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Contents

List of Abbreviations	I
Table of Cases	III
Table of Legislation	V
1. Introduction	1
1.1. Research Issue	1
1.2. Research Question	3
1.3. Methodology.....	4
2. Political Rights at Federal Level; Particularly the Right of Initiative and the Right of Referendum	4
2.1. Introduction to the Swiss Constitutional State.....	5
2.2. The Interdependence of Democracy, Human Rights and the Rule of Law	7
2.3. Federalism, Popular Initiatives and Referendums	10
2.3.1. Historical Aspects.....	10
2.3.2. Direct and Indirect Effects of Instruments of Direct-Democracy.....	11
2.4. Political Rights as Individually Enforceable Fundamental Right.....	15
3. Popular Initiatives at Federal Level	18
3.1. Procedure for Popular Initiatives Requesting a Partial Revision of the Federal Constitution	18
3.1.1. The Launch of Popular Initiatives	18
3.1.2. Federal Council Dispatch and Draft Decree	19
3.1.3. The Procedure in the Federal Assembly	20
3.1.4. Decision of the Federal Assembly Regarding the Validity of Popular Initiatives.....	21
3.1.4.1. The Requirements of Validity in General.....	21
3.1.4.2. The Requirements of Consistency of Form and of Subject Matter	22
3.1.4.3. The Requirement That Popular Initiatives Must Not Infringe Peremptory Norms of International Law	23
3.1.4.3.1. Developments Towards a Limitation Clause in the Federal Constitution	23
3.1.4.3.2. Scope of Application	26
3.2. Popular Initiatives at Cantonal Level.....	27
3.3. Problematic Popular Initiatives in the Light of Human Rights Obligations	28
3.3.1. General Remarks	28
3.3.2. Initiative ‘Lifelong Detention for Extremely Dangerous, Non-Treatable Violent and Sexual Offenders’ (‘ <i>Verwahrungsinitiative</i> ’).....	30
3.3.3. Initiative ‘For Democratic Naturalisation Procedures’ (‘ <i>Für demokratische Einbürgerungen</i> ’).	33

3.3.4. Initiative ‘Against the Construction of Minarets’ (<i>‘Minarettinitiative’</i>)	35
3.3.5. Initiative ‘Stop Mass Immigration’ (<i>‘Masseneinwanderungsinitiative’</i>)	39
3.3.6. ‘Initiative on the Expulsion of Foreign Criminals’ (<i>‘Ausschaffungsinitiative’</i>)	43
3.3.7. ‘Initiative on the Enforcement of the Expulsion of Foreign Criminals’ (<i>‘Durchsetzungsinitiative’</i>).....	50
3.3.8. Initiative ‘Swiss Law Instead of Foreign Judges’ (<i>‘Selbstbestimmungsinitiative’</i>)	54
4. State Obligations Arising From the International Human Rights Framework	59
4.1. Legally Binding Universal Human Rights Framework	59
4.2. Duty to Perform Treaties	61
4.3. Human Rights Protection at International Level	64
4.4. International <i>Ordre Public</i>	66
4.5. Incorporation of Human Rights Standards Into Domestic Law.....	69
4.6. UN Treaty Based Monitoring Procedures	71
4.6.1. International Covenant on Civil and Political Rights	72
4.6.2. International Convention on the Elimination of All Forms of Racial Discrimination.....	74
4.6.3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	83
4.7. UN Charter Based Monitoring Procedure: Universal Periodic Review	84
4.8. Switzerland as a Member of the Council of Europe.....	86
4.8.1. European Convention on Human Rights	87
4.8.2. Commissioner for Human Rights of the Council of Europe.....	89
4.8.3. European Commission Against Racism and Intolerance.....	91
4.9. Switzerland as Participating State of the Organization for Security and Co-operation in Europe (OSCE)	92
4.10. Interim Conclusion	92
5. The Practice of the Parliament and the Federal Supreme Court to Reconcile Conflicts between National and International Law	96
5.1. Current Practice of the Parliament to Draft Legislation	97
5.1.1. Initiative ‘Lifelong detention for extremely dangerous, non-treatable violent and sexual offenders’	100
5.1.2. Initiative ‘Against the Construction of Minarets’	101
5.1.3. Initiative ‘Stop Mass Immigration’	101
5.1.4. ‘Initiative on the Expulsion of Foreign Criminals’	101
5.2. Interim Conclusion	102
5.3. Current Practice of the Judiciary to Reconcile Conflicts between International Human Rights Obligations and Contradicting Domestic Law	103
5.4. Initiative ‘Swiss Law Instead of Foreign Judges’	107
5.5. Interim Conclusion	110

6. Final Conclusions	111
UN Documents	117
Documents of the Council of Europe	121
Official Papers: Switzerland.....	123
Bibliography	127
Abstract	143
Zusammenfassung	145

List of Abbreviations

ACHR	American Convention on Human Rights
BGE	Bundesgerichtsentscheid
BGG	Bundesgesetz über das Bundesgericht
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EU	European Union
GA	General Assembly
GRECO	Group of States against Corruption
HR Committee	Human Rights Committee
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ILC	International Law Commission
OHCHR	Office of the United Nations High Commissioner for Human Rights

OSCE	Organization for Security and Co-operation in Europe
PRA	Federal Act on Political Rights
SCHR	Swiss Centre of Expertise in Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
VDPA	Vienna Declaration and Programme of Action
SVP	Swiss People's Party

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Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Merits) [1970] ICJ Rep 3

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Austria v Italy (App no 788/60) 4 European Yearbook of Human Rights (1961) 116

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BGer 1C_237/2015, 24 August 2015

BGer 1C_293/2015, 24 August 2015

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International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1971, entered into force 3 September 1981) 1249 UNTS 13

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

Statute of the International Court of Justice 1946

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (opened for signature on 21 March 1986) Doc. A/CONF.129/15

Vienna Declaration and Programme of Action (adopted 25 June 1993) A/CONF.157/23

Council of Europe

Statute of the Council of Europe (opened for signature 5 May 1949, entered into force 3 August 1949) CETS No. 1

Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and No. 14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005

Protocol No. 12 to ECHR (opened for signature 4 November 2000, entered into force 1 April 2005) CETS No. 177

Domestic Legal Sources: Switzerland

Federal Constitution of the Swiss Confederation 1999 (Status as of 1 January 2016)

Bundesgesetz über das Bundesgericht 2005 (Status as of 1 January 2016)

Federal Act on the Acquisition and Loss of Swiss Citizenship 1952 (Status as of 1 January 2013)

Federal Act on Political Rights 1976 (Status of 1 November 2015)

Federal Act on the Federal Assembly 2002 (Status as of 1 March 2016)

Swiss Criminal Code 1937 (Status as of 1 January 2016)

1. Introduction

1.1. Research Issue

In Switzerland a democratic political system has been developed where representative as well as direct-democratic elements have been included, with the latter reflecting the principle of the sovereignty of the people as the supreme authority of the Swiss Confederation.¹ Starting from the cantonal level², direct democratic instruments including the right of referendum and of initiative have been implemented through all levels of the Swiss Confederation thus including federal, cantonal and municipal level. This unique system where the people can participate vividly in the political decision-making process constitutes an essential element shaping the political system of Switzerland.³ Particularly the right to launch a popular initiative is regarded as one of the best anchored instrument of the Swiss constitutional state.⁴

Deriving from the sovereignty of the people, constitutional amendments must be submitted to the vote of the people (and the cantons).⁵ Furthermore, if the necessary signatures are collected, the Federal Constitution can be partially amended through popular initiatives at any time.⁶ There are hardly any limits for popular initiatives, as long as such concerns are eligible to codification.⁷

Along with the rise of the right-wing populist Swiss People's Party (SVP), which is the strongest party today,⁸ several popular initiatives have been launched, which were

¹ Wolf Linder, *Schweizerische Demokratie, Institutionen – Prozesse - Perspektiven* (3rd ed, Haupt, 2012) 367f. (hereafter: Linder, *Schweizerische Demokratie*). Confederation is the Swiss term for the state.

² Giovanni Biaggini, 'Ausgestaltung und Entwicklungsperspektiven des demokratischen Prinzips in der Schweiz' in Hartmut Bauer and others (eds), *Demokratie in Europa* (Mohr Siebeck, Tübingen 2005) 107, 119f. (hereafter: Biaggini, 'Ausgestaltung und Entwicklungsperspektiven').

³ *ibid* 107, 121.

⁴ Helen Keller, Markus Lanter and Andreas Fischer, 'Volksinitiativen und Völkerrecht: die Zeit ist reif für eine Verfassungsänderung' (2008) 2 ZBI 121, 138 (hereafter: Keller, Lanter and Fischer, 'Volksinitiativen und Völkerrecht').

⁵ See Federal Constitution of the Swiss Confederation 1999 (Status as of 1 January 2016) art 140 (Federal Constitution) (mandatory referendum).

⁶ See art 139 (1) Federal Constitution.

⁷ Pierre Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft* (Stämpfli Verlag AG, Bern 2004) [44, side note 30] (hereafter: Tschannen, *Staatsrecht*).

⁸ In October 2015 the SVP won a record number of seats of the National Council (+11; 1/3 of all seats) which caused a remarkable shift to the right in this chamber (see Schweizerische Eidgenossenschaft, 'Statistik Schweiz' (2015) <www.politik-stat.ch/2015_de.html> accessed 21 May 2016). The SVP is

strongly criticised both domestically and abroad because of their xenophobic and discriminatory content.⁹ Even though such initiatives were regarded as a new phenomenon because of the intended conflict with international law obligations,¹⁰ and despite the disapproval repeatedly expressed by the Federal Council and many members of the parliament, they were nevertheless not declared invalid. The reason is that the Federal Constitution sets hardly any material limits to popular initiatives. Only when a popular initiative infringes peremptory norms of international law it is declared invalid by the Federal Assembly.¹¹ Therefore, popular initiatives have been approved in the last years by the people (and the cantons) although thereby introducing constitutional amendments, which were potentially conflicting with international law, particularly human rights obligations.

The problems arising from such initiatives are seen as ‘pressing’¹² and for many years debates among scholars but also on a political level on how to mitigate such conflicts between popular initiatives and human rights obligations have been on-going.¹³ Yet,

overall the strongest party in Switzerland (see ‘Parteien’ *Swissinfo.ch* (18 May 2016) <www.swissinfo.ch/ger/parteien/28977748> accessed 30 June 2016).

⁹ See as an example the debates surrounding the initiative ‘Against the Construction of Minarets’: Informationsplattform humanrights.ch, ‘Federal Council rejects initiative to ban minarets’ (30 October 2008)

<www.humanrights.ch/en/switzerland/internal-affairs/groups/cultural/swiss-vote-initiative-ban-minarets> accessed 30 June 2016. See further the intervention of the United Nations’ (UN) special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, *Doudou Diène*, regarding the SVP’s political poster with which the party promoted their ‘Initiative on the Expulsion of Foreign Criminals’. According to *Doudou Diène*, this poster provoked racial and religious hatred and he therefore urged the SVP to withdraw it (see ‘Sheep poster gets black marks from UN’ *Swissinfo.ch* (14 September 2007) <www.swissinfo.ch/eng/sheep-poster-gets-black-marks-from-un/6146958> accessed 30 June 2016).

¹⁰ Linder, *Schweizerische Demokratie* (n 1) 277, 316.

¹¹ Arts 139 (3), 194 (2) Federal Constitution.

¹² Keller, Lanter and Fischer, ‘Volksinitiativen und Völkerrecht’ (n 4) 121, 137.

¹³ Federal Council, ‘Das Verhältnis von Völkerrecht und Landesrecht, Bericht des Bundesrates in Erfüllung des Postulats 07.3764 der Kommission für Rechtsfragen des Ständerates vom 16. Oktober 2007 und des Postulats 08.3765 der Staatspolitischen Kommission des Nationalrates vom 20. November 2008’ (5 March 2010) BBl 2010 2263 (hereafter: Federal Council, ‘Das Verhältnis von Völkerrecht und Landesrecht’ 2010). See as well the overview on the current discussion among scholars: Ramona Pedretti, *Vom Verbot von gleichgeschlechtlichen Ehen und Minaretten: Direkte Demokratie und Minderheitenschutz, Ein Beitrag zur Diskussion über menschenrechtswidrige Volksinitiativen* (Helbing & Lichtenhahn Verlag, Basel 2015) 46ff (hereafter: Pedretti, *Vom Verbot von gleichgeschlechtlichen Ehen und Minaretten*).

discussions about reforming the instrument of popular initiatives have not been successful so far.¹⁴

However, Switzerland is a member to the UN and of the Council of Europe, and furthermore has ratified or acceded to several human rights treaties and therefore has voluntarily committed to ensure a wide range of human rights obligations.

1.2. Research Question

Deriving from this conflict, the question arises whether popular initiatives and the constitutional amendments thereto put Switzerland in a situation where it is not able to fulfil its human rights obligations and therefore breaches its obligations under international law, which in the affirmative would entail Switzerland's responsibility to remedy the situation by introducing limits to the right of initiative.

In order to reach a conclusion on this subject, firstly, political rights with a focus on the right of referendum and of initiative at federal level will be discussed and thereby the significance and impact of direct-democratic instruments in the political system of Switzerland as well as the relationship existing between democracy, human rights and the rule of law shall be analysed (chapter 2.). Secondly, the procedure for popular initiatives will be explained and examined. This includes a discussion on the limits set in order for popular initiatives to be declared invalid by the Federal Assembly and thus, what problems arising from the existing legal framework. Moreover, those problematic popular initiatives of the last fifteen years will be scrutinized, which were in the focus of debates at domestic level and which were addressed by international monitoring bodies when reviewing or commenting Switzerland's human rights performance (chapter 3.). Thirdly, it will be elaborated from a general point of view, what measures a state has to undertake in order to adequately perform its obligations under international and more particularly under human rights law. Furthermore, individual communications, rulings and country-related recommendations of different international monitoring mechanisms

¹⁴ Informationsplattform humanrights.ch, 'Bessere Vereinbarkeit des Initiativrechts mit den Menschenrechten vorläufig gescheitert' (16 December 2013) <www.humanrights.ch/de/menschenrechte-schweiz/inneres/direkte-demokratie/reform/bessere-vereinbarkeit-initiativrechts-voelkerrecht-vorlaeufig-gescheitert> accessed 30 June 2016.

shall be examined in order to scrutinize Switzerland's human rights performance in relation to popular initiatives (chapter 4.). Lastly, the practice of the parliament and the judiciary in Switzerland shall clarify whether and if so how conflicts between domestic legislation implemented through popular votes and international human rights obligations are tackled (chapter 5.). Interim conclusions shall help to approach possible findings, and final conclusions shall address consequences thereto.

1.3. Methodology

In order to approach these issues, a desk-based legal research and analysis of international legislation, individual communications, general comments and country-related concluding observations of UN treaty and charter based monitoring bodies and experts, publications of the International Law Commission (ILC), reports and recommendations of institutions and bodies of the Council of Europe as well as rulings handed down by the European Court of Human Rights (ECtHR) will be undertaken. Furthermore, domestic legislation and decisions of the Federal Supreme Court, parliamentary reports, reports of the authorities and of non-governmental organisations, academic publications and articles as well as newspaper articles will be analysed.

2. Political Rights at Federal Level; Particularly the Right of Initiative and the Right of Referendum

After a short overview on how the Swiss constitutional state is built up and how democracy, human rights and the rule of law are intertwined, it shall be shown in the following chapter what significance do the right of initiative and referendum have in the Swiss political system. This shall help to get an understanding why discussions on limiting particularly the right to initiative are met with considerable reluctance at domestic level. Finally, the dualistic nature of political rights will be involved and thereby problematic aspects raised, which also have the potential to influence the outcome of popular initiatives.

2.1. Introduction to the Swiss Constitutional State

Preliminary it shall be noted that the International Covenant on Civil and Political Rights (ICCPR)¹⁵, which is binding for Switzerland (see chapter 4.6.1.), does not demand for a specific democratic model. The second sentence of article 1 ICCPR lays down the right of all peoples to ‘freely determine their political status’. This includes the right to freely choose the form of constitution or of government within their respective state.¹⁶ This right is closely related to the political rights and freedoms established in the ICCPR, according to which the relevant people in a given state have the right to take part in the political decision-making process.¹⁷ One of these rights - the right to take part in the conduct of public affairs (article 25 lit. a ICCPR) - leaves it to the discretion of the states parties whether to grant it either directly or through freely chosen representatives. Therefore, beyond a representational system, direct democratic participatory rights may be implemented, although there is no obligation to do so.¹⁸

The Federal Constitution of the Swiss constitutional state is based on four main pillars of liberal rule of law, semi-direct democracy, federalism and welfare.¹⁹ Unlike in most other democratic states of the world where representative democracy is the rule, in Switzerland a democratic system was established, where the two elements of representative and of direct democracy were combined.²⁰ This system of semi-direct democracy runs through all levels of the Swiss Confederation and is thus implemented at federal and cantonal level, as well as in the municipalities.

¹⁵ ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹⁶ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel, 2005) Art 1 CCPR [32] and Art 25 CCPR [5] (hereafter: Nowak, *CCPR Commentary*).

¹⁷ *ibid* [34].

¹⁸ *ibid* Art 25 CCPR [12] – [13].

¹⁹ Giovanni Biaggini, ‘Verfassungsreform in der Schweiz, Die neue schweizerische Bundesverfassung vom 18. April 1999 im Zeichen von „Verfassungsnachführung“ und Verfassungspolitik’ (1999) 54 ZÖR 433, 435.

²⁰ Linder, *Schweizerische Demokratie* (n 1) 367f. Other than abroad, in Switzerland direct decision-making on the part of the people is connected with the term ‘direct democracy’ instead of ‘plebiscitary democracy’. The reason is that in Switzerland plebiscites are connected with popular political participation that depends from the discretion of authorities, whereas popular votes are part of normal political processes laid down in the Federal Constitution and thus do not depend from a governmental decision. Hence, the term ‘plebiscite’ has a pejorative connotation and is therefore not common in Switzerland (see Biaggini, ‘Ausgestaltung und Entwicklungsperspektiven’ (n 2) 107, 108 and Tschannen, *Staatsrecht* (n 7) [6, side note 15]).

The principle of the sovereignty of the people as the supreme authority of the Swiss Confederation is laid down in the Federal Constitution.²¹ This core idea that all power emanates from the people goes back to the guarantee of human dignity and forms the foundation of the principle of democracy.²² In Switzerland it is especially reflected in direct democratic popular rights of the people²³, which are an essential element of the constitutional system of the Swiss Confederation.²⁴

It has to be noted that only Swiss citizens may exercise political rights in federal matters if they are over the age of eighteen, unless they lack legal capacity due to mental illness or mental incapacity.²⁵ At federal level, political rights not only include the right to participate in elections for the National Council²⁶ and in federal popular votes, but also

²¹ Art 148 (1) Federal Constitution.

²² René Rhinow and Markus Schefer, *Schweizerisches Verfassungsrecht* (2nd ed, Helbing & Lichtenhahn Verlag, Basel 2009) [245f.] (hereafter: Rhinow and Schefer, *Schweizerisches Verfassungsrecht*).

²³ The Federal Constitution uses the term ‘political rights’, which includes the right to vote and stand as a candidate in elections, the right to participate in votes and the right to sign initiatives and referendums (art 136 (2) Federal Constitution). However, in Switzerland the colloquial term ‘*Volksrechte*’ (‘popular rights’) is much more common and used as a synonym for ‘political rights’ (see Biaggini, ‘Ausgestaltung und Entwicklungsperspektiven’ (n 2) 107, 111). However, the term ‘*Volksrechte*’ is narrower and usually does not include the right to vote and stand as a candidate in elections and is thus no synonym (see Tschannen, *Staatsrecht* (n 7) [48, side note 2f.]). In the present thesis, when using the term ‘political rights’, it is used as laid down in the Federal Constitution and when using the term ‘popular rights’, it is used in the narrower sense and therefore focuses on the right of initiative and referendum and the accompanying right thereto to participate in votes.

²⁴ Giovanni Biaggini, ‘Die schweizerische direkte Demokratie und das Völkerrecht – Gedanken aus Anlass der Volksabstimmung über die Volksinitiative «Gegen den Bau von Minaretten»’ (2010) 3 ZÖR 325, 327 (hereafter: Biaggini, ‘Schweizerische direkte Demokratie und Völkerrecht’).

²⁵ See art 136 (1) Federal Constitution. Particularly after popular votes it is common in the media and by politicians to state that the result of the vote reflects ‘the will of the popular sovereignty’ (see Oliver Diggelmann, ‘«Der Souverän hat entschieden», Zur Archäologie einer politischen Formel’ in Andrea Good and Bettina Platipodis (eds), *Direkte Demokratie, Herausforderungen zwischen Politik und Recht, Festschrift für Andreas Auer zum 65. Geburtstag* (Stämpfli Verlag AG, Bern 2013). Yet, in reality it is only a clear minority of 12 to 22 per cent of the resident population that decides on a matter. The reason is that only around 65 per cent of the resident population is entitled to vote (minors and foreign residents are not eligible to vote) and a certain amount of citizens entitled to vote do not participate in the ballot (see Linder, *Schweizerische Demokratie* (n 1) 307f.). At the end of 2014 the percentage of foreigners among the resident population was 24.3 per cent. The majority are nationals of a member state of the European Union (EU) or of the European Free Trade Association (EFTA). Switzerland is among the countries in Europe with the highest proportion of foreign nationals in its resident population. Among others, this situation can be explained by its restrictive policy in terms of naturalisation (see Schweizerische Eidgenossenschaft, Statistik Schweiz, ‘Ständige ausländische Wohnbevölkerung nach Staatsangehörigkeit’ (2016)

<www.bfs.admin.ch/bfs/portal/de/index/themen/01/07/blank/key/01/01.html> accessed 17 May 2016.

²⁶ The National Council, together with the Council of States, builds the Federal Assembly (the parliament at federal level), see art 148 (2) Federal Constitution. In contrast to the election of the National Council, the election of representatives of the Council of States is a cantonal matter and thus regulated by cantonal

the right to launch or sign popular initiatives and requests for referendums.²⁷ This provision shows both the element of representative democracy, where the voters elect the legislative authority, but also the direct democratic element according to which voters have the power to take the final decisions regarding fundamental matters through their popular rights.

2.2. The Interdependence of Democracy, Human Rights²⁸ and the Rule of Law

In line with the concept of constitutional democracy, all activities of the state are based on and limited by law.²⁹ This also applies to the bearer of sovereignty, the people.³⁰ Political participation of the voters is thus only granted as far as it is provided in the Federal Constitution³¹. What is more, the utmost target values of a constitutional democracy are justice and human dignity, therefore these core goals set limits to the material scope of application of political rights.³² Thus, while the voters in Switzerland have the right to amend the Federal Constitution at any time based on their

law (see art 150 Federal Constitution). This is why the election of the Council of States is not listed as a political right in the Federal Constitution.

²⁷ See art 136 (2) Federal Constitution.

²⁸ The Federal Constitution speaks of ‘fundamental rights’ (*Grundrechte*) instead of ‘human rights’. It contains a fundamental rights catalogue, which, among others, reflects the rights enshrined in the European Convention on Human Rights [Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and No. 14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005 (ECHR)]. However, it entails fundamental rights that are not or not fully protected by international law as for example the protection against arbitrary conduct and the principle of good faith (art 9 Federal Constitution), economic freedom (art 27 Federal Constitution) and political rights (art 34, 136 Federal Constitution) (see the full list in Legal Affairs Committee of the National Council, ‘Parlamentarische Initiativen, Verfassungsgerichtsbarkeit, Bundesverfassung massgebend für rechtsanwendende Behörden’ (12 August 2011) BBl 2011 7271, 7277 (hereafter: Legal Affairs Committee of the National Council, ‘Verfassungsgerichtsbarkeit’ 2011)). Some of these provisions may be enshrined in international treaties which however Switzerland has not ratified. Moreover, EU law might cover the above mentioned provisions. Yet, as non EU-member EU law is (mostly) not applicable in Switzerland.

²⁹ See art 5 (1) Federal Constitution.

³⁰ Yvo Hangartner and Andreas Kley, *Die demokratischen Rechte in Bund und Kantonen der Schweizerischen Eidgenossenschaft* (Schulthess, Zürich 2000) [239] (hereafter: Hangartner and Kley, *Demokratische Rechte*).

³¹ The focus in this master thesis is on political rights at federal level. Therefore, political participatory rights at cantonal and communal level will not be discussed.

³² Hangartner and Kley, *Demokratische Rechte* (n 30) [324].

constitutional popular rights, these must not be viewed as absolute. Otherwise, this would lead to an unlimited democratic absolutism.³³

In general terms and how it is understood and used today, the concept of democracy is not only based on the majority rule. On the contrary, values of pluralism and tolerance towards minorities and outsiders must place immanent barriers to the majority rule in order to protect the human rights of all individuals. Else, free and open democratic societies cannot exist and they become ‘tyrannies of the majority’.³⁴ Moreover, as democratic decisions are mainly taken by a majority, they consequently lack full democratic legitimacy as they do not have the approval of a minority. Therefore, there is a need to implement legal barriers, which protect fundamental aspects of human integrity of all residents from attacks of the majority.³⁵ Consequently, human rights and democracy are two sides of the same coin because they depend on each other, as human rights require democracy and democracy can only exist if human rights are protected.³⁶

Therefore, in a constitutional state like Switzerland, the protection of human rights sets barriers to the popular rights of the people. The Federal Constitution refers to this interdependence by codifying that one of the aims of the Swiss Confederation shall be ‘to protect the liberty and rights of the people’.³⁷ To this end, both ‘the liberty of the people’ shall be preserved through democratic self-determination and ‘the rights of the people’ through human rights protection.³⁸ Thus, all state organs, also the electorate in

³³ *ibid* [488f.]. However, there is a tendency in Switzerland to declare the sovereignty of the people ‘sacred’ and to attribute to the people an unlimited power in its role as legislator. This includes the idea that the majority of the electorate can shape the legislation through direct-democratic instruments as they wish by ignoring ideals of justice that are laid down in the Federal Constitution. This idea of absolute sovereignty of the people is broadly criticised among scholars. As an example *René Rhinow*, former professor of federal constitutional and administrative law and former member of the Council of States once stated: ‘Das Volk ist als Verfassungsgeber und als Gesetzgeber nicht der sterbliche Gott, der sich willkürlich über alles hinwegsetzen kann’ (see Council of States, ‘Amtliches Bulletin der Bundesversammlung’ (16 March 1995) AB 1995 II 334, 338).

³⁴ Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill Academic Publishers, Leiden 2003) 45f., with reference to the jurisprudence of the ECtHR (hereafter: Nowak, *Introduction*).

³⁵ Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [1991]. See as well Pedretti, *Vom Verbot von gleichgeschlechtlichen Ehen und Minaretten* (n 13) 19.

³⁶ Hangartner and Kley, *Demokratische Rechte* (n 30) [490].

³⁷ Art 2 (1) Federal Constitution.

³⁸ Hangartner and Kley, *Demokratische Rechte* (n 30) [489].

its function as constitutional legislator, have to respect fundamental and human rights.³⁹ This principle is expressly laid down in the Federal Constitution saying that ‘whoever acts on behalf of the state is bound by fundamental rights and is under a duty to contribute to their implementation’.⁴⁰

Hence, the respect for fundamental rights, which forms the basic principles of humanity and justice, should be the necessary yardstick for political decisions. However, experience has shown, that political decision-making processes are often accompanied by fights for political power, in which fundamental interests of individuals and minority groups are woefully disregarded. Therefore, democratic legitimacy of political decisions can only be reached if also majority decisions adhere to principles governing the rule of law.⁴¹ Apart from legal certainty, the rule of law shall protect people against arbitrariness from others. This core aspect of the rule of law contains that judicial review by independent courts is provided.⁴² If no limits are put in place by a constitutional state to constrain the power of direct-democratic participatory rights, the bases of democracy itself is at risk.⁴³

Pursuant to the dualistic nature of political rights, the electorate does not only enjoy its individual political right. What is more, in its function as organ of the state, it must respect the principle of the rule of law according to which all activities must be based on and limited by law, and therefore it must respect constitutional rights and human rights as part of international law.⁴⁴

Consequently, all three elements – democracy, human rights and the rule of law – are inseparably interlinked and in order to guarantee that all elements unfold effect, they have to be put into a reasonable balance to each other. Already in 1949, these three fundamental values were laid down as the foundation of the Council of Europe (see

³⁹ Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [989].

⁴⁰ Article 35 (2) Federal Constitution.

⁴¹ Tschannen, *Staatsrecht* (n 7) [11, side note 10ff.].

⁴² Nowak, *Introduction* (n 34) 46.

⁴³ Regina Kiener and Melanie Küsi, ‘Bedeutungswandel des Rechtsstaats und Folgen für die (direkte) Demokratie am Beispiel völkerrechtswidriger Volksinitiativen’ (2009) 5 ZBI 237, 247 (hereafter: Kiener and Küsi, ‘Bedeutungswandel des Rechtsstaats’).

⁴⁴ Art 5 (4) Federal Constitution. See as well Pedretti, *Vom Verbot von gleichgeschlechtlichen Ehen und Minaretten* (n 13) 30.

chapter 4.8.). At the Vienna World Conference on Human Rights (see chapter 4.1.), a strong commitment was made by the international community to build a world order based on these pillars.⁴⁵ So, there is consensus today that democracy and human rights are not two different issues but that they form, together with the principle of the rule of law, interdependent values.⁴⁶

Yet, as shown further below, discussions are on-going at domestic level regarding the question whether (further) limits are needed in law and practice at the expense of popular rights of the voters in order to protect human rights as well as fundamental principles of the rule of law.

2.3. Federalism, Popular Initiatives and Referendums

2.3.1. Historical Aspects

Besides the principle of the sovereignty of the people, the federal structure of the Swiss Confederation aims to control the power of the state by distributing competences among the Confederation, the cantons and the municipalities. The cantons are therefore ‘sovereign except to the extent that their sovereignty is limited by the Constitution’.⁴⁷ The decentralized distribution of power intends to better protect human rights, particularly minority rights, as the federal structure shall preserve deeply rooted linguistic and cultural characteristics among the cantons, which are seen as a typical peculiarity of Swiss society. The federal structure was therefore a political compromise agreed upon by liberal Protestants and conservative Catholics. It was explicitly laid down in the first Federal Constitution of 1848, when the Confederation became a federal state. Moreover, it was also established in the Constitution then, that

⁴⁵ Manfred Nowak, ‘Vienna Declaration and Programme of Action: Key Outcomes, Results and Achievements’ in Wolfgang Benedek and others (eds), *Global Standards – Local Action, 15 Years Vienna World Conference on Human Rights* (Neuer Wissenschaftlicher Verlag, 2009) 115.

⁴⁶ Nowak, *CCPR Commentary* (n 16) Art 25 CCPR [1]. Actually, ‘the main components of democracy, i.e., the right of the people to sovereignty, internal self-determination and equal participation in political decision-making processes together with the protection of minorities against the “tyranny of the majority”, are already part of the international law of human rights’ (see *ibid*).

⁴⁷ Art 3 Federal Constitution. Thus, the cantons have their own constitutions, parliaments, executives and courts, and both at federal and cantonal level legislation is adopted. Furthermore, political rights are granted at all federal levels (see The portal of the Swiss government, ‘Federalism’ (21 September 2015) <www.admin.ch/gov/en/start/federal-council/political-system-of-switzerland/swiss-federalism.html> accessed 19 May 2016).

constitutional amendments must be put not only to the vote of the people, but also to the vote of the cantons.⁴⁸ This was to ensure that not only a majority of the voters was necessary for the approval of a constitutional amendment, but additionally, that also the majority of the cantons had to agree. The need of a majority of the cantons was to prevent that densely populated cantons might overrule sparsely populated ones.⁴⁹

Direct democratic instruments of popular rights were introduced in a development process that has lasted many decades and which first started at cantonal level.⁵⁰ Together with the federal structure, its aim has been to protect minority and opposition groups by establishing instruments allowing them to take part in the decision-making process of representative democracy.⁵¹

Over decades, both optional and mandatory referendums and the right to launch popular initiatives requesting the total or partial revision of the Federal Constitution have been incorporated in the Constitution.⁵² The latter, which is in the centre of this thesis, was introduced in 1891. Particularly left-wing politicians were very much in favour of implementing this instrument allowing citizens to circumvent the representatives of the parliament and forcing them to introduce legislation according to the will of the people. This stance showed on the one hand a mistrust of representative democracy and on the other hand a belief in the common sense of the people,⁵³ which has influenced the question of reforming popular rights up until today.

2.3.2. Direct and Indirect Effects of Instruments of Direct-Democracy

The belief that decisions taken by the citizens entitled to vote enjoy the highest degree of legitimacy is one of the core elements of Swiss political culture. This is why the

⁴⁸ Linder, *Schweizerische Demokratie* (n 1) 24, 264.

⁴⁹ Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [587ff]. One problematic aspect is that all cantons enjoy equal rights and thus every cantonal vote has the same weight (apart from half-cantons having half a cantonal vote, art 142 (4) Federal Constitution). Therefore, the votes of the electorate of small cantons, which are often more conservative, weigh significantly more. As an example, one vote from the canton Uri is equal to thirty-one votes from the canton of Zürich (see *ibid* [2249]).

⁵⁰ Biaggini, 'Ausgestaltung und Entwicklungsperspektiven' (n 2) 107, 119f.

⁵¹ Luzius Wildhaber, *Menschen- und Minderheitenrechte in der modernen Demokratie, Rektoratsrede gehalten an der Jahresfeier der Universität Basel am 27. November 1992* (Helbing & Lichtenhahn Verlag, Basel 1992) [17] – [18] (hereafter: Wildhaber, *Menschen- und Minderheitenrechte*).

⁵² See arts 138 – 142 Federal Constitution.

