DIRECT DEMOCRACY AND JUDICIAL REVIEW: A COMPARATIVE STUDY OF US AND SWISS LEGAL SYSTEMS

Doğrudan Demokrasi ve Yargı Denetimi: ABD ve İsviçre Hukuk sistemlerinin karşılaştırmalı bir incelemesi

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Abstract

In the US, almost half of the states have established direct democracy mechanisms, but there is a paucity of such mechanisms at the federal level. By contrast, the Swiss system knows extensive direct democracy at both the cantonal and the federal level, including rights of referendum on laws enacted by the parliament and popular initiatives for constitutional revision.

This paper focuses on how direct democracy mechanisms, such as referendums and citizens' initiatives serving an overarching ideal of public sovereignty, may inform and affect judicial review. The paper also examines certain differences in treatment between federal and state laws when it comes to judicial review, as the courts will not necessarily apply the same standards despite the existence of similar democratic mechanisms at both levels.

In this contribution, I first argue that none of the existing systems is fully satisfactory. The *status quo* in the Swiss model might be a source of instability and threaten legal certainty, coherence and transparency and could ultimately be more harmful to public sovereignty in that federal acts may in practice be set aside without constitutional basis. As to the US model, the combination of an absence of citizen involvement at the federal level with extensive judicial review might ultimately be deemed as unsatisfactory from the perspective of democratic rights.

This does not mean however that direct democracy is somehow superior to representative, or that either of judicial or legislative power should prevail over the other. To the contrary, in this paper I argue that in a federal system all are complementary. Furthermore, I claim that one should recognise the limits of direct democracy and of judicial review in order to improve both by striking a balance between them.

Keywords: Direct Democracy, Judicial Review, US legal system, Swiss legal system, referendum, popular initiative, individual rights, popular sovereignty

Özet

ABD'de, eyaletlerin yaklaşık yarısında doğrudan demokrasi mekanizmaları bulunurken, federal seviyede aynı mekanizmalarda bir eksiklik olduğu gözlemlenmektedir. Buna karşılık, İsviçre'de gerek kantonal gerekse federal düzeyde parlamento tarafından çıkarılan yasaların referanduma sunulmasını ve anayasa değişimi için halk inisiyatiflerinin düzenlenebilmesini de içeren şekilde geniş doğrudan demokrasi mekanizmaları mevcuttur.

Bu çalışmada halk iradesini temsil eden referandum ve halk inisiyatifleri gibi doğrudan demokrasi mekanizmalarının yargı denetimi ile olan ilişkisi incelenmektedir. Bu bağlamda, yargı denetiminin federal ve yerel kanunlar açısından farklılıklarına da değinilmektedir.

Bu çalışmada yapılan değerlendirmede, öncelikle mevcut sistemlerin hiçbirinin tamamen tatmin edici olmadığı savunulmaktadır. İsviçre'deki mevcut modelin bir istikrarsızlık kaynağı olabileceği ve hukuki güvenlik, tutarlılık ve şeffaflık gereklerine bir tehdit oluşturabileceği; ayrıca, pratikte anayasal temeli olmadan federal yasaların yürürlükten kaldırılabilme imkanı tanımasının kamu egemenliğine faydadan çok zararları olabileceği tartışılmaktadır. ABD modelinde ise, kapsamlı yargı denetiminin varlığı ile federal düzeyde vatandaş katılımının noksanlığının birleşimi sonucunda demokratik haklar açısından yetersiz olabileceği tartışılmaktadır.

Ancak bu doğrudan demokrasinin temsili demokrasiden üstün olduğu ve/veya yargı veya yasama gücünün baskın olması gerekliliği anlamına gelmez. Aksine, bu çalışmada federal sistemlerde yargı denetimi ile doğrudan demokrasi mekanizmalarının tamamlayıcı olduğu ortaya konulmaktadır. Dahası, gerek doğrudan demokrasinin gerekse yargı denetiminin sınırlarının belirlenip, aralarında adil bir denge oluşturulması gerekliliği savunulmaktadır.

Anahtar Kelimeler: Doğrudan Demokrasi, Yargı Denetimi, ABD Hukuk Sistemi, İsviçre Hukuk Sistemi, Referandum, Halk İnisiyatifi, Bireysel Haklar, Kamu Egemenliği

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Introduction

In a hierarchical account of legal systems such as that of Hans Kelsen, the Supreme Courts are tasked with upholding the primacy of the Constitution. In this context, the doctrine of judicial review may be defined as the courts' power to declare acts of the executive or the legislative branches unconstitutional. As such, judicial review has been the object of much criticism and praise. Put in the broadest terms, critics question the democratic legitimacy of the doctrine as the court overrides the will of the majority, whilst scholars in favor of the doctrine argue that the "double check" by the judge is necessary to guarantee effective protection of constitutional rights, thus rejecting the quest for so-called "popular constitutionalism".

Although the topic of judicial review is generally seen as the preserve of scholars of American law, it is also much debated in Switzerland. This paper suggests that a comparative study of both systems in this area is both relevant given their comparable characteristics (federalism, direct democracy), and useful given certain fundamental differences of approach to the doctrine of judicial review.

Direct democracy decision-making ensures the primary exercise of popular sovereignty. The citizenry are part of machinery of the state, in addition to the classical elected or appointed judicial, executive and legislative government bodies. Nonetheless, to fully exercise its power, this fourth body might depend on the other bodies. In this respect, judicial review challenges the conformity of acts enacted by the popular will. But does this challenge necessarily mean that direct democracy and judicial review are conflicting? Or is it possible to conceive of a way to ensure the smooth functioning of both in a well-organised democracy? This contribution seeks to analyse the interrelation between direct democracy and judicial review. As constitutional scholarship has largely covered both, there is little to be added to that literature. In this comparative analysis, I argue that one should recognise the limits of direct democracy and of judicial review and strike a balance between them. To this end, I will focus on how direct democracy mechanisms, such as referendums and citizens' initiatives serving an overarching ideal of public sovereignty, may inform and affect judicial review.

First and foremost, I refer to judicial review for the protection of human rights. Thus, the analysis will mainly focus on the role of courts, particularly regarding the protection of civil rights and liberties. For this purpose, mainly the rights-based challenges to certain initiatives will be analysed, as opposed to those that are powers-based.[1] Second, as a comparative study I will compare

[1] For the distinction see Kenneth P. Miller, *Direct Democracy and The Courts*, Cambridge

the American experience of judicial review with the Swiss legal order, as well as the Swiss electoral system (direct democracy) with the American (Electoral College). This comparison will help show that both systems are more inclusive than exclusive within their own countries respectively. Obviously, the objective is not to compare what is not comparable, but I will attempt by a thorough examination of these two systems to assess a proposal for reforming the existing legal frameworks. To this end, the current state of the relatonship between popular democracy and constitutionality, that appears at first sight to be conflictual, should be briefly described as it exists in Switzerland and the United States. Only afterward can eventual reciprocal influences be apprehended.

Comparison between Switzerland and the United States is justified for several reasons. It is therefore worth beginning with a brief reminder of the differences and similarities between these legal orders. First of all, the Swiss institutional structure is historically based on the American model. Both of the countries are federal and utilize some form of direct democracy, though at different levels. Furthermore, like the United States legal system, Switzerland's constitutional jurisdiction is diffuse. The extent of judicial federalism is much greater in Switzerland, as there is a superposition of cantonal and federal courts which are competent to adjudicate over national law, while in the United States state and federal courts have distinct and complementary competencies[2]. Nonetheless, there is not as such a constitutional jurisdiction in the United States either, given that all courts are empowered to review constitutionality.

