

Domestic mechanisms for the implementation of international obligations in the Swiss cantons

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In Switzerland, as in most states, a gap exists between the state's international commitments and the reality on the ground. Switzerland being a federal state, this gap must be filled at the federal and cantonal levels in accordance with the constitutional division of competences. This study sheds light on concrete factors that improve the implementation of international legislative obligations in the Swiss cantons. Based on theoretical considerations and empirical observations, the paper defines and discusses the concept of «domestic implementation mechanisms». By studying mechanisms that work in isolation in a specific case jointly, the study offers the possibility to highlight implementation mechanisms that already exist, but which may not be qualified as such. The results provide actors at the cantonal level with hints as to how synergies could be created and highlight common characteristics enhancing parliamentary engagement.

Keywords: international obligations – implementation mechanisms – Swiss cantons

Table of Contents

- I. Introduction
- II. Structure of the paper
- III. What are domestic implementation mechanisms?
 - A. Legislative influences in general
 - B. What is a «mechanism»?
 - C. Domestic implementation mechanisms: a definition
- IV. Practical application of the definitional criteria
 - A. The implementation of the CRPD in the canton of Basel-Stadt
 - B. The implementation of the Schengen acquis on data protection
- V. Conclusion

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I. Introduction

International literature deplores a «gap between a State's commitments in international law and the reality on the ground in that State»¹. As international treaties frequently insist on the adoption of legislative measures to give effect to the obligations they contain², domestic legislators³ play a key role in the implementation process of treaties⁴. In Switzerland, federal and subnational legislators are responsible for the implementation of international obligations in their own respective fields of competence. The state of Switzerland – represented by the federal government – is internationally responsible if the subnational entities fail to implement their international obligations. In theory, the implementation of international obligations should be a seamless process in which the cantonal legislator adopts the necessary implementing measures, thereby avoiding the state to breach international law by violating the law of state responsibility. The reality, however, is quite different: the implementation of international obligations at cantonal level can be particularly challenging. When new obligations need to be implemented, 26 semi-professional parliaments are required to become active. However, the necessary resources or expertise to identify and interpret international obligations incumbent upon them may sometimes be lacking or insufficient. Numerous factors and influences thus come into play in these implementation processes. Some measures specifically aim at improving implementation and others influence the implementation process «unintentionally». This study focuses on those aimed at the implementation of international legislative obligations, referred to here as «domestic implementation mechanisms». By defining and discussing this concept, this contribution sheds light on concrete factors susceptible of improving the implementation of international legislative obligations in the Swiss cantons. It does so by bringing visibility to existing mechanisms and identifying com-

- 1 BRIAN CHANG, *Global developments in the role of parliaments in the protection and promotion of human rights and the rule of law: An Emerging Consensus*, Wiltshire 2017, 5. See also STEVEN L.B. JENSEN et al., «The Domestic Institutionalization of Human Rights: An Introduction», 37 *Nordic Journal of Human Rights* (2019), 165–176, at 165.
- 2 EVELYNE SCHMID & TILMANN ALTWICKER, «International Law and (Swiss) Domestic Law-Making Processes», 25 *Swiss Rev. Int'l & Eur. L. (SZIER/RSDIE)* (2015), 501–505, at 502.
- 3 International law is indifferent to the question of which body is empowered to adopt a legislation in domestic law (Permanent Court of International Justice, *Case concerning certain German Interests in Polish Upper Silesia (The Merits)*, 25 May 1926, para. 19). Hence, the notion of legislator in international law can refer to different actors according to the organization of powers in the State concerned. In this paper, focus will be on laws adopted by cantonal parliaments, i.e. laws in the formal sense. This relies on the fact that Swiss constitutional law requires a formal law for politically important issues and that international treaties often deal with such issues.
- 4 CHANG, *supra* n. 1, at 9; MURRAY HUNT, «Introduction», in: Murray Hunt, Hayley Jayne Hooper & Paul Yowell (eds.), *Parliaments and Human Rights Redressing the Democratic Deficit*, London 2015, 1–26, at 14; ALICE DONALD & PHILIP LEACH, *Parliaments and the European Court of Human Rights*, Oxford 2016, 72 et seq.

mon characteristics which enhance parliamentary engagement. In the next subsection, the structure of the paper will be presented.

II. Structure of the paper

In a first theoretical part (III.), some context on factors influencing legislators and implementation processes in general is given. The purpose of these theoretical considerations is to demonstrate why the definition of «domestic implementation mechanisms» is needed to disentangle these factors. Then this paper addresses the notion of «mechanism» and explain how it is understood in different fields of research. Finally, based on these theoretical considerations and some empirical observations conducted in the author's doctoral research, a definition of «domestic implementation mechanisms» is proposed. In a second part (IV.), the definitional criteria of «domestic implementation mechanisms» is applied to two concrete examples previously studied in detail for the author's doctoral research. The aim of this section is to discuss the elements of cantonal legislative processes that constitute implementation mechanisms and what tangible contributions these mechanisms made. In conclusion (V.), this paper stresses the role of «domestic implementation mechanisms» in the implementation process of international obligations and exposes some shared characteristics, which seem to enhance parliamentary engagement.

III. What are domestic implementation mechanisms?

In the following subsections, some general factors that may influence a legislative implementation process are mentioned (A.). Then the understanding of the notion of «mechanism» in different fields of research is addressed (B.). Finally, a definition of «domestic implementation mechanisms» is offered and delimited from other related concepts (C.).

A. Legislative influences in general

Various political scientists analysed the factors and conditions influencing parliamentary behavior in general. Without going into a detailed analysis of this literature, it is worth noting that a wide range of influences may come into play in every law-making process. For example, authors mention factors such as government types⁵, politi-

5 MARK HALLERBERG, «Electoral Laws, Government, and Parliaments», in: Mark Hallerberg & Herbert Döring (eds.), *Patterns of parliamentary behavior: passage of legislation across Western Europe*, London/New York 2004, 32.

cal agenda-setting⁶, or parliamentary institutional features⁷. Milet also mentions the identity of the actors involved and «major events» as factors influencing the legislative process⁸. In the field of international relations, Ku and Diehl use the notion of «political shocks» to describe discrete events or significant processes, which represent «dramatic changes in the international political environment» and may facilitate legislative modifications in the international legal system⁹. Phenomena such as demonstrations, strikes, land occupation, natural disasters or other isolated events can also induce modifications in the domestic legal system. These events give salience to the issue at stake, which can prompt domestic authorities to take action upon it.

Since it is part of the legislative activity of parliaments, the implementation of international obligations also relies on various endogenous or exogenous factors influencing parliamentary work. In addition to the variables mentioned above, the type of international obligation concerned (programmatic goal-based norm or rather concrete technical norm) and the international context in which the norm is adopted (bilateral or multilateral treaty, pressure exerted by the contracting States) should also be considered. The existence of international monitoring mechanisms, such as regional courts, UN periodic reporting system or international monitoring procedures, can also influence the implementation process.

At cantonal level, factors such as the political color of the parliament, its openness to international law, the size of the canton, the existence of a parliamentary committee on human rights or the professional background of parliamentarians may also influence the engagement of a parliament with its international obligations. Moreover, the participation of cantonal authorities (executive and legislative) in the process of negotiating new international agreements¹⁰, undeniably influences the implementation process. Indeed, it enables the cantonal authorities concerned to be informed in due time so that they are ready to implement their obligations¹¹.

