15. The Impact from Without: International Law and the Structure of Federal Government in Switzerland*

1. Introduction

To Raimund E. Germann, we all owe a critical and consistent appraisal of direct democracy and coalition government in Switzerland. Over many years of his fruitful academic life, he had the courage to question the conventional wisdom of the political system as practised in this country. He developed conceptual ideas, far away from the mainstream in this country, on representation and majority rules with parties in opposition. He intended to move the Swiss towards parliamentary democracy and thus towards the mainstream model in Western Europe, and perhaps throughout the globe. He doubted whether direct democracy would be able to cope with the challenges of the modern world, with European integration and globalization.

In many respects, he was right. Direct democracy, in particular the referendum as a corner stone of the political system, produced an inward looking polity. The country, while a forerunner in international trade and an open economy in industrial goods and services, still lags behind in participation in major international fora and in European political integration. Switzerland was a member of the League of Nations. It still is not a full member of the United Nations, as accession was strongly rejected in a referendum in 1986. This is embarassing and extremely difficult to understand from without, through the spectacles of a foreign observer, in light of the self-declared principle of Swiss solidarity in foreign relations, and given the substantial contributions by Switzerland to, and benefits drawn from membership of, most of its special organizations, let alone the country's role of hosting UN headquarters in Geneva. The country neither is a member of the European Union and does not participate in shaping and making European law of which it absorbs most ex post and autonomously. Again, this is extremely difficult to understand from without, given the more than full economic integration of Swiss economy in Europe. This is yet another phenomenon which can only be explained in terms of the hurdles posed by direct democracy. Nor is the country a member of

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NATO, abstaining from it during the cold war, while benefiting from its shield under a formal concept of neutrality. It is apparent that direct democracy renders it difficult to move towards new and more meaningful roles of Switzerland in European security architecture. A proposal to introduce UN peacekeeping forces was met with resistance and failed in a referendum. It forced the government to an incremental and cautious approach.

Today, the country is at pains in finding its way and orientation in the changing landscapes of Europe and the globe. It is a matter of speculation where the country would stand and be without its extensive instruments of direct democracy. We note that membership of the country in the Bretton Woods systems was achieved after long debate in 1991. Equally, Switzerland is a founding Member of the WTO. Direct democracy does not exclude such important steps. Changes occur, once perceptions and attitudes have changed after long travails in the making of public opinion. But this takes much time, perhaps too much time, and windows of opportunities are being lost for many years, sometimes for ever.

Changes, both domestically and in foreign relations, require considerable shifts in mainstream attitudes which need to translate in popular vote. Today, resistance to changing paradigms in foreign policy and international relations is not limited to nationalist parties and groups. The loss of boundaries is a cause of *angst* and anxiety. Many fear a loss of national identity as we knew it. The feeling reaches far into the mainstream political spectrum. Yet, it would be fair to say that short of direct democracy, and with a system of representational majority government, changes would have occurred more rapidly, in order to integrate the country into new European landscapes. Parliament and the executive branch would move more boldly. Learning processes could be accelerated, and myths would be left to the past more rapidly than today. Lessons would have been learned more rapidly that sovereignty today can be better defended by integration than by abstaining and leaving it to an increasingly formal concept. At the same time, there is a risk that such changes would have occurred without true consent and support of the population, leaving many behind and thus contributing to estrangement and frustration with politics in the country. The government may go for a bridge too far. There are two sides to the coin, and we come back to this.