⁵³ Linder, *Schweizerische Demokratie* (n 1) 264.

instruments of popular initiatives and referendums are considered more important than elections. Thus, proceeding from the principle of the sovereignty of the people as the supreme authority, the most important decisions shall be taken by the people that is the electorate. Important decisions are, on principle, taken by the parliament and all other decisions by the government.⁵⁴ Therefore, in general terms, amendments to the Federal Constitution are subject to mandatory referendums⁵⁵ and the Federal Constitution itself can be amended by popular initiatives.⁵⁶ Even though it is the parliament's task to legislate, federal acts are also subject to referendums, if 50,000 persons eligible to vote or any eight cantons request it (optional referendum).⁵⁷ Parliamentary decisions and regulations of the Federal Council are not subject to referendums and popular initiatives.⁵⁸

Although the Swiss electorate in very few cases calls for a referendum (only in seven per cent of decisions eligible to a referendum), the success rate is still 52 per cent. Therefore, it has over time significantly contributed to the political system of finding compromise solutions in politics. As the government and the parliament always have to anticipate a possible referendum, their political negotiations aim to find a broad consensus among all relevant stakeholders like political parties and associations. Therefore, the referendum has led to a system of consensual democracy. Another effect of the referendum has been that over decades all relevant political forces have been

⁵⁴ *ibid* 266.

⁵⁵ Also other matters require mandatory referendums, as for example the proposal to join supranational organisations or organisations for collective security. Thus, the list is not exhaustive. Furthermore, mandatory referendums must not always be put to the vote of the people and the cantons. In some cases the majority of the vote of the people is sufficient. See art 140 Federal Constitution.

⁵⁶ Arts 138 – 139b Federal Constitution. Other than the initiative in the form of a general proposal, the initiative in the form of a specific draft must be submitted both to the vote of the people and the cantons (see art 139 (5) Federal Constitution).

⁵⁷ Art 141 Federal Constitution. Optional referendums are also possible in other matters. For example, for international treaties of unlimited duration without a possibility to denounce or international treaties providing for accession to an international organisation (see the exhaustive list under art 141 Federal Constitution).

⁵⁸ See Linder, *Schweizerische Demokratie* (n 1) 264ff.

integrated into the government.⁵⁹ This resulted in a system, where political opposition in the parliament is lacking ('concordance system').⁶⁰

And this is where popular initiatives come into play as they serve as a tool of political opposition. By launching a popular initiative (political) groups with not sufficient or no political power in the parliament may place an issue on the political agenda, which has been ignored by established political parties.⁶¹ Important is that as soon as a request for a popular initiative is successful, it must be submitted to the vote of the electorate (and the cantons) even though the Federal Assembly might not support the proposal (unless it is declared invalid, which is very seldom, see below).⁶² Furthermore, it is prohibited that a text of an initiative in the form of a specific draft be modified by the Federal Assembly.⁶³ Moreover, both the Federal Council and the Federal Assembly must take position during the political procedure of a popular initiative as they have to agree on a voting recommendation.⁶⁴ This obligation forces them to debate an issue they might rather ignore and the electorate gets to know the position of both the executive and the parliament.⁶⁵ Additionally, basically any concern can be subject of a popular initiative as long as it can be codified in a constitutional norm.⁶⁶ Consequently, popular initiatives have the effect of pushing forward political processes. Together with the referendum, both instruments are of vital importance in the political system of Switzerland.⁶⁷

When looking at the average success rate of popular initiatives, which is not more than approximately ten per cent, their indirect effect should not be disregarded. In order to prevent a popular initiative to be successful, the Federal Council and the parliament

⁵⁹ Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [2038], [2226ff].

⁶⁰ Biaggini, 'Ausgestaltung und Entwicklungsperspektiven' (n 2) 107, 123.

⁶¹ Wildhaber, *Menschen- und Minderheitenrechte* (n 51) [18].

⁶² Art 139 (5) Federal Constitution and Federal Act on the Federal Assembly 2002 (Status as of 1 March 2016) (Parliament Act) art 99.

⁶³ Art 99 Parliament Act.

⁶⁴ Arts 97 and 100 Parliament Act.

⁶⁵ Johannes Reich, 'Direkte Demokratie und völkerrechtliche Verpflichtungen im Konflikt, Funktionellrechtlich differenzierte Herstellung praktischer Konkordanz zwischen der Beachtung des Völkerrechts und konfligierenden Volksinitiativen im schweizerischen Bundesverfassungsrecht' (2008) 68 *ZaöRV* 979, 988 (hereafter: Reich, 'Direkte Demokratie und völkerrechtliche Verpflichtungen').

⁶⁶ Tschannen, *Staatsrecht* (n 7) [44, side note 30].

⁶⁷ Biaggini, 'Ausgestaltung und Entwicklungsperspektiven' (n 2) 107, 121.

already adopt some aspects of the initiative and formulate their own counter-proposal.⁶⁸ The latter is often more moderate than the popular initiative itself. Even if the counter-proposal is successful, the initiators have already achieved some of their goals as parts of their concerns are nevertheless introduced. It is estimated, that around one third of popular initiatives do have an indirect effect in subsequent legislation.⁶⁹

Since their introduction in 1891, 320 popular initiatives have obtained the required number of valid signatures.⁷⁰ Although over the last fifty years, votes originating from referendums and popular initiatives have greatly increased,⁷¹ the average amount of popular initiatives has remained stable at a high level over the last twenty years.⁷² Therefore, the problem is not of quantity but of the content of the respective popular initiatives.⁷³ In this context, political parties push forward proposals by means of popular initiatives, which do not necessarily find a majority in the parliament, but however help to shape their political profile. Popular initiatives with such messages help to win electoral votes and find the support of protest-voters. For example the SVP has been using popular initiatives to present itself as a right-wing opposition party since the 1990s. Therefore, frequent topics of popular initiatives are connected to asylum questions and immigration.⁷⁴ Although these topics have been part of initiatives already since the 1970s, it is a new phenomenon that a governing party launches popular initiatives, which are in conflict with international law.⁷⁵ Even if the direct success of

⁶⁸ Art 101 Parliament Act.

⁶⁹ Linder, *Schweizerische Demokratie* (n 1) 287f.

⁷⁰ Schweizerische Bundeskanzlei, 'Zustandegekommene Volksinitiative' (20 May 2016) <www.admin.ch/ch/d/pore/vi/vis_2_2_5_3.html> accessed 21 May 2016.

⁷¹ Linder, *Schweizerische Demokratie* (n 1) 264. Looking at all the popular votes taking place between 1900 and 1993 worldwide at national level, almost half of them took place in Switzerland. Today, popular votes at communal, cantonal and federal level take place several times a year (see Biaggini, 'Ausgestaltung und Entwicklungsperspektiven' (n 2) 107, 108).

⁷² Andreas Gross, 'Zur sanften Renovation einer 125 Jahre alten, ebenso revolutionären wie modernen Errungenschaft' in Georg Kreis (ed), *Reformbedürftige Volksinitiative, Verbesserungsvorschläge und Gegenargumente* (Verlag Neue Zürcher Zeitung, Zürich 2016) 38 (hereafter: Gross, 'Zur sanften Renovation'). From 1991 – 2014 89 votes on popular initiatives took place (see Luca De Carli, 'Diese Kantone werden bei Volksinitiativen schwach' *Tages-Anzeiger* (27 November 2014) <<http://blog.tagesanzeiger.ch/datenblog/index.php/6628/22193>> accessed 21 May 2016).

⁷³ Gross, 'Zur sanften Renovation' (n 72) 39.

⁷⁴ Linder, *Schweizerische Demokratie* (n 1) 288f., 292, 316.

⁷⁵ *ibid* 277, 316. As is for example the successful initiative 'Against the Construction of Minarets' and the 'Initiative on the Expulsion of Foreign Criminals'.

popular initiatives is low on average, it has been increasing since the year 2000. What is more, it is striking that relatively often successful initiatives are related to fear of foreigners and immigrants.⁷⁶

2.4. Political Rights as Individually Enforceable Fundamental Right

In Switzerland, the theory ultimately prevailed that the legal nature of political rights is dualistic.⁷⁷ Thus, on the one hand, the electorate plays a public role and acts collectively as an organ of the state. On the other hand, political rights are also human rights, or more precisely citizens' rights, which accord subjective rights to the individual.⁷⁸

The ICCPR enshrines the individual human right to take part in the conduct of public affairs either directly or through freely chosen representatives, the right of voting and being elected. According to the Covenant, states parties are not obligated to implement direct democratic participatory rights. However, once such rights are guaranteed, citizens must have the right to exercise all political rights provided for in the respective state.⁷⁹

At domestic level, the same scope of protection is granted to the individual according to the Federal Constitution, where political rights are protected as a fundamental right.⁸⁰ The scope of protection includes political rights as laid down in the Federal Constitution as well as in the respective cantons and municipalities.⁸¹ The guarantee of political rights protects as well the freedom of the voters to form an opinion and to give genuine expression to their will.⁸² As already mentioned, the foreign residential population is excluded from political rights.⁸³

Even though the focus of this thesis is on the public role the electorate fulfils when making use of political rights, concerns and recommendations of international

⁷⁶ Luca De Carli, 'Diese Kantone werden bei Volksinitiativen schwach' *Tages-Anzeiger* (27 November 2014) <<http://blog.tagesanzeiger.ch/datenblog/index.php/6628/22193>> accessed 21 May 2016.

⁷⁷ Manfred Nowak, *Politische Grundrechte* (Springer-Verlag, Wien, New York 1988) 157f.

⁷⁸ Tschannen, *Staatsrecht* (n 7) [48, side note 11ff.].

⁷⁹ Art 25 ICCPR. See Nowak, *CCPR Commentary* (n 16) Art 25 CCPR [13].

⁸⁰ Art 34 Federal Constitution.

⁸¹ Art 34 (1) Federal Constitution.

⁸² Art 34 (2) Federal Constitution. See as well Regina Kiener and Walter Kälin, *Grundrechte* (Stämpfli Verlag AG, Bern 2007) 26f.

⁸³ Art 136 (1) Federal Constitution.

monitoring bodies are not only connected to popular initiatives as a direct-democratic constitutional institution, but also to the fundamental right aspect of the voters to form an opinion and to give genuine expression to their will.

As discussed further below (see chapters 4.6. – 4.10.), international monitoring bodies are on the one hand very critical of the right to initiative itself in its established form under domestic law because of its absence of sufficient safeguards. On the other hand, they point to the problem of racist and xenophobic statements by politicians of right-wing populist parties and sections of the media in connection with forthcoming votes. According to them, such statements might amount to hate speech, which have often remained unprosecuted due to the lack of comprehensive anti-racist and anti-discrimination legislation. By the same token, political campaigns launched by the SVP are very critically viewed by international monitoring bodies as according to them they advocate racism and xenophobic ideas. The position of Switzerland, that, among other reasons, the right of freedom of expression is of such great importance, that any interference can hardly ever be justified, is of particular concern to them.

However, in line with the position of the executive, also the Federal Supreme Court⁸⁴ has always been very reluctant to impose explicit rules of behavior when it comes to political campaigns, as according to its case-law such limits would seriously infringe the right of freedom of expression. It rather trusts the electorate to be capable to take decisions, which are reasonable and to thereby remain unaffected by ‘exaggerations’.⁸⁵ Therefore, although there is a constant position that such political campaigns and statements may be contrary to public morals, they are nevertheless seen as in conformity with the Federal Constitution and thus not infringing the right of the voters to form an opinion and to give genuine expression to their will.

Criticism is also expressed when it comes to the distribution of financial means to support political campaigns. Switzerland has no specific regulations on political parties.

⁸⁴ The Federal Supreme Court is the supreme judicial authority of the Confederation (art 188 Federal Constitution).

⁸⁵ Tschannen, *Staatsrecht* (n 7) [52, side note 27], with reference to the judgment of the Federal Supreme Court (BGE 98 Ia 73 E. 3b) regarding a cantonal popular vote.

Furthermore, there is no specific legislation on the financing of political parties and political campaigns and there are no monitoring mechanisms or bodies in place at federal level. The Group of States against Corruption (GRECO) has therefore repeatedly expressed its concerns that Switzerland has remained almost the only state in Europe, where legislation at federal and mostly at all cantonal levels, imposing rules on transparency of political parties and political campaign financing is lacking.⁸⁶ GRECO pointed out that this is clearly incompatible with the respective recommendations of the Council of Europe on common rules against corruption in the funding of political parties and election campaigns.⁸⁷

The ratio of unequal distribution of financial means is in some votes up to 10:1, 20:1 or even more. This led to the discussion whether this unequal distribution is compatible with the freedom of the voters to form an opinion and to give genuine expression to their will.⁸⁸ The issue was also discussed in connection with *Christoph Blocher*, former president of the SVP and billionaire entrepreneur, who has significantly contributed to the success of the party.⁸⁹ However, as just discussed, there is very little political will to make progress in accordance with international recommendations in this matter.

Consequently, political parties hardly face limits when spreading their convictions among the electorate. Moreover, the lack of transparency regarding the financing of political campaigns and the unequal distribution of financial means thereto are additional elements influencing the shaping of opinions and thus the outcome of popular votes.

⁸⁶ See Group of States against Corruption (GRECO) 'Evaluation Report on Switzerland, Transparency of Political Party Funding' (21 October 2011) Greco Eval III Rep (2011) 4E.

⁸⁷ *ibid* [64]. Again in 2015, GRECO noticed that Switzerland 'has made little tangible progress regarding the overall implementation of the recommendations considered not to have been acted upon in the Third Round Compliance Report' and it regretted 'the federal government's decision (...) not to legislate on the transparency of funding of political parties and election campaigns' (see GRECO 'Second Interim Compliance Report on Switzerland' (19 June 2015) Greco RC-III (2015) 6E [21] – [25]).

⁸⁸ Linder, *Schweizerische Demokratie* (n 1) 306.

⁸⁹ See, among others, 'Riesen-Werbesumme für SVP-Wahlpropaganda' *news.ch* (23 October 2007) <www.news.ch/Riesen+Werbesumme+fuer+SVP+Wahlpropaganda/290751/detail.htm> accessed 21 May 2016.

3. Popular Initiatives at Federal Level

In the following chapter popular initiatives launched at federal level will be discussed. Thereby the role the Federal Council and the Federal Assembly play and the problems arising from the existing legal framework will be elaborated. Furthermore, popular initiatives of the last years will be scrutinised, which were addressed by international monitoring bodies because of their problematic content in light of Switzerland's human rights obligations. A short referral to popular initiatives at cantonal level shall clarify why the existing framework thereto does not lead to the same concerns.

3.1. Procedure for Popular Initiatives Requesting a Partial Revision of the Federal Constitution

3.1.1. The Launch of Popular Initiatives

A partial revision of the Federal Constitution can be requested, if 100,000 persons eligible to vote submit the necessary signature lists for a popular initiative within eighteen months at the latest from the date of publication of the initiative's text in the Federal Gazette.⁹⁰ A popular initiative requesting a partial revision may have the form of a general proposal or of a specific draft.⁹¹ The specific draft must contain a precise legal text on how the constitutional provisions shall be amended or of the proposed new constitutional provisions, as the Federal Assembly must submit the proposed text to the vote of the electorate 'as it stands'.⁹² Furthermore, by adopting a popular initiative, the

⁹⁰ Art 139 (1) Federal Constitution and art 71 (1) Federal Act on Political Rights 1976 (Status of 1 November 2015) (PRA).

⁹¹ Art 139 (2) Federal Constitution.

⁹² Art 99 Parliament Act. At federal level, legislative initiatives are not provided. However, proposals for partial amendment of the Federal Constitution may be formulated in such a precise manner, that they rather resemble statutory laws than federal constitutional provisions and are therefore very similar to legislative initiatives, which is tolerated in practice (see Tschannen, *Staatsrecht* (n 7) [49, side note 20]). Whether amended or newly introduced federal constitutional law is directly applicable to the authorities that apply the law (judiciary, administrative authorities), depends on how precise it is. If federal constitutional law is sufficiently precise, enacting legislation is not needed and the respective authorities can directly apply the federal constitutional provisions. In contrast, if federal constitutional amendments are not precise enough, it is the task of the national legislator (the parliament) to draft implementation legislation in line with the spirit of the popular initiative (see Robert Baumann, 'Die Umsetzung völkerrechtswidriger Volksinitiativen' (2010) 5 ZBI 241, 257 (hereafter: Baumann, 'Völkerrechtswidrige Volksinitiativen')). Such federal acts are subject to an optional national referendum (art 141 (1) lit. a Federal Constitution), which then has to be approved by the people (art 141 (1) Federal Constitution). The

legal text comes into force as it was formulated by the initiators.⁹³ As popular initiatives in the form of a general proposal are rarely used,⁹⁴ the respective procedure is not further discussed here.

For a request to totally amend the Federal Constitution, the same amount of signatures as discussed above is needed.⁹⁵ They are very seldom⁹⁶ and moreover not connected to the problematic aspects discussed in the present thesis and therefore not further discussed.

Before the collection of signatures starts, a preliminary examination is undertaken by the Federal Chancellery. This examination only aims to examine whether the signature list corresponds to the form prescribed by law, whether the title of the popular initiative is misleading or contains commercial advertising or personal publicity or whether it gives rise to confusion. These are the only reasons allowing the Federal Chancellery to make corrections to the text.⁹⁷ After the allotted time for collecting signatures has expired, it is also the Federal Chancellery that establishes whether the popular initiative has obtained the required numbers of valid signatures and was thus successful.⁹⁸ The question of validity is however decided later on by the Federal Assembly.⁹⁹

3.1.2. Federal Council Dispatch and Draft Decree

After a popular initiative was formally declared successful by the Federal Chancellery, it is submitted first to the Federal Council. Within one year, the latter has to submit to the Federal Assembly a dispatch (*'Botschaft'*) and the draft of a federal decree providing the considerations of the Federal Assembly.¹⁰⁰ The deadline of one year is

question of direct applicability of federal constitutional law in context with popular initiatives conflicting with international law is of great importance (see BGE 139 I 16, discussed in chapter 3.3.6.).

⁹³ Art 195 Federal Constitution and art 15 (3) PRA. The latter provision also stipulates that adopted popular initiatives come into force on their adoption date, unless the proposal itself does provide otherwise.

⁹⁴ Hangartner and Kley, *Demokratische Rechte* (n 30) [367], [834f.].

⁹⁵ Art. 138 (1) Federal Constitution.

⁹⁶ Since 1874 a total amendment of the Federal Constitution has been requested only two times (see Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [2161]).

⁹⁷ Art 69 (1), (2) PRA.

⁹⁸ Art 72 PRA.

⁹⁹ Art 75 PRA.

¹⁰⁰ Art 97 (1) lit. a Parliament Act.

extended to eighteen months if the Federal Council at the same time submits a draft federal decree on a counter-proposal or a bill which is closely related to the popular initiative.¹⁰¹

The dispatch of the Federal Council includes an assessment to the question of validity of the popular initiative, to the question whether it recommends its approval or rejection and whether a counter-proposal should be drafted.¹⁰² Furthermore, it assesses the consequences for constitutional rights, its compatibility with superior law and its relationship with European law if approved.¹⁰³

3.1.3. The Procedure in the Federal Assembly

Within thirty months after a popular initiative in the form of a specific draft was submitted, the Federal Assembly has to decide on the validity of the popular initiative and whether it recommends its approval or rejection.¹⁰⁴ In most cases, the recommendation is to reject the initiative.¹⁰⁵ Furthermore, the Federal Assembly is allowed to submit its own counter-proposal regarding the same constitutional issue to the initiative.¹⁰⁶

A counter-proposal must have the same objectives as the popular initiative.¹⁰⁷ However, in practice it is often formulated more moderately. Important is that the initiative committee has the right to withdraw their popular initiative until a very late stage of the parliamentary procedure that is until the day on which the Federal Council sets up the date for the popular vote.¹⁰⁸ This gives the initiator the opportunity to force the Federal Assembly to draft a counter-proposal, which includes as many of their ideas as possible. Actually, it is often not the primary aim of the initiators that a popular vote takes place, because already the counter-proposal itself can serve the purpose (see chapter 2.3.2.). Therefore, as soon as the Federal Assembly has approved the counter-proposal,

¹⁰¹ Art 97 (2) Parliament Act.

¹⁰² Tschannen, *Staatsrecht* (n 7) [44, side note 59].

¹⁰³ Art 141 (2) lit. a Parliament Act.

¹⁰⁴ Art 139 (5) Federal Constitution and art 100 Parliament Act.

¹⁰⁵ Tschannen, *Staatsrecht* (n 7) [44, side note 61].

¹⁰⁶ Art 139 (5) Federal Constitution and art 101 (1) Parliament Act.

¹⁰⁷ Hangartner and Kley, *Demokratische Rechte* (n 30) [882].

¹⁰⁸ Art 73 (2) PRA.

initiative committees may decide to withdraw their initiative. In that case, only the counter-proposal is put to the vote of the electorate.¹⁰⁹

If the National Council and the Council of States do not manage to reach an unanimous decision regarding a counter-proposal within the above mentioned deadline, the Federal Council nevertheless has to set out a popular vote.¹¹⁰ Within ten months after the final vote on the federal decree on the counter-proposal took place in the Federal Assembly, or at the latest within ten months after expiry of the statutory period allowed to the parliament to consider the popular vote, the Federal Council must submit the popular initiative to a popular vote.¹¹¹

3.1.4. Decision of the Federal Assembly Regarding the Validity of Popular Initiatives

3.1.4.1. The Requirements of Validity in General

During the parliamentary procedure, it is the parliament's duty and in its power to decide whether a popular initiative is valid.¹¹²

The Federal Constitution contains only three reasons according to which a declaration of invalidity is allowed: In the case where an initiative 'fails to comply with the requirements of consistency of form'¹¹³ or if it does not 'respect the principle of cohesion of subject matter'¹¹⁴ and lastly, where 'it infringes mandatory provisions of international law'¹¹⁵. In these cases, the Federal Assembly shall declare the popular initiative to be invalid in whole or in part.¹¹⁶

¹⁰⁹ Hangartner and Kley, *Demokratische Rechte* (n 30) [898f.].

¹¹⁰ Art 106 Parliament Act.

¹¹¹ Art 75a PRA.

¹¹² Art 173 (1) lit. f Federal Constitution.

¹¹³ Arts 139 (3), 194 (3) Federal Constitution and art 75 (1), (3) PRA.

¹¹⁴ Art 194 (2) Federal Constitution. See as well art 139 (3) Federal Constitution and art 75 (1), (2) PRA.

¹¹⁵ Arts 139 (3), 194 (2) Federal Constitution and art 75 (1) PRA. Even though not explicitly listed in the Federal Constitution, there is another unwritten limit for popular initiatives. This is if an initiative is impossible to implement in practice. Yet, problems to implement an initiative because it will cause a conflict to international law obligations does not fall under impracticability reasons (see Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [464f.]). For another reason not explicitly mentioned in legislation, see chapter 3.3.8.

¹¹⁶ Art 139 (3) Federal Constitution and art 98 (1) Parliament Act.

A decision regarding the (partial) validity of an initiative requires the agreement of both the National Council and the Council of States.¹¹⁷ A decision of invalidity has the form of a ‘simple federal decree’¹¹⁸, which is not subject to review and therefore final.¹¹⁹ The lack of judicial review is considered critically, as the decision on invalidity is taken by a political body.¹²⁰ In 1996, when the total revision of the Federal Constitution was discussed, the Federal Council proposed, among other things, that the Federal Supreme Court should have constitutional jurisdiction in cases where the parliament was unsure whether a popular initiative complied with the requirements of consistency of form, of subject matter or whether it infringed peremptory norms of international law. The Federal Council was of the opinion that the decision regarding the validity of a popular initiative was purely political and therefore saw a need to provide a minimum guarantee of judicial review in disputed cases.¹²¹ Yet, this proposal was rejected by the parliament.¹²²

3.1.4.2. The Requirements of Consistency of Form and of Subject Matter

Consistency of form requires that a popular initiative must be formulated either in the form of a general proposal or in the form of a specific draft.¹²³ As the procedures are different depending on the version chosen, a mixture of the two options is not allowed. However, up until today no popular initiative has been declared invalid at national level based on a lack of consistency of form.¹²⁴

The consistency of subject matter requires that there is an immanent connection between the different parts of the initiative.¹²⁵ This requirement arises from the fundamental right guarantee, which protects the freedom of the voters to form an opinion and to give genuine expression of their will (see chapter 2.4.) and is often

¹¹⁷ Art 156 (2) Federal Constitution.

¹¹⁸ Art 163 (2) Federal Constitution and art 29 (1) Parliament Act.

¹¹⁹ Reich, ‘Direkte Demokratie und völkerrechtliche Verpflichtungen’ (n 65) 979, 995.

¹²⁰ Hangartner and Kley, *Demokratische Rechte* (n 30) [855].

¹²¹ Federal Council Dispatch, ‘Botschaft über eine neue Bundesverfassung’ (20 November 1996) BBl 1997 I 1, 482f. (hereafter: Federal Council Dispatch, ‘Botschaft neue Bundesverfassung’ 1996).

¹²² Council of States, ‘Amtliches Bulletin der Bundesversammlung’ (30 August 1999) AB 1999 IV 606, 609f.

¹²³ See n 91.

¹²⁴ Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [479].

¹²⁵ Art 75 (2) PRA. See as well n 114.

subject to debates in the parliament. Yet, the Federal Assembly acts, not only in this regard but particularly when it comes to the entire question of validity of initiatives, according to the firmly established principle *in dubio pro populo*¹²⁶ and thereby affords direct-democratic popular rights a privileged position.

3.1.4.3. The Requirement That Popular Initiatives Must Not Infringe Peremptory Norms of International Law

3.1.4.3.1. Developments Towards a Limitation Clause in the Federal Constitution

Over decades the relationship between international and constitutional law, more specific between international law and direct-democratic instruments of popular initiatives was not subject to particular discussions at domestic level.¹²⁷ However, even before the right to launch a popular initiative requesting a partial revision of the Federal Constitution in specific terms was introduced in 1891, the question how to solve the problem of conflicting constitutional with international law already existed at that time. Yet, the Federal Constitution of 1874 did not include explicit provisions on how to solve such a conflict.¹²⁸

Even though during the 20th century the opinion prevailed that conflicting international law did not put any limits to the material scope of popular initiatives, there had nonetheless been academic discussions on whether constitutional revisions through direct-democratic instruments should be restricted. However, already in those times no consensus on this issue could be achieved and popular initiatives, which did not violate

¹²⁶ Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [474].

¹²⁷ Keller, Lanter and Fischer, 'Volksinitiativen und Völkerrecht' (n 4) 121, 122. Only during the last decade, when several popular initiatives were launched which had a potential to conflict with international law obligations, heated debates among scholars, politicians and in the public field arose (ibid 122).

¹²⁸ Hangartner and Kley, *Demokratische Rechte* (n 30) [531]. Interestingly enough, the Federal Constitution of 1872 included, in regard to legislative initiatives, a provision saying that 'such an initiative must not conflict with contractual obligations of the Confederation'. Yet, this Federal Constitution was discarded at the end and the Federal Constitution of 1874 did not include legislative initiatives any more. When 1891 popular initiatives requesting partial revisions of the Federal Constitution were introduced, this limiting provision was not included (see ibid [532]).

the requirements of consistency of form or of subject matter, were put to the vote of the people (and the cantons).¹²⁹

In connection with a popular initiative in 1954 (*‘Volksbegehren zum Schutze der Stromlandschaft Rheinfall—Rheinau’*), which was in conflict with a bilateral international treaty, the Federal Council gave a firm commitment in its dispatch in favour of direct-democratic instruments by emphasising the conviction that the electorate would not support populist proposals. It therefore rejected the idea of introducing any material limits to constitutional revisions.¹³⁰ This conviction of voters taking reasonable decisions is firmly embedded in the Swiss political system and shapes the discussion up until today.¹³¹ This is why the Federal Assembly has been very reluctant to declare popular initiatives invalid. So far, there exist only four cases where such a decision has been taken and only one of them (*‘Eidgenössische Volksinitiative ‘für eine vernünftige Asylpolitik’*’¹³²) was rejected because it conflicted with international law.¹³³

The last-named initiative violated, among others, the principle of *non-refoulement*, the cornerstone of asylum and international refugee law. This had the consequence, that the Federal Council in its dispatch of 1994 did not uphold its position any longer, that international law obligations never impose limits to popular initiatives. With reference to the recent doctrine of that time, it concluded that ‘at least’ peremptory norms of international law must not be violated by constitutional law and that popular initiatives violating such norms had to be declared invalid. Furthermore, it concluded that the principle of *non-refoulement* was pursuant to the unanimous opinion of the doctrine and the jurisprudence a peremptory norm of international law, which was why the Federal

¹²⁹ Reich, ‘Direkte Demokratie und völkerrechtliche Verpflichtungen’ (n 65) 979, 1000f.

¹³⁰ Federal Council, ‘Bericht des Bundesrates an die Bundesversammlung über das Volksbegehren zum Schutze der Stromlandschaft Rheinfall—Rheinau’ (4 May 1954) BBl 1954 I 721, 750f.

¹³¹ Linder, *Schweizerische Demokratie* (n 1) 276f.

¹³² Schweizerische Bundeskanzlei, ‘Eidgenössische Volksinitiative „für eine vernünftige Asylpolitik“’ (31 May 2016) <www.admin.ch/ch/d/pore/vi/vis223t.html> accessed 1 June 2016. The initiative was launched by the Swiss Democrats, a nationalist right-wing populist party.

¹³³ Keller, Lanter and Fischer, ‘Volksinitiativen und Völkerrecht’ (n 4) 121, 126. See as well Schweizerische Bundeskanzlei, ‘Ungültig erklärte Volksinitiativen’ (31 May 2016) <www.admin.ch/ch/d/pore/vi/vis_2_2_5_6.html> accessed 1 June 2016.

Council recommended to declare the initiative invalid.¹³⁴ The Federal Assembly followed that proposal.¹³⁵ Along with the total revision of the Federal Constitution in 1999, this practice was included in the Federal Constitution by saying in respect to popular initiatives requesting a partial revision of the Constitution in specific terms, that ‘if the initiative (...) infringes mandatory provisions of international law, the Federal Assembly shall declare it to be invalid in whole or in part’¹³⁶. Yet, the debates in the parliament made clear, that the implementation of limits going beyond peremptory norms of international law were not supported.¹³⁷

As a consequence, popular initiatives conflicting with international law obligations that are not qualified as peremptory norms of international law, are not declared invalid and are put to the vote of the people (and the cantons). The same holds true for initiatives infringing national law as for example fundamental guarantees enshrined in the Federal Constitution.¹³⁸ Hence, apart from the limits discussed previously, no other material limits are opposed to the right to launch a popular initiative.¹³⁹ The belief that such limits are not needed as the electorate would not give in to the temptation of taking disgraceful decisions¹⁴⁰ has been damped over the last years where popular initiatives conflicting particularly with international human rights law were launched and some even adopted by popular vote.¹⁴¹

The solution laid down in the current Federal Constitution cannot hide the fact that international obligations nevertheless must be respected by Switzerland. Yet, apart from *ius cogens*, where conflicting domestic legislation is null and void, other conflicts between international law obligations and domestic legislation do not have the same

¹³⁴ Federal Council Dispatch, ‘Botschaft über die Volksinitiativen «für eine vernünftige Asylpolitik» und «gegen die illegale Einwanderung»’ (22 June 1994) BBl 1994 III 1486, 1495, 1498f.

¹³⁵ Federal Assembly, ‘Bundesbeschluss über die Volksinitiative «für eine vernünftige Asylpolitik»’ (14 March 1996) BBl 1996 I 1355f.

¹³⁶ Art 139 (3) Federal Constitution. See as well art 194 (2) Federal Constitution.

¹³⁷ Hangartner and Kley, *Demokratische Rechte* (n 30) [536]. Unlike other countries, the Federal Constitution does not include unchangeable provisions, so called ‘Ewigkeitsklauseln’ (see *ibid* [485]).

¹³⁸ Kiener and Küsi, ‘Bedeutungswandel des Rechtsstaats’ (n 43) 237, 247.

¹³⁹ Swiss Centre of Expertise in Human Rights (SCHR), *Umsetzung der Menschenrechte in der Schweiz, Eine Bestandesaufnahme im Bereich Institutionelle Fragen* (Editions Weblaw, Bern 2013) [270] (hereafter: SCHR, *Umsetzung der Menschenrechte*).

¹⁴⁰ Biaggini, ‘Ausgestaltung und Entwicklungsperspektiven’ (n 2) 107, 118.

¹⁴¹ Linder, *Schweizerische Demokratie* (n 1) 276f.

consequence. In the latter case, even though the state must still not violate international law obligations, it nevertheless might do so and as a consequence becomes responsible under international law.¹⁴²

Debates among scholars but also among politicians regarding the question if and what further limitations to popular initiatives are needed to mitigate conflicts with international law obligations as well as with core elements of the constitutional state and fundamental rights have arisen in the last years. However, it is very unclear, what restrictions, if any, to popular initiatives will ever be put in place (see chapter 5.1.).

3.1.4.3.2. Scope of Application

The newly introduced constitutional provision regarding peremptory norms of international law has provoked discussions in the doctrine regarding its interpretation.¹⁴³ There is no common consensus whether or not it refers to the term '*ius cogens*' under international law and if yes, which guarantees have to be subsumed thereto.¹⁴⁴ Yet, approving a referral to *ius cogens* has the consequence that further limits to popular initiatives going beyond those guarantees need a constitutional revision and thus the approval of both the people and the cantons.¹⁴⁵ Other scholars reject this interpretation. They hold the opinion that the newly introduced constitutional provision is autonomous, therefore not congruent with the narrow concept of *ius cogens*¹⁴⁶ and thus allowing a broader scope of application setting limits to popular initiatives. Following this second position, it is nevertheless unclear, whether the Federal Council and the Federal

¹⁴² Baumann, 'Völkerrechtswidrige Volksinitiativen' (n 92) 241, 261. Consequences under international law may include diplomatic interventions, restoration of a status in line with international law, denunciation of the respective international treaties and others (see *ibid* 261). See as well chapter 4.2.

¹⁴³ Keller, Lanter and Fischer, 'Volksinitiativen und Völkerrecht' (n 4) 121, 130.

¹⁴⁴ *ibid* 121, 130ff.

¹⁴⁵ *ibid* 121, 130ff.

¹⁴⁶ It remains disputed among states and scholars, which kind of behaviour should be subsumed under the term *ius cogens* and the International Court of Justice (ICJ) shows great reluctance to give guidance thereto (see Jan Klabbers, *International Law* (Cambridge University Press, Cambridge 2013) 60f. (hereafter: Klabbers, *International Law*)).

