Voting down international law?

Lessons from Switzerland for compensatory constitutionalism

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There was quite some relief in Switzerland when it became clear on Sunday 25th November that the so called “initiative on democratic self-determination” had been rejected by the voters (the end result with 66 percent no-votes was much clearer than expected). While it is nothing new in Switzerland that popular initiatives are launched which lead to conflicts with international law (just remember the popular initiatives on the ban of minarets, on the expulsion of foreign criminals or on “mass immigration”), the proposal voted upon on Sunday went one step further. Its aim was to fundamentally reshape the relationship between international law and the Swiss legal order, introducing a strict hierarchy of norms with the Swiss Constitution at its top. One of the driving factors behind the proposal was to make sure that the European Convention on Human Rights would be removed as an obstacle to the full implementation in Swiss law of popular initiatives that demand measures in violation of the Convention (such as the expulsion of aliens in violation of the right to family life). The initiative – whose full name is “Swiss law against foreign judges” – had also targeted the European Court of Human Rights. The sponsors had argued that the Court’s jurisprudence curtails and undoes Swiss politics that rest on a democratic basis. Many observers had pointed out that a positive vote on the initiative would have obliged Switzerland to leave the Strasbourg system (for an overview see here or here).

Even though the initiative’s proposal was rejected and the clear result is celebrated as a victory of the rule of law and human rights, many questions remain. We think that they are relevant beyond Switzerland. First of all, it is bewildering in political terms how such fierce debate about the benefits of international law could be possible in a small and wealthy country like Switzerland that not only depends on international law and cooperation, but also hosts a number of international organisations. In addition, important legal questions arise. Switzerland is probably the state which provides the most far-reaching democratic participation rights for its citizens in the processes of shaping and implementing international law. Nonetheless, the aversion against international law seems to be even more intense in Switzerland than elsewhere. What does that tell us about the idea to democratize international law “from below”, i.e. through processes at the domestic level – is this endeavour doomed to failure? Does the Swiss case show us that the idea of *compensatory constitutionalism* does not work? These are the questions we would like to briefly address in this post.

An early reaction to globalization phenomena

Switzerland has a very strong tradition of direct democracy. This has led the country respond already in the 1990s to the impact of global governance measures and international law on domestic democratic processes which were felt to be undermined. Today, the Swiss Constitution and various laws foresee far-reaching participation rights in foreign affairs. This seems unique from a comparative perspective. Three actors are involved in the State's participation in the making of international law (ranging from treaties over soft law to the adoption of secondary law in international organisations): Parliament, the citizens, and the cantons. The involvement of the cantons reflects a "vertical separation of powers" in the federal state, and we will leave this aside.

We start with the Parliament (the *Bundesversammlung*). Efforts to strengthen its role in foreign policy started in the early 1990es when the "zoning up" of regulation to the level of international law (e.g. in the field of environment and trade), power shifted from Parliament to the Government which represents the state on the international plane and which concludes treaties. The creation of various types of new powers for Parliament was continued at the occasion of the revision of the Constitution in 1999. In the course of the constitutional reform debates, it was even discussed whether a true paradigm shift was needed by giving the lead in foreign affairs to Parliament. In the end, such a reversal of the leading role was rejected. A middle-ground solution was adopted: the two branches (executive and legislative branch) exercise their powers jointly. The overall responsibility for foreign affairs remains with the Government, however subject to the *participatory rights* of Parliament (see Art. 184(1) of the Swiss Constitution of 1999). Parliament 'participates in shaping foreign policy and supervises the maintenance of foreign relations' (Art. 166(1) of the Constitution).

In practice, this means that Parliament is involved in the domestic ratification of treaties. However, parliamentary participation in foreign affairs is not limited to the domestic approval of treaties. It already starts *prior* to the conclusion of treaties and does not end with the ratification. This seems to be unique in the world. Parliament can either participate in foreign affairs through the use of the general parliamentary instruments such as parliamentary initiatives or so-called parliamentary motions by which Parliament can ask the Government to take certain action in a binding way (c.f. Art. 120(1) of the Parliament Act). Other tools are especially designed for foreign policy, mainly information and consultation (see Art. 152 of the Parliament Act).

Importantly, Parliament actually uses these instruments which are codified in law and not merely based on political practice. Resort to these mechanisms is probably even increasing. A recent example are three motions filed by parliamentary committees, asking the Government to get parliamentary approval before accepting the Global Compact for Migration (a soft law document) at the intergovernmental conference of December 2018 (motion 18.4093 SPK-NR of 19th Oct. 2018 and motion 18.4103 SPK-SR of 8 Nov. 2018 and motion 18.4106 APK-SR of the upper house's foreign policy committee of 12 Nov. 2018). Quite remarkably, the Government gave in and announced on the 21st of November that it will withhold signing or otherwise accepting the Compact pending the debate in Parliament, although this is not an

international treaty which would be subject to formal parliamentary approval anyway (Art. 166(2) of the Constitution).

