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OJ **Constance Kaempfer,
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On 25 November 2018, the Swiss population and the cantons voted on a popular initiative that sought to alter the place and role of international law within the domestic legal system. Whereas preliminary surveys attested considerable support for the proposal, the initiative was [rejected](#) by a surprisingly large majority of Swiss voters (66.2%) and by all cantons. The participation rate was unusually high (47.7%). In this post, we present the proposal, we explain why we opposed it and we argue that future debates about the relationship between the Swiss legal order and international law should avoid deterministic assumptions that such initiatives are the ‘natural’ consequence of the increased relevance of international norms.

The initiative

(Semi-)direct democracy in Switzerland foresees that a vote is held on any proposal for a [constitutional amendment on any matter](#) provided that 100’000 citizens sign the proposal and provided that the Federal Assembly does not declare the proposal to be invalid. On a side note, on 25 November, we not only voted on the initiative discussed in this post, but also on the question whether farmers who do not remove the horns from [cows and goats](#) should receive increased subsidies.

The so-called ‘[Swiss law, not foreign judges](#)’ initiative (‘[self-determination initiative](#)’) was the result of a popular initiative launched in 2016 by the major right-wing Swiss party, the [Swiss People’s Party](#). The full text of the initiative is available in [French](#), in [German](#) and in [Italian](#). The proposal sought to introduce the priority of the Swiss Constitution over

international treaties, with the only exception being peremptory norms of international law. In the case of a conflict between an international treaty obligation and the Swiss Constitution, the initiative would have amended the constitution so that the Confederation and the cantons would have been obliged to ‘adapt’ international treaties to the constitution and withdraw from international treaties ‘if needed’. While the initiative would have left unchanged the existing constitutional obligation stipulating that ‘the Confederation and the cantons respect international law’, the initiative proposed to severely restrict the sources that the Federal Tribunal and the Swiss authorities would apply. Only treaties whose approbation by the Federal Assembly has been subject to a referendum would have remained applicable, thus excluding the vast majority of international treaties concluded by Switzerland before 2003, when the [facultative referendum](#) in the area of foreign policy was introduced. Without saying so explicitly, this provision endangered the application of the European Convention on Human Rights, [ratified by Switzerland in 1974](#).

This episode of Swiss direct democracy history must be understood both in its international and internal context. Internationally, the initiative is part of a wider phenomenon of challenging human rights through simplistic critiques of international institutions, international ‘elites’ and notably the EU. The awareness of why previous generations fought for the international recognition of human rights and the establishment of institutions mandated to protect them is fading. Domestically, the initiative was launched following a 2012 [decision](#) of the Swiss Federal Tribunal in which the Court prevented the removal of a residence permit of a nineteen-year-old foreign national convicted of drug offenses. Following the adoption of the [popular initiative on the removal of foreign criminals](#) in 2010, the Swiss People’s Party hoped for automatic deportations without consideration of proportionality. Of course, this idea was in tension with both the ECHR but also our own Constitution. Additionally, the Swiss People’s Party was unhappy with the legislative implementation of their initiative on ‘mass immigration’ and [argued](#) that the root causes of their anger was that international bodies and authorities are constantly expanding the scope of international law and politicians and courts no longer implement popular initiatives because they invoke international norms.

According to [media reports](#), the campaign surrounding this proposal was one of the most expensive campaigns Switzerland has ever seen, with more money spent on the side of those favoring the proposal but considerable sums also being spent by the opponents, most notably by *economiesuisse*, the largest corporate union.

Why we opposed the proposal

If the ‘self-determination initiative’ had been accepted, it would have had various harmful consequences at the domestic and at the international level. At the domestic level, three aspects deserve to be mentioned here.

First, contrary to other constitutional systems, the Swiss Constitution is comparatively easy to amend and there are [few restrictions](#) to do so. A popular initiative that does not – according to the assessment by the Federal Assembly – infringe a peremptory norm of international law can only be rendered invalid if it fails to comply with ‘the requirements of consistency of form and of subject matter’. For all the enthusiasm we have for direct democracy, this arrangement means that the constitutional lawmaker, i.e. the people and the cantons, can at any time abolish or restrict fundamental rights or modify the separation of powers. In case of tensions between new constitutional provisions and international law, the federal legislator

and the authorities try to resort to what can be described as delicate creative pragmatism in order to accommodate both norms.