The late Raimund E. Germann was of a generation of scholars who witnessed and participated in times of great designs and political planning. Discussions of reforming the Constitution were discussions as to changing the political system in a profound way. He taught us to

pursue a path without looking at immediate prospects of implementing an idea whose time may come, perhaps much later. I share with him the belief in long-term views. But unlike his generation, and those who all worked on previous and failed projects of substantial constitutional reform in the reforming spirit of the 1970s, we are reluctant to address grand designs and overhauls. Again, it is direct democracy and a political culture working bottom-up and incrementally and mainly interested in single and specific issues to form political debate which has shaped our experiences and attitudes. The Federal Constitution was reformed. A new Constitution was adopted in April 1999 and will enter into force with the new millennium. Yet, is was a formal overhaul, a new dress, with substantial changes yet to be developed over the next decades, following the traditional of incremental progress. It is fair to say that a bold approach and proposal would have failed in the double referendum in 1999. Even mentioning European integration, and the role of Switzerland in Europe, may have turned the new Constitution down. It was a close run, as many associated the new constitution with a new age towards a more outward-looking polity.

All of the Swiss down-to-earth pragmatism and impossibility to bring about substantive constitutional change must have caused a substantial amount of frustration with Raimund and his generation. His time has yet to come, and it may. Future changes will not occur with a big bang, as we do not seek revolution with all its pains. Experience shows that formal changes in the system of government will not occur formally, and from within, given stable social and economic conditions in the country. But they may occur informally and shift the political system towards some of the ideas he had put forward during his life span. Today, we are less ambitious, or perhaps ambitious in a different way. We work incrementally. We are less interested in formal changes and new designs, but in studying underlying, slow and gradual changes in legal and political culture and constitutional practices. The document may stay, but the life of the Constitution and conventions will change over time.

One of these silent changes has been the role of international law on constitutional structures and political systems. It informally shapes constitutional law more and more, all within the bounds of a written charter. Changes sometimes merely relate to practices, Sometimes, they will result in legislative changes.

In this chapter and tribute to Raimund E. Germann, I should like to explore the idea to what extent the decline of Parliament will eventually shift constitutional practices towards a system of representative government with the federal Council more directly depending on

majorities of the day. All depends on the future of the referendum, less so on the initiative which we shall not address in this paper. It will be argued that there is little or no room to limit the referendum. Minor, but important organizational changes may assist in reshaping the balance of powers in a structural reform. Yet, it will be submitted that the referendum may lose some of its traditional and current importance in the light of regionalization and globalization. Moreover, its role might also change with the introduction of constitutional judicial review over federal statutes. And such evolutions may bring the system closer to ideas developed by Raimund E. Germann, at his time.

2. The Transformation of Law-Making

As in periods before, political and legal change is less induced from within the country and its utterly stable constellations, but from without, i.e. from a changing international context of the Constitution. Technological advances, in particular in communications, have profoundly changed business and private lives. Regulatory needs transgress the traditional bounds of the traditional nation states. Political scientists and lawyers alike increasingly draw to the fact that law and regulations, formerly enacted on a national level, are being increasingly shaped in international processes. The age of comprehensive national codification has come to an end. Most areas of law, today, have an international and European legal dimension, be it public, private or penal law. The impact has been of paramount importance in the field of economic law, regulating commerce both domestically and internationally. The law of the World Trade Organization today comprises rules reaching far beyond the scope of border regulation. Starting with tariff reductions in 1948, principles and rules now reach into regulating domestic agricultural support, industrial subsidies and thus industrial policies, service regulation and intellectual property. Tomorrow, they are likely to include rules on conduct of private corporations (restricted business practices) and specific aspects of human rights in trade regulation. Additional fields may be added over the next decades, linking the trading system with other international organizations. Similarly, discussions increasingly address the problem to what extent international law should shape minimal standards as to good governance and the rule of law, some even argue that there should be a right to democracy as a matter of principles of international or, perhaps better, global law. It is important to emphasize that these are not essentially international issues, but primarily issues of domestic concern. The concept of national sovereignty has come a long way in terms of realpolitik. It is about to change steadily and gradually towards new, yet unknown, dimensions of global governance.

In a particular regional context, of course, these developments are even for more advanced and intrusive. There is no need for elaboration of this point. The law of the European Union has gone much beyond transboundary non-discrimination and market access. It regulates entire walks of life, such as agriculture or competition, and it increasingly shapes what formerly was national law, both public and private.

