

Popular Initiatives for Better Regulation in Switzerland

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I. Introduction

Switzerland will vote on several popular initiatives requesting "good" laws, both on the federal and on the state level. One political party is gathering signatures for an initiative proposing a new constitutional right *"to laws that are understandable and simply, unburdensomely and efficiently implemented."* Some cantons have adopted laws to improve the quality of legislation and to diminish the administrative burden of small and medium enterprises.

The paper will study these popular initiatives in the light of modern legislation theory. It will assess their chances and risks to improve the quality of legislation. In order to do so the paper first must turn to possible understandings of better legislation or better regulation.

II. Struggle for Quality in Legislation

1. Different Ideals

There is little doubt that the quality of legislation is of high political and legal importance. There is a widespread consensus that laws must be "good"¹. The consensus often goes further that the quality of current legislation is poor – whoever enters the field of legislation enters an area of permanent crisis, so to speak². There is little debate, however, what are actually the criteria to determine the quality of legislation.

The quality of legislation can be understood at least in three different respects:

First, laws can be considered "good" if they fulfill criteria of sound *legal drafting*³. Such criteria are sometimes quite technical, e.g. the proper numeration of a law, but easily

¹ Schuppert (2011: 27-28), Burghart (1995: 20), Kervin (2003: 93-94), OECD (2010: 4).

² Hill (1993: 5), Schweizer (1999: 89-93), Eichenberger (1982: 15), Müller (2010: 356-58), Karpen (2008: 30-34), Flückiger (2008: 15), Manning (1977: 767).

³ Dorsey (2006: 3-16), Thornton (1970: 94-95), Allio (2007: 81-82), Wagner and Cacciaguidi-Fahy (2006: 22).

also affect the content of the law, such as the request for coherent wording of the text. Some of these rules are quite vague, such as the "clarity" of law⁴.

Second, laws can be assessed on the basis of their chance to succeed, their *effectiveness to achieve a certain aim*. Such a perspective is typically taken by the OECD and other international bodies⁵. In its seven "Guiding Principles for Regulatory Quality", principle one requires the adoption of clearly identified political goals, whereas principle two stresses the importance to "assess impacts and review regulation systematically to ensure that they meet the intended objectives efficiently [...]"⁶. In this respect, the term often used is "regulation" which encompasses the – important – aspects of implementation and enforcement.

Third, one should not forget that a good law should also be *fair* or *just*, in order to use a broad term for the material quality of the law. Obviously, the fairness of legislation is difficult to measure on a scientific level; there is an ongoing debate whether legislation theory can and should say something on the fairness of legislation⁷. To be on the safe side, one may require at least the "rationality" of the law⁸ which brings a good law near the requirements of the effective implementation of clear objectives, as described before. A rational decision requires a "solid evidence base"⁹. However, solid evidence "is an aid to political decision-making, not a substitute for it"¹⁰. Additionally, a "fair" or "just" law may be also one that has been enacted in a highly democratic process, being the product of a fair, open debate in public and – ideally – being accepted by the vast majority of citizens¹¹. In this sense, the function of the law is not only effective regulation "from above" but being a valuable tool of social peace keeping¹².

The three aspects of good legislation obviously overlap in some aspects. A contradictory law is hardly a product of good legislative technique, will typically be hard to implement and – being contradictory – will often violate standards of fairness such as the principle of equality. In such cases, the elements of good legislation are concurrent. This may not hold true for others. A poorly drafted statute may not harm implementation when nobody reads the law but everyone agrees on the rule to be. Good drafting and an elaborate de-

⁴ Flückiger (2006: 74-78), Schneider (2002: 46), Champeil-Desplats (2006: 39).

⁵ OECD (2006), Guy-Ecabert (2003: 151-154), Jacobs (2007: 23).

⁶ OECD (2005: 3-4).

⁷ Schäffer (1988: 17-19), Noll (1973: 63-64).

⁸ Banks (2009: 3-7), Head (16-18), Susnjar (2010: 29), Allio (2007: 73).

⁹ OECD (2010: 10).

¹⁰ EU Commission (2009: 4).

¹¹ Müller (2006: 15-19), Eichenberger (1982: 12-13), Karpen (1998: 390).

¹² Müller (2006: 11).

mocratic process may enhance quality and acceptance of the law but may impede the effectiveness of the regulation if they come with a long process for elaboration; effective regulation often requires swift action.