Assembly are allowed to extend the limits of popular initiatives by applying their own interpretation without a revision of the Federal Constitution.¹⁴⁷

Considering the drafting materials, the majority of the doctrine and the practice, an interpretation that the constitutional provision refers to the term *ius cogens* under international law apparently prevails.¹⁴⁸ Despite this position, the Federal Council seems to subsume more acts under the narrow concept of *ius cogens* as generally acknowledged at international level.¹⁴⁹ This is why there would be more leeway to declare popular initiatives invalid, which however in practice is hardly ever done.¹⁵⁰

3.2. Popular Initiatives at Cantonal Level

As a side note it is worth referring to the matter of cantonal popular initiatives, where both the examination of validity and legal protection are very different to the one at federal level.

As federal law takes precedence over any conflicting provision of cantonal law, cantonal authorities, in most cases the cantonal parliaments, are allowed to examine whether cantonal popular initiatives comply with higher-ranking federal law.¹⁵¹ Therefore, additionally to the reasons to declare a popular initiative invalid at national level as previously discussed, cantonal popular initiatives can be declared invalid and are thus not put to a vote of the people, if they infringe, among others, fundamental

¹⁴⁷ See the whole discussion with references to other scholars: Keller, Lanter and Fischer, 'Volksinitiativen und Völkerrecht' (n 4) 121, 130ff. See as well Jörg Künzli, 'Demokratische Partizipationsrechte bei neuen Formen der Begründung und bei der Auflösung völkerrechtlicher Verpflichtungen' (2009) I ZSR 47, 64ff (hereafter: Künzli, 'Demokratische Partizipationsrechte').

¹⁴⁸ Keller, Lanter and Fischer, 'Volksinitiativen und Völkerrecht' (n 4) 121, 136.

¹⁴⁹ The Federal Council considers the following provisions as peremptory norms of international law that put limits to popular initiatives: sovereign equality of states, prohibition of the use of force, prohibition of genocide (Convention on the Prevention and Punishment of the Crime of Genocide), fundamental principles of international humanitarian law (art 3 of the four Geneva Conventions of 1949), principle of *non-refoulement* (art 33 of the UN Convention relating to the status of refugees), right to life (art 2 (1) ECHR, art 6 (1) ICCPR), prohibition of torture (art 3 ECHR and art 7 ICCPR), prohibition of slavery, servitude and forced labour (art 4 (1), (2) ECHR, art 8 (1), (2) ICCPR), *nulla poena sine lege* (art 7 ECHR and art 15 ICCPR), *ne bis in idem* (art 4 Protocol 7 ECHR and art 14 (7) ICCPR), freedom of thought, conscience and religion (art 18 ICCPR - only 'internal dimension' of freedom of religion), prohibition of imprisonment on the grounds of inability to fulfil a contractual obligation (art 11 ICCPR), the right to recognition everywhere as a person before the law (art 16 ICCPR) (see Federal Council, 'Das Verhältnis von Völkerrecht und Landesrecht' 2010 (n 13) 2263, 2314f.).

¹⁵⁰ See chapter 3.1.4.3.1.

¹⁵¹ Art 34 in conjunction with art 49 Federal Constitution.

rights of the Federal Constitution or international human rights obligations.¹⁵² Such a cantonal decision of invalidity is open to judicial review up to the Federal Supreme Court.¹⁵³

Furthermore, when a cantonal popular initiative is adopted and is included in cantonal statutory law, the Federal Supreme Court as final instance is allowed to repeal cantonal legislation if it violates federal or international law (abstract judicial review).¹⁵⁴ Moreover, cantonal acts are also eligible to concrete judicial review.¹⁵⁵ Cantonal constitutional provisions, which were implemented through popular initiatives, are under certain circumstances likewise eligible to concrete judicial review.¹⁵⁶

This legal framework has allowed the Federal Supreme Court to develop a rich jurisprudence regarding the question of validity of cantonal popular initiatives.¹⁵⁷ However, even though the question of validity concerns complex legal questions, it is at federal level exclusively the parliament that decides on that matter. In 1996 a proposal of the Federal Council to involve the Federal Supreme Court in disputed cases was rejected by the parliament (see chapter 3.1.4.1.)

3.3. Problematic Popular Initiatives in the Light of Human Rights Obligations

3.3.1. General Remarks

As previously shown, the fact that popular initiatives may be in conflict with international law obligations other than *ius cogens* or with constitutional law, is somehow accepted as there exists the belief that the electorate will act reasonably and reject such proposals.

¹⁵² Andreas Auer, 'Dürfen eidgenössische Volksinitiativen Grundrechte verletzen? Überlegungen zur Grundsatzfrage und zum Verfahren' in Georg Kreis (ed), *Reformbedürftige Volksinitiative, Verbesserungsvorschläge und Gegenargumente* (Verlag Neue Zürcher Zeitung, Zürich 2016) 63 (hereafter: Auer, 'Grundrechte').

¹⁵³ Bundesgesetz über das Bundesgericht 2005 (Status as of 1 January 2016) (BGG) art 82 lit. c.

¹⁵⁴ Art 82 lit. b BGG, art 189 (1) lit. a, b Federal Constitution.

¹⁵⁵ Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [777].

¹⁵⁶ Arts 51 (2) and 172 (2) Federal Constitution (see Auer, 'Grundrechte' (n 152) 63f.).

¹⁵⁷ Michael Leupold and Michel Besson, 'Gefährden Volksinitiativen die «gute Ordnung» der Verfassung?' (2011) 3 LEGES 389, 394.

Already in the past, several problematic popular initiatives were successfully launched and in the end nevertheless rejected by the electorate. However, in recent years the launch of such initiatives has been on the rise and therefore as well the potential for such conflicts. This trend can ultimately be ascribed to two key factors. One is due to the growing number of international law obligations in the field of human rights. The other relates to the fact that an increasing number of popular initiatives is launched by political parties that form part of the government and of the parliament and who therefore are much more influential to the outcome of such an initiative (see chapter 2.3.2.).¹⁵⁸ The initiators can often be allocated to populist movements. Furthermore, the immanent pattern of these proposals frequently is that they aim at provoking external fears among the electorate towards specific minority groups (foreigners, religious minorities like Muslims, criminals) or towards elitist groups like the ‘*classe politique*’ that allegedly does not care about the concerns of ‘the man on the street’. More and more popular initiatives attack institutions of the constitutional state like the rule of law and separation of powers and moreover target ‘foreign judges’¹⁵⁹, which include both the competence of the ECtHR and the Federal Supreme Court. Additionally, the message is given that international human rights obligations are not legally binding.¹⁶⁰ When looking at political campaigns accompanied by popular initiatives, the question comes to mind whether it is even questioned that all human beings are in fact attributed human rights.¹⁶¹

¹⁵⁸ Biaggini, ‘Schweizerische direkte Demokratie und Völkerrecht’ (n 24) 325, 331. The author refers to popular initiatives launched in the 1970s, which had the aim to restrict immigration.

¹⁵⁹ The fear of ‘foreign judges’ relates to the history of the Swiss Confederation and often forms part of historical myths brought forward frequently by populist parties (see Pedretti, *Vom Verbot von gleichgeschlechtlichen Ehen und Minaretten* (n 13) 29).

¹⁶⁰ Kiener and Küsi, ‘Bedeutungswandel des Rechtsstaats’ (n 43) 237, 244f. See as well the analysis done by Ramona Pedretti: Pedretti, *Vom Verbot von gleichgeschlechtlichen Ehen und Minaretten* (n 13) 18ff.

¹⁶¹ See some of the disturbing political posters used in political campaigns by the SVP: ‘Minarett-Initiative, Uno-Rüffel wegen SVP-Plakaten’ *Blick* (13 October 2009) <www.blick.ch/news/politik/minarett-initiative-uno-rueffel-wegen-svp-plakaten-id33665.html> accessed 3 June 2016; ‘Wegen «Schlitzer-Plakat», SVP-Initiative soll für ungültig erklärt werden’ *Blick* (30 January 2015) <www.blick.ch/news/politik/wegen-schlitzer-plakat-svp-initiative-soll-fuer-ungueltig-erklaert-werden-id3445869.html> accessed 3 June 2016; ‘SVP revitalisiert Plakat aus dem Jahre 2004’ *Neue Zürcher Zeitung* (15 April 2008) <www.nzz.ch/svp-revitalisiert-plakat-aus-dem-jahre-2004--1.710703> accessed 3 June 2016.

Consequently, popular initiatives as described above do not carry the original intention anymore which has been that certain concerns – often progressive ones - can be added to and shape the political debate by stakeholders with little or no representative power in the parliament or government. Popular initiatives in that context are used as a mere tool of opposition, aiming at defeating or even abrogating human und fundamental rights, that had been won over centuries of struggle. Most importantly, in order to reach political and strategic goals, some political parties expressly question human and fundamental rights of certain groups usually already marginalized in society.¹⁶² Or, as expressed pointedly:

‘(...) heute sind wir, so scheint es, mit gefährlichen Missbräuchen direkt-demokratischer Instrumente konfrontiert. (...) Marginale Bevölkerungsgruppen werden von Parteistrategen und ihren Gefolgsleuten ins Visier genommen, und weitere können folgen. Morgen vielleicht wieder die Juden? Die Türken? Die Zigeuner? Die «Farbigen»? Behinderte? Geisteskranke und andere «Abnormale»?’¹⁶³

Even though the problems arising from such popular initiatives are seen as ‘acute’¹⁶⁴ and increasing, as discussed at the beginning of this chapter, the concern is still not one of quantity.¹⁶⁵ Yet, in the following chapters those problematic popular initiatives of the last fifteen years will be discussed, which have been in the focus of debates in light of their potential incompatibility with human rights obligations and to which also international monitoring bodies have expressed their views (see chapters 4.6. – 4.8.3.).

3.3.2. Initiative ‘Lifelong Detention for Extremely Dangerous, Non-Treatable Violent and Sexual Offenders’ (‘*Verwahrungsinitiative*’)

This popular initiative goes back to a crime in 1993 that triggered particular outrage in Switzerland. A man who had been sentenced to lifelong imprisonment for, among others, double murder and rape in more than ten cases, murdered a young woman when

¹⁶² Pedretti, *Vom Verbot von gleichgeschlechtlichen Ehen und Minaretten* (n 13) 18ff.

¹⁶³ Bernhard Dutoit and others, ‘Volksinitiativen: Gefahren des Missbrauchs’ (2007) I ZSR 429f.

¹⁶⁴ Keller, Lanter and Fischer, ‘Volksinitiativen und Völkerrecht’ (n 4) 121, 137.

¹⁶⁵ Gross, ‘Zur sanften Renovation’ (n 72) 38.

he was granted prison leave for two days.¹⁶⁶ This crime led to this initiative, according to which lifelong incarceration must be ordered for dangerous or sexual offenders considered unresponsive to therapy. Early release and temporary leave are not allowed. Only if new scientific findings prove that an offender can be cured and therefore no longer represents a danger to the public, new reports can be drawn up.¹⁶⁷

In the opinion of the Federal Council the initiative did fulfil the requirements of validity. Regarding the question of compatibility with international human rights law, the Federal Council stated that although the proposal interfered with guarantees laid down in the ECHR and the ICCPR, it did not violate *ius cogens* as interpreted by the Federal Council. And because the proposed constitutional provision was not directly-applicable, the Federal Council indeed saw a need to interpret the amendment broadly in order to draft statutory law in accordance with human rights law, which however seemed within the realm of possibility. That is why it considered the initiative to be valid, although it recommended its rejection without wanting to draft a counter proposal.¹⁶⁸ The Federal Assembly shared this evaluation.¹⁶⁹ Despite this recommendation, the people and the cantons adopted the initiative on 8 February 2004.¹⁷⁰ On the same day, the amended constitutional provision thereto came into force.¹⁷¹

It lasted another three years until the Council of States and the National Council agreed upon its implementation in statutory law. As the deadline for an optional referendum expired unused, the amendments to the Criminal Code came into force on 1 August

¹⁶⁶ SRF, 'Heute vor 22 Jahren: Mord an Pasquale Brumann' (30 October 2015) <www.srf.ch/sendungen/tageschronik/heute-vor-22-jahren-mord-an-pasquale-brumann> accessed 4 June 2016.

¹⁶⁷ Schweizerische Bundeskanzlei, 'Eidgenössische Volksinitiative 'Lebenslange Verwahrung für nicht therapierbare, extrem gefährliche Sexual- und Gewaltstraftäter'' (31 May 2016) <www.admin.ch/ch/d/pore/vi/vis294t.html> accessed 4 June 2016.

¹⁶⁸ Federal Council Dispatch, 'Botschaft zur Volksinitiative «Lebenslange Verwahrung für nicht therapierbare, extrem gefährliche Sexual- und Gewaltstraftäter»' (4 April 2001) BBl 2001 3433f., 3438f., 3464.

¹⁶⁹ Federal Assembly, 'Bundesbeschluss über die Volksinitiative «Lebenslange Verwahrung für nicht therapierbare, extrem gefährliche Sexual- und Gewaltstraftäter»' (20 June 2003) BBl 2003 4434f.

¹⁷⁰ Schweizerische Bundeskanzlei, 'Volksabstimmung vom 08.02.2004' (31 May 2016) <www.admin.ch/ch/d/pore/va/20040208/index.html> accessed 4 June 2016.

¹⁷¹ Art. 123a Federal Constitution.

2008.¹⁷² According to the amendments thereto, a review of lifelong incarceration remains possible, although it requires a complex multistep procedure. Hence, a review can only be initiated, if a commission of experts comes to the conclusion that new scientific evidence exists that offenders are treatable in a way as not to pose a danger to the public any more. Therefore, lifelong incarceration is not subject to a review on a regular basis any longer. The legislator is of the opinion, that the amendments to the Criminal Code are both compatible with the new constitutional provision as well as with human rights law, particularly the ECHR.¹⁷³ Opinions are divided whether this holds true.¹⁷⁴

However, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) strongly criticised the implementation law and expressed concerns that it might lead to decisions not compatible with human rights law.¹⁷⁵

In a court ruling of 2013¹⁷⁶, the Federal Supreme Court lifted an indefinite incarceration order that had been based on the amended Criminal Code. In the Court's opinion, prognoses that an offender would not be eligible for therapy for a period of twenty years did not justify the assumption that an offender was 'permanently untreatable' as required by the Criminal Code. By referring to the legislative materials, the Federal

¹⁷² Federal Assembly, 'Schweizerisches Strafgesetzbuch (Lebenslängliche Verwahrung extrem gefährlicher Straftäter), Änderung vom 21. Dezember 2007', AS 2008 2961ff.

¹⁷³ Bundesamt für Justiz, Schweizerische Bundeskanzlei, 'Ausführungsbestimmungen zur lebenslangen Verwahrung' (18 June 2008) <www.bj.admin.ch/bj/de/home/aktuell/news/2008/ref_2008-06-18.html> accessed 5 June 2016. See as well Federal Council Dispatch, 'Botschaft zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter)' (23 November 2005) BBl 2006 889ff.

¹⁷⁴ Some scholars share the Federal Council's position. See, among others, Reich, 'Direkte Demokratie und völkerrechtliche Verpflichtungen' (n 65) 979, 1004; Kiener and Küsi, 'Bedeutungswandel des Rechtsstaats' (n 43) 237, 238. The association Humanrights.ch/MERS disagreed. In its opinion the implementation legislation is not in line with international human rights law. See Informationsplattform humanrights.ch, 'Zur Umsetzung der Verwahrungsinitiative' (19 December 2013) <www.humanrights.ch/de/menschenrechte-schweiz/inneres/strafen/freiheitsentzug/bge-140-iv-1-2013-umsetzung-verwahrungsinitiative> accessed 5 June 2016.

¹⁷⁵ CPT, 'Rapport au Conseil fédéral suisse relatif à la visite effectuée en Suisse par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 10 au 20 octobre 2011' (CPT/Inf (2012) 26) [99], [118].

¹⁷⁶ Bundesgerichtsentscheid (BGE) 140 IV 1.

Supreme Court established that such prognoses would hardly ever be made by professionals and that thus the new legislative provisions would rarely or never be applied. Yet, in another case that was widely discussed in the public, a first instance court recently ordered lifelong incarceration.¹⁷⁷ It is very probable, that there will be a future ruling on the case by the Federal Supreme Court and - depending on the outcome - also the ECtHR. It is likely, that according to the jurisprudence of the Federal Supreme Court, lifelong incarceration will never be ordered and to this end, the constitutional provision remains theoretical.

Unlike the popular initiatives discussed in the following, the initiative ‘Lifelong Detention for Extremely Dangerous, Non-Treatable Violent and Sexual Offenders’ is one of the rare examples, where the initiators do not belong to political parties that are integrated in the government or the parliament. Therefore, it better fits into the original meaning of the instrument of popular initiatives, even though the initiator’s proposal is not compatible with human rights obligations.

3.3.3. Initiative ‘For Democratic Naturalisation Procedures’ (*‘Für demokratische Einbürgerungen’*)

This popular initiative was put forward by the SVP in 2004. It was a reaction to the jurisprudence of the Federal Supreme Court of 2003, where the practice of some Swiss communities to subject citizenship applications to a popular vote taken at the ballot box were declared unconstitutional.¹⁷⁸ The Court had argued, that such decisions were not supported by any reasoning and therefore contrary to the right to be heard in conjunction with the right not to be discriminated against. In another ruling, the Federal Supreme Court had reiterated the same arguments and declared a cantonal popular initiative initiated by the SVP invalid, which aimed to introduce that citizenship applications were subjected to a popular vote taken at the ballot box.¹⁷⁹

¹⁷⁷ Andrea Kucera, ‘Urteil im Fall Marie, Claude D. will in Rekurs gehen’ *Neue Zürcher Zeitung* (Renens, 24 March 2016) <www.nzz.ch/panorama/ungluecksfaelle-und-verbrechen/fall-marie-urteil-ld.9718> accessed 5 June 2016.

¹⁷⁸ BGE 129 I 217.

¹⁷⁹ BGE 129 I 232.

With its popular initiative, the SVP aimed to overturn the jurisprudence of the Federal Supreme Court by popular vote. In the political campaign political posters were used showing hands of different colours grabbing for Swiss passports, carrying the heading ‘Stop Mass Naturalisations’¹⁸⁰. The initiative wanted to introduce a constitutional provision, according to which local communities could autonomously decide on their naturalisation procedure. Particularly popular votes taken at the ballot box would have been lawful again. Furthermore, such decisions should have been final and not eligible to any (judicial) review.¹⁸¹

Even though the Federal Council was of the opinion that this popular initiative infringed important human rights conventions, particularly the ECHR, the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)¹⁸², it nevertheless suggested not to declare it invalid¹⁸³, as it was in its opinion not contrary to peremptory norms of international law.¹⁸⁴ The Federal Council stated:

‘(...) diesbezüglich hat sich der Bundesrat (...) ausdrücklich dagegen ausgesprochen, dass Normen aus völkerrechtlichen Verpflichtungen, selbst wenn sie für die Schweiz von so überragender Bedeutung sind, dass deren Aufkündigung nicht in Frage kommt, mit zwingendem Völkerrecht gleichgestellt werden. Dies führt dazu, dass trotz der Unkündbarkeit des Pakts II und trotz des hohen Ranges der EMRK in der Hierarchie der Übereinkommen, beide Abkommen kein zwingendes Völkerrecht im Sinne von Artikel 139 (alt) Absatz 3 BV darstellen.’¹⁸⁵

The position of the Federal Council that popular initiatives should not be declared invalid as long as they ‘only’ violated non-peremptory norms of international law has

¹⁸⁰ See n 161.

¹⁸¹ Schweizerische Bundeskanzlei, ‘Eidgenössische Volksinitiative «für demokratische Einbürgerungen»’ (5 June 2016) <www.admin.ch/ch/d/pore/vi/vis320t.html> accessed 5 June 2016.

¹⁸² ICERD (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

¹⁸³ Other than the above mentioned cantonal popular initiative of similar content, that was declared invalid by the Federal Supreme Court due to the existing legal framework (see chapter 3.2.).

¹⁸⁴ Federal Council Dispatch, ‘Botschaft zur Eidgenössischen Volksinitiative «für demokratische Einbürgerungen»’ (25 October 2006) BBl 2006 8953, 8958, 8962 (hereafter: Federal Council Dispatch, ‘Botschaft demokratische Einbürgerungen’ 2006).

¹⁸⁵ *ibid* 8962.

constantly been criticised by several scholars.¹⁸⁶ The argument was brought forward, that judicial legal protection from fundamental and human rights violations was a fundamental normative principle of a constitutional state bound by the rule of law. Therefore, the Federal Council should interpret the term '*ius cogens*' autonomously and broader by subsuming the just mentioned fundamental guarantees under that term and as a result declare the initiative invalid.¹⁸⁷ Yet, up to now the Federal Council has not followed this interpretation. Therefore, it was of the opinion that the popular initiative 'For Democratic Naturalisation Procedures' was valid. However, it recommended its rejection.¹⁸⁸ The Federal Assembly came to the same conclusion.¹⁸⁹ Even though no counter-proposal¹⁹⁰ was submitted on its own, an indirect one was.¹⁹¹ The electorate followed that recommendation and both the people and the cantons rejected the initiative on 1 June 2008.¹⁹²

3.3.4. Initiative 'Against the Construction of Minarets' ('*Minarettinitiative*')

In May 2007, a group of right-wing politicians, mainly members of the SVP, launched the popular initiative aiming at banning the construction of minarets in Switzerland.¹⁹³ Right from the beginning, the initiative was widely debated and strongly criticised in Switzerland. The Federal Commission against Racism stated that the initiative slandered

¹⁸⁶ See, among others, Giuseppe Nays, 'Soll der Bund Volksinitiativen ungültig erklären, wenn sie gegen nicht zwingendes Völkerrecht verstossen?' (2007) 3 Plädoyer.

¹⁸⁷ *ibid.*

¹⁸⁸ Federal Council Dispatch, 'Botschaft demokratische Einbürgerungen' 2006 (n 184) 8953, 8956.

¹⁸⁹ Federal Assembly, 'Bundesbeschluss über die Eidgenössische Volksinitiative «für demokratische Einbürgerungen»' (5 October 2007) BBl 2007 6947f.

¹⁹⁰ See chapter 3.1.3., n 106.

¹⁹¹ Indirect counter-proposals do not necessarily have to be submitted to a popular vote at the same time as the popular initiative. Furthermore, they can have different forms and depending on that, they follow different procedures (see Hangartner and Kley, *Demokratische Rechte* (n 30) [888ff.]). The indirect counter-proposal just mentioned was already accepted in the Federal Assembly in December 2007, leading to a revision of the Federal Act on the Acquisition and Loss of Swiss Citizenship 1952 (Status as of 1 January 2013) (Swiss Citizenship Act) that came into force on 1 January 2009 (see Informationsplattform humanrights.ch, 'Änderung des Bürgerrechtsgesetzes in Kraft' (5 January 2009) <www.humanrights.ch/de/menschenrechte-schweiz/inneres/auslaender/buergerrechtspolitik/einbuengerungen-svp-initiative-chancenlos> accessed 6 June 2016).

¹⁹² Schweizerische Bundeskanzlei, 'Volksabstimmung vom 01.06.2008' (5 June 2016) <www.admin.ch/ch/d/pore/va/20080601/det532.html> accessed 5 June 2016.

¹⁹³ See the text of the initiative here: Schweizerische Bundeskanzlei, 'Eidgenössische Volksinitiative «Gegen den Bau von Minaretten»' (7 June 2016) <www.admin.ch/ch/d/pore/vi/vis353t.html> accessed 7 June 2016.

the Muslim community, violated the freedom of religion and the right not to be discriminated against. Several Federal Councillors publicly condemned the initiative. The former judge of the Federal Supreme Court, *Giusep Nay*, requested the Federal Assembly to declare it invalid and thus not to submit it to a popular vote. Religious leaders from Protestant and Catholic churches condemned the initiative as well. At that time, around 300,000 Muslims lived in Switzerland. Only two mosques with minarets existed, yet some new projects were pending.¹⁹⁴

The initiative committee was of the opinion that minarets did not have a religious character. Thus, a ban would not infringe freedom of religion. Moreover, they took the view that minarets were a symbol of a political and religious claim to power and therefore a ban needed.¹⁹⁵ This position was visualised with political posters accompanying the political campaign, which were highly controversial in Switzerland.¹⁹⁶ It was unclear whether they violated anti-racist legislation. In its detailed response, the Federal Commission against Racism came to the conclusion, that according to the current jurisprudence regarding the anti-racist legislation under the Criminal Code¹⁹⁷, such posters were not prohibited. Furthermore, the Commission added, that a non-discrimination framework under civil law was still lacking in Switzerland.¹⁹⁸ Therefore, the current legislative framework would not be effective enough to prevent such posters. Yet, it emphasised that even if freedom of expression in political contexts was of high value, the protection of religious minorities and the protection of society as a whole from incitement to hatred has nevertheless to have limits. And if not by legally enforceable means, then at least by state policy factors.¹⁹⁹ Thus, taking into account those reasoning, several cities followed this request and

¹⁹⁴ See for the whole discussion n 9.

¹⁹⁵ See a summary of the arguments of the initiators here: Federal Council Dispatch, 'Botschaft zur Volksinitiative «Gegen den Bau von Minaretten»' (27 August 2008) BBl 2008 7603f. (hereafter: Federal Council Dispatch, 'Botschaft «Gegen den Bau von Minaretten»' 2008).

¹⁹⁶ See a link to one of the political posters in n 161.

¹⁹⁷ Swiss Criminal Code 1937 (Status as of 1 January 2016) art 261bis.

¹⁹⁸ See some information in the chapter 4.6.2.

¹⁹⁹ Federal Commission against Racism, 'Zum Aushang von Plakaten der Initiative «Gegen den Bau von Minaretten» im öffentlichen Raum' (6 October 2009)

<www.ekr.admin.ch/pdf/091006_StellungnahmeEKR_PlakateMinarettinitiativea4cf.pdf> accessed 6 June 2016.

prohibited the suspension of such posters.²⁰⁰ The Human Rights Committee's (HR Committee) concern regarded not only the initiative itself but also the 'discriminatory advertising campaign which accompanies it'²⁰¹.

The Federal Council was strongly against this popular initiative and listed very clearly all the factors speaking against it. From a legal point of view, it came to the conclusion, that in case of an approval, the newly implemented constitutional provision would violate fundamental rights laid down in the Federal Constitution, in the ICCPR as well as in the ECHR.²⁰² However, in line with its previous position, it came to the conclusion that the initiative did not violate peremptory norms of international law and was therefore valid. It recommended not to submit a counter-proposal and to reject the initiative.²⁰³ The Federal Assembly followed this position.²⁰⁴ Some scholars backed this decision saying that the practice and doctrine did not allow not to submit the initiative to a popular vote.²⁰⁵ Despite the clear statements of the government and the parliament, the people and the cantons adopted the initiative on 29 November 2009²⁰⁶ and on the same day the new constitutional provision prohibiting the construction of minarets came into force.²⁰⁷

Switzerland was strongly criticised by international monitoring bodies for implementing such a discriminatory provision in its Federal Constitution.²⁰⁸ Up until today it is unclear whether it is directly applicable or if it only contains a mandate to the cantonal authorities to amend their construction and planning legislation in accordance with the newly introduced constitutional provision. In the latter case, it is uncertain, whether

²⁰⁰ 'Plakat zur Anti-Minarett-Initiative scheidet die Geister' *Neue Zürcher Zeitung* (9 October 2009) <www.nzz.ch/stadt-zuerich-laesst-aushang-zu---verurteilt-aber-plakat-1.3821002> accessed 6 June 2016.

²⁰¹ HR Committee 'Concluding observations on the third periodic report of Switzerland' (3 November 2009) UN Doc CCPR/C/CHE/CO/3 [8] (hereafter: HR Committee 'Concluding observations' 2009), see chapter 4.6.1.

²⁰² Federal Council Dispatch, 'Botschaft «Gegen den Bau von Minaretten»' 2008 (n 195) 7603f., 7638, 7640ff.

²⁰³ *ibid* 7603, 7605, 7650.

²⁰⁴ Federal Assembly, 'Bundesbeschluss über die Volksinitiative «Gegen den Bau von Minaretten»' (12 June 2009) BB1 2009 4381f.

²⁰⁵ Biaggini, 'Schweizerische direkte Demokratie und Völkerrecht' (n 24) 325, 328.

²⁰⁶ Schweizerische Bundeskanzlei, 'Volksabstimmung vom 29.11.2009' (5 June 2016) <www.admin.ch/ch/d/pore/va/20091129/index.html> accessed 6 June 2016.

²⁰⁷ Art 72 (3) Federal Constitution.

²⁰⁸ See chapter 4.7.

such implementation could not also be done in line with international law.²⁰⁹ In the case of direct applicability, it is also unclear whether the authorities in a specific case would refuse to apply a constitutional provision that is contrary to international human rights law (see chapter 5.3). Because according to a judgment²¹⁰ of the Federal Supreme Court of 2012 regarding the ‘Initiative on the Expulsion of Foreign Criminals’ (see chapter 3.3.6.), the assumption is likely, that in a specific case where the construction of a minaret is prohibited solely based on reasons conflicting with fundamental and human rights law, that the application of the problematic provision will be denied at least by the final instance. This view was expressed by *Markus Schefer* when commenting this specific judgment in a newspaper article.²¹¹ *Jörg Paul Müller* shared the same opinion by emphasising that the Federal Supreme Court was primarily bound by the international human rights framework, which prevailed domestic law and therefore likewise the conflicting prohibition on the construction of minarets.²¹²

In July 2011, the ECtHR declared two applications inadmissible²¹³ that had been lodged solely based on the new constitutional provision without the applicants being affected by a denial of a construction permit. The ECtHR was therefore of the opinion, that the applicants had not been directly affected so far by the constitutional norm. Furthermore, the ECtHR denied the question of being potential victims of a violation. Among others, it stated that the constitutional provision itself was not suitable to have an impact on the applicants’ behaviour and therefore that they could freely enjoy their religion despite the new constitutional provision.²¹⁴ Hence, no case has been brought to the ECtHR yet, in which the construction of a minaret was actually prohibited based on the new constitutional provision.

²⁰⁹ Daniel Kettiger, ‘Minarettverbot: Offene Fragen zur Umsetzung’ (2010) Jusletter 1 March 2010. The author comes to the conclusion, that the newly implemented federal constitutional provision is not directly applicable.

²¹⁰ BGE 139 I 16.

²¹¹ Markus Häfliger, ‘Auch das Minarettverbot gilt nicht absolut’ *Neue Zürcher Zeitung* (Bern, 9 February 2013) <www.nzz.ch/schweiz/auch-das-minarettverbot-gilt-nicht-absolut-1.17991202> accessed 6 June 2016.

²¹² Jörg Paul Müller, ‘Wie wird sich das Bundesgericht mit dem Minarettverbot der BV auseinandersetzen?’ (2010) Jusletter 1 March 2010 (hereafter: Müller, ‘Minarettverbot’).

²¹³ *Ouardiri v Switzerland* (App no 65840/09) ECtHR 28 June 2011 and *La Ligue des Musulmans de Suisse and others v Switzerland* (App no 66274/09) ECtHR 28 June 2011.

²¹⁴ *ibid.*

3.3.5. Initiative ‘Stop Mass Immigration’ (‘*Masseneinwanderungsinitiative*’)

As Switzerland is not a member of the EU, the relations are currently framed by a series of bilateral treaties whereby Switzerland participates in the EU’s single market and in the Schengen area, and it partly applies EU asylum legislation (Dublin regulation). The Initiative ‘Stop Mass Immigration’, which was launched by the SVP in 2011, mainly aimed to limit immigration of EU citizens²¹⁵ to Switzerland. In order to control immigration of foreign nationals, Switzerland was supposed to re-introduce annual quantitative quotas. Such limits should apply to all permits issued under foreign legislation, including those related to asylum matters and thus also to persons granted refugee status and temporary protection.²¹⁶

The Federal Council, all political parties represented in the parliament apart from the SVP, and all relevant stakeholders heavily rejected this proposal. The Federal Council strongly emphasised, that the initiative was not compatible with the bilateral Agreement on the Free Movement of Persons and with the EFTA.²¹⁷ Furthermore, it outlined that depending on its implementation, the initiative might be proven not to be compatible under international human rights law, particularly with the rights laid down in the ECHR, the ICCPR and the Convention on the Rights of the Child (CRC)²¹⁸. Yet, it was of the opinion that an implementation not violating human rights obligations was possible. The core question whether the initiative violated the principle of *non-refoulement* and therefore *ius cogens*²¹⁹ was denied by the Federal Council. It stated that a failure to comply with the requirement that an initiative had not to infringe *ius cogens* only materialized if an implementation of a popular initiative consistent with international law was not possible at all. Thus it was of the opinion, that even though the principle of *non-refoulement* was clearly involved, an implementation compatible

²¹⁵ Approximately one in four people residing in Switzerland is a foreigner. About two thirds of them are EU/EFTA citizens, see n 25.

²¹⁶ See the text of the initiative here: Schweizerische Bundeskanzlei, ‘Eidgenössische Volksinitiative «Gegen Masseneinwanderung»’ (7 June 2016) <www.admin.ch/ch/d/pore/vi/vis413t.html> accessed 7 June 2016.

²¹⁷ Federal Council Dispatch, ‘Botschaft zur Volksinitiative «Gegen Masseneinwanderung»’ (7 December 2012) BBl 2013 291ff (hereafter: Federal Council Dispatch, ‘Botschaft «Gegen Masseneinwanderung»’ 2012).

