



SWITZERLAND

JOHANNES REICH

Professor of Public Law, Environmental Law, and Energy Law
University of Zurich

I. INTRODUCTION

Alexis de Tocqueville famously observed that there is hardly a political question in the United States that does not, sooner or later, turn into a legal one to be decided by the courts.¹ The opposite is true for Switzerland: There is hardly a major legal issue that does not, sooner or later, become a political issue to be decided by the People at the ballot box.² Any individual, group of citizens, association or political party able to collect 100,000 supporting signatures from fellow citizens (i.e. less than 2 per cent of all Swiss citizens eligible to vote) within 18 months may propose an amendment to the Swiss Federal Constitution (Fed. Const.)³ that will be decided upon at the ballot box. All amendments to the Federal Constitution are subject to a mandatory referendum (Article 140 (1a) Fed. Const.). All Statutes passed by Federal Parliament may be challenged with an ‘optional referendum’ by collecting 50,000 signatures of citizens within 100 days and decided by a popular vote (Article 141 (1a) Fed. Const.). Issues that have sparked culture wars in many democracies – from same-sex marriage to gun control, European integration, nuclear phase-out, the relationship between national sovereignty and international human rights law, and even whether Switzerland should develop and deploy nuclear weapons – have been decided neither by parliament nor by courts, but by popular vote.⁴

Like any other form of democracy, the reliance on a close interaction between direct and representative democracy,⁵ as it has evolved in Switzerland since 1848 into a consociational democracy,⁶ is not without its downsides. The possibility of vetoing bills with a referendum just before they reach the finish line render coherent and comprehensive reforms almost impossible (status quo bias).⁷ Moreover, political accountability tends to evaporate within the tight web of direct democracy, federalism, separation of powers, and collegial executives.⁸

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Elections to the Federal Assembly, Switzerland’s bicameral parliament consisting of the National Council (200 representatives of the People; proportional representation) and the Council of States (46 members, in principle two representatives per canton; overwhelmingly majority voting), are widely perceived as complicated and of minor importance.⁹ This is due both to the proportional representation system, with many parties running in the more populous cantons, and to the instruments of direct democracy, which give citizens a direct vote on important political issues.¹⁰ As a result, voter turnout in federal elections has remained stubbornly below 50 percent since 1979, fluctuating between 42 and 48 percent. Therefore, Switzerland ranks among the countries with the lowest voter turnout in the world.¹¹ In the federal election of 22 October 2023, turnout reached 46.7 percent, slightly above the 45.1 percent of 2019.

In the elections for the Federal Assembly on 22 October 2023, the national-conservative ‘Swiss People’s Party’ again won the largest share of the vote for the National Council with 27.9 percent (62 mandates), an increase of 2.3 percent from 25.6 percent (53 mandates) in 2019. The Social Democrats came in second with 18.3 percent of the vote (41 mandates), an increase of 1.5 percent from the 16.8 percent they won in 2019, when they had 39 mandates. The shares of the ‘Liberal Party’ and the ‘Center’ remained almost unchanged. At the losing end were the ‘Greens’, who received 9.4 percent of the vote (23 mandates), a drop of 3.8 percent (minus 5 mandates). In the Council of States, both the ‘Swiss People’s Party’ (6 mandates) and the Social Democrats (9 mandates) retained their seats, while the ‘Center’ gained two mandates (from 13 to 15) and the ‘Greens’ lost two of their five seats (3 mandates). The ‘Swiss People’s Party’ benefited from widespread concern about high levels of immigration, while the Social Democrats made gains thanks to former ‘Greens’ voters.¹² The composition of the executive branch of government, the Federal Council, whose members are elected by the Federal Assembly for a four-year term, remained unchanged.

Swiss citizens who are eligible to vote are usually called upon to vote on popular initiatives or referendums three or four times a year. However, due to federal elections held in October, only one vote was held in 2023. It took place on 18 June 2023. Voters were asked

to decide on one amendment to the Federal Constitution and two Federal Acts. The first of these two Federal Acts – the ‘Federal Act on Climate Protection Targets, Innovation and Strengthening Energy Security’ – is a framework law whose core provision stipulates that the federal government ‘shall ensure that the impact of anthropogenic greenhouse gas emissions in Switzerland is zero by 2050 (net zero target)’.¹³ The bill was approved by 59.1 percent.

