

Switzerland

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Roughly every second referendum held worldwide at the national level takes place in Switzerland,¹ turning voting into nothing short of “a way of life.”² All amendments to the Federal Constitution of the Swiss Confederation (Fed Const)³ are subject to a referendum. Constitutional law is therefore as least as much shaped by “the People” as it is by courts, Parliament, or the executive branch. This is all the more true in view of the Federal Constitution identifying Federal *Parliament* rather than the courts as “the supreme authority”⁴ of Switzerland as a federal republic, being a “confederation” in all but its official name. Courts and administrative agencies are consequently bound to apply both federal statutes and international treaties, both enacted by Federal Parliament, even when such provisions conflict with the Federal Constitution.⁵ As a result of both frequent referenda and weak judicial review, federal constitutional law has for all its existence since 1848 been deeply embedded in politics. Rather than being “an anchor” or “a rock to hold on to,”⁶ the Federal Constitution forms not only an object of constant public discourse but also of the politics of the day. To this effect, the Federal Constitution of the Swiss Confederation may be aptly characterised as a “popular constitution” em-

bodiment elements not only of liberal but also of “radical democracy.” One would probably expect that such a “popular constitution” would readily fall prey to the wave of populism that caught some liberal democracies in recent years. Yet, developments in Swiss constitutional law, tracing back to 1848 and beyond, paint a more nuanced and richer picture. They point to the fact that the equilibrium between popular sovereignty and individual liberty demands, within certain limits, constant deliberation and re-balancing. Swiss constitutional law thus attests to the French proverb according to which it is only the temporary arrangements that last (*Il n’y a que le provisoire qui dure*).

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Liberal and Radical Democracy

“Liberal democracy” is a concept aiming to reconcile the “rule by the people” (“democracy”) with individual liberty through constitutional institutions such as limited government, separation of powers, and the rule of law. Individual freedom in a liberal democracy is primarily conceived of as negative freedom, i.e., freedom from government intervention. Alluding to Abraham Lincoln’s Gettysburg Address, liberal democracy thus

¹ Uwe Serdült, ‘Referendums in Switzerland’ in Matt Qvortrup (ed), *Referendums Around the World: The Continued Growth of Direct Democracy* (Palgrave Macmillan 2014) 65–121, 68.

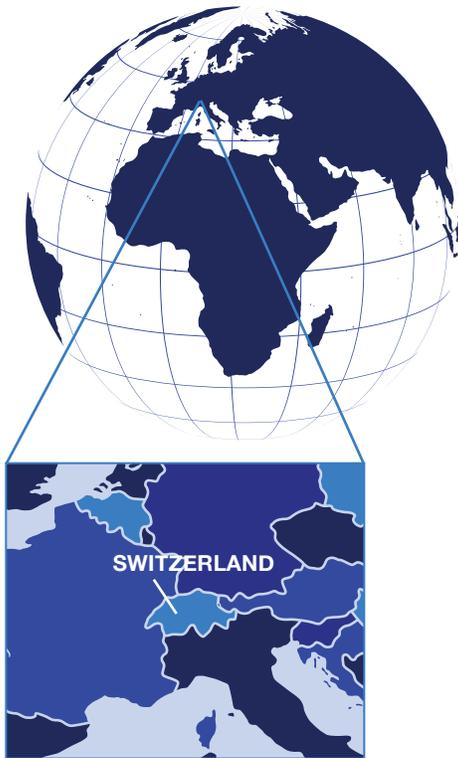
² ‘Voting as a way of life’, *The Economist* (London, 12 February 2004) 6.

³ Federal Constitution of the Swiss Confederation of 18 April 1999 [unofficial English translation available at <www.admin.ch/opc/en/classified-compilation/19995395/index.html> accessed 28 February 2018].

⁴ Fed Const, art 148 cl 1.

⁵ Fed Const, art 190.

