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Abstract

This paper discusses several problems of direct popular decisions. In the first part, we consider problems related to the functioning of direct democracy. As a political system it only makes sense if there exists a continuous process and not if only occasional single questions are brought to a referendum. Then, the relation between direct democracy and the rule of unanimity is discussed, a subject of special relevance to the European Union, before we consider the role of quorums. In the second part, some areas are considered in which conflicts might arise. Results of initiatives might be incompatible with individual human rights or might endanger fiscal sustainability, and referenda might impede economic reforms. All these problems, however, do not justify a general rejection of direct popular rights. Thus, we conclude by listing several points that should be observed to safeguard the well-functioning of direct democracy.

JEL-Code: H110.

Keywords: direct democracy, referendum, initiative, human rights, economic reforms, fiscal sustainability.

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1 Introduction

[1] During the negotiations on Germany's Grand Coalition at the end of 2013, it briefly looked as if the introduction of direct popular rights to Germany might be possible on the national level. The two smaller of the three participating parties, the Social Democrats (SPD) and the Christian Social Union (CSU), seemed to favour this. But ultimately the largest party, the Christian Democratic Union (CDU), prevailed with its rejecting stance. The supporters of direct democracy on the federal level must therefore await another legislative period, maybe even longer. The question, of course, is: does it make any difference at all whether the citizens have direct rights in the political process?

[2] What would Switzerland look like, for example, if it had no direct popular rights (on the federal level)? Women would have had active and passive voting rights on the federal level since 1958, at the latest, rather than only in 1971. There would probably also be more nuclear power plants; in 1990, the initiative for a ten-year moratorium was accepted with the effect, among other things, that for a while no further nuclear power plant was proposed and later, the processing of the proposals submitted shortly before the Fukushima disaster were suspended. Switzerland would have been a member of the European Economic Area and possibly also of the European Union; in both cases, there would have been unlimited free movement of persons between Switzerland and EU member countries in the future. But economically, too, some things would be different. Switzerland would have a Value Added Tax of at least 10 per cent; on 12 June 1977, a draft law was rejected that planned the transformation of the Sales Tax into a VAT, but also stipulated a maximum tax rate of 10 per cent. If Switzerland had joined the European Union, the rate of the value added tax would even be at least 15 per cent; today it is 8 per cent. Starting in 2015, the toll way permit sticker presently costing 40 CHF should have increased to 100 CHF; the voters rejected a federal draft law to this effect on November 24, 2013. Finally, today women would not receive their full pensions from the first column of the old age pension system, Age and Survivors' Insurance (AHV) at the age of 64 today, but only at 65; the planned age-increase on 16 May 2004 was clearly rejected. There are many other examples in which the people decided differently than the government and parliament recommended, sometimes even in cases where, as for example when deciding about joining the European Economic Area on December 6, 1992, the parliament's decision had an overwhelming majority.

[3] Without direct democracy, Switzerland would thus look markedly different. Vice versa, Germany, too, would be in a different situation today as well, if there were such rights on the federal level (or if they had existed in recent decades). It is fairly certain that Germany would not be a member of the Euro zone, and it is questionable whether the Euro would have been introduced at all. If one can give any measure of belief to surveys, Germany would also already have had a legal minimum wage for quite some time. If the parties had not suggested it themselves, an initiative would likely have introduced this. The childcare subsidy, on the other hand, would probably have had no chance in a referendum. There are likely additional examples of the German government and parliament making decisions against a clear majority of the population that would not have survived a referendum.

[4] Thus, independent of the political evaluation, direct democracy makes a difference. It should also not be overlooked that direct democracy is very popular among the Swiss population, and that – at least presently – Switzerland's economic and political situation is very positive compared to most other Western democracies. Traditionally, its unemployment rate is very low. The main reason for this might be the flexible labour market, but direct popular rights did at least not impede it.[1)] Compared to other industrial countries, its tax share is relatively low.[2)] The debt brake introduced in 2001 at the federal level led to a decline of public debt (in absolute terms) since 2005; public debt did not even increase during the economic and financial crisis, and at the end of 2013, with 36.3 per cent in relation to GDP, it was again below the level of 1992 of 38 per cent.[3)] Taking all evidence that is well documented in the literature and discussed below in *Section 3.2* together, direct popular rights might have had a positive impact on the sustainability of Switzerland's public finances not only at the federal but also at the cantonal level

[5] Of course, whenever we try to evaluate the impact of direct popular rights on economic or political developments we have to be very cautious in order not to draw any premature conclusions from single examples. On 9 February 2014, a majority of 50.3 per cent of the Swiss voters agreed to a limitation of the free movement of European Union citizens to Switzerland. Parts of the international press as well as many contributions in the internet interpreted this as a strong indication of hostility of the Swiss population against foreigners.[4)] However, it is overlooked that Swiss voters not only agreed to this free movement on 21 May 2000, but also to its extension to Bulgaria and Romania on 9 February 2009. Beyond that, on 26 November 2006, they accepted making an 'enlargement contribution' of 1 billion CHF in the form of concrete projects in these ten states. The EU had demanded this as compensation for the eastward expansion of the European common market, to which Switzerland has free access. It is not clear which EU member state would also have been willing to make such a contribution.

[6] Looking at the German discussion on direct democracy from a Swiss perspective, it is conspicuous that hopes and fears are tied to its introduction are that can hardly be justified.

1. It might be objected that the low Swiss unemployment rate is mainly due to the fact that residence permits for foreign workers will not be prolonged once they lose their job. This is correct for the crisis of the seventies when Switzerland's economy was hit much stronger than most others and, nevertheless, there was hardly an increase of unemployment. This argument is, however, not valid for the period after 1990 when most foreign workers (and their families) had unlimited residential permits which were not conditional on having a job. As a result, unemployment rose considerably after 1990. The decline later on and the low rate during the last ten years can, therefore, not be traced back to the policy on foreigners.

2. S. BUCOVETSKY (1991) and J. D. WILSON (1991) show that, due to international tax competition, small countries tend to have lower taxes than large countries. The smallness of Switzerland might, however, not be the only reason for its low tax share. There are other highly developed small European countries like Austria, Sweden or Denmark which have considerably higher tax shares. For OECD figures see, for example, http://www.efd.admin.ch/themen/steuern/02409/index.html?lang=de (15/05/15).

3. The maximum value in relation to GDP was 2003 with 54.3 per cent. See: *Statistical Yearbook of Switzerland 2013*, Table T 18.4.1.1 (electronic Version), *2015*, Table T 18.4.1.1, p. 439.

4. See, for example: Chronologie des Rassismus: So fremdenfeindlich ist die Schweiz, Focus online of February 9, 2014, http://www.focus.de/politik/ausland/rassismus-chronologie-so-fremdenfeindlich-ist-die-schweiz_aid_1067059.html (15/05/15).

For example, direct democracy can reduce people's frustration with politics, but not eliminate it. There is frustration with politics in Switzerland as well: for example, if one is (almost) regularly in the minority when referenda are held, then one's enthusiasm for this system is probably limited. On the other hand, the claim "When the citizens themselves decide, then the monolog replaces the dialog between voters and elected officials",[5] is simply wrong, as the Maastricht Treaty, for example, shows. When the German parliament, the Bundestag, voted on this issue, there was hardly any public discussion in Germany, in particular not between voters and elected officials; in contrast, in Denmark an intense discussion preceded the referendum of 2 June 1992.

[7] It is also often argued that ADOLF HITLER came into power with the aid of direct democracy, although research has long since disproved this. The two referenda that were carried out during the Weimar Republic[6] can hardly be made responsible for what happened with ADOLF HITLER'S appointment as Reichskanzler on 30 January 1933 or with the agreement of all the bourgeois parties to the Enabling Act of 23 March 1933, when these parties provided support for doing away with democracy. And when THEODOR HEUSS argued on 1 April 1947 in the Landtag (state parliament) of Württemberg-Baden that the Reichstag election of 5 March 1933 was understood as a plebiscite for Hitler,[7] this can hardly be understood as anything but a falsification of history with which he wanted to cover up his own failure at that time.

