4. Switzerland

Daniel Moeckli

1. INTRODUCTION

Switzerland has a very extensive system of direct democracy, with various direct-democratic instruments existing at the federal, cantonal as well as municipal levels. The legal limits imposed on these instruments are, especially at the federal level, rather weak. At the federal level, it is parliament that is in charge of reviewing compliance with these limits. The result is a very low rate of popular initiatives and referendums that are declared invalid. A somewhat different picture emerges at the cantonal level, where the legal limits are more stringent and compliance with these limits can be reviewed in a judicial procedure.

2. DIRECT-DEMOCRATIC INSTRUMENTS

The direct-democratic instruments existing at the *federal level* include the mandatory referendum (a law-initiated referendum), the optional referendum (a rejective referendum that can be initiated either by a certain number of citizens or a number of cantons) and the popular initiative (a proactive citizen-initiated referendum). Apart from the optional referendum, which can also be initiated by a number of cantons, there is no institution-initiated referendum. Nor does the citizens' agenda initiative exist at the federal level.

The cantons are free to introduce further instruments of direct democracy. Therefore, at the *cantonal level* there are a number of additional instruments. For example, some cantons allow the rejective referendum to be combined with a proactive proposal;¹ certain cantons allow parliament to initiate a ref-

¹ See for example Art. 63(3) Constitution of the Canton of Bern (*Verfassung des Kantons Bern vom 6. Juni 1993 (Systematische Rechtssammlung (SR) (Classified compilation of legislation) 131.212)*).

erendum;² four cantons provide for the citizens' agenda initiative;³ and the scope of the popular initiative, which at the federal level is restricted to constitutional amendments, extends to legislative acts in all cantons and, in four cantons, even to ordinances.⁴

Finally, there typically also exist a range of direct-democratic instruments at the *municipal level*.⁵

This chapter focuses on the three main instruments that exist at both the federal and the cantonal levels. Due to the significant variances between the direct-democratic systems of the 26 cantons, only the federal instruments can be covered in detail.

2.1 Mandatory Referendum

Article 140(1) of the Federal Constitution of Switzerland⁶ provides that:

1. amendments to the Federal Constitution,
2. accession to organisations for collective security or to supranational organisations, and
3. emergency federal acts that are not based on a provision of the Constitution and whose term of validity exceeds one year

are subject to a mandatory referendum. The mandatory referendum can be classified as a law-initiated referendum as it is automatically triggered if one of the conditions specified by the Constitution is met. The measures listed

² See for example § 51(2) Constitution of the Canton of Basel-Stadt (*Verfassung des Kantons Basel-Stadt vom 23. März 2005* (SR 131.222.1)); § 23(d) Constitution of the Canton of Lucerne (*Verfassung des Kantons Luzern vom 17. Juni 2007* (SR 131.213)).

³ Art. 47 Constitution of the Canton of Fribourg (*Constitution du canton de Fribourg du 16 mai 2004* (SR 131.219)); Art. 41 Constitution of the Canton of Neuchâtel (*Constitution de la République et Canton de Neuchâtel du 24 septembre 2000* (SR 131.233)); Art. 31 Constitution of the Canton of Schaffhausen (*Verfassung des Kantons Schaffhausen vom 17. Juni 2002* (SR 131.223)); Art. 34 Constitution of the Canton of Solothurn (*Verfassung des Kantons Solothurn vom 8. Juni 1986* (SR 131.221)).

⁴ See Andreas Auer, *Staatsrecht der Schweizerischen Kantone* (Stämpfli 2016) 427.

⁵ For the example of the City of Berne, see Art. 70 ff Regulation on Political Rights of the City of Berne (*Reglement über die politischen Rechte vom 16. Mai 2004* (SSSB 141.1)).

⁶ *Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999* (SR 101). An English version of the Federal Constitution is available on the website of the Swiss Confederation <http://www.admin.ch/ch/e/rs/c101.html>, accessed 15 May 2020.

above need to be approved by a double majority: the majority of citizens who participate in the vote and the majority of cantons,⁷ the vote of the latter being determined by the result of the popular vote in the respective canton.⁸

At the federal level, 224 mandatory referendums have been held in total by summer 2020, resulting in 168 approvals and 56 rejections. Counting from 1991, there have been 63 mandatory referendums, with 49 approvals and 14 rejections.⁹ In the 26 cantons, more than 1,000 mandatory referendums have been held since 1991, with a success rate that comes close to 90 per cent.¹⁰

2.2 Optional Referendum

According to Article 141(1) of the Federal Constitution,

1. federal acts passed by the Federal Assembly (the federal parliament),
2. emergency federal acts whose term of validity exceeds one year,
3. federal decrees, provided the Constitution or an act so requires, and
4. international treaties that
 - (i) are of unlimited duration and may not be terminated,
 - (ii) provide for accession to an international organisation, or
 - (iii) contain important legislative provisions or provisions whose implementation requires the enactment of federal legislation

are subject to an optional referendum. This means that, if within 100 days of the official publication of their enactment either 50,000 persons eligible to vote or eight cantons request it, these measures must be put to a popular vote. In the former case, the optional referendum can be classified as a citizen-initiated rejective referendum, in the latter case as a subnational entity-initiated rejective referendum. If it comes to a vote, a simple majority of voters is sufficient for these kinds of measures to be approved.¹¹

At the federal level, 189 optional referendums have been held in total so far, resulting in 109 approvals and 80 rejections. In the last three decades there has been a significant rise in the number of optional referendums: counting from 1991, there have been 86 optional referendums, with 64 approvals and 22

⁷ Art. 140(1) and 142(2) Federal Constitution.

⁸ Art. 142(3) Federal Constitution.

