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International Law and (Swiss) Domestic Law-Making Processes

from **Evelyne Schmid & Tilmann Altwicker**[1]

As international law has proliferated over the past few decades, so too has the interest in how national legal systems implement, shape and sometimes challenge international norms. In the recent past, academics have expanded their attention beyond the traditional focus on national courts and tribunals to the processes by which international law influences, or fails to influence, domestic law-making processes. Also in Switzerland, national law-makers grapple with the decision of how much weight to attach to international legal norms in national law-making, when to enact domestic norms that are equivalent to international standards, when to defy international law or how to proactively shape the process of international norm-creation. How do international law and domestic law-making processes complement, contest or mutually influence each other and how do these interactions affect the effectiveness, legitimacy and role of international law in domestic legal orders?

The selected contributions focus on some of these questions. Broadly speaking, the essays shed light on two main themes:

1. *Legislative duties:* How much leeway does international law give to national law-makers? When does international law prescribe specific duties to the national legislator and how are these to be identified in the first place?
2. *Democratic participation:* What does the increased relevance of sometimes extremely detailed secondary law mean for the domestic participation of the (Swiss) parliament and the people in the adoption and implementation of legal norms? More generally, how can the demands of international law be squared with the prevailing idea of a largely autonomous legislative branch tasked to represent domestic constituencies?

International law «in action» has always depended on domestic legislators implementing and shaping norms originating from the international level.[2] Given the rise in the number of international legal norms and in the regulatory ambitions of the international community, the significance of the domestic actors involved in the formation, implementation and administration of international

[1] Dr. iur. Evelyne Schmid and Dr. iur. Tilmann Altwicker are lecturers and post-doctoral researchers at the University of Basel.

[2] Pierre-Marie Dupuy, *International Law and Domestic (Municipal) Law,* in: Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law, Heidelberg 2011, para. 45.

norms also tends to increase. We thus start from the premise that the complexities of interaction and mutual influence between domestic parliaments and the international legal order are increasing.

The point of departure is the observation that international law today has significant expectations towards domestic law-makers. States and other international actors have agreed to intense international law-making on diverse issues ranging from global counter-terrorism to global health, economic, environmental or human rights concerns. Jacob Katz Cogan coined the term of the «regulatory turn» in international law to illustrate the high ambitions of the international community to create an ever more detailed framework of international legal norms to be implemented by domestic law-makers.[3] Not surprisingly, the question often asked today is what is left of the discretion of national law-makers in certain policy fields and particularly, how domestic law-making processes change, given the density and specificity of international law. Against this background, it seems warranted to critically engage with the warning issued by Christian Tomuschat that «the quantity and quality of international obligations has reached a level that puts in jeopardy the right of framing independently the internal constitutional order».[4]

As the compiled articles show, on the whole, international legal norms still leave considerable discretion to domestic law-makers. In some selected policy fields, however, international norms start to become more statute-like, decreasing the margin of discretion of legislatures implementing them. Other international norms explicitly oblige States to take legislative measures. Yet, it is still relatively rare that international law can rely on mechanisms that ensure the uniform implementation of international norms within national jurisdictions.

Anna Petrig begins by asking what *marge de manœuvre* the Swiss parliament and people have in the adoption and implementation of a specific type of international law, namely secondary law originating from organs of international organisations or other institutions. Such international secondary law has proliferated over the past few decades and has, in her view, too long been marginalised in Swiss legal doctrine. Petrig argues that secondary law should no longer be assumed to deal «merely» with technicalities that can be left to the executive branch. Rather, Petrig holds that democratic participation in the creation of these norms is essential to ensure the domestic democratic legitimacy of this widely used type of norms and that such participation would be largely possible within the confines of the existing Swiss legal system. In order to address the specific challenges raised by the diverse and dynamic development of often wide-ranging secondary

[3] Jacob Katz Cogan, *The Regulatory Turn in International Law,* 52 Harvard International Law Journal (2011), p. 321–372, 346.

[4] Christian Tomuschat, International Law: Ensuring the Survival of Mankind on the Eve of a New Century, 281 Collected Courses of the Hague Academy of International Law (2000), p. 9–438, 184.

law, she urges Swiss legal scholarship and practice to abandon the almost exclusive focus on treaty-law when determining the appropriate level of democratic participation and convincingly points out that democratic participation must start early on, i.e., during the *development* of new international secondary law, rather than only at the level of its domestic implementation.

Nesa Zimmermann examines an area in which States may not (or no longer) have discretion to decide whether or not their legislators shall take action, but where there remains considerable discretion as to the precise substance of the legislation to be adopted domestically. In her article «Legislating for the vulnerable? Special duties under the European Convention on Human Rights», Zimmermann traces legislative duties arising from the recent vulnerability jurisprudence of the European Court of Human Rights. While the Court has so far not sufficiently clarified the content and function of the vulnerability concept under the Convention, Zimmermann situates the concept in the context of international positive duties. She argues that the Court's vulnerability jurisprudence may give rise to potentially wide-ranging legislative duties for the protection of special groups of individuals. In a sense, then, legislative duties identified through the judicial interpretation of international human rights norms such as in this constellation, add to the complexity of interaction between the domestic and the international legal order.