The amendment to the ‘Federal Act on the Legal Basis for Federal Council Ordinances to Combat the Covid-19 Epidemic (Covid-19 Act)’ was approved by 61.9 percent of voters. The amendment to the Federal Constitution, which Swiss citizens were asked to vote on 18 June 2023, was proposed by Parliament. The amendment was due to the internationally agreed introduction of a global minimum tax rate of 15 percent. The GMCR was approved at the international level within the framework of the ‘Inclusive Framework on Base Erosion and Profit Shifting’ (BEPS), which is jointly led by the ‘Organization for Economic Co-operation and Development’ (OECD), an international organization of countries committed to democracy and the market economy, and the ‘G20’, an intergovernmental forum of the finance ministries of most of the world’s largest economies. The so-called GloBE (Global Anti-Base Erosion Rules) of BEPS provide for a minimum tax rate of 15 percent for groups of companies with an annual turnover of at least EUR 750 million on the basis of an internationally standardized tax base. The minimum tax rate must be met in each country. Against this background, the proposed constitutional amendment provided for an additional tax for such large groups that fall below the 15 percent tax rate. At the same time, the proposed constitutional amendment was intended to maintain Switzerland’s attractiveness as a tax domicile through compensatory measures. The constitutional amendment was approved by 78.5 percent of voters and all cantons. It entered into force on 1 January 2024 as Article 129 of the Feder-

al Constitution. The article and its history testify to the characteristics of Switzerland as a small open economy: As an exporting country with limited foreign policy clout, it has little influence on the rules governing its foreign economic relations and must therefore adapt to them flexibly.

III. CONSTITUTIONAL CASES¹⁴

1. BGE 149 I 248: Constitutionality of Bans on Begging

1.1. Regulation of begging as a balancing act from a fundamental rights perspective

Begging is, according to the Swiss Federal Supreme Court, “to ask another person for alms, usually in the form of money, in the expectation of his generosity”, and is widely practiced because of “the neediness of a person in a precarious situation”. For many, begging is a necessity, for some it may be a choice or even a way of life, while for many members of the public it is considered a mere nuisance. This makes the regulation of begging a balancing act from a fundamental rights perspective, given the shifting perceptions of the social phenomenon over time.

In the territory of present-day Switzerland, begging was an important social phenomenon until the end of the 19th century.¹⁵ Begging was mostly viewed favorably in the Middle Ages, as it offered wealthy Christians the perceived prospect of eternal salvation by giving alms. In the 14th and 15th centuries, however, begging was prohibited in Zurich, Berne, and Basel, but only for foreigners and ‘idlers’ who were considered fit for work. The Protestant Reformation led not only to the municipalization and bureaucratization of aid to the poor, but also to a ban on all forms of begging in most Swiss towns. While until the mid-19th century begging was widely perceived as a moral wrong in the face of a rigid work ethic, the welfare state virtually eliminated begging, only for the phenomenon to resur-

face towards the end of the 20th century as a practice often associated with either drug and alcohol abuse, human trafficking, or organized crime. This has led some Swiss cities and cantons to (re-)introduce begging bans over the last three decades.

1.2. Bans on begging: regulation in the shadow of both the Federal Constitution and the ECHR

The canton of Basel-Stadt, mainly consisting of Basel, Switzerland’s third most populous city, repealed its blanket ban on begging in 2019, replacing it with a provision that only those who “send other people to beg” or “beg as part of a gang” would be punished. This allegedly led to widespread begging, sparking an intense public debate.

In the midst of this debate, on 19 January 2021, the European Court of Human Rights (ECtHR) delivered its judgment No. 14065/15 *Lacatus v. Switzerland*. The ECtHR held that Switzerland had violated Article 8 of the European Convention on Human Rights (ECHR), i.e. the right to respect for private and family life, because the canton of Geneva had fined a beggar CHF 500 (the equivalent of about EUR 450 or USD 550 at the time), later commuted to five days’ imprisonment after it was found to be unrecoverable, for violating the ban on begging. The ECtHR stated that there are more lenient measures than a total ban on begging. In the light of this ruling, the parliament of Basel-Stadt decided to (re-)introduce only a partial ban on begging. This revised Criminal Code of the Canton of Basel-Stadt (CC-B) entered into force on 1 September 2021.