It should be noted that to ensure the uniformity of federal law, as the highest authority of the judiciary in the Confederation[3], the Federal Supreme Court rules in the final instance. Therefore, the Federal Court[4] assumes a role similar to that of America's Supreme Court.

1. Direct democracy and Judicial review in general

Direct democracy embodies the idea that legislative power resides in the people[5]. Independently of whether or not direct democracy enhances citizenship virtues, it is undeniable that by recognising the authority of the people, elected parliamentarians become accountable. Thus, the citizens

University Press, Cambridge, (2009) at 115.

2 Article III sec. 2 § 1 U.S. Constitution.

3 Article 188 (1) Swiss Constitution placing it over the Federal Criminal Court, the Federal Administrative Court and the Cantonal Judicial Authorities.

4 Hereinafter: Swiss Supreme Court.

5 Jean-Jacques Rousseau, *Contrat Social II*, 4, (1790), at 352.

constitute a balancing power rendering politicians more responsible towards the people they represent. Sovereignty ultimately remains with the people, i.e. the body politic which is bound by the social pact which is the constitution.

Judicial review raises the obvious question of whether the legislator or the judge is best placed to protect fundamental rights. To put it differently, this raises the difficult question of democratic legitimacy of judicial review, along with the paradox of democratic representation. Still, one should ask if there is a reason to divide the labour strictly between the legislature and the judiciary,[6] or whether there might be a different manner to conceive of the checks and balances in constitutional adjudication. A limited judicial review, while providing a competitive alternative to direct participatory democracy will lead to the better protection of constitutional rights, intended solely as fundamental human rights.

Historically, only the legislator elaborated the law. Today, the roles have evolved: the judge is no longer perceived as being limited in role to the strict and rigorous interpretation of the law, acting only as the "mouth of the law".[7] Indeed, this "modern judge" is one who acts as a legislator and emits normative jurisprudence.[8] If the adjustment of the judiciary was initially met with some reluctance (due to the distancing from the legal syllogism), it is now recognized that judicial interpretation of legislation also involves some form of lawmaking, as a positive legislator.

The national courts must discharge their duty to protect fundamental rights, in particular where legislative gaps remain. It should be specified that the term legislator not only refers to the elected parliament but also includes the whole citizenry when exercising the same power through instruments of direct democracy. The lack of judicial review, seemingly overrides the supremacy of international law over national law. Without judicial review, what protections can remain for constitutional rights?

A. The Swiss Experience

Given the institution of (semi-) direct democracy, Swiss federalism is characterized by its allowing citizens to have the first and/or last word by empowering them to act directly to make and repeal laws and to change the constitution. Conceived as early as 1848[9], the Swiss Constitution, as of

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6 See Samantha Besson, The Morality of Conflict, A Study on Reasonable Disagreement in the Law, Hart Publishing, Oxford, (2005).

7 Montesquieu, *De l'Esprit des lois*, livre XI, chapitre VI, Genève (1748).

8 *See* François Ost, ''Retour sur l'interprétation'', *Aux confins du droit*, Berne (2001), at 133.

9 For the history of direct democracy in Switzerland, *see* Kris W. Kobach, *The referendum : direct democracy in Switzerland*, Dartmouth, Aldershot, (1993).

today, allows the mandatory referendum, the optional referendum, and the popular initiative at the federal level. Consecrated as political rights of all Swiss citizens satisfying the prescribed conditions of age and legal capacity,[10] the Swiss Constitution provides a right of popular initiative at the federal level to request a partial or complete revision of the Federal Constitution, as well as mandatory or optional referendum rights over legislation.

Any amendment of the Swiss Constitution triggers a mandatory referendum, as does accession to organisations for collective security or supranational communities.[11] Both a majority of cantons and of voters is required.[12] Strictly speaking, the validity of any such measure ultimately depends on the approval of the people. Thus, there are no material limits to the revision of the constitution in Switzerland. This is not to imply that there are no material limits on the exercise of popular sovereignty. The most binding of such material limits to the exercise of popular sovereignty is found in international treaties, especially those pertaining to human rights.

A law adopted by the Federal Assembly, or parliamentary approval of important treaties, will be subject to an optional referendum upon request by 50'000 persons eligible to vote or upon request by eight Cantons,[13] thus allowing the people to have the final say in legislative matters as well as constitutional. Indeed, laws promulgated by the Federal Assembly may not be challenged in the Federal Supreme Court,[14] but they remain subject to referendum within 100 days of their adoption.

Particularly, as pertains to the purpose of this analysis, the popular initiative allows for the possibility of triggering a partial or total revision of the Constitution upon the demand of 100,000 voters.[15] A popular initiative is successful upon approval by a majority of both voters and of Cantons.[16]

All these components of direct democracy demonstrate the citizenry's sovereignty, as they are binding upon the other branches of the government. Indeed, the Federal Assembly and the Federal Council are bound by the popular will, and even the Federal Supreme Court is not entitled to declare a referendum or initiative unconstitutional. At the most, the Federal Assembly can declare an initiative invalid if it does not comply with the principle

10 Article 136 Swiss Constitution.
11 Article 140 (1) Swiss Constitution.
12 Article 140 (1) and 142 (2) Swiss Constitution.
13 Article 141 (1) Swiss Constitution.
14 Article 189 (4) Swiss Constitution.
15 Articles 138 and 139 Swiss Constitution.
16 Article 139 (5) and 142 (2) Swiss Constitution.

of cohesion of subject matter[17], the principle of consistency of form or contravenes *jus cogens* provision of international law.[18]

It is necessary to point out three main failures of the current system.[19] The first of these flaws is related to parliament's power to declare a popular initiative void, and this without clearly established grounds in the Constitution. The second of these flaws is the fact that a political body is deciding on a legal issue, instead of an independent judicial authority that may provide a formal reasoned decision. It is indeed preferable that the Federal Assembly pass statutes only after consultation of the Supreme court. As Häfelin raises it, even the control itself is an assertion of the supremacy of the democratic principle, whereas the same cannot be said about the respect of the rule of law.[20]

Pursuant to Article 148 (1) Swiss Constitution, the Federal Assembly is the supreme authority of the Confederation. Subsequently, in accordance with Article 190 Swiss Constitution, federal statutes enjoy immunity from judicial review. The only remaining control over legislative acts consists therefore in subjecting them to public review in the form of referendum. Subject to the rights of the people and the cantons[21], federal statutes based on popular initiatives escape monitoring. As the saying goes: "*vox populi, vox dei*".[22] Therefore, the lack of judicial review of acts representing the popular will may lead to a deficiency in the protection of fundamental rights. This lack of safeguards for fundamental rights is further "exacerbated by a loophole in constitutional jurisdiction, whereby federal laws remain valid even if they contravene the constitution. There is no independent body to check whether federal laws are unconstitutional".[23]

According to Article 190 of the Swiss Constitution, all authorities are bound by law to enforce federal statutes and international treaties. Thus, Article

17 i.e. the single-subject rule.