²¹⁸ CRC (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

²¹⁹ See the list of the acts subsumed under *ius cogens* by the Federal Council in n 149.

with international law was however possible and therefore the initiative valid.²²⁰ Yet, it recommended its rejection without submitting a counter-proposal.²²¹ The Federal Assembly took on the same position.²²² On 9 February 2014 both the people and the cantons backed the initiative. The constitutional amendment came into force on that very day.²²³ The initiative was adopted by an extremely thin majority of 50.3 per cent of the voters. The difference between the supports and the opponents was thus only 19,500 votes.²²⁴ A survey ordered by the Federal Council after the approval showed that on a general note, the attitude towards or even more the fear of foreigners was decisive for that outcome.²²⁵

A political poster of the SVP accompanying its political campaign again raised the question of whether it was contrary to the prohibition of racial discrimination according to the Criminal Code. Around a year after the popular vote had taken place, two members of the SVP responsible for the publication were condemned for racial discrimination. Yet, the former SVP party leader could not be held criminally responsible, as the parliament had refused to waive immunity. The second instance court upheld the judgment, which is not yet final.²²⁶

²²⁰ Federal Council Dispatch, 'Botschaft «Gegen Masseneinwanderung»' 2012 (n 217) 291, 298ff., 334ff., 343. The Swiss Refugee Council strongly opposed this position and declared, that the initiative indeed violated, among others, peremptory norms of international refugee and human rights law (see Swiss Refugee Council, 'Umsetzung von Art. 121a BV, Stellungnahme der Schweizerischen Flüchtlingshilfe SFH' (12 March 2015) <www.fluechtlingshilfe.ch/assets/publikationen/stellungnahmen/150312-stn-sfh-umsetzung-mei.pdf> accessed 7 June 2016).

²²¹ Federal Council Dispatch, 'Botschaft «Gegen Masseneinwanderung»' 2012 (n 217) 291f.

²²² Federal Assembly, 'Bundesbeschluss über die Volksinitiative «Gegen Masseneinwanderung»' (27 September 2013) BBl 2013 7351f.

²²³ Schweizerische Bundeskanzlei, 'Volksabstimmung vom 09.02.2014' (7 June 2016) <www.admin.ch/ch/d/pore/va/20140209/index.html> accessed 7 June 2016. See particularly art 121a Federal Constitution.

²²⁴ 'Die Überraschung ist perfekt' *Neue Zürcher Zeitung* (9 February 2014) <www.nzz.ch/schweiz/svp-initiative-im-aargau-auf-ja-kurs-1.18239183> accessed 7 June 2016.

²²⁵ Forschungsstelle sotomo, 'Politgeografische Studie zur Masseneinwanderungsinitiative' (--) <www.sem.admin.ch/dam/data/sem/aktuell/news/2014/2014-12-17/studie-mei.pdf> accessed 7 June 2016.

²²⁶ The issue started, when the SVP published a statement on their website in 2011 saying 'Kosovaren schlitzten Schweizer auf' ('Kosovars slather Swiss'). The slogan was published after a man of Kosovar origin had attacked a Swiss with a knife. The statement was online until 2013 and used as a slogan on a poster for the political campaign of the SVP promoting the initiative 'Stop Mass Immigration'. Apart from the slogan, the poster showed threatening pair of legs stepping over the Swiss flag. The first instance

After the first instance judgment, two applicants lodged an appeal in respect of irregularities at popular votes.²²⁷ They were of the opinion that by means of using political posters amounting to racial discrimination, the political right of the voters to form an opinion and to give genuine expression to their will had been violated. Therefore, they claimed that the result of the vote should be lifted. Even though experts said that such an appeal might be successful,²²⁸ the Federal Supreme Court rejected it because the deadlines for lodging an appeal had not been respected.²²⁹ Yet, even though the Federal Supreme Court did not have to deal with the complaint on the merits, it nevertheless expressed doubts on whether the political poster in question – especially as its publication was stopped long before the vote took place - could have influenced the forming of opinions in an unlawful manner.²³⁰

As to the adoption of the popular initiative, it is yet very unclear how Switzerland will implement it and what the consequences will be. Based on a transitional provision in the Federal Constitution, the Federal Council has started to renegotiate the Agreement on the Free Movement of Persons with the EU as the constitutional amendments are in breach thereto. The timeframe for negotiations is three years from the date of adoption of the popular initiative.²³¹ On the one hand, the Federal Council is still trying to find a mutual agreement with the EU. On the other hand, several pieces of draft legislation on the implementation of the constitutional provision on immigration were submitted to the parliament. They include a unilateral safeguard clause, which provides annual limits on the number of permits issued to people from EU and EFTA countries if immigration

criminal court in Bern handed down the conviction (see Daniel Gerny, ‘SVP bezeichnet Urteil als politisch’ *Neue Zürcher Zeitung* (Bern, 1 May 2015) <www.nzz.ch/schweiz/SVP-kader-verletzten-rassismus-strafnorm-1.18533431> accessed 27 April 2016). The Court of Appeal uphold the judgment of the first instance. The convicted consider a further appeal to the Federal Supreme Court (see Katharina Fontana, ‘SVP-Kader wegen Rassendiskriminierung verurteilt’ *Neue Zürcher Zeitung* (Bern, 15 March 2016) <www.nzz.ch/schweiz/rassendiskriminierung-urteil-im-fall-des-kosovaren-plakats-ld.7732> accessed 27 April 2016).

²²⁷ Based on art 77 (1) lit. b PRA.

²²⁸ ‘«Abstimmungsbeschwerde ist legitim»’ *Neue Zürcher Zeitung* (30 January 2015) <www.nzz.ch/schweiz/abstimmungsbeschwerde-ist-legitim-1.18472446> accessed 7 June 2016.

²²⁹ BGer 1C_63/2015, 1C_109/2015, 1C_237/2015, 1C_293/2015, 24 August 2015.

²³⁰ *ibid* [4.1.].

²³¹ Art 197 section 11 (1) Federal Constitution.

exceeds a certain threshold.²³² Such a unilateral limitation clause could already be put in force in February 2017, which might be contrary to the bilateral agreements with the EU. It is unclear, whether, and if so, to which legislation an optional referendum might be held.²³³ The same holds true for a probable denunciation of the bilateral agreements with the EU, which raises the question whether the Federal Council has the competence to denounce such a treaty under its own authority or how far the parliament and the people by holding a mandatory or optional referendum must be involved.²³⁴ Yet, the Federal Council is not considering a denunciation. However, the implementation of a unilateral safeguard clause contradicting bilateral agreements could make a denunciation inevitable.²³⁵

In a ruling²³⁶, which though not directly related to the new constitutional provision on immigration, the Federal Supreme Court anyhow referred to. The Court, by emphasising the principle *pacta sunt servanda* under international law, confirmed that the Agreement on the Free Movement of Persons, similar to human rights obligations, prevailed over conflicting domestic law and thus also over the new article 121a of the Federal Constitution. The so called ‘Schubert-Practice’ (see chapter 5.3.) would thus not apply. Consequently, the Court stated that international treaties had to be respected as long as they were not re-negotiated or denounced, regardless of a unilateral safeguard clause or other domestic legislation.²³⁷ Thus, even though the Federal Council does not want to consider a denunciation, it might nevertheless be obligated to do so, if a domestic implementation in accordance with international obligations shows to be

²³² The Federal Council, ‘Federal Council submits draft legislation to manage immigration’ (4 March 2016) <www.admin.ch/gov/en/start/documentation/media-releases.msg-id-60871.html> accessed 7 June 2016.

²³³ ‘Neue EU-Abstimmung laut Widmer-Schlumpf möglich’ *Neue Zürcher Zeitung* (3 February 2015) <www.nzz.ch/wirtschaft/newsticker/neue-eu-abstimmung-laut-widmer-schlumpf-moeglich-1.18475001> accessed 7 June 2016.

²³⁴ In that sense, Künzli, ‘Demokratische Partizipationsrechte’ (n 147) 47, 62. The scholar is of the opinion that repealing legislation as a ‘*contrarius actus*’ has to take place according to the same procedure as it was codified.

²³⁵ Joëlle de Sépibus and Cenni Najy, ‘Das Bundesgericht und die Personenfreizügigkeit’ *Neue Zürcher Zeitung* (11 March 2016) <www.nzz.ch/meinung/kommentare/umsetzung-der-masseneinwanderungsinitiative-das-bundesgericht-und-die-personenfreizuegigkeit-ld.6873> accessed 7 June 2016.

²³⁶ BGer 2C_716/2014, 26 November 2015.

²³⁷ *ibid* [3.2.] – [3.3.]

impossible and if it want to avoid that Switzerland becomes responsible under international law.²³⁸

In this context, a counter initiative (*‘Eidgenössische Volksinitiative «Raus aus der Sackgasse! Verzicht auf die Wiedereinführung von Zuwanderungskontingenten»*²³⁹) is worth mentioning because it aims to revert the new constitutional provision on limiting immigration. In November 2015 the Federal Chancellery announced that this initiative has obtained the required number of valid signatures and was thus successfully launched.²⁴⁰ The Federal Council has now a one year period to publish its dispatch.

3.3.6. ‘Initiative on the Expulsion of Foreign Criminals’ (*‘Ausschaffungsinitiative’*)

This initiative was launched in 2007. It proposed amendments to the Federal Constitution, according to which foreign nationals, irrespective of their legal status in Switzerland, ‘shall lose their right of residence and all other rights to remain in Switzerland’ if they were convicted by a final judgment of ‘an offence of intentional homicide, rape or any other serious sexual offence, any other violent offence such as robbery, the offences of trafficking in human beings or in drugs, or a burglary offence; or have improperly claimed social insurance or social assistance benefits’. In such a case, a ‘foreign national must be deported from Switzerland by the competent authority

²³⁸ Joëlle de Sépibus and Cenni Najy, ‘Das Bundesgericht und die Personenfreizügigkeit’ *Neue Zürcher Zeitung* (11 March 2016) <www.nzz.ch/meinung/kommentare/umsetzung-der-masseneinwanderungsinitiative-das-bundesgericht-und-die-personenfreizuegigkeit-ld.6873> accessed 7 June 2016.

²³⁹ Schweizerische Bundeskanzlei, ‘Eidgenössische Volksinitiative «Raus aus der Sackgasse! Verzicht auf die Wiedereinführung von Zuwanderungskontingenten»’ (28 June 2016) <www.admin.ch/ch/d/pore/vi/vis458t.html> accessed 28 June 2016.

²⁴⁰ Federal Chancellery, ‘Eidgenössische Volksinitiative «Raus aus der Sackgasse! Verzicht auf die Wiedereinführung von Zuwanderungskontingenten», Zustandekommen’ (11 November 2015) BBl 2015 8337. One of the members of the initiative committee is *Andreas Auer*, a highly respected former professor of federal constitutional law (see for the members of the committee Federal Chancellery, ‘Eidgenössische Volksinitiative «Raus aus der Sackgasse! Verzicht auf die Wiedereinführung von Zuwanderungskontingenten», Vorprüfung’ (18 November 2014) BBl 2014 9009f.).

and must be made subject to a ban on entry of from 5-15 years. In the event of reoffending, the ban on entry is for 20 years'.²⁴¹

Consequently, the automatic expulsion of foreigners convicted for certain crimes or for abuse of social benefits was proposed. The provisions were supposed to completely lift the margin of appreciation of the authorities applying the law and thereby to remove the possibility of assessing the circumstances of the individual case.²⁴²

Again, the Federal Council was of the opinion that an interpretation of the initiators' proposal in line with the principle of *non-refoulement* and thus with *ius cogens*²⁴³ was possible. Hence, it saw no reason to declare it invalid. Yet, it pointed to serious conflicts with principles of the rule of law, particularly with the principle that state activities had to be proportionate to the ends sought²⁴⁴ and with other rights enshrined in the Federal Constitution, particularly the right to privacy and family life²⁴⁵ that would emerge if the initiative was adopted. The same concerns related to conflicts with non-peremptory norms of international law, particularly guarantees laid down in the ECHR and in the Agreement on the Free Movement of Persons. The Federal Council concluded, that in such an indissoluble conflicting case, the denunciation of those international treaties would be the logical consequence. However, legal and political reasons would preclude such a solution. Thus, the rejection of the initiative was recommended, together with an indirect counter-proposal, which had already been submitted to the consultation procedure. The indirect-counter proposal wanted to include the initiators' concerns. Thus, higher requirements in order to grant a permanent residence permit was proposed. Moreover, the reasons for revoking a permit were specified and the margin of appreciation of authorities applying the law limited. However, only to an extent that was

²⁴¹ Schweizerische Bundeskanzlei, 'Eidgenössische Volksinitiative «für die Ausschaffung krimineller Ausländer (Ausschaffungsinitiative)»' (7 June 2016) <www.admin.ch/ch/d/pore/vi/vis357t.html> accessed 8 June 2016.

²⁴² Reich, 'Direkte Demokratie und völkerrechtliche Verpflichtungen' (n 65) 979, 1018.

²⁴³ See the list of the acts subsumed under *ius cogens* by the Federal Council in n 149.

²⁴⁴ Art 5 (2) Federal Constitution.

²⁴⁵ Art 13 Federal Constitution.

still compatible with constitutional and international law in order to avoid a conflict with the latter.²⁴⁶

Some scholars shared the opinion that the initiative did not violate *ius cogens*.²⁴⁷ Others disagreed by stating that the text of the initiative did not permit any other interpretation than it being in violation of those guarantees.²⁴⁸ In a legal paper, Walter Kälin and Jörg Künzli supported the position of the Federal Council and the parliament to link the constitutional term ‘peremptory norms of international law’ to *ius cogens* and to additionally subsuming non derogable core substances of human rights (‘Kerngehalte’) under that term. As they were of the opinion that the principle of proportionality was the core substance of any human right eligible to derogation, they concluded that any provision violating that principle, also violated *ius cogens*.²⁴⁹ Thus, a decision that the initiative violated *ius cogens* because of wanting to implement an automatic expulsion mechanism and thus of invalidity could likewise have been justified.

However, the Federal Assembly followed the recommendations of the Federal Council. It declared the popular initiative valid, recommended its rejection and submitted a direct counter-proposal²⁵⁰ to the initiative, which was based on the Federal Council’s draft.²⁵¹ Regardless of the direct counter-proposal, the popular initiative was adopted by a majority of the people and the cantons by rejecting the counter-proposal in November 2010.²⁵²

²⁴⁶ Federal Council Dispatch, ‘Botschaft zur Volksinitiative «für die Ausschaffung krimineller Ausländer (Ausschaffungsinitiative)» und zur Änderung des Bundesgesetzes über die Ausländerinnen und Ausländer’ (24 June 2009) BBl 2009 5097ff., 5106 ff.

²⁴⁷ See, among others, Reich, ‘Direkte Demokratie und völkerrechtliche Verpflichtungen’ (n 65) 979, 1019.

²⁴⁸ See, among others, Müller, ‘Minarettverbot’ (n 212).

²⁴⁹ Jörg Künzli and Walter Kälin, ‘Das Verhältnismässigkeitsprinzip als Bestandteil des zwingenden Völkerrechts? Gedanken zu Art. 139 Abs. 3 BV’ (2014) Jusletter 23 June 2014 [13], [32].

²⁵⁰ Federal Assembly, ‘Bundesbeschluss über die Aus- und Wegweisung krimineller Ausländerinnen und Ausländer im Rahmen der Bundesverfassung (Gegenentwurf zur Volksinitiative «für die Ausschaffung krimineller Ausländer [Ausschaffungsinitiative]»)’ (10 June 2010) BBl 2010 4243f. In 2010 the Committee against Torture called on the Swiss authorities to ensure that the initiative does not violate Switzerland’s international obligations (see chapter 4.6.3.).

²⁵¹ Federal Assembly, ‘Bundesbeschluss über die Volksinitiative «Für die Ausschaffung krimineller Ausländer (Ausschaffungsinitiative)»’ (18 June 2010) BBl 2010 4241f.

²⁵² Schweizerische Bundeskanzlei, ‘Volksabstimmung vom 28.11.2010’ (7 June 2016) <www.admin.ch/ch/d/pore/va/20101128/index.html> accessed 8 June 2016.

Another political poster - it showed three white sheep kicking a black sheep out of the country - used in the political campaign of the SVP caused a reaction of the United Nations' special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, *Doudou Diène*, who urged the party to withdraw it. He was of the opinion that it provoked racial and religious hatred. In their reaction the Swiss authorities emphasised the importance of freedom of expression and stated that it would be up to the courts to decide on such a matter. The SVP refused to pull down their posters and on the contrary, announced to hang up even more of them. They stated 'that an international organisation wants to have its say on how the Swiss election campaign is run just takes the cake'.²⁵³

After the adoption, the parliament has started to draft an implementation law in order to substantiate the new constitutional provisions. Before the federal law thereto was adopted, an individual case was brought to the Federal Supreme Court challenging the decision of a cantonal authority revoking a residence permit of a foreign national, convicted for several severe drug related offences. In its landmark ruling²⁵⁴ of October 2012, the Federal Supreme Court fundamentally discussed the relationship between international and domestic law and how a constitutional provision implemented through popular initiatives had to be interpreted in light of the Federal Constitution as a whole. Because of the importance and of the impact of its findings in regard to (future) popular initiatives conflicting with constitutional and international law, a detailed description is given in the following.

In a first step, the Federal Supreme Court came to the result that in light of the current legal framework, of its jurisprudence and of the interpretation of article 8 ECHR the revocation was not proportionate.²⁵⁵ The question arose whether the new provisions regarding the expulsion of foreign offenders²⁵⁶ would change the Court's conclusion. In this context, the Federal Supreme Court discussed how the new provisions had to be

²⁵³ 'Sheep poster gets black marks from UN' *Swissinfo.ch* (14 September 2007) <www.swissinfo.ch/eng/sheep-poster-gets-black-marks-from-un/6146958> accessed 10 June 2016.

²⁵⁴ BGE 139 I 16, see n 210.

²⁵⁵ *ibid* considerations 2. - 3.

²⁵⁶ Art 121 (3) – (6) Federal Constitution.

interpreted, whether they were directly applicable, the relationship between international law and (posterior) federal acts and the relationship between international law and (posterior) constitutional law.

As to the interpretation of newly implemented constitutional provisions, the Federal Supreme Court made clear that an isolated interpretation only based on the legal text of those provisions and on the will of the initiators was not permissible. It rather called for the established principle of a holistic interpretation of new constitutional provisions in light of the whole Federal Constitution, whereby conflicting constitutional and fundamental rights objectives had to be balanced in a way that one constitutional value was not realised at the expense of another ('practical concordance'). According to the Court, supremacy of a single constitutional provision over others could not easily be assumed, particularly if it was one conflicting with international human rights law. Such an interpretation might only be allowed if the supremacy in the sense of a conflict of law rule was clearly established. Nothing else applied for posterior constitutional provisions. Therefore, constitutional provisions had to be interpreted by taking into consideration the structure of the Federal Constitution as a whole, the compatibility with international law and by striving for a minimum cohesion of all constitutional provisions.²⁵⁷

The Court further elaborated, that the question of direct applicability had also to be established by interpretation, which however showed that the new constitutional provisions were not sufficiently clear in order to be declared directly applicable, particularly because they were in contradiction with core constitutional principles of the rule of law (the binding force of law, the principle of proportionality and good faith, the respect for international law) and with the respect for fundamental rights.²⁵⁸ Furthermore, an isolated interpretation of the new provisions would lead to a clear conflict with several human rights treaties, among others the ECHR, the ICCPR and the CRC.²⁵⁹ Consequently, the provisions needed to be specified in implementation

²⁵⁷ BGE 139 I 16, considerations 4.2.1. – 4.2.3. and 5.

²⁵⁸ *ibid* considerations 4.2.3. and 4.3.2.

²⁵⁹ *ibid* consideration 4.3.3.

legislation, whereby the legislator – and because of the principle of separation of power not the judiciary - had to clarify their relationship to other constitutional provisions and principles along the lines pointed out by the Court.²⁶⁰

Should the case arise that such implementation legislation would again contradict international law, the Federal Supreme Court reminded its jurisprudence that in a conflicting case between federal acts - regardless of being posterior or not - and international human rights law, the latter prevailed. The so called ‘Schubert-Practice’ (see chapter 5.3.) did not apply.²⁶¹

The Federal Supreme Court further discussed the relationship between international and (posterior) constitutional law in case the latter would be directly applicable. By confirming that constitutional amendments through popular initiatives violating non-peremptory norms of international law were possible, it stated that the question how authorities applying the law had to solve a conflicting case and whether posterior constitutional provisions conflicting with international law prevailed or not, was another matter.²⁶² By referring to the state’s obligations under the ECHR, it stressed that Switzerland had not only to secure within its jurisdiction the guarantees laid down in the Convention, but also to respect its enforcement mechanisms and to implement the measures needed in order to prevent future violations, if necessary by amendments to domestic legislation.²⁶³ Therefore, new constitutional provisions could only be implemented within the margin of appreciation granted by the ECtHR. But also within such a framework, an automatic expulsion mechanism – if directly applicable - would be contrary to the ECHR and therefore did not apply.²⁶⁴ Consequently, based on article 190 Federal Constitution, the Federal Supreme Court clearly expressed that it granted supremacy to international human rights law even if the conflict arose with posterior constitutional provisions. With this ruling, a controversial issue was in the end clarified by the Court. The question that remained unclear was how to solve a conflict if a new

²⁶⁰ *ibid* consideration 4.3.4.

²⁶¹ *ibid* consideration 5.1.

²⁶² *ibid* consideration 5.2.1.

²⁶³ *ibid* consideration 5.2.3.

²⁶⁴ *ibid* consideration 5.3.

constitutional provision expressly declared to take precedence over international law.²⁶⁵ Such an upcoming conflict became apparent with the ‘Initiative on the Enforcement of the Expulsion of Foreign Criminals’ and is also discussed in connection with the initiative ‘Swiss Law Instead of Foreign Judges’ (see the following chapters).

The reactions to the judgment were controversial. According to members of the SVP the Federal Supreme Court had overstepped its competences, violated the principle of separation of powers and limited the right to popular initiatives. They announced further popular initiatives to guarantee supremacy of domestic over international law.²⁶⁶

In the drafting legislation process, which was accompanied by highly controversial discussions on how to implement the constitutional provisions,²⁶⁷ the parliament agreed in the end to renounce from implementing an automatic expulsion mechanism in the Criminal Code. Instead, the legislation proposal included a ‘hardship clause’ aiming to allow the judiciary to take into consideration the individual circumstances of the case.²⁶⁸ As the draft legislation still leaves it to the discretion of the authorities applying the law to renounce from an expulsion order in cases where the person concerned was granted refugee status or where other peremptory norms of international law are involved, rulings in a specific case must clarify whether the federal act is actually compatible with human rights law, particularly with the principle of *non-refoulement*.²⁶⁹ Furthermore, it remains unclear whether, among others, the newly proposed provision according to which the abuse of social assistance benefits is made an offence under criminal law

²⁶⁵ The summary and comments are based on the judgment review made by Astrid Epinay, ‘Das Verhältnis von Völkerrecht und Landesrecht aus der Sicht des Bundesgerichts, Anmerkung zum BGE 2C_828/2011 vom 12. Oktober 2012’ (2013) Jusletter 18 March 2013 (hereafter: Epinay, ‘Völkerrecht und Landesrecht’).

²⁶⁶ See n 211.

²⁶⁷ Informationsplattform humanrights.ch, ‘Umsetzung der Ausschaffungsinitiative mit Härtefallklausel’ (16 March 2015) <www.humanrights.ch/de/menschenrechte-schweiz/inneres/auslaender/politik/umsetzung-ausschaffungsinitiative> accessed 9 June 2016.

²⁶⁸ Federal Assembly, ‘Schweizerisches Strafgesetzbuch und Militärstrafgesetz (Umsetzung von Art. 121 Abs. 3–6 BV über die Ausschaffung krimineller Ausländerinnen und Ausländer)’ (20 March 2015) BBl 2015 2735ff.

²⁶⁹ See *ibid* art 66d draft Criminal Code.

leading to a mandatory expulsion order is compatible with the principle of proportionality.²⁷⁰

Because the ‘Initiative on the Enforcement of the Expulsion of Foreign Criminals’ was rejected in February 2016 (see chapter 3.3.7.), the draft proposal will come into force on 1 October 2016.²⁷¹ A future application in a specific case will show whether it is in conformity with human rights law.

3.3.7. ‘Initiative on the Enforcement of the Expulsion of Foreign Criminals’ (*‘Durchsetzungsinitiative’*)

As previously mentioned, along the drafting process following the newly implemented constitutional provisions adopted through the ‘Initiative on the Expulsion of Foreign Criminals’ heated debates arose in the parliament. Particularly discussions between the two chambers on how to implement those provisions were conducted. Controversies mainly addressed the question whether to stick to the initiators’ will and draft a law that might not be compatible with constitutional and international law, a position mainly defended by the bourgeois-conservative members of the National Council holding a majority or whether to implement it by respecting the rule of law and fundamental rights. Even though the parliament was given five years²⁷² for drafting a law, the SVP launched the ‘Initiative on the Enforcement of the Expulsion of Foreign Criminals’ already at the beginning of that process, in order to put pressure on the parliament to draft a law according to the text of the previous ‘Initiative on the Expulsion of Foreign Criminals’. Yet, as the Council of States did not give in by refusing to implement an automatic expulsion mechanism and insisted on the introduction of a ‘hardship clause’, the Federal Assembly finally agreed on a draft that should avoid a conflict with the existing legal framework (see chapter 3.3.6.). Even though the parliament included

²⁷⁰ See arts 66 (1) lit. e and 148a draft Criminal Code.

²⁷¹ Der Bundesrat, ‘Neues Ausschaffungsrecht tritt am 1. Oktober 2016 in Kraft’ (4 March 2016) <www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-60863.html> accessed 3 May 2016.

²⁷² Art 197 (8) Federal Constitution.

many of the concerns of the SVP proposed in both initiatives in their draft in order to achieve the withdrawal of the new initiative, the SVP saw no reason to do so.²⁷³

The initiative picked up what had already been included in the ‘Initiative on the Expulsion of Foreign Criminals’. To this end, the automatic removal mechanism was again proposed and the list of criminal offences leading to a mandatory expulsion order - again including most serious crimes and the abuse of social assistance benefits - repeated. Additionally, another list of criminal offences was added. According to the latter, the conviction on account of certain minor crimes (for example common assault, threats against public officials, unlawful entry, exit, and period of stay, work without a permit, consumption of narcotics without authorization), should as well lead to an automatic expulsion if the foreigner had been sentenced to imprisonment or a fine within the previous ten years, regardless of the severity of that offence.²⁷⁴ The proposal specified the constitutional amendments very accurately in order to achieve their direct applicability. This intention was underpinned by heading that the constitutional provisions were ‘directly applicable’. In doing so, firstly the legislator should be circumvented and thus prevented from again drafting an implementation law not in accordance with the initiators’ objectives. And secondly, the Federal Supreme Court should be urged to accept the direct applicability of the proposed constitutional amendments other than in its previous ruling²⁷⁵. Having thus in mind an upcoming conflict between non-peremptory norms of international law and posterior constitutional law, the initiators added in their draft constitutional text a conflict of law rule according to which the latter had to prevail. With that, the supremacy of the proposed constitutional norm over non-peremptory norms particularly of the ECHR should be

²⁷³ See for the whole development towards the launch of the ‘Initiative on the Enforcement of the Expulsion of Foreign Criminals’: Informationsplattform humanrights.ch, ‘Durchsetzungsinitiative klar abgelehnt: ein deutliches Ja zum Rechtsstaat’ (29 February 2016) <www.humanrights.ch/de/menschenrechte-schweiz/inneres/auslaender/politik/durchsetzungsinitiative-rechtsstaat> accessed 10 June 2016.

²⁷⁴ Schweizerische Bundeskanzlei, ‘Eidgenössische Volksinitiative «Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)»’ (10 June 2016) <www.admin.ch/ch/d/pore/vi/vis433t.html> accessed 10 June 2016.

²⁷⁵ BGE 139 I 16, see chapter 3.3.6.

achieved.²⁷⁶ Such a conflict has already been raised by the Federal Supreme Court. Yet, it had not given an express answer on how to solve it.²⁷⁷

Additionally, the initiators' proposal included an exhaustive list of *ius cogens* norms in the text, which was more restrictive than the constant interpretation of both the Federal Council and the Federal Assembly and also of the interpretation at international level. Therefore, the Federal Council recommended to delete the respective provision and to partly declare the popular initiative invalid.²⁷⁸ The Federal Assembly shared the same position and declared the popular initiative valid by excluding the sentence in question.²⁷⁹ Moreover, the Federal Council recommended a rejection because the once more proposed automatic removal mechanism was in contradiction to fundamental principles of the rule of law and of international law. Neither the proposed offences leading to an expulsion order were seen as proportionate, nor had the authorities applying the law be given a possibility to take the circumstances of the individual case into account. The proposed conflict of law rule excluded the application of international human rights law, particularly guarantees of the ECHR, the ICCPR and the CRC. Such an intended conflict would normally be interpreted by the Federal Council as a mandate to denounce the respective international treaties. Yet, this was clearly no option for the Federal Council. As to the direct-applicability, it expressed its doubts on whether the proposed constitutional amendments were in fact directly-applicable and criticised a circumvention of the legislator.²⁸⁰ The Federal Assembly also proposed a rejection of

²⁷⁶ Schweizerische Volkspartei, 'Durchsetzungsinitiative, Argumentarium für die Volksabstimmung vom 28. Februar 2016' (--)

<www.svp.ch/de/assets/File/kampagnen/durchsetzungsinitiative/Argumentarium_Durchsetzungsinitiative-volksabstimmung-d.pdf> accessed 10 June 2016.

²⁷⁷ BGE 139 I 16, see chapter 3.3.6.

²⁷⁸ Federal Council Dispatch, 'Botschaft zur Volksinitiative «Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)»' (20 November 2013) BBl 2013 9459, 9471ff (hereafter: Federal Council Dispatch, 'Botschaft Durchsetzungsinitiative' 2013).

²⁷⁹ Federal Assembly, 'Bundesbeschluss über die Volksinitiative «Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)»' (20 March 2015) BBl 2015 2701ff (hereafter: Federal Assembly, 'Bundesbeschluss Durchsetzungsinitiative' 2015).

²⁸⁰ Federal Council Dispatch, 'Botschaft Durchsetzungsinitiative' 2013 (n 278) 9459, 9491f., 9500ff., 9505f.

the initiative. A counter-proposal was not submitted, as the draft legislation on the 'Initiative on the Expulsion of Foreign Criminals' had already been finalized.²⁸¹

The initiative has caused harsh criticism among opponents as it was seen as an attack on the principle of the rule of law with its fundamental pillars of the principle of proportionality and separation of power, and the respect for fundamental and human rights. Moreover, there was consensus that a rejection of this initiative was crucial in order not to pave the way for the even more radical initiative 'Swiss Law Instead of Foreign Judges' (see chapter 3.3.8.).²⁸²

Starting with a big success of the SVP in the parliament elections in October 2015, another overwhelming success to win this initiative seemed apparent.²⁸³ However, the mobilisation against the initiative was organized on an unprecedented scale. To this end, most members of the parliament signed a statement against this popular initiative. Nearly all law professors of Switzerland signed a manifest stating that an approval of the initiative would severely endanger the rule of law in Switzerland. Politicians, employers, artists, writers and others signed different petitions calling not to vote in favour of the initiative and social media was strongly used by young political activists to mobilise against it.²⁸⁴

This mobilisation that took place only in the last few weeks before the voting date changed the forecasts. On 28 February 2016, with an exceptional high voting turnout,

²⁸¹ Federal Assembly, 'Bundesbeschluss Durchsetzungsinitiative' 2015 (n 279) 2701ff.

²⁸² Simon Gemperli, 'Gefährlicher als ihr Name' *Neue Zürcher Zeitung* (10 November 2015) <www.nzz.ch/meinung/kommentare/gefaehrlicher-als-ihr-name-1.18643848> accessed 11 June 2016; Kurt Fluri, '"Die Durchsetzungsinitiative zielt auf die EMRK"' *Swissinfo.ch* (17 December 2015) <www.swissinfo.ch/direktedemokratie/standpunkt_die-durchsetzungsinitiative-zielt-auf-die-emrk/41841356> accessed 11 June 2016; Informationsplattform humanrights.ch, 'Durchsetzungsinitiative klar abgelehnt: ein deutliches Ja zum Rechtsstaat' (29 February 2016) <www.humanrights.ch/de/menschenrechte-schweiz/inneres/auslaender/politik/durchsetzungsinitiative-rechtsstaat> accessed 11 June 2016.

²⁸³ Christof Vuille, 'Durchsetzungs-Initiative: Heute gilt es ernst, Die 7 grössten Aufreger im Abstimmungskampf' *Blick* (28 February 2016) <www.blick.ch/news/politik/durchsetzungs-initiative-heute-gilt-es-ernst-die-7-groessten-aufreger-im-abstimmungskampf-id4733008.html?ajax=true> accessed 11 June 2016.

²⁸⁴ Marc-André Miserez, 'Demokratie, spontan und sehr gut organisiert' *Swissinfo.ch* (7 March 2016) <www.swissinfo.ch/ger/nein-zu-durchsetzungsinitiative_demokratie--spontan-und-sehr-gut-organisiert/42005836> accessed 11 June 2016.

the people and the cantons very clearly rejected the initiative.²⁸⁵ The famous black and white sheep often used by the SVP to promote their initiatives, were turned into depictions of a herd of sheep, each of another colour, celebrating together by throwing sparkling tinsel in the air, with a depressed wolf named SVP standing aside.²⁸⁶

3.3.8. Initiative ‘Swiss Law Instead of Foreign Judges’ (‘*Selbstbestimmungsinitiative*’)

For many years, the SVP has taken the position that Swiss law was increasingly being ousted by international law, particularly by the ECtHR. In its opinion, the Federal Council, all other political parties, the Federal Supreme Court, law professors as well as the ‘*classe politique*’ favours ‘foreign law’, ‘foreign judges’ and ‘foreign courts’ at the expense of popular rights. In its opinion, this undermined the people and the cantons and thus the sovereignty of the people as the supreme authority in Switzerland. Several rulings of the ECtHR against Switzerland as well as the previously mentioned judgment of the Federal Supreme Court²⁸⁷ provoked harsh criticism particularly among members of the SVP. In order to regain self-determination and independence, the party saw a need to launch a popular initiative according to which domestic law should take precedence over international law.²⁸⁸ Therefore, on 10 March 2015 the collection of the required signatures for the initiative ‘Swiss Law Instead of Foreign Judges’ started²⁸⁹

²⁸⁵ *ibid* and Schweizerische Bundeskanzlei, ‘Volksabstimmung vom 28.02.2016’ (10 June 2016) <www.admin.ch/ch/d/pore/va/20160228/index.html> accessed 10 June 2016.