6 LIEVEN DE WINTER, «Government Declaration and Law Production», in: Mark Hallerberg & Herbert Döring (eds.), *Patterns of parliamentary behavior: passage of legislation across Western Europe*, London/New York 2004, 53; MARC MILET, «Parliament in the policymaking process: toward a sociology of law-making», in: Cyril Benoit & Olivier Rozenberg (eds.), *Handbook of parliamentary studies: interdisciplinary approaches to legislatures*, Northampton 2020, 447.

7 HALLERBERG, supra n. 5, at 3.

8 MILET, supra n. 6, at 447.

9 CHARLOTTE KU & PAUL F. DIEHL, *The dynamics of international law*, Cambridge/New York 2010, 79.

10 See art. 55 para. 3 of the Swiss Constitution.

11 JUDITH WYTENBACH, *Umsetzung von Menschenrechtsübereinkommen in Bundesstaaten: gleichzeitigen Beitrag zur grundrechtlichen Ordnung im Föderalismus*, Zurich/St. Gall 2017, 345. In connection with the participation of the cantons in the development of the Schengen acquis see ROLAND MAYER, «Die Bilateralen Abkommen II und die Kantone: Test für die Föderalismustauglichkeit des bilateralen Wegs», in: Christine Kaddous & Monique Jametti Greiner (eds.), *Accords bilatéraux II Suisse-UE et autres accords récents = Bilaterale Abkommen II Schweiz-EU und andere neue Abkommen*, Geneva 2006, 155–167, at 165.

Given the wide variety of factors influencing the implementation process, it is not an easy task to determine which ones foster the engagement of domestic parliaments with their international obligations. To disentangle this vast web of influences, it might be useful to categorise some of them under the concept of «domestic implementation mechanisms». The aim is to distinguish such mechanisms from other factors, which influence implementation processes «unintentionally». In the next subsection, the understanding by other authors of the notion of «mechanism» in different fields of research is addressed.

B. What is a «mechanism»?

According to the Oxford English Dictionary, a mechanism is the «structure or operation of a machine or other complex system; a theory or approach relating to this»¹². The French dictionary Le Petit Robert defines mechanisms as a «*mode de fonctionnement de ce que l'on assimile à une machine*»¹³. Following these definitions, a mechanism is what makes a «machine» or a «system» operate. In philosophy, the notion of mechanism refers to the theory that everything in the physical world is explicable by material movements¹⁴. This philosophical understanding of the notion is thus based on the idea of movement, which prompts change¹⁵. In the field of political sciences, mechanisms are often associated with causality¹⁶. For example, Beach and Pedersen define mechanisms as «causal processes that are triggered by causes and that link them with outcomes in a productive relationship»¹⁷. According to them, mechanisms are productive processes that make the link between a cause and an outcome. They consider that mechanisms have a causal character: the goal is to determine what process(es) were operative in a case¹⁸. Thus, based on this reasoning, mechanisms should be distinguished from series of events in between the occurrence of the cause and the outcome¹⁹. In legal literature, the notion of «mechanism» is used to describe a large number of processes, procedures, evaluations, etc. The following ex-

12 Oxford English Dictionary (OED) Online, «mechanism, n.», February 2021, <www.oed.com/view/Entry/115557?redirectedFrom=mechanism&>.

13 PAUL ROBERT et al., *Le petit Robert: dictionnaire alphabétique et analogique de la langue française*, Paris 2016, 1558.

14 JOSEPH BEAUDE, «Mécanisme, philosophie», *Encyclopedia Universalis*, February 2021, <www.universalis-edu.com/encyclopedie/mecanisme-philosophie/>; JACK MACINTOSH, «Mechanism, in modern philosophy», *Routledge Encyclopaedia of Philosophy*, February 2021, <www.rep.routledge.com/articles/thematic/mechanism-in-modern-philosophy/v-1>.

15 BEAUDE, supra n. 14.

16 JOHN GERRING, «Causal Mechanisms: Yes, But», 43 *Comparative Political Studies* (2010), 1499–1526, at 1500.

17 DEREK BEACH & RASMUS BRUN PEDERSEN, *Process-Tracing Methods*, Michigan 2019, 30.

18 BEACH & PEDERSEN, supra n. 17, at 30.

19 BEACH & PEDERSEN, supra n. 17, at 31.

amples are described as «mechanisms» in the legal field: the judicial procedure before the European Court of Human Rights²⁰, the UN periodic reporting system²¹, the means by which parliaments of the Member States of the Council of Europe implement the ECHR²², the monitoring by an internal supervisory authority²³, various monitoring processes and institutions foreseen by multilateral environmental agreements²⁴, or the procedure for evaluating the implementation of the Schengen acquis by the Member States of the Schengen area²⁵.

What these various definitions and examples have in common is the idea of «making» (a change, an outcome, a machine operate, a decision). Mechanisms, thus, imply some action to achieve a goal. They are not mere events or phenomena eventually leading to other events: they are meant to produce an event or an outcome.

However, it is rare for one mechanism to be the sole cause of a result. In practice, various different mechanisms may interact together and with other factors. Beach and Pedersen recognise the need, when observing mechanisms, to take into account the context and the circumstances surrounding them²⁶. They acknowledge that «we almost never have access to the full evidentiary record» that links the cause to the outcome²⁷. Thus, in «the overall jigsaw puzzle of potential empirical evidence that the causal mechanism is theorised to produce»²⁸, it is difficult to identify which pieces are actually linked to the mechanism. This is also true for mechanisms leading to the implementation of international law at domestic level. In the implementation

20 GIORGIO MALINVERNI, «La Convention européenne des droits de l'homme – Droits garantis et mécanisme de mise en œuvre», in: Maya Hertig Randall & Michel Hottelier (eds.), *Introduction aux droits de l'homme*, Zurich 2014, 397–426, at 397.

21 AGNÈS DORMENVAL, *Procédures onusiennes de mise en œuvre des Droits de l'Homme: limites ou défauts*, Paris 1991, para. 1.

22 Assemblée parlementaire du Conseil de l'Europe, *Le rôle des parlements dans la mise en œuvre des normes de la CEDH: vue d'ensemble des structures et des mécanismes existants*, 2 novembre 2016, para. 1.

23 For example, the Federal Data Protection and Information Commissioner. See on this topic: MONIQUE COSSALI SAUVAIN, «Mécanismes de mise en œuvre prévus par la loi fédérale sur la protection des données: le point de vue de l'OFJ», in: Astrid Epiney & Daniela Nüesch (eds.), *Durchsetzung der Rechte der Betroffenen im Bereich des Datenschutzes = La mise en œuvre des droits des particuliers dans le domaine de la protection des données*, Zurich/Basel/Geneva 2015, 126; JEAN-PHILIPPE WALTER, «L'effectivité des mécanismes de mise en œuvre de la protection des données: le point de vue du Préposé fédéral à la protection des données et à la transparence (FPDPT), en bref», in: Astrid Epiney & Daniela Nüesch (eds.), *Durchsetzung der Rechte der Betroffenen im Bereich des Datenschutzes = La mise en œuvre des droits des particuliers dans le domaine de la protection des données*, Zurich/Basel/Geneva 2015, 116.

24 JULIETTE VOINOV KOHLER, *Le mécanisme de contrôle du respect du Protocole de Kyoto sur les changements climatiques: entre diplomatie et droit*, Zurich 2006, 4.