18 Article 173 (1) f ; 193 (4) and 194 (3) (4) Swiss Constitution.

19 Ulrich Häfelin, «Le référendum et son contrôle en Suisse», in *Justice constitutionnelle et démocratie référendaire*, Actes du Séminaire UniDem organisé à Strasbourg les 23 et 24 juin 1995 en coopération avec l'Institut des hautes études européennes de Strasbourg, Université de Schuman, et avec le soutien de l'Union européenne, éditions du Conseil de l'Europe, Strasbourg, (1996), 62-75, at 73.

20 *Idem*, p. 75. In this context, the Federal Council launched in March 2013 a consultation procedure to instaure a preliminary substantive examination of popular initiatives and the extension of the grounds for their refusal or invalidity if they are inconsistent with fundamental rights, but to no avail.

21 Article 148 (1) Swiss Constitution.

22 Michel Hottelier, «Suisse», AIJC, (2011) 417-442, at 420.

23 Bruno Kaufmann, Rolf Büchi, Nadja Braun, *Guidebook to direct democracy: in Switzerland and beyond*, 4th ed., Initiative & Referendum Institute Europe, Marburg, (2010) at 98.

190 of the Federal Constitution grants total immunity to federal statutes, prohibiting the Swiss Supreme Court from reviewing their constitutionality; however, the control of federal statutes has undergone major changes over the years.[24]

In several occasions, the Swiss Supreme Court has admitted verification of a federal statute's compliance with the Constitution. However, in the event that a federal statute is found unconstitutional, the Federal Supreme Court may not set the conflicting unconstitutional provisions aside.

Hence, unlike in the United States, constitutional review of federal statutes is not possible in Switzerland. As a result, the lack of judicial review is replaced by public review in the form of a right to referendum: just as the people have the possibility to challenge laws passed by parliament before they are enacted. In theory this may be seen as a reflection of popular will and of democratic sovereignty. The people will have expressly or tacitly (in the absence of a referendum) accepted an act that is unconstitutional.

Nonetheless, in practice where a grievance relates to a fundamental right, especially if guaranteed by the ECHR, federal judges allow themselves to put aside a federal statute—acting themselves in violation of the Constitution, in order to ensure its supremacy[25]. A coherent and sustainable strategy should ideally apply the same scrutiny when it comes to a fundamental right, as when the plaintiff argues solely on the basis of an ordinary constitutional disposition.

Over the past years, Swiss voters have approved, among others, three popular initiatives on very controversial issues. The first of these, on a constitutional ban on the construction of minarets, was approved by 58% of voters on 29 November 2009.[26] The second initiative, which concerned a new constitutional provision entailing the automatic expulsion of foreign nationals convicted of certain criminal offences specified by law, obtained approval of 53 % of voters on 28 November 2010. Most recently, on 9 February 2014, the initiative "against mass immigration" was approved with 50.3% of votes cast in favor, and was passed by a majority of cantons.

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24 A first popular initiative on Constitution supremacy - by extending judicial review to federal statutes - has been overwhelmingly rejected, FF 1939 I 161. Again, the proposal to repeal Article 190 of the Swiss Constitution, in order to revoke federal statutes' immunity, failed due to the refusal of two chambers in December 2012 : BO 2011 N 1918 ; 2012 E 432 ; N 1968.

25 See infra.

26 *See* Daniel Moeckli, «Of Minarets and Foreign Criminals : Swiss Direct Democracy and Human Rights», Human Rights Law Review (2011) 11 (4) : 774-794.

The outcome of these, especially the first and the last, attracted attention from all over the world and have been widely condemned. The so-called "minarets initiative" restricting freedom of religion[27], for a constitutional amendment banning the construction of new minarets, has been translated as a constitutional provision providing that "the construction of minarets is prohibited".[28] Again, the "expulsion initiative", restricting among others the right to private and family life, is discerned as a constitutional amendment.[29] The latest initiative on immigration policy is even more problematic in that it challenges not only Switzerland's international obligations and is also likely to restrict the free movement of people, but also reveals the clash among its citizens. As a matter of fact, the majority of Swiss voters (54.6%) voted favorably at the time of an optional referendum for the bilateral accords with the EU which took place on 5th June 2005[30].

As regards these amendments, it should be noted that both the Federal Council and the Federal Assembly, along with many social organisations, recommended that the proposed amendment be rejected as inconsistent with the basic principles of the Suisse Constitution, but to no avail.[31]

With this, one notes that a judicial review sometimes better ensures effective protection of fundamental rights. Indeed, on the one hand, even if putting aside a federal act allows for the protection of a fundamental right in a given case and, as it constitutes a declaration of incompatibility with constitutionnaly declared rights and as such gives a legislative opportunity to rectify, currently there is no real mechanism to put pressure on parliament to follow judicial opinion.

On the other hand, in order to ensure legal stability, the citizenry must be able to foresee the circumstances under which their fundamental rights may be limited. This must be precisely indicated in the legal basis for the interference with the legal norm. And it must be formulated with precision as to its meaning and scope – the *foreseeability* of the law.

B. The United States Experience

In accordance with the Constitution, the founders opted at the national level solely for a representative democracy, excluding any form of direct

27 Article 15 Swiss Constitution.
28 Article 72 (3) Swiss Constitution.
29 Article 121 (3) Swiss Constitution.
30 Referendum over the Federal decree of 17 December 2004 on the approval and implementation of the bilateral agreements between Switzerland and the EU on the Schengen and Dublin accords. FF 2005 4891.
31 *See* FF 2013 6575, FF 2013 279.

democracy[32]. Since then, efforts to establish a democracy based on the people's consultation at the national level have failed[33]. The constrained use of popular democracy at the national level in America appears to be in contrast with expanded use of direct democracy in Switzerland. Among other reasons, this was also justified by the large territory and widely dispersed population.[34]

Nonetheless, almost half of the States have established direct democracy mechanisms.

Again, the U.S. legal system differs from the Swiss one, as long as the courts' power "to strike down any state law that conflicts with state constitutions or the Constitution of the United States (…) extends to law enacted directly by the people", and thus "provides a broad institutional limitation on the people's rule".[35] On the other hand, in several states as the constitution can be directly amended, the people hold a counterweight to judicial power.[36] A counter-example of what exists currently in Switzerland i.e. lack of judicial power over initiatives can be found, where a strong form of direct democracy and an expansive judicial power prevail.

When it comes to judicial review of individual initiatives, the question can be asked whether or not the scrutiny / standard of review changes compared to one exercised in relation to acts of parliament in order to respect those expressed by the people's will. Eule framed the question thus: "Should the conflict between the lawmaker and judge be played out differently when the people express their preferences directly rather than through an agent?".[37]

It follows from case law that both legislative- and initiative-issued acts are subject to the same standards of review[38]. This has been expressly

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32 *See* James Madison, *Federalist* No. 63, at 385, where he pleads for a republican government that "*in the total exclusion of the people, in their collective capacity*, from any share in" the legislative process. See also Madison, Federalist No. 51, at 319 and Federalist No. 10, at 73.

33 Julian N. Eule, "La justice constitutionnelle et la démocratie référendaire aux Etats-Unis", Actes du Séminaire UniDem organisé à Strasbourg les 23 et 24 juin 1995 en coopération avec l'Institut des hautes études européennes de Strasbourg, Université de Schuman, et avec le soutien de l'Union européenne, éditions du Conseil de l'Europe, Strasbourg, (1996), 76-97, at 77. Eule refers in particular to the attempt to amend the constitution in 1977 and the call launched by Ross Perot in 1992. *See* W. Richard Merriman, "To collect the wisest sentiments : Representative Government and Direct Democracy", The Jefferson Foundation on Direct Democracy.