⁹ The statistics are available on the website of the Federal Statistical Office <https://www.bfs.admin.ch/bfs/de/home/statistiken/politik/abstimmungen.assetdetail.8126482.html>, accessed 15 May 2020.

¹⁰ Auer (n 4) 448–449.

¹¹ Art. 141(1) and 142(1) Federal Constitution.

rejections.¹² At the cantonal level, around 400 optional referendums have been held since 1991, with a success rate of around 50 per cent.¹³

2.3 Popular Initiative

The popular initiative foreseen by Articles 138 and 139 of the Federal Constitution gives 100,000 persons eligible to vote the right to propose a total or partial revision of the Federal Constitution. It is thus a typical case of a citizen-initiated proactive referendum. Since its introduction in 1891, the number of signatories required to launch a popular initiative has been only raised once, from 50,000 to 100,000 in 1977, not least as a reaction to the introduction of women's suffrage in 1971.¹⁴ Today, that number equals 1.85 per cent of the 5.4 million citizens who are eligible to vote (out of a total population of 8.4 million).

The proposal for a partial revision can take the form of either a general proposal or a draft of the constitutional provisions proposed.¹⁵ Any measure that can be formulated as a general proposal or a constitutional norm may be proposed by way of a popular initiative. This may include proposals that would entail radical changes to the political system of Switzerland, such as abolition of the armed forces¹⁶ or accession to the European Union.¹⁷ Thus, 'the popular initiative enlarges the realm of the politically thinkable and feasible.'¹⁸ Apart from the very limited reasons for declaring popular initiatives invalid discussed in Section 3 below, they must be put to the vote in their original wording. The Federal Assembly must issue a recommendation to voters on how to vote.¹⁹ Apart from that, the only way in which it can react to a popular

¹² The statistics are available on the website of the Federal Statistical Office <https://www.bfs.admin.ch/bfs/de/home/statistiken/politik/abstimmungen.assetdetail.8126482.html>, accessed 15 May 2020.

¹³ Auer (n 4) 451–452.

¹⁴ *Botschaft des Bundesrates an die Bundesversammlung über eine Erhöhung der Unterschriftenzahlen für Initiative und Referendum vom 9. Juni 1975*, *Bundesblatt* (Federal Gazette) 1975 II, 129, 131 and 138.

¹⁵ Art. 139(2) Federal Constitution.

¹⁶ In 1989 and 2001 initiatives to abolish the Swiss army were rejected.

¹⁷ In 2001 a proposal to enter into negotiations on acceding to the European Union was rejected.

¹⁸ Wolf Linder, 'Direct Democracy' in Ulrich Klöti et al. (eds), *Handbook of Swiss Politics* (2nd edn, NZZ Libro 2007) 101, 117.

¹⁹ Art. 139(5) sentence 2 Federal Constitution.

initiative is to draft a counterproposal.²⁰ Popular initiatives need to be approved by the double majority of voters and cantons.²¹

Only 22 out of the 216 federal popular initiatives voted on so far have managed to overcome this hurdle.²² In addition, six counterproposals to initiatives have also been approved.²³ The reason for this low success rate of popular initiatives as compared with optional and, especially, mandatory referendums is that the latter often concern rather uncontentious constitutional amendments, whereas the popular initiative is typically used by those in the political minority to propose changes that may be regarded as radical. However, the number of successful initiatives, as well as the number of initiatives in general, has risen considerably. In the years between 2001 and 2010 alone, six initiatives were approved. Furthermore, even if not approved, a popular initiative may have a significant indirect impact, putting issues on the political agenda or triggering legislative changes.

Source: The diagram is based on the statistics provided by the Federal Statistical Office accessed 15 May 2020.

Figure 4.1 Number of popular initiatives voted on

²⁰ Art. 139(5) sentence 3 Federal Constitution.

²¹ Art. 139(5) sentence 1 and 142(2) Federal Constitution.

²² The statistics are available on the website of the Federal Chancellery https://www.admin.ch/ch/d/pore/vi/vis_2_2_5_9.html, accessed 15 May 2020.

²³ See the statistics provided by the Federal Statistical Office <https://www.bfs.admin.ch/bfs/de/home/statistiken/politik/abstimmungen.assetdetail.1866592.html>, accessed 15 May 2020.

At the cantonal level, more than 500 popular initiatives have been voted on since 1991, around a third of which have been approved.²⁴

3. LEGAL LIMITS

The only substantive limits imposed on the popular initiative and, to some extent, the mandatory referendum are the requirements that proposals put to a vote must not violate higher-ranking norms and that it must be practically feasible to implement them. The optional referendum, as a rejective instrument, is not subject to any substantive limits: it can be used against any measure falling within its scope. In addition, there are a number of formal limits that apply to all types of direct-democratic instruments. They follow from the freedom to vote guaranteed by Article 34(2) of the Federal Constitution: referendum questions and initiative proposals must be clear and they must observe the requirements of consistency of the subject matter and consistency of form.

3.1 Substantive Limits

3.1.1 Compliance with higher-ranking law

Cantonal popular initiatives are declared invalid if they violate *any* higher-ranking norm, be it found in international law, federal law, inter-cantonal law or higher-ranking cantonal law.²⁵ Almost all cantons have explicitly established this substantive limit in their constitution or in an act. Lack of compliance with higher-ranking law, especially federal law, is the most frequent reason for the invalidity of cantonal initiatives.²⁶ For example, a cantonal initiative demanding the prohibition of certain schoolbooks on religion as well as an initiative directed against a centre for ‘Islam and society’ were declared invalid for violating the prohibition of religious discrimination of Article 8(2) of the Federal Constitution; these invalidity decisions have been confirmed by the Federal Court.²⁷

In contrast, *federal* popular initiatives (which are aimed at changing the Federal Constitution) must, as a general rule, not comply with any pre-existing law, including international law. According to Article 139(3) of the Federal Constitution, the Federal Assembly can only declare a federal popular initia-

²⁴ Auer (n 4) 454–455.