25 YVES PASCOUAV, *The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock*, Brussels 2012, 1.

26 BEACH & PEDERSEN, *supra* n. 17, at 202.

27 BEACH & PEDERSEN, *supra* n. 17, at 203.

28 BEACH & PEDERSEN, *supra* n. 17, at 204.

process, it is very challenging to prove that one specific mechanism resulted in the adoption of a legislative provision. There may also be several different mechanisms that, together, led to a new or modified legislation. Based on these theoretical considerations and empirical observation conducted in the author's doctoral research, in the next subsection, a definition of «domestic implementation mechanisms» is proposed.

C. Domestic implementation mechanisms: a definition

The notion of domestic mechanisms for the implementation of international obligations is not new. In her book «Mobilizing for Human Rights» (2009), Simmons considered that compliance with international human rights treaties was mainly the result of mechanisms operating at domestic level (agenda setting at executive level, litigation and activism)²⁹. In his PhD on «Non-Judicial Mechanisms for the Implementation of Human Rights in European States» (2010), De Beco considered, for its part, that domestic non-judicial mechanisms (national human rights institution, human rights indicators, human rights impact assessments and national human right action plans) should be established to implement human rights³⁰. More recently, various authors also recognised the decisive role of domestic mechanisms in the field of internal enforcement of decisions issued by supranational bodies³¹. Murray and De Vos underlined the value of such mechanisms in determining which state actor is responsible and how implementation should be coordinated³². According to them, clarity helps ensuring implementation because it is seen «as a technical and administrative process, rather than just a political one»³³. In connection with the implementation of human rights obligations, other scholars have recently considered that different domestic structures and mechanisms «represent a response to bridging the implementation gap between commitments and reality»³⁴. They mention in particular governmental focal points within the administration and parliamentary human

29 BETH A. SIMMONS, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge 2009, 126 et seqq.

30 GAUTHIER DE BECO, *Non-judicial mechanisms for the implementation of human rights in the European states*, Brussels 2010, 3.

31 RACHEL MURRAY, «Addressing the Implementation Crisis: Securing Reparation and Righting Wrongs», 12 *Journal of Human Rights Practice* (2020), 1–21, at 1; ALICE DONALD & ANNE-KATRIN SPECK, «The Dynamics of Domestic Human Rights Implementation: Lessons from Qualitative Research in Europe», 12 *Journal of Human Rights Practice* (2020) 48–70, at 67.

32 RACHEL MURRAY & CHRISTIAN DE VOS, «Behind the State: Domestic Mechanisms and Procedures for the Implementation of Human Rights Judgments and Decisions», 12 *Journal of Human Rights Practice* (2020) 22–47, at 29.

33 MURRAY & DE VOS, *supra* n. 32, at 36.

34 STEVEN L.B. JENSEN et al., *supra* n. 1, at 165.

rights committees³⁵. Some of these authors were criticised for not having demonstrated the existence of a causal link between the mechanisms studied and generally stronger compliance with international obligations at domestic level³⁶. Given the numerous factors influencing implementation, the difficulty to prove causality between one mechanism and a domestic outcome, or to evaluate the efficiency of a specific mechanism is manifest.

In those conditions, what should be regarded as decisive in qualifying a measure as a «mechanism» is not its result, rather its aim. A mechanism aims at achieving its goal (the implementation of an international obligation in cantonal law). Thus, a mechanism is not a mere event leading by chance to the desired result. Its function is to influence or produce the outcome. However, due to the variety of existing factors influencing the implementation process, the goal of this paper is not to prove the existence of a causal link between the mechanism and the outcome. This brings us to the first definitional criterion, namely the objective of the measure under consideration. To be qualified as a «mechanism», a measure must have the formal or informal function of making the Swiss cantonal legislators act to implement their international legislative obligations.

The second definitional criterion focuses on the types of measures that can be qualified as mechanisms. First of all, such measures must be internal. This excludes international implementation mechanisms such as regional courts, UN periodic reporting system or international monitoring procedures. Such mechanisms can be very useful to help domestic authorities interpret and implement international obligations. For instance, international reports or decisions can be strategically used by civil society or legislators to push a domestic legislative project³⁷. While such documents will be taken into account when analysing the implementation of some obligations in the cantons, this paper does not aim to study the effect of international mechanisms on Swiss cantonal legislators. This is justified by different factors. Firstly, authors have recently addressed this issue³⁸. Secondly, unlike international mecha-

35 STEVEN L.B. JENSEN et al., *supra* n. 1, at 169.

36 JASPER KROMMENDIJK, «The Impact and Effectiveness of Non-Judicial Mechanisms for the Implementation of Human Rights», 5 *Human Rights and International Legal Discourse* (2011), 264–293, at 271; ERIC A. POSNER, «Some Skeptical Comments on Beth Simmons’s <Mobilizing for Human Rights>», 44 *New York University Journal of International Law and Politics* (2012), 819–831, at 831.

37 For example, the Beijing Declaration and Platform for Action adopted in 1995 at the Fourth World Conference on Women was used by various deputies of Neuchâtel’s parliament to support their arguments in favor of maintaining a family and equality service – rather than replacing it with an equality delegate as proposed by the executive (Official bulletin of the canton of Neuchâtel, Vol. 161 (1995–1996), at 1162 et seq.).

38 See for example SAMANTHAN BESSON & EVA MARIA BELSER, *La Convention européenne des droits de l’homme et les cantons*, Zurich/Basel 2014; WYTTENBACH, *supra* n. 11, at 349 et seqq.

nisms, which give rather general recommendations³⁹, domestic implementation mechanisms can take into account the internal specificities of the Swiss political system, such as cantonal autonomy and subsidiarity. They are therefore complementary to international mechanisms because of their proximity to local peculiarities. Finally, the study of local mechanisms follows a trend in international literature of focusing on local actors of implementation⁴⁰. Beyond their internal character, several measures can be assimilated to implementation mechanisms. Based on empirical observations conducted in the author's doctoral research, measures such as reports, structures, guides, good practices, monitoring, scientific support, subventions or models may be involved in implementation processes. But phenomena such as demonstrations, strikes, land occupation or natural disasters also play a role in such processes. This second category of influences is deliberately excluded. While phenomena or events may be the starting point for implementation processes at the cantonal level, they are left out of the definition. This is due to their eminently political and local character and their «immaterial» aspect, which make them difficult to analyse from a legal perspective. The definition also excludes the participation of cantonal authorities (executive and legislative) in the process of negotiating new international agreements, as provided by art. 55 para. 3 of the Swiss Constitution. The necessity and effectiveness of this practice to improve the implementation of international obligations ratified by Switzerland are not questioned. It enables the cantonal authorities concerned to be informed in due time so that they are ready to implement their obligations⁴¹. However, this study focuses on mechanisms that take place after the adoption of a treaty. Based on the foregoing, the measures under consideration in this study are internal structures, instruments, tools, techniques or methods.

Finally, the third criterion of the definition concentrates on the actors who can initiate a mechanism. In this respect, the focus is placed on institutional actors. This excludes mere individuals or larger groups of people (for example the participants in a strike). The considered actors may be, for example, state organs⁴², civil society or-

39 For example, in its Concluding observations on the fourth periodic report of Switzerland (E/C.12/CHE/CO/4), the Committee on Economic, Social and Cultural Rights encouraged Switzerland «to strengthen the coordination mechanisms among the Confederation, the cantons and the municipalities so as to ensure the full implementation of the rights recognized in the Covenant» (para. 7).