[8] Despite the experience of Switzerland and the United States, in Germany it is still assumed that citizens would behave irresponsibly if they were permitted to vote on questions with fiscal consequences. This is why everywhere in Germany where direct democracy is possible, there is a (variably strong) 'fiscal reservation' prohibiting popular votes with financial consequences.[8] Of course, such votes can create problems. On the other hand, precisely the experience of Switzerland shows that votes on financial questions can contribute to the solidity of public finances.[9]

[9] Finally, the discussion of direct democracy is not always conducted entirely honestly in Germany. It is hard to shake off the impression that these rights are often demanded when one is certain that such a demand cannot be successful or when it does not affect one's own political area. For example, Bavaria's former State Premier, EDMUND STOIBER, called for a referendum on the European constitution as early as 2005.[10] And yet not only had he earlier re-

5. P. GRAF KIELMANSEGG: Soll die Demokratie direkt sein? Wenn die Bürger selbst entscheiden, ersetzt der Monolog den Dialog zwischen Wählern und Gewählten, *Frankfurter Allgemeine Zeitung* No. 96 of 25 April 2001, p. 14.
6. On the experiences in the Weimar Republik, see for example O. JUNG (1989) as well as G. KIRCHGÄSSNER, L.P. FELD and M.R. SAVIOZ (1999, Chapter 6).
7. On this, see O. JUNG (1994, p. 293).
8. On the fiscal reservation in the German Länder see J. KRAFCZYK (2005).
9. On this, see G. KIRCHGÄSSNER (2012).
10. See: Stoiber wirbt für Volksabstimmung über die europäische Verfassung, Welt Online of 31 July 2005. (http://www.welt.de/print-welt/article331451/Stoiber-wirbt-fuer-Volksabstimmung-ueber-die-europaeische-Verfassung.html (15/05/15)).

sisted to an extension of direct popular rights in 'his' Bavaria, but he had also helped to restrict the existing ones. In 2000, his government ensured that the Bavarian constitutional court (which was essentially controlled by his party, the CSU) rejected as unconstitutional a more citizen-friendly arrangement of the extremely restrictive regulations on referenda in the Free State of Bavaria. The CSU had already earlier made direct democracy more difficult, in 1968 by reducing the registration period for referenda from four to two weeks. EDMUND STOIBER's aim in calling for a referendum about the European Constitution was quite obviously the opportunistic use of direct popular rights to achieve a specific goal, and not a general effort for more direct say for citizens. After all, he was also a full member of the Joint Constitutional Commission of the Bundestag and Bundesrat (lower and upper houses of the German parliament respectively) that, after Germany's reunification, discussed adjustments of West Germany's constitutional document, the Basic Law, in which the CDU/CSU in particular prevented the introduction of direct popular rights on the federal level.[11)]

[10] But in Switzerland, too, neither direct popular rights nor their discussion are completely without problems. Thus, quite recently in particular, initiatives were to be voted on that conflicted with individual human rights. On 8 February 2004, an initiative to introduce "lifelong custody for extremely dangerous sexual and violent criminals who cannot be therapised" was approved that stands in contradiction to the European Human Rights Convention (EHRC), since for the most part it excludes any possibilities of reviewing the detention of such perpetrators. And although the Justice Minister at that time, CHRISTOPH BLOCHER, supported the objective of this initiative, he was unable to suggest to the parliament a law fully respecting this new article of the constitution and in conformity with the EHRC.[12)] On 1 June 2008, a citizens' initiative "For democratic naturalisation" was rejected; its adherents had designed it to make it possible to hold referenda on the ballot box on naturalisation after the federal court twice ruled on 9 July 2003 (BGE 129 I 217 and BGE 129 I 232) that they were unconstitutional because they did not fulfil the claim to a legal hearing and thus contradicted Article 9 of the Federal Constitution, which forbids arbitrary measures. The 'Deportation Initiative' passed on 28 November 2010, which stipulated that foreigners convicted of a crime were to be automatically deported without regard to the commensurability of punishment to the crime, received a similar treatment. Here, too, it is hardly possible to implement the mandated change to the constitution without coming into conflict with the EHRC. And, finally, we can mention the 'minaret initiative', clearly accepted on 29 November 2009, which stipulated that in the future in Switzerland, mosques can be built only without a minaret. Of course, jurists disagree whether that touches the religious freedom guaranteed by the EHRC.

[11] Behind these initiatives stood the right-wing bourgeois Swiss People's Party (Schweizerische Volkspartei, SVP), which in the past has used xenophobic slogans to win several elections and referendum campaigns. This has led to some very negative reactions abroad not only in connection with the mass immigration initiative of 9 February 2014, but also as early

11. On this, see T. SCHMACK-RESCHKE (1997) and Bundestagsdrucksache 12/6000.

12. On this, see: Verwahrungsinitiative weiter abgeschwächt: Doch Dilemma zwischen EMRK und Volkswillen bleibt, *Neue Zürcher Zeitung* No. 275 of 24 November 2005, p. 13.

as in 2007.[13)] This party and in particular its de facto leader of many years, former Bundesrat member CHRISTOPH BLOCHER, take the position that the results of referenda should take priority over international law, for: "It cannot be that 'higher law' or 'international law' can casually limit or overrule the democratically determined right of our own citizens."[14)] On the other hand, some reactions (abroad) to the referendum of 9 February were also exaggerated: against the background of an enormously voluminous immigration to Switzerland in recent years, the mere fact that a narrow majority has called for re-introducing immigration quotas does not justify accusing the Swiss in general of xenophobia. After all, until a few years ago, Switzerland worked with such contingents, and this did not prevent Switzerland from becoming in this period the European state (mini-states excluded) with the highest percentage of foreigners. Outside the European Union, probably all states characterised by sizable immigration work with such contingents, not at least the United States, Canada, and Australia.

[12] Thus, a political system with extensive direct political rights can be very successful, but popular political decisions can also involve substantial problems. Radical defenders of direct popular rights often do not see these problems or argue extremely naïvely (and/or ideologically), a behaviour that, however, can also be found by resolute opponents of direct democracy. In the following, some of these problems will be presented and discussed. At issue will be, first, direct democracy's mode of operation (*Section 2*) and, second, the actual or supposed fields of conflict that result from direct popular rights (*Section 3*). Then the paper addresses some frequently presented points of criticism, which are hardly convincing, and concludes with a list of important points resulting from our discussion that must be considered if a direct democratic system is to function sensibly (*Section 4*).

2 On the Functioning of Direct Democracy

[13] First it should be made clear that a direct democracy can well function as a political system only, if it is designed as a permanent process, rather than if merely individual questions are 'picked out' to be presented to the citizens for decisions (*Section 2.1*). Then there is the question, important in particular for the realm of the European Union, of how direct democracy relates to the unanimity rule (*Section 2.2*). *Section 2.3* discusses the role of quorums. Here, 'direct democracy' is always to be understood as a 'semi-direct system' in which the representative democracy is supplemented by direct popular rights. A purely direct system, as still can be found today in many Swiss communities and in the two cantons Appenzell-Innerrhoden and Glarus, where the parliament consists of the whole citizenry, is not discussed here and is irrelevant for the problems that have arisen, for example in connection with the European Union.

13. On this, see for example: Schweiz als schwarzes Schaf: Wie nie zuvor berichten ausländische Medien über den Wahlkampf – fast nur negativ, *NZZ am Sonntag* of 14 October 2007, p. 13, and: Endlich, die Schweiz holt auf, *DIE ZEIT* No. 43 of 18 October 2007, p. 11.