²⁸⁶ See the pictures under this link:

<www.google.ch/search?q=durchsetzungsinitiative+schaf+farbig&biw=1600&bih=701&tbm=isch&tbu=u&source=univ&sa=X&ved=0ahUKEwj9vOSu_J_NAhXCWxQKHxYkDqAQsAQILQ#imgrc=_7uDoqPfPOHiJM%3A> accessed 10 June 2016.

²⁸⁷ See n 210.

²⁸⁸ Schweizerische Volkspartei, ‘Volksinitiative «Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)»’ (–)

<www.svp.ch/kampagnen/uebersicht/selbstbestimmungsinitiative/um-was-geht-es/> accessed 11 June 2016; Schweizerische Volkspartei, ‘Missbrauchte Menschenrechte: Vom Versuch fremder Richter, den schweizerischen Gesetzgeber auszuhebeln’ (20 August 2015) <www.svp.ch/aktuell/editorials/missbrauchte-menschenrechte-vom-versuch-fremder-richter-den-schweizerischen-gesetzgeber-auszuhebeln/> accessed 11 June 2016.

²⁸⁹ Schweizerische Bundeskanzlei, ‘Eidgenössische Volksinitiative «Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)»’ (10 June 2016)

<www.admin.ch/ch/d/pore/vi/vis460.html> accessed 11 June 2016.

and apparently the necessary signatures have already been collected as the SVP plans to submit the initiative to the Federal Chancellery on 12 August 2016.²⁹⁰

According to the initiative's text²⁹¹, the hierarchy of legal norms shall newly be determined. With the exception of *ius cogens*, constitutional provisions shall be the primary legal source and prevail international law regardless of being anterior or posterior to the latter. In a conflicting case, international treaties should be renegotiated in favour of the Federal Constitution. If necessary, the international treaty may be denounced. As a general rule, only international treaties that have been submitted to a referendum shall be applied by the authorities and the Federal Supreme Court. This is for example not the case for the ECHR, because its ratification was not submitted to a referendum as the legal framework at that time did not include a direct-democratic involvement for international treaties eligible to denunciation within fifteen years after ratification.²⁹² The amendments shall be retroactively applicable to all constitutional provisions and to all international obligations as well as to all future ones.

This popular initiative has been strongly criticised right from its beginning. Almost all political parties of the parliament published a common media release the very day when the SVP started its collection of signatures. They stated that in fact the initiative was an 'anti-human rights initiative'. They emphasised that human rights protection was the bedrock of democracy, legal certainty and freedom in Switzerland. Therefore, this initiative had to be 'rigorously objected'. According to them, it was unacceptable to allow in domestic legislation the breach with international obligations, which put legal certainty and stability at risk. By confirming the inalienable and inseparable connection

²⁹⁰ 'Jetzt ist es fix: Am 12. August reicht die SVP ihre Selbstbestimmungs-Initiative ein' *watson* (25 July 2016) <www.watson.ch/Schweiz/SVP/697399256-Jetzt-ist-es-fix--Am-12--August-reicht-die-SVP-ihre-Selbstbestimmungs-Initiative-ein> accessed 27 July 2016.

²⁹¹ Schweizerische Bundeskanzlei, 'Eidgenössische Volksinitiative «Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)»' (10 June 2016) <www.admin.ch/ch/d/pore/vi/vis460t.html> accessed 12 June 2016.

²⁹² Federal Council, '40 Jahre EMRK-Beitritt der Schweiz: Erfahrungen und Perspektiven, Bericht des Bundesrates in Erfüllung des Postulats Stöckli 13.4187 vom 12. Dezember 2013' (19 November 2014) BBl 2015 357, 373f. (hereafter: Federal Council, '40 Jahre EMRK-Beitritt' 2014).

of human rights with the humanitarian tradition of Switzerland, they stated that a denunciation of human rights treaties was no option.²⁹³

Dozens of organisations of civil society have already started an intense mobilisation against that initiative. For example the campaign ‘*Schutzfaktor M*’, that unites around 70 organisations, among them the Swiss Red Cross, Caritas Switzerland, Amnesty International and the Swiss Refugee Council, has the primary goal to prevent the passing of this initiative and thus also a denunciation of the ECHR.²⁹⁴

A legal study²⁹⁵ published by *Walter Kälin* and *Stefan Schlegel* assessed the consequences if the Federal Constitution took precedence over international law, particularly the ECHR. According to them, an adoption of the initiative would have a serious impact on the human rights protection in Switzerland and much more far reaching consequences than in other member states of the Council of Europe because of the limited constitutional jurisdiction regarding federal acts (see chapter 5.3 and 5.4.) and because of the direct-democratic possibility of the people to amend the Federal Constitution through popular initiatives at any time. They assume that a systematic failure to abide by the rulings of the ECtHR would cause strong reactions from the institutions of the Council of Europe. The proposal of the SVP to denounce and re-accede with new reservations would furthermore not be possible under international law. Therefore, Switzerland would have to denounce the ECHR with the risk of being excluded from the Council of Europe.²⁹⁶

²⁹³ FDP, CVP, SP, Grüne, Grünliberale, EVP, BDP, ‘Nein zur Volksinitiative „Landes- vor Völkerrecht“, Untolerierbar für die Menschenrechte und unvereinbar für den Standort’ (10 March 2015) <www.bdp.info/data/uploads/schweiz/deutsch-unterlagen/medienmitteilungen/2015/mm_ueberparteilich-nein-zur-vi-landes--vor-voelkerrecht.150310.pdf> accessed 12 June 2016.

²⁹⁴ Schutzfaktor M, ‘Menschenrechte schützen uns’ (10 March 2015) <www.schutzfaktor-m.ch/> accessed 12 June 2016.

²⁹⁵ Walter Kälin and Stefan Schlegel, *Schweizer Recht bricht Völkerrecht? Szenarien eines Konflikts mit dem Europarat im Falle eines beanspruchten Vorranges des Landesrechts vor der EMRK* (Bern 2014) (hereafter: Kälin and Schlegel, *Schweizer Recht bricht Völkerrecht?*).

²⁹⁶ *ibid* 21 ff.. In his analyses, *Ed Bares* shows that even though a denunciation of the ECHR after a certain period of time is legal, political pressure not to do so would be considerably high. The only state that has ever denounced the treaty was Greece under its military regime. In the late 1980s, after the ruling in the case *Belilos v Switzerland*, the probability that Switzerland denounced the treaty was yet very high. To the question of entering reservations to the ECHR, he shows that there is a trend among member states to withdraw their reservations and that new member states have been very reluctant to enter reservations

In a guest commentary, *Andreas Auer* picked the initiative to pieces by showing that many of the proposed amendments might be proven futile from a legal point of view. Yet, the attempt to undermine the Swiss constitutional state by aiming at establishing an unlimited supremacy of the people, where the people is a contracting party, amend the Federal Constitution, at the same time draft implementation laws and furthermore take the role of the judiciary would lead to a democracy abolishing itself through democracy. In his opinion, this concept of democracy has no longer anything to do with the one that has been developed and well established over the last century.²⁹⁷ According to *Astrid Epinay* the mere attempt to introduce a conflict of law rule favouring constitutional law at the expense of international law would not necessarily lead to an inapplicability of all other fundamental constitutional provisions like the rule of law. How upcoming conflicts within the Federal Constitution should be solved needed a holistic interpretation in light of the entire Constitution ('practical concordance') and could not be solved by simply introducing some isolated constitutional provisions. Therefore, such a provision could turn out to be inapplicable itself.²⁹⁸

In a report for the attention of the Federal Assembly related to Switzerland's ratification of the ECHR in 1974, the Federal Council emphasised the importance of the ECHR as a corner pillar laying down common values that have to be respected by member states of the Council of Europe. Even though to the Federal Council it was important to critically

at all. Furthermore, the Strasbourg Court under its 'severance doctrine' has been very strict in accepting reservations and wants to eliminate them as far as possible. The author supports the view that denouncing a treaty with the sole purpose of re-ratifying it by entering new reservations ('strategic denunciation') is illegal under international law, at least in the case of human rights treaties (see Ed Bares, 'Avoiding Legal Obligations Created by Human Rights Treaties' (2008) 57 ICLQ 751, 756, 758f, 763f., 785). Consequently, even if assuming that a denunciation along with a new ratification was legal, it would be highly probable that a general reservation allowing the precedence of domestic law over guarantees of the ECHR in a conflicting case would be declared unlawful by the ECtHR.

²⁹⁷ Andreas Auer, 'Gastkommentar zur Selbstbestimmungsinitiative, Die Abschaffung der Demokratie durch Demokratie' *Neue Zürcher Zeitung* (13 April 2015) <www.nzz.ch/meinung/debatte/die-abschaffung-der-demokratie-durch-demokratie-1.18520748> accessed 13 June 2016.

²⁹⁸ Astrid Epinay, 'Gastkommentar zum Völkerrecht, «Die Verfassung ist als Einheit anzusehen»' *Neue Zürcher Zeitung* (31 January 2014) <www.nzz.ch/meinung/die-verfassung-ist-als-einheit-anzusehen-1.18232699> accessed 13 June 2016.

follow the jurisprudence of the ECtHR and to support necessary reforms, a denunciation of the ECHR was from a legal and a political point of view clearly not an option.²⁹⁹

Apparently the Federal Council and the parliament will soon have to officially debate this initiative. In that context, the requirements of validity could raise the question of whether it actually can be treated as a request to partially amend the Federal Constitution. Because in general terms, a partial revision may only propose partial amendments. If, however, such a request attempts to amend or lift core principals of the Constitution, it might no longer be a partial request. By contrast, this could be a request for a total revision of the Constitution. This may be the case for example if a popular initiative puts in question the protection of human rights as a whole or core principles like separation of power or the rule of law. Such an initiative officially claiming a request for a partial but in fact aiming a total revision of the Constitution, is unconstitutional and must be declared invalid by the Federal Assembly, although no specific legal provision exists neither in constitutional nor in statutory law thereto. A conversion of the partial request into a total request is not possible, because in the latter case, no substantive proposals for amendments are allowed.³⁰⁰ *Astrid Epinay* raised the same question with regard to the ‘Initiative on the Enforcement of the Expulsion of Foreign Criminals’. She favoured the argumentation, that core principles like the rule of law could not simply be annulled because of an initiatives’ specific proposal. On the contrary, in her view such core principles could only be amended if a popular initiative targeted expressly that very constitutional provision. In such a case however it would be very questionable if the requested signatures could be collected. In her opinion the question of invalidity should be discussed and clarified whether such a proposal was in fact a total revision. However, in practice such a case has never been discussed in the parliament and apparently the majority of the doctrine are against such a position.³⁰¹ Under the requirements of validity laid down in the Federal Constitution, the question whether this initiative is compatible with the requirement of consistency of subject matter could likewise arise. An assessment of the impact of such an initiative to other

²⁹⁹ Federal Council, ‘40 Jahre EMRK-Beitritt’ 2014 (n 292) 357, 359.

³⁰⁰ Hangartner and Kley, *Demokratische Rechte* (n 30) [814] – [815].

³⁰¹ Epinay, ‘Völkerrecht und Landesrecht’ (n 265) [19] – [21].

core principles of the Federal Constitution might bring to light that an immanent connection between different parts of the initiative is no longer given. In that case, a genuine expression of the will of the voters is no longer guaranteed (see chapter 2.4.) and therefore a decision of invalidity needed.

Apart from showing the political and legal framework in which popular initiatives at federal level are embedded, the aim of this chapter was to bring to light the conflict potential of popular initiatives with human rights obligations and other core pillars of the Swiss constitutional state.

4. State Obligations Arising From the International Human Rights Framework

Before scrutinising whether such initiatives effectively lead to a breach of international, particularly human rights law, the following chapter shall firstly clarify what measures a state has to undertake in order to adequately perform its obligations under international law as well as more particularly to fulfil its human rights obligations. Furthermore, it shall be shown how human rights standards have to be implemented into the domestic legal framework and finally the findings of international monitoring bodies regarding Switzerland's human rights performance in connection with popular initiatives shall be scrutinised.

4.1. Legally Binding Universal Human Rights Framework

When the UN were founded as a reaction to the horrendous atrocities committed during the Word War II and the Nazi Holocaust, the founders enshrined in the UN Charter as one of the corner purposes of the UN the achievement of international co-operation in 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.³⁰² Member states assure to cooperate with the UN for the realization of that core objective.³⁰³ The UN Charter does not explicitly mention the 'protection' but rather the 'promotion' of human rights as a

³⁰² UN, *Charter of the United Nations* (signed 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI, art 1 (3) (UN Charter). In September 2002 Switzerland became a member to the UN after the people approved its accession in March 2002 (see Schweizerische Eidgenossenschaft, 'ABC Schweiz UNO' (2012) 5

<www.eda.admin.ch/content/dam/eda/de/documents/publications/GlossarezurAussenpolitik/ABC-Schweiz-UNO_de.pdf> accessed 4 April 2016).

³⁰³ Art 56 in conjunction with art 55 UN Charter.

legitimate concern of the international community and it neither gives a definition of what human rights are nor does it grant any legal entitlements to individuals. However, almost all states of the world have since ratified the UN Charter and have therefore accepted that human rights are a matter of the international community.³⁰⁴ Based on the Universal Declaration of Human Rights (UDHR)³⁰⁵, which contains an authoritative³⁰⁶ and universal definition of human rights and sets the standards in international human rights protection, numerous international and regional human rights treaties have been drafted since. All states have at least ratified one, many several, of these core human rights treaties. This legally binding universal human rights framework is ‘the only universally accepted value system of our times’.³⁰⁷ It affords individual rights to human beings and entails corresponding international legal obligations for states to respect, fulfil and protect these rights.³⁰⁸

At least since 171 representatives of states adopted unanimously the Vienna Declaration and Programme of Action (VDPA)³⁰⁹ during the second World Conference on Human Rights in 1993,³¹⁰ emphasising that not only the ‘promotion’ but also the ‘protection’ of all human rights and fundamental freedoms ‘must be considered as a priority objective of the United Nations’ and that ‘the promotion and protection of all human rights is a legitimate concern of the international community’,³¹¹ there was no doubt that states

³⁰⁴ Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz* (Helbing & Lichtenhahn Verlag, Basel 2005) 44f.

³⁰⁵ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

³⁰⁶ Office of the United Nations High Commissioner for Human Rights (OHCHR), Inter-Parliamentary Union, ‘Human Rights: A Handbook for Parliamentarians’ (No. 8, 2005) 4 (hereafter: OHCHR, ‘Handbook for Parliamentarians’).

³⁰⁷ Manfred Nowak, ‘Challenges to National Implementation of International Human Rights Standards – Background Paper WG I’ in Wolfgang Benedek and others (eds), *Global Standards – Local Action, 15 Years Vienna World Conference on Human Rights* (Neuer Wissenschaftlicher Verlag, Wien, Graz 2009) 121 (hereafter: Nowak, ‘Challenges to National Implementation’).

³⁰⁸ *ibid* Preface of the Editors of the BIM Study Series.

³⁰⁹ Vienna Declaration and Programme of Action (adopted 25 June 1993) A/CONF.157/23 (VDPA).

³¹⁰ OHCHR, ‘World Conference on Human Rights, 14-25 June 1993, Vienna, Austria’

<www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx> accessed 1 April 2016. The World Conference took place in Vienna from 14 to 25 June 1993.

³¹¹ VDPA, para. 4.

violating human rights could no longer consider it to be a domestic matter under article 2 (7) UN Charter.³¹²

4.2. Duty to Perform Treaties

The main source in the field of human rights law arises from treaty law.³¹³ By entering a human rights treaty, states agree to be bound and to thus respect the rights and obligations enshrined therein. The conclusion of such a treaty based on the free will of states is therefore no contradiction to the states' sovereignty. For treaties concluded between states, the rules codified in the Vienna Convention on the Law of Treaties (VCLT)³¹⁴ are applicable. The same applies to treaties concluded with or between international organisations.³¹⁵ According to the ILC a fundamental principle of the VCLT is enshrined in article 26, according to which 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. In its commentary, the ILC states that in light of the jurisprudence of international tribunals, the principle of good faith must be seen as a legal principle which forms an integral part of the rule *pacta sunt servanda*. Accordingly, in order to fulfil contractual obligations, the right of a state 'to exercise its rights of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the Treaty'.³¹⁶

Consequently, the VCLT establishes that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.³¹⁷ Resulting from these principles, a state can neither refer to provisions of constitutional law nor to other aspects of domestic law to justify a failure to perform or give effect to obligations under a treaty. Thus, all branches of government - executive, legislative and judicial -

³¹² Nowak, 'Challenges to National Implementation' (n 307) 122.

³¹³ Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press, Bern 2009) 37 (hereafter: Kälin and Künzli, *International Human Rights*).

³¹⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

³¹⁵ As the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (opened for signature on 21 March 1986, Doc. A/CONF.129/15) is not yet in force, the VCLT is also applicable to treaties concluded with or between international organisations (see Klabbers, *International Law* (n 146) 25f.).

³¹⁶ ILC, 'Draft Articles on the Law of Treaties with commentaries' (1966) Yearbook of the International Law Commission, vol. II, art 23, n 1, 2.

³¹⁷ Art 27 VCLT.

regardless of their national, regional or local level, are responsible for fulfilling a state party's contractual obligations of a treaty.³¹⁸ Also a referral to a state's constitution does not release it from its international law obligations. This also applies in cases where constitutional law was amended directly by popular votes.³¹⁹ Initiators of popular initiatives are in this function law-making bodies and are thus obliged to respect international law obligations of the respective State.³²⁰

In this context, the question arises in which cases a breach of an international obligation takes place. More specifically, whether the mere existence of legislation conflicting with international law already constitutes a violation or whether such legislation has to be applied in a specific case in order to entail a state's responsibility under international law for its conduct. The ILC, who gives an authoritative framework for the interpretation of the perception of breaching obligations, stated generally that 'there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character'.³²¹ The commentary thereto shows that there is no clear-cut answer given to the question formulated above.³²² Yet, *James Crawford*, the former ILC Special Rapporteur on State responsibility, specified that 'obligations in the field of human rights (...) involve obligations of result, since they do not prescribe precisely how the relevant rights are to be respected, and they are consistent with a diversity of law and institutions'.³²³ The ILC tends to assume that inconsistent legislation generates a state's responsibility only if it contravenes most important primary rules as it is the case for the international prohibition of torture.³²⁴ Thus, as a general rule, the legislation in question

³¹⁸ See HR Committee 'General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev. 1/Add. 13 [4] (hereafter: HR Committee 'General Comment No. 31').

³¹⁹ Hangartner and Kley, *Demokratische Rechte* (n 30) [513].

³²⁰ *ibid* [514].

³²¹ ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001) Supplement No. 10 (A/56/10), chp.IV.E.1, art 12 (hereafter: ILC, 'Draft Articles on Responsibility of States' 2011).

³²² *ibid* art 12 [12].

³²³ 'Second report on State responsibility, by Mr. James Crawford, Special Rapporteur' (1999) UN Doc A/CN.4/498 [54].

³²⁴ *ibid* [78].

must therefore be implemented in the given case in order to assess whether a breach of an international obligation has occurred.³²⁵

The case-law of the ECtHR³²⁶ shows the same restrictive approach. In individual complaints procedures, applicants who have not been directly affected by a concrete act must prove a potential risk of being affected by a law leading to a human rights violation. Accordingly, the risk of being affected must be so great, that individuals are forced to modify their conduct in order to avoid such a violation. The law in question must thus have a ‘chilling effect’ on the behaviour of them.³²⁷

In inter-state complaint procedures, no victim requirement is needed. Therefore, a state can complain that the mere legislation of another state violates the ECHR.³²⁸ While the ECtHR acknowledges that a law by itself can violate the Convention, it nevertheless requires that it is ‘sufficiently clear and precise to make the breach immediately apparent; otherwise, the decision of the Convention institutions must be arrived at by reference to the manner in which the respondent State interprets and applies *in concreto* the impugned text or texts’.³²⁹ Hence, the guarantees under the Convention leave

³²⁵ Similarly Karl Zemanek, ‘Die völkerrechtliche Verantwortlichkeit und die Sanktionen des Völkerrechts’ in Hanspeter Neuhold and others (eds), *Österreichisches Handbuch des Völkerrechts* (2nd ed, Manzsche Verlags- und Universitätsbuchhandlung, Wien, 1991) [2289] and Meinhard Schröder, ‘Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung und Sanktionen’ in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (5th ed, Walter De Gruyter GmbH & Co.KG, Frankfurt/M., Bonn 2010) [side note 22].

³²⁶ Switzerland has neither accepted the individual communication procedure under the ICCPR nor are the opinions adopted in individual communication procedures under ICERD and under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [(adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)] against Switzerland relevant in the context discussed here (see chapters 4.6.2. – 4.6.3.). Therefore, the practice of these monitoring bodies in regard to individual complaints procedures are not further discussed.

³²⁷ *Burden v the United Kingdom* (App no 13378/05) ECtHR 29 April 2008 [34]; see as well Künzli, ‘Demokratische Partizipationsrechte’ (n 147) 47, 73, with reference to *Wolfmeyer v Austria* (App no 5263/03) ECtHR 26 May 2005.

³²⁸ See art 33 ECHR. Inter-state complaint procedures under the UN system are not discussed, as up to now no such complaint has ever been lodged (see OHCHR, ‘Human Rights Bodies - Complaints Procedures’ (2016) <www.ohchr.org/EN/HRBodies/TBPPetitions/Pages/HRTBPetitions.aspx#interstate> accessed 21 June 2016).

³²⁹ *Ireland v the United Kingdom* (Series A, No. 25) ECtHR, 18 January 1978 [240].

discretion to the states parties on how to secure compatibility with the ECHR in their domestic legal system.³³⁰

The mandate of treaty monitoring bodies reviewing state reports includes the assessment on whether legislation itself constitutes a violation of international law. Such a finding can be made if the international provision is ‘sufficiently precise’ and the domestic law ‘constitutes a manifest violation’.³³¹ Yet, the express formulation of a violation of legislation in their concluding observations is omitted. However, a wording of non-compliance is used in such cases.³³² Although such a finding is not legally-binding, it is still of authoritative character (see chapter 4.3.).

That being said, only if a breach is manifest, the respective state becomes responsible under international law for not having performed a treaty in good faith. Such infringements range from minor ones up to the most serious ones and correspondingly involve different consequences under international law.³³³ Such a breach can be determined by different monitoring bodies and institutions under the respective human rights framework. More commonly, the question of a breach arises in cases where legislation is given effect in specific cases. However, the enactment of legislation itself can conflict with what is required by an international obligation. On a general note, such conclusions nevertheless are drawn only if the violation becomes ‘immediately apparent’.

4.3. Human Rights Protection at International Level

Other than in classical international law, where treaties between states base on the principle of reciprocity, human rights treaties follow another order. Therefore, by ratifying human rights treaties, states commit themselves to respect human rights of human beings under their jurisdiction, regardless of the performance of other

³³⁰ Ineke Boerefijn, ‘Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues Under UN Human Rights Treaties’ (2009) LVI NILR 167, 173 (hereafter: Boerefijn, ‘Establishing State Responsibility’). It has to be noted that up until today, the inter-state complaint under the ECHR has remained ineffective (see European Court of Human Rights, ‘Inter-States applications’ (2016)

<http://echr.coe.int/Documents/InterStates_applications_ENG.pdf> accessed 21 June 2016).

³³¹ Boerefijn, ‘Establishing State Responsibility’ (n 330) 167, 180, 204.

³³² *ibid* 167, 182, 194.

³³³ ILC, ‘Draft Articles on Responsibility of States’ 2011 (n 321) art 12 [6].

contracting states. Since the principle of reciprocity is not applicable in order to ensure that contracting states fulfil their obligations, other enforcement measures are needed. It is for this reason that collective monitoring and enforcement mechanisms were put in place. To this end, it is the task of international organisations such as the UN with its charter and treaty based procedures and the Council of Europe with its bodies and procedures, to protect human rights through their monitoring mechanisms.³³⁴

Although international monitoring bodies can give guidance to states on how to better comply with their human rights obligations by issuing general comments and concluding observations, these measures are not legally binding under international law. Nevertheless, they are highly authoritative³³⁵ in precisely defining the nature and content of the international legal obligations the treaty creates and may put moral and political pressure on states to better implement human rights at domestic level.³³⁶ Decisions taken by UN human rights treaty bodies in individual complaint procedures are equally not legally binding. However, especially decisions taken by the HR Committee obtain in many cases *de facto* recognition because of its high quality.³³⁷ Important in the context of human rights protection in Europe are, in contrast to what has just been said, the legally binding judgments of the ECtHR.³³⁸ However, as compulsory enforcement mechanisms of international law are lacking, it is ultimately up to the states' decision how their national legal protection system is built up in order to implement international human rights standards.³³⁹ Hence, states thus dispose of a margin of appreciation regarding their obligations to respect, protect and fulfil human rights as long as the principle of progressive realization is respected. To this end, reservations, derogation and limitation clauses set forth in human rights treaties allow states parties under certain conditions to both implement human rights but also to satisfy specific national interests.³⁴⁰ Yet, as elaborated earlier, states parties must in any case fulfil in good faith their contractual obligations, which they have accepted by adopting,

³³⁴ Nowak, *Introduction* (n 34) 35f.

³³⁵ See Statute of the International Court of Justice 1946, art 38 (1) lit. d.

³³⁶ Nowak, 'Challenges to National Implementation' (n 307) 123.

³³⁷ Kälin and Künzli, *International Human Rights* (n 313) 220.

³³⁸ See art 46 ECHR.

³³⁹ Nowak, 'Challenges to National Implementation' (n 307) 123 and Nowak, *Introduction* (n 34) 36.

³⁴⁰ OHCHR, 'Handbook for Parliamentarians' (n 306) 13, 21.

signing and ratifying human rights treaties voluntarily. Therefore, only valid reservations³⁴¹, derogations and application of limitation clauses may justify an interference with human rights obligations. Apart from this margin accorded to the contracting states, the protection and fulfilment of human rights require principally to ‘take the necessary legislative, administrative, political measures to provide an environment in which all human rights can be realised to the greatest extent possible’.³⁴² Furthermore, states ‘must adopt a legislative framework which creates a human rights friendly environment’.³⁴³ By the same token, the World Conference declared that ‘there is a need for States and international organisations (...) to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights’.³⁴⁴

Consequently, inherent to the voluntary commitment of states to respect human rights by ratifying human rights treaties, is the general obligation established by international law that contracting states adopt their national legal system to the provisions of the treaties. To this end, states have the obligation to ‘review and improve (...) national laws and performance’ according to their contractual obligations under international law continuously.³⁴⁵

4.4. International Ordre Public

To refer ‘merely’ to states obligations to fulfil their contractual commitments by granting enforceable subjective rights *vis-à-vis* human beings subject to their jurisdiction is too short sighted.³⁴⁶ The ICJ recognized, that certain human rights obligations ‘are the concern of all States’ and of such importance that ‘all States can be

³⁴¹ However, the World Conference on Human Rights encouraged the states to limit the extent of any reservations, to formulate any reservations as precisely and narrowly as possible, to ensure that none is incompatible with the object and purpose of the relevant treaty and to regularly review any reservations with a view to withdraw them (VDPA, chapter II para. 5).

³⁴² Manfred Nowak, ‘Human Rights Theory, Introduction to Human Rights Theory’ in Tina Hofstätter and others (eds), *All Human Rights for All, Vienna Manual on Human Rights* (Neuer Wissenschaftlicher Verlag, 2012) 271.

³⁴³ *ibid* 273.

³⁴⁴ VDPA, chapter I para. 13.

³⁴⁵ Committee against Torture, ‘General Comment No. 2, Implementation of article 2 by States parties’ (24 January 2008) UN Doc CAT/C/GC/2 [4].

³⁴⁶ Matthew Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11 EJIL 489, 519.

held to have a legal interest in their protection; they are obligations *erga omnes*.³⁴⁷ What is more, specific human rights deriving from conventions and from customary law do not only create obligations that states have towards the international community as a whole. Much more, according to state practice and activities of international organisations and bodies, they constitute an objective order or an international *ordre public*.³⁴⁸ Among other criteria, by establishing collective enforcement mechanisms (for example UN treaty based monitoring procedures), by shaping and limiting international cooperation (for example in connection with the admission of new member states of the Council of Europe or the European Union) or by affording priority to human rights law in relation to other international law, the objective character of such human rights becomes manifest. To this end, they do not only afford subjective rights to individuals towards the respective state, but they rather establish key principles obliging states to take action.³⁴⁹

However, there is not a single international *ordre public* created by human rights, but many different layers of it. *Walter Kälin* distinguishes between firstly a universal public order established by customary human rights law, secondly orders created by universal human rights conventions and thirdly regional orders. When it comes to objective orders deriving from human rights conventions, it needs to be considered that those conventions do not automatically create an objective order to the states parties. It rather depends on their respective practice whether specific human rights obligations apart from having *erga omnes* effect, reach an impact going even further.³⁵⁰

The ICJ has afforded such an objective character to only a few international obligations.³⁵¹ Other in the case of the American Convention on Human Rights

³⁴⁷ *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (Merits) [1970] ICJ Rep 3 [33].

³⁴⁸ *Walter Kälin*, 'Menschenrechte als Gewährleistung einer objektiven Ordnung' (1994) 33 *Berichte der Deutschen Gesellschaft für Völkerrecht* 9, 38, 47 (hereafter: *Kälin*, 'Gewährleistung einer objektiven Ordnung').

³⁴⁹ *ibid* 9, 37f., 47, with reference to *Daniel Thürer*, 'Neuere Entwicklungen im Bereich der Europäischen Menschenrechtskonvention' (1988) 89 *Schweizerisches Zentralblatt für Staats- und Gemeindeverwaltung* 394.

³⁵⁰ *Kälin*, 'Gewährleistung einer objektiven Ordnung' (n 348) 9, 38-40, 47f.

³⁵¹ The ICJ included thereto acts of aggression and of genocide, the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination, the

(ACHR)³⁵² and in the present case even more important the ECHR. As *Judge Cançado Trindade* of the Inter-American Court of Human Rights (IACtHR) has pointed out:

‘The converging case-law to this effect has generated the common understanding, in the regional (European and inter-American) systems of human rights protection, that human rights treaties are endowed with a special nature (...); that human rights treaties have a normative character, of *ordre public*; that their terms are to be autonomously interpreted; that in their application one ought to ensure an effective protection (effet utile) of the guaranteed rights; that the obligations enshrined therein do have an objective character, and are to be duly complied with by the States Parties, which have the additional common duty of exercise of the collective guarantee of the protected rights; and that permissible restrictions (limitations and derogations) to the exercise of guaranteed rights are to be restrictively interpreted. The work of the Inter-American and European Courts of Human Rights has indeed contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances.’³⁵³

The foundation of the Council of Europe was based on such a common value system as it enshrined the fundamental purpose to re-establish full respect of the principles of human rights, democracy and the rule of law in its Statute.³⁵⁴ Only states accepting these principles may become a member of the Council of Europe,³⁵⁵ which shows their importance when it comes to international cooperation. As early as in 1961 the European Commission of Human Rights already stated in its decision *Austria v Italy*³⁵⁶:

common art 3 of all four Geneva Conventions of 12 August 1949 and ‘elementary considerations of humanity’ (see *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (Merits) [1970] ICJ Rep 3 [33], *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4 22, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14 [218]).

³⁵² ACHR (adopted 22 November 1969, entered into force 18 July 1978).

³⁵³ Judge Cançado Trindade in his Separate Opinion in *Caesar v Trinidad and Tobago*, IACtHR, Ser C No 123, [7].

³⁵⁴ See Preamble to the Statute of the Council of Europe (opened for signature 5 May 1949, entered into force 3 August 1949) CETS No. 1 [Statute (1949)] and art 1 lit. b Statute (1949).

³⁵⁵ *ibid* arts 3 and 4 Statute (1949).

³⁵⁶ *Austria v Italy* (App no 788/60) 4 European Yearbook of Human Rights (1961) 116.

‘(...) the purpose of the High Contracting Parties in concluding the convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests, but to realise the aims and the ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law.’³⁵⁷

This statement made it clear that the ECHR creates an objective order, which does not only include the guarantees enshrined in the ECHR but more comprehensively the core ideals and aims laid down in the Statute 1949 as well.³⁵⁸

4.5. Incorporation of Human Rights Standards Into Domestic Law

From the perspective of international law, it is left to the states’ national constitutional law, how international human rights obligations are incorporated into the respective domestic legal system, as long as it is done adequately.³⁵⁹

The Federal Constitution defines that the Federal Council is responsible for foreign relations, that it signs and ratifies international treaties and submits them to the Federal Assembly for approval for those treaties which may not be concluded on its own responsibility.³⁶⁰ Treaties that are submitted to the Federal Assembly include reservations, which the Federal Council proposes to make. The Federal Assembly can amend them or add additional ones.³⁶¹ Treaties approved by the Federal Assembly must be put both to the vote of the people and the cantons, if, among others, the accession to organisations for collective security or to supranational communities is provided.³⁶² Approved international treaties by the Federal Assembly of unlimited duration, which

³⁵⁷ *ibid* 18.

³⁵⁸ Walter Kälin speaks of a ‘European *ordre public*’ in the sense of a regional order (see Kälin, ‘Gewährleistung einer objektiven Ordnung’ (n 348) 9, 21, 40).

³⁵⁹ Nowak, *Introduction* (n 34) 36f.

³⁶⁰ Art 184 Federal Constitution and Eidgenössisches Departement für auswärtige Angelegenheiten, ‘Das Verhältnis von Völkerrecht und Landesrecht in der Schweiz’ (2012) 9

<www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/120904_DV_Broschuere_Voelkerrecht_Landesrecht_DE_Web.pdf> accessed 6 April 2016.

³⁶¹ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge 2000) 150 (hereafter: Aust, *Modern Treaty Law*).