Direct involvement of the citizens

The Swiss scheme of government possesses another unique feature. Because of the great value placed on democracy, the citizens or the "people" are involved in foreign policy as well. First of all, citizens can bring matters of foreign policy on the table via popular initiatives. This has happened on several occasion over the last years as already mentioned (see for the requirements Art. 139 of the Constitution).

In addition, many international treaties are subject to a referendum, i.e. to a vote of the Swiss people, before Government can declare Swiss acceptance on the international plane. Some treaties are subject to a mandatory referendum, which means that they are voted upon automatically and that they need the approval of the citizenry to become part of the Swiss legal order. This is the case for the accession to organisations for collective security or to supranational communities (Art. 140(1) (b) of the Constitution). Other treaties are only voted upon if 50'000 citizens ask for a vote. This mechanism is called the optional referendum, and it concerns treaties of unlimited duration which may not be terminated, treaties that provide for accession to an international organisation, and treaties that contain important legislative provisions or whose implementation requires the enactment of federal legislation (Art. 141(1)(d) of the Constitution).

A model case for compensatory constitutionalism?

This overview shows how well developed the democratic participation rights in foreign policy are. Of course, none of the reforms that introduced these rights went without debate. There was always the concern that the expansion of participation rights would hamper the Executive from acting swiftly and flexibly, and to speak with one voice on the international plane. Especially in the course of the extension of the referendum, many discussants expressed the concern that the possibility to veto treaties would endanger Switzerland's credibility as a treaty partner. However, practice shows that this danger has not materialized. Even though citizens can now request a referendum vote in many cases, this happens only very rarely. In total, only five votes have actually taken place, although roughly 200 treaties were subject to the possibility of demanding a referendum or were ex lege subject to the mandatory referendum (see also this useful data base). All referendums concerned bilateral treaties with the EU, and in all votes those treaties were then accepted by the people.

From this point of view, the reforms expanding participation rights thus seem to be a success. However, the numerous votes that took place in Switzerland over the last years following popular initiatives, attacking international law and institutions, seem to show another picture. The backlash against international law seems to be even stronger than in other countries. How does that go together, and what does it mean for compensatory constitutionalism?

In our view, the Swiss case shows both the desirability and the difficulties of compensatory constitutionalism as a normative programme. ‘Compensatory constitutionalism’ describes the fact that national law and international law are like communicating vessels, and that constitutionalist principles such as the rule of law, democracy, and human rights should govern both ‘levels’ of law. The scooping out of democracy on the national level through internationalisation could be compensated by strengthening features of democratic participation in the process of international law-making – within the international fora themselves and in the accompanying domestic procedures.

In Switzerland, concern about legitimacy deficits of international law and governance institutions might be felt more intensely because of the great value placed on the sovereignty of the people. The direct democratic participation rights permit the articulation of concerns earlier and more directly than in other countries. The Swiss case thus illustrates that is inevitable to continue to develop ideas for coping with globalization phenomena and with the weakness of safeguards for constitutionalism at the international level. In our view, it would also be too short-sighted to just shrug off the debate around the Global Compact for Migration in Switzerland as the work of populists. It is yet another example showing that the discrepancy between the weakly democratic and rather intransparent policy decisions on the international plane and empty shells of democratic exercises on the national level is felt, and maybe increasingly so.

But the Swiss case also shows that the efforts to democratize the processes surrounding the creation of international hard and soft law inside the states have their limits. First of all, democratic processes do not work in the same way at the domestic and international levels. For example, the main merit of the referendum at the national level is that the mere ‘damocles sword’ of the veto option leads to more dialogue and to the elaboration of more acceptable laws. This equation does not work in international negotiations on treaty texts, because the treaty partner is not involved in the nation-wide debate triggered by the looming danger of submitting the text to a referendum Moreover, certain global governance phenomena are simply hard to grasp in domestic constitutional terms. This is reflected in the debates around the mentioned soft law instrument on migration which because of its non-binding character is not formally subject to parliamentary approval, but which is nonetheless felt to have important consequences.

Nonetheless, we submit that the most recent negative vote on the popular ‘self-determination initiative’ shows the importance and the chances that lie in democratic debate on international law-making at the domestic level. In our view, it is highly remarkable that broad parts of the Swiss society over the last months have intensely debated international legal matters. Of course, rooted in a longstanding direct democratic culture in Switzerland, the Swiss model cannot simply be transplanted to other contexts. Also, as a general matter, it seems preferable to involve voters already prior to the conclusion of treaties and not just at the ratification stage of a treaty. But the rejection of the ‘self-determination initiative’ shows that rational arguments may in the end win and that rule of law-standards are not always on the losing side. This seems noteworthy also from a broader perspective. Persistent

policy challenges of a global scale, ranging from climate change over data protection to migration, will keep on requiring joint governance efforts, and therefore, the tension between international regulation and domestic constitutionalism is likely to remain or even increase. The Swiss popular vote in favour of international law, international courts, and precedence of international law over domestic law including constitutional law suggests that the democratic involvement of the people in questions of international law (or on the relationship between international law and domestic law) indeed allows citizens to release some pressure and to enhance ownership of international law. This is an important finding and might inspire future discussions on the everlasting task to justify international law.

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