34 See James Madison, *Federalist* No. 10.

35 Miller, *supra* note 2, at 2.

36 *Idem*, at 3.

37 Julian N. Eule, "Judicial Review of Direct Democracy", 99 Yale L.J., (1990), 1503-1510, at 1505.

38 Craig B. Holman, Robert Stern, "Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts" refer to *Gordon v. Lance*, 403 U.S. 1 (1971); *James v. Valtierra*,

acknowledged by the popular statement of Chief Justice Burger in *Citizens Against Rent Control /Coalition for Fair Housing v. City of Berkeley*: "It is irrelevant that the voters, rather than a legislative body, enacted [this law], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."[39]

As Justice Robert Jackson made it clear in *West Virginia State Board of Education v. Barnette* : "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[40] On another note Justice Hugo Black opined on a greater deference when the law is adopted by the people, observing that "when the voters of the State establish their policy, which is as near to a democracy as you can get".[41]

In the same vein, in California: *In Re Marriage Cases* - a citizen initiative called "Proposition 22" aimed to restrict the definition of marriage as a union between persons of the opposite sex. Chief Justice George stated that "the circumstance that the limitation of marriage to a union between a man and a woman (…) was enacted as an initiative measure by a vote of the electorate (…) neither exempts the statutory provision from constitutional scrutiny nor justifies a more deferential standard of review. Although California decisions consistently and vigorously have safeguarded the right of voters to exercise the authority afforded by the initiative process, (…) our past cases at the same time uniformly establish that initiative measures adopted by the electorate are subject to the same constitutional limitations that apply to statutes adopted by the Legislature, and our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution".[42]

402 U.S. 137 (1971); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Forty-Fourth Gen. Assembly v. Lucas*, 379 U.S. 693 (1965); *Legislature v. Deukmejian*, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).

39 Citizens Against Rent Control /Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981).

40 *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), 638.

41 *Reitman v. Mulkey*, 387 U.S. 369 (1967). This remark was made in a spirited exchange with then-Solicitor General Thurgood Marshall in oral arguments before the Court. See *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, Philip B. Kurland & Gerhard Casper eds., vol. 64, University Publications of America, Arlington, (1975) at 668.

42 *In re Marriage Cases*, 43 Cal. 4th 757 (2008), 851.

Even more recently, dealing with the same subject matter, and following similar decisions made in Utah[43], Oklahoma[44] and Virginia[45], the District Court for the Western District of Texas struck down the state's ban on same-sex marriage, ruling it was unconstitutional[46].

The Oregon Compulsory Public Education Initiative – which aimed to close private Catholic schools and integrate the children into the public school system – serves as a leading case to better comprehend the court's power over the exercise of direct democracy. Obtaining approval of 52.7 % of the voters on 7 November 1922, the bill's constitutionality was challenged before the Federal Court, which ruled that the bill violated not only the constitution of Oregon but also the U.S. Constitution, namely the 14th amendment, and declared the bill unconstitutional. The U.S. Supreme Court, in its turn, affirmed the Federal Court's decision and overturned the litigious bill in *Pierce v. Society of Sisters.* [47]

Judicial review of abortion initiatives is undoubtedly a leading example with respect to the subject matter. The U.S. Supreme Court recognized that a woman's decision to interrupt her pregnancy was constitutionally protected in *Roe v. Wade*[48], and motivated Congress to undertake statutory responses to the abortion issue, in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* such as the Freedom of Choice Act. Following this, numerous initiatives have been launched in several States, in order to prohibit or limit the practice of abortion[49]. Among these, the Supreme Court of Oklahoma struck, over the course of ten years, two initiatives[50] from the state ballot, considering that if the measure was to be enacted it would be unconstitutional under the Supreme Court's decision in *Casey*.

Referring to the debate on the counter-majoritarian nature of judicial review, Eule asks why "the argument for judicial intervention [does] not abate as it becomes clearer what the majority prefers".[51] Outlining the complexity and difficulties encountered in the process of implementing direct democracy, particularly on account of required percentages and sufficiently informed

43 *Kitchen v. Herbert*, No. 2:13-CV-217 (Dec. 20, 2013).
44 *Bishop v. Oklahoma*, No. 4:04-cv-00848-TCK-TLW (Jan. 14, 2014).
45 *Bostic v. Rainey*, No. 2:13-cv-00395-AWA-LRL (Feb. 13, 2014).
46 *DeLeon et al v. Perry et al.*, No. 5:13-CV-00982 (Feb. 26, 2014).
47 *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
48 *Roe v. Wade*, 410 U.S. 113 (1973).
49 *See* Jon O. Shimabukuro, "Abortion: Judicial History and Legislative Response", Congressional Research Service, 7-5700, RL33467, www.crs.gov.
50 *In re Initiative Petition* No. 349, 838 P.2d 1,3 (OK 1992) and *In re Initiative Petition* No. 395., 286 P.3d 637 (OK 2012).
51 Eule, *supra* note 38, at 1506.

voters, Eule urges the need to "conceptualize a different judicial role when the law under review emanates from the electorate rather than a legislative body."[52] Thus, he claims that "when laws enacted by plebiscite are challenged under other provisions of the Federal constitution, the republican form clause informs the nature of the judicial role" and calls for more judicial scrutiny, not less[53]. Making this same point, Miller explains Justice Robert Jackson's statement as "the principle of higher constitutionalism – the idea that constitutional rights rise above normal democratic politics and that courts, not the people, are the final interpreters and guardians of these rights".[54] He further specifies that this reasoning applies only to federal constitutional rights, as long as at the state-level voters can still amend constitutional rights[55].

It is true that "a judicial ruling that an initiative violates the federal Constitution is the most powerful institutional limitation on direct democracy"[56]. Yet, this is the only way to ensure constitutionally recognised fundamental rights. If not, minority rights would not be ensured by any power. To put it differently, "eliminating judicial review would cause a complete collapse of the process. The addition of more judicial review is inadequate, but the total absence of any judicial review would be a far worse situation".[57] Surely, as in the case of California, "a constitutional system that combines a strong form of direct democracy and an expansive judicial power can produce dramatic conflict". In sum, neither lesser nor greater deference is required, but rather an intermediate level of scrutiny over laws enacted by popular initiative, as well as for those of the legislature, sufficient to verify constitutional compatibility.

First of all, a distinction should be made between basic constitutional principles that we will refer to as constitutional rights (in reference to the catalogue of human rights in Swiss Constitution and the Bill of Rights, respectively) and the rest of the constitution.