3. The Impact of European and International Law on the Balance of Federal Powers

3.1. The Decline of Parliament

All these factual evolutions exert a silent but profound impact on the structure of government and the Constitution of the nation state. They induce shift of powers which the text of the Constitution will hardly show, but which are significant in real terms. Increasing efforts on the international level reinforces the position of the executive branch. In Switzerland, this amounts to enhancing the position of the Federal Council with its seven members. In substance, the increase of power is with the administration. International negotiations are led by high ranking officers, both diplomats and officials. Individual negotiators, often in the beginning of their careers, exert a considerable influence on the so called technical level, depending on energy, skills and resources allocated to the matter. Often, it is more significant than the influence of an elected Member of Parliament. Lobbies defending private interests are well organized and exert a considerable influence in shaping negotiating interests and positions and informal bottom lines. Parliament, on the other hand, has been overall losing influence in law-making in important areas.

Up to recent years, the influence of Parliament was limited to approving *in toto* important treaties as negotiated and signed by the executive. For a long time, the chambers did not have a say in shaping negotiating positions. They even were not fully informed. The same was true for political parties. Recent years have witnessed changes to the effect that Parliament is to be consulted by way of its different commissions, and advice given will be taken into account politically. To a minor extent, this is also true for the cantons. Foremost, the influence of political parties and party leaders has been improved in recent years, in particular during bilateral negotiations with the European Union from 1995 to 1999. Extensive consultations are now held among the coalition parties before major decisions are taken in the negotiating process. As traditional distinctions between domestic and foreign policies vanish, international and European policies have become, so to speak, a regular affair. Yet, such consultations cannot undo the fact that Parliament is

limited to approve or reject the results *in toto;* in practical terms, the choice to reject is limited. Parliament then may enact accompanying and implementing legislation which, in most cases, does not allow for extensive options.

Finally, it is submitted that the powers of the people by way of referendum, mandatory or not, has stayed about the same. Whether it is a matter of assessing domestic legislation or a treaty, the option has always been limited to approval or veto power, without any bargaining power. Whether or not a bill or a treaty is before the people does not change its formal options. The difference lies in the fact that the threat to use a referendum is of very limited use in the context of international agreements. It is hardly in a position to shape negotiating positions of the partner, eg the European Union, unless the subject matter is of prime interest to the partner. This is mostly not the case and it is Switzerland seeking results in the first place. Policies to influence negotiations by hinting to risk of a referendum, it would seem, have not significantly influenced negotiating positions in bilateral talks. But they clearly led to insistence on a package-deal approach by the European Union (so-called single undertaking) – all in order to deter and limit the potential risks of selectivity induced by referenda relating to single items (e.g. the agreement on free movement of labour and professional services) in Switzerland.

The significant evolution of regionalization and globalization of law-making, in many areas, thus consists of losses in bargaining power in Parliament, and a further shift towards the executive branch. Enhanced activism and assertiveness in Parliament cannot substantially change this fact of life. The question arises whether this decline under the present constitutional practice of conceiving Parliament and Federal Council as two independent bodies may react by asserting stronger controls of Parliament over the Federal Council. In practice, this implies a move towards parliamentary democracy, as Raimund E. Germann suggested. Election and composition of the Federal Council may become more strongly tied to majorities in the chambers, based upon large coalitions and coalition agreements. Nothing in the Constitution prevents from changing current practices and conventions to leave decisions of leaving office to individual Federal Councillors. Yet, direct democracy seems to set practical limits to such a change. The referendum rights practically oblige to encompass and envelope all major powers which are able to fight successfully and win a referendum against the government. The broad coalition government clearly follows from the corner-stone of the referendum powers, discussed in a moment. Leaving major actors out of government runs the risk of uncontrollable opposition policies, making life of government hard, if not impossible. It would therefore

seem that direct democracy, again, limits the scope to revise current practices in a fundamental manner.