⁶ Justice Antonin Scalia (referring to the United States Constitution), in an interview conducted by Dan Izenberg, ‘Clinging to the Constitution’ *Jerusalem Post* (Jerusalem, 19 February 1990) 5.



tends to emphasise government “for” rather than “of” or “by” the people.⁷ The modern idea of liberal democracy is rooted in the writings of philosophers such as John Locke, Montesquieu, or Immanuel Kant. A liberal democracy particularly emphasising safeguards against oppressing majority rule is, with reference to James Madison’s remarks in *The Federalist No 10*, sometimes called a “Madisonian Democracy.”⁸ Liberal democracy is distinguishable from “radical democracy.” This rather elusive term captures an understanding of democracy aiming at the highest possible degree of equal, direct, and broad participation of the citizens of a polity by way of constitutional arrangements such as extended electoral rights, referenda, and popular initiatives (direct democracy). Radical democracy hence emphasises self-rule – in short, government “of” and “by” the people. The notion of “radical democracy”⁹ is most notably associated with the ideas of the Geneva-born Jean-Jacques Rousseau.

The Federal Court Policing the Democratic Process at the Canton Level

The Swiss Federal Constitution combines elements of both liberal and radical democracy. The bill of rights enshrined in the Constitution and the separation of powers between the bicameral Federal Parliament (“Federal Assembly”; legislative branch); the multi-party collegiate Federal Council consisting of seven members with equal rights and responsibilities elected by parliament for a term of four years (executive branch); and the Federal Court,¹⁰ being the highest judicial authority of the Federation, all rank among the constitutional compo-

nents of liberal democracy. The Federal Court in fact constitutes the federal *supreme* court but owes its modest and slightly misleading name to the fact that it formed the only federal court at the time of its establishment as a permanent court in 1874. The Federal Court is not a special constitutional court operating separately from the ordinary courts, but decides cases and controversies pertaining to civil, criminal, administrative, and constitutional law. Its authority is, as noted above, severely limited with regard to both federal and international law, but not to the laws and regulations of the *Cantons*, the component states of Switzerland. One of the Federal Court’s core functions, therefore, extends to “policing” the democratic process in the Cantons by applying what, alluding to John Hart Ely, may be called a “participation-oriented” and “representation-reinforcing” approach to judicial review.¹¹

In its judgments either published or decided in 2017, the Federal Court applied this approach in a rather bold fashion as its case law regarding voting systems at the Canton level illustrates. Whereas Switzerland’s 26 Cantons are all bound to elect their parliaments directly by the people, the Federal Constitution fails to explicitly specify whether such elections are to be held on the basis of proportional representation or majority voting. Rather, the Federal Constitution provides that it is for each Canton to decide how the political rights within the respective polity are being exercised.¹² Still, the Federal Court has severely limited the Canton’s autonomy in this regard on the ground of the Federal Constitution’s guarantee to each citizen to equal treatment in a string of decisions since

2014. This case law sheds light on the fact that, under the condition of majority voting, a considerable portion of votes fails to exert any influence on the outcome of an election at all. Votes cast either for the losing candidate or for the winning candidate beyond the required threshold (“excess votes”) are virtually “wasted.” When proportional representation applies, in contrast, many more votes carry weight with regard to the actual outcome of an election. On these grounds, the Federal Court, in a decision published in 2017, reinforced its position that a Canton is under a constitutional obligation to provide compelling reasons, such as limited relevance of political parties within a polity or a comparatively low number of voters residing in a given voting district, to constitutionally cling to a majority voting or a mixed voting system.¹³ Intervention by officials in referendum campaigns provide yet another example of said “participation-oriented” and “representation-reinforcing” approaches to judicial review as applied by the Federal Court. Reaffirming a statement having formed part of its case law since at least eight decades, according to which “no result of a vote may be approved failing to reflect the free and unbiased will of the voters,”¹⁴ authorities may, according to the Court’s judgment published 2017, provide the voters with their own assessment of a proposal put to vote in a Canton or municipality different from the respective authority as long as such a statement is not only drafted in an objective and unbiased manner but the polity, of which said authority forms part, is “affected” by the outcome of the vote in question.¹⁵

Consociational Democracy and Its Moder-

⁷ See Abraham Lincoln, ‘Address Delivered at the Dedication of the Cemetery at Gettysburg’ (19 November 1863) in: Roy P. Basler (ed), *Collected Works of Abraham Lincoln* (New Brunswick 1953) 17–23.

⁸ Robert Dahl, *A Preface to Democratic Theory* (University of Chicago Press 1956) 4–33.

⁹ For a contrasting juxtaposition of liberal and radical democracy see, e.g., Marc Bühlmann, Adrian Vatter, Oliver Dlabac, and Hans-Peter Schaub, ‘Liberal and Radical Democracies: The Swiss Cantons Compared’ (2014) 10 *World Political Science Review* 385, 391–396.