Considering that courts are not better placed than legislators, Waldron pleads for the abolishment of judicial review.[58] His main argument relies on that majority decision should preveal over court decision in sake of political and democratical legitimacy. In answer to Waldron's position, Fallon argues

52 *Idem*, at 1533.
53 *Idem* , at1544.
54 Miller, *supra* note 2 at 9.
55 *Idem*, at 10.
56 *Idem*, at 14.
57 Douglas C. Hsiao, "Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic," Duke Law Journal 41 (Apr. 1992), 1267–1310.
58 Jeremy Waldron, "The Core of the Case Against Judicial Review", 115 Yale L.J., 1346, (2006), 1388-1392.

that political legitimacy should not be understood in a unique way of the majority claim, but that can still be satified with the judicial review, which is itself legitimate.[59] As regards Waldron's scepticism: it is not simply that judges are more likely to protect fundamental rights than legislators. For a case to be brought before the Court, one will have already edicted this law- and will have had the opportunity to check whether or not it is respectful of fundamental rights. But as the legislative deliberation is general and abstract, before the concrete application of a statute it is not evident to perceive its implications, which is not to say that judges are better protectors, but that they are simply better positioned. In other words, it is not about advocating for judicial review in the absolute. The truth is that judicial review also has its deficiencies[60]. It is obvious that when a judge declares a statute adopted by a legislator void, he acts as a negative legislator, or as a positive one when he plugs a loophole. Implicit in this understanding, is that judicial review is an inherently legal activity[61]. This does not mean that the judge impinges and/ or infringes on the legislator's capabilities. Rather, he is supposed to exercise oversight in order to ensure foreseeability for the citizenry. This is tantamount to saying that, rather than limiting the legislature's authority, judicial review ensures its credibility in respect to right holders. In the same vein, we can mention implicit constitutional rights that the judiciary granted or recognised by means of extensive interpretation of existing provisions, but not expressly those that are enshrined as such in the Constitution. The judge acts as a *de facto* lawmaker by determining and materializing the content and scope of the rights and freedoms provided initially by the Constitution to adapt them to a concrete case[62]. With regard to dichotomy between originalism and the living constitution, I will not dwell on that issue. Rather, I will assume with Balkin that, originalism and living constitutionalism "are two sides of the same coin".[63] In other terms, implicit constitutional rights are nothing more than the recognition than "living originalism"[64] a in order to adjust the Constitution, by interpretation in the light of changing social and political values while

59 Richard H. Fallon, Jr, "The Core of an Uneasy Case *For* Judicial Review", (2008) 121 Harv LR 1693-1736, at 1718.

60 *See* Mark Tushnet, "How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review ?" Oxford JLS, Vol. 30 No.1, (2010), 49-70.

61 Alon Harel, "Rights-Based Judicial Review: A democratic Justification", Law and Philosophy, vol. 22, No.3/4, Judicial Review (Jul., 2003), 247-276, note 12. *Contra* Christopher L. Eisgruber, *Constitutional Self-Government*, Harvard University Press, (2001), 57-64.

62 *See* Allan R. Brewer-Carias, Constitutional Courts as Positive Legislators, A Comparative Law Study, Cambridge University Press, New York, (2011), 173-193.

63 Jack M. Balkin «Framework Originalism and the Living Constitution» 103 Nw. L. Rev. 549 (2009) at 549.

64 Jack M. Balkin, *Living Originsalism*, Harvard University Press (2011).

remaining faithful to its origin. The recognition of the right to privacy in the U.S.[65] and the recognition of the freedom of expression in Switzerland[66], before it has been incorporated into the Constitution demonstrate this form of interpretation which transforms, in a sense, the judge into a legislator. In sum, when it comes to unwritten basic rights, judicial lawmaking is not the same as impinging on ordinary legislative competencies, but more often it is "merely a temporary solution because it only becomes effective if the legislator [has] failed to decide on a required rule and the legislation therefore suffers from a lack of completeness, contrary to plan".[67]

Miller asks "Who is sovereign in this system- the people or the judges?".[68] Opposing the one to the other and considering them as a near opposite powers, this statement seems to deny that the judges derive their power from the people[69], and when it comes to denying the will of the majority , it is not a denial but a recall to respect the social contract that the people adhere to in order to establish their democracy. When it comes to the relation between judicial review and direct democracy, one should notice that rather than limiting it, judicial review enhances popular sovereignty by promoting respect of individual rights[70]. This is to say that judicial review does not necessarily conflict with direct democracy. Instead of focusing too much on the dichotomy between the legislature and courts, what must be recognised is the complementarity of the two powers. "One might also view the rights-protecting function of judicial review as a part of a system of checks and balances, aimed at preventing an undemocratic rule by the judiciary".[71] The reasoning behind this argument recalls, to some extent, Hamilton's point in *Federalist* 78, stating that judicial review does not "by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people,

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65 *See Griswold v. Connecticut* 381 U.S. 479 (1965). See also *Roe v. Wade* 410 U.S. 113 (1973) and Ronald Dworkin, "Unenumerated Rights : Whether and How Roe Should Be Overruled", in: *The Bill of Rights in The Modern State*, Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein (eds), University of Chiago Press : Chicago, (1992), at 386.

66 ATF 87 I 114. Now Article 16 Swiss Constitution.

67 Tobias Jaag, "Constitutional Courts as Positive Legislators, National Report:Switzerland", Allan R. Brewer-Carias, Constitutional Courts as Positive Legislators, A Comparative Law Study, Cambridge University Press, New York, (2011) 783-802, at 799.

68 Miller, *supra* note 2, at 128.

69 *See* Christopher L. Eisgruber, *supra* note 62 at 64-65. *See* also Harel, *supra* note 62 at 258 : "The judges themselves are ultimately political appointees nominated and confirmed either directly or indirectly by elected officials".

70 Yuval Eylon - Alon Harel, "The Right to Judicial Review", Virginia Law Review, Vol. 92, No. 5, September (2006), 991-1022, at 1021.

71 Jon Elster, "On Majoritarianism and Rights", 1 E. Eur. Const. Rev. 19 (1992), 19-24, at 22.

as declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental".[72]

Bickel considers that judicial review acts against the majority and therefore that it is "a deviant institution in our democracy".[73] Judicial review which declares "unconstitutional" a legislation does not mean in every case that the judges are counter-majoritarian but rather that they voice a challenge in order to protect the right of a minority. For instance, judicial review should not be seen as a "watchdog that protects rights from the legislature, and ultimately from the people it represents".[74] Rather, judicial review has to be considered as a watchdog of minority rights. At most, it might be conceded that judicial review recalls "rights-based limitations on the power of the legislature".[75] And by doing so, "judicial review facilitates a better reflection and implementation of the will of the people"[76]. Therefore, this "rights-based judicial review can be described as an alternative form of democratic participation".[77] Moreover, as Raz puts it, "assertions for rights are typically intermediate conclusions in arguments from ultimate values to duties".[78] Therefore, even though it seems as if direct democracy is being limited, judicial review recalls the duty to respect the latter by protecting minority rights. One can draw a parallel with conflicting constitutional rights. Actually, as political rights are also enshrined in the Constitution, judicial review over these constitutes a kind of body of conflicting rights. One's rights stop where the other's start. The protection of political rights which is conducive to sovereignty stand just before the protection of fundamental rights which is conducive to autonomy. To draw a parallel with Rawls' *Law of Peoples*, when minority rights are protected by the means of judicial review, we refer to a small number of core rights, that we consider fundamental- such as the UDHR does for its own contents. According to this line of thinking, judicial review does not deprive "the right of rights".[79] Along these lines, we advocate that the effective protection of constitutional rights requires a system of judicial review.

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72 Hamilton, Federalist 78, at 466.
73 Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, Bobbs-Merrill, New York, 2d ed., (1986), at 16-23.
74 Eylon, Harel, *supra* note 71, at 2.
75 Harel, *supra* note 62, at 261.
76 *Idem*, at 249.
77 *Idem*, at 247.
78 Joseph Raz, *The Morality of Freedom*, Clarendon Press, Oxford, (1986), at 181.
79 Jeremy Waldron, *Democracy and Disagreement*, Clarendon Press, Oxford, (1999), Chap.11.