14. C. BLOCHER, speech of 1 August 2007 in Schwarzenburg, http://www.blocher.ch/artikel/1-august-rede-2007-in-schwarzenburg/92f47941f7dd7087ac578aac0148b3d8.html (15/05/15).

[14] In discussions, it is not always clear what is understood by ‘direct democracy’. For example, in Germany, a discussion was carried out in 2009 under this rubric (once again) about the direct election of the Federal President. Of course this can be discussed, though probably more speaks against than for it. But quite apart from that: a direct election of the Federal President has as little to do with direct democracy as does the direct election of mayors or district administrators; both cases have to do with the election of representatives, even if this election is not carried out indirectly via a parliament. Direct democracy is a political system where citizens decide themselves about factual issues, be it constitutional rules, laws, or large (investment) projects. Not for nothing does the institute at the University of Dresden that deals with questions of direct democracy call itself ‘Deutsches Institut für Sachunmittelbare Demokratie’ (German institute for factual issue democracy). It focuses on direct decisions of issues, not on direct elections of persons.[15)]

[15] In Germany, direct popular rights are termed Volksbegehren (petition) and Volksentscheid (popular decision). This allows citizens to submit a concern, for example in a draft statute, to a parliament. To be submitted, a given number of signatures must be collected within a given period of time, whereby the form of the collection can also be stipulated. If the parliament does not take this interest into account (or not to a sufficient degree), a vote, a popular decision, can be brought about. It can be possible for a parliamentary decision to reverse this popular decision.

[16] In Switzerland, we distinguish, first, between the initiative and the referendum. The initiative essentially corresponds to the German procedure. A new article of the Constitution or, on the cantonal level, a new law can be suggested. On the federal level, 100'000 eligible citizens must sign an initiative to reach the stage of voting. A referendum, in distinction, is a vote on a suggestion made by the government and/or parliament. For changes to the constitution and on certain international agreements, as well as on joining international organisations, it is mandatory; for new laws or changes of an already existing law, it is optional. To establish that such a referendum will take place, again on the federal level, 50'000 signatures have to be collected. That is about 1 percent of the eligible voters. On the cantonal and local level, citizens also vote on fiscal proposals if they exceed certain amounts. Some cantons have only an optional fiscal referendum, others only a mandatory one, while other cantons know both kinds of referenda.

[17] In total, we can distinguish four different kinds of popular votes on issues.

(i) *Controlling referenda*: Here, laws, constitutional amendments, and budgetary projects (‘fiscal referendum’) passed by the parliament must be presented to the citizens for a vote before they can become legally binding. Such referenda can be mandatory or optional; in the latter case, they must be carried out if a certain number of citizens so demands. These referenda aim to rule out that the governing bodies can resolve laws or budgetary projects

15. Accordingly, the United States do have direct democracy only at the state and local levels but not at the federal level despite that the president is (half-) directly elected by the citizens.

against the will of the (majority of the) citizens. They help to prevent a cartel of those governing against the citizens.

(ii) *Initiatives concerning laws or constitutional changes*: Here, the initiative comes from the people: those in the government are forced to pass (changes of) laws and take measures that they would not pass or take on their own. Such laws can serve, for example, to limit powers or privileges of the government and administrative authorities that the parliamentarians create for themselves.

(iii) *Plebiscitary referenda* (plebiscites): Here, the government and/or the parliament decide on its own accord to submit certain draft laws to the people, in order to gain special legitimation for them.

(iv) *Consultative referenda*: Here, the governing persons ask the population about their opinion on an important matter, the result is, however, not binding.

In Germany, the discussion orbits primarily around initiatives. But along with them, controlling referenda are at least as important for empowering citizens to make their interests prevail; both are effective means for enforcing the government to legislate corresponding to the people's wishes. In the following, we will therefore examine these two kinds of popular vote. Less important, but not entirely uninteresting, are also consultative referenda, because when their result contradicts what the government and/or parliament wants, they can exert substantial pressure to respect the result.

2.1 Direct Democracy as a Permanent Process

[18] As the examples above show, politicians (but not they alone) occasionally call for popular votes in (almost) purely representative systems when they expect this to help prevail their goals. These are plebiscites scheduled ad hoc. They have little to do with a general avowal of the introduction of direct popular rights. The motivation can be one's desire for a negative decision when one does not want to take responsibility for it, or one's hope that the referendum will provide additional legitimation for one's own action. As, besides others, two French examples show, the latter can turn out differently than desired. President CHARLES DE GAULLE resigned on 28 April 1969, the day after he had lost a referendum he had himself organised for a law to create regions and to revamp the Senate. And President JACQUES CHIRAC, too, failed in his attempt to give the European Constitution additional legitimation through a referendum. In both cases, the voting citizens were less concerned with the problem being voted on than with using this means to vent their displeasure over the policies of the French President.[16)] The possibility of such reactions can always be expected in plebiscites that are seldom held. Direct popular rights are thereby drained of their actual function and in a certain way misused, both by the governing persons who schedule the plebiscite and by the citizens who use this as a means of protest, mostly without connection to the question to be decided on.

16. See for example S. TOMIK, Der politische Unfall, *FAZ.NET* (http://www.faz.net/aktuell/politik/europaeische-union/faz-net-analyse-der-politische-unfall-1229244.html (15/05/15)).

When referenda and votes on initiatives are carried out regularly, such behavior cannot be completely ruled out, but is much less probable.

[19] However, the results can contradict what one wants or considers economically sensible not only in individually arranged plebiscites, but also in 'normal' referenda. In recent decades, this has been the case in Switzerland especially in regard to the deregulation and privatisation of activities traditionally regarded as tasks for the state. Many economists called for such measures, whereby the European Union was the driving institutional force in Western Europe. But the great economic and financial crisis that began in 2008 was not the first sign to indicate that deregulations of markets and especially privatisations are a much more difficult endeavor than was imagined in the 1970s and 1980s. In addition, not everything is squared away after privatisation. Rather, in many cases elaborate regulating mechanisms are needed to finally achieve a satisfactory result.[17)] In Switzerland, lack of trust that this could be achieved has led to the failure of several privatisations planned in politics. For example, in the canton Basel-Town, the privatisation of garbage incineration was rejected on 19 November 1995, even though there was a clear majority in favour of it in parliament.[18)] Another 'privatisation refusal' came on 10 June 2001 in Zurich, when 51.4 percent of the voters rejected transforming the electric works of the canton Zurich into a stock company and with that its privatisation.[19)] Apparently, the (politically active) population does not want to relinquish control of certain matters, or they do not automatically trust that the quality of the services offered (with which surveys show they are currently satisfied) will be maintained should there be a privatisation.[20)] The Swiss population is not the only one sharing this view, as the referendum about re-purchasing the energy nets of Hamburg on September 23, 2013 shows. A small majority of the people supported this re-purchase, despite that not only the SPD with its absolute majority but also the opposition parties CDU and FDP opposed it.[21)] Finally, as D. BÖS (1989) for example has elucidated, a tension between efficiency and quality arises, and the essential arguments for privatisation are often more political (or ideological) than economic in nature, as became very obvious, for example, in the Swiss discussion about the cantonal monopolies for natural damage insurance.[22)]

[20] But not only privatisations have failed; with the rejection of the electricity market law of 22 September 2002 in Switzerland, the voters rejected an important deregulation plan as

17. On this, see also W.W. POMMEREHNE (1990) and F. SCHNEIDER (1998).

18. See: Basel gegen Privatisierung des Kehrichtwesens, *Neue Zürcher Zeitung* No. 270 of 20 November 1995, p. 13.

19. See: Elektrizitäts-Neuordnung knapp verworfen: Gehaltene Ernüchterung bei Regierung, EKZ und Axpo, *Neue Zürcher Zeitung* No. 133 of 11 June 2001, p. 41.