²⁵ Auer (n 4) 432–433.

²⁶ See Bénédicte Tornay, *La démocratie directe saisie par le juge – L’empreinte de la jurisprudence sur les droits populaires en Suisse* (Schulthess 2008) 90.

²⁷ BGE (*Entscheidungen des Schweizerischen Bundesgerichts* (decisions of the Swiss Federal Supreme Court)) 139 I 292 (28 August 2013); BGE 143 I 129 (14 December 2016).

tive invalid if it violates ‘*peremptory norms* of international law’.²⁸ While some authors argue that this is a reference to the corpus of law that is internationally recognised as constituting *ius cogens*,²⁹ others think that it is an autonomous term of Swiss constitutional law that can be interpreted more broadly to also include fundamental norms of international law that have not (yet) attained *ius cogens* status.³⁰ The Federal Council and the Federal Assembly today seem to side with the latter group of authors and thus to understand ‘peremptory norms of international law’ as an autonomous constitutional term.³¹ In any event, they interpret the term narrowly, limiting it to those rules that are of such fundamental importance to the international community that they must be regarded as binding upon any state that respects the rule of law and that can thus never be derogated from.³² These rules are said to include the prohibitions of genocide, slavery and torture, the principle of *non-refoulement*, the core guarantees of international humanitarian law and the non-derogable guarantees of the European Convention on Human Rights (ECHR)³³ and the International Covenant on Civil and Political Rights (ICCPR).³⁴ ³⁵ Since international responsibility for violation of this body of international law simply cannot be evaded, it makes good sense that norms of domestic law that are incompatible with it should never come into force, regardless of their democratic legitimacy.

Given its narrow definition, however, this validity requirement does not present a major obstacle; only two popular initiatives have been declared invalid on this basis. In 1996, the Federal Assembly adjudged an initiative

²⁸ Emphasis added.

²⁹ For example Yvo Hangartner/Andreas Kley, *Die demokratischen Rechte in Bund und Kantonen der Schweizerischen Eidgenossenschaft* (Schulthess 2000) 227–228.

³⁰ For example Daniel Thürer, ‘Verfassungsrecht und Völkerrecht’ in Daniel Thürer, Jean-François Aubert and Jörg Paul Müller (eds), *Verfassungsrecht der Schweiz* (Schulthess 2001) 179, 184–185.

³¹ See, for example, *Botschaft zur Volksinitiative ‘Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)’*, Bundesblatt 2013, 9459, 9467–70.

³² For an overview see Robert Baumann, ‘Völkerrechtliche Schranken der Verfassungsrevision’, (2007) 108 *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 181, 190–206.

³³ Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 UNTS 222.

³⁴ International Covenant on Civil and Political Rights of 16 December 1966, 999 UNTS 171.

³⁵ For example *Botschaft zur Volksinitiative ‘Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)’*, Bundesblatt 2013, 9459, 9467–70; *Botschaft zur Eidgenössischen Volksinitiative ‘für demokratische Einbürgerungen’*, Bundesblatt 2006, 8953, 8962; *Botschaft über eine neue Bundesverfassung*, Bundesblatt 1997 I, 1, 362.

demanding the immediate expulsion of all asylum-seekers who have entered the country illegally to be incompatible with the principle of *non-refoulement*.³⁶ In 2015, an initiative designed to enforce the expulsion of foreign criminals was declared partially invalid. The Federal Assembly held that the part of the initiative that wanted to provide, for the purposes of the initiative, an exhaustive list of peremptory norms of international law that were to be respected in the case of expulsions was not compatible with the principle of *non-refoulement* as it defined this principle more narrowly than international law did.³⁷

In contrast, numerous popular initiatives that are incompatible with norms of international law that do not amount to *peremptory* norms have been declared valid and thus put to a popular vote. Some of them have been accepted by a majority of voters and cantons; these include, for example, initiatives for a ban on the construction of minarets³⁸ and for the automatic expulsion of foreign nationals convicted of certain criminal offences,³⁹ both of which violate a number of human rights guarantees, as well as an initiative ‘against mass immigration’,⁴⁰ which conflicts with the Agreement on the Free Movement of Persons concluded between Switzerland and the European Union.⁴¹

³⁶ *Botschaft über die Volksinitiativen ‘für eine vernünftige Asylpolitik’ und ‘gegen die illegale Einwanderung’*, Bundesblatt 1994 III, 1486, 1499; *Bundesbeschluss über die Volksinitiative ‘für eine vernünftige Asylpolitik’*, Bundesblatt 1996 I, 1355.

³⁷ *Botschaft zur Volksinitiative ‘Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)’*, Bundesblatt 2013, 9459, 9467–72; *Bundesbeschluss über die Volksinitiative ‘Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)’ vom 20. März 2015*, Bundesblatt 2015, 2701.

³⁸ *Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 29. November 2009*, Bundesblatt 2010, 3437, 3440. For an explanation of why this initiative was regarded as violating international law but not any peremptory norms of international law, see *Botschaft zur Volksinitiative ‘Gegen den Bau von Minaretten’*, Bundesblatt 2008, 7603, 7609–7612 and 7630–7645.

³⁹ *Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 28. November 2010*, Bundesblatt 2011, 2771, 2773. For an explanation of why this initiative was regarded as violating international law but not any peremptory norms of international law, see *Botschaft zur Volksinitiative ‘für die Ausschaffung krimineller Ausländer (Ausschaffungsinitiative)’ und zur Änderung des Bundesgesetzes über die Ausländerinnen und Ausländer*, Bundesblatt 2009, 5097, 5102–5103 and 5106–5113.