C. Comparison of effects

Does it mean that "individual rights are any better protected in the United States than in Switzerland?"[80]

It is true that the people are sovereign and the exercise of that sovereignty may affirm or reject a federal law through an optional referendum. In other terms, it is the optional referendum which ensures the checks and balances on the power of the legislative branch. Nonetheless, this popular control, even if justified on the basis of free will, may not find any constitutional grounding. Or, reconciliation of competing values as direct democracy and minority rights could be ensured through a heightened scrutiny of laws enacted by popular vote.[81]

"Majority in the heat of passion may fail to perceive what is in its true interest"[82]. One should "identify the motives which move the members of the majority to infringe on the rights of the minority"[83]. While, in case of constitutional breach , the Swiss Supreme Court can only have an informative impact with the opportunity to draw the parliamentarians' attention to the need for legislative reform, the federal judges are still bound to apply the (unconstitutional) statute pursuant to Article 190[84]. Put differently, if the Assembly Federal does not adapt the litigious disposition to the Constitution, the Swiss Supreme Court remains bound by this latter's application. The situation grows more complicated if the federal statute contravenes an international treaty, such as European Convention on Human Rights. Constraint to respect and apply both the federal statutes and international law, the Swiss Supreme Court faces a major dilemma where to set the priority when the latter conflict with the former.[85] In this regard, given the fact that international law covers almost all areas, and especially human rights, the traditional opposition between the legislature - comprised as parliamentarianism and direct democracy- on the one hand and the constitutional judge on the other hand is more complex today than ever before.[86]

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80 Wojciech Sadurski, "Judicial Review and the Protection of Constitutional Rights", Oxford Journal of Legal Studies, Vol. 22, No. 2, (2002), 275-299, at 275.

81 Marc Slonim, James H. Lowe, "Judicial review of laws enacted by popular vote", 55 Wash. L. Rev. 175, (1979-1980) at 209.

82 Jon Elster, « On Majoritarianism and Rights », 1 E. Eur. Const. Rev. 19 (1992),19-24, at 20.

83 *Idem*.

84 Hottelier, *supra* note 23 p. 440.

85 Intended when an interpretion of the national law in conformity with the international law is not possible.

86 Hottelier, *supra* note 23, at 442.

II. Constitutional Amendment

The greatest difference between the American and the Swiss constitutions is found in the respective countries' mechanisms for constitutional amendment. Whereas the Swiss Constitution is a flexible one, the U.S. Constitution is rigidly framed.

A. Swiss Constitution

Article 192 (1) provides that the Federal Constitution may be totally or partially revised at any time. To amend the Constitution, an obligatory referendum and a double majority is required[87]. For instance, a total revision of the Swiss Constitution may be proposed by the People or by either of the two Councils or be decreed by the Federal Assembly.[88] As to a partial revision, it may be requested by the People or decreed by the Federal Assembly.[89] The only constitutional limit consists in the respect of *jus cogens*.[90] Therefore, a decision taken through a direct democratic procedure enjoys a secure legitimacy.

B. U.S. Constitution

In the United States legal system, the basic principle of limitation is a high barrier to amend the federal constitution. Compared to its Swiss counterpart, the U.S. mechanism seems to embody Thomas Jefferson's concerns of a constitution "like the ark of the covenant, too sacred to be touched".[91] The efforts to permit people to amend it were proved too difficult.[92] As prescribed by Article V Constitution, there are basically two methods by which the the federal constitution may be amended. The first method consists in a proposition supported by two-thirds of both houses of Congress which requires ratification by three-quarters of the states. As to the second method prescribed, two-thirds of state legislatures can collectively force congress to call a constitutional convention, to be approved again by the three-quarters of states.

87 Article 140 (1) (a) and Article 195 Swiss Constitution.
88 Article 193 (1) Swiss Constitution.
89 Article 194 (1) Swiss Constitution.
90 Article 193 (4) Swiss Constitution.
91 Thomas Jefferson, Letter to Samuel Kercheval (1816) in: *The Writings of Thomas Jefferson*, Andrew A. Lipscomb and Albert E. Bergh, eds., Vol.15 (Washington D.C.: Thomas Jefferson Memorial Association, (1904) at 40, cited by Miller, *supra* note 2, at 157.
92 Miller, *supra* note 2, at157.

Miller recalls that the courts have consistently interfered with citizens' attempts to take part in the process of amending the Constitution[93] and this holds true even though the Supreme Court has recognized that the term "Legislatures" in the article V application clause is unclear.[94] Mainly, it amounts to a refusal to politicize the Constitution to avoid degeneration[95].

C. Comparison of effects

A related point as to the outcome of an amendment process are the eventual unconstitutional constitutional amendments[96]. Under the Swiss amendment process, if the citizens could in theory contravene the constitution, such as, for instance, by repealing the human rights catalogue (which to a large extent reproduces ECHR), they remain bound by *jus cogens*.

In addition to the restrictive process in the United States, there are two substantive limitations on the power to amend the Constitution. The first is related to the prohibition of amending any constitutional amendment dating before 1808. The second restriction prohibits any amendment that would deprive a State of its equal suffrage in the Senate. Therefore, by contrast to what might happen in the Swiss legal system, unconstitutional constitutional amendments are very unlikely to arise in the United States[97]. As long as the Constitutional provisions increase legal stability[98], it is important to avoid unconstitutional constitutional provisions.

As can be seen from the above examples, unlike its Swiss counterpart, when an initiative contravenes supreme law and thus violates or threatens minority rights as guaranteed in the Bill of Rights[99], both the state and federal court are entitled to declare it unconstitutional and to refuse to apply such a statute. This is true even when there is a jurisdictional distinction in between.

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93 *Idem* at 171. California Proposition 35 of 1984 and Montana Constitutional Initiative No. 23 of 1984.

94 *Uhler v. AFL-CIO* 468 U.S. 1310 (1984).

95 Kathleen Sullivan, "What's Wrong with Constitutional Amendments" in: Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change, the Century Foundation Press, New York City, (1999), 39-44.

96 Mark A. Graber, *A New Introduction to American Constitutionalism*, Oxford University Press, New York, (2013) at 149: "It is not conceptually impossible, because there are constitutional provisions that are so fundamental that they also bind the framer of the constitution". *See Leser v. Garnett* 258 U.S. 130 (1922); ATF 139 I 16.

97 Mark Tushnet, The Constitution of the United States of America, A Contextual Analysis, Hart Publishing, Oxford, (2009) at 239.

98 Graber, *supra* note 97 at 47.

99 Miller, *supra* note 2 at 131, See also *Gitlow v. New York*, 268 U.S. 652 (1925).

This is not to say that direct democracy at the national level is detrimental to a federal state. On the contrary it allows citizens to make their voices heard at the federal level. So far as the Swiss practice is concerned, what is needed is a better circumstantial control of these instruments. In order to strike a balance between direct and representative democracy, it is therefore necessary to provide some room for constitutional amendments to ensure popular sovereignty in respect of the rule of law. Direct democracy and representative democracy are not mutually exclusive.

Indeed, optional legislative referendum is directly connected to representative democracy, insofar as "the referendum vote is on decisions which have been reached by parliament, and which have to be either approved or rejected".[100] Therefore one may confirm that they are not exclusive but complementary in order to counterbalance the inconvenience of the one and the other. Thus, "the direct democracy does not oppose, but completes the representative democracy"[101].

III. Impact of International Law

The rank recognised by international law in a given national order might have an influence over the judicial review, and to some extent, direct democracy.