40 STEVEN L.B. JENSEN et al., *supra* n. 1, at 165.

41 WYTENBACH, *supra* n. 11, at 345. In connection with the participation of the cantons in the development of the Schengen acquis see MAYER, *supra* n. 11, at 165.

42 The notion of «state organ» refers to legislative, executive or judicial organs at federal, cantonal or inter-cantonal level. A parliament can «auto-encourage» itself to act through thematic committees, motions, interpellations, etc.

ganisations⁴³ or universities⁴⁴. This choice relies on the fact that individuals' actions heavily depend on the local and political context and, thus, may be more difficult to reproduce. As the aim is to highlight existing tools that could potentially be used in other contexts, such actions are deliberately excluded.

Based on the theoretical considerations mentioned above and the empirical observations conducted in the author's doctoral research, domestic implementation mechanisms can be defined as follows: the internal structures, instruments, tools, techniques or methods employed by institutional actors, which have the formal or informal function of making Swiss cantonal legislators act to implement their international legislative obligations.

IV. Practical application of the definitional criteria

Based on the author's doctoral research, particularly interesting implementation processes in the Swiss cantons were identified. In the following subsections, the definitional criteria presented above will be applied to two of these processes: 1) the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) in the canton of Basel-Stadt, and 2) the implementation of data protection law con-

43 The concept of «civil society» is «one of the most enduring and confusing concepts in social science» (MICHAEL EDWARDS, «Introduction: civil society and the geometry of human relations», in: Michael Edwards (ed.), *The Oxford Handbook of Civil Society*, Oxford 2011, 3–13, at 3.). It is referred to as a «lieu commun», a «mot-valise» (JAY ROWELL & ANNE-MARIE SAINT-GILLE, «De l'idéal-type de société civile à la société civile incarnée: pour une approche empirique et plurielle», in: Jay Rowell & Anne-Marie Saint-Gille (eds.), *La société civile organisée aux XIXe et XXe siècles: perspectives allemandes et françaises*, Villeneuve d'Ascq 2010, 13 et seq.) or a «mot éponge» (MICHEL OFFERLÉ, «Cette société que l'on dit à présent civile...», in: Jay Rowell & Anne-Marie Saint-Gille (eds.), *La société civile organisée aux XIXe et XXe siècles: perspectives allemandes et françaises*, Villeneuve d'Ascq 2010, 21). According to Samantha Besson, it is a «concept polysémique et complexe, voire essentiellement contestable dont il existe autant de conceptions que de courants politiques» (SAMANTHA BESSON, «La Constitution de la société civile», *Revue Fribourgeoise de Jurisprudence* (2005), 323–347, at 327). Although it is difficult to settle on a clear definition, the often-cited one of Michael Walzer will be used, according to whom «the words <civil society> name the space of uncoerced human association and also the set of relational networks – formed for the sake of family, faith, interest, and ideology – that fill this space» (MICHAEL WALZER, «The concept of civil society», in: Michael Walzer (ed.), *Toward a global civil society*, Oxford 1995, 7–27, at 7).

44 Following the abovementioned definition of civil society, universities and research centers constitute a distinct category of actors. In Walzer's definition, there is the idea that the «uncoerced» relations depend upon shared values (TERRY NARDIN, «Private and public roles in civil society», in: Michael Walzer (ed.), *Toward a global civil society*, Oxford 1995, 29–34, at 29). Even though researchers and professors might share some values, this is not the reason why they are brought together in an academic institution. Moreover, the role of universities in encouraging the implementation of international obligation is different than that of civil society. Where civil society actors contribute to the implementation of norms thanks to their «voluntary, local, and issue-specific character» (KU & DIEHL, *supra* n. 9, at 113), universities can encourage implementation through quality education and expertise on scientific topics.

tained in the Schengen Association Agreement (SAA) by Swiss cantonal legislators. With this approach, the aim is to identify the mechanisms at play in the selected legislative processes and to cast light on concrete contributions these mechanisms made.

A. The implementation of the CRPD in the canton of Basel-Stadt

The example of the law on the equality of persons with disabilities in the canton of Basel-Stadt will be presented first. This implementation process has been successful due to various elements. While some are implementation mechanisms, others are not.

1. The implementation process

The UN Convention on the Rights of Persons with Disabilities (CRPD)⁴⁵ entered into force for Switzerland on 15 May 2014. On 8 June 2015, a parliamentary motion was tabled by several deputies of the cantonal parliament of Basel-Stadt to request that the cantonal government drafts a framework law ensuring equality for persons with disabilities⁴⁶. According to the main mover of the motion, Georg Mattmüller – who is also the director of the cantonal Disability Forum since 20 years – this motion was generated by three different motives: 1) a general dissatisfaction with the protection of the rights of people with disabilities, 2) the ratification by Switzerland of the UN Convention on the Rights of Persons with Disabilities (CRPD), and 3) the decision to close the cantonal service for the rights of people with disabilities⁴⁷. The aim of the motion was the creation of a new cantonal framework legislation to protect the rights of persons with disabilities, in accordance with the CRPD. The cantonal government was not in favor of the motion⁴⁸. To avoid the drafting of a poor quality law by the executive, the Disability Forum launched, in parallel, a collection of signatures for a cantonal constitutional initiative named «For a cantonal disability equality»⁴⁹. The intent was to put pressure on the government and withdraw the initiative once a satisfactory law had been passed⁵⁰. On 18 October 2017, the popular initiative was

45 Convention on the Rights of Persons with Disabilities (CRPD), RS 0.109.

46 Motion Georg Mattmüller and others regarding cantonal disability equality law (15.5282.01), 8 July 2015.

47 Information gathered in an interview with Georg Mattmüller, socialist deputy in the parliament of Basel-Stadt and director of the cantonal Disability Forum, on 18 January 2021.

48 Government of the canton of Basel-Stadt, Motion Georg Mattmüller and others regarding cantonal disability equality law – Opinion, 8 December 2015.

49 Information gathered in an interview with Georg Mattmüller, socialist deputy in the parliament of Basel-Stadt and director of the cantonal Disability Forum, on 18 January 2021.

50 Ibid.

approved with 3'417 signatures⁵¹. The government declared it legally valid and decided to prepare a framework law, as required by the initiative⁵².

Based on the two abovementioned initiatives, the cantonal government prepared a draft counterproposal⁵³. The procedure for the preparation of this draft legislation was innovative for three reasons. Firstly, the cantonal government ensured that people with disabilities as well as disability organisations were included in the legislative process, notably by organising a workshop to identify needs for action⁵⁴. Secondly, the relevant administrative departments were involved in the process as early as possible: structured interviews were held with experts within the administration. On basis of these discussions, amendments to the relevant cantonal laws were drawn up⁵⁵. Finally, the entire project was scientifically accompanied by the chair of Prof. Markus Schefer, Faculty of Law of the University of Basel⁵⁶.