2. Different Methods und Different Authorities

The different understandings of "good" legislation explain why also the methods of measuring and improving the quality of legislation must be different. Drafting a good legal text is typically a lawyers' task. Measuring the impacts of the law will be done by a specialized team, familiar with the techniques of evaluation¹³. The "fairness" of legislation must be decided upon by a political institution in a democratic deliberation.

Hence, the different aspects of "good" legislation must be assured by different authorities – not every authority is comparably apt to ensure certain aspects of good legislation. It is common knowledge that members of Parliaments – rightly – care more about the "political" aspects of legislation than the adherence to drafting guidelines¹⁴. It is less clear whether administrative units preparing legislation should think "politically" or "strategically"¹⁵. Of course, this does not exclude that certain authorities or certain instruments will help to ensure different aspects of good legislation. Consultation procedure, e.g., "is intended to provide information on material accuracy, feasibility of implementation and public acceptance of a federal project"¹⁶.

In my view, concepts for better regulation only work properly if (1) they make sufficiently clear what aspect of regulation has to be improved, (2) are attributed to the proper authority and (3) fit in logically in the legislative process in force. Even then, programs for better regulation will fail if they are not endorsed by the authority in charge or if they are poorly funded¹⁷.

¹³ Cf. Balthasar (2002: 32-35), Baumann and Lauterburg (2004: 104-106), Rieder and Ritz (2000: 78-79), Wicki (2002: 78-79).

¹⁴ Müller (2006: 238-39), Eichenberger (1982: 33), Jegher (1999: 49), Manning (1977: 772), Jones and Thompson (1996: 65).

¹⁵ Müller (2006: 228-29), Schuppert (2003: 14), Tuori (2002: 100-101).

¹⁶ Article 2 sec. 2 Federal Act of 18 March 2005 on the Consultation Procedure (Consultation Procedure Act, CPA, 172.061).

¹⁷ Cf. Hösli (2009).

III. Better Regulation in Switzerland

1. Current Situation

For a long time, the legislative process in Switzerland was a quiet field, politically speaking. Preparation of laws is a typical task of the executive branch¹⁸. According to article 181 of the Swiss Constitution, "the Federal Council shall submit drafts of Federal Assembly legislation to the Federal Assembly." The task of preparation is usually handed down to the administration. On the federal level, the Federal Office of Justice (FOJ) has specialized legislative units in order to support the special branches. It also ensures the knowledge and the education of the civil servants¹⁹. The cantons (states) often have similar units.

In the last ten years, Swiss Parliaments tends to become more active in drafting legislation themselves. This tendency may be explained not only by increasing regulatory pressure²⁰ but also that the usually weakly staffed legislator now often has more ample resources, not matching these of the administration but at least allowing proper legislative work. Still, the work on laws in Parliament typically focuses on political questions²¹.

The administration itself has been active to introduce new tools into the legislative process. On the federal level and in several cantons (states) the government launched initiatives to improve the overall quality of existing legislation²². Regulatory Impact Analysis (RIA) has been embraced by the Swiss Government in 1999²³, transferring this task to State Secretariat for Economic Affairs (seco). The newly drafted Swiss Constitution of 1999 explicitly requires in article 170 that "federal measures are evaluated with regard to their effectiveness"²⁴. However – as criticized by the OECD – the RIA is late in the political process if ever applied, the seco is meagerly staffed to deal with this task and in-depth cost-benefit analysis are rarely carried out²⁵. Additionally, the seco typically focuses on economic aspects of regulation. The Federal Office of Justice (FOJ), overseeing legislation in general, also deals with RIA, usually using the term "evaluation". In 2004, a working group between several administrative units, including the seco und the FOJ, pre-

¹⁸ Müller (2006: 238), Schneider (2002: 65), Eichenberger (1982: 29-30) Ruch (1976: 229).

¹⁹ E.g. through legislation guides, legislative technical guidelines, internal administrative editorial board.

²⁰ Cf. van Gestel/Hertogh (2006).

²¹ Müller (2006: 239), Mader (2009: 183-84).

²² Müller (2007), Müller (2003).

²³ Report of the executive federal council on measures to deregulate and administrative discharge, November 3, 1999, Swiss Official Journal (Bundesblatt) 2000, pp. 994-1043.

²⁴ Cf. Mastronardi (2008), Mader (2005), Biaggini (2007).

²⁵ OECD (2006: 43-44).

pared a common report on the techniques to measure the effectiveness of federal measures²⁶.