⁴⁰ *Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 9. Februar 2014*, Bundesblatt 2014, 4117, 4120. For an explanation of why this initiative was regarded as violating international law but not any peremptory norms of international law, see *Botschaft zur Volksinitiative ‘Gegen Masseneinwanderung’*, Bundesblatt 2013, 291, 298–300 and 334–342.

⁴¹ *Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit vom 21. Juni 1999* (SR 0.142.112.681).

According to Article 194(2) of the Federal Constitution, the requirement of compliance with peremptory norms of international law also applies to amendments of the Federal Constitution made by the Federal Assembly that, according to Article 140(1) of the Federal Constitution, are subject to the mandatory referendum. Since compliance with this limit can only be ensured by the Federal Assembly itself (see Section 4.1.2 below), it is not of any practical relevance.

3.1.2 Feasibility

A further substantive limit, although one that is of less relevance in practice, is that it must be practically feasible for a popular initiative to be implemented. Most cantonal constitutions explicitly list this validity requirement.⁴² However, there have only been two cases so far where a decision to declare a cantonal popular initiative invalid on this basis was confirmed by the Federal Court.⁴³

Although it is not mentioned in the Federal Constitution, it is commonly accepted that the requirement of practical feasibility also applies to federal popular initiatives.⁴⁴ In 1955, a federal popular initiative that demanded a reduction of the military budget within a certain time period was held to be in breach of this requirement as it was impossible to hold the popular vote on the initiative early enough to allow for its implementation.⁴⁵

3.2 Formal Limits

3.2.1 Clarity of the referendum question/initiative proposal

Article 34(2) of the Federal Constitution guarantees ‘the freedom of the citizen to form an opinion and to give genuine expression to his or her will’. It follows from this guarantee that any question put to the people must be clear. The

⁴² See for example Art. 59(2)(b) Constitution of the Canton of Berne; Art. 31 Constitution of the Canton of Solothurn; Art. 28(1)(c) Constitution of the Canton of Zurich (*Verfassung des Kantons Zürich vom 27. Februar 2005* (SR 131.211)).

⁴³ BGE 128 I 190 (17 April 2002) para 5, 201 ff.; Judgment of the Federal Court 1P.454/2006 of 22 May 2007, para 3.

⁴⁴ See Giovanni Biaggini, *BV Kommentar: Bundesverfassung der Schweizerischen Eidgenossenschaft* (2nd ed, Orell Füssli 2017) Art. 139, n 14; Astrid Epiney/Stefan Diezig, ‘Art. 139’ in Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (eds), *Bundesverfassung: Basler Kommentar* (Helbing & Lichtenhahn 2015) n 45–46.

⁴⁵ *Zweiter Bericht des Bundesrates an die Bundesversammlung über das Volksbegehren für eine vorübergehende Herabsetzung der Militärausgaben (Volksinitiative für eine Rüstungspause)*, Bundesblatt 1955 II, 325; *Bundesbeschluss über das Volksbegehren für eine vorübergehende Herabsetzung der Militärausgaben (Volksinitiative für eine Rüstungspause) vom 15. Dezember 1955*, Bundesblatt 1955 II, 1463.

Federal Court has held that referendum questions must be drafted in a clear and impartial manner and may not be misleading or suggestive.⁴⁶ It has, on occasion, annulled cantonal referendums because it adjudged the question to be suggestive.⁴⁷ With regard to referendums at the federal level, the issue of the clarity of the question has sometimes been raised,⁴⁸ but, to my knowledge, never has a referendum been called off for this reason.

The requirement of clarity equally applies to popular initiatives. With regard to the federal popular initiative, Article 69(2) of the Federal Act on Political Rights⁴⁹ provides that the Federal Chancellery will amend the title of an initiative if it is misleading. Although this rarely happens, there have been a few cases. For example, the Federal Chancellery amended the title of an initiative aiming at abolishing a law against racial hate speech that was originally entitled ‘Das freie Wort’ (‘The free word’).⁵⁰ At the cantonal level, a few cantonal constitutions explicitly state that popular initiatives must be sufficiently precise.⁵¹ Yet the requirement is also applicable to the other cantons since, as has been confirmed by the Federal Court, it follows from Article 34(2) of the Federal Constitution.⁵²

3.2.2 Consistency of the subject matter

According to the requirement of consistency of the subject matter (called ‘unity of content’ in the Venice Commission’s Code of Good Practice on Referendums⁵³ and ‘single-subject rule’ in the United States), a referendum

⁴⁶ BGE 137 I 200 (24 March 2011) para 2.1, 203; BGE 121 I 1 (6 March 1995) para 5b/aa, 12.

⁴⁷ BGE 106 Ia 20 (28 March 1980) para 3, 27 (in this case, concerning a vote on the construction of a nuclear power plant, the authorities had suggested in the referendum question that the construction of the power plant was desirable).

⁴⁸ See for example Biaggini (n 44) Art. 34, n 24.

⁴⁹ *Bundesgesetz über die politischen Rechte vom 17. Dezember 1976* (SR 161.1). An English translation is available at www.admin.ch/opc/en/classified-compilation/19760323/index.html, accessed 15 May 2020.

⁵⁰ See Judgment of the Swiss Federal Court 1A.314/1997 of 30 March 1998, (1999) 100 *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 527. See also decision of the Federal Chancellery of 28 April 1998 regarding the popular initiative ‘*Die persönliche Souveränität der Bürger*’, *Bundesblatt* 1998 III, 2546.

⁵¹ See for example Art. 28(2) Constitution of the Canton of Uri (*Verfassung des Kantons Uri vom 28. Oktober 1984* (SR 131.214)).

⁵² BGE 139 I 292 (28 August 2013) paras 5.8 and 5.9, 296–297; BGE 129 I 392 (21 November 2003) para 2.2, 395.