A. The United States of America

Following the wording of Article VI of the U.S. Constitution[102] which states that treaties constitute part of the supreme law of the land, one might asses that the U.S. legal system has monist tendencies[103] similar to the Swiss legal system. Nonetheless, practice demonstrates that it is inclined more to a dualist approach. As to treaties as Supreme Federal law[104], with reference to *Ware v. Hylton*[105], Bradley ascertains "the ability of the Supreme Court to

100 Kaufmann, Büchi, Braun, *supra* note 24, at 43.

101 Andreas Auer, "La justice constitutionnelle et la démocratie déréfendaire: Rapport de synthèse", in : Justice constitutionnelle et démocratie référendaire, Actes du Séminaire UniDem organisé à Strasbourg les 23 et 24 juin 1995 en coopération avec l'Institut des hautes études européennes de Strasbourg, Université de Schuman, et avec le soutien de l'Union européenne, éditions du Conseil de l'Europe, Strasbourg, (1996) 167-184, at 169.

102 Article VI sec.2. U.S. Constitution.

103 *See* Curtis A. Bradley, International Law in the U.S. Legal System, OUP, (2013). See also, Frederic L. Kirgis, "Int'l Agreements and U.S. Law," ASIL Insights, May 27, 1997, available at https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law, (last visited on May 19 2018).

104 *Idem*, at 39.

105 *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

enforce the supremacy of treaties over state law". [106] As to the supremacy rule over Constitution, when interpreting the latter the Supreme Court takes into account international treaties.[107] Moreover, as stated above, the U.S. legal system does not contain implications for citizen's involvement to ratify international treaties, hence direct democracy at the federal level does not apply. Therefore, an assessment regarding the impact of direct democracy on the influence of international law is not possible.

B. The Swiss Confederation

According to the rule enshrined in Article 5 (4) and Article 190 of the Constitution, the Confederation and the cantons must respect peremptory international law. While it is clear that the Constitution must be interpreted and applied in accordance with the ECHR, its position in the hierarchy of the Swiss legal system still remains unclear.[108] As regards to federal statutes previous to adhesion to the ECHR, the Swiss Supreme Court recognized immediately that to be applicable, the former must be interpreted in conformity with the latter[109]; otherwise, they should be set aside.[110]

If the Swiss Supreme Court first recognized the full supremacy of international law[111], subsequently by reference to principles of *lex specialis* and *lex posterior*, the Court considered that no hierarchy applies to international law and domestic law.[112] Thus, the jurisprudence *Schubert* was established, where the Federal Supreme Court, while recognizing the primacy of international law, over federal statutes, recognizes that a provision can waive the latter if the lawmaker has enacted it deliberately.[113] In this sense, the Swiss Supreme Court implicitly recognizes the superiority of the national lawmaker in the exercise of its sovereignty to derogate from international obligations.

It is in the *PKK* case that the Swiss Supreme Court excluded explicitly for the first time the application of federal law contrary to the ECHR, ruling that "a norm of domestic law which would, in any particular case not conform to international law, should not be applied [especially when] the primacy is given to the international public law, which seeks to protect human rights."[114]

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106 Bradley, *supra* note 104 at 40.

107 *See Roper v. Simmons*, 543 U.S. 551, 575 (2005) ; *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). For an overview, see Peter J. Spiro, "Treaties, International Law, and Constitutional Rights", Stan. L. Rev. 55 (2003); Carlos M. Vázquez, "Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties", Harv. L. Rev. 122 (2008).

108 *See* Michel Hottelier; Hanspeter Mock ;Michel Puéchavy, *La Suisse devant la Cour européenne des droits de l'homme*, 2nd ed., Geneva, (2011) 11-15.

109 ATF 120 V 1 ; ATF 119 V 171 ; ATF 105 V 1.

110 ATF 122 II 485, 487 ; ATF 125 II 417 ; ATF 128 I 254; ATF 128 IV 201; ATF 131 V 66, 70.

111 ATF 35 I 467.

112 ATF 59 II 331.

113 ATF 99 Ib 39. V.a. ATF 111 V 201; ATF 112 II I, JdT 1986 I 633; ATF 118 Ib 277.

114 ATF 125 II 417, SJ 2000 I p. 202.

However, despite this approach, in a more recent decision on the compliance of federal law with respect to the ECHR, although having referred to the PKK case, the Swiss Supreme Court has backtracked and followed the ruling in the *Schubert* case[115]. Thus, while admitting that the refusal to amend the legislation and adapt to the ECHR respectively, the current jurisprudence of the Court underlines the willingness of the Swiss legislature to consciously waive treaty law, and ruled that national legislation overrode it. Although The Swiss Supreme Court is accurate in its jurisprudence relating to the PKK, in a subsequent decision it held that "when there is an insurmountable contradiction between the two legal orders, (...) public international law prevails in principle over the domestic law, especially when the protection of human rights are at stake, but also without any implication of human rights, so that conflicting national provisions can not be applied." [116] It thus seems to relativize the *PKK* case-law to allow greater flexibility to the national legislature.

Finally, in a decision in 2012, The Swiss Supreme Court has clearly established that "a federal statute which violates a fundamental right guaranteed by international convention, such as the ECHR must be set aside."[117]

With regard to federal standards prior to the entry into force of the ECHR in the Swiss legal system, the judge reveals him/herself to be more flexible than the legislature, since the compliance of federal statues with the ECHR should be verified.

In sum, there is a form of a judicial review over the federal statues which overrides Article 190 of the Constitution. As such, it definitely undermines not only democratic legitimacy, but also legal certainty. In other words, the current practice gives an illusion of direct democracy which is circumvented by judicial review.

In sum, the establishment of judicial review power in Switzerland will certainly not only ensure a more effective protection of fundamental rights, but above all ensure the coherence of the legal order.

The unclear rank of international law (except for peremptory provisions) in the Swiss constitutional system is also found in the American constitutional system, where it is by the means of interpretative presumptions in order to ensure compliance of the former to the latter where such construction is possible.[118]

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115 ATF 136 III 168, JDT 2010 I, p. 335, consid. 3.3.2. et 3.3.4. V. M. Hottelier, V. Martenet, "La pratique suisse relative aux droits de l'homme 2010", RSDIE (2011) 455–493, at 462.

116 TF 2C_319/2009, January 26, 2010.

117 TF 4A_238/2011, January 4th, 2012, para. 3.1.

118 Graber, *supra* note 97, at 207.

IV. Proposals for reforming the current systems

As an interim conclusion, even if the two legal orders subject to this analysis are essentially distinct, as common to all constitutional democracies, both establish fundamental law and respect the rule of law.

It goes without saying that wherever possible, both courts rules on the basis of the percept of interpretation in conformity with the Constitution, holding, out of several possible interpretation of a statute, the one which leads to its conformity with the Constitution. Given the state formation—representative in the United States and direct democracy in the case of Switzerland, it is reasonable that we have found these dissimilarities.

Comparative analysis suggests that is the amenability of a Constitution often determines the judiciary's attitude of interpretation. The greatest difference between the American and Swiss legal systems is found in their respective Constitutions.

On the one hand the U.S. legal system is too restrictive. In the US, the Constitution is considered almost "untouchable". Furthermore, judicial review activism is too present to ensure the expression of popular will in a satisfactory measure. On the other hand, the Swiss legal system is distinguished by a flexible constitution given the ease of the amendment processes, whilst the deficiency of judicial review concerning federal statutes and constitutional amendments threatens the rule of law.