³⁶² Art 140 Federal Constitution (mandatory referendum).

may not be denounced, are eligible to an optional referendum.³⁶³ The same applies, among others, if the accession to an international organisation is provided.³⁶⁴ Once an international treaty enters into force, its legal norms become automatically an integral part of Swiss domestic law.³⁶⁵ As long as the binding international legal norms are sufficiently determined (self-executing), they can be invoked before domestic courts.³⁶⁶

Apart from the duty to perform treaties in good faith (see chapter 4.2.), international law does not determine which rank incorporated treaty law must take in the domestic legal order.³⁶⁷ Other than the explicit provision in the Federal Constitution that federal law takes precedence over any conflicting provisions of cantonal law,³⁶⁸ it does not provide a conflict of law rule to determine the relationship between international and national law. Initially, the Federal Council proposed to implement an explicit conflict of law rule with the primacy of international law, when a draft for the new Federal Constitution was discussed in 1995. Yet, the compromise, which has been reached, was to introduce a provision determining merely that international law must be respected by all state authorities, both at federal and cantonal level.³⁶⁹ Moreover, the obligation that peremptory norms of international law must not be infringed by constitutional amendments was explicitly implemented as well (see chapter 3.1.4.3.1.). Furthermore, the Federal Constitution lays down that all activities of the state are based on and limited by law.³⁷⁰ In addition, the Federal Constitution addresses the judiciary and states that the Federal Supreme Court and other judicial authorities apply the federal acts and international law.³⁷¹ These provisions however do not clearly establish how they are

³⁶³ Art 141 Federal Constitution.

³⁶⁴ Art 141 Federal Constitution.

³⁶⁵ An explicit provision in the Federal Constitution stipulating this principle is lacking. However, according to federal constitutional customary law Switzerland has implemented a monistic legal system (see Hangartner and Kley, *Demokratische Rechte* (n 30) [518f.]). See as well Federal Council Dispatch, 'Botschaft neue Bundesverfassung' 1996 (n 121) 1, 134.

³⁶⁶ Aust, *Modern Treaty Law* (n 361) 150.

³⁶⁷ Klabbbers, *International Law* (n 146) 296.

³⁶⁸ Art 49 Federal Constitution.

³⁶⁹ Art 5 (4) Federal Constitution. See as well Federal Council, 'Das Verhältnis von Völkerrecht und Landesrecht' 2010 (n 13) 2263, 2305.

³⁷⁰ Art 5 (1) Federal Constitution.

³⁷¹ Art 190 Federal Constitution.

interrelated with one another,³⁷² which laws prevail in a conflicting case between international and national law and there is no final answer given by both the practice and doctrine, which rank shall be given to international law in the domestic legal norm hierarchy.³⁷³ It is however undisputed that peremptory norms of international law always precede national law, that international law always precede cantonal law and federal regulations.³⁷⁴ Yet, how conflicts between international and federal law shall be solved remains disputed (see chapters 5.1. – 5.3.).

4.6. UN Treaty Based Monitoring Procedures

As described earlier, the question whether a state party fulfils its human rights obligations not only arises in individual complaints procedures. Following from the fact that human rights are *erga omnes* obligations, state reporting procedures, as other international supervisory procedures, are intended to scrutinize a state's human rights performance independently of individuals claiming a violation of their subjective rights.³⁷⁵ As to the individual communications, general comments and country-related concluding observations, there is consensus that they give a highly authoritative interpretation of the nature and content of international legal obligations.³⁷⁶

In the following, state related reports of UN treaty monitoring bodies as well as charter based monitoring mechanisms and reports and recommendations of institutions and bodies of the Council of Europe shall be discussed. Only those are assessed that refer to the issue of direct democracy in Switzerland and particularly to the right to launch popular initiatives.³⁷⁷

³⁷² Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [3633].

³⁷³ Federal Council, 'Das Verhältnis von Völkerrecht und Landesrecht' 2010 (n 13) 2263, 2306.

³⁷⁴ *ibid* 2263, 2306.

³⁷⁵ In its General Comment, the HR Committee clarifies that 'every State Party has a legal interest in the performance by every other State Party of its obligations'. Therefore, 'to draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should (...) be considered as a reflection of legitimate community interest' (see HR Committee 'General Comment No. 31' (n 318) [2]).

³⁷⁶ Nowak, *CCPR Commentary* (n 16) XXVII [21]. See as well chapter 4.3.

³⁷⁷ Therefore, although Switzerland has ratified the Convention on the Elimination of All Forms of Discrimination against Women [adopted 18 December 1971, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)] and the CRC, which could both give reason for recommendations to the topic discussed here, they did not refer to it in their country-related reports and are therefore not further discussed.

4.6.1. International Covenant on Civil and Political Rights

The ICCPR enshrines civil and political rights, which urge the states parties to respect liberal freedoms of individuals and providing them access to political participation. The HR Committee is responsible for monitoring the states parties' compliance with their treaty obligations under the ICCPR and its optional protocols.³⁷⁸

Switzerland acceded to the ICCPR on 18 June 1992 and has since had to undergo the mandatory state reporting procedure laid down in article 40 ICCPR.³⁷⁹ However, to date Switzerland has not accepted the individual communication procedure under the First Optional Protocol to the ICCPR³⁸⁰.³⁸¹ Several reservations that Switzerland entered by accession have been withdrawn in the meantime.³⁸²

In its general comment regarding the states parties' general legal obligations to ensure the Covenant rights, the HR Committee pointed out that 'Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations'. Furthermore, 'Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order'. In case of 'inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees'. Although these necessary steps can be undertaken in accordance with a State's constitutional processes, 'a failure to perform or give effect to obligations under the treaty' cannot be justified by revering

³⁷⁸ OHCHR, 'Monitoring the core international human rights treaties, What are the treaty bodies?' <www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> accessed 4 April 2016.

³⁷⁹ OHCHR, 'Ratification Status for Switzerland' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=169&Lang=EN> accessed 4 April 2016.

³⁸⁰ Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

³⁸¹ OHCHR, 'Acceptance of individual complaints procedures for Switzerland' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=169&Lang=EN> accessed 4 April 2016.

³⁸² Remaining reservations: art 12 (1) (limitations to the right to liberty of movement and freedom to choose one's residence of aliens shall still be possible), art 20 (no further measures to ban propaganda for war, which is prohibited by article 20 (1), shall be adopted), art 25 lit. b (elections within assemblies other than secret ballot shall be permissible), art 26 (the equality of all persons before the law and their entitlement without any discrimination to the equal protection of the law shall be guaranteed only in connection with other rights contained in the ICCPR) (see OHCHR, 'Status of Ratification Interactive Dashboard' <<http://indicators.ohchr.org/>> accessed 4 April 2016).

to ‘provisions of constitutional law or other aspects of domestic law’ or ‘by reference to political, social, cultural or economic considerations within the State’. Moreover, integral to article 2 is the obligation ‘to take measures to prevent a recurrence of a violation of the Covenant’, (...) which ‘may require changes in the State Party’s laws or practices’.³⁸³ Additionally, article 2 (2) ICCPR gives the ‘overarching framework within which the rights specified in the Covenant are to be promoted and protected’.³⁸⁴ A violation of this overarching provision is, for example, committed by a state when necessary laws in order to comply with the rights enshrined in the Covenant are not enacted.³⁸⁵

The obligations of states to take all the necessary legislative and other measures to give effect to human rights as discussed here under article 2 (2) ICCPR are universally applicable as elaborated earlier.³⁸⁶ Furthermore, because the work of the HR Committee is known for its very high quality,³⁸⁷ its standards regarding general legal obligations of states for the protection and fulfilment of human rights are therefore applicable to all human rights treaties and thus as well to the treaties discussed further below.

In its concluding observations following the third periodic report submitted by Switzerland,³⁸⁸ the HR Committee expressed its concern regarding the initiative ‘Against the Construction of Minarets’:

‘The Committee is concerned about the *referendum initiative* (emphasis added) aimed at prohibiting the construction of minarets and about the discriminatory advertising campaign which accompanies it. It notes that the State party does not support this referendum initiative, which, if adopted, would bring the State party into non-compliance with its obligations under the Covenant.’³⁸⁹

³⁸³ See HR Committee ‘General Comment No. 31’ (n 318) [4], [7], [14], [17] (see as well chapter 4.2.).

³⁸⁴ *ibid* [5].

³⁸⁵ Nowak, *CCPR Commentary* (n 16) Art. 2 CCPR [15].

³⁸⁶ See chapter 4.3.

³⁸⁷ Nowak, *Introduction* (n 34) 80f.

³⁸⁸ HR Committee ‘Concluding observations’ 2009.

³⁸⁹ *ibid* [8].

The HR Committee hereby assessed that such a constitutional amendment, which was in fact adopted (see chapter 3.3.4.), was incompatible with Switzerland's general obligation to ensure under its domestic framework the rights set forth in the Covenant (article 2 ICCPR), with freedom of thought, conscience and religion (article 18 ICCPR), as well as with the prohibition of incitement to discrimination, hostility and intolerance (article 20 ICCPR³⁹⁰).³⁹¹ It therefore recommended Switzerland to 'ensure respect of freedom of religion and firmly combat incitement to discrimination, hostility and violence'³⁹².

In its following list of issues, the HR Committee referred to the aforementioned recommendation and asked Switzerland to describe the measures it has undertaken in order to ensure respect for freedom of religion and to combat intolerance. It also wanted Switzerland to explain how the newly introduced constitutional provision prohibiting the construction of minarets was compatible with articles 18 and 20 (2) ICCPR.³⁹³ Switzerland's reply to this list of issues, initially due in November 2015 and now in July 2016, has not yet been submitted.³⁹⁴

4.6.2. International Convention on the Elimination of All Forms of Racial Discrimination

The ICERD prohibits any discrimination 'based on race, colour, descent, national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights'.³⁹⁵ The Committee on the Elimination of Racial Discrimination (CERD) is the expert body that monitors states' compliance with their obligations enshrined in this Convention.³⁹⁶ Switzerland acceded

³⁹⁰ Switzerland's reservation under art 20 ICCPR is not related to the HR Committee's recommendation in the context here mentioned (see n 382).

³⁹¹ HR Committee 'Concluding observations' 2009 (n 201) [8].

³⁹² *ibid* [8].

³⁹³ HR Committee 'List of issues prior to submission of the fourth periodic report of Switzerland' (25 November 2014) UN Doc CCPR/C/CHE/QPR/4 [19].

³⁹⁴ OHCHR, 'Reporting Status for Switzerland'

<http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CHE&Lang=EN> accessed 22 June 2016.

³⁹⁵ Art 1 ICERD.

³⁹⁶ OHCHR, 'Committee on the Elimination of Racial Discrimination'

<www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx> accessed 4 April 2016.

to the ICERD on 29 November 1994 and has therefore an obligation to submit its state report according to article 9 ICERD.³⁹⁷ As will be shown in the following, the reservation according to which Switzerland has the right to take the legislative measures necessary for the implementation of article 4 ICERD by taking due account of freedom of opinion and freedom of association³⁹⁸ is strongly criticised by CERD. On 19 June 2003, Switzerland additionally accepted the individual communication procedure laid down in article 14 ICERD.³⁹⁹

When expressing concerns regarding the issue of popular initiatives, CERD, as well as other monitoring bodies, do often not see it as an isolated issue of concern. But rather they put it into context with the problem of combatting racial discrimination and xenophobia, particularly in the political discourse. The lack of comprehensive anti-racism and generally of comprehensive anti-discrimination legislation and Switzerland's stance to confer the right to freedom of expression such an importance that it may amount to hate speech, which however remains unprosecuted, is also discussed. Therefore, even though the main focus in this chapter is on the concluding observations made by CERD, referrals to recommendations of other international monitoring mechanisms will be given as well. Yet, they will be returned to further below under the respective monitoring mechanisms.

In considering the combined fourth to sixth periodic report of Switzerland, CERD expressed the following concerns and recommendations:

‘The Committee notes with regret the lack of substantial progress made by the State party in combating racist and xenophobic attitudes towards some

³⁹⁷ OHCHR, ‘Ratification Status for Switzerland’

<http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=169&Lang=EN> accessed 4 April 2016.

³⁹⁸ Apart from this reservation to art 4 ICERD, a reservation was entered under article 2 (1) lit. a in order to preserve the right to apply its legal provisions concerning the admission of foreigners to the Swiss market (see OHCHR, ‘Status of Ratification Interactive Dashboard’ <<http://indicators.ohchr.org/>> accessed 4 April 2016).

³⁹⁹ OHCHR, ‘Acceptance of individual complaints procedures for Switzerland’

<http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=169&Lang=EN> accessed 4 April 2016. The Committee adopted one opinion in a case regarding Switzerland (*A.M.M. v. Switzerland* (18 February 2014) Communication no 50/2012 UN Doc CERD/C/84/D/50/2012), which however is not related to the topic discussed in the present thesis.

minorities, including black persons, Muslims, Travellers, immigrants and asylum-seekers. It is particularly concerned at the hostility resulting from the negative perception of foreigners and certain minorities by part of the population, which has resulted in *popular initiatives* (emphasis added) questioning the principle of non-discrimination. The Committee regrets that in the period covered by the report, the prohibition against racial discrimination had to be defended against repeated attacks in the political arena, including demands for its abolition or restriction.

The Committee urges the State party to further intensify its efforts in education and awareness-raising campaigns (...). The State party should consider implementing the recommendations made by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance following his visit to Switzerland in 2006, as well as the relevant recommendations made by the working group on the universal periodic review⁴⁰⁰ in 2008.⁴⁰¹

Following his visit to Switzerland, the aforementioned Special Rapporteur saw a major obstacle in effectively combatting racism, racial discrimination and xenophobia in the lack of comprehensive national legislation. He noted that in the political discourse and in political platforms, a culture of xenophobia was fostered and he was particularly alarmed that, ‘owing to their electoral impact, racist and xenophobic political platforms would spread in the future’. He additionally referred to political campaigns launched by the SVP, which have often been described by different stakeholder as advocating racism

⁴⁰⁰ The working group recommended that Switzerland reinforced existing mechanisms on combating racial discrimination, to withdraw reservations to article 4 ICERD and to provide protection against all forms of discrimination (see Universal Periodic Review (UPR) ‘Report of the Working Group on the Universal Periodic Review, Switzerland’ (28 May 2008) UN Doc A/HRC/8/41 [rec. 57.6], [rec. 57.15], [rec. 57.18] (hereafter: UPR ‘Report of the Working Group’ 2008)). Apart from the recommendation to reinforce existing mechanisms in order to combat racial discrimination, which was accepted, Switzerland rejected the other recommendations (see UPR ‘Report of the Working Group on the Universal Periodic Review, Switzerland, Addendum, Responses to the recommendations within the framework of the universal periodic review’ (25 August 2008) UN Doc A/HRC/8/41/Add.1 [6], [15], [18] indicated in bold) (footnote added), (hereafter: UPR ‘Report of the Working Group, Addendum’ 2008).

⁴⁰¹ CERD ‘Concluding observations of the Committee on the Elimination of Racial Discrimination, Switzerland’ (23 September 2008) UN Doc CERD/C/CHE/CO/6 [7] (hereafter: CERD ‘Concluding observations’ 2008).

and xenophobic ideas. On a final note and by mentioning his personal experiences during his visit, where his authority as Special Rapporteur was challenged due to his African origin, he spoke of a ‘disturbing emergence of a culture of xenophobia in certain segments of Swiss society, which can have a long-term damaging effect on the image of the country’⁴⁰².

In relation to Switzerland’s consistent position not to withdraw the reservation related to the prohibition of hate speech under the Convention, CERD noted:

‘The Committee notes with concern the reasons expressed by the State party for maintaining its reservation to article 4 of the Convention relating to the prohibition of hate speeches. While taking into account the importance conferred by the Constitution on the freedoms of expression and assembly, the Committee recalls that freedom of expression and assembly is not absolute and that the establishment and activities of organizations promoting or inciting racism and racial discrimination shall be prohibited. In this regard, the Committee is particularly concerned at the role played by some political associations and parties in the rise of racism and xenophobia in the State party.

Taking into account the mandatory nature of article 4 of the Convention, the Committee invites the State party to consider withdrawing its reservation to article 4 and recommends that the State party enact legislation that declares illegal and prohibits any organization which promotes or incites racism and racial discrimination.’⁴⁰³

Furthermore, CERD was concerned that comprehensive civil and administrative legislation and policies are missing in order to effectively combat racial discrimination

⁴⁰² Report by Mr. Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance ‘Mission to Switzerland’ (30 January 2007) UN Doc A/HRC/4/19/Add.2 [60], [64], [69], [79], [84], [85]. Among others, he recommended a national programme of action against racism and xenophobia including national legislation for this purpose, see *ibid* [87].

⁴⁰³ CERD ‘Concluding observations’ 2008 (n 401) [15]. In the next monitoring cycle, CERD reiterated its concerns regarding the maintenance of reservations to art 4 (and 2) ICERD (see CERD ‘Concluding observations on the combined seventh to ninth periodic reports of Switzerland’ (13 March 2014) UN Doc CERD/C/CHE/CO/7-9 [11] (hereafter: CERD ‘Concluding observations’ 2014)).

in all areas. As recommended by the Special Rapporteur, CERD as well invited Switzerland to adopt a national plan and legislation at federal and cantonal level against racial discrimination, xenophobia and other forms of intolerance.⁴⁰⁴

In the following reporting cycle, CERD referred explicitly to the system of direct democracy in Switzerland and stated:

‘While noting the unique system of direct democracy in the State party, the Committee expresses deep concern at the lack of sufficient safeguards to ensure that *popular initiatives* (emphasis added) proposed by citizens do not contradict the obligations of the State party under the Convention (art. 2).

The Committee urges the State party to step up its efforts to introduce an effective and independent mechanism to review the compatibility of *popular initiatives* (emphasis added) with the State party’s obligations under international human rights law, including the Convention. The Committee also recommends that the State party urgently and systematically strengthen its efforts at all levels to widely publicize and raise awareness among the public about any conflict between a *proposed initiative* (emphasis added) and the State party’s international human rights obligations, as well as the ensuing consequences.’⁴⁰⁵

Furthermore, CERD expressed its concern regarding the restrictive application of provisions of the Criminal Code⁴⁰⁶ prohibiting hate crime and hate speech, which often lead to acquittal.⁴⁰⁷ On the subject of racism and xenophobia in politics and the media, CERD made the following remark:

⁴⁰⁴ CERD ‘Concluding observations’ 2008 (n 401) [9]. CERD reiterated its concerns regarding ‘the lack of effective de jure implementation of the Convention, including the lack of progress in introducing legislation at the federal level’ (see CERD ‘Concluding observations’ 2014 (n 403) [6]).

⁴⁰⁵ CERD ‘Concluding observations’ 2014 (n 403) [8].

⁴⁰⁶ Art. 261bis Criminal Code.

⁴⁰⁷ CERD ‘Concluding observations’ 2014 (n 403) [7]. In this context, a judgment of the Federal Supreme Court (BGer 6B_715/2012, 6 February 2014) attracted interest well beyond the Swiss border: Following an arrest of an Algerian asylum seeker a police officer called the suspect ‘*Drecksasylant*’ (‘Dirty asylum-seeker’) and ‘*Sauausländer*’ (‘Foreign pig’) in front of a crowd. Even though the cantonal court condemned him for racial discrimination based on art 261bis Criminal Code, the Federal Supreme Court

‘The Committee is deeply concerned at racist stereotypes promoted by members of right-wing populist parties and sections of the media, (...) It is also concerned at the display of political posters with racist and/or xenophobic content and of racist symbols⁴⁰⁸, as well as at racist behaviour and at the lack of prosecution in such cases.⁴⁰⁹ The Committee is further concerned at the xenophobic tone of *popular initiatives* (emphasis added) targeting non-citizens, such as the initiative “against the construction of minarets”, (...) the initiative on the “expulsion of foreign criminals”, (...) and the initiative “against mass immigration”, (...). The Committee notes that such initiatives have led to a sense of unease among the affected communities and in Swiss society generally (arts. 2, 4 and 6).’⁴¹⁰

In order to combat stigmatization and stereotyping, which degraded certain individuals and groups, the Committee recommended a wide range of measures to be undertaken by the state party. Apart from rigorously prosecute instances of racist remarks and acts, it urged high-level public officials to formally reject and condemn such incidents.⁴¹¹

lifted the judgment. It stated that the insults did not refer to a specific group protected (race, ethnicity, religion) under the anti-racist provision of the Criminal Code. Furthermore, it was of the opinion that even in the case the accused had insulted the asylum seeker because of his race, ethnic origin or religion, the expressions nevertheless would not involve an attack on ‘human dignity’, which is one of the cumulative elements of art 261bis Criminal Code, but would merely constitute an insult as such expressions were widely used insults in the German language. Yet, the Federal Supreme Court stated that because the accused did not act as private person but as police officer, the expressions were indeed absolutely unacceptable, a fact which had to be taken into account when assessing the degree of culpability under art 177 Criminal Code (insult) (see, among others, Norbert Aepli, ‘Für Schweizer Gerichtshof ist "Drecksasylant" nicht rassistisch’ *Zeit Online* (21 February 2014) <www.zeit.de/gesellschaft/zeitgeschehen/2014-02/schweiz-bundesgerichtshof-urteil-rassendiskriminierung> accessed 27 April 2016; ‘Swiss court rules police officer's slurs did not breach anti-racism law’ *The Guardian* (21 February 2014) <www.theguardian.com/world/2014/feb/21/switzerland-police-officer-racist-slur-law> accessed 29 June 2016).

⁴⁰⁸ In a ruling the Federal Supreme Court argued that a Nazi salute made publicly does not fall under the anti-racist provision, as long as it is no being used to spread racist ideology (see ‘Swiss court rules that Nazi salute may be ‘personal statement’, not racism’ *The Guardian* (21 May 2014) <www.theguardian.com/world/2014/may/21/swiss-court-rules-nazi-salute-personal-statement-not-racism> accessed 29 June 2016 (footnote added)).

⁴⁰⁹ In a rare case, two members of the SVP were condemned of racial discrimination for publishing a disturbing political poster, that was also used in the political campaign of the SVP promoting the initiative ‘Stop Mass Immigration’ (see n 226) (footnote added).

⁴¹⁰ CERD ‘Concluding observations’ 2014 (n 403) [12].

⁴¹¹ *ibid.*

During his visit in Switzerland, the former Commissioner for Human Rights of the Council of Europe showed his deep concern when witnessing a ‘disturbing xenophobic manifestation, widely reported in the press, consisting of aggressive, insulting slogans’, published by a major political party, targeting migrants from certain countries. To him racism and intolerance appeared to be on the rise in Switzerland.⁴¹² Like other monitoring bodies, he pointed out that freedom of expression had to be restricted in order to safeguard the human rights of others, particularly when marginalised groups were targeted by acts of incitement and hatred. He was of the opinion that particularly national political leaders bore a significant responsibility ‘being bound to effectively safeguard the rule of law, human rights and pluralism in a democratic society’. Moreover, he stated that ‘it is of the utmost importance that the authorities at federal, cantonal and municipal level adopt a proactive, vigorous approach towards all manifestations of racism and intolerance, condemn them immediately and publicly, and adopt all possible measures in order to effectively safeguard the fundamental values of Swiss society and the European human rights standards to which Switzerland has subscribed’. Furthermore, he criticised that political discourse of xenophobic and racist nature was in principle not interpreted as falling under the hate crime and hate speech legislation under the Criminal Code and therefore was criminally not sanctioned by the courts.⁴¹³

Regarding racism in political discourse, the European Commission against Racism and Intolerance (ECRI) expressed its deep concern of racist and xenophobic political discourses and hate speeches that in its view had extremely harmful consequences in the living situation of socially vulnerable groups, calling the Swiss authorities to urgently reinforce their efforts to combat this form of racism. ECRI reiterated its grave concern on the adoption of the popular initiative ‘Against the Construction of Minarets’ and additionally noted:

⁴¹² Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, *Mr Didier Burkhalter, Federal Councillor, Head of the Federal Department of Foreign Affairs, Bern, Switzerland* (Letter to the Federal Councillor following the visit to Switzerland from 20 to 23 February 2012, CommHR/SB/sf 022-2012 [CommDH(2012)]19, 2012) [1] (hereafter: Hammarberg, Commissioner for Human Rights of the Council of Europe, ‘Visit to Switzerland’ 2012).

⁴¹³ *ibid* [2] – [4].

‘During its fifth visit to Switzerland, ECRI could but note the extremely harmful consequences of this trend: Muslims, Black people, the Yenish and the Roma perceive a considerable deterioration of their situation and of the political climate. Refugees, cross-border workers and lesbian, gay, bisexual and transgender (LGBT) persons are also the targets of hate speech. In particular, the Democratic Union of the Centre (UDC) party (SVP; added), (...), has continued to use extremely intolerant images and language in connection with its recent popular initiatives "For the expulsion of foreign criminals" (...), "Against mass immigration" (...) and "For the effective expulsion of foreign criminals" (...).’⁴¹⁴

Thus, ECRI urged particularly the prosecution services to show zero tolerance especially in regard to racist statements of politicians due to their exemplary role they play in society. It recommended a consistent application of the anti-racist provision under the Criminal Code and to lift immunity of politicians using racist discourse.’⁴¹⁵

Yet, already in 2008 similar recommendations made by other states in the UPR process were rejected by Switzerland. It was of the opinion that an adoption of a specific law prohibiting incitement to racial and religious hatred, in accordance with article 20 (2) ICCPR and therefore an amendment to article 261bis Criminal Code on racial discrimination was not needed as the provision would already fulfil the requirements. Furthermore, a withdrawal of its reservation to article 4 ICERD was rejected as Switzerland wanted to take due account of the rights to freedom of opinion and association.⁴¹⁶ Moreover, the recommendation ‘to adopt legislative or other measures so that human rights are taken into account upstream by the judiciary, in particular during the elaboration of popular initiatives to ensure their compliance with international obligations’⁴¹⁷, was neither accepted by Switzerland. It was of the opinion that there was no need for additional measures to ensure compliance of popular initiatives with international law because ‘popular initiatives that contravene peremptory international

⁴¹⁴ ECRI *Report on Switzerland (fifth monitoring cycle)* (CRI(2014)39, 2014) [20] (hereafter: ECRI *Report on Switzerland 2014*).

⁴¹⁵ *ibid* [22] – [23].

⁴¹⁶ UPR ‘Report of the Working Group, Addendum’ 2008 (n 400) [7], [15] indicated in bold.

⁴¹⁷ UPR ‘Report of the Working Group’ 2008 (n 400) [rec. 57.4].

law are declared totally or partially void by the Swiss Parliament. When an initiative has been accepted, the authorities ensure that it is implemented in accordance with Switzerland's international commitments'⁴¹⁸.

Despite the statement that there was no need to adopt measures in order to guarantee that popular initiatives were not incompatible with international human rights obligations, the Federal Council nonetheless proposed reforms in the parliament, which however had to be shelved as a failure became evident in 2013. New reforms are currently discussed in the parliament, however the outcome is still very unclear (see chapter 5.1.).

Several monitoring bodies have expressed their concerns about the lack of comprehensive general anti-discrimination legislation at federal level, the insufficient effectiveness of the existing legal framework and the inconsistent transposition in the cantons in order to prevent and combat discrimination on all the prohibited grounds, including based on race, which as well had a negative impact in connection with popular initiatives in the past years.⁴¹⁹ In this context it has to be noted that a comprehensive anti-discrimination law at federal level does not exist and the current legal framework is rather fragmented, thus not guaranteeing full protection. Other than under EU law, protection against discrimination among private law subjects hardly exists.⁴²⁰ However, up until today Switzerland does not consider adopting such legislation as urged by monitoring bodies and prefers a sectoral approach. Therefore, up

⁴¹⁸ UPR 'Report of the Working Group, Addendum' 2008 (n 400) [4] indicated in bold.

⁴¹⁹ Committee on Economic, Social and Cultural Rights 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Switzerland' (26 November 2010) UN Doc E/C.12/CHE/CO/2-3 [7]; Committee on the Elimination of Discrimination against Women 'Concluding observations of the Committee on the Elimination of Discrimination against Women' (7 August 2009) UN Doc CEDAW/C/CHE/CO/3 [18]; Committee on the Rights of the Child 'Concluding observations on the combined second to fourth periodic reports of Switzerland' (26 February 2015) UN Doc CRC/C/CHE/CO/2-4 [24]; UPR 'Report of the Working Group' 2008 (n 400) [rec. 57.18]; UPR 'Report of the Working Group on the Universal Periodic Review, Switzerland' (7 December 2012) UN Doc A/HRC/22/11 [rec. 123.27] -[123.29], [123.35], [123.76] (hereafter: UPR 'Report of the Working Group' 2012); ECRI *Report on Switzerland 2014* (n 414) [3], [6], [12]; Hammarberg, Commissioner for Human Rights of the Council of Europe, 'Visit to Switzerland' 2012 (n 412) [7].

⁴²⁰ SCHR, *Umsetzung der Menschenrechte* (n 139) [270].

to date Switzerland has refused to make a commitment at international level regarding a general prohibition of discrimination.⁴²¹

Yet, in 2013 Switzerland acknowledged the need to examine whether the current provisions did sufficiently grant protection and in the following mandated the SCHR to conduct a study.⁴²² It recently has been published and includes a wide range of recommendations.⁴²³ However, the Federal Council rejected most of them as it saw no need for action.⁴²⁴ This position was harshly criticised by non-governmental organisations.⁴²⁵

4.6.3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Committee against Torture monitors implementation of the CAT by its states parties.⁴²⁶ Switzerland ratified CAT on 2 December 1986 and has since had the obligation to submit its state report as laid down in article 19 CAT. On 2 December 1986, Switzerland accepted the individual communication procedure according to article 22 CAT as well.⁴²⁷ The State did not enter reservations to the treaty.⁴²⁸

⁴²¹ This is the reason why Switzerland has not yet acceded to Protocol No. 12 to ECHR (opened for signature 4 November 2000, entered into force 1 April 2005) CETS No. 177 and also made a reservation to art 26 ICCPR (see n 382).

⁴²² UPR 'Report of the Working Group on the Universal Periodic Review, Switzerland, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review' (5 March 2013) UN Doc A/HRC/22/11/Add.1 [rec. 123.27] (hereafter: UPR 'Report of the Working Group, Addendum' 2013).

⁴²³ SCHR, *Der Zugang zur Justiz in Diskriminierungsfällen, Synthesebericht* (Bern 2015).

⁴²⁴ Eidgenössisches Justiz- und Polizeidepartement, 'Bundesrat will Diskriminierungsschutz punktuell stärken' (25 May 2016)

<www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2016/2016-05-25.html> accessed 17 June 2016.

⁴²⁵ Informationsplattform humanrights.ch, 'Enttäuschender Bericht des Bundesrats zum Diskriminierungsschutz' (3 June 2016)

<www.humanrights.ch/de/menschenrechte-schweiz/inneres/innenpolitik/bericht-bundesrat-diskriminierungsschutz> accessed 17 June 2016.

⁴²⁶ OHCHR, 'Committee against Torture' <www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx> accessed 4 April 2016.

⁴²⁷ OHCHR, 'Ratification Status for Switzerland'

<http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=169&Lang=EN>

accessed 4 April 2016. The Committee has dealt with quite a few Swiss cases. They were mainly related to the principle of *non-refoulement* in asylum cases. Yet, there is not a direct link to the topic discussed here.

⁴²⁸ See OHCHR, 'Status of Ratification Interactive Dashboard' <<http://indicators.ohchr.org/>> accessed 4 April 2016.

In its concluding observations of 2010 the Committee against Torture explicitly referred to the ‘Initiative on the Expulsion of Foreign Criminals’ and noted:

‘(...) the Federal Council has made a counter-proposal and recommended that the initiative be rejected, having found it incompatible with international law and the Swiss Constitution. However, the Committee remains concerned that the application of the initiative, if adopted by referendum, would seriously risk violating the principle of non-refoulement (art. 3).

The State party must continue its efforts to ensure that the initiative on the expulsion of foreign criminals does not violate the international obligations that Switzerland has undertaken, (...).’⁴²⁹

In the following reporting cycle 2015, the Committee against Torture did not refer to its previous recommendations regarding this popular initiative any more.⁴³⁰ The reason may be that the implementation law drafted by the parliament resulting from the newly introduced constitutional provisions in 2010 by popular vote will be brought into force only in October 2016.⁴³¹

4.7. UN Charter Based Monitoring Procedure: Universal Periodic Review

According to a General Assembly (GA) resolution, it is the Human Rights Council’s (HRC) task to ‘undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States’.⁴³² The review is based on obligations arising from the UN Charter, the UDHR, and the human rights treaties to which the state under review is a party and its voluntary pledges and commitments made. Such commitments also include the state’s commitment to implement specific recommendations issued by members of the HRC at the end of the reviewing process. The main objective of the UPR is the

⁴²⁹ Committee against Torture ‘Concluding observations of the Committee against Torture, Switzerland’ (25 May 2010) UN Doc CAT/C/CHE/CO/6 [11].

⁴³⁰ Committee against Torture ‘Concluding observations on the seventh periodic report of Switzerland’ (7 September 2015) UN Doc CAT/C/CHE/CO/7.

⁴³¹ See n 271.

⁴³² UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251 [5(e)].

implementation of its recommendations by the member states in order to improve their human rights situation at domestic level.⁴³³ States can be held politically accountable for their implementation performance following the accepted recommendations. Moreover, they are supposed to further consider those they have not yet accepted.⁴³⁴

As already mentioned earlier, the recommendation to adopt legislative or other measures in order to ensure that popular initiatives comply with international obligations was rejected by Switzerland in 2008.⁴³⁵ In this context, Belgium was concerned that there was no legal body in place responsible to analyse whether a popular initiative violated Switzerland's human rights obligations and that it was only the parliament, thus a political body, deciding on the legality of popular initiatives.⁴³⁶ The issue was again returned to in the second cycle of the UPR in 2012 and recommendations once more concerned popular initiatives. Switzerland was invited to 'introduce prompt constitutional and legislative measures ensuring that "popular initiatives" do not violate the human rights of certain individuals or groups' and by the same token to 'put in place institutional guarantees to ensure that its human rights commitments are protected against popular initiatives that may violate these commitments'.⁴³⁷ During the interactive dialogue, Switzerland explained that mechanisms of direct democracy like popular initiatives were an essential part of the Swiss political tradition and therefore crucial for upholding confidence between the state and its citizens. At the same time, Switzerland admitted that some popular initiatives were problematic in light of 'fundamental freedoms'. It referred to two reports of the Swiss Federal Council of 2010⁴³⁸ and 2011⁴³⁹, which proposed specific measures to address the problem, including a proposal to extend the grounds according

⁴³³ HRC 'Institution-building of the United Nations Human Rights Council, Annex to Human Rights Council Res 5/1, Part I' (18 June 2007) UN Doc A/HRC/21, [1], [4], [26].

