights proliferated. A law professor thus argued that democracy did not first and foremost concern political rights (elections, initiatives, referenda), but the principle of the separation of powers that “represented the sole characteristic that was necessary to identify a political regime as democratic”.<sup>2</sup> This position was widely adopted and its most fervent defenders were individuals who were otherwise seen as embodying the “participation-based” tendency, which in other contexts was highly favourable to the expansion of direct democracy (such as with regard to the total revision of the Federal Constitution). This time, however, direct democracy needed to be “framed” by subjecting popular initiatives to judicial (and no longer just political) review of their compliance with fundamental rights (and no longer with just the binding norms of international law).

The Federal Council remained cautious with regard to these propositions, as evidenced by the statement made by Calmy-Rey shortly after the vote:

“If you follow this argument to its logical end, you will arrive at the conclusion that participative democracy must be scrapped, framed, ultimately challenged. No one wants that.”<sup>3</sup>

When asked to take a clearer position, the government dragged its feet. In March 2010 it published a voluminous report,<sup>4</sup> once again highly focused on the legal dimensions of this political issue; the report prudently did not propose any modifications to current practices:

“Any attempt to introduce stricter limits to the validity or implementation of popular initiatives would generate both legal and political problems.”

An additional report<sup>5</sup> was published a year later, this time mentioning the possibility of invalidating popular initiatives in cases where they “violated the essence of fundamental rights”, a notion likely just as vague as that of “binding international law”, while prescribing measures designed to improve citizen awareness (publishing an official legal opinion) on the potential conflicts between initiatives and fundamental rights. The first measure, as well as the measure granting the Federal Supreme Court the jurisdiction to invalidate popular initiatives – which the Federal Council to this day does not support – would have implied amending the Federal Constitution. This was a major obstacle and partly explains the government’s reticence, as well as that of the majority of parliamentarians, who already anticipated the vagaries of a popular verdict pitting “foreign judges” against the sacrosanct institutions of “direct democracy”. This reticence is especially visible in the fact that all proposals to expand the scope of constitutional jurisdiction in Switzerland have been rejected by Parliament these past thirty years.

1. *L'Hebdo*, 10 December 2009.

2. Jean-Daniel Delley, “Quand le peuple souverain met la démocratie en péril”, *Domaine public*, 1891, 29 November 2010.

3. “Micheline Calmy-Rey: le vote suisse réveille des vocations anti-islamistes”, *Le Monde*, 4 December 2009.

4. *Feuille fédérale*, 2010, 2067-143 (2143).

5. *Feuille fédérale*, 2011, 1-45.

More widely, however, any potential constitutional amendment would likely be faced with strong resistance, similar to that expressed in the immediate aftermath of the minaret referendum, in defence of the institutions of direct democracy. One example of many, the editorial piece below described the vote as a “rebellious uprising against groupthink”:

“Some have viewed the result as an attack on democracy. They're wrong about that [...]. Certain champions of direct democracy have even gone so far as to call for foreign arbitration. To drag the ballot boxes to the judges in Strasbourg. Regardless of the bitterness or injustice felt after the vote, no higher conception of the ‘good’ authorises anyone to question the *vox populi*. Many Swiss citizens voted with their hearts and minds. And no one has the right, here or elsewhere, to suggest that they made a mistake.”<sup>1</sup>

The UDC thus favour the playing field of direct democracy. The ballot boxes do not always go in the party's favour, but the initiative “For the deportation of foreign criminals” was passed a year after the minaret affair and raised the same questions regarding its compliance with the Convention. Since the legislation to apply this initiative has not yet been adopted, the UDC has already launched a new initiative, “For the effective deportation of foreign criminals”, a so-called “implementation” initiative designed to “force the federal government to finally respect the will of the people and immediately apply the deportation initiative”.<sup>2</sup> Reacting to the proposals to have a judicial body monitor the validity of popular initiatives, the UDC threatened to launch a popular initiative “For all popular initiatives to be judged admissible”.