After approximately three years, the legislative process at executive level led to a draft framework law comprising general provisions as well as various proposals for amendments to existing cantonal law (e.g. cultural promotion, education, social assistance)⁵⁷. Following the draft legislation and the message of the executive, the health and social committee of the parliament discussed the government's proposal in seven meetings at the beginning of 2019⁵⁸. Among others, the committee invited Dr. Caroline Hess-Klein, lecturer at the University of Basel and vice-director of the association Inclusion Handicap, to comment on the draft legislation from a scientific perspective⁵⁹. Except for the deletion of a provision on free proceedings and some small amendments, the committee requested the parliament to approve the new legislation⁶⁰. Before the cantonal parliament, the debates were swift, thanks to the numerous discussions that took place upstream⁶¹. The proposition of the health and social

51 Website of the initiative committee: <<http://behindertengleichstellung.ch>>.

52 Government of the canton of Basel-Stadt, Advice and report regarding the cantonal popular initiative «For a cantonal disability equality» and counterproposal for a law on the rights of people with disabilities, as well as report on the motion Georg Mattmüller and others regarding cantonal disability equality law, 16 January 2019.

53 Government of the canton of Basel-Stadt, Report of 16 January 2019, supra n. 52, at 9.

54 Ibid, at 11.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid.

59 Health and Social Commission of the parliament of the Canton of Basel-Stadt, Report on the advice and report concerning the cantonal popular initiative «For a cantonal disability equality» and counterproposal for a law on the rights of people with disabilities as well as report on the motion Georg Mattmüller and others concerning cantonal disability equality law, 23 May 2019, 3.

60 Health and Social Commission of the parliament of the Canton of Basel-Stadt, Report of 23 May 2019, supra n. 59, at 11.

61 Information gathered in an interview with Dr. Céline Martin, scientific collaborator at the University of Basel, on 6 October 2020 and completed by written exchange on 8 December 2020.

committee was adopted unanimously with one abstention on 18 September 2019⁶² and the law entered into force on 1st January 2021.

As to their content, the new provisions cover the areas of life included in the CRPD, the full realisation of which are incumbent upon the cantons. For example, art. 24 para. 1 of the CRPD foresees that «States Parties shall ensure an inclusive education system at all levels». The Swiss Constitution (art. 62 para. 3) provides that the cantons are competent to ensure that children and young people with disabilities receive adequate special education. Accordingly, the drafters of the law analysed the existing cantonal legislation in this field and identified a need for action to enable children and young people with sensory disabilities to learn communication technology in a manner adapted to their disability⁶³. Therefore, they proposed the introduction of a new provision in the cantonal School Act⁶⁴, requiring the authorities to provide appropriate services for children and young people with sensory disabilities⁶⁵. The provision was accepted by the parliament as part of the general legislative revision⁶⁶. This is just one of several examples, but an analysis of the entire cantonal compendium of laws was conducted to evaluate its conformity with the CRPD⁶⁷.

On the basis of the information collected, it would appear that the implementation process described above succeeded owing to various elements. Firstly, there was some dissatisfaction in the cantonal population regarding the protection of the rights of people with disabilities, which was exacerbated by the closure of the service protecting them. Simultaneously, Switzerland ratified the CRPD. These events led the director of the Disability Forum, Georg Mattmüller, to launch a parliamentary motion and a constitutional initiative to require a new legislation on the rights of persons with disabilities. These actions would probably not have been undertaken if the director of the Disability Forum had not also been a parliamentary deputy⁶⁸. Then, the support provided by the team of Prof. Schefer helped shaping the draft legislation in accordance with the CRPD. Finally, the law was adopted by the parliament⁶⁹.

2. Analysis of the factors involved in the implementation process

In the next subsections, the established definitional criteria are applied to factors that influenced the implementation process described above.

62 Official bulletin of the canton of Basel-Stadt, 18 September 2019, 865.

63 Government of the canton of Basel-Stadt, Report of 16 January 2019, *supra* n. 52, at 16.

64 School Act of 4 April 1929 (410.100).

65 Government of the canton of Basel-Stadt, Report of 16 January 2019, *supra* n. 52, at 60.

66 Official bulletin of the canton of Basel-Stadt, 18 September 2019, 864.

67 Information gathered in an interview with Dr. Céline Martin, scientific collaborator at the University of Basel, on 6 October 2020 and completed by written exchange on 8 December 2020.

68 Information gathered in an interview with Georg Mattmüller, socialist deputy in the parliament of Basel-Stadt and director of the cantonal Disability Forum, on 18 January 2021.

69 Official bulletin of the canton of Basel-Stadt, 18 September 2019, 865.

a) Dissatisfaction and closure of the cantonal disability service

The dissatisfaction of the population and the closure of the cantonal disability service are events that contributed to the launch of political initiatives. As mere events, they do not constitute an «internal structures, instruments, tools, techniques or methods» and thus are no mechanisms.

b) Parliamentary motion and constitutional initiative

The parliamentary motion and the constitutional initiative launched by Georg Mattmüller were decisive in the implementation process. But are they «domestic implementation mechanisms»? Both of these political means were expressly aimed at implementing de CRPD in the canton of Basel-Stadt⁷⁰. Hence, the first criterion of the definition – to have the formal or informal function of making the Swiss cantonal legislators act to implement their international legislative obligations – is met. As to the second criterion, it is also met because the motion and the initiative both are local political «instruments». Finally, regarding the actors from whom these instruments emanate, the parliamentary motion stems from the initiative of several deputies of the cantonal parliament of Basel-Stadt. As members of a «state organ», parliamentary deputies are institutional actors according to the definition proposed above. Hence, the motion filed by Georg Mattmüller and others is a «domestic implementation mechanism». The initiative, for its part, does not emanate from an institutional actor, but from the will of the 3'000 citizens (*Stimmberechtigte*) who signed it. Since individual were deliberatively excluded from the categories of actors entitled to activate a mechanism, the constitutional initiative cannot be qualified as such.

The parliamentary motion is an interesting mechanism due to the fact it acted as a catalyst in the implementation process. According to Dr. Caroline Hess-Klein, the bottom-up approach was decisive in this case⁷¹. The pressure exerted on parliament by the motion initiated the implementation of the CRPD in the canton. However, the bottom-up approach is not sufficient to implement international law. Some legal work is then necessary to interpret international provisions and translate them to fit the cantonal legal framework.

c) Academic support

In the case studied, this support was provided by a team of academicians at the University of Basel. It consisted in 1) an analysis of the cantonal systematic collection of

70 Motion Georg Mattmüller and others regarding cantonal disability equality law (15.5282.01), 8 July 2015; Website of the initiative committee: <<http://behindertengleichstellung.ch>>.

71 Intervention of Dr. Hess-Klein at 2020 annual conference of the platform humanrights.ch: The conference took place online on 2 November 2020, <www.humanrights.ch/fr/plateforme-ong/conferences-annuelles/>.

laws (*Systematische Gesetzessammlung*) to evaluate their conformity with the CRPD, 2) the formulation of priorities and actions to be undertaken, 3) the drafting of questionnaires in preparation for the interviews conducted in the cantonal administration, and 4) the formulation of a first draft for the framework law⁷².

This work corresponds to the definition of «domestic implementation mechanism». It aims at implementing the CRPD into cantonal law, consists of internal techniques or methods (analysis, evaluation, questionnaire and draft) and was conducted by an institutional actor (the University). On this last point, it should be added that the public mission of Swiss universities is, among others, to ensure that research results are available to the public⁷³. Art. 2 of the agreement between the cantons of Basel-Landschaft and Basel-Stadt on the joint sponsorship of the University of Basel⁷⁴ specifies that one of the University's purposes is to act in the service of the general public. By helping cantonal institutions implement their international obligations, the university puts its scientific expertise and knowledge at the service of the community, in accordance with its mission.