According to the revised CC-B, people who “beg in an organized way”, “send other people to beg” or “use deceptive or unfair methods when begging” are to be punished, the maximum penalty being a fine of up to CHF 10,000 (or roughly EUR 9,200 or USD 10,900 at the time), which, if left unpaid, may lead to imprisonment, generally calculated at one day for every CHF 100

(EUR 92; USD 109) of unpaid fine. The law also penalizes people who “disturb public safety, peace and order”, in particular those who beg “in an obtrusive or aggressive manner” or “within five meters” of entrances and exits to public facilities such as railway stations, bus stops, payment and ticket machines, shops, banks, post offices, museums, theaters, cinemas, hotels, restaurants or within public parks, gardens, cemeteries, playgrounds or school facilities.

1.3. Scope of fundamental rights

On appeal, lodged by several NGOs and private individuals, the Federal Supreme Court stated that begging would fall within the scope of both the constitutional right to personal liberty (Article 10 (2) Fed. Const.) and the right to respect for private and family life (Article 8 ECHR). Bans on begging would also “affect” human dignity as such (Article 7 Fed. Const.). However, the Court declined to consider it necessary to clarify whether begging fell within the scope of the freedom of expression (Article 16 Fed. Const.; Article 10 ECHR) and economic freedom (Article 27 Fed. Const.).

1.4. Legitimate public interests and proportionality

The Court recognized that a ban on begging may pursue a variety of legitimate objectives, such as public safety and the fundamental rights of third parties (e.g., children who are forced to beg or otherwise exploited, or people in the immediate vicinity of payment points and ATMs, store entrances, train stations, or other public buildings). Furthermore, the Court stressed that “restrictions on fundamental rights must be proportionate” (Article 36 (3) Fed. Const.). Begging “in an organized way” therefore required a narrow reading when enforced by the local police in order to be constitutional, the Court stated. Thus, mere coordination among beggars would not meet the threshold of “organized” begging, while exploitative or deceptive conduct amounting to “gang-like conduct” would. With regard

to the territorial scope of the prohibition, the Court found that the prohibition of (passive) begging in public parks was unconstitutional because, unlike cemeteries, such areas are not quiet zones, nor are they highly frequented, such as exits from public buildings or train stations, or used by vulnerable groups, such as schools.

1.5. Indirect discrimination: a law aimed at the Roma community?

The appellants also alleged indirect discrimination on the basis that the challenged ban on begging was aimed solely, or at least largely, at members of the Roma community. The Court acknowledged that the fact that “beggars belonging to the Roma ethnic group, mainly from Romania, came to Switzerland to beg” was one of the main reasons for the political authorities to revise the law. However, given the neutral wording of the law, it held that it could not find indirect discrimination unless there was clear evidence that the ban was applied “in an offensively unequal manner to the detriment of one ethnic group”, with the result that “other people, such as drug addicts or the homeless” were treated more leniently by local police.

1.6. Conclusion: the precarious nature of fundamental rights

Fundamental rights protect behavior, speech or conduct that is sometimes incomprehensible to others and perceived as an imposition. This is the case, for example, with religious practices (singing, ringing of bells, processions, rituals, dress, etc.), the meaning of which is not obvious to people who do not belong to the religious group in question and which are therefore perceived as disturbing. This can lead to the criminalization of such activities, which are considered undesirable and disruptive by a significant portion of society. The global spread of begging, which has a long history in Switzerland, shows that the boundary between individual rights and public order is not set in stone. Fundamental rights are therefore of a precarious nature and require broad so-

cial acceptance. The Federal Supreme Court has drawn the line between fundamental rights and public order in a careful, differentiated and well-founded manner, which should contribute to a broad acceptance of fundamental rights as a concept.

2. Social Media Activities of Public Service Broadcasters: BGE 149 I 2

2.1. Public service broadcasters: in a gray zone?

In many constitutional democracies, public service broadcasters play an essential but demanding role in the formation of public opinion in a democracy: they are responsible for informing the public in a neutral, factual and objective manner. Public broadcasters are funded by the public. However, in order to protect them from political pressure, public service broadcasters are often not funded by taxes. While this maintains the independence of public service broadcasters from the political budgetary process, the widespread use of license fee models means that citizens are always aware of how much they are paying for public service broadcasting without necessarily tuning in to its programming. This, in turn, can make public broadcasters vulnerable to political scapegoating.

2.2. Constitutional obligations of public service broadcasters and their social media activities

Therefore, public broadcasters are under a constitutional obligation “to present events accurately and to allow a diversity of opinions to be adequately expressed”, while their “independence of radio and television as well as their autonomy in deciding on their programs is guaranteed” (Article 93 (2&3) Fed. Const.). In a ruling, the Federal Court had to clarify whether these obligations also extend to the activities of public broadcasters on social media.