20. See: Zufriedene Stromkunden sagen Nein: Analyse Abstimmungsergebnisse zur EKZ-Vorlage, *Neue Zürcher Zeitung* No. 198 of 28 August 2001, p. 41.

21. On this see: Hamburger stimmen für Rückkauf der Energienetze, ZEIT online vom 23. September 2013, http://www.zeit.de/wirtschaft/2013-09/hamburg-rueckkauf-energienetze-volksentscheid (15/03/14).

22. On this, see also M. PRISCHING (1988), who points out that privatisation is often (also) symbolic politics. This need not be a counter-argument, but it illuminates an aspect that is often overlooked in economic discussions. – On the cantonal monopolies for natural damage insurance see G. KIRCHGÄSSNER (2007a).

well.[23)] Here, just like with the failed privatisations, not only the majority of the political representatives, but also the majority of economists favoured this change. At least prima facie, it is an odd result that voters want to see the field of tasks allocated to the state further expanded than corresponds to the ideas of the (majority of the) politicians representing them. This is at least surprising for political economists, because one of the assumptions in the economic theory of politics or of bureaucracy is that politicians and bureaucrats have an interest in expanding the activities of the state more than is in the interests of their voters.

[21] Apparently, citizens trust that, in this regard, their political influence on public enterprises is more to their advantage than it would be with private incorporations. As a citizen in a direct democracy, these voter decisions have to be respected. To the degree that we as economists are convinced that a (purely) private-economy solution would be more efficient in such cases, and to the degree that we also advocated it, the question arises for us: why do voters, for whom our theory usually assumes that they have rational expectations, so obviously have a different conviction from ours and from the politicians we advise? As G.J. STIGLER (1979) has emphasised, one should be careful about attributing this (ad hoc) to the voters' lack of information or their distorted information on the 'true' costs and benefits of such political measures.

[22] In this sense, A. BRUNETTI (1997) and S. BORNER (2005) are not wrong in their criticism of direct democracy, though we need not draw the same conclusions. In any case, we should not judge direct democracy by the outcomes of individual decisions, but by the expected average quality of all decisions altogether. And what should be used for comparison are the actual situations in representative democracies, not some ideals. In such comparisons, much speaks for direct democracy, as G. KIRCHGÄSSNER, L.P. FELD, and M.R. SAVIOZ (1999) have elaborated. Comparisons between actual situations and imagined ideal situations have no validity.

2.2 Direct Democracy and the Unanimity Rule

[23] Many areas in the European Union, in particular constitutional questions, are subject to the unanimity rule. The great advantage of this rule is that it fulfils the Pareto criterion: no one can be put in a worse position against his will through another's decision. The rule gives every decision-maker a veto.

[24] As the number of participants increases, however, the unanimity rule becomes ever more problematic. The problem is not only that the 'normal' costs of finding agreement increase, but above all that there is an associated danger of strategic behavior: if someone is aware that he or she is absolutely required for a positive decision, then he or she has the pos-

23. It is interesting that the right-wing-bourgeois voters of the SVP were more likely to reject the draft law than the (leftist) SP sympathisers. Thus, this result cannot be attributed to a simple right-left schema of 'less' versus 'more' state. On this, see: SP stimmte wirtschaftsliberaler als SVP: Vox-Analyse zu den Abstimmungen of 22 September, *Neue Zürcher Zeitung* No. 265 of 14 November 2002, p. 13. – Developments in California may have played a role in this rejection, though the situations are not comparable. For the situation in California, see for example R.T. CROW (2002).

sibility to ‘exploit’ those who would especially benefit from the acceptance of a proposal. As where unanimity is required, everyone is in this strategically favourable situation, the costs of finding agreement greatly increase when this rule is applied in the ongoing political process. This is true all the more, the larger the group taking part in a vote. A situation thereby arises in which decisions become ever more difficult, people engage in blockade politics, or there is a bottleneck impeding reforms.[24)]

[25] K. WICKSELL (1896, p. 117) has already pointed out this problem. Although he argued on the basis of his theoretical conception for the principle of unanimity, he saw the problems involved in its practical application and therefore suggested for votes a “qualified majority, for example of three-quarters, five-sixths, or even nine-tenths of the ballots cast” depending on the kind of issue.

[26] When the number of participants is small, this problem can be solved by logrolling, in which one agrees to support someone else’s project, even if it is not advantageous for oneself, if the other supports the project important to oneself in return. Such logrolling can be advantageous for all. In any case, it is the only way to bring about unanimous decisions in a group with divergent interests.[25)]

[27] Logrolling presupposes binding agreements among the participants. This becomes all the more difficult the larger the group is, also because then the aforementioned strategic motives become stronger. If voters decide, binding agreements are not possible; they are free to decide as they choose. This is revealed time and again at elections when party executive committees make agreements to mutually support each other’s candidates, but the voting population does not adhere to the agreements. For this reason, logrolling in balloting is not possible; one can at most attempt implicit logrolling by creating certain ‘packages’. But as Switzerland’s experience shows, this is very difficult and often fails. But this means that the unanimity rule makes no sense in referenda; instead, it effects a total blockade and thus cements the status quo.

[28] If one wants to make changes possible at all, direct democracy and the principle of unanimity are thus incompatible; one has to decide which of them one wants. If one insists on both, one has to face the accusation that one consciously wants to bring about a blockade. But if that is the case, one ought to admit it openly, rather than abusing direct popular rights in this way.

[29] For the European Union, this means that, if one does not want to perpetuate today’s constitutional reality, referenda as a general mechanism should be seriously considered only if the unanimity rule does not apply. Even Switzerland does not demand that, to effect changes

24. This leads to a situation that is like a complement to the tragedy of the commons. In the latter case, there is too much activity because everyone can act without the agreement of others who are affected by his acts; in the former, now too little activity (or none at all) is carried out, because the agreement of all is always required. On this, see also J.M. BUCHANAN and Y.J. YOON (2000) and, from a political science perspective, A. HÉRETIER (1999).

25. On logrolling, see for example D.C. MUELLER (2003, p. 104ff.). Coalition agreements are a typical example for this.

in the constitution, all cantons must agree, but only that both, the majority of voters and the majority of cantons, agree. It is rare that all cantons agree on a revision of the constitution in a mandatory referendum. In the United States, where a constitutional change requires 'only' three-quarters of all the states, there have been only 27 constitutional amendments since the Constitution was ratified in 1789, although here no referenda are required. As long as changes to the European 'constitution' require the agreement of all member states, it is thus extremely problematic to generally plan on referenda.[26)] But it is doubtful whether the member states are willing (and in particular Germany) to eschew their veto right on these fundamental decisions. As long as this willingness is lacking, direct democracy will never be able to play more than a very subordinate role on the European level.

2.3 The Role of Quorums

[30] To increase the legitimacy of referenda, there is often a demand that referenda be valid only when the participation of a specific minimum quorum is reached: as a rule. In most cases 50 percent are demanded. Corresponding rules are found, for example, in Italy and in Hamburg, and W. WITTMANN (1998, p. 233), for example, calls for it for Switzerland. The aim is to prevent 'coincidental' majorities organised by a small but highly motivated segment of the population from bringing about decisions against the will of the parliament, which is elected by and represents the whole population. This would mean that popular decisions would be politically officially acknowledged only if a correspondingly large proportion of those eligible to vote – more than 25 percent, in any case – support the measure in question.