The party's activism, explicitly oriented against legal rulings and the expansion of the courts' jurisdiction, found many outlets in the media. Referring to an issue of *Weltwoche*, a daily paper with UDC affinities, *Le Temps* ran an article tellingly titled “The UDC is firing its cannons at the judges”.<sup>3</sup> Reacting to a ruling by the FSC that favoured the application of the Convention rather than the constitutional provision relating to the expulsion of foreign criminals,<sup>4</sup> Christoph Blocher instigated a controversial debate in the German-speaking media. For the UDC leader, certain “domains” such as the federal court and legal science endeavour to “superimpose the vague stipulations of international public law over national law”. By positioning themselves “above the Constitution”, the federal judges were accused of violating the Constitution and the power it conferred to the people in cases of amendment: “This is nothing more or less than a silent *coup d'état*”, fomented by a political class that strove to “exclude the people”. He concluded that:

“The Federal Supreme Court and the administration seem to have forgotten that according to the rule of law, one must not only determine what is the just form of the law, but also who is its legislator. In Switzerland, things are clear: the ultimate constituent of the country is its sovereign – the people and the cantons. All state bodies must respect this principle.”<sup>5</sup>

1. “Pas de mépris pour la vox populi”, *24 Heures*, 3 December 2009.

2. <<http://www.initiative-de-mise-en-œuvre.ch/texte/index.html>> (accessed on 18 October 2013).

3. *Le Temps*, 22 November 2010.

4. ATF, 2C.828/2011 from 12 October 2012.

5. Christoph Blocher, “Les manigances des juges pour mettre la Suisse sous le joug”, *Le Temps*, 22 March 2013, translation of his opinion piece which appeared in the *Neue Zürcher Zeitung*, followed by a response from a former federal court judge, Claude Rouiller.

Ultimately, the multitude of different and highly polarised positions adopted all shared the same vision of citizens' rights as the expression of the people's will. Beyond this eminently binding belief in the quasi-mythical nature of Swiss democracy, the debate also updated what was at stake: limit the use of popular initiatives and referenda to counteract the UDC's use of direct democracy mechanisms; or, on the contrary, favour their expansion as tools to gain power. Commentators from all sides were caught up in this issue, to which they contributed and in which they were literally trapped, to the extent that for the most part they were unable to analyse the practical cleavages underpinning the debate.<sup>1</sup>

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The controversy studied in this article confirms the hypothesis that conflicts linked to the public regulation of religious affairs have experienced a resurgence in Europe since the 1990s. The "religious peace" enshrined in the Swiss Constitution has thus been broken by sovereignist political actors who, via the popular initiative mechanism, have access to a powerful tool to further their cause. In the name of the people, the leaders of the popular initiative against minaret construction forced the recognition of a symbolic coup against a religious minority, which had all the outward trappings of democracy and was likely capable of being applied to similar issues: a constitutional popular initiative seeking to prohibit the wearing of the burqa was approved in Ticino canton in 2013, and draft legislation designed to ban the wearing of headscarves in school is currently being elaborated in several other cantons. The Federal Supreme Court will, in all likelihood, become involved in those matters in the near future.<sup>2</sup> If the court is appealed to, its ruling could ultimately be countered by a popular initiative by sovereignists, a threat that also looms over any potential ECHR decision regarding minarets or potential amendment to the Constitution to enshrine the supremacy of internationally recognised fundamental rights. It still remains to be seen who will have "the last word" with regard to minaret construction and, more generally, concerning the supremacy of international law over national, constitutional law.