⁵³ Code of Good Practice on Referendums, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16–17 March 2007), CDL-AD (2007) 008rev, para. III.2.

question or initiative proposal may not combine two or more issues or subject matters that lack an inherent connection. This requirement equally follows from the freedom to vote guaranteed by Article 34(2) of the Federal Constitution. If the requirement is not met, voters cannot genuinely express their will: either they have to approve the whole proposal, although they disagree with certain parts of it, or they have to vote ‘no’, although they agree with the other parts of it.⁵⁴

At the federal level, the requirement is explicitly mentioned in Article 139(3) of the Federal Constitution for the popular initiative and in Article 194(2) of the Federal Constitution for the mandatory referendum. Whether it also applies when the Federal Assembly passes federal acts that are then subject to the optional referendum is contentious. The majority of legal scholars argue, correctly in my view, that it does, as it follows from Article 34(2) of the Federal Constitution.⁵⁵ This has, however, not prevented the Federal Assembly from, for example, joining together in one federal act, on the one hand, a corporate tax reform and, on the other hand, a scheme providing additional funding for the public pensions scheme, with a view to attract as many ‘yes’ votes as possible. Unsurprisingly, this ‘package deal’ was approved by a large majority of voters in 2019.⁵⁶ Also as far as popular initiatives are concerned, the Federal Assembly’s practice of applying the requirement of consistency of the subject matter has been very generous: it has only declared two initiatives invalid on this basis. In 1977, it found an initiative against inflation that combined a number of various demands (including state control of prices and capital investments, progressive taxation and the introduction of guarantees of economic and social rights) to be incompatible with this requirement.⁵⁷ In 1995, it declared invalid an initiative that demanded that the military budget be reduced by half, while at the same time requiring that this money be used for purposes of peace-keeping and the provision of social security.⁵⁸ In

⁵⁴ BGE 129 I 366 (27 August 2003) para 2.2, 370.

⁵⁵ See for example René Rhinow, ‘Die Einheit der Materie – ein Kompromisskiller?’, (2019) 120 *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 113–114; Gerold Steinmann, ‘Art. 34’, in: Bernhard Ehrenzeller, Benjamin Schindler, Rainer J Schweizer and Klaus A Vallender (eds), *Die schweizerische Bundesverfassung – St. Galler Kommentar* (3rd ed, Dike 2014) n 23. For an opposing view, see Andreas Kley, ‘Die Einheit der Materie bei Bundesgesetzen und der Stein der Weisen’, (2019) 120 *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 3.

⁵⁶ *Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 19. Mai 2019 vom 8. Juli 2019*, Bundesblatt 2019, 4985.

⁵⁷ *Bundesbeschluss über die Volksinitiative ‘gegen Teuerung und Inflation’ vom 16. Dezember 1977*, Bundesblatt 1977 III, 919.

⁵⁸ *Bundesbeschluss über die Volksinitiative ‘Für weniger Militärausgaben und mehr Friedenspolitik’ vom 20. Juni 1995*, Bundesblatt 1995 III, 570.

contrast, for example, the so-called ‘Ecopop’ initiative was declared valid in 2013, despite the fact that it demanded, on the one hand, enhanced immigration restrictions and, on the other, the promotion of birth control measures in developing countries.⁵⁹

At the cantonal level, many cantonal constitutions explicitly refer to the requirement of consistency of the subject matter.⁶⁰ As with the clarity requirement, the Federal Court has confirmed that, in any event, this formal limit already follows from Article 34(2) of the Federal Constitution.⁶¹ Therefore, the requirement of consistency of the subject matter applies to all cantonal direct-democratic instruments, be it popular initiatives, mandatory referendums, optional referendums or other instruments.⁶² The Federal Court has elaborated the different aspects of this requirement in a rich jurisprudence, repeatedly coming to the conclusion that it had been violated.⁶³

3.2.3 Consistency of form

The requirement of consistency of form only applies to popular initiatives. According to this requirement, an initiative must take the form of either a general proposal or a specific draft of the proposed provisions, but not a hybrid between the two. Also this requirement has been deduced by the Federal Court from the freedom to vote: if the requirement is not complied with, the Court has held, voters cannot foresee the exact consequences of approving the initiative.⁶⁴ Article 139(3) of the Federal Constitution explicitly lists the consistency of form requirement as one of the admissibility criteria for federal popular initiatives, and also some cantonal constitutions explicitly refer to it.⁶⁵ However, the requirement is of little practical relevance. Not a single federal popular initiative has been found to be in breach of this limit until

⁵⁹ *Bundesbeschluss über die Volksinitiative ‘Stopp der Überbevölkerung – zur Sicherung der natürlichen Lebensgrundlagen’ vom 20. Juni 2014*, Bundesblatt 2014, 5073.

⁶⁰ See for example Art. 59(2)(c) Constitution of the Canton of Bern; § 22(3)(b) Constitution of the Canton of Lucerne; Art. 28(1)(a) and 133 Constitution of the Canton of Zurich.

⁶¹ BGE 129 I 366 (27 August 2003) para 2.1, 369–370.

⁶² BGE 129 I 366 (27 August 2003) para 2.2, 370.

⁶³ See, for example, BGE 137 I 200 (24 March 2011); BGE 130 I 185 (26 May 2004) 195 ff; BGE 129 I 381 (25 September 2003) para 2, 383 ff; BGE 123 I 63 (12 March 1997) paras 4–5, 70 ff. For an overview of the relevant case-law, see Patrizia Attinger, *Die Rechtsprechung des Bundesgerichts zu kantonalen Volksinitiativen* (Schulthess 2016) 81 ff; Tornay (n 26), 76 ff.