[31] One might initially suspect that such an arrangement would lead to greater voter participation, since the 'moral' arguments that motivate citizens to cast a ballot are strengthened when a low turnout brings the danger that a proposal desired by the people cannot be implemented. But in point of fact, the opposite is the case. With a quorum of 50 percent participation, it is always rational for an opponent of the suggestion not to take part in the voting, because in the extreme case this participation quorum can be achieved only if more than half of the eligible voters are in favour of the proposal. But in that case, the measure would be accepted in any case. So it is simpler to defeat a measure through insufficient participation than by fielding a majority of nay votes. Since the agreement of 50 percent of all eligible voters is very improbable in most cases, such an arrangement means it is possible that, in many cases, a (clear) majority favours a proposal, but cannot clear the 50 percent hurdle.[27)]

[32] The negative consequences of this arrangement were revealed in the Weimar Republic,[28)] but they also clearly emerged in Italy on 18 April 1999 when a change in election law

26. In L.P. FELD and G. KIRCHGÄSSNER (2004), we suggested that changes to the European Union Constitution should be resolved in mandatory referenda with a simple majority of the population, but with a two-thirds majority of all member states. However, it might also be reasonable to demand two-third-majorities of both, the population and the member countries, in order to minimise the chances of the small as well as the large members to exploit the other group.

27. Lower participation quotas create the same incentive for strategic nonparticipation, though to a lesser degree.

28. On this, see G. KIRCHGÄSSNER, L.P. FELD, and M.R. SAVIOZ (1999, p. 145ff.)

was voted on. Although 91.7 percent – the overwhelming majority – of the votes cast were for this change, it was not implemented, because turnout, at 49.6 percent, was just below the necessary 50 percent mark.

[33] Beyond that, the argument behind this suggestion is itself dubious. First, whether a high level of voter participation is always a good sign is controversial. Low turnout does not necessarily cast doubt on the legitimacy of a political decision made by a people. Second, it must be considered that participation in elections for representatives is often also very low. In Switzerland in the last two decades, for example, it was below 50 percent even in the elections to the Nationalrat, the national parliament. So it is completely unclear what legitimates a narrow decision by a parliament elected by only a little more than 40 percent of the voters as a clear decision by the people, while a decision that barely fails to reach the participation threshold of 50 percent can be overruled.

[34] If one wants to implement a quorum at all, then it should be a quorum of approval. It is conceivable, for example, that a decision be valid only if at least 25 percent of all those eligible agree to it.[29)] In this case, both adherents and opponents of the proposal would have an incentive to take part. Of course, the quorum should not be set so high that it de facto requires a higher rate of participation than the elections do. It would be hard to find a justification for such a high quorum.

[35] Along with quorums of approval or participation, the quorums for numbers of signatures on petitions are also relevant. In Switzerland today, they are relatively low. On the federal level, 100'000 signatures are needed for an initiative and 50'000 for a referendum. This is a little more than 2 and 1 percent of the eligible voters, respectively. The signatures must be collected within 100 days for a referendum and within 18 months for an initiative. In the German Länder (states), the rules are much more restrictive: in Bavaria, for example, 25'000 eligible voters must sign a petition. Then, within 14 days, 10 percent of the eligible voters must sign the petition before it can be presented (after parliamentary consultation) for a vote.[30)]

[36] Such restrictive regulations more or less annul popular rights. So it is no wonder that there have been all of 20 popular petitions and only 19 referenda in Bavaria since 1945.[31)] In this context, a study by J.G. MATSUSAKA (1995) is interesting. He shows for the American states that the right to an initiative has a (statistically) significant effect only if the required number of signatures on the petition is lower than 10 percent of the eligible voters.[32)] The regulations valid in Bavaria today, for example, just like the 50 percent participation rule in

29. This is the case, for example, in Bavaria for changes to the constitution.

30. See http://www.stmi.bayern.de/buerger/wahlen/volksbegehren/ (15/05/15).

31. See ibid.

32. On this, see also E.R. GERBER (1999).

Hamburg, restrict the formally existing popular rights to the degree that they are almost ineffective.[33)]

3. Potential Areas of Conflict in Direct Democracy

[37] The fears expressed in connection with direct popular rights are in part strategic, because these rights effect an unwanted partial shift of power from the elected representatives of the parliamentarian system back to the sovereign people, but some are indeed to be taken seriously. This is especially the case for possible conflicts with international law, as sometimes actually do arise in Switzerland (*Section 3.1*). But arguments can also be found for the fiscal reservation (*Section 3.2*). In both cases, however, the fears relate primarily to initiatives, but have hardly anything to do with referenda. On the other hand, a problem of referenda might be that they hamper political reforms if not even make them impossible (*Section 3.3*). These fears will be examined in the following.

3.1 Direct Democracy and Human Rights

[38] The modern state in the Western tradition is characterised by two *principles* that stand in tension with each other: democracy and the rule of law.[34)] An (extremely extensive) direct democracy can lead to a situation in which the electorate makes arbitrary decisions that unambiguously contradict elementary human and/or civil rights as they are today widely or even generally accepted in the Western world and as are found in the United Nations Declaration of Human Rights. Besides the Preventive Custody and Deportation initiatives mentioned above the naturalisation decisions of 4 December 1997 in Pratteln and of 12 March 2000 in Emmen can also serve as examples. In these decisions naturalisation was denied at the ballot box to people of Turkish or Yugoslav descent, respectively, despite clear recommendations of the naturalisation commissions.[35)] But this can also happen in a purely representative democracy, as the retention (or reactivation) of the death penalty in the United States shows. On the other hand, as the German example shows, an extremely broadly extended constitutional jurisdiction can lead to a situation in which the parliament, even with an overwhelming majority, can no longer make certain decisions such as are made in other states (under the rule of law), even if they in no way contradict generally recognised human rights. This is found, for example, by

33. The same applies to arrangements like those until now in Hamburg, which allow the parliament and government to ignore referenda.

34. On this, see also A. D'ATENA (1999). Of course, democracy requires a certain set of rules so that decisions can be made and enforced at all. Legal provisions are needed for this. But this alters nothing about the fundamental field of tension between the two principles.

35. On this, see: Emmen sagt Nein zu 19 Einbürgerungsgesuchen, *Neue Zürcher Zeitung* No. 61 of 13 March 2000, p. 10; Willkürliche Verweigerung der Einbürgerung: Baselbieter Verfassungsgericht hebt Pratteler Entscheide auf, *Neue Zürcher Zeitung* No. 76 of 30 March 2000, p. 13; Unterschiedlich strenge Schweizermacher: Keine Beweise, aber Indizien der Diskriminierung, *Neue Zürcher Zeitung* No. 260 of 7 November 2000, p. 13; A. Auer, Einbürgerung durch Volksentscheid? Verfassungsrechtliche Grenzen der direkten Demokratie, *Neue Zürcher Zeitung* No. 73 of 27 March 2000, p. 13.

the degree to which the German constitutional court constrains the legislature even in questions of taxation.