Second, the ECHR plays a crucial and comparatively more important role within the Swiss domestic constitutional law framework than it does elsewhere. (For an English-language outline of the status quo, see the tab ‘documents’ on this [website](#).) Switzerland follows the monist tradition which implies that international treaties do not need to be transposed. International norms will thus deploy most effects when they are considered directly applicable which is generally the case for the substantive norms of the ECHR. But this of course only works if the Federal Tribunal is given the right to actually apply them. If a ‘hard’ conflict of norms arises (i.e. one that cannot be solved by interpretation), there is a long-established jurisprudence that international law usually prevails. (For the possible exceptions, see e.g. [here](#).) This co-applicability of international law and domestic law is of particular importance because the Swiss constitutional system does not provide for [constitutional review of federal laws](#), i.e. judicial authorities have to apply federal laws (and ordinances depending on federal laws) even if they are unconstitutional. (For an analysis in English, see Rosalind Dixon’s paper [here](#).) However, given that international law is equally part of the applicable law, the Swiss Federal Tribunal can ensure that federal laws and their application comply with the ECHR and other international conventions. This ‘conventionality check’ would have been endangered if the initiative had been accepted (We use the term ‘endangered’ rather than ‘abolished’ given that Switzerland ratified Protocols Nr. 14 and 15 after the introduction of the facultative referendum for such treaties – these Protocols would thus seem to have remained applicable and the argument was made that the submission to the facultative referendum of the two protocols indirectly means that the ECHR as well enjoys the status of a treaty that might have remained applicable. Gladly, the courts will not need to answer this question.)

Third, the text of the proposal suffered from internal inconsistencies and ambiguities. For reasons of space, suffice it to say that it would have undoubtedly raised a plethora of complex legal questions than it pretended to solve (for more detail see an open letter by 201 law professors and lecturers [here](#)). It was mostly this issue of legal certainty that motivated the employers’ union to oppose the proposal, notably in relation to the Agreement on the Free Movement of Persons with the EU.

We also opposed the initiative because it would have had deplorable consequences at the international level. The initiative would have harmed the reputation of Switzerland as a reliable partner internationally given that our Constitution would have stipulated that we distinguish two categories of treaties and will not apply some treaties in case of normative conflicts. Even more problematic, an acceptance of the ‘self-determination initiative’ would have been in line with other worrisome developments related to the protection of human rights in the Council of Europe and beyond. We are thus relieved that Switzerland decided to reject a proposal that indirectly aimed at targeting the role of the ECHR in the domestic legal system (and the domestic – not so much the foreign – judges applying it in national decisions).

Where does this leave us?

All’s well that ends well? Not quite. In our view, the rejection of the initiative provides an opportunity for honest reflections on the relationship between the Swiss legal order and international law. To name just a few ideas:

- there are [reflections](#) on how the Swiss constitutional system can continue to assure the domestic democratic legitimacy of international norms that are not contained in international treaties,
- a legislative [proposal](#) to clarify the internal division of competence for the withdrawal from international treaties,
- the idea to openly discuss [a constitutional presumption](#) of ‘friendliness towards international law’,
- or there are those who propose to explain much more widely why Switzerland and the world around it are highly interdependent.

We hope to contribute to the debate on the interactions of the Swiss legal system with a dense web of international norms and actors. We will start a research [project](#) next year and will examine the concrete parliamentary structures and mechanisms in Swiss cantons that potentially support cantonal legislative actors to recognize, influence, defy or fulfil international obligations.

In that continuing debate, we suggest that we need to keep analytically separate the description of the *context* from the identification of the *motivations* of those behind proposals such as the initiative by the Swiss People’s Party. Of course, it is entirely correct to observe that there are more numerous and more detailed international standards than a century ago, that supervision has increased, and international norms sometimes place very high ambitions on domestic actors, including domestic legislators. But we would take issue with explanatory attempts that suggest a monocausal and deterministic relationship between ‘more international norms’ and proposals such as this Swiss popular initiative. We do not deny that a relationship exists and that this relationship deserves to be taken seriously. Yet, in our view, the ‘self-determination initiative’ cannot and must not be explained by a simple reference to the increased relevance of international law and its institutions or globalization *tout court*. If the proponents emphasized that the Federal Constitution is the supreme source of the law of the Confederation, why would they attempt to curtail the power of the highest domestic tribunal to apply international law while at the same time continuing its opposition to the introduction of judicial review against the federal legislator that would precisely allow the Constitution to play a more important role in the domestic legal system? We believe that additional explanatory factors play a role. Quite simply, not everyone shares the idea that ‘all human beings are born free and equal in dignity and rights’. There is nothing surprising about the fact that courts and other institutions protecting fundamental rights are not always unequivocally welcome. Let’s hope that the rejection of the proposal by the Swiss voters is at least a glimmer of hope to celebrate the 70th anniversary of the UDHR.

Topics

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