In short, there are limits as to what extent such loss can be compensated within the national framework, at least in a medium time perspective. Things may be different in a long-term perspective. We return to this in a moment. Meanwhile, formal reforms may focus on different strategies.

3.2. Towards Transnational Parliaments

First, efforts need to focus on improving the influence of elected bodies both on the regional and on the global level. Joining the European Union is a major strategy to reestablish the balance of power between elected representation and government. The European Parliament has gained substantial additional powers under the Treaty of Amsterdam. Democracy is being improved (not always to the benefit of small nations, of course, which have a relatively strong position in the Commission and the Council). Efforts, however, also need to focus, in a long-term view, on global institutions. While much progress has been achieved with the European Parliament, the idea of parliamentary representation in other international fora, such as the United Nations, the Bretton Woods institutions or the World Trade Organization are very much in their beginnings.

3.3. Short-Term Rebalancing at Home

Second, some efforts at rebalancing powers at home may be discussed. Reform of government should consider a number of practical options. They can be realized in a short term perspective.

3.3.1. Transparency

The enhanced role of the executive and the administration will need to be reflected in enhanced transparency of international policy-making processes. Up to now, negotiating mandates – unlike in the United States or the European Union – are defined, upon consultation, by the Federal Council alone. They are not published. Arguments in favour of confidentiality are mainly tactical ones. It allows to define bottom-lines. Moreover, it allows to change instructions, which may be necessary for a small and medium power, without loss of face. There are advantages to this. But consider also the price. The public is not clearly informed about goals, aspirations and positions and a course taken. There is no open and transparent process in defining negotiating goals. As before, little is known at the time of writing, for example, about Swiss positions developed for the Millennium Round of the WTO. The matter has

remained behind closed doors. It is submitted that this should change. Governmental reform should install an open and transparent process involving public hearings of the administration and before Parliament. It should regularly inform the public. I do confess, as a practical matter, that this will make things more complicated. But we need to worry about legitimacy of outcomes in a democratic society. The law resulting from negotiations depends on high levels of acceptance if voluntary compliance is to be secured. Such acceptance cannot be achieved, possibly in a referendum, if persons affected are under the impression that they were left without a say in the inception phase, as much as throughout the negotiations. What is true for domestic legislation with its tradition of invited hearings is equally true for international negotiations. As domestic and foreign policy can no longer be separated, procedures should be designed to serve both avenues under the same set of procedural principles.

3.3.2. *Approval by Parliament of Chief Negotiators and Task Force Leaders*

A second implication of the shift of power is the problem of mandating negotiators. Contemporary international negotiations require a very high degree of interagency and inter-departmental coordination. They require active leadership. In a system with different agencies and departments involved, responsibilities are difficult to define. The concept of *Federführung* (ie leading on in a task) may no longer be sufficient. It is suggested that negotiations should be organized in formally approved and publicly known task forces which are led by an appointed chief negotiators. This system of task forces and building blocks would seem more suitable than the current trend, resulting in the State Secretariat for the Economy (called SECO), to build extremely large departments which are difficult to control and lead. A system inspired by the military concept of small brigades is more responsive than traditional structures of large and inflexible divisions. The idea of secretaries of state, rejected in a referendum, would need to be reviewed in order to comply with such requirements. They should not be subject to a particular department of federal councillor, but to the Council and thus the cabinet as a whole.

This leads to the problem of leadership of ad hoc task forces. The Federal Council is rarely in a position to assume such leadership except in early and final stages. In fact, the responsibility is assumed by chief executive officers and diplomats. These persons are generally highly qualified and motivated. Often, however, they lack the necessary authority to arbitrate between different agencies as they need to defend their own department's views. Even on the level of the Federal Council, such

arbitration is sometimes extremely difficult to bring about as the President of the Swiss Confederation does not have substantial powers. This may change in the future. Still, arbitration by chief negotiators is likely to stay an important goal. They also need to be able to deal with commissions of Parliament directly.