⁴³⁴ Asia Pacific Forum, 'International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions' (2012) 43
<<http://nhri.ohchr.org/EN/IHRS/Documents/International%20HR%20System%20Manual.pdf>> accessed 5 April 2016.

⁴³⁵ See chapter 4.6.2., n 416, 418.

⁴³⁶ UPR 'Report of the Working Group' 2008 (n 400) [12].

⁴³⁷ UPR 'Report of the Working Group' 2012 (n 419) [rec. 123.59], [123.60].

⁴³⁸ Federal Council, 'Das Verhältnis von Völkerrecht und Landesrecht' 2010 (n 13) 2263.

⁴³⁹ Federal Council, 'Zusatzbericht des Bundesrats zu seinem Bericht vom 5. März 2010 über das Verhältnis von Völkerrecht und Landesrecht' (30 March 2011) BBl 2011 3613.

to which popular initiatives could be declared invalid, namely in case of an ‘infringement of the essence of fundamental Constitutional rights’.⁴⁴⁰ By referring to the on-going discussion in the parliament, the government rejected the aforementioned recommendations because it did not want to anticipate the decision of the parliament.⁴⁴¹

During the UPR, many states criticised Switzerland for its ban on the construction of minarets.⁴⁴² This led to the request to lift this prohibition by referring to the UN High Commissioner for Human Rights and the Special Rapporteur on the Freedom of Religion, who both had declared it ‘to be clearly discriminatory’.⁴⁴³ Yet, this recommendation remained uncommented by Switzerland in its response to the UPR recommendations.⁴⁴⁴

4.8. Switzerland as a Member of the Council of Europe

On 6 May 1963 Switzerland became the seventeenth member⁴⁴⁵ of the Council of Europe, which was mainly created in order to prevent another European war. To this end, a new European identity was supposed to emerge based on the three principles of pluralistic democracy, the rule of law and human rights.⁴⁴⁶ As discussed earlier, the aims and ideals of the Council of Europe form a regional *public order* whereby the primary focus is not on the protection of the individual but on the conviction that such a European identity can only be realised if it is based on common values that have to be respected by its member states (see chapter 4.4.). This is the reason why the membership depends on the acceptance of these core values.⁴⁴⁷ Moreover, member

⁴⁴⁰ UPR ‘Report of the Working Group’ 2012 (n 419) [66].

⁴⁴¹ UPR ‘Report of the Working Group, Addendum’ 2013 (n 422) [123.59] – [123.60].

⁴⁴² UPR ‘Report of the Working Group’ 2012 (n 419) [37] – [38], [56], [62], [76], [97], [104].

⁴⁴³ *ibid* [rec. 124.3].

⁴⁴⁴ UPR ‘Report of the Working Group, Addendum’ 2013 (n 422).

⁴⁴⁵ Council of Europe, ‘Switzerland // 47 States, one Europe’ <www.coe.int/en/web/portal/switzerland> accessed 4 May 2016.

⁴⁴⁶ Manfred Nowak, ‘The Council of Europe, An Introduction to the Human Rights Mechanisms of the Council of Europe’ in Tina Hofstätter and others (eds), *All Human Rights for All, Vienna Manual on Human Rights* (Neuer Wissenschaftlicher Verlag, 2012) 119. See as well the preamble and art 1 of the Statute of the Council of Europe, n 354.

⁴⁴⁷ Art 3 Statute (1949).

states seriously violating the principles of the rule of law and human rights may, as a last resort, be expelled from the Council of Europe.⁴⁴⁸

In the following, concerns expressed by bodies and institutions of the Council of Europe regarding Switzerland's human rights performance in connection with popular initiatives will be discussed.

4.8.1. European Convention on Human Rights

The ECHR is the flagship of the Council of Europe and its ratification mandatory for states in order to become its member.⁴⁴⁹

Switzerland ratified the ECHR on 28 November 1974 and on the same day it came into force.⁴⁵⁰ Two declarations and a corresponding reservation regarding article 6 ECHR have been withdrawn by Switzerland in the year 2000.⁴⁵¹

Up until today, the ECtHR has not yet ruled on the merits of an appeal that was brought forward claiming a human rights violation based on legislation implemented through above mentioned popular initiatives. Either the initiatives were rejected, like the initiative 'For Democratic Naturalisation Procedures' and the 'Initiative on the Enforcement of the Expulsion of Foreign Criminals', or the implementation is yet unclear, which is the case regarding the initiative 'Stop Mass Immigration'. There exists another case, where the parliament drafted an implementation legislation that in its view was compatible with human rights law, which however has remained disputed at domestic level. The 'Initiative on the Expulsion of Foreign Criminals' might turn out to

⁴⁴⁸ Art 8 Statute (1949). So far, only Greece under its military regime has denounced the ECHR and in order to prevent its suspension, declared on its own initiative its withdrawal from the Council of Europe (see Eckart Klein, '50 Jahre Europarat' (2001) 39 AVR 121, 134).

⁴⁴⁹ Martyn Bond, 'The Council of Europe and human rights' (Council of Europe Publishing, 2010) 8. Although article 58 ECHR includes the option of denunciation and remains silent on the consequences this would have regarding a state's membership of the Council of Europe, by considering article 3 Statute (1949) it seems not likely that a denunciation is possible while upholding the membership.

⁴⁵⁰ Council of Europe, 'Chart of signatures and ratifications of Treaty 005, Convention for the Protection of Human Rights and Fundamental Freedoms' (4 May 2016)

<www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/signatures?p_auth=BHlm7p6W> accessed 4 May 2016.

⁴⁵¹ Federal Council Dispatch, 'Botschaft zum Bundesbeschluss über den Rückzug der Vorbehalte und Auslegenden Erklärungen der Schweiz zu Artikel 6 der Europäischen Menschenrechtskonvention' (24 March 1999) BBl 1999 3658ff.

be an example for this. It is likely that the Federal Supreme Court will assess in a future case whether human rights are violated and in the affirmative may refuse its application (see chapter 5.3.). In a rather different situation regarding indefinite incarceration, it is likely that the Federal Supreme Court may never assume that an offender is ‘permanently untreatable’ and thus an application of lifelong detention very unlikely. Yet, depending on the outcome of future rulings of the Federal Supreme Court, a referral to the ECtHR may occur. Among most stakeholders there is broad consensus that the constitutional provision based on the initiative ‘Against the Construction of Minarets’ violates human rights obligations. Yet, its application is unclear and again it is probable that the Federal Supreme Court may deny an application if contrary to human rights obligations (see the whole discussion chapter 5.3.). The two applications brought to the ECtHR after the approval of that initiative were declared inadmissible as the complaints were related to an abstract judicial review and the victim requirement denied by the Court.

However, one popular initiative is already in the focus of the Council of Europe. When speaking to the Parliamentary Assembly in January 2016, *Thorbjørn Jagland*, the Secretary General of the Council of Europe, by emphasising the outstanding role of the ECHR, expressed his concerns regarding attempts to question the primacy of that Convention. In this connection he referred to the growing political threat posed by, among others, the initiative ‘Swiss Law Instead of Foreign Judges’.⁴⁵²

As already elaborated (see chapter 3.3.8.), it is unclear yet whether this initiative will be put to a popular vote and in the case of an approval, how it would be implemented. However, in their study⁴⁵³ *Walter Kälin* and *Stefan Schlegel* expressed no doubt that irrespective of rulings in individual cases, if Switzerland created a legal situation which would make it likely that the ECHR could no longer be respected, the Council of Europe with its respective mechanisms would take the actions foreseen for this purpose. In this context they refer to measures that could be taken by the ECtHR, the Committee

⁴⁵² ‘The European Convention on Human Rights under threat: a call to States’ action’ *Blogactiv* (4 February 2016) <<https://eulogos.blogactiv.eu/2016/02/04/the-european-convention-on-human-rights-under-threat-a-call-to-states-action/>> accessed 16 June 2016.

⁴⁵³ Kälin and Schlegel, *Schweizer Recht bricht Völkerrecht?* (n 295).

of Ministers, the Parliamentary Assembly, the Secretary General, the Commissioner for Human Rights and furthermore by the member states themselves through inter-state complaints.⁴⁵⁴ It might be that the concerns expressed by the Secretary General in his speech in January 2016 could be seen as a starting point of putting pressure on Switzerland in order to find a way to prevent such a vote.

4.8.2. Commissioner for Human Rights of the Council of Europe

As already shown above, *Thomas Hammarberg*, former Commissioner for Human Rights of the Council of Europe, expressed concerns regarding racism and intolerance, particularly in the political discourse and through political campaigns, which often remained unprosecuted (see chapter 4.6.2.). Already the first Commissioner for Human Rights, *Alvaro Gil-Robles*, showed worries on political propaganda fuelling xenophobia in Switzerland. He thereby expressly referred to the political poster used by the SVP to promote their initiative ‘For Democratic Naturalisation Procedures’ (see chapter 3.3.3.). In order to combat racist and offensive campaigns, he recommended, among others, to introduce effective systems to monitor and penalise such racist incidents.⁴⁵⁵ Another issue discussed by *Alvaro Gil-Robles* related to criticism expressed by some members of the executive and legislature in Switzerland regarding several rulings of the Federal Supreme Court and its developed case-law not to apply federal laws if they led to a human rights violation in a specific case. Critiques were of the opinion that the Federal Supreme Court overstepped its competence and insisted that sovereignty of the people meant that their decisions would prevail at the expense of human rights. *Alvaro Gil-Robles* showed great concern that some judges responsible for those rulings were

⁴⁵⁴ *ibid* 22 - 36. The authors did not refer to the European Commission for Democracy Through Law (Venice Commission), which however could be involved if carrying out a research on its own initiative or upon request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state or international organisation or body participating in the work of the Commission (see Venice Commission ‘Resolution RES (2002) 3 Adopting the Revised Statute of the European Commission for Democracy Through Law’ (27 February 2002) CDL (2002) 27) art 3.

⁴⁵⁵ Report of Mr Alvaro Gil-Robles, Commissioner for Human Rights, Visit to Switzerland from 29 November to 3 December 2004, CommDH(2005)7, 8 June 2005 [109], 48 (hereafter: Gil-Robles, Commissioner for Human Rights, ‘Visit to Switzerland’ 2004).

threatened, among others, with not being re-elected.⁴⁵⁶ To him this ‘could be seen as an unacceptable attack on the independence of judges’.⁴⁵⁷ Regarding the adoption of the initiative ‘Lifelong detention for extremely dangerous, non-treatable violent and sexual offenders’, he urged that its application had to provide compatibility with the ECHR.⁴⁵⁸

Following his visit to Switzerland in 2012, the former Commissioner for Human Rights of the Council of Europe, *Thomas Hammarberg*, was concerned about certain popular initiatives, which were according to him not compatible with human rights standards:

‘Certain *popular initiatives* (emphasis added), such as those concerning the ban of minarets and the automatic expulsion of migrants having committed a certain crime, raise serious issues of compatibility with human rights standards - notably those of the European Convention on Human Rights. The need for an effective political or judicial filtering system to safeguard human rights standards in this particular context has been acknowledged by the Federal Council and the parliament. The Commissioner welcomes this intention to meet the obligation to make sure that constitutional provisions introduced through popular initiatives are reconcilable with the peremptory norms of international law as well as all other agreed upon European and international standards concerning human rights and fundamental freedoms.’⁴⁵⁹

⁴⁵⁶ Pursuant to art 168 (1) Federal Constitution, judges of the Federal Supreme Court are elected by the Federal Assembly for a period of six years and must be then re-elected (art 145 Federal Constitution). There is criticism that this relatively short time affects the independence of the judiciary by pointing to an increase of putting political pressure on judges by political parties, some members of the executive and the media. Particularly comments of the former Federal Councillor and head of the Federal Department of Justice and Police *Christoph Blocher*, member of the SVP, regarding rulings handed down by the Federal Supreme Court caused strong reactions (see Rhinow and Schefer, *Schweizerisches Verfassungsrecht* (n 22) [2882], [2889] – [2892], [2999]). Yet, his statements involved an official investigation with the result that his comments were declared improper. He was urged to show greater reluctance when commenting rulings of the judiciary and if doing so, to do it in an accurate and balanced way (see Control Committee of the Council of States, ‘Untersuchung von öffentlichen Aussagen des Vorstehers des EJPD zu Gerichtsurteilen, Bericht der Geschäftsprüfungskommission des Ständerates’ (10 July 2006) BBl 2006 9051).

⁴⁵⁷ Gil-Robles, Commissioner for Human Rights, ‘Visit to Switzerland’ 2004 (n 455) [121] – [126], 49.

⁴⁵⁸ *ibid* [121] – [126], 49.

⁴⁵⁹ Hammarberg, Commissioner for Human Rights of the Council of Europe, ‘Visit to Switzerland’ 2012 (n 412) [6].

However, reforms proposed by the Federal Council in order to obtain greater conformity between popular initiatives and international human rights obligations had to be shelved in 2013 as a setback became evident.⁴⁶⁰

4.8.3. European Commission Against Racism and Intolerance

As already mentioned above, ECRI has repeatedly expressed its deep concern regarding political parties, mainly the SVP and their extremely intolerant political campaigns and usage of language amounting to hate speech. It has urged Switzerland to strenuously apply its anti-racist provision and to lift immunity against politicians if needed.⁴⁶¹ ECRI spoke of a ‘dangerous polarisation in political discourse’, of a ‘racist and xenophobic tone’ in politics, where foreigners’ fundamental rights were questioned, which has ‘created a deep sense of unease in Swiss society generally and especially in minority communities’ and had a ‘devastating effect on the atmosphere concerning the target groups in Switzerland’. ECRI regretted that popular initiatives infringing human rights which were not subsumed under *ius cogens* were not declared invalid and put to a popular vote.⁴⁶²

In its most recent report of 2014⁴⁶³, ECRI regretted the decision of the Federal Council to abandon the attempt to propose reforms in order to obtain greater conformity between popular initiatives and human rights obligations. In this context, ECRI referred to the ruling of the Federal Supreme Court⁴⁶⁴ where the Court afforded human rights obligations supremacy over domestic legislation. ECRI was therefore of the opinion, that ‘in view of the extremely harmful impact of the campaigns preceding the above-mentioned referendums and given that the Federal Supreme Court has made it clear that it will verify the conformity of the proposals adopted with public international law, ECRI considers that the Swiss authorities should re-examine the possibilities of

⁴⁶⁰ Eidgenössisches Justiz- und Polizeidepartement, ‘Volksinitiativen, Völkerrecht und Verfassung: Suche nach Auflösung des Spannungsfeldes’ (13 December 2013) <www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2013/2013-12-133.html> accessed 28 July 2016, see as well chapter 5.1.

⁴⁶¹ See chapter 4.6.2. and ECRI Report on Switzerland (fourth monitoring cycle) (CRI(2009)32, 2009) 8.

⁴⁶² *ibid* 8f.

⁴⁶³ ECRI Report on Switzerland 2014 (n 414).

⁴⁶⁴ See n 210.

introducing a prior screening system’. Such a system would furthermore ‘avoid racist and discriminatory campaigns’.⁴⁶⁵

4.9. Switzerland as Participating State of the Organization for Security and Co-operation in Europe (OSCE)

For decades, the participating states of the OSCE have agreed on a large set of human rights principles, which are also laid down in core international human rights treaties and declarations. All decisions and commitments agreed upon are taken by consensus by the participating states. They have therefore a moral and also political obligation to comply with these standards.⁴⁶⁶ Yet, the commitments and mechanisms of the OSCE to monitor compliance with the aforementioned standards are not legally binding. This is the reason why States are less reluctant to infringe their political commitments entered in the framework of the OSCE than their treaty obligations.⁴⁶⁷ Because of the political character of the OSCE, Switzerland’s compliance with the standards set by OSCE participating states will not be further discussed.

4.10. Interim Conclusion

As shown in the previous chapters, the legally binding human rights framework affords not only subjective rights to individuals, but as well includes corresponding international obligations to states in order to respect, fulfil and protect these rights. States that voluntarily accept to be bound by obligations enshrined in human rights treaties, have the inherent duty to perform those treaties in good faith. Therefore, for example referrals to constitutional amendments based on popular votes conflicting with treaty obligations are not permissible. What is more, the executive, the legislator and the judiciary must fulfil a state’s contractual obligations of a treaty. The same applies to initiators of popular initiatives. Yet, international law does not determine how treaty

⁴⁶⁵ ECRI *Report on Switzerland 2014* (n 414) [25] – [27], 33.

⁴⁶⁶ Lamberto Zannier, ‘The Organization for Security and Co-operation in Europe, Human Rights and OSCE’s Comprehensive Security Concept’ in Tina Hofstätter and others (eds), *All Human Rights for All, Vienna Manual on Human Rights* (Neuer Wissenschaftlicher Verlag, 2012) 211.

⁴⁶⁷ Pieter van Dijk, ‘Vergleich zwischen dem Menschenrechtssystem des Europarates und der menschlichen Dimension der Konferenz über Sicherheit und Zusammenarbeit in Europa’ in Manfred Nowak (ed), *Europarat und Menschenrechte: Dokumentation eines Seminars im Schloss Laudon gemeinsam mit dem Ludwig-Boltzman-Institut für Menschenrechte vom 4. – 6. Oktober 1993 anlässlich des Gipfeltreffens des Europarates in Wien vom 8. – 9. Oktober 1993* (Verlag Orac, 1994) 31f.

obligations have to be incorporated into domestic law, as long as they are adequately met. Furthermore, human rights obligations are *erga omnes* obligations and beyond this may even create an objective order which unfolds further effect than the mere duty to fulfil treaty obligations *vis-à-vis* an individual.

Among other measures and in order to ensure that human rights are adequately respected, enforcement mechanisms are established. To this end, courts – in the present context the ECtHR - deliver legally binding judgments related to guarantees under the ECHR. Furthermore, monitoring mechanisms both under the UN treaties and under the framework of the Council of Europe are implemented in order to give authoritative guidance on how to adequately ensure human rights protection in the respective states and furthermore to release authoritative findings on whether a breach of an international obligation has occurred. Moreover, UN charter based mechanisms put political pressure on states in order to respect their obligations. Such findings of a wrongful act entailing a state's responsibility under international law is drawn if an infringement through mere legislation becomes immediately apparent or else in the concrete application of the law. Overall, the legally binding human rights framework requires that states adopt their national legal system to the provisions of the treaties and in general to take continuously all measures needed in order to create an environment in which all human rights obligations can be realised to the greatest extend possible.

Switzerland as member to the UN and of the Council of Europe, and as state party to several human rights treaties has voluntarily committed to ensure a wide range of human rights obligations. Moreover, particularly as a member of the Council of Europe it has accepted to respect the common value system that is as well acknowledged as a regional *ordre public*.

Under this human rights framework several monitoring bodies and institutions have repeatedly addressed the particularity of direct democracy in Switzerland, especially the right to launch popular initiatives. Their concerns are explicitly related to the popular initiatives discussed at the beginning of this thesis. Based on their assessment they are of the opinion that some popular initiatives raise serious issues of compatibility with human rights obligations and they criticise the lack of safeguards ensuring that popular

initiatives must not infringe those obligations. An independent filtering system is strongly recommended, which would guarantee the declaration of invalidity in case they infringe human rights obligations, regardless of being subsumed under *ius cogens* or not, and thus not put to a popular vote. Some political campaigns accompanying such popular initiatives are strongly disapproved of as they often advocate racism and xenophobia. The same holds true for the political discourse of some politicians, particularly of members of the SVP, which incites racism and racial discrimination and even amounts to hate speech. The fact that such incidents often remain unprosecuted and that the legal framework under the Criminal Code is too narrow to include them, is viewed with great concern. In this regard, they see that politicians of right-wing parties bear a responsibility for the rise of racism and xenophobia in Switzerland.

In this context, the concept of freedom of expression having in Switzerland in fact a higher rank than other human rights is seriously questioned by the monitoring bodies. Thus, a withdrawal of reservations thereto is strongly recommended. Over all, the lack of comprehensive anti-racist and anti-discrimination legislation is strongly regretted. It is noted that popular initiatives together with political campaigns and debates accompanying them over the last years have had a devastating effect on minority groups often targeted by such political activities and in general have created a deep sense of unease in Swiss society.

Regarding the initiative on the ban of the construction of minarets, the monitoring bodies use in their findings expressions like ‘if adopted, would bring the State party into non-compliance with its obligations’, ‘clearly discriminatory’, it should be ‘lifted’, ‘raise serious issues of compatibility with human rights standards’. This wording seems to indicate that the initiative and the constitutional provision thereto are in breach of human rights obligations. Besides, the Federal Council shared the same view during the adoption procedure. Regarding this initiative and the ones on the expulsion of foreign criminals and on lifelong detention for extremely dangerous offenders, findings like ‘raise serious issues of compatibility with human rights standards’, ‘if adopted would seriously risk a violation’, Switzerland must ‘ensure that the initiative does not violate international obligations’ are formulated. This wording leaves no doubt that such

popular initiatives themselves raise great concerns among monitoring bodies regarding the compatibility with human rights obligations. Yet, although questioning whether an implementation in conformity with international obligations is at all possible, a chance that the risk of non-compliance will not materialize is still given. Therefore, the conclusion of a ‘manifest violation’ and thus of a breach of international law by merely looking at constitutional provisions themselves may be too far-reaching. The same holds true when it comes to popular initiatives in general. Even though the monitoring bodies regret the fact that popular initiatives infringing human rights are put to a popular vote and they show deep concern about the lack of safeguards to ensure that popular initiatives do not contradict Switzerland’s human rights obligations, the conclusion based on their findings that popular initiatives themselves as well as the enacted constitutional provisions thereto clearly lead to a breach of international law and thus entail Switzerland’s responsibility under international law cannot easily be drawn. Although the findings allow the interpretation that such initiatives are of such a high risk that a limitation of popular rights in themselves is indeed highly recommended, they still leave discretion to Switzerland to ensure that such a risk does not materialize in its result. Even more by considering that such findings, although having authoritative character, are not legally binding, a conclusion of infringement would require that the monitoring bodies would have clearly established such a violation. This is highly probable in the case of the constitutional provision prohibiting the construction of minarets, but cannot be drawn as a general conclusion. What is more, regarding the ban on minarets, the ECtHR denied a ‘chilling effect’ deriving directly from the constitutional amendment. Thus, despite the wording of the monitoring bodies in the latter case, a conclusion of a breach of international law can neither be drawn taking into account the legally binding decision of the ECtHR.

Considering moreover that the human rights framework leaves a certain margin of discretion to the states on how they ensure human rights protection at domestic level and by taking into account the very high threshold to declare the mere existence of – in the present context – constitutional law as a breach of international law both under the reporting procedure but as well by the ECtHR, it is concluded as an interim result that

neither popular initiatives in themselves nor the enactment of constitutional provisions thereto have clearly led to a breach of international law up until today.

Therefore, in the following chapter it shall be clarified whether statutory law implementing constitutional provisions deriving from popular initiatives ‘manifestly’ breaches international law or whether such a breach is ‘immediately apparent’⁴⁶⁸ and furthermore, how the judiciary reconciles conflicts with international law obligations in the concrete application of the law.

5. The Practice of the Parliament and the Federal Supreme Court to Reconcile Conflicts between National and International Law

As stated earlier, all branches of government - executive, legislative and judicial - are responsible for fulfilling a state party’s contractual obligations of a treaty,⁴⁶⁹ which also applies in cases where constitutional law was amended directly by popular votes.⁴⁷⁰ The voters in their function as constitutional legislator have thus the duty to respect fundamental rights and the rule of law, which includes the respect for human rights (see chapter 2.2.).

However, examples of popular initiatives of the past years have shown that the electorate does not always abide by this duty. In such cases it can however not be held responsible for its failures. Yet, within the whole process from launching a popular initiative until its concrete application, not only the electorate but also subsequent state organs are bound by the principles as just mentioned. Thus, the parliament is responsible for the implementation of legislation deriving from constitutional provisions introduced by popular vote, which however has to be in conformity with international law. The same holds true for the judiciary when giving its ruling in specific cases. Consequently, a retroactive remedy of the conflict is possible.⁴⁷¹ Bearing this in mind, it shall be looked in the following whether the practice of the parliament and the judiciary achieve this goal.

⁴⁶⁸ See chapter 4.2.

⁴⁶⁹ See HR Committee ‘General Comment No. 31’ (n 318) [4].

⁴⁷⁰ Hangartner and Kley, *Demokratische Rechte* (n 30) [513].

⁴⁷¹ Pedretti, *Vom Verbot von gleichgeschlechtlichen Ehen und Minaretten* (n 13) 30 - 32.

5.1. Current Practice of the Parliament to Draft Legislation

In a democracy, national parliaments particularly with their legislative duties play a crucial role in ensuring that international human rights obligations are adequately transformed into domestic law, which is why they can be considered guardians of human rights.⁴⁷² They must therefore take the necessary legislative measures in order to ensure that the State fulfils its human rights treaty obligations. In fact, without the necessary legislative framework, human rights cannot be sufficiently implemented.⁴⁷³

Deriving from the principle under international law that treaties are binding upon the parties and must be performed in good faith (see chapter 4.2.), the Federal Constitution lays down that state institutions shall act in good faith and must respect international law.⁴⁷⁴ The respect of this principle of *pacta sunt servanda* is undisputed among scholars and the judicature at domestic level.⁴⁷⁵ And this is why the parliament in practice accepts its duty to interpret, among others, constitutional provisions in conformity with international law.⁴⁷⁶

To this end, the Federal Council, among others, carries out an assessment of the question of compatibility of a popular initiative with international law, which is then included in its dispatch. The decision of the Federal Assembly on whether to declare a popular initiative valid, on whether to reject it and on whether to draft a counter-proposal derives as well from this assessment (see chapters 3.1.2. – 3.1.4.3.2.). If despite the recommendation of rejection a popular initiative is nevertheless adopted, the parliament then drafts statutory law by trying to do this in conformity with constitutional and international law.⁴⁷⁷ This applies where the constitutional provision is not directly applicable, which is mostly the case.⁴⁷⁸ The authorities are of the opinion, that real conflicts between popular initiatives and international law obligations are

⁴⁷² OHCHR, 'Handbook for Parliamentarians' (n 306) 63.

⁴⁷³ William Schabas, 'Summary of Discussion' in Wolfgang Benedek and others. (eds), *Global Standards – Local Action, 15 Years Vienna World Conference on Human Rights* (Neuer Wissenschaftlicher Verlag, Wien, Graz 2009) 137.

⁴⁷⁴ Arts 5 (3), (4) Federal Constitution.

⁴⁷⁵ Kiener and Küsi, 'Bedeutungswandel des Rechtsstaats' (n 43) 237, 248.

⁴⁷⁶ Federal Council, 'Das Verhältnis von Völkerrecht und Landesrecht' 2010 (n 13) 2263, 2315ff.

⁴⁷⁷ Kiener and Küsi, 'Bedeutungswandel des Rechtsstaats' (n 43) 237, 249.

⁴⁷⁸ See the discussion of the ruling of the Federal Supreme Court (BGE 139 I 16) in chapter 3.3.6.

seldom and legislation in line with international law obligations usually possible.⁴⁷⁹ Yet, as shown above, such conflicts are still on the rise (see chapter 2.3.2.).

In the case of a popular initiative clearly aiming to contradict non peremptory norms of international law or if the legislator cannot draft a law in conformity with international law, the Federal Council assumes that an approval of such a popular initiative implicitly gives a mandate to denounce the international treaty.⁴⁸⁰ In this context, the question is raised of the body having effectively the competence to repeal legislation and of the respective procedure thereto.⁴⁸¹ Furthermore, the problem arises what to do when a state can in principle not free itself from contractual obligations because the respective treaty does not include a termination clause or provide for denunciation or withdrawal,⁴⁸² which is the case for the ICCPR.⁴⁸³ Regarding the ECHR, although providing the possibility of denunciation,⁴⁸⁴ the Federal Council has repeatedly and firmly rejected it by stating that legal and political reasons excluded such an option and by bringing to mind that a denunciation of the ECHR would lead to an exclusion from the Council of Europe.⁴⁸⁵

Therefore, particularly when it comes to human rights obligations, a denunciation is not seen as a valid possibility by the Federal Council. In the case where the parliament cannot otherwise than draft legislation, which is not in conformity with international law and where a denunciation of the treaty is not possible, such legislation has to be enacted anyway and the conflict then shifts to the judiciary.

As shown above, several popular initiatives were not declared invalid as a conflict with peremptory norms of international law was excluded or its implementation in conformity with *ius cogens* seen possible. Yet, conflicts with ‘other’ international law, mainly human rights law, were pointed out on several occasions by the Federal Council in its dispatches leading to recommend a rejection. Thus, in connection with the adopted

⁴⁷⁹ Federal Council, ‘Das Verhältnis von Völkerrecht und Landesrecht’ 2010 (n 13) 2263, 2272.

⁴⁸⁰ *ibid* 2263, 2317.

⁴⁸¹ See chapter 3.3.5., particularly n 234.

⁴⁸² See art 56 VCLT.

⁴⁸³ Nowak, *CCPR Commentary* (n 16) Introduction [32ff].

⁴⁸⁴ See art 58 ECHR.

⁴⁸⁵ See, among others, Federal Council, ‘40 Jahre EMRK-Beitritt’ 2014 (n 292) 357, 404ff.

popular initiatives described above, the question arises whether statutory law was drafted that is according to the threshold of international monitoring bodies ‘apparently’⁴⁸⁶ not in line with human rights obligations.

Before discussing that question, it has to be noted that among some politicians and the Federal Council there is awareness that popular initiatives and the current legal framework thereto may cause conflicts with Switzerland’s obligations under international law and for many years discussions have been on-going on how such conflicts could be mitigated.⁴⁸⁷ Scholars as well have dealt intensively with the question of possible reforms, either suggesting reforms regarding the requirements of validity in order to prevent some popular initiatives to be put to a popular vote or focusing on strengthening the judiciary by implementing comprehensive constitutional jurisdiction.⁴⁸⁸ Yet, it has become apparent that consensus among politicians on possible reforms can hardly be achieved. Among others, a proposal to introduce comprehensive constitutional jurisdiction failed in 2012.⁴⁸⁹ The same holds true regarding the Federal Council’s proposals to introduce a non-binding preliminary examination on whether a popular initiative is in compliance with the requirements of validity and furthermore one regarding the broadening of the material limitations of constitutional amendments including if the ‘essence of fundamental rights’ or the ECHR is infringed.⁴⁹⁰ In December 2013 the Federal Council had to decide to not further pursue its proposals as a failure in the parliament became evident.⁴⁹¹ A new report⁴⁹² of the Political Institutions Committees of the Council of States again recently identified a need for action regarding popular initiatives conflicting with core principles of the Federal

⁴⁸⁶ See chapter 4.2.

⁴⁸⁷ Federal Council, ‘Das Verhältnis von Völkerrecht und Landesrecht’ 2010 (n 13) 2263ff.

⁴⁸⁸ See overview on the current discussion among scholars: Pedretti, *Vom Verbot von gleichgeschlechtlichen Ehen und Minaretten* (n 13) 46ff.

⁴⁸⁹ See n 505.

⁴⁹⁰ Federal Council, ‘Bericht des Bundesrates zur Abschreibung der Motionen 11.3468 und 11.3751 der beiden Staatspolitischen Kommissionen über Massnahmen zur besseren Vereinbarkeit von Volksinitiativen mit den Grundrechten’ (19 February 2014) BBl 2014 2337ff.

⁴⁹¹ Eidgenössisches Justiz- und Polizeidepartement, ‘Volksinitiativen, Völkerrecht und Verfassung: Suche nach Auflösung des Spannungsfeldes’ (13 December 2013) <www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2013/2013-12-133.html> accessed 28 July 2016

⁴⁹² Political Institutions Committees of the Council of States, ‘Anforderungen an die Gültigkeit von Volksinitiativen, Prüfung des Reformbedarfs, Bericht der Staatspolitischen Kommissionen des Ständerates’ (20 August 2015).

Constitution. Among others, the argument was brought forward that the trust of the electorate in the instrument of popular initiatives was affected if in the end it turned out that a conflicting initiative could not be implemented as promised in the beginning. The amendments proposed aiming at strengthening the requirements to declare popular initiatives invalid have been supported by the Political Institutions Committees of the National Council in February 2016.⁴⁹³ Among others, the proposals include a firmer application or further clarification of the requirement of subject matter and an optional and non-binding preliminary examination on whether a popular initiative is in conformity with the requirements of validity.⁴⁹⁴ It is however questionable whether the new proposals could mitigate the existing conflict. It is rather regarded as a ‘minor’ but realistic reform into the right direction, whose impact might remain small but however might find a majority in the parliament. Yet, opposition against any reform regarding popular initiatives has already been expressed.⁴⁹⁵

In the following it shall be verified whether the parliament adopted statutory law deriving from constitutional amendments, which were ‘manifestly’ not compatible with human rights obligations.

5.1.1. Initiative ‘Lifelong detention for extremely dangerous, non-treatable violent and sexual offenders’

In the case of the approved initiative on lifelong detention, the Federal Council saw a need to broadly interpret the constitutional provision in order to avoid a conflict with human rights law. After a long drafting process, the legislator was of the opinion that the amendments to the Criminal Code were compatible with human rights obligations,

⁴⁹³ Staatspolitische Kommission des Nationalrates (SPK-NR), ‘Gültigkeit von Volksinitiativen: auch Nationalratskommission sieht Handlungsbedarf’ (5 February 2016) <www.parlament.ch/press-releases/Pages/mm-spk-n-2016-02-05-b.aspx> accessed 27 June 2016.