The work conducted by the team of Prof. Schefer was pivotal for the effective implementation of the CRPD. The provisions finally adopted by the parliament would have been less likely to be in line with the CRPD without the intervention of the University. In that sense, Dr. Céline Martin considers that the analysis of the cantonal compendium of laws they conducted enabled the identification of gaps in the existing legislation and necessary actions to implement the obligations of the Convention⁷⁵. According to Dr. Martin, the involvement of the University has been beneficial for various reasons. Firstly, academic support could complement the cantonal administration's expertise in the relevant field⁷⁶. She also mentioned that the University's external perspective contributed to support the legislative project against skepticism or resistance from some departments⁷⁷ and that the factual argumentation of external experts allowed for the creation of the necessary trust and understanding⁷⁸. She added that the involvement of external experts helped prevent an accumulation of roles by the department in charge and the responsible office, enabling them to act with a certain degree of neutrality and to avoid conveying an impression

72 Information gathered in an interview with Dr. Céline Martin, scientific collaborator at the University of Basel, on 6 October 2020 and completed by written exchange on 8 December 2020.

73 Art. 49 of the Federal Act on the Promotion of Research and Innovation of 14 December 2012 (RIPA, 420.1).

74 Agreement between the Cantons of Basel-Landschaft and Basel-Stadt on the joint sponsorship of the University of Basel of 27 June 2006 (442.400).

75 Information gathered in an interview with Dr. Céline Martin, scientific collaborator at the University of Basel, on 6 October 2020 and completed by written exchange on 8 December 2020.

76 Ibid.

77 Ibid.

78 Ibid.

of being too paternalistic⁷⁹. Finally, she considers that in a transversal field such as the rights of persons with disabilities, it cannot be expected that every employee of the administration knows the relevant international obligations or believes that the rights of persons with disabilities concern their work⁸⁰. A stable scientific basis can help to inform, respectively convince them⁸¹. In the same vein, Georg Mattmüller believes that the support provided by Prof. Schefer's team was necessary due to the complexity of the legislative framework, which also involves special laws⁸². Even though qualitative interviews were not conducted with members of the cantonal administration, it seems that academic support played a decisive role for the implementation of the CRPD in the canton studied. This finding is hardly surprising in the Swiss militia system, where non-professional parliaments heavily rely on external advice⁸³. Namely, the implementation of international obligations requires such obligations to be interpreted and translated into domestic law. This task necessitates in-depth legal knowledge, both in international law and in the field covered by the agreement in question. Thus, the implication of competent academic researchers appears to be an appropriate means of implementing such obligations.

With this first example, it was demonstrated that a variety of elements could be involved in an implementation process, some of them being mechanisms according to the definition. The identification of these mechanisms enabled to highlight characteristics enhancing implementation. They will be discussed in more detail in the conclusion. The next section will turn to the second example, the implementation of the Schengen acquis on data protection.

B. The implementation of the Schengen acquis on data protection

This second example relates to the implementation of data protection law contained in the Schengen Association Agreement (SAA) by Swiss cantonal legislators. Unlike the previous example, the focus is not placed on the legislative process in one specific canton. This is due to the fact that the cantonal legislative processes leading to the implementation of the Schengen acquis on data protection law were (more or less) similar in all Swiss cantons⁸⁴.

79 Ibid.

80 Ibid.

81 Ibid.

82 Information gathered in an interview with Georg Mattmüller, socialist deputy in the parliament of Basel-Stadt and director of the cantonal Disability Forum, on 18 January 2021.

83 ODILE AMMANN, «Rechtswissenschaft und Politik: Fließende Grenzen? Überlegungen zur wissenschaftlichen Unabhängigkeit», in: Thomas Walter Köhler & Christian Mertens (eds.), *Jahrbuch für politische Beratung 2019/2020*, Vienna 2020, 139–157, at 145.

84 The executive initiated the process by drafting a law, that was then submitted to parliament.

1. The implementation process(es)

Unlike the previous example, the trigger for implementation in this case was not an important event or a political initiative but, quite simply, the adoption of the Schengen Association Agreement (SAA)⁸⁵. The SAA was concluded on 26 October 2004, approved by the Swiss people on 5 June 2005 following an optional referendum⁸⁶ and the instrument of ratification was deposited on 20 March 2006. Its effective application took place on 12 December 2008⁸⁷, after the transposition of the Schengen acquis into Swiss domestic law (art. 2 para. 1 and art. 15 para. 1 SAA). With the exception of a few provisions applicable upon signature (art. 14 para. 2 SAA), the application of the agreement was conditioned by the incorporation of the Schengen acquis into Swiss law⁸⁸. Thus, the procedure leading to the effective application of the agreement forced the Swiss authorities to implement the Schengen acquis. In order to benefit from Schengen, the Swiss authorities had to implement the Schengen acquis, including data protection⁸⁹. The police authorities, who had a huge interest in being part of Schengen – in particular in receiving information from the Schengen Information System (SIS) – strongly supported the implementation of data protection⁹⁰.

To implement these provisions on data protection, the Confederation and the cantons had to legislate in their own fields of competence⁹¹. The cantons also had to adopt legislation on data processing by cantonal authorities⁹². Considering the complexity of the matter, the Conference of Cantonal Governments (CCG) gave Beat

85 Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, 26 October 2004 (RS 0.362.31).

86 Swiss Federal Gazette (FF) 2005, 4891.

87 See the decision of the Council of the European Union of 17 November 2008 (14798/08), in which the Council confirmed that the necessary conditions for the application of the Schengen acquis were met and decided that «all the provisions referred to in Annexes A and B to the Agreement and any act constituting a further development of one or more of these provisions, shall apply to the Swiss Confederation as from 12 December 2008».

88 ANNE CORNU, «Les aspects institutionnels des Accords d'association de la Suisse à Schengen et à Dublin», in: Christine Kaddous & Monique Jametti Greiner (eds.), *Accords bilatéraux II Suisse-UE et autres accords récents = Bilaterale Abkommen II Schweiz-EU und andere neue Abkommen*, Geneva 2006, 229.

89 Information gathered in an interview with Beat Rudin, Data Protection Officer of the canton of Basel-Stadt and titular Professor of Information and Data Protection Law at the University of Basel, on 11 January 2021.

90 BEAT RUDIN, «Datenschutzreform in der Schweiz: EU-Nachvollzug – idealistisch und realpolitisch», in: Stephan Breitenmoser, Otto Lagodny & Peter Uebersax (eds.), *Schengen und Dublin in der Praxis, Aktuelle Herausforderungen*, Zurich/St. Gall 2018, 215–238, at 217.

91 EVA MARIA BELSER et al., *Datenschutzrecht: Grundlagen und öffentliches Recht*, Bern 2011, 317.

92 BEAT RUDIN & SANDRA STÄMPFLI, «Datenschutzrechtliche Weiterentwicklungen: neue Herausforderungen», in: Stephan Breitenmoser, Sabine Gless & Otto Lagodny (eds.), *Schengen und Dublin in der Praxis: Weiterentwicklung der Rechtsgrundlagen*, Zurich/St. Gall/Baden-Baden 2010, 202; BELSER, supra n. 91, at 314.