⁶⁴ BGE 114 Ia 413 (14 December 1988) para 3c, 416–417.

⁶⁵ See for example Art. 59(2)(c) Constitution of the Canton of Berne; § 22(3)(b) Constitution of the Canton of Lucerne.

today, and also at the cantonal level initiatives are only very rarely declared inadmissible on this basis.⁶⁶

4. INSTITUTIONAL AND PROCEDURAL FRAMEWORK

4.1 Federal Level

4.1.1 Popular initiative

In order to launch a popular initiative, its authors (the initiative committee) must, first of all, submit the signature sheet to the Federal Chancellery (the general administrative office of the Federal Council (the federal government)). The Federal Chancellery carries out a preliminary, purely formal examination of the initiative: it reviews whether the signature sheet contains the information required by law (names of the authors of the initiative, title of the initiative, a withdrawal clause etc.)⁶⁷ and whether the title of the initiative is not misleading.⁶⁸ Members of the initiative committee may challenge a decision of the Federal Chancellery on the validity of the signature sheet or its decision to amend a misleading initiative title before the Federal Court (Switzerland's highest court).⁶⁹ If these formal requirements are met, the initiative is published in the Federal Gazette.⁷⁰ From the moment of official publication, the authors have 18 months to collect and submit the required 100,000 signatures.⁷¹ After the collection of the signatures, but before the popular vote is held, both chambers of the Federal Assembly, based on a report of the Federal Council,⁷² review the initiative for its compliance with the limits set out above in Section 3. If one of the limits is violated, the Federal Assembly declares the initiative invalid.⁷³ It can also declare only parts of it invalid, but it cannot split an initiative up into different parts or amend its wording.⁷⁴ If the initiative is

⁶⁶ See Tornay (n 26) 72 ff.

⁶⁷ Art. 68 and 69(1) Federal Act on Political Rights.

⁶⁸ Art. 69(2) Federal Act on Political Rights.

⁶⁹ Art. 80(3) Federal Act on Political Rights.

⁷⁰ Art. 69(4) Federal Act on Political Rights.

⁷¹ Art. 139(1) Federal Constitution.

⁷² See Art. 97(1)(a) Federal Act on the Federal Assembly (*Bundesgesetz über die Bundesversammlung (Parlamentsgesetz) vom 13. Dezember 2002* (SR 171.10)). An English translation of the Act can be found at www.admin.ch/opc/en/classified-compilation/20010664/index.html, accessed 15 May 2020.

⁷³ Art. 139(3) Federal Constitution.

⁷⁴ Art. 99 Federal Act on the Federal Assembly; see Daniel Moeckli, 'Die Teilungültigerklärung und Aufspaltung von Volksinitiativen', (2014) 115 *Schweizerisches Zentrablatt für Staats- und Verwaltungsrecht* 579, 597.

found to comply with the limits, it is put to the vote. Since the review is carried out by the Federal Assembly, the usual parliamentary procedure applies. As a consequence, there are no specific due process guarantees (such as a right of members of the initiative committee to be heard by parliament before the decision is made) that would apply. The reasons for the Federal Assembly's decision can only be gleaned from the minutes of the parliamentary debate.

The decision of the Federal Assembly on the validity of an initiative is final; it cannot be challenged before the Federal Court (or any other body). This follows from Article 189(4) of the Federal Constitution, which states in its first sentence that acts of the Federal Assembly (as well as those of the Federal Council) may not be challenged before the Federal Court. Although, according to the second sentence of this provision, exceptions to this general rule can be provided for by law, no such exception has been created with regard to initiatives or referendums.⁷⁵

The fact that it is the federal parliament that decides on the validity of popular initiatives is highly problematic from the perspective of the rule of law: whether an initiative meets or does not meet the requirements listed in the Federal Constitution is a purely legal decision. Therefore, the final word on this question should not belong to parliament, a body that acts according to political considerations.⁷⁶ A look at the respective debates in the Federal Assembly (especially its first chamber, the National Council) confirms that it is often the case that political instead of legal arguments are advanced in favour of the validity, or lack of validity, of a given initiative.⁷⁷ Unfortunately, however, there is little prospect that the existing procedure could be reformed as a majority of parliamentarians are simply not willing to give up (or share) the power to decide on the validity of initiatives.

4.1.2 Mandatory and optional referendum

As in the case of popular initiatives, Article 189(4) of the Federal Constitution prevents federal mandatory and optional referendums from being challenged before the Federal Court (or any other body) for failing to meet the limits set out in Section 3 above. Thus, for example, a complaint brought against the vote on the corporate tax reform proposal mentioned in Section 3.2.2 above,

⁷⁵ See Walter Haller, 'Art. 189' in Ehrenzeller, Schindler, Schweizer and Vallender (eds) (n 55) n 62 ff.

⁷⁶ Biaggini (n 44) Art. 139 n 10; Yvo Hangartner/Bernhard Ehrenzeller, 'Art. 173' in Ehrenzeller, Schindler, Schweizer and Vallender (eds) (n 55) n 10–110; Pierre Tschannen, *Stimmrecht und politische Verständigung: Beiträge zu einem erneuerten Verständnis von direkter Demokratie* (Helbing & Lichtenhahn 1995) n 726.