With regard to the phenomenon of judicialisation, this case study suggests the importance of paying special attention to the institutional configuration within which actors evolve, and nuancing the observations made in other national contexts of the expansion of the power of judges, and thus the emergence of a new model of religious regulation. In Switzerland, the intervention of the courts in this domain is in fact a longstanding tradition. The Federal Supreme Court (much like the United States Supreme Court) has developed a body of case law since the end of the nineteenth century, helping to define, nuance and circumscribe the principles guaranteed by the 1848 Federal Constitution and expanded in 1874 (freedom of religious belief, worship and conscience), especially with regard to their compliance with the various cantonal regimes of regulation of the relation between the state and religious communities. Public law experts have long helped to consolidate case law and their expertise is

1. On this topic, cf. Daniel Gaxie, "Les partis politiques et les modes de scrutin en France (1985-86). Croyances et intérêts", in Serge Noiret (ed.), *Stratégies politiques et réformes électorales. Aux origines des modes de scrutin aux XIX<sup>e</sup> et XX<sup>e</sup> siècles* (Baden-Baden: Nomos Verlagsgesellschaft, 1990), 423-49.

2. In a verdict handed down on 11 July 2013 (ATF 2C\_794/2012), the Federal Supreme Court ruled that the prohibition on wearing headscarves in compulsory school must be based on cantonal legal grounds, without however ruling on the merits of the case, and thus demonstrating the extent to which it was divided on what constituted eligibility criteria for this kind of ban with regard to religious freedom.

often solicited by public authorities, as we can see from the numerous messages published by the Federal Council regarding religious matters, as well as from the tone of parliamentary debates on the subject. Switzerland's accession to the European Convention on Human Rights in 1974 no doubt amplified the judicialisation of public action, in particular by gradually leading the Federal Supreme Court, on the grounds of initially uncertain case law, to verify the compliance of federal laws with the Convention and other international treaties concerning human rights. At the judicial level, the question of wielding such control over the provisions of the Federal Constitution still remains open-ended, mobilising public law doctrine and engendering numerous political controversies whose protagonists, as they anticipate the possible decisions of the Strasbourg Court, contrast the power of foreign judges with citizens' rights, as was seen in the minaret conflict.

Nonetheless, we have emphasised the fact that, beyond the specific traits of the minaret controversy, no analysis of the judicialisation of public action should be reduced to the mere expansion of judicial power; the judicialisation of public action should also be viewed from the angle of the transformation of the rules of politics, which is brought about – not without resistance – by anticipation in the parliamentary arena, and, more broadly, in the public sphere, regarding legal rulings. While, on the one hand, it is relevant to examine the phenomenon from the perspective of the position and role of judges in the decision-making process, on the other hand, our analysis suggests that we should consider the effects of this judicial presence in political exchanges. Since it stems from a long chain of interdependencies, the phenomenon of judicialisation benefits from a relational and process-based analysis that views it as the product of relationships between a multiplicity of actors striving, for different and sometimes conflicting reasons, to create public action. As a composite and polymorphic phenomenon, judicialisation must be contextualised in relation to other processes with broad scope (politicisation, managerialisation, media coverage, etc.). No analysis should thus be limited, following an often normative and strategist bias, to rivalries between champions of and opponents to the “power of the judges”. This is what we have endeavoured to illustrate in this case study focusing on the *modus operandi* of judicialisation. Between 2005 and 2009, the controversy unfolded through a series of sequences, whose actors, justifications and rationales for action varied according to the social spheres involved (political, judicial, media, academic, religious, diplomatic). From the collecting of signatures to success at the ballot box, and against all odds, this appeal to the people “took hold” via a series of redefinitions (the dispute was successively categorised as municipal, cantonal, and federal). The controversy also successively involved construction law, religious freedom, international law, *jus cogens*, and the will of the “sovereign”, and unfolded within highly juridicised frameworks dependent on the leeway actors believed they possessed, whether rightfully or not, with regard to the rules laid out in the Constitution. In Switzerland as elsewhere, political exchanges were imbued with normative uncertainty. The legal repertoire was thus increasingly mobilised, especially via public law experts, as the disputed (and fluid, vague and even incomplete) provisions were marked by significant interpretative flexibility. Depending on their position, context, resources, and relationship to the judicial sphere, social actors felt differently bound by the law. Some were not content with waiting for judges to rule and instead appealed to them directly, or in some cases, circumvented or even excluded them. These attempts to play on compliance with the law were filtered through varied beliefs and practices that nourished the highly heterogeneous social forces of judicialisation.

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