But what are the contours of international legislative duties and how can they be identified? Evelyne Schmid suggests a conceptualisation of international legislative duties and their significance in the contemporary international legal system. On this basis, she identifies the challenges related to pinning down the precise scope of international legislative duties in the particularly contested and loosely defined area of «Business and Human Rights». She then discusses the consequences of potential legislative duties in this area for the Swiss legislator. Her analysis suggests that the Swiss legislator is indeed obliged to take further steps to implement Switzerland's duties to protect against corporate human rights abuse. At the same time, she observes that international law does not determine the precise manner in which this duty has to be fulfilled and – as in many other fields – that it would be inaccurate to claim that the domestic legislator no longer enjoys any leeway in deciding how to regulate the behaviour of non-State actors in the field of «Business and Human Rights».

The three contributors share the assumption that State discretion has always been a central feature of international legal instruments.[5] Despite claims that

[5] E.g. Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?,* 16 European Journal of International Law (2005), p. 907–940. Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law,* 97 American Journal of International Law (2003), p. 38–79.

national parliaments are no longer able to exercise discretion in their democratic function, the three essays suggest that domestic law-makers still enjoy a considerable range of options when engaging with international law – albeit the exercise of their prerogatives has admittedly become more complex.

Against this background, and in the light of the importance of legislative processes for domestic democracy as well as for the translation of international law into practice, we believe that it is necessary to expand the focus of research beyond the role of domestic courts. In the recent decade, significant research has been undertaken on international law in domestic courts.[6] The conceptual insights flowing from this rich strand of research should in our view be explored and complemented in order to shed further light on the interactions between international law and domestic law-making processes. This seems especially warranted given that the interaction between international and domestic law is subject of intense public controversies today. We do not think that the debate on the relationship between international law and domestic law-makers should be left to those who pretend that the question is whether one is in favour or against international law. Rather, since the influence of international law on domestic legislators is there to stay, just as are the dense normative interlinkages between the international and domestic legal order,[7] the related questions need to be addressed in a more nuanced fashion.

Hence, it seems to us that the real question is whether the interaction between international law and domestic law-making could be improved. Further research and ideas on how domestic law-making can fine-tune or complement some of its existing mechanisms are needed. This is also true with regard to Switzerland. Future research should focus, for instance, on consultation processes, information provided for in ratification messages, possibilities of how to raise awareness for the (federal and cantonal) parliaments' role or the international law dimensions of domestic law-making projects.

6 E.g. André Nollkaemper, National Courts and the International Rule of Law, Oxford 2011. Antonios Tzanakopoulos & Christian J Tams, *Introduction: Domestic Courts as Agents of Development of International Law,* 26 Leiden Journal of International Law (2013), p. 531–540. Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts,* 34 Loyola International and Comparative Law Review (2011), p. 133–168. Ole Kristian Fauchald & André Nollkaemper (eds), The Practice of International and National Courts and the (De-)Fragmentation of International Law, Oxford 2012; Armin von Bogdandy & Ingo Venzke, In Whose Name? A Public Law Theory of International Adjudication, Oxford 2014. For the most recent additions, see Eirik Bjorge, Domestic Application of the ECHR: Courts As Faithful Trustees, Oxford 2015 or Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW,* (forthcoming) American Journal of International Law (2016).

7 Jörg Paul Müller & Daniel Thürer, *Landesrecht vor Völkerrecht? Grenzen einer Systemänderung,* 134 I Zeitschrift für Schweizerisches Recht (2015), p. 3–20.

In any event, the three contributors make clear that domestic parliaments and other law-makers – collectively and through their individual members – exercise a significant international role. After all, their conduct is attributable to the State as a whole and – as Schmid emphasises in her essay – legislative action or omissions can amount to an internationally wrongful act for which the State will be internationally responsible. If the implementation of an international legal obligation can be supervised internationally, such as – for instance – the legislative duties outlined by Zimmermann, a State could potentially be confronted with a judicial finding of a violation of international law.

In sum, the three articles underline the need to better position domestic law-makers as actors who can directly influence international norm-making and who can potentially enter into a constructive dialogue with supervisory organs or the executive branch before or during the actual creation of new international norms. These and other scholarly endeavours contribute to raising the awareness for the (often underused and certainly undertheorized) potential of domestic parliaments in international law-making processes.

The three contributions stem from a workshop held at the University of Basel in September 2015. The workshop was organized in association with the Working Group of Young Scholars in Public International Law (*Arbeitskreis junger VölkerrechtswissenschaftlerInnen, AjV*).[8] The workshop hosted nine speakers selected on the basis of 79 abstracts received in response to an international call for papers. We would like to take this opportunity to express our gratitude to the University of Basel's support scheme for young scientists (*Ressort Nachwuchsförderung*) as well as to the Swiss National Science Foundation for funding the conference. We would also like to thank the Editorial Board of SZIER/SRIEL for reviewing a number of contributions and for providing room for exploring some of the aspects related to the role of international law in Swiss law-making processes. Two further contributions were published by *Jusletter*.[9] We hope that this symposium will mark just the beginning of the exploration a new field of research with a sustained focus on the functions and options of national parliaments and other law-making actors who (potentially) play a fundamental role in shaping and implementing international law.

[8] AjV is a loose network of young international law scholars and maintains a peer-reviewed blog on <http://voelkerrechtsblog.com>.

[9] Sieber-Gasser Charlotte, *Democratic Legitimation of Trade Policy Tomorrow: TTIP, Democracy and Market in the Swiss Constitution,* Jusletter, 9. November 2015. Tizian Troxler, *International Standards in Swiss Financial Market Law: A Brief Overview and Critical Assessment,* Jusletter, 16. November 2015.