⁷⁷ See for the example of the 'Durchsetzungsinitiative': *Amtliches Bulletin* (Official Bulletin) 2014, N 490 ff.

which was triggered by an optional referendum, was declared inadmissible by the Federal Court: the decision of the Federal Assembly to link together in one federal act a tax reform and measures to increase the funding for the public pensions scheme, the court held, was covered by Article 189(4) of the Federal Constitution and could, therefore, not be challenged for violating the requirement of consistency of the subject matter.⁷⁸ Similarly, at the federal level, the formulation of a referendum question cannot be reviewed for its compliance with the requirement of clarity. There is only one exception where the Federal Court allows a challenge against a federal referendum, namely when it becomes clear after the popular vote that the Federal Council has provided, during the referendum campaign, incomplete or misleading information on the proposal voted on. This type of situation is, according to the court, not covered by Article 189(4) of the Federal Constitution.⁷⁹

4.2 Cantonal Level

4.2.1 Popular initiative

The procedure for reviewing cantonal popular initiatives is largely similar to the one at the federal level, although there are some interesting deviations.⁸⁰ In virtually all cantons there is, before the collection of signatures is allowed to start, a preliminary formal examination of the initiative by some administrative authority, which is meant to ensure that the signature sheet contains the information required by law and that the information provided is not misleading. In two cantons, however, the review carried out before the collection of signatures also includes a substantive admissibility test: in St Gallen and Vaud, the cantonal government reviews the initiative proposal for its compliance with all the formal and substantive limits; it may declare an initiative inadmissible already at this stage.⁸¹

After the collection of the required number of signatures it is in most cantons, as at the federal level, parliament that decides on the validity of a popular initiative. In the canton of Zurich, a decision to declare an initiative

⁷⁸ Judgment of the Federal Court 1C_323/2019, 1C_324/2019 of 24 June 2019, para 3.

⁷⁹ Judgment of the Federal Court 1C_315/2018, 1C_316/2018, 1C_329/2018, 1C_331/2018, 1C_335/2018, 1C_337/2018, 1C_339/2018, 1C_347/2018 of 10 April 2019, paras 2.1, 2.5; BGE 138 I 61 (20 December 2011) para 4.5, 75 ff, para 7, 84 ff.

⁸⁰ For an overview, see Auer (n 4) 438–440.

⁸¹ Art. 36 Act on Referendum and Initiative of the Canton of St. Gallen (*Gesetz über Referendum und Initiative vom 27. November 1967* (sGS 125.1)); Art. 80 Constitution of the Canton of Vaud (*Constitution du Canton de Vaud du 14 avril 2003* (SR 131.231)).

invalid requires a two-thirds majority in parliament,⁸² in Basel-Landschaft and Graubünden such a decision can only be taken if the illegality of the initiative proposal is *obvious*.⁸³ In three cantons, the decision on validity is made by the government rather than parliament – in St Gallen and Vaud, as mentioned above, before the collection of signatures, in Geneva afterwards.⁸⁴ In the canton of Jura, the relevant legislation provides that parliament must provide the initiative committee the opportunity to be heard before it takes its decision on validity.⁸⁵ In other cantons, it is general practice to consult the initiative committee before the decision, without there being an explicit guarantee to be heard.⁸⁶ Nevertheless, the Federal Court has held that the Federal Constitution does not provide voters or members of an initiative committee a right to be heard when a parliament decides on the validity of an initiative; given the transparent procedure of parliament and the possibility for individuals to approach parliamentarians, there was no justification for such a right.⁸⁷ The Federal Court has recognised a right to be heard, albeit one that is rather limited in scope, only for those cases where the validity decision is taken by a government before the collection of signatures.⁸⁸

In a number of cantons, the decision on the (in)validity of an initiative can be challenged before a cantonal court: in Nidwalden, Jura, Vaud and Geneva before the constitutional court,⁸⁹ in Graubünden and St Gallen before the administrative court.⁹⁰ In the canton of Basel-Stadt, parliament can, instead of

⁸² Art. 28(3) Constitution of the Canton of Zurich.

⁸³ § 29(1) Constitution of the Canton of Basel-Landschaft (*Verfassung des Kantons Basel-Landschaft vom 17. Mai 1984* (SR 131.222.2)); Art. 14(1) Constitution of the Canton of Graubünden.

⁸⁴ Art. 60(1) Constitution of the Republic and the Canton of Geneva (*Constitution de la République et canton de Genève du 14 octobre 2012* (SR 131.234)).

⁸⁵ Art. 89(2) and 90(3) of the Act on Political Rights of the Canton of Jura (*Loi sur les droits politiques du 26 octobre 1978* (RSJU 161.1)).

⁸⁶ Camilla Jacquemoud, 'Le droit d'être entendu lors du contrôle de validité des initiatives', Jusletter, 27 May 2019, n 1, https://jusletter.weblaw.ch/juslissues/2019/981/le-droit-d-etre-ente_2547d39135.html, accessed 15 May 2020.

⁸⁷ BGE 145 I 167 (26 November 2018) para 4.2, 172; BGE 123 I 63 (12 March 1997) para 2, 66 ff.

⁸⁸ BGE 145 I 167 (26 November 2018) para 4.3, 172 ff.

⁸⁹ Art. 69(2)(5.) Constitution of the Canton of Nidwalden (*Verfassung des Kantons Nidwalden vom 10. Oktober 1965* (SR 131.216.2)); Art. 104(2)(c) Constitution of the Republic and the Canton of Jura (*Constitution de la République et Canton du Jura du 20 mars 1977* (SR 131.235)); Art. 19 Act on the Constitutional Jurisdiction of the Canton of Vaud (*Loi sur la juridiction constitutionnelle du 5 octobre 2004*; RSV 173.32); Art. 130B(1)(c) of the Act on the Judicial Organisation of the Canton of Geneva (*Loi sur l'organisation judiciaire du 26 septembre 2010* (SG E 2 05)).

⁹⁰ Art. 14(3) Constitution of the Canton of Graubünden; Art. 59bis(1) Act on the Administrative Procedure of the Canton of St Gallen (*Gesetz über die Verwaltungsrechtspflege vom 16. Mai 1965* (sGS 951.1)).

deciding itself, refer the question of the validity of an initiative to the court of appeal.⁹¹ If parliament decides itself, that decision can be challenged before the constitutional court.⁹² Regardless of which organ has decided on the validity of an initiative at the cantonal level, the final cantonal decision can, according to Article 82(c) of the Federal Act on the Federal Court,⁹³ be challenged before the Federal Court.