The seco also has introduced "simplified" RIA in order to assess the needs of *small and medium enterprises (SME)*²⁷. These tests are typically carried out by a series of in-depth interviews with selected firms²⁸. The advantages of this technique are savings of time and costs.

2. Popular Initiatives

In recent years, more political consideration was given to the regulative process. The first popular initiatives typically were closely linked to the needs of small and medium enterprises (SME), specifically objecting the rise of administrative burdens. These popular initiatives were launched in many Swiss cantons²⁹, coordinated by the local trade association and political allies. In the canton of Zurich, a popular initiative introduced a "Law to Reduce the Density of Legislation and the Administrative Burden on Small and Medium Enterprises (SME)"³⁰. According to the formulated legal text of the initiative, the number of legal norms (§ 1 sec. 2 lit. b) and the effort to find and consult them (§ 1 sec. 2 lit. g) have to be reduced. Administrative procedures must be simplified (§ 1 sec. 2 lit. d) and coordinated (§ 1 sec. 2 lit. e and § 4). Regulatory impact assessment has to be established (§ 3), applying to new as well as to existing legislation (§ 3 sec. 3 and § 5).

The government of Zurich as well as Parliament rejected the initiative but introduced a counter-project which induced the committee to withdraw its initiative. The counter-project was much shorter than the initiative. As the title indicates, the new law focuses on the administrative burden on enterprises³¹. Zurich is supposed to reduce the number of administrative units to be consulted, give access to the administration by electronic means, simplify and harmonize forms and data collection by the administration (§ 1

²⁶ See http://www.ejpd.admin.ch/content/dam/data/staat_buerger/evaluation/umsetzung/schlussbericht-kontaktgruppe-d.pdf (in German).

²⁷ Following parliamentary motions Durrer (no. 99.3284): KMU-Verträglichkeitsprüfung für geplante staatliche Regulierungen und Verfahren.

²⁸ Cf. Gautschi (2008), Miauton/Gautschi (2008).

²⁹ Canton *Schwyz* (popular initiative „Für weniger Bürokratie“ accepted on November 25, 2007); canton *Basel-Landschaft* (popular initiatives „KMU-Förderinitiative“ und „KMU-Entlastungsgesetz“ accepted on June 5, 2005); canton *Solothurn* (Debate in local parliament on popular initiative „KMU-Förderinitiative: Weniger Bürokratie – mehr Arbeitsplätze“ in May 2011); canton *Graubünden* (popular initiative „Gegen unnötige Bürokratie und Reglementierung“, supported by the executive branch of the canton).

³⁰ "Gesetz für den Abbau der Regelungsichte und die Reduktion der administrativen Belastung für kleine und mittlere Unternehmen (KMU)" (ABI 2007, 2296; ABI 2008, 1909).

³¹ Entlastungsgesetz (LS 930.1).

sec. 2). RIA – in respect to the administrative burden of enterprises – has been introduced, limited however to new projects and newly enacted laws (§ 3); older laws must be checked on their compliance with the reduction of administrative burden, as § 5 puts it more vaguely. The new law has entered into force on January 1, 2011.

On the federal level, one political party is currently gathering votes for a popular initiative named "Stop Bureaucracy!"³². In article 94 of the Swiss Constitution (principles of the economic system) a new sentence shall be introduced. Currently, federal and state authorities "shall endeavor to create favorable general conditions for the private sector in accordance with their responsibilities" (article 94 sec. 3). The initiative adds: "They take measures to reduce the density of legislation and the administrative burden for the private sectors, with special regard to small and medium enterprises."

It is noteworthy that the popular initiative tries to write an individual right to "unbureaucratic" enforcement into the constitution. The proposed new article 9a of the Constitution reads as follows:

"Every person has a right to laws [...] that are understandable and simply, unbureaucratically and efficiently implemented [...]."

The initiative was published in the Swiss Official Journal (Bundesblatt) on October 12, 2010³³, which triggers the 18-month period within the gathering of the necessary 100'000 signatures has to take place (until April 12, 2012). A successful popular initiative must be submitted to the vote of the people and the cantons (states), with Parliament either rejecting or supporting the initiative (article 139 sec. 5 Swiss constitution).

3. Better Regulation through Popular Initiatives?

One may only speculate on the effects of these initiatives on the legislative process. Will they lead to better regulation?