¹⁰ All opinions of the Federal Court are available free of charge in their respective original language (German, French, Italian, Romansch) at <www.bger.ch> accessed 28 February 2018.

¹¹ The above cited were famously coined in the context of United States Constitutional Law by John Hart Ely, *Democracy and Distrust* (Harvard University Press 1980) 73, 88.

¹² See Fed Const, art 39 cl 1.

¹³ BGE 143 I 92 para. 6.4 (decided on 12 October 2016; published in 2017).

¹⁴ See, e.g., BGE 75 I 244.

¹⁵ BGE 143 I 78 (decided on 14 December 2016; published in 2017).

Democracy as founded on the Swiss Federal Constitution is, however, a far cry from a “Madisonian Democracy.” Rather, the ideals of radical democracy have left their lasting marks on federal constitutional law of which the popular initiative is the prime example. Said instrument allows a committee of 7 to 27 citizens to put a proposal of a constitutional amendment in unaltered form to a popular vote, provided that 100,000 citizens, whose signatures must be collected within 18 months, are backing said draft. Popular initiatives may therefore pursue radical and rather utopian objectives such as the abolition of the Swiss Army in 1989 and 2001 or, more recently in 2016, the introduction of a nation-wide universal basic income. The Federal Constitution fails to erect any barrier as to the content of such a proposal other than the “peremptory norms of international law” (*ius cogens*) consisting of such basic norms as the prohibition of genocide, torture, slavery or inhuman and degrading treatment.¹⁶ As all popular initiatives are channelled through the system of representative democracy, providing both the Federal Council (executive branch) and the Federal Assembly (legislative branch) with an opportunity not only to recommend the voters to either back or reject the proposal but to initiate a counter-proposal diminishing the chances for the popular initiative to be successful at the ballot box, almost all proposals severely restricting minority rights have been rejected since popular initiatives were introduced at the federal level in 1891.¹⁷ Just as all other amendments to the Federal Constitution,

popular initiatives require a cumulative majority of both the voters and the 26 Cantons in order to be approved. The result of the popular vote in each Canton determines its respective vote. Of all the 238 popular initiatives put to a popular vote between 1891 and 1999, a mere 12 (or 5 percent) were successful;¹⁸ the very first popular initiative ever put to a federal vote on 20 August 1893 – the ban of kosher butchering, largely motivated by anti-Semitic prejudice – being the only popular initiative approved by both the voters and the Cantons, unambiguously infringing on minority rights during this era.¹⁹

The very low success rate of popular initiatives over more than a century was largely due to a process of political decision-making called “consociational democracy,” which has been of crucial importance for Switzerland as a multilingual and multidenominational country with a permanent resident population of whom 29.1 percent are foreign born.²⁰ Consociational democracy consists of elements such as consensual power sharing, broad participation of minority groups, elite cooperation, and gradual inclusion of opposition parties into the executive branch.²¹ Said composition of the executive branch (Federal Council) is the prime example of consociational democracy. The Federal Council is composed of seven members with equal rights and responsibilities, who since 1943 have belonged to five different parties and currently originate from the German, French, and Italian-speaking regions of Switzerland. The moderating effect of consociational democracy on radical democracy has been in sharp decline since the

early 1990s, however, due to increased polarization of the political landscape. Key political issues such as immigration and Switzerland’s relation to the European Union (EU) spurred divergence among political parties to levels barely known since the end of the Second World War, from which the country was spared. Whereas Switzerland is, unlike all of its neighbouring states, neither a member of the EU nor the European Economic Area, it is closely connected with the EU by a densely knit network of bilateral treaties. The demise of consociational democracy and its moderating effect on radical democracy is underscored by the fact that around 20 percent of the popular initiatives put to a popular vote between 2004 and 2013 were approved.²² Among these constitutional amendments passed were a ban on the construction of minarets, a constitutional amendment limiting “mass immigration,” and, in 2010, a requirement to readily expel foreign criminals.²³ Still, a popular initiative aimed at an enforcement mechanism for the last-mentioned obligation without judicial review was rejected in a popular vote in 2016.