⁴⁹⁴ *ibid.*

⁴⁹⁵ Christine Eggerszegi-Obrist, ‘Entmachtung des Volkes oder nur Reförmchen? Zu den möglichen Wegen einer notwendigen Reform gemäss den Vorschlägen der Staatspolitischen Kommission des Ständerats’ in Georg Kreis (ed), *Reformbedürftige Volksinitiative, Verbesserungsvorschläge und Gegenargumente* (Verlag Neue Zürcher Zeitung, Zürich 2016) 38.

particularly the ECHR.⁴⁹⁶ Whether this holds true was however disputed at domestic level⁴⁹⁷ and also critically viewed by the CPT (see chapter 3.3.2.).

5.1.2. Initiative ‘Against the Construction of Minarets’

Regarding this initiative and the constitutional provision thereto, monitoring bodies most probably tend to determine it as a breach of human rights obligations. The Federal Council shared this position and was furthermore of the opinion, that no implementation law was needed. Consequently, it has remained unclear to the present date how the constitutional provision shall be applied in a specific case.⁴⁹⁸ However, the opinion was expressed that cantonal legislation was nonetheless needed, which might allow amendments in accordance with international law (see chapter 3.3.4.).

5.1.3. Initiative ‘Stop Mass Immigration’

In the case of the initiative ‘Stop Mass Immigration’, the Federal Council saw great conflict potential to international law obligations. Yet, other than the potential conflict with the Agreement on the Free Movement of Persons, an implementation not violating human rights obligations was seen as possible. Up until now it is not clear, how the initiative will be implemented. Therefore, whether such implementation will be in conformity with human rights law remains to be proven. At the centre of the discussion hereto is not a denunciation of human rights treaties but whether a denunciation of bilateral agreements with the EU is needed (see chapter 3.3.5.).

5.1.4. ‘Initiative on the Expulsion of Foreign Criminals’

The Federal Council saw a potential for serious conflicts with, among others, the principles of the rule of law and with human rights law and as a logical consequence a need to denounce the respective international treaties in order not to become responsible under international law. However, at the same time it rejected such a solution out of political and legal reasons. After the adoption of the initiative, the parliament drafted a

⁴⁹⁶ See n 173. See as well Federal Council, ‘40 Jahre EMRK-Beitritt’ 2014 (n 292) 357, 396.

⁴⁹⁷ See n 174.

⁴⁹⁸ See chapter 3.3.4. and Federal Council, ‘40 Jahre EMRK-Beitritt’ 2014 (n 292) 357, 396.

law trying to take into account the aims of the initiative but as well international obligations. Even though the parliament is of the opinion that the legislative amendments coming into force in October 2016 are in line with international law, rulings in specific cases will have to establish whether this holds true.

5.2. Interim Conclusion

For the popular initiatives discussed here a final assessment whether the current practice of the parliament leads to legislation violating human rights obligations is not possible, as some legislation is not yet drafted or as it is unclear whether implementation law is needed. However, in light of the very high threshold set up by international monitoring bodies for declaring statutory law itself as a breach of international law, the conclusion that the parliament exceeded that threshold in the cases where the parliament actually adopted legislation cannot be drawn.

Although the legislator has always recommended a rejection of the popular initiatives discussed above because of the potential conflict of future constitutional provisions with international law obligations in case of adoption, it has shown nevertheless its willingness to accept the duty as a state organ to respect the rule of law and human rights and thus to draft legislation thereto in conformity with international law. This might indeed lead to controversial debates in the parliament (as an example see chapter 3.3.6.) and what is more, such a decision strongly depends on the power distribution in the two chambers of the parliament. Thus, a guarantee that the legislator will uphold its current position to try to respect the principles laid down in the Federal Constitution is not given. However, it has to be noted that safeguards guaranteeing that a state organ abides by its constitution can never be fully implemented and thus such a risk always is within the realm of possibility.⁴⁹⁹

Yet, according to the legislation processes and its outcomes here discussed, a failure of the parliament has not become ‘immediately apparent’, so the conclusion that a violation of international law has occurred would not be justified.

⁴⁹⁹ Tschannen, *Staatsrecht* (n 7) [10, side note 2].

Indeed, there were doubts expressed on whether legislation was in fact compatible with human rights law. However, as such a conclusion cannot easily be drawn, the question shifts to the judiciary and its case-law. How a probable conflict in a specific case is solved and on whether human rights are protected in such rulings remains to be seen.

Therefore, the following chapter shall discuss how the judiciary in practice solves such conflicts arising between human rights and domestic law. As already noted, the Federal Constitution does not include an explicit rule how conflicts between international and both constitutional and statutory federal law shall be solved. Therefore, this topic area has been leading to discussion among scholars over decades and is subject of many disputes among politicians up until today. Many questions thereto remain unsolved.⁵⁰⁰ However, these discussions will not be elaborated further and in the following chapter the focus lies only on the case-law of the Federal Supreme Court and how the highest court rules in such cases.

5.3. Current Practice of the Judiciary to Reconcile Conflicts between International Human Rights Obligations and Contradicting Domestic Law

Preliminary it shall be noted that in this chapter not every single popular initiative will be discussed in a separate chapter, as the case-law of the Federal Supreme Court has an overall impact on the question on how to solve conflicts between international and domestic law.

As already mentioned, full constitutional jurisdiction at federal level is not given because of article 190 Federal Constitution. Already in 1996, the Federal Council emphasised the crucial role constitutional jurisdiction takes in context of the framework of the Council of Europe.⁵⁰¹ Therefore, it made a proposal that in specific cases⁵⁰² the Federal Supreme Court shall have jurisdiction to verify whether federal acts are in conformity with the Federal Constitution and international law. However, this proposal was rejected by the parliament.⁵⁰³ Another proposal⁵⁰⁴ to introduce full constitutional

⁵⁰⁰ Federal Council, 'Das Verhältnis von Völkerrecht und Landesrecht' 2010 (n 13) 2263, 2306.

⁵⁰¹ Federal Council Dispatch, 'Botschaft neue Bundesverfassung' 1996 (n 121) 1, 68f.

⁵⁰² An abstract review on whether federal legislation is in line with international law obligations is in any case not possible (see Tschannen, *Staatsrecht* (n 7) [11, side note 27, 33].

⁵⁰³ Council of States, 'Amtliches Bulletin der Bundesversammlung' (30 August 1999) AB 1999 IV 606f.

jurisdiction by deleting article 190 Federal Constitution, which was fully backed by the Federal Council, was again rejected by the National Council in 2012.⁵⁰⁵

The already mentioned constitutional provision limiting constitutional jurisdiction, states that ‘the Federal Tribunal (Federal Supreme Court: added) and the other judicial authorities apply the federal acts and international law’⁵⁰⁶. Consequently, both federal and international law are binding for the judiciary. Therefore, even in cases where these laws are in contradiction to the Federal Constitution, they must be applied by the judiciary. Thus, whilst the Federal Supreme Court in a conflicting case between constitutional and federal law is allowed to determine that the latter is not in conformity with the Federal Constitution, it still must apply the unconstitutional federal law.⁵⁰⁷

This principle of limited constitutional jurisdiction has existed since 1874. The reason for this principle lies in the legislator’s mistrust of the judiciary. Therefore, federal laws adopted in a democratic process by the federal parliament were not eligible to be lifted by the judiciary. Furthermore, at that time citizen’s freedoms were primarily limited by cantonal legislation which was and still is eligible to full constitutional review. However, since then a shift towards federal legislation has taken place.⁵⁰⁸ Therefore, the lack of full juridical protection has become manifest particularly in the area of fundamental rights. Because in a conflicting case between the latter and federal legislation, the Federal Supreme Court is not allowed to protect fundamental rights of an individual although these are enshrined in the Federal Constitution. In such cases, fundamental rights protection ‘remain a dead letter’⁵⁰⁹.

However, over many years the Federal Supreme Court has developed a practice allowing fundamental rights protection in cases where they are congruent with human

⁵⁰⁴ Legal Affairs Committee of the National Council, ‘Verfassungsgerichtsbarkeit’ 2011 (n 28) 7271, 7273f.

⁵⁰⁵ Informationsplattform humanrights.ch, ‘Absage an die Verfassungsgerichtsbarkeit für Bundesgesetze’ (4 December 2012)

<www.humanrights.ch/de/menschenrechte-schweiz/inneres/direkte-demokratie/verfassungsgerichtsbarkeit/absage-verfassungsgerichtsbarkeit> accessed 24 June 2016.

⁵⁰⁶ Art 190 Federal Constitution.

⁵⁰⁷ Tschannen, *Staatsrecht* (n 7) [8, side note 6].

⁵⁰⁸ Legal Affairs Committee of the National Council, ‘Verfassungsgerichtsbarkeit’ 2011 (n 28) 7271, 7280ff.

⁵⁰⁹ Giuseppe Noy, ‘Unhaltbare Lücken im Grundrechtsschutz’ (2008) 5 Plädoyer.

rights guarantees under international law. As article 190 Federal Constitution not only stipulates that federal acts have to be applied but as well international law, the question arose how to proceed in a conflicting case.⁵¹⁰ According to the so called ‘Schubert practice’⁵¹¹ established in 1973, the Federal Supreme Court in general follows the principle that international law takes precedence over posterior federal law. However, in exceptional cases where the legislature deliberately and explicitly takes a violation of international law into account, posterior federal law prevails.⁵¹² In another landmark ruling⁵¹³ handed down in 1999, the Federal Supreme Court further developed its ‘Schubert practice’ by ruling that in conflicts between federal legislation and international human rights law, the latter had to take precedence, irrespective of whether a violation of international law was taken into account by the legislator.

That is why human rights and fundamental rights are protected by the judiciary when it comes to conflicts with federal law. The protection gap deriving from limited constitutional jurisdiction can thus be filled by affording human rights obligations supremacy in the first place.⁵¹⁴ However, a gap regarding fundamental rights that are broader in scope than human rights guarantees or where an equivalent human rights obligation is lacking, remains.⁵¹⁵

As showed earlier, constitutional amendments based on popular initiatives conflicting with human rights obligations are not declared invalid, as long as they do not violate *ius cogens*. Therefore, conflicts between international and posterior constitutional law may arise. How to proceed in such cases has remained disputed among scholars and case-law thereto has been lacking up until recently because constitutional provisions are in most cases not directly applicable and therefore a conflict mostly involves federal legislation.⁵¹⁶ Yet, the earlier discussed landmark decision⁵¹⁷ of the Federal Supreme

⁵¹⁰ The conflict excludes *ius cogens*, which always takes precedence (see chapter 3.1.4.3.1.).

⁵¹¹ BGE 99 Ib 39.

⁵¹² This practice however has remained controversial among scholars (see Kiener and Küsi, ‘Bedeutungswandel des Rechtsstaats’ (n 43) 237, 251).

⁵¹³ BGE 125 II 417.

⁵¹⁴ Tschannen, *Staatsrecht* (n 7) [8, side note 10].

⁵¹⁵ See n 28.

⁵¹⁶ Federal Council, ‘Das Verhältnis von Völkerrecht und Landesrecht’ 2010 (n 13) 2263, 2309.

⁵¹⁷ BGE 139 I 16 (see discussion to this ruling in chapter 3.3.6.)

Court regarding constitutional amendments implemented through the ‘Initiative on the Expulsion of Foreign Criminals’ clarified that in a conflict between international and posterior constitutional law the first prevailed. Moreover, in another ruling⁵¹⁸ indirectly connected to the initiative ‘Stop Mass Immigration’, the Federal Supreme Court repeated that international treaties had to be performed in good faith as long as they were binding for Switzerland and therefore prevailed as a general rule constitutional and statutory law. Furthermore, it repeated that the exception under the ‘Schubert practice’ did not apply if human rights obligations were involved and furthermore, did neither apply in the case of an involvement of the Agreement on the Free Movement of Persons.

After the amendments to the Criminal Code deriving from the approved initiative ‘Lifelong detention for extremely dangerous, non-treatable violent and sexual offenders’ came into force, it remained unclear whether the legislative framework was compatible with human rights obligations (see chapter 3.3.2.). Yet, a ruling⁵¹⁹ of the Federal Supreme Court thereto put such a high threshold for allowing lifelong incarceration, that it is very probable that the constitutional provision will never be applied.

In sum, these rulings show that the judiciary abides by its role as state organ and respects core principles laid down in the Federal Constitution including the rule of law, human rights and fundamental rights obligations as far as the latter is possible due to the limited constitutional jurisdiction. The case-law of the Federal Supreme Court leaves little doubt that the judiciary will stick to its practice to respect legally binding international law and particularly human rights. This also applies in the context of the construction of minarets where a future denial of such a construction solely based on the constitutional provision would most probably not be accepted by the Federal Supreme Court.⁵²⁰

⁵¹⁸ BGer 2C_716/2014, 26 November 2015, see chapter 3.3.5.

⁵¹⁹ BGE 140 IV 1, see the discussion thereto in chapter 3.3.2.

⁵²⁰ See the discussion thereto in chapter 3.3.4.

5.4. Initiative ‘Swiss Law Instead of Foreign Judges’

Because this initiative has not yet been submitted to the Federal Chancellery, it is discussed separately in connection with the practice of the parliament and the judiciary to reconcile conflicts between international and domestic law.

In their legal study⁵²¹ *Walter Kälin and Stefan Schlegel* come to the conclusion that such an initiative in fact aiming to establish that contradicting national law must always take precedence over international law other than *ius cogens* and consequently wants to change the hierarchy of legal norms, is of utmost concern. Particularly the lack of comprehensive constitutional jurisdiction regarding federal acts (see chapter 5.3.) and the almost unlimited possibility of the people to amend the Federal Constitution through popular initiatives would have a great impact on human rights protection. They state that these particularities in Switzerland together with a downgrading of human rights law, especially the ECHR, in the hierarchy of legal norm below constitutional law, would have a far-reaching impact.⁵²² Firstly, fundamental rights and human rights violations deriving from incompatible federal legislation could no longer be prevented by the Federal Supreme Court because the obligation to apply contradicting federal law according to article 190 Federal Constitution would prevail. The only remaining possibility would be that the parliament restrains itself by ensuring that it only adopts federal laws following not directly applicable constitutional amendments that are compatible with human rights law, especially with the ECHR. Secondly, as recent popular initiatives have aimed to introduce constitutional provisions rather resembling statutory law in order to circumvent the legislator, conflicts between constitutional and human rights law might arise.⁵²³

Although recent jurisprudence put a very high threshold to declare a constitutional provision directly applicable, it nonetheless left the question open how to solve a conflict if a new constitutional provision expressly declares to take precedence over

⁵²¹ Kälin and Schlegel, *Schweizer Recht bricht Völkerrecht?* (n 295).

⁵²² *ibid* 20ff.

⁵²³ *ibid* 20ff.

international law.⁵²⁴ Therefore, this initiative aiming to create a legal system not allowing to perform international treaties in good faith any longer might become reality and is already of great concern to the Council of Europe (see chapter 4.8.1.).

The Federal Council and the Federal Assembly will most likely soon have to discuss this initiative also in relation to the limitation provision excluding popular initiatives infringing peremptory norms of international law from popular votes.⁵²⁵ Following the position of some scholars to interpret this constitutional provision autonomously – which however is not the case in the current practice - a broader interpretation of *ius cogens* would allow a decision of invalidity if a violation of *de iure* and *de facto* non-terminable international treaties was at stake.⁵²⁶ Furthermore, the question arises whether this initiative is actually a request for a total revision of the Federal Constitution and whether the requirement of subject matter is fulfilled, which however has to be clarified by detailed analyses.⁵²⁷ It is thus unclear how the Federal Council and the parliament will assess the question of validity. Yet, considering its practice over the last years, a declaration of invalidity is very unlikely. It is as well too early to anticipate how such an initiative would be implemented by the parliament and how the Federal Supreme Court eventually would handle such a situation in case of an adoption. It might be that such an initiative would as well remain unapplied.⁵²⁸ Yet, it must be assumed that a successful attempt to establish a legal system where supremacy of international law obligations shall no longer be upheld could not completely be ignored by the legislator and the judiciary. Consequently, the risk that those bodies are no longer willing or able to respect their duties as state organ may increase. It is also probable that if the Federal Supreme Court furthermore takes its role as state organ seriously by respecting core principles of the Federal Constitution, that threats from members of the parliament against judges may increase.⁵²⁹

⁵²⁴ See chapter 3.3.6.

⁵²⁵ Art 139 (3) Federal Constitution. See as well art 194 (2) Federal Constitution.

⁵²⁶ See chapter 3.1.4.3.2. and also the reference to the discussion among scholars here: Keller, Lanter and Fischer, 'Volksinitiativen und Völkerrecht' (n 4) 121, 130ff.

⁵²⁷ See as well chapters 3.1.4.3.2. and 3.3.8.

⁵²⁸ See as well chapter 5.3.

⁵²⁹ See chapter 4.8.2., n 456.

Unclear, among many issues, is furthermore what consequences a denunciation of the ECHR would have. One factor is that international obligations deriving from international customary law would remain legally binding to Switzerland.⁵³⁰ Thus, the question arises whether the ECHR constitutes regional customary law in line with the definition given thereto by the ICJ, requesting evidence of a general practice that is accepted as law.⁵³¹ On a general note, such a general practice can also be established by some states, which then constitutes regional customary law.⁵³² In a preliminary assessment it could be argued that the ECHR constitutes regional customary law. Firstly, since the foundation of the Council of Europe in 1953 22 states had ratified the ECHR already until 1990 and up until today all 47 member states did so.⁵³³ Therefore, there is a state practice among members of the Council of Europe attributing the guarantees under the ECHR a central role, which has developed over more than fifty years. Moreover, the ratification of the ECHR is mandatory in order to become a member of the Council of Europe and the duty to respect human rights as enshrined in the ECHR a core requirement for a membership in the EU, which as well shows the ECHR's crucial importance.⁵³⁴ Secondly, there is no doubt that the ECHR must be accepted as law as the ECtHR's rulings are binding and its execution supervised by the Committee of Ministers.⁵³⁵ The ECHR also forms part of a regional *ordre public*, which can be seen in the just mentioned collective enforcement mechanisms and in connection with the admission of new member states to the Council of Europe and the EU. Based on its *ordre public* character, the Court of Justice of the European Union (CJEU) affords the ECHR mandatorily primacy over domestic legislation and therefore puts limits to the constitutional legislator in the case the latter affords those guarantees only a rank

⁵³⁰ Federal Council, '40 Jahre EMRK-Beitritt' 2014 (n 292) 357, 405.

⁵³¹ Statute of the International Court of Justice 1946, art 38 (1) lit. b.

⁵³² Klabbers, *International Law* (n 146) 27.

⁵³³ Council of Europe, 'Chart of signatures and ratifications of Treaty 005' (26 June 2016) <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=YHcF9hTd> accessed 26 June 2016.

⁵³⁴ Kälin, 'Gewährleistung einer objektiven Ordnung' (n 348) 9, 20.

⁵³⁵ Art 46 ECHR.

equivalent to statutory law.⁵³⁶ Consequently, it may be said that the ECHR forms a rule of regional customary law.

Breaches of international law take place not only if an act is not in conformity with a treaty obligation, but as well with customary law.⁵³⁷ Therefore, regardless of a denunciation of the ECHR, acts contrary to those guarantees would be considered as a breach of international law, namely regional customary law, and would entail Switzerland's responsibility under international law as those guarantees would remain binding. Such a violation would thus not be seen as the beginning of a new custom, as it is not very likely that states having ratified the ECHR would agree on such a conclusion.⁵³⁸ Following this argumentation, a denunciation of the ECHR would not release Switzerland of its responsibility under international law.⁵³⁹ Therefore, there would be no other way than restore a situation in conformity with international law.⁵⁴⁰ Thus, this might be another factor to be considered by the Federal Council and the parliament for their probable debates on the initiative 'Swiss Law Instead of Foreign Judges'.

5.5. Interim Conclusion

Looking at the legislation processes and the enacted statutory laws thereto, it has not become 'immediately apparent' that legislation not in conformity with international law obligations was adopted. Thus, the parliament as a state organ is up until now willing and able to take its duties seriously and therefore to interpret constitutional provisions in line with international law. Yet, such an abstract assessment leaves room for interpretation and doubts, and the question of compatibility often has to be clarified by the judiciary.

⁵³⁶ Kälin, 'Gewährleistung einer objektiven Ordnung' (n 348) 9, 24ff, 26, with reference to several rulings.

⁵³⁷ ILC, 'Draft Articles on Responsibility of States' 2011 (n 321) art 12 [12].

⁵³⁸ See Klabbbers, *International Law* (n 146) 32.

⁵³⁹ Apart from the guarantees under the ECHR, Switzerland of course remains responsible to fulfil its contractual obligations under other treaties, particularly the ICCPR, which anyhow cannot be denounced (see chapter 5.1., n 483).

⁵⁴⁰ Federal Council, 'Das Verhältnis von Völkerrecht und Landesrecht' 2010 (n 13) 2263, 2289.

The case-law of the Federal Supreme Court however shows the willingness to perform treaties in good faith as long as they are binding for Switzerland. Particularly when it comes to human rights obligations, they are granted a supreme position. Therefore, when looking at the interaction of all state organs as a whole, there is a functioning system in place in Switzerland guaranteeing human rights protection, even though some popular initiatives of the last decade have tried to undermine this protection framework.

Consequently, up until today constitutional amendments deriving from popular initiatives have not led to a situation neither in the legislation process nor in the specific application of the law, where state organs are principally not able or willing to ensure human rights protection to everyone within Switzerland's jurisdiction any more. Therefore, the state's responsibility under international law is not entailed and thus an obligation to remedy the situation by putting limits on the right of initiative not given. However, an adoption of the initiative 'Swiss Law Instead of Foreign Judges' may lead to another conclusion. Yet, it is too early to anticipate whether this initiative will be declared valid and particularly, how it will be implemented by the parliament and applied by the judiciary in case of its adoption. It is yet understood that the institutions and bodies of the Council of Europe will closely monitor the developments in Switzerland regarding this initiative. Even though the conclusion of a failure of the state organs to respect their human rights obligations cannot be drawn, there is yet awareness at domestic level that conflicts between popular initiatives and those obligations exist and that they are on the rise. Therefore, proposals have been made to introduce reforms by limiting either the right to launch popular initiatives as such, or by strengthening the judiciary by introducing comprehensive constitutional jurisdiction. Yet, all these attempts have failed up until today. As popular rights are very strongly embedded in the Swiss political system and are furthermore heavily defended by mainly conservative politicians, which currently as well have a majority in the parliament, any future proposals involving a reform of popular rights are not very likely to pass.

6. Final Conclusions

The purpose of this master thesis has been to examine whether popular initiatives of recent years, which have caused strong reactions at domestic and international level,

have led to a breach of Switzerland's human rights obligations and thus entail the state's responsibility to remedy the situation by limiting the right of initiative.

The analyses show that international monitoring bodies and institutions of the UN and the Council of Europe assessing Switzerland's human rights performance have repeatedly referred to the particularity of direct democracy in Switzerland, especially the right to launch popular initiatives. According to their findings some popular initiatives have a potential of seriously questioning their compatibility with human rights obligations.

The overall assessment of several popular initiatives, which were at the center of political and public debates over the past years, has indeed revealed that initiators, mainly belonging to the SVP, have increasingly launched initiatives conflicting with human rights law in order to shape their political profile and have thus ignored their responsibilities as a state organ to respect, among others, human rights obligations. The same holds true for the electorate that has approved some of these initiatives despite being aware of the potential for conflict with human rights guarantees.

However, an analyses of the subsequent state organs, the Federal Assembly and the Federal Supreme Court, brought to light the overall willingness to take human rights seriously. Therefore, looking at the general domestic political and legal framework to implement human rights obligations adequately, it can be concluded that there is a functioning system in place in Switzerland guaranteeing human rights protection, even though some popular initiatives of the last decade have tried to undermine this protection structure.

Consequently, and despite the strong findings of international monitoring bodies, a violation of human rights obligations deriving from problematic popular initiatives could not be established as up until today human rights treaties have been fulfilled in good faith. Accordingly, the state's responsibility under international law is not entailed and thus an obligation to remedy the situation by putting limits to the right of initiative not given. This conclusion however may not be upheld any longer if the initiative 'Swiss Law Instead of Foreign Judges' is adopted.

Even though a breach of international law deriving from popular initiatives has not become manifest, this does not mean that there are no shortcomings in Switzerland's human rights performance in connection with popular initiatives. Having in mind that legally binding decisions determining a violation of Switzerland's human rights obligations are exclusively handed down by the ECtHR and furthermore, by taking into account that Switzerland has not accepted the individual communication procedure under the ICCPR, a clear determination of a breach of human rights obligations becomes inherently seldom. Hence, there is a serious demand from authoritative findings of international monitoring bodies on how to ensure human rights protection at domestic level, which have to be considered if Switzerland takes its human rights obligations seriously, regardless of the probability to be held accountable for its wrongdoings at international level.

Such a need for action in connection with popular initiatives is not only seen as a necessity because of the assessment of international monitoring bodies and institutions. It is also worthwhile remembering the fundamental idea that was initially given to the right of initiative and which was established over many decades before it has drifted into the background during the last years. The inherent idea was to ensure that particularly minority (political) groups with little or no power in the parliament were given the opportunity to put a specific concern on the political agenda without needing a majority support among established political parties. Such a request often aimed to create progressive legislation by taking into account minority concerns despite its lack of backing in the parliament. By having to consider its success in a future popular vote, such proposals constituted a negotiating pawn which brought pressure to the parliament to include core aspects in a counter-proposal in order to achieve the withdrawal of the initiative. Consequently, the initiative was a tool for finding a compromise and to effectively involve broader opinions into political debates than just the ones brought forward by political leaders. The function of the initiative was as a result to find a broad consensus beyond members of the parliament, which had thus a stabilizing effect. Yet, as popular initiatives mainly launched by the SVP over the past years have shown, this core idea of the right to initiative has not been in the forefront any longer. The reason is that such a broad consensus with stabilizing effect beyond the parliament is not aimed at

by the initiators. There is no intention to withdraw popular initiatives in order to find a compromise and to include minority concerns into the political debate. On the contrary, the more extreme the initiative is formulated, the better in order to shape the political profile and to gain votes. What is more, the SVP is not an uninfluential political party that by means of popular initiatives can add own demands to the political process. Quite the contrary, it is the strongest political party in Switzerland, which is well embedded in the government and the parliament, and thus uses popular initiatives with the primary aim to increase its power, which is often done by fuelling fears and stigmatizing already marginalized groups.⁵⁴¹

Furthermore, there is a need to critically review the concept of democracy, which has been orchestrated for many years by mainly the radical populist SVP, which solely bases on the majority rule deriving from the popular will and which rejects any constitutional restraints. It is thereby easily forgotten that constitutional restraints are indispensable not only to protect human rights but also to put limits to sometimes short-term and unwise decisions of the people, which could easily lead to an abolition of democracy itself.⁵⁴² An effect if pondered to the very end, which is most probably not intended by the voters. What is more, such a limited concept of democracy⁵⁴³ clearly opposes the democratic understanding of the Swiss constitutional state where not only the democratic principle of people's sovereignty is embedded, but as well the protection of the rights of the people through safeguarding fundamental and human rights and by establishing the protection of the people against arbitrariness through the rule of law. These constitutional constraints aiming at finding a reasonable balance between all three elements were as well legitimated through popular vote when approving the Federal Constitutions like constitutional amendments are approved on a regular basis through

⁵⁴¹ Pedretti, *Vom Verbot von gleichgeschlechtlichen Ehen und Minaretten* (n 13) 19ff.

⁵⁴² Tjitske Akkerman, 'Populism and Democracy: Challenge or Pathology?' (2003) 38 *Acta Politica* 147, 156. In this context, Giuseppe Nays describes this pointedly in his frequently quoted remark '*Das Volk hat nicht immer Recht*' ('The sovereign is not always right') (see Giuseppe Nays, '*Das Volk hat nicht immer Recht, Zur Erweiterung der Ungültigkeitsgründe für eidgenössische Volksinitiativen*' in Andrea Good and Bettina Platipodis (eds), *Direkte Demokratie, Herausforderungen zwischen Politik und Recht, Festschrift für Andreas Auer zum 65. Geburtstag* (Stämpfli Verlag AG, Bern 2013) 163).

⁵⁴³ Todd Landman, *Human Rights and Democracy, The Precarious Triumph of Ideals* (1st ed, Bloomsbury Publishing Plc, 2013) 26f.

popular initiatives. The political system developed over decades as well show that the idea of a mere majority dictating the well-being of the State is not at all favoured. On the contrary, over decades Switzerland has established a consensus system, where powers are shared and dispersed and where political decisions should be based on inclusiveness, bargaining and finding broadly supported compromises.

Therefore, deriving not only from authoritative findings of human rights monitoring bodies, but also by recalling main pillars of the Swiss legal and political system, a reform - be it by formally putting further limits to the right of initiative or by adopting the practice - does not unduly limit popular rights according to its original understanding. Rather, popular rights would be taken more seriously as the electorate would not be called to give its vote to issues, which in the end turn out not to be implemented. The trust in political processes would thus increase and the Swiss democratic system as such strengthened and stabilized. An attempt to reinforce human rights protection along with popular initiatives would prevent that minority groups already facing discrimination in their daily lives and who often have no right to participate in popular votes, would constantly be targeted through populist campaigns and debates. Protecting their dignity and well-being would avoid further marginalisation and thus help to stabilise the society as a whole.

Therefore, although an obligation under international law to put limits on the right to launch popular initiatives could not be established, from a human rights perspective there is nevertheless undoubtedly a need to strengthen human rights protection along with popular initiatives. However, such a need to rethink how a better balance between democracy, human rights and the rule of law could be achieved, it is worth looking at the semi-democratic political system of Switzerland as such, with its right to initiative, with its inclusiveness of political decision-making, with its federal structure and overall with its core principles laid down in the Federal Constitution of - on the one hand respecting people's sovereignty and on the other hand ensuring their human rights protection - and overall by putting constraints in place so that one element is not favoured at the expense of the other. In this spirit, Switzerland would show willingness

to create an environment in which the human rights of all individuals are protected to the greatest extent possible and would thereby strengthening its unique political system.

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Abstract

Over the last years, popular initiatives have been launched, which were strongly criticised both domestically and particularly by international monitoring bodies. They have repeatedly expressed concerns as such initiatives were seen incompatible with Switzerland's human rights obligations. Hence, the question arises whether such initiatives indeed have led to a breach of the state's obligations under international law.

The analyses show that both the initiators of such initiatives and the sovereign often disregard their obligation to respect human rights. Yet, according to the current legal framework such initiatives are not declared invalid. However, an examination of the practice of the Federal Assembly and the Federal Supreme Court show the overall willingness to take human rights seriously. Therefore, it is concluded that there is a functioning system in place guaranteeing human rights protection. Thus, Switzerland's responsibility under international law is not entailed and therefore an obligation to remedy the situation by putting limits on the right of initiative not given. However, a probable adoption of the initiative 'Swiss Law Instead of Foreign Judges' may lead to another conclusion.

Although a breach of international law has not been established, shortcomings in Switzerland's human rights performance in connection with popular initiatives have nevertheless become manifest. By recalling the fundamental idea given to the right of initiative and by looking at the political system developed over decades, the introduction of further limits to popular initiatives would be perfectly justified and thereby would restore a better balance between democracy, the rule of law and human rights protection.

Human Rights, State Responsibility, Relationship between International and National Law, Popular Initiative (Switzerland), Popular Rights (Switzerland), Constitutional State (Switzerland), Direct Democracy (Switzerland), Rule of Law, Pacta Sunt Servanda

Zusammenfassung

Während den letzten Jahren wurden Volksinitiativen lanciert, welche sowohl innerhalb wie auch ausserhalb der Schweiz harsche Kritik ausgelöst haben, insbesondere von internationalen Überwachungsorganen. Diese haben wiederholt die Befürchtung geäussert, dass solche Initiativen mit den Menschenrechtsverpflichtungen der Schweiz unvereinbar seien. Die Frage stellt sich daher, ob solche Initiativen tatsächlich zu einer Verletzung der völkerrechtlichen Verpflichtungen der Schweiz geführt haben.

Die Analyse ergibt, dass sowohl die Initiatoren von Volksinitiativen wie auch der Souverän oftmals ihrer Verpflichtung die Menschenrechte zu beachten nicht nachkommen. Jedoch erlauben die derzeitigen gesetzlichen Bestimmungen keine Ungültigerklärung dieser Volksinitiativen. Allerdings zeigt die Untersuchung der Praxis sowohl der Bundesversammlung als auch des Bundesgerichts, dass Menschenrechte generell beachtet werden. Deshalb wird die Schlussfolgerung gezogen, dass in der Schweiz ein funktionierendes System vorhanden ist, welches Menschenrechte zu schützen vermag. Aus diesem Grund wird die Schweiz nicht verantwortlich und sie ist demnach völkerrechtlich auch nicht verpflichtet, eine Einschränkung des Initiativrechts vorzunehmen, um den völkerrechtskonformen Zustand wiederherzustellen. Diese Einschätzung könnte sich jedoch mit einer möglichen Annahme der 'Selbstbestimmungsinitiative' ändern.

Obwohl eine Verletzung völkerrechtlicher Verpflichtungen nicht festzustellen ist, wurden Mängel im Menschenrechtsschutz in Zusammenhang mit Volksinitiativen trotzdem ersichtlich. Werden der ursprüngliche Sinn des Initiativrechts und das politische System, welches sich über Jahrzehnte entwickelt hat, in Betracht gezogen, so wäre eine Einschränkung der Volksinitiative durchaus gerechtfertigt. Dabei würde auch ein ausgewogeneres Gleichgewicht zwischen Demokratie, Rechtsstaatlichkeit und Menschenrechtsschutz wiederhergestellt werden.

Menschenrechte, Staatenverantwortlichkeit, Verhältnis Völkerrecht und Landesrecht, Volksinitiative (Schweiz), Volksrechte (Schweiz), Verfassungsstaat (Schweiz), Direkte Demokratie (Schweiz), Rechtsstaatlichkeit, Pacta Sunt Servanda