In my opinion, the initiatives correctly stress the importance of *proper enforcement*. Even the best legislation will be ineffective or even harmful if implementation and enforcement fail. The canton of Zurich concentrates its efforts on the administrative burden of enterprises which seems to be a realistic concept, especially at the state level. The reduction of administrative burden as a key point is certainly a rather vague idea, however easier measurable and attainable than many concepts of better regulation. The new law also clearly allocates competences and duties between legislator, executive branch and administration. Practice will prove whether the authorities meet the expectations.

³² Swiss Official Journal (Bundesblatt, BBl) 2010 p. 6633.

³³ Swiss Official Journal (Bundesblatt, BBl) 2010 p. 6633.

The popular initiatives may also stimulate the RIA efforts on the federal level. Indeed, many of the ideas behind these initiatives are fully in line with (and actually support) the efforts to evaluate and to improve the effectiveness of federal measures³⁴. The popular initiatives are clearly business oriented which is basically also the focus of the State Secretariat for Economic Affairs (seco)³⁵.

However, the popular initiatives will probably fall short of improving the quality of legislation. The request for a lower density of legislation is misleading if not harmful to the very interests of the political forces behind these initiatives. A lower density of legislation may lead to less regulation if the term is understood as a test to the very necessity of a legal norm³⁶. More commonly, density of legislation describes the leeway of an authority to apply a specific norm; a dense norm gives only a small margin of appreciation whereas open norms open large margins³⁷. The same holds true for less regulation: Less regulation usually leads to gaps to be filled by the enforcing authority. Such margins of appreciation for the administrative authorities – meaning power to enforce the policy chosen by the administrative authority – is hardly what the drafters of the popular initiatives had in mind.

The popular initiatives will also be little effective where they simply state very general principles of good legislation. "Understandable" laws is certainly a well meant idea which follows a certain Swiss tradition of good law drafting³⁸. However, "understandable" laws may endanger the preciseness of the law; a law understandable to laymen may confuse experts. Additionally, if everyone is responsible for the implementation of general principles such as the "understandability", experience suggests that no one will care. True, legislator may give specific meaning to abstract constitutional principles – however, legislator can do so even in the absence of such principles. There is little need for new constitutional norms.

Possibly aware of such shortcomings, the popular initiative states a "right" to "laws that are understandable and simply, unbureaucratically and efficiently implemented." The proposed article 9a of the Swiss constitution is located in the chapter on fundamental rights, just after the protection against arbitrary conduct and the principle of good faith (article 9) and the right to life and to personal freedom (article 10). The drafters of the

³⁴ Cf. III. 1.

³⁵ Cf. III. 1.

³⁶ Müller (2006: 159), Weber-Dürler (2005: 594), decision of the federal court BGE 136 I 29 (principle of proportionality in legislation).

³⁷ Häfelin/Müller/Uhlmann (2010: 98-99), Tschannen/Zimmerli/Müller (2009: 208-12).

³⁸ It was Eugen Huber, drafter of the Swiss civil code, who came up with the famous words that a good legislator should think like a philosopher but write like a farmer, cf. Lötscher/Nussbaumer (2007: 5).

popular initiative clearly intended to introduce a fundamental right that can be relied upon before any state authority, including courts. The open question remains whether article 9a really adds something new to the Constitution. Already today, a law that cannot be understood is not applicable to private parties – although, admittedly, courts often accept legislation that is badly written and ambiguous³⁹. General procedural guarantees safeguard that cases in judicial and administrative proceedings are decided within a reasonable time (article 29 sec. 1 Swiss Constitution). A "bureaucratic" attitude of the administration, especially the administration acting overly formalistic⁴⁰, may be challenged under article 5 section 3 of the Swiss Constitution; state institutions (and private persons) shall act in good faith. It is possible but by all means open to question whether a "new" fundamental right will intensify court control on legislative and administrative behavior.

In sum, the popular initiatives may improve some aspects of implementation and enforcement. Other positive impacts on regulation and legislative process are however doubtful.

³⁹ The Federal Supreme Court only requires that legal rules must have an adequate and appropriate precision. This requirement should not be understood in an absolute way (decision BGE 129 I 161, 163). Legislation cannot avoid vague terms that must be specified by practice (decision BGE 136 I 87). For a comparison with the jurisprudence of the ECtHR and the ECJ cf. the review in Woltjer (2011: 100-105).

⁴⁰ Cf. BGE 135 I 6, 9; 134 II 244, 247 f; 128 II 139, 142, decision of the federative administrative court B-2473/2009 of 23 September 2009.

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