In contrast to the federal level, similar proposals equally infringing minority rights but launched in the Cantons are appealable with the Federal Court. The Federal Court’s invalidation of such a sub-federal popular initiative seeking to frustrate the formation of a theological education institution for imams at the University of Fribourg, a state run university with a Roman-Catholic faculty of theology, on account of the Federal Constitution’s prohibition of discrimination on the

¹⁶ For a more detailed assessment see the English summary of Johannes Reich, ‘Direkte Demokratie und völkerrechtliche Verpflichtungen im Konflikt [Direct Democracy and Obligations Stemming from Public International Law in Conflict]’ [2008] *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [Heidelberg Journal of International Law] 979, 1024–25.

¹⁷ Johannes Reich, ‘An Interactional Model of Direct Democracy: Lessons from the Swiss Experience’ (SSRN, 23 July 2008) <<http://dx.doi.org/10.2139/ssrn.1154019>> accessed 23 February 2018.

¹⁸ Bernhard Degen, ‘Initiative populaire’ (*Dictionnaire historique de la Suisse*, 18 July 2016) <<http://www.hls-dhs-dss.ch/textes/f/F10386.php>> accessed 23 February 2018.

¹⁹ See Friedrich Külling, ‘L’abattage rituel’ (*Dictionnaire historique de la Suisse*, 2 September 2008) <<http://www.hls-dhs-dss.ch/textes/f/F11380.php>> accessed 23 February 2018.

²⁰ Organisation for Economic Co-operation and Development, *International Migration Outlook 2017* (41st edn, OECD Publishing 2017) 297 (referring to 2015) <http://dx.doi.org/10.1787/migr_outlook-2017-en> accessed 28 February 2018.

²¹ The theory of consociational democracy was first and foremost developed by Arend Lijphart; for an overview see Rudy B. Andeweg, ‘Consociational democracy’ (2000) 3 *Annual Review of Political Science* 509.

²² See Adrian Vatter, *Das politische System der Schweiz* (2nd edn, Nomos 2016) 351–2.

²³ See on the first and the third of the above-mentioned initiatives Daniel Moeckli, ‘Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights’ (2011) 11(4) *Human Rights Law Review* 774.

grounds of religion in 2017,²⁴ illustrates the different regimes in place at the various levels of governance.

The European Convention of Human Rights as a Contested Additional Constitutional Layer

Still, in a controversial *obiter dictum* of 12 October 2012, the Federal Court, given the constitutional obligation committing all courts to adhere to international law even when the latter conflicts with the Constitution,²⁵ foreshadowed the possibility of what could be coined “concrete (para-)constitutional review” of provisions of the Federal Constitution on the basis of the European Convention on Human Rights (ECHR), ratified by Switzerland in 1974. As the European Court of Human Rights (ECtHR) monitors Switzerland’s compliance with the ECHR unhinged by a clause limiting the scope of its review similar to article 190 Fed Const, the Federal Court has taken the view since 1999 that both the ECHR and other international human rights treaties take precedent over Federal Statutes.²⁶ In the aforementioned controversial *obiter dictum* of 2012, the Court, or rather its second public law division, went a step further and declared that the ECHR would even precede norms of the Federal Constitution itself.²⁷ Such a move would effectively transform the ECHR into an additional (supra-)constitutional layer above the actual domestic constitution.

Said *obiter dictum* produced a considerable political backlash culminating in the filing of yet another popular initiative referred to as “Swiss Law instead of Foreign Judges (Self-determination Initiative)” with the Federal Chancellery in 2016, seeking to enact a constitutional amendment according to

which the Federal Constitution, at least in principal, takes precedent over any other law with the exception of peremptory norms of international law (*ius cogens*). The respective popular vote is unlikely to take place before 2019. The Federal Council, on 5 July 2017, formally recommended rejecting said “Self-determination Initiative.” Federal Parliament is expected to decide on its recommendation in the course of 2018.

Frail Legitimacy of Switzerland’s “Cooperative democracy”

Consociational democracy has for about a century provided not only for equilibrium between two competing concepts of democracies but also for considerable protection for those minority groups who actively participate in the bargaining process of political decision-making. The demise of consociational democracy since the 1990s and the lack of reliable enforceable protection against an overreaching majority provided by the Constitution cast a light on the fragile legitimacy of Switzerland’s democracy with regard to its “cooperative,” club-like trait. These characteristics trace back to the governance of some late-medieval free farmer societies and towns in many of today’s Cantons that bore some resemblance to today’s cooperatives,²⁸ i.e., entities established according to the principles of self-government and self-administration whose members join together in order to promote and safeguard common interests by way of collective self-help.²⁹ Many municipalities still take their decisions on citizenship applications of foreign residents seeking Swiss citizenship at town hall meetings after a deliberation by a show of hands. Any cooperation, however, inevitably rests on a distinction between members and non-members. This raises difficult moral

questions as soon as some of the decisions taken by members extend to non-members, as Swiss democracy illustrates. 24.6 percent of the country’s permanent residents are, after all, non-Swiss citizens.³⁰ Political rights at the federal level are, however, restricted to Swiss citizens over the age of 18. Judged against the normative premise according to which equality forms the bedrock of democracy,³¹ the cooperative trait of Swiss democracy raises increasingly difficult questions as to its legitimacy.