[39] Behind these examples stand two different constitutional traditions, a 'liberal' tradition and a 'democratic' one, which not only can invoke different 'founding fathers' from the Period of Enlightenment,[36] but which can also be very well illustrated in the contrasting development in Germany (Prussia) and Switzerland in the 19th century. Even if many people sympathised with the French Revolution and its ideal of equality, the strength of the princely houses meant that the democratic principle had no chance of even partial realisation in Germany at the beginning of the 19th century. In accordance with the monarchist principle, the decisive power laid with the princely houses until the November Revolution in 1918 at the end of World War I.[37] Nonetheless, in this period, in particular in consequence of the Stein-Hardenberg Reforms carried out in Prussia, an administrative state under the rule of law developed that limited the powers of the monarchy in that the actions of the rulers, but in particular of their administrations, were constrained by constitutions promulgated in the first decades of the century.[38] Citizens had the possibility to sue in court against the administrations' transgressions of these limits. It is true that jurisdiction was still exercised in the name of the chieftains, "but jurisprudence had nonetheless wrested its independence from the administration. Justice was carried out by civil servants subject solely to the law."[39]

[40] In Switzerland, in contrast, when the radical governments replaced the liberal ones in the 1830s and 1840s, the democratic principle dominated over the liberal one:[40] the 'free' Swiss resolved to attend to their political matters themselves. This does not necessarily imply the introduction of direct democracy: around 1840, there were cantonal assemblies in seven cantons and semi-direct democracy in six, but eleven cantons had a purely representative system, while Neuenburg was a constitutional monarchy.[41] The new federal constitution of 1848 had only a few components of direct democracy; the most important popular rights existing today on the federal level – the optional legislative referendum and the people's initiative for partial revision of the constitution – were not adopted in the constitution until 1874 (in the

36. F.A. v. HAYEK (1967, p. 11) names as intellectual predecessors of the liberal tradition David Hume, Adam Smith, Alexis de Tocqueville, Immanuel Kant, Wilhelm von Humboldt, and James Madison, among others; as representatives of the democratic tradition, he names Voltaire, Jean Jacques Rousseau, and Marquis de Condorcet. For a characterisation of the two approaches, see for example F. SCHNABEL (1964, p. 128ff.).

37. On the 'monarchist' principle and its application in the various constitutions in Germany, see also F. SCHNABEL (1964, p. 111ff.).

38. The idea of the rule of law that emerged in the 18th century has three components: "the bourgeoisie's hope for a free development of the market, without patronising state control…, the desire to be freed of absolutist fetters in matters of religion and education, and the claim to political participation by the third estate, even if this last component was much more weakly developed in Germany than in France or England." (M. STOLLEIS (1990, p. 367).) On the individual reforms, see T. NIPPERDEY (1983, p. 31ff.).

39. H. FEHR (1962, p. 275).

40. On this, see G. ANDREY (1983, p. 267) and M. SCHAFFNER (1998).

41. AI, AR, GL, NW, OW, UR, and SZ had cantonal assemblies, BL, GR, LU, SG, VS, and ZG were semi-direct democracies, and AG, BE, BS, FR, GE, SH, SO, TG, TI, VD, and ZH had representative democracies. See G. ANDREY (1983, p. 267).

framework of the first total revision) and in 1891. Next to these democratic rights, the rule of law was accorded less importance: in particular where there was a cantonal assembly, i.e., where every (male) citizen could bring his interests into the political process, it made little sense to sue in court against political decisions.[42)] To this day, this conviction is widespread in the Swiss population, and it is revealed, for example in the resistance to introducing a constitutional jurisdiction on the federal level.

[41] The fundamental tension between the principle of the rule of law and the principle of democracy can be pragmatically regulated, but it is not really solvable. Whatever the arguments used to legitimate certain norms, ultimately there is only positive law, i.e., there must be a (human) instance that posits every law, and this includes the fundamental constitutional law.[43)] This is particularly true of the secular state. In modern societies, this is done with the aid of democratic procedures, whereby different procedures and quorums can be applied in different areas. For example, it can be set up that specific components of the constitution – in the sense of a so-called eternity paragraph – may not be altered, not even with the majority that is entitled to change the constitution. This can be used to secure the essential human and civil rights, in particular. The constitutional court then has the task of protecting these rights and thereby represents the principle of the rule of law, also against the democratically legitimated legislative body. But this cannot prevent a new constitution from being enacted, likewise in a democratic way that curtails democratic participation rights and/or civil freedom rights, as happened for example a few years ago in Liechtenstein (in fact by applying a direct-democratic procedure).[44)]

[42] Disregarding for now this problem of competence-competence, the question arises of the scope for action to be granted to the constitutional court. The institutional solutions in Germany and in Switzerland can be regarded as ‘corner solutions’: whereas the constitutional court in Germany, once appealed to, has a very broad scope for decision, in Switzerland its scope is narrower. The broad scope in Germany has two (institutional) causes: first, certain groups can appeal to the court, even if they are not affected by the issue in question. In particular, the (parliamentary) opposition has this right. Since the times of Chancellor KONRAD ADENAUER, the opposition, if it lost in the Bundestag (Germany’s parliament), often tried to have the parliamentary majority’s decision annulled and its own position at least partially established. Second, the court has the competence over the abstract control of norms, i.e., it can decide whether a law is unconstitutional, even if so far no one’s constitutional rights have yet been impaired by its application. At the same time, in its statement of the reasons for its

42. Accordingly, administrative law and administrative jurisdiction developed later in Switzerland than in Germany. On the development in Germany, see C. KELLER (1998).

43. The exactly same holds whenever one appeals to nonhuman authorities. Even if everyone affected refers to a divine authority and/or advocates the view that people are entitled to certain rights ‘by nature’, the corresponding legal norms to make them societally effective must be established by people or, if they are traditional, at least must be accepted and enforced by people.

44. On this, see for example: Scharfe Kritik am Fürsten: Bericht von Europarats-Delegierten erschüttert Liechtenstein, *NZZ am Sonntag* of 14 September 2003, p. 15; Drohende Überwachung des Fürstentums: Liechtensteins Verfassungsstreit vor dem Europarat, *Neue Zürcher Zeitung* No. 250 of 28 October 2003, p. 17.

judgment, it can set far-reaching instructions for the legal regulation that is to be resolved. In certain cases, the parliament is thus neutralised as legislative branch to a large degree.

[43] The Swiss alternative to this consists not only in that constitutional jurisdiction exists only rudimentarily on the federal level. In addition, only those directly affected can file suit, and the federal court, to the degree that it has jurisdiction in the first place, is entitled solely to concrete control of norms: when it is called upon, it can determine whether the plaintiff's constitutional rights have been curtailed. This can also require the suspension of certain legal regulations. This happened, for example, when the federal court decided that ballot-box decisions on naturalisation violate the constitution's ban on arbitrariness and are therefore impermissible, because the decisions required no justifications and thus could not be juridical contested[45)] In its statement on its ruling, however, the federal court (following its usual tradition) consciously avoided elucidating how naturalisation decisions are to be correctly carried out. For example, it remained open whether local councils are permitted to make naturalisation decisions. In the concrete situation, this was widely considered disadvantageous, because the cantons and communities in question were unsure how they should behave in the future.[46)] But it enabled them to develop various institutions. For example, it is possible to decree that a proposal to reject a naturalisation must be justified in a local council meeting and that this meeting must vote openly. Such 'experimenting' with various models would not be possible if the federal court had directed, for example, that a local council meeting was not permitted to vote on naturalisations.

[44] One can ask about the degree to which restrictions of individual freedom rights are actually a relevant problem with referenda or whether these are merely purely theoretical considerations that play no role in practice. There are several empirical studies on this that investigate the degree to which popular rights have led to limitations or expansions of individual freedom rights. The results are mixed and depend strongly on the judgment as to which initiatives and/or referenda limit popular rights.[47)] Thus, the studies provide no basis for clearly answering this question. On the other hand, the examples mentioned above show that the question of the compatibility of direct political and individual freedom rights has recently gained importance in Switzerland. In particular, the question arises of how the right to carry out initiatives affects the rights of minorities. The papers in A. VATTER (2011) investigate this for religious minorities and show that it largely depends on whether the electorate perceives them as 'insider' or 'outsider' groups, whereby the example of the Jewish minority shows that this perception can change over time. For outsider groups, the danger is large that referenda result in outcomes unfavourable for their legitimate interests.

45. On this, see: Zwei Machtworte zur Einbürgerung: Diskriminierung verboten – Begründung erforderlich, *Neue Zürcher Zeitung* No. 157 of 10 July 2003, p. 11; and: Ende der Urnen-Einbürgerung, *St. Galler Tagblatt* of 10. July 2003, p. 5.