Thus, on the one, U.S., hand we have excess constitutionalism creating the danger of a state ruled by judges so that legalistic interpretations of fundamental rights replace politics, by extensive recourse to judicial review, especially at national level. On the other, Swiss, hand, we have deficient constitutionalism, giving expression to the threat of the tyranny of the majority, so that minorities and human rights may be disregarded for lack of review.[119] Thus, both extremes undermine democracy, underlining the need to strike a correct balance in order to enforce true democratic values.

A. The Swiss Legal System

Defined as a constitutional democracy, "democracy is no longer seen only in terms of the supreme and unlimited power of the people, but finds its basis and material limits in being bound to a constitution and to the fundamental human rights set out therein".[120] Accordingly, a decision by popular vote cannot be legitimate if it violates the constitution or constitutionally protected fundamental rights.

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[119] Kaufmann, Büchi, Braun, *supra* note 24, 95-105.

[120] *Idem*.

Pursuant to existing positive law in Switzerland, "the principle of direct democracy prevails over the rule of law".[121] However, Chemerinsky properly identifies deficiency of two other branches in upholding the primacy of the Constitution giving way to override the respect of civil rights and liberties.[122]

A judicial review mechanism over direct democracy instruments should be implemented in order to ensure both minority rights and international obligations. If it is true that judicial review might have a restrictive effect on the will of the people , it is indeed *sine qua non* to ensure rule of law. "Democratic, a State is also a State of rule of law which commands unconditional respect of the protection of human rights and protection of minorities. Thus, there is an urgent need to establish a new form of organization of power."[123] A vision which no longer encompasses a conflict, but a complementarity between direct democracy and judicial review in order to ensure minority rights.

Brettschneider argues that judicial review is sometimes justified by the democratic outcomes that it secures—and in particular, by the ability of judges to protect core democratic rights.[124] The US Supreme Court 'can act democratically by overriding majoritarian decision making' when the "core values of democracy" are at stake. Adopting the American model, the Swiss Supreme Court should be entitled to review popular initiatives as well as federal statutes which contravene fundamental human rights. Strictly speaking, taken in this sense, the purpose of judicial review is not to substitute popular self-government by judges, but promoting the rule of law and preventing disastrous political choices.[125] Thus, this represents an equivalent to a system of checks and balances considering all powers on an equal footing. As Auer emphasizes: "The delicate but essential task to recall the sovereign people to respect the Constitution is often left to judges who shall ensure that civil rights and liberties of others are respected. Entrusted with legislative capabilities, people are and remain a State power which derives its authority from the Constitution and therefore can neither impinge on the capabilities that the Constitution attributes to other State organs, nor violate the civil rights and liberties".[126]

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121 Jaag, *supra* note 68, at 786.

122 Erwin Chemerinsky, "In Defense of Judicial Review : The Perils of Popular Constitutionnalism", 2004 U. III. L. Rev. 673 (2004), 673-690, at 679.

123 Hottelier, *supra* note 23, at 442.

124 *See* Corey Brettschneider, "Democratic Rights and the Substance of Self-Government", Princeton University Press, Princton (2007).

125 *Contra*, Waldron, *supra* note 59.

126 Auer, *supra* note 102, at 172.

In sum, through civil rights and liberties protections, a judicial review of peoples' enacted statutes or amendments will ensure to protect minorities not only from the government[127] but also from the people who will ignore others' rights. Hence in the words of Madison "a pure democracy can admit no cure for the mischiefs of faction. A common passion or interest will be felt by a majority, and there is nothing to check the inducements to sacrifice the weaker party".[128]

B. The American Legal System

One might argue that, given the Swiss experience, the institution of direct democracy at the national level would not constitute an ideal to be pursued. While the reasoning behind the the idea of constraining direct democracy at the level of individual states in the U.S. might be justified to protect individual rights against the "tyranny of the majority", representative democracy is nothing more than the expression of the majority.

Yet, one must reckon with the fact that it is not direct democracy in itself which is precarious, but how it is administered. In order to mitigate the detrimental impact of greater judicial review and thus the critics as to "government of judges", it remains crucial to allow citizens more opportunities to be involved in the political process.[129] Thus, setting up direct democracy at the national level will ensure checks and balances over elected bodies which might (and often do) deviate from the programmes put forward during electoral periods. Or, as is the case today, citizens are strictly deprived of the possibility to directly call for a federal constitutional convention, to ratify or reject constitutional amendments.[130] Given that "constitutional compromises promote consensus as opposed to majoritarian democracy"[131], it is important to allow the citizenry the instrument of direct democracy in order to amend the Federal Constitution, as well as it is equally important to check its compliance with the Bill of Rights. Allowing a constitutional initiative and statutory referendum will certainly increase the legitimacy of parliamentary acts but also constitute a counter-power to the represented majority. As such, initiatives and referenda at national level would enhance the accountability of government. In sum, even if one can argue that representative democracy is better at protecting minority rights, this does not justifies excluding any forms of direct democracy - political rights - which equals to deny popular

127 Robert Dahl, How Democratic Is the American Constitution ?, Yale University Press, New Haven, (2001).

128 Madison, The Federalist, No.10, at 133.

129 As Bryan Woodrow Wilson and Theodore Roosevelt believed that the initiative process would increase accountability of elected officials and make government more responsible.

130 Miller, *supra* note 2, at 216 quoting Reformers from William Jennings Bryan to Ralph Nader who tried to introduce direct democracy at national level.

131 Graber, *supra* note 97, at 59.

sovereingty. Finally, given the technological facilities of today, the great territory argument no longer appears relevant to exclude direct democracy instruments at national level.

Conclusion

As regards legislative power, it must be asserted that direct democracy and representative democracy are not mutually exclusive. Indeed, optional legislative referendum is directly connected to representative democracy, insofar as "the referendum vote is on decisions which have been reached by parliament, and which have to be either approved or rejected", which underlines the complementarity of direct democracy to the representative one.[132] Therefore, one may confirm that they are not exclusive but complementary in order to counterweigh the inconveniences of the one and the other. Thus, "the direct democracy does not oppose, but completes the representative democracy ". [133]

Both legislators and judges have virtues and vices. In this sense, instead of viewing them as conflicting powers, one should consider them – as they have been instructed- as complementary. From this perspective, "constitutionalism and democracy may also be complementary rather than antagonistic".[134] In order to avoid the threats inherent to direct democracy - majoritarian abuse -, an appropriate check over the laws enacted by popular vote would not be detrimental to popular sovereignty. If direct democratic instruments enhance the role of citizenry in government, at the same time they often undermine the protection of individual and minority rights.[135] While prohibiting popular enactment would help avoid such threats, it would unnecessarily sacrifice the democratic and educational values of the initiative process. An appropriate reconciliation of these competing values can therefore be reached only by establishing thorough scrutiny of laws enacted by popular vote. To put it another way, scrutiny over a provision will be justified as far as its purpose is to ensure that none of the four powers exceeds its capabilities.

Last but not least, direct democracy does not undermine representative democracy or parliament but reinforces its legitimacy. Therefore, a balance between direct democracy and judicial review is urged in order to ensure greater legal certainty, coherence and transparency, and ultimately, a satisfying degree of democratic rights.

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132 Kaufmann, Büchi, Braun, *supra* note 24, at 43.

133 Auer, *supra* note 102, at 169.

134 Graber, *supra* note 97, at 43.

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