Rudin the mandate to draw up a practical guide on data protection to ensure the adoption of the necessary provisions by the cantons⁹³. At the time, Beat Rudin – who is currently the Data Protection Officer of the canton of Basel-Stadt and a titular Professor of Information and Data Protection Law at the University of Basel – was an independent expert for the Foundation for Data Protection and Information Security. In this capacity, he was frequently in contact with Bruno Baeriswyl, who was part of the Working group on data protection of the Intercantonal Schengen/Dublin accompanying organisation (BOSD/OASD) of the CCG⁹⁴. The members of this working group realised that the average Swiss canton did not have sufficient knowledge and resources to grasp the meaning of these EU provisions on data protection and the implications they had on it⁹⁵. This is why the working group contacted Beat Rudin to draft an implementation guide⁹⁶. The aim of the guide was to break down the minimum standards of the *acquis* on data protection into individual elements that could be implemented⁹⁷. The result consists of 1) a checklist with different legislative objectives that must be met by the cantons, and 2) a commentary of the checklist describing these objectives and giving possible solutions to realise them.

Once ready, the practical guide was sent to the governments of the Swiss cantons in the spring of 2006⁹⁸. The legislative process then generally started with a report of the executive to the parliament – largely based on the guide written by Beat Rudin – containing a proposal for a legislative revision⁹⁹ or a new draft law on data protection¹⁰⁰. In the cantons of Basel-Stadt and Basel-Landschaft, Beat Rudin drafted the

93 BEAT RUDIN, Guide pratique du 15 mars 2006: Mise en œuvre de Schengen/Dublin dans les cantons: protection des données.

94 Information gathered in an interview with Beat Rudin, Data Protection Officer of the canton of Basel-Stadt and titular Professor of Information and Data Protection Law at the University of Basel, on 11 January 2021.

95 Ibid.

96 Ibid.

97 BEAT RUDIN, «Die datenschutzrechtliche Umsetzung von Schengen in den Kantonen», in: Stephan Breitenmoser, Sabine Gless & Otto Lagodny (eds.), Schengen in der Praxis. Erfahrungen und Ausblicke, Zurich/St. Gall/Vienna/Baden-Baden 2009, 213–255, at 223.

98 Information gathered in an interview with Beat Rudin, Data Protection Officer of the canton of Basel-Stadt and titular Professor of Information and Data Protection Law at the University of Basel, on 11 January 2021.

99 See for example the report of 30 January 2008 presented by the executive Council of the Canton of Bern to the parliament on the amendment of the data protection act, at 3; the report (*Ratschlag und Entwurf*) of 26 September 2007 presented by the government of the canton Basel-Stadt to the parliament concerning the partial revision of the data protection act (*Datenschutzgesetz*), at 9, and the Message of 4 March 2008 from the government of the canton of Fribourg to the parliament, accompanying the draft law amending the law on data protection, at 1 et seq.

100 See for example the report of 23 January 2007 of the government of the canton Schwyz presenting the new law on publicity of the administration and data protection (*Gesetz über die Öffentlichkeit der Verwaltung und den Datenschutz*) or the report of 20 May 2008 of the government of the canton St. Gall presenting the new law on data protection (*Datenschutzgesetz*).

new legislative provisions himself¹⁰¹. Beat Rudin also drafted a legal notice for the canton of St. Gall¹⁰² and was in close contact with the Data Protection Officer of Zurich during the legislative process in this canton¹⁰³.

The proposals of the executive were then adopted by the parliament, generally without major changes and without creating heated debate¹⁰⁴. In the debates, the parliamentarians often mentioned their international obligation to transpose the Schengen acquis into their cantonal legislation and considered that it left them little flexibility¹⁰⁵. They were ready to act so that the EU could not refuse Switzerland's accession to Schengen¹⁰⁶. According to Beat Rudin, the main ideas in the guide were taken up in most cantons even though the laws finally adopted contain some differences¹⁰⁷.

On 5 June 2008, the Council of the European Union declared, after verification and evaluation visits, that Switzerland ensured satisfactory levels of data protection and had thus fulfilled the conditions for the application of the Schengen acquis in this area¹⁰⁸. In this respect, the draft report on the Schengen Evaluation visit to the Swiss Confederation for evaluation of data protection specified that «fourteen cantons (AG, AR, BL, GR, LU, NW, OW, SH, SZ TG, UR, VD, VS and ZH) [had] concluded their own legislative processes and passed legislation on data protection as set out in Article 117 of the Schengen Convention. The other cantons [would] complete their legislative processes in 2008»¹⁰⁹. The EU thus accepted that Switzerland

101 RUDIN, *supra* n. 97, at 222 and 225.

102 BEAT RUDIN, *Datenschutzgesetze – fit für Europa: Europarechtliche Anforderungen an die schweizerischen Datenschutzgesetze*, Zurich/Basel/Geneva 2007, 7 f.

103 Information gathered in an interview with Beat Rudin, Data Protection Officer of the canton of Basel-Stadt and titular Professor of Information and Data Protection Law at the University of Basel, on 11 January 2021.

104 See for example the Official bulletin of the canton of Bern of 31 March 2008, 215; the Official bulletin of the canton of Basel-Stadt of 16 April 2008, 187; the Official bulletin of the canton of Fribourg of 8 May 2008, 648 et seq., and the Official bulletin of the canton of Schwyz of 23 May 2007, 1462 et seq.

105 See for example the Official bulletin of the canton of Fribourg of 8 May 2008, 647. For a parliamentarian «l'adaptation de notre législation en matière de protection des données est une obligation due aux engagements internationaux de la Suisse. Nous n'avons que peu de marge de manœuvre [...]». See also the Official bulletin of the canton of Basel-Stadt of 9 April 2008, 180. In this canton, a parliamentarian said: «Die hier vorgeschlagenen Änderungen des Datenschutzgesetzes entsprechen den Schengen-Vorschriften. Damit erfüllt unser Kanton die entsprechenden Vorgaben».

106 Information gathered in an interview with Beat Rudin, Data Protection Officer of the canton of Basel-Stadt and titular Professor of Information and Data Protection Law at the University of Basel, on 11 January 2021.

107 *Ibid.*

108 Official Journal of the European Union, L 149/74, Council of 5 June 2008 on the application of the provisions of the Schengen acquis relating to the Schengen Information System in the Swiss Confederation (2008/421/EC).

109 Council of the European Union, Draft report on the Evaluation Committee's visit to the Swiss Confederation for evaluation of data protection within the framework of the evaluation of Switzerland's preparations for the full implementation of the Schengen acquis of 7 May 2008.

was part of Schengen as long as the cantons were «on the way» to amending their legislation¹¹⁰. All cantons had finally adapted their legislation to the Schengen acquis, respectively adopted a new data protection law on 1 January 2010¹¹¹.

2. Analysis of the factors involved in the implementation process(es)

Different elements contributed to the rapid and comprehensive implementation of the Schengen acquis in the cantons. The obligation to transpose the acquis in order to become part of the Schengen area has certainly played a central role in getting cantonal executives and parliaments involved with this issue. However, without the rapid reaction of the CCG and the drafting of a clear implementation guide by Beat Rudin, cantonal authorities would likely have found it very difficult to implement the Schengen acquis on data protection. These elements are analysed below in the light of the definitional criteria.

a) The conditional application of the SAA

According to Art. 15 para. 1 of the SAA, the Schengen acquis shall be put into effect by Switzerland on a date to be determined by the Council of the European Union after having ensured that Switzerland has fulfilled the preconditions for the implementation. These preconditions include the adaptation of the Swiss legal order to the Schengen provisions on data protection. Naturally, this conditional application has put pressure on the Swiss authorities – at federal and cantonal level. If they wanted to be part of Schengen, they had to implement the Schengen acquis on data protection.