46. On this, see: Kein rechtsfreier Raum bei Einbürgerungen: Bundesgericht begründet Urteile gegen Urnenentscheide, *Neue Zürcher Zeitung* No. 170 of 25 July 2003, p. 13.

47. On this, see the overview in G. KIRCHGÄSSNER (2009).

[45] This does not speak against these popular rights, however, but probably against how these questions are treated in Switzerland. One could (and probably also should) solve this problem by introducing a right of the constitutional court to review initiatives, in order to prevent them of being incompatible with individual human rights when brought to a vote. As the German example in the 1970s and the most recent development in the United States show, there can, however, be massive limitations of individual freedom rights in purely representative systems, as well. This danger is not limited to direct democracies.

[46] These thoughts suggest that the 'optimal' competence area of the constitutional court may lie between the German and the Swiss arrangements. While the constitutional court in Germany may have too much power, Switzerland has a deficit in this area. Today, the Supreme Court in Lausanne can act as a constitutional court only for the cantonal level. It could make sense to extend this competence to the review of federal laws. To prevent a development like Germany's one might, however, as up to now, permit only the concrete control of norms.[48)]

3.2 The Fiscal Reservation

[47] There are fears that the direct participation of voters on decisions on factual issues could lead them to making decisions without taking the financial consequences into account, for example simultaneously voting for additional public expenditure and a reduction of taxes, which could result in problems for the public budgets. This cannot be ruled out a priori, and it provides the argument for the fiscal reservation that the Weimar constitution already knew and that is valid today in all German Länder: budget-relevant decisions are reserved to the parliament and may not be the object of a referendum.[49)] But since there are only a few political decisions that have absolutely no fiscal effects, this means a massive limitation of direct popular rights.

[48] Is this reservation justified? Is this theoretically existing possibility relevant in practice? A comparison between Switzerland and Germany provides an initial answer: in Switzerland, where there is no such reservation, so far no canton has declared a budget emergency and sked for additional funds from the other cantons and/or from the federal government; in Germany, both Bremen and Saarland did this in 1992, and their suit before the Federal Constitutional Court was successful. The Land of Berlin also tried it in 2006, but was turned down. Bremen, Saarland, and Berlin have meanwhile demanded additional aid and, together with Schleswig-Holstein, have received it in the framework of Federalism Reform II.[50)] Apparent-

48. Because Switzerland has signed the European Convention for Human Rights, it has put itself under the control of the European Court of Human Rights. Correspondingly, this court executes part of the constitutional control missing in Switzerland. Thus, even those who are highly sceptical with respect to a national constitutional jurisdiction have to ask themselves whether – in such a situation – it would not be preferable to have 'own' judges to decide about human rights' matters and not to leave this to 'foreign' judges.

49. On this, see for example J. KRAFCZYK (2005).

50. It can be doubted that this is sufficient to achieve the goal of the reform: to be able to present a balanced budget by the year 2020. On this, see G. KIRCHGÄSSNER (2009a, pp. 76ff.)

ly, in the past massive financial difficulties arose in some German Länder despite the existing fiscal reservation. In Switzerland, where no such reservation exists, nothing comparable has appeared.

[49] The situation in Switzerland looks comparatively good on the federal level, as well. After federal debt markedly rose in the period of weak growth from the beginning of the 1990s to the middle of the last decade,[51)] on 2 December 2001 84.7 percent of the voters agreed to the introduction of a debt brake into the federal constitution. After a transitional period in which the structural deficit was reduced, which was eased of course by favourable economic development, the debt brake went into full effect on 1 January 2007. This led to a reduction of debt starting in 2005. At the end of 2011, as mentioned above, federal debt in relation to gross domestic product was again below the level of 1992. Even in 2009, the year of the most severe recession in the recent financial and economic crisis, it was possible to reduce public debt, even though a total of three stimulus packages were decided on. The extraordinary situation would have allowed raising government expenditure beyond the limit prescribed by the debt brake, but this proved to be unnecessary.

[50] A fundamental reason why the situation in Switzerland's cantons is different from the one in the German Länder, for example, although some cantons, in particular Geneva and Vaud are deep in debt, lies in the canton's tax sovereignty: if problems arise, the cantons can increase their tax revenue. Since the citizens know that they may have to pay for the public expenditure with their taxes, they are reserved accordingly. The German Länder have no such tax competence. Accordingly, it may be that their voters also have fewer inhibitions against voting for expenditure.[52)]

[51] It is also interesting to take a look at the situation in the United States. As J.G. MATSUSAKA (1995, 2000) has shown, direct democracy in U.S. states before World War II tended to lead to an expansion of state activity, while after the war they tended to lead to a reduction of state activity. An important negative example is certainly the financial starvation of the state of California due to Proposition 13. Apparently, the effects can be quite different, and it depends crucially on the respective institutions whether expanding direct popular rights to include decisions with fiscal effects tends to foster or impair public finances.

[52] The German discussion of the fiscal reservation, however, generally covers only part of the relation between direct popular rights and financial solidity. It reduces direct democracy at least implicitly to the instrument of the initiative ('Volksbegehren' and 'Volksentscheid'), which may be understandable from the German perspective, because these are the main instruments are available, but which brackets away some essential aspects. To grasp the effects of direct popular rights on public finances, one must consider the entire set of instruments.

51. On the period of Swiss weak growth, see G. KIRCHGÄSSNER (2005).

52. Thus, L.P. FELD und G. KIRCHGÄSSNER (2008), for example, show that in the Swiss cantons, more extensive direct popular rights – ceteris paribus – lead to significantly lower per capita cantonal debts.

[53] The most important direct-democratic instrument of fiscal policy is the fiscal referendum: all expenditure that are not mandated by law and that exceed a specified sum must be presented to the electorate for agreement. At issue here are primarily larger investment projects. The limits can differ depending on whether non-recurring or new recurrent expenditure is under consideration; in the latter case, the limits are generally markedly lower. The referendum can be mandatory or optional; in the latter case, first signatures have to be collected. With the exception of Vaud, all cantons have a fiscal referendum: 13 cantons and half-cantons have both a mandatory and an optional referendum, 5 cantons have only a mandatory referendum, and 7 cantons have only an optional referendum.[53)] The fiscal referendum is able to reduce public expenditure, but not increase them; a fiscal reservation is therefore superfluous with this instrument. On the federal level, the fiscal referendum has been discussed several times, but the parliament has never given it a majority. Of course, considering that large investment projects have little importance in comparison with the overall budget, the fiscal referendum is also less important; it would be relevant primarily for large transportation infrastructure projects and military expenditure.

[54] The canton St. Gallen can serve as an example. It demands a mandatory referendum for non-recurring expenditure above 15 million CHF and for recurring expenditure exceeding 1.5 million CHF, if they are not already covered by existing laws. Considering that the cantonal budget exceeds 4 billion CHF, these are relatively small sums. The optional referendum can be held on nun-recurring expenditure exceeding 3 million CHF and on recurring expenditure exceeding 300'000 CHF. To do so, 4'000 signatures have to be collected within 100 days. With 312'600 eligible voters, these are not high hurdles.[54)]

[55] The second important instrument is the (optional) referendum on statutory laws: new laws or revisions of laws must be presented to the voters for approval if they so desire. This instrument, too, tends to hold expenditure down, rather than increase them, when the voters reject laws passed by the legislature that have financial consequences. Empirical studies show that – ceteris paribus – a draft law is all the more likely to be rejected the more expensive it is.[55)] Of course it is also possible that the people reject a proposition intended to save money. So it occasionally also happens that a successful referendum makes solid fiscal policy more difficult.