4.2.2 Mandatory and optional referendum

The procedural system of the canton in question will determine the organ that is in charge of ensuring compliance of a referendum question with the limits set out in Section 3 and whether it is possible to challenge a referendum proposal before a cantonal court. As in the case of popular initiatives, however, based on Article 82(c) of the Federal Act on the Federal Court, it is in any case possible to challenge cantonal referendums before the Federal Court as final instance. For example, a voter can bring a complaint that a revision of the cantonal constitution by the cantonal parliament, triggering the mandatory referendum, violates the requirement of consistency of the subject matter⁹⁴ or that the wording of a referendum question adopted by the cantonal government or the cantonal parliament is misleading.⁹⁵

5. PRACTICAL RELEVANCE OF THE LEGAL LIMITS

At the federal level, out of the 342 popular initiatives that have attracted the required 100,000 signatures since the existence of this instrument, only four have been declared invalid: one for not being compatible with peremptory norms of international law, one for not being practically feasible and two for failing to meet the requirement of consistency of the subject matter. In addition, one initiative has been declared partially invalid. These cases have been described above. With regard to mandatory and optional referendums, I am not aware of a federal referendum that would have been annulled for failing to meet one of the limits described above.

For the cantonal level, there are no reliable figures for the total of initiatives or referendums declared invalid in all 26 cantons. What can be safely stated, however, is that the share of cantonal initiatives declared invalid is

⁹¹ § 91(1)(g) Constitution of the Canton of Basel-Stadt.

⁹² § 16 Act on Initiative and Referendum of the Canton of Basel-Stadt (*Gesetz betreffend Initiative und Referendum vom 16. Januar 1991* (SG 131.100)).

⁹³ *Bundesgesetz über das Bundesgericht vom 17. Juni 2005* (SR 173.110).

⁹⁴ BGE 129 I 366 (27 August 2003).

⁹⁵ BGE 121 I 1 (6 March 1995); BGE 106 Ia 20 (28 March 1980).

considerably higher than that of federal initiatives. According to one author, 170 cantonal initiatives have been declared invalid since 1970, amounting to roughly 15 per cent of initiatives.⁹⁶ Similarly, it is not uncommon for a cantonal mandatory or optional referendum to be annulled because it fails to meet one of the formal limits. Interestingly, decisions regarding the (in)validity of cantonal initiatives that have been made by a judicial body are statistically more likely to be upheld by the Federal Court than those that have been made by parliament.⁹⁷

6. CONCLUSION

The low legal hurdles that are imposed on direct-democratic instruments at the federal level, combined with the lenient standard of review employed by the Federal Assembly, have resulted in an increasing number of votes on popular initiatives that are, in all likelihood, contrary to international law.⁹⁸ Similarly, in recent years, the people have been repeatedly asked to vote on initiative and referendum proposals that arguably violate the requirement of consistency of the subject matter.⁹⁹ Thus, Switzerland's practice at the federal level cannot be said to be in line with the Venice Commission's Code of Good Practice on Referendums, which states that texts submitted to a referendum 'must not be contrary to international law' and that 'there must be an intrinsic connection between the various parts of each question put to the vote'.¹⁰⁰

In order to address this problematic state of affairs, a number of reform proposals have been put forward by a range of actors, including the Federal Council, members of parliament and legal scholars. According to a first set of proposals, the review of popular initiatives prior to the start of the collection of signatures should be extended to include a non-binding assessment, carried out by a governmental department, of the conformity of popular initiatives with international law. Second, it has been suggested that the competence to review popular initiatives for their validity after submission of the required number of signatures should be transferred to the Federal Court or some newly created

⁹⁶ Maximilian Schubiger, "'In dubio pro populo': The Invalidation Process of Popular Initiatives at the Subnational Level in Switzerland", Poster Presentation (Geneva, 2019), on file with author.

⁹⁷ Tornay (n 26) 57–58.

⁹⁸ For some examples see Daniel Moeckli, 'Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights', (2011) 11 Human Rights Law Review 774.

⁹⁹ The votes on the 'Ecopop' initiative in 2014 and the tax reform proposal in 2019, both described in Section 3.2.2 above, are the most glaring cases.

¹⁰⁰ Code of Good Practice on Referendums (n 53), paras III.3, III.2.

expert body; or that it should be possible to bring a legal challenge against the Federal Assembly's decision; or, at the very least, that the Federal Assembly should be able to request a legal opinion from the Federal Court. Third, there have been proposals to change the legal limits themselves so that, for example, also popular initiatives that violate other norms of international law than those that are of a peremptory nature could be declared invalid or that the requirement of consistency of the subject matter would be applied more stringently.¹⁰¹

However, virtually all efforts to reform the legal regime of the federal direct-democratic instruments have failed so far. Now that these instruments have been in use for considerably more than a century, it has become politically nearly impossible to impose any new restrictions on them. In addition, as far as the institutional framework is concerned, parliament is apparently not willing to give up (or share) its power to decide on the validity of initiatives and referendums.

¹⁰¹ For an overview of the most important reform proposals, see Ulrich Häfelin, Walter Haller, Helen Keller and Daniela Thurnherr, *Schweizerisches Bundesstaatsrecht* (9th ed, Schulthess, 2016) 551–555; Pascal Mahon, 'Les droits politiques' in Oliver Diggelmann, Maya Hertig Randall and Benjamin Schindler (eds), *Verfassungsrecht der Schweiz*, Vol. 2 (Schulthess 2020) V.14, n 41–51.