In 2021, the Swiss public broadcaster ‘SRG’ published an article on ‘Instagram’, a social

media platform, about the abolition of free coronavirus tests in Germany. On the same day, an individual added a comment to the article on ‘Instagram’. The SRG’s editorial team deleted the comment a few hours later, citing its ‘netiquette’, the SRG’s own rules on appropriate behavior in internet and social media forums. Both the SRG’s ombudsperson and the ‘Independent Complaints Authority for Radio and Television’ (ICA) refused to hear the complaint lodged by the person whose comment was deleted, on the grounds that such comments would fail to constitute ‘editorial content’ produced by the SRG’s team.

2.3. Public service broadcasters: organizations bound by fundamental rights

Article 35 (2) Fed. Const. states that those acting “in the name of the state” are “bound by fundamental rights”. According to the court, editorial content published by the SRG on social media and comments on it must be treated “as a single entity”. On this basis, the Federal Court ruled that the SRG, as a public broadcaster, is bound by fundamental rights. The deletion of a comment on social media by the SRG editorial team would therefore amount to an infringement of the freedom of expression (Art. 16 (2) Fed. Const.) of the person who posted the comment. Relying on the guarantee of an effective remedy (Art. 29a of the Swiss Constitution; Art. 13 of the European Convention on Human Rights), the court held that it would not be sufficient to refer complaints against the deletion of comments published by the SRG itself on social media to civil proceedings.

2.4. Conclusion: public service broadcasters and the simplistic “public/private” dichotomy

In practice, the ruling is likely to mean that public broadcasters will mostly keep the comment function closed to individuals when publishing editorial content on their social media channels. From a constitution-

al point of view, it is doubtful whether it is accurate to classify public broadcasters as “agents of the state” bound by fundamental rights. Public broadcasters provide public services, not government services. They have a mandate to remain impartial in political matters. This is hardly the same as declaring that a private institution such as SRG is under a strict obligation to respect fundamental rights in its dealings with its listeners and viewers. In conclusion, the Federal Tribunal’s ruling sheds light on the precarious position of public broadcasters in a gray zone between the state and private entities. This zone cannot be captured by the simple dichotomy between “state” and “society” that is all too often invoked in fundamental rights adjudication.

IV. LOOKING AHEAD

Direct democracy is often said to be able to curb excessive government spending and limit an overly generous welfare state (however one might define “overly generous”). This assumption will be tested in a natural experiment by two popular initiatives to be voted on in 2024. On 3 March 2024, citizens will be asked to vote on the popular initiative ‘For a better life in old age’, which seeks to expand the existing pension system for the elderly. On 6 June 2024, citizens will vote on the popular initiative ‘Maximum 10 percent of income for health insurance premiums (premium relief initiative)’. The initiative proposes to add the following clause to the Federal Constitution: “The premiums to be paid by insured persons may not exceed ten percent of their disposable income”. The reduction in premiums would be funded by both the Federation and the cantons through taxes.

V. FURTHER READING

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- See Johannes Reich and Nina Boss, “Switzerland” ([2023]) Yearbook of International Environmental Law <https://doi.org/10.1093/yiel/yvad032>.
- See Johannes Reich, “Switzerland – 2020 Review of Constitutional Law: Constitutional and Administrative Law amid the COVID-19 Pandemic” ([2021]) Social Science Research Network <https://doi.org/10.2139/ssrn.379565>.
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- Georg Lütz and Anke Tresch, “National Elections,” in Patrick Emmenegger et al (eds), *The Oxford Handbook of Swiss Politics* (Oxford University Press 2024) <https://doi.org/10.1093/oxfordhb/9780192871787.013.20>.
- Anke Tresch et al., “Élections fédérales 2023. Participation et choix électoral” (2024), <https://doi.org/10.24447/SLC-2024-00002/>.
- For more background, see Johannes Reich and Nina Boss, “Switzerland” ([2023]) Yearbook of International Environmental Law <https://doi.org/10.1093/yiel/yvad032>.
- Judgments of the Swiss Federal Supreme Court are available at <<https://www.bger.ch>>.
- This historical sketch draws on Erika Flückiger, “Mendians” (Historical Dictionary of Switzerland, 27 November 2008) <https://hls-dhs-dss.ch/fr/articles/016095/2008-11-27/>.