[56] The mandatory constitutional referendum does also hardly cause any problems; the same arguments hold for it as for the optional referendum on laws. After all, these are proposals of the government and the parliament for whose fiscal discipline those bodies are already responsible. Thus, here too, a fiscal reservation is not up for debate. Beyond that, in many cases changes to the constitution are not expensive, because the arrangements that lay down the fiscal consequences are mainly fixed in place in the accompanying laws.

53. On this, see L.P. FELD and G. KIRCHGÄSSNER (2001).

54. For a more detailed description of the institutions and the situation in St. Gallen canton, see for example P. SCHÖNEBERGER (1975) and G. KIRCHGÄSSNER (2009).

55. On this, see G. KIRCHGÄSSNER und T. SCHULZ (2005).

[57] Things are a bit different with the initiative. On the federal level, we have only the constitutional initiative; on the cantonal level we also have the initiative for new or revisions of laws. If the latter initiates new projects, expenditure increases can indeed occur and place the desired budget discipline into question. Since the chances of initiatives on the federal level, first, are very low and, second, often relate to financially neutral projects, this danger is relatively low here. In addition, because of the lack of a fiscal referendum on the federal level in Switzerland, initiatives are occasionally used to block expenditure approved by the parliament, for example purchasing new fighter jets. Prohibiting such initiatives because of their financial consequences would be downright counterproductive for the sustainability of public finances.

[58] To the degree that referenda on laws could endanger the sustainability of public finances, this can be countered with debt breaks. This can be done on the federal as well as on the sub-federal governmental levels, in Germany the Länder and local communities, as in several Swiss cantons.[56)] This should make more sense than to generally exclude decisions with financial consequences from the realm of direct popular rights. As empirical results show, cantons with debt limits have significantly lower deficits and debt than cantons that lack such instruments.[57)] In Germany, too, in the framework of Federalism Reform II, debt limits for the federal government as well as the Länder were laid down in its constitution; they have used the arrangement on the federal level in Switzerland as a role model. To the degree that it can be assumed that these new fiscal institutions actually become effective, there is no longer any reason for any kind of fiscal reservation in the German Länder.[58)]

[59] Whether the debt breaks of the German Länder are able to achieve their fiscal sustainability is, however, highly questionable. In order to ensure this, their incentives to come into a budget emergency in order to receive fiscal assistance from the other Länder and/or the federal government with the help of the constitutional court have to be as small as possible. This should ensure that they have a strong interest in the sustainability of their finances. The first condition requires a credible no-bailout rule; the second requires that the Länder have power over their own revenues and taxes. Neither is given for the individual Länder; if they find themselves in a deficit, all they can do is take on debt.[59)] One could fear that direct popular rights could increase the probability of such situations, for example if the population rejects laws that lead to savings. The problem then lies, of course, not with the direct popular rights, but on the problematic design of the debt brake. Switzerland shows that suitable shaping of the debt limits makes it possible to counter dangers to the financial solidity also of subordi-

56. A detailed description of the arrangements introduced up to the year 2000 is found in T. STAUFFER (2001). More recent overviews are found in KONFERENZ DER KANTONALEN FINANZDIREKTORINNEN UND FINANZDIREKTOREN (2009), L.P. FELD et al. (2011, pp. 84ff.), and N. BABUC and U. MÜLLER (2012).

57. On this see L.P. FELD and G. KIRCHGÄSSNER (2008).

58. On the German debt limit, see for example I. KEMMLER (2009) and G. KIRCHGÄSSNER (2014).

59. In addition, the investments are not treated separately, but must be funded with the current budget. For smaller Länder, in particular, this can result in substantial problems during investment peaks.

nate levels of organisation without thereby having to limit the direct popular rights that could lead to such dangers. As the comparison between Germany and Switzerland shows, financial solidity is much more endangered in the German system with its much narrower popular rights than it is in Switzerland's direct democracy.

[60] Direct popular rights in the form of the fiscal referendum could have a supporting effect on fiscal sustainability, but they are not a necessary precondition. Entirely independent of such rights, debt limits can be useful institutions for securing sustainable fiscal policy. This is true not only of the federal level in Germany, but also for the European Fiscal Pact, which is to introduce debt limits in the member states of the European Union. It is thus possible to counter threats to the financial solidity also of subordinate levels of governmental levels without therefore having to limit the direct popular rights that can lead to such dangers. It is advisable to install such limits, quite independently of the extent of direct popular rights.

3.3 Direct Democracy and Political Reforms

[61] As was just elucidated, the optional referendum on laws not only can mean that a law entailing expenditure is not promulgated; it can also block necessary reforms. Those who want to limit direct popular rights in Switzerland make this accusation again and again. For example, S. BORNER writes: "The decisive effect of the optional referendums is that this mechanism makes it much more difficult for the government and the parliament to make any major change in the institutional framework. … Comprehensive political or economic changes are the exception in Switzerland."[60] W. WITTMANN (1998) expresses himself quite similarly, if even more dramatically. He demands: "Switzerland must abandon direct democracy and turn to parliamentary democracy like other countries" (p. 233), since in his opinion "… direct democracy in general and the referendum in particular will ruin the Swiss economy in the long run by preventing market economy reforms. Direct democracy is on the way to endangering and destroying Switzerland." (pp. 206f.)

[62] It can hardly be denied that the referendum has delayed important decisions. For example, on 1 February 1959, the majority of male voters for the last time rejected women's suffrage on the federal level; women did not receive the vote until 7 February 1971. Things were even more questionable on the cantonal level. While most cantons introduced cantonal women's suffrage starting in February 1971 if they did not already have it, the two Appenzells continued to refuse it. In Appenzell Outer Rhodes, it was not introduced in the cantonal assembly until 1989, and the Inner Rhodes assembly still rejected it in 1990. Only a decision by the federal court in the same year that forced this last canton, too, to introduce women's suffrage secured equal political rights for women on all levels.

[63] In the political discussion of recent times, however, what played a role was less this anachronism than certain economic policy decisions as, for example the rejection of joining the European Economic Area (EEA) on 6 December 1992, the rejection of the reform of the

60. S. BORNER, Direkte Demokratie – letzter Schweizer Mythos, *Neue Zürcher Zeitung* No. 1 of 3 January 1997, pp. B9f.

labour law on 1 December 1996, and the rejection of free movement of persons with EU countries on 9 February 2014. The rejection of EEA membership, in particular, had negative economic consequences for Switzerland; the policy of bilateral agreements that has been pursued since then and that were strikingly confirmed in the popular vote of 8 February 2009 were able to compensate this to a large degree, but not completely. The decision of 9 February 2014 calls this into question again. So the question whether Switzerland's direct democracy is not a hindrance for further economic development is justified.

[64] Of course it is very problematic to want to decide such questions on the basis of the outcome of a single vote or even a few votes. In purely representative systems, too, there are individual decisions that entail negative economic consequences. The relevant question is whether on average direct democracy leads to 'better' decisions than an actual, purely representative system, whereby the standards for 'better' and 'worse' would have to be decided first. In regard to reforms, in recent years Switzerland can definitely bear comparison with the larger neighbouring states: reform deadlock is at least as serious in Germany, France, and Italy as in Switzerland.[61)] For example, starting in the nineties Switzerland has carried out a reform of its federalism that came into effect on January 1, 2008. It is much more far-reaching than all the reforms that have been seriously considered in Germany,[62)] although the German problems have long been known: as early as 1988, F.W. SCHARPF pointed out the 'joint decision trap' to which German politics is exposed. The problem of reform deadlock can thus not be reduced to a question of purely representative versus semi-direct democracy.

[65] On the other hand, the referendum produces a 'status quo bias, i.e., under otherwise equal conditions, an advantage for the status quo in a vote. G. KIRCHGÄSSNER and T. SCHULZ (2005) have shown that, in a voting campaign