Conclusion: In Search of New Equilibrium between Liberal and Radical Democracy

The ongoing debate on the scope of judicial review and the status of international law bring the tensions between liberal and radical democracy inherent in the Federal Constitution to light. The system of consociational democracy providing for equilibrium between liberal and radical democracy has been in demise for almost two decades. The fragile legitimacy of Swiss democracy with regard to its considerable foreign population has become more visible as a result. In view of both the demand of the EU to put the close mutual relations on the more solid legal footing of a “framework agreement” and popular initiatives such as the “Self-determination Initiative,” the remaining years of the second decade of the current century are likely to mark a critical juncture for whether liberal or radical democracy prevails.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Amendments to the Swiss Federal Constitution

²⁴ BGE 143 I 129 (decided on 14 December 2016; published in 2017).

²⁵ Fed Const, art 190.

²⁶ See the respective leading case BGE 125 II 417 para 4 (26 July 1999).

²⁷ BGE 139 I 16 para 5 (12 October 2012).

²⁸ See Robert Dahl, *Polyarchy* (Yale University Press 1971) 53.

²⁹ See Swiss Code of Obligations (Schweizerisches Obligationenrecht), art. 828 sect. 1.

³⁰ Federal Statistical Office, ‘Statistical Data on Switzerland 2017’ (Federal Statistical Office 2017) 7 <<https://www.bfs.admin.ch/bfsstatic/dam/assets/2040009/master>> accessed on 28 February 2018.

³¹ Dahl (n 29) 202-7; Robert Dahl, *Democracy and Its Critics* (Yale University Press 1989) 233.

In 2017, Swiss citizens were called upon to decide on four constitutional amendments.³² Two amendments were endorsed on 12 February 2017, one facilitating the naturalization of third-generation immigrants, the other reforming the funding-scheme of transport infrastructure. A largely symbolic constitutional amendment on nutrition security found a majority in the popular vote on 24 September 2017, whereas a constitutional provision raising the VAT rate for the benefit of the old-age pension insurance was rejected.

Federal Court

The “chilling effect” doctrine as originally developed by the U.S. Supreme Court with regard to free speech provides for a recurrent topic in comparative constitutional law. Against this backdrop and by way of abstract constitutional review, the Federal Court held a newly enacted statute of a Canton in conformity with both freedom of expression and freedom of assembly as guaranteed by the Federal Constitution. Said statute holds that both promoters and violent participants of political rallies causing violence or damage to property would be liable up to an amount of CHF 30,000 (ca USD 30,000; EUR 26,000) in the event that the rally in question was either conducted unauthorized or the promoters deliberately failed to comply with the terms of the permission granted by the local authorities. The Court in its majority was of the opinion that the “chilling effects” of the provision was limited as promoters and participants of political rallies could take precautionary measures in order to avoid any liability at all.³³

In many of Switzerland’s Cantons, judges of ordinary courts of first instance are often elected by the people with a limited term of office (usually four or six years). Periodic re-elections of judges raise questions of judicial independence. Balancing sovereignty of the people and judicial independence, the Federal Court held a provision of a Canton, according to which new candidates may only stand for election as president of a court of first instance at the first ballot in the event of the incumbent president stepping down, to be constitutional.³⁴

Constitutional guarantees of human dignity are often perceived as protecting against blatant infringements of individual liberty only. Contrasting such conceptions, the Federal Court held that calling a person by his or her first (instead of his last) name during a stop-and-search procedure by a police officer degrades the person in question to ‘a mere object of the procedure’ and may therefore, based on the concrete circumstances, amount to an infringement of said person’s human dignity.³⁵ According to the Federal Court, it is therefore not the quantity but the quality of an infringement that matters when a violation of human dignity is to be assessed. Whether or not it is sensible to equate a mere lack of respect between decent human beings – with a violation of human dignity the most basic human right there is – seems open to question, however.