It could be argued that such a provision constitutes a «mechanism» as it aims for the implementation of international provisions. In any case, as it is part of an international treaty, it cannot be a «domestic» implementation mechanism that would fall within the scope of the definition.

b) The rapid reaction of the Conference of Cantonal Governments (CCG)

The CCG reacted immediately after the signature of the SAA by commissioning Beat Rudin to draw up an implementation guide for the cantons. The mandate given by the CCG to an external expert aimed for the implementation of the Schengen acquis. Moreover, the CCG is an intercantonal conference, i.e. a collegiate intercantonal

110 Information gathered in an interview with Beat Rudin, Data Protection Officer of the canton of Basel-Stadt and titular Professor of Information and Data Protection Law at the University of Basel, on 11 January 2021.

111 The last canton to have adapted its data protection law is the canton of Geneva, where the revised law came into force on 1 January 2010.

body to which cantons delegate representatives¹¹². Created in 1993 to promote cooperation between cantons and ensure coordination in federal matters affecting them¹¹³, it is composed of delegates of the cantonal governments. The CCG is thus an institution according to the definition. However, the action of mandating an expert is a mere event. In absence of a technique or a method, this act cannot be qualified as a mechanism.

c) The implementation guide

On the mandate of the CCG, Beat Rudin created a highly accurate implementation guide enabling the cantonal authorities to quickly transpose the provisions of the Schengen acquis into their legislation. The aim of the guide was to help the cantons implement the Schengen acquis on data protection; the first criterion of the definition is thus met. The second criterion is also met because the guide is an internal tool, or instrument, designed to support the cantons. As to its authorship, it was drafted by an external expert on behalf of the Conference of cantonal Governments. Acting as an agent of a state actor, Beat Rudin was an institutional actor in this process. Therefore, the implementation guide can be qualified as a «domestic implementation mechanism».

The guide's clear presentation and high degree of precision helped the cantonal authorities implement the highly technical provisions – moreover spread over several legal acts of the EU – of the Schengen acquis on data protection. In this case, the existence of a precise implementation mechanism was very useful. In addition, it has been used by all the cantons. This raises the question of the role of cantonal parliaments when international law contains specific provisions that must be incorporated almost unchanged into domestic law. If the parliament's role is reduced to a mere «registration chamber» for the provisions of EU law, is the parliament not deprived of its main role, namely that of legitimately challenging and debating societal issues? With regard to data protection, Beat Rudin considers that it was not the case because the EU provisions leave some margin of appreciation to the domestic authorities¹¹⁴. In particular, they remain free to organise themselves freely (Data Protection Officer or commission)¹¹⁵. Moreover, the EU provisions regulate only the main principles (for example the obligation to have a legal basis to process data)¹¹⁶. There is still room for maneuver, allowing for discussion and debate about the details, when adopting or

112 ELOI JEANNERAT, *L'organisation régionale conventionnelle à l'aune du droit constitutionnel suisse: questions choisies de collaboration intercantonale et intercommunale*, Basel 2018, 112.

113 Art. 1 para. 2 of the Convention on the Conference of Cantonal Governments of 8 October 1993.

114 Information gathered in an interview with Beat Rudin, Data Protection Officer of the canton of Basel-Stadt and titular Professor of Information and Data Protection Law at the University of Basel, on 11 January 2021.

115 Ibid.

116 RUDIN, *supra* n. 102, at 40.

modifying a special law in a field in which data is processed¹¹⁷. Thus, in this case, cantonal parliaments have retained some influence on the application of the principles set out in the Schengen acquis. As will be discussed in the conclusion, it seems that leaving some room for maneuver to the cantonal legislators is advisable in order to enhance their engagement with international law.

V. Conclusion

The theoretical considerations presented above as well as the two examples studied show that a vast combination of factors and conditions is necessary for an implementation process to succeed. This article contributed to unravelling these factors by presenting the concept of «domestic implementation mechanisms». The particularity of these mechanisms lies in the fact that they are specifically aimed at implementing an international obligation, unlike other factors, which influence implementation processes «unintentionally». Moreover, mechanisms are distinct from mere events or individuals' actions.

The mechanisms observed in this contribution range from the parliamentary motion to an implementation guide and academic support. Even if they represent only a small sample of the mechanisms that exist at domestic level, they already allow for identification of certain characteristics that encourage cantonal legislators to take action. The engagement of parliaments with their international obligations seems to be enhanced when mechanisms 1) identify international obligations incumbent upon the cantonal legislator, 2) interpret these obligations and translate them into provisions that fit into the cantonal legislation, and 3) leave some margin of maneuver for the cantonal legislators.

The first and second points are crucial in the Swiss system of militia parliaments. In vast or technical fields covered by numerous international provisions – like the rights of persons with disabilities or the Schengen acquis on data protection – cantonal parliaments do not necessarily have the knowledge and resources to identify the obligations incumbent upon them. Nor do they have the capacity to translate them into cantonal law. This is particularly true in areas covering several aspects of life, as different cantonal laws will have to be amended. Thus, as a first step, it is necessary for qualified actors to identify the obligations incumbent on cantonal legislators – for example, by means of a parliamentary motion. In a second step, legal advice is needed to help parliamentarians implement these obligations. This advice may take the form of a legislative analysis, the formulation of priorities or the drafting of an implementation guide.

117 Information gathered in an interview with Beat Rudin, Data Protection Officer of the canton of Basel-Stadt and titular Professor of Information and Data Protection Law at the University of Basel, on 11 January 2021.

The third point which seems crucial to enhance parliamentary engagement is the margin of maneuver left to the cantonal legislators. Due to the numerous differences between the 26 cantonal legal orders, international provisions cannot or need not be implemented in the same manner in every canton. To be effective, they need to be adapted to the cantonal specificities. Consequently, overly strict mechanisms, which would simply impose the transposition of international law at cantonal level, are not the solution. They would run the risk either of not being respected or of leading to an «alibi» implementation, thereby failing to substantially improve the situation of the persons concerned.

This paper introduced the concept of «domestic implementation mechanisms» and showed, with illustrative examples, what elements of cantonal legislative processes could be described as mechanisms. The study also identified some of their characteristics enhancing parliamentary engagement. As a complement to the creation of new implementation mechanisms¹¹⁸, this study has the merit to valorise existing ones. Identifying and highlighting these mechanisms will facilitate the engagement of cantonal parliaments with their international obligations in the future. Indeed, this contribution will make it easier for stakeholders to replicate elements of these mechanisms in implementation processes of other international obligations or in other cantons. Finally, this study provides actors at the cantonal level with hints as to how synergies could be created when implementing new international obligations. For example, instead of each canton making an individual interpretation of technical international provisions, this paper provides them with clues on how they could coordinate to entrust this task to qualified lawyers. This would save them resources that could then be invested in translating these provisions into their cantonal legislative framework. To complement this research in the future, political scientists could use the concept of «domestic implementation mechanisms» to analyse, in an empirical way, what are the most effective mechanisms to enhance parliamentary engagement with international law.

118 Such as a National Human Rights Institution (NHRI).