Chief negotiators and leaders of a task force therefore should not only be appointed by the Federal Council. They should also be approved by the respective commissions of Parliament and be responsive to them. To the extent that a system of junior ministers is developed, such confirmation may be given with the appointment. To the extent the function remains with able career civil servants, it should be done upon specific assignments. By the way, similar procedures could also be followed in the process of developing national legislation and projects. The problems of coordination are comparable, and a need to define clear leadership is essential. Again, it is a matter of finding procedures which are suitable for domestic and international affairs, as both are inextricably intertwined nowadays.

3.4. Long-term Rebalancing of Powers: The Problem of the Referendum

The shift of power, finally, leads to the question of the referendum and the right of the people, ie political parties, lobbies, media and other interests group to exert political influence in and outside Parliament. As to the people, we argued that the situation has not changed. But is there a possibility to reinforce Parliament by limiting direct democracy, as Raimund E. Germann has argued?

3.4.1. *The Virtues of the Referendum Right*

As indicated above, the referendum, while not existing from the beginning, has become the corner-stone of Swiss democracy. It is an essential part of the country's identity, on all levels. Minds have been shaped over the last century by a democracy which is essentially defined by extensive referenda, and which focuses on individual issues, rather than on elections with a view to change overall political and ideological directions. The political system, as it evolved during this century, has been profoundly defined by it since these instruments were introduced. In fact, the long lasting coalition government in place since 1959, the working of parliament and political parties, and the role of the Federal Council all have been profoundly shaped by it. It has exerted a most powerful check on spending powers of government. Finally, the allocation of powers between the cantons and the federation as essentially defined by the mandatory constitutional referendum, as

flexible doctrines of inherent or implied powers have been rejected as undermining compulsory referendum rights. We also stress that the referendum rights bring about a relatively high level of information and thus of relative awareness of political issues in the population as compared to other countries. It may well be that political awareness in this country and the absence of a succinct *class politique* is substantially shaped and developed through and by the very tradition of initiative and referenda on all levels of government, federal, cantonal and communal.

Moreover, we need to stress that successful referenda, or the absence of taking up a facultative referendum, significantly increases legitimacy of law, and in particular of international agreements. It is not a coincidence that the tradition of direct application of international agreements (self-executing effect) is more developed in this country than elsewhere.

3.4.2. *Limiting Referendum Rights ?*

While there are many virtues, the disadvantages of direct democracy remain, in particular the effect of weakening Parliament in the balance of powers. Reducing the scope of referenda allows to reestablish the balance. It would increase the pace of regional and global integration of the political system. It would reinforce the importance of elections and thus of political parties and representation. As retaining the last word by referendum no longer exists in many areas, the spectrum represented in Parliament would become the more important. Party programmes and platform would become much more relevant. People could chose in elections among real programmes and priorities, not just on the basis of non-committal slogans. Individual members of Parliament would possibly seek stronger links with the electorate to generate necessary feedback. Election of the Federal Council would depend on coalition agreements. Work in Parliament, indispensable to shape compromise and rational solutions, would be reinforced. As a consequence, it may be more attractive to run for the office of Member of Parliament. Sure, there is no shortage of candidates in election. But those qualified best to live up to the challenges and complexities of contemporary problems may not always be available as power is too limited to justify a full engagement of human and financial resources. Populism, effective mainly through the potential of referendum rights, and media power (in particular of oligopolistic electronic media) will be reduced in impact. In result, policies and decision may improve in quality to the benefit of people. The political system would move towards parliamentary representation. It would move closer to the political systems based

upon which the European Union operates. It may be better prepared to work within the Union, in the future.

From this perspective, it would be advantageous to revise the scope of referendum rights. It may thus be further enhanced in its core functions. It should be limited to central issues and applied in a sparse manner, so to leave more final powers to Parliament. In other words, it should be shaped in a manner to restore and enhance bargaining powers and the position of Parliament. A new balance of power should be sought. Perhaps less by increasing the number of signatures required (although this is perfectly logical, given the fact that the electorate has multiplied since the referendum was introduced). Suggestions to exclude the referendum when a certain quorum of approval is reached in Parliament would seem to be a good idea. For example, a referendum could be only held if the bill was approved by less than two-thirds. Comparable rules could be designed for compulsory referenda. It would both retain the referendum in critical and highly controversial issues. But it would equally enhance the powers of Parliament to bring about the balance of powers which has been lost.

The idea, however, of balancing powers by reducing the referendum is likely to continue to face well-known problems. Reforms on referendum rights on the federal level need to consent both of the majority of citizens and of the cantons. This is bound to fail, even if the arguments in favour of moving towards parliamentary democracy and benefits to the people can be put in a convincing manner. Most citizens in this country are not willing to give up a legacy of distrust *vis-à-vis* those in power 'in Berne'. The rights as they stand are deeply enshrined. Inevitably, instincts addressing the suspicion of government will be alerted with any proposal seeking to reduce these rights. As to the introduction of a quorum, the people sometimes acts as the true opposition and rejects bills which were adopted by large majorities. Minority representatives in Parliament will inevitably oppose such a move, as a quorum would dramatically reduce their influence. Again, it is not a coincidence that a recent attempt to reform the referendum failed in Parliament at its very stage of inception. In short, it may be possible further to enlarge direct democracy, but very difficult to limit it in a formal way. We conclude that strategies at *changing* existing referendum rights therefore should not be pursued as a prime long-term remedy to address fundamental structural problems of the nation state in adapting to regional and global integration.

We may rather look into the prospects how international law and relations may influence and shape the *use* of the referendum rights. The question arises whether this tradition and perception, and the political

culture, are going to be changed with the advent of regionalization and globalization of law. What is the likely impact on the exercise of the referendum rights? It could be that the instrument will become of a less political and practical importance in the future, for the following reasons.

3.4.3. *The Potential Practical Decline of the Referendum*

The traditions of progress by introducing rejected proposals and concepts after some years, sometimes twice or three times until approved (such as the women's vote) does no longer exist to the same extent with an increasing body of law prepared by way of international negotiations and law-making outside the nation state. We cannot take the time we wish. International agreements not only depend on one actor, but obviously on two or more negotiating partners. Their rejection in a referendum closes a window of opportunity which in many instances is not likely to come up again. This has been the case with the Agreement on the European Economic Area, rejected in 1992. The EEA option probably no longer exist politically, as conditions in Europe have changed within the last years ever since other EFTA states joined the European Union.

Importantly, multilateral agreements come as package-deals, containing both advantages and disadvantages. They no longer focus on a particular single important issue which traditionally has been the object of a referendum and the political debate. This is an important factor. A country strongly depending on effective market access abroad cannot afford to refute the giving part of the deal. Moreover, the main function of the referendum, ie the threat of using it before and during parliamentary negotiations and work, does not exist. Treaties are dealt with on a basis of take it or leave it. Political parties and actors are aware of this. It is interesting to observe that no referendum was held with respect to the results of the Uruguay Round Agreements of the WTO, despite substantial impact in particular in agriculture. It is equally interesting to observe that a referendum on the results of bilateral negotiations with the European Union held conducted with great difficulties between 1995 and 1999, will not be challenged by any of the major coalition parties and players. In Parliament, the referendum was mainly used as a threat to optimize interest in implementing and accompanying legislation. But it was clear from the beginning that effective use of it will be dangerous and could further isolate the nation. The tool has become too dangerous. It has become overbroad, no longer sufficiently targeted. This very factor might influence the political system without changing the text of the constitution.

A similar observation may be made for the referendum once Switzerland has joined the European Union. European and constitutional lawyers have put forth the view that the referendum necessarily would need to be excluded for implementing legislation: it would be contrary to the principles of hierarchy of law and supremacy of Community law. This is a logical point of view. It, however, does not necessarily flow from the precepts of European law and will create perhaps insurmountable political difficulties at home. As much as implementation of directives may face difficulties and delays in Parliament, it equally is allowed to produce such effects by the people acting in a referendum. In both cases, the remedies in European law are defined and may ultimately result in fines. We do not see a need to restrict the formal rights of referenda. A strategy of formal limitation of rights should not be pursued. Rather, the relationship of European law and national law should be viewed and perceived, in this context, as a dialectical process, sitting out major difficulties and seeking to solve the problems arisen in a second, and perhaps a third draft bill.

Again, the answer in accommodating the need for integrating international law is likely to be in a more cautious and much more selective use of the referendum. In many instances, it simply will not make sense to make use of it. As people will be fully informed that a proposal is mandated by EC law, they will consider this factor in making up a decision. It is likely that a referendum will only pass as a safeguard of last resort, taking into account the political, financial and legal costs associated with such conduct. There may be values at stake worth paying such a price. But it is clear that this will apply only to very importance issues which deserve being pursued potentially in conflict with EC law.

3.4.4. *The Impact of International Law on Judicial Review*

Finally, we note that the referendum may also change its function domestically upon introduction of judicial review of federal statutory law. So far, such review has been excluded for federal statutes subject to the referendum. Given the traditions and supremacy of democracy – Rousseau's principle – Switzerland will not adopt ex ante review of federal statutes, but is likely to limit such review ex post to specific applications of a federal bill, if at all. This would be compatible with the referendum, but nevertheless opens new avenues of opposition. Statutes may be combated in court by way of constitutional review. Opposition towards legislation may no longer need to pursue the general vote but could seek decisions by may of a test case. Overall, this might result in less referenda which, after all, are costly and always bind considerable

resources. Court proceedings may in some cases become a valuable alternative, as it already exists with respect to laws and statutes of the cantons. It would be interesting to examine to what extent the referendum would have been used even more frequently in the cantons if judicial review before the Federal Court would not be available.

Judicial review of federal statutes would be an important step with a view to improve protection of fundamental rights. Whether or nor it will materialize is unclear at this stage. Given the impossibility to bring about fundamental changes in the political system, many doubts exist, and the effort may fail.

Again, it is interesting to observe that it is international law which, incrementally and case-by-case, has brought about substitutes for such inability at reform. The practice of the Federal Court relating to the European Convention on Human Rights, in many respects, amounts to constitutional review of federal legislation. It is in the hand of the courts to further develop such judicial policy with respect to other international instruments, in particular the UN Covenants on Human Rights. The general primacy of international law and international agreements, in combination with direct effect where suitable, enables courts to develop effective controls over national legislation which may compensate for the lack of constitutional review. As international agreements, such as the WTO, increasingly assume constitutional functions, this trend is likely to increase in coming years in the field of economic regulations, as well. In practical terms, control by way of applying international agreements, may thus substitute in suitable cases for the referendum in a more nuanced manner. The impact from without may bring about incrementally what domestic political reform is unable to achieve.

4. The Impact of European and International Law on Federalism

4.1. The Demise of Clear-cut Allocations of Powers

International law and relations not only affect the balance of powers between the Swiss Parliament, the people and the government. It also affects the balance between the cantons and the federation, as much as between the Member States and the European Union.

The past and novel federal Constitution of Switzerland both rely upon traditional concepts of enumerated powers. As indicated above, the system is shaped by mandatory referenda for the introduction of new federal assignments, leaving very little room for doctrine of implied

and inherent powers well known under other federal constitutions. Frequent formal change has been required in order to reallocate powers between the cantonal and federal levels. Political scientists, including Raimund E. Germann, like to say that the Swiss have the most stable political system and the most unstable constitution. This, of course, is only true due to the principle of explicit allocation of federal powers. It is not accurate as to the provisions and the system of government on the federal level. Both of which have remained unchanged for many decades.

Over time, realities have produced a wide entanglement of mixed and joint competencies of the Federation and the cantons. Moreover, in this country, implementation is mainly left to the cantons as a mainstay of keeping control and limit expansive federal authority. Recent efforts, mainly for financial reasons, seek to find back their way to a more clear-cut separation of different tasks. Although this would seem logic, the process does not sufficiently consider the impact of international law. An analysis of legal integration both on the regional and global level reveals that international legislation not only is piecemeal, but equally does not consider federal structures of different countries. We need to be able to deal with different layers effectively a the same time. Directives of the EC, as much as treaties concluded under the umbrella of the WTO, affect both the cantons and the federal level. While the federation is responsible under international law to implement these obligations, it does not have the necessary authority to do so under constitutional law. For example, the federation does not have legislative authority to implement the WTO Agreement on Government Procurement for the cantons. The same holds true for a number of services which are regulated by the cantons. In government procurement, some elements were addressed in an internal market bill. Overall, legislation in this particular field resulted in five different levels: a federal bill for federal procurement, a federal internal market bill partly covering procurement in cantons and communities, an interstate agreement between the Cantons, cantonal regulations and finally, communal regulations. It goes without saying that this approach is detrimental to develop cohesion and legal security. In other walks of life, similar constellations may be produced. It seems inevitable to provide the necessary tools for uniform domestic implementation of international obligations, binding both the federal and cantonal level. The policies of neatly dividing federal and cantonal powers are likely to run into difficulties from this perspective. It probably becomes necessary to introduce authority to enact framework legislation on the federal level. The new Constitution does not provide for such authority outside the competencies assigned to the federal level. This is a feature

and a deficiency affecting the overall structure of the Constitution. It cannot be readily remedied by inserting piecemeal revision and building blocks. It is here that we see more than elsewhere how much constitutional structures developed in the 19th and 20th centuries will face difficulties in the 21st century in the light of changing roles and functions of regional and global legal integration.

4.2. Toward a Five Storey House

The limits of finding new balances of power within the nation state induces to search for new concepts of constitutionalism. Traditions of perceiving constitutions as a matter of the modern nation state are no longer sufficient. As we have come to an end of the idea of national codification, we also reach the end of the idea of a comprehensive national constitution. It was seen that the balance of power between elected Parliament and the executive branch requires to expand the equation beyond the national level, and to include regional and global structures, the latter yet to be designed. The problem has to be approached in an overall context. The influence of international law on structures of government does no longer allow to remain within traditional concepts of constitutionalism. The notion and perception needs to be expanded to the level of regional integration and to global integration. But we equally need to expand the concept to cover cantons and communities, as they are increasingly affected by foreign policy prerogatives of the federal level. Procedures of law-making and policy-making on all these levels need to be addressed in a consistent and coordinated manner. We find ourselves within a five storey house. Different floors, of course, of this edifice are and remain of different importance and impact. The nation state is bound to play a crucial role far into the 21st century. And structures are not similar on the regional level, and they are again different on the global level, as much as federal, cantonal and communal levels differ in many respects. Yet, we need to start looking at all these levels, as different as they are, as a combined system of different polities. It is from this angle that we need to reflect on governmental structures, on the role of the referendum, addressed in a somewhat speculative manner in this paper, on law-making, but also in judicial functions on different levels of the overall Constitution. By doing so, we will be in a better position to allocate powers and, most importantly, to find an overall balance of power between different levels, and also between different institutions, democratic, executive, and judicial within an overall umbrella.

4.3. A Tribute

Reading the works of Raimund E. Germann helps us to find our way in a new landscape. Much earlier than others he reflected upon the structures of government in light of European integration and formulated his proposals without illusion, but with clarity and consistency. He took a long-term view. He encourages us to do the same thing, whatever the price, whatever the efforts it takes. For this, we thank him. He was not able to see the fruits of his works in Swiss politics. Later generations may. His ideas may materialize some day, should the referendum right and direct democracy – the key and all encompassing institution of the Swiss political system - lose their paramount practical importance in the light of regionalization and globalization of law making processes and new avenues of judicial control and review.

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