European Court of Human Rights

Whereas 29.1 percent of Switzerland’s permanent resident population is foreign born,³⁶ more than 93 percent of all students attend

state-run institutions in order to fulfill their compulsory schooling years.³⁷ As Swiss constitutional law requires state schools to be neutral in matters of religion, accommodating students’ religious beliefs and practices has been a focal point of constitutional law for more than a decade.³⁸ The ECtHR in its judgment in the case of *Osmanoğlu and Kocabaş v Switzerland*, dated 10 January 2017, held that the school authorities of the Canton Basel-City acted in conformity with freedom of thought, conscience, and religion of two parents of Turkish origin and Muslim faith when fining the latter CHF 700 (about USD 620 at the time) each for refusing their two daughters (7 and 11 years of age, respectively) to attend mandatory mixed-gender swimming instruction as part of the regular curriculum at their local state school on account of their religious beliefs.³⁹ The Court therewith confirmed the assessment of the case by the Federal Court.⁴⁰

IV. LOOKING AHEAD TO 2018

The Swiss Federal Constitution currently limits the powers of the Federation to levy direct federal tax and VAT until 2020. A constitutional amendment prolonging this time limit until 2035 will be put to a popular vote on 4 March 2018. On the same date, Swiss citizens will be called upon to decide on a popular initiative seeking to completely privatize public service broadcasting by rendering federal subsidies in favour of TV and radio stations unconstitutional. On 10 June 2018, a popular vote will be held on a highly technical but radical constitutional amend-

³² See Chancellerie fédérale [Federal Chancellery], ‘Répertoire chronologique 2011-2018’ (1st February 2018) <https://www.bk.admin.ch/ch/f/pore/vab/vab_2_2_4_1_2011_2020.html> accessed 28 February 2018.

³³ BGE 143 I 147 para 5.4 (18 January 2017).

³⁴ BGE 143 I 211 (30 March 2017).

³⁵ Federal Court, Judgement 1B_176/2016 para 8.2 (11 April 2017).

³⁶ Organisation for Economic Co-operation and Development, *International Migration Outlook 2017* (41st edn, OECD Publishing 2017) 297 (referring to 2015) [<http://dx.doi.org/10.1787/migr_outlook-2017-en>].

³⁷ Federal Statistical Office, ‘Lernende: Basistabelle 2015/16’ (Federal Statistical Office 2017) <<https://www.bfs.admin.ch/bfsstatic/dam/assets/2242887/master>> accessed 28 February 2018.

³⁸ See Johannes Reich, ‘Switzerland: Freedom of Creed and Conscience, Immigration and Public Schools in the Postsecular State: Compulsory Coeducational Swimming Instruction Revisited’ (2009) 7 *International Journal of Constitutional Law* 754–767.

³⁹ *Osmanoğlu and Kocabaş v Switzerland* ECHR 2017/*Osmanoğlu and Kocabaş v Switzerland* App no 29086/12 (ECtHR, 10 January 2017). [EGMR, *Osmanoğlu et Kocabaş c. Suisse*, Requête no 29086/12, 10 janvier 2017].

⁴⁰ BGE 135 I 79 (25 October 2008); the leading case being BGE 135 I 79 (25 October 2008).

ment seeking to fundamentally modify Switzerland's monetary policy and its financial market. The "Sovereign Money Initiative" aims at limiting money creation to Switzerland's independent central bank, the Swiss National Bank. In the current financial system, not only central banks but private banks create money, in particular by granting loans, which, according to the committee promoting said popular initiative, undermines the stability of the financial market by provoking "bank runs." Further popular votes at the federal level are planned to be held on 23 September and 25 November 2018. The Federal Council will determine, four months prior to the respective polling days at the latest, which matters will be submitted to a vote.

V. FURTHER READING

Clive H. Church and Adrian Vatter, 'Shadows in the Swiss Paradise?' (2017) 27 *Journal of Democracy* 166

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I·CONnect-Clough Center

2017 Global Review of Constitutional Law

Richard Albert, David Landau,
Pietro Faraguna and Simon Drugda
Editors

© 2018 I•CONnect

Electronically published by I•CONnect and the Clough Center
for the Study of Constitutional Democracy at Boston College.

www.iconnectblog.com | www.bc.edu/cloughcenter

ISBN: 978-0-692-15916-3

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