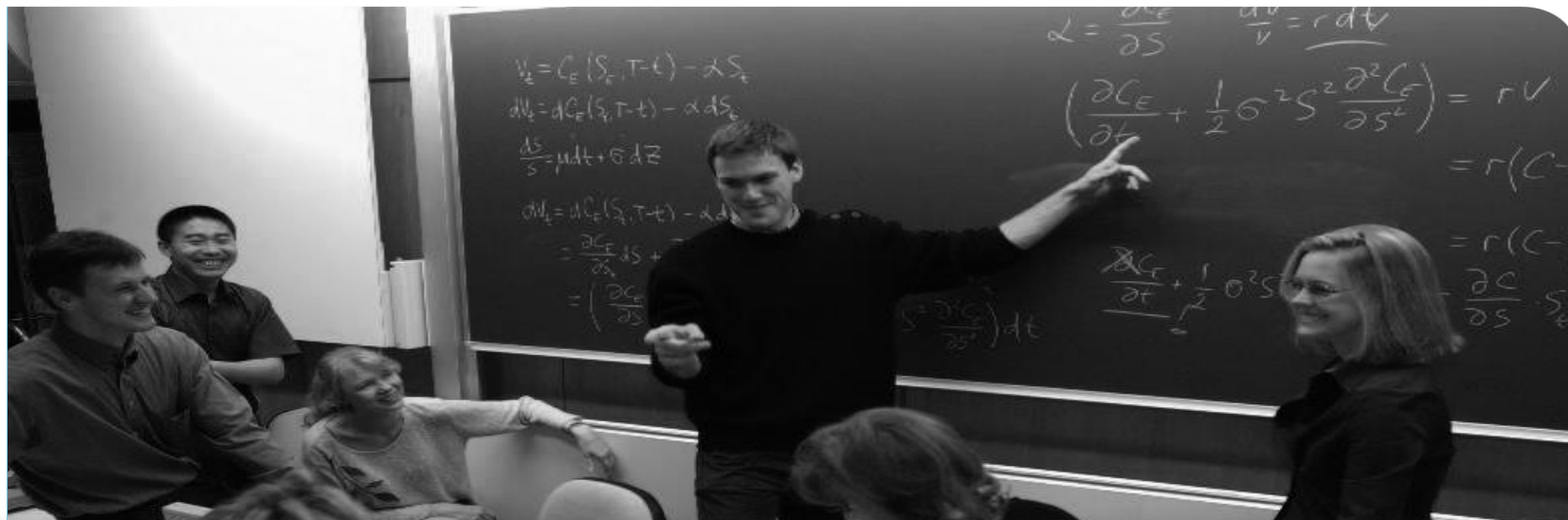


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## The Swiss Legal Order and International Law: Does Direct Democracy Make a Difference?

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# Overview

## 1. Introduction

## 2. The Role of the People and the Cantons (Direct Democracy)

1. Popular Initiatives
2. Referenda (Compulsory and Optional)

## 3. Outlook

# 1. Introduction

- Relationship between International Law and Domestic Law
  - Validity: Monism
  - (Direct) Applicability: Possible though sometimes excluded
  - Rank: Primacy of PIL (with exceptions)
- Domestic Rules on the Making and Breaking of International Law
  - Indirect Democracy: Parliament
  - Federalism: The Cantons
  - **Direct Democracy**

# Article 5 Constitution: Rule of law

<sup>1</sup> All activities of the state are based on and limited by law.

...

<sup>4</sup> The Confederation and the Cantons shall respect international law.

# Art. 190 Constitution: Applicable Law

- The Federal Supreme Court and the other judicial authorities apply the federal acts and international law.

## 2. Direct Democracy

### 1. Popular Initiatives (Article 139 Constitution)

- to introduce new rules that may conflict with exiting international obligations
- to terminate an existing treaty (de jure or de facto)
- to influence negotiations of an international treaty

### 2. Referenda (Article 140 and 141 Constitution) regarding ratification of international treaties (and laws implementing them)

# Art. 139 Popular initiative requesting a partial revision of the Federal Constitution in specific terms

- <sup>1</sup> Any 100,000 persons eligible to vote may within 18 months of the official publication of their initiative request a partial revision of the Federal Constitution.
- <sup>2</sup> A popular initiative for the partial revision of the Federal Constitution may take the form of a general proposal or of a specific draft of the provisions proposed.
- <sup>3</sup> **If the initiative fails to comply with the requirements of consistency of form, and of subject matter, or if it infringes peremptory norms of international law, the Federal Assembly shall declare it to be invalid in whole or in part.**
- <sup>4</sup> If the Federal Assembly is in agreement with an initiative in the form of a general proposal, it shall draft the partial revision on the basis of the initiative and submit it to the vote of the People and the Cantons. If the Federal Assembly rejects the initiative, it shall submit it to a vote of the People; the People shall decide whether the initiative should be adopted. If they vote in favour, the Federal Assembly shall draft the corresponding bill.
- ...

# Direct Democracy

"A Yes to the limitation initiative would also endanger the Schengen Agreement and thus the backbone of Switzerland's security."

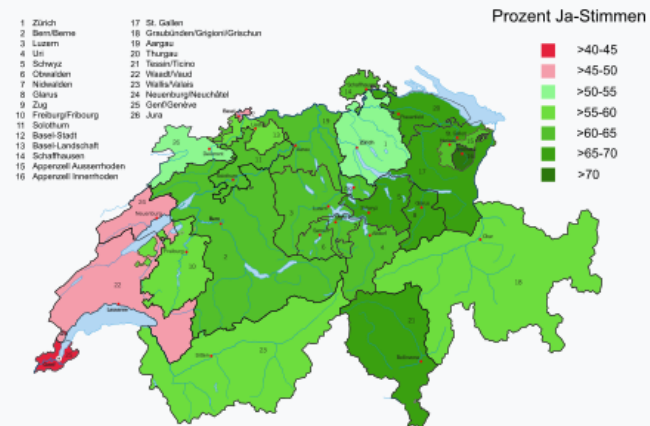
warns Justice Minister Karin Keller-Sutter in an interview with Georg Häslar Sansano and Larissa Rhyn (NZZ, 22. August 2020)



# Example: Human Rights Treaties

## Federal popular initiative "against the construction of minarets"

Results		
Choice	Votes	%
✓ Yes	1,535,610	57.51%
✗ No	1,134,440	42.49%
Valid votes	2,670,050	98.55%
Invalid or blank votes	39,237	1.45%
<b>Total votes</b>	<b>2,709,287</b>	<b>100.00%</b>
Eligible to vote/turnout	5,039,676	53.76%



The results of the November 2009 referendum by canton. Red indicates opposition to the ban of minarets, green support of the ban.

# Political Process

- On 28 August 2008 the [Swiss Federal Council](#) opposed a building ban on minarets.
- It said that the popular initiative against their construction had been submitted in accordance with the applicable regulations, but infringed guaranteed international human rights and contradicted the core values of the Swiss Federal Constitution.

## Art. 140 Cst (existing)

- Art. 140 Mandatory referendum
- 1 The following must be put to the vote of the People and the Cantons:
  - a.
    - amendments to the Federal Constitution;
  - b.
    - accession to organisations for collective security or to supranational communities;
  - c. ...

# Examples

## Compulsory referenda

- 1920 League of Nations
- 1972 Free Trade Agreement with EU
- 1986/2002 United Nations
- 1992 EEA
- 2024 Framework Agreement with EU ?

## Optional referenda

- 2020 Frontex
- 2021 FTA Indonesia
- 2019 EU Law on control of the acquisition and possession of weapons

# Art. 141 Optional referendum (since 1921)

- 1 If within 100 days of the official publication of the enactment any 50,000 persons eligible to vote or any eight Cantons request it, the following shall be submitted to a vote of the People: ...
  - d. international treaties that:
    1. are of unlimited duration and may not be terminated,
    2. provide for accession to an international organisation,
    3. contain important legislative provisions or whose implementation requires the enactment of federal legislation.

# Article 140 Cst (proposal for an expansion - 2021 rejected)

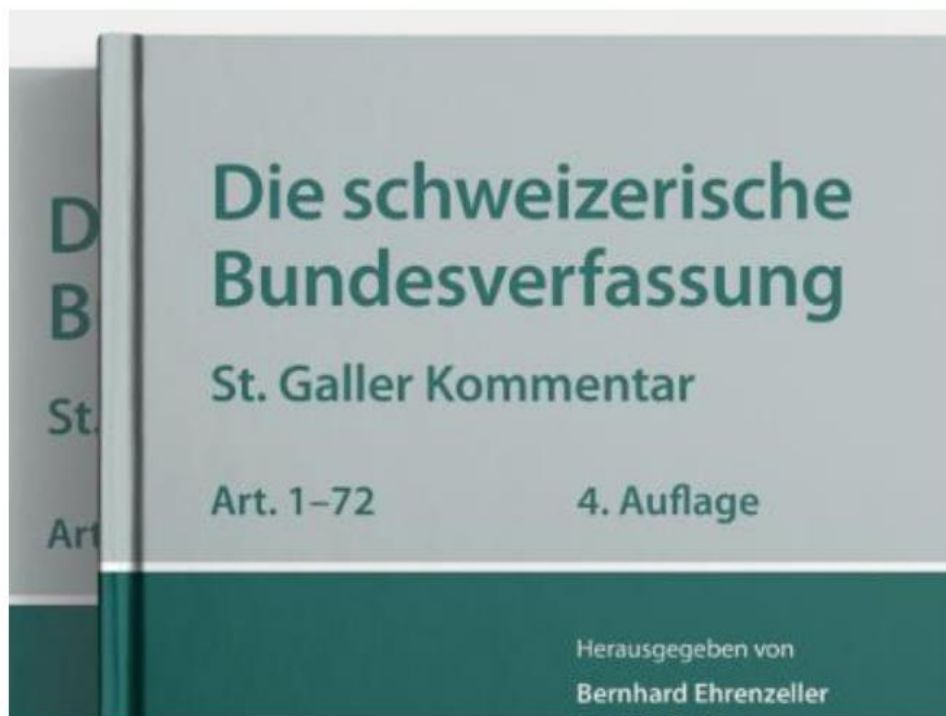
- *bbis.* international treaties that contain provisions of constitutional rank or whose implementation requires an amendment to the Federal Constitution; provisions of constitutional rank are in particular those relating to:
  - 1. the existence of fundamental rights, civil rights and political rights,
  - 2. the relationship between the Confederation and the Cantons and the powers of the Confederation,
  - 3. the basic features of the organization and procedure of the federal authorities;...

# Outlook

- International Law ... more legitimacy through information, consultation, approval?
- Effectiveness, Reliability of Foreign Policy by the executive in view of participation rights of Parliament / Cantons / Citizens

# Nouvelle publication du professeur Andreas R. Ziegler : Constitution fédérale et droit international

Ziegler Andreas R., Bundesverfassung und Völkerrecht (The Swiss Constitution and International Law), 2023. pp. 27-63 dans Ehrenzeller Bernhard et al. (eds.), St. Galler Kommentar zur Bundesverfassung, Dike Verlag, Zurich. [serval:BIB\_8035CC03CBE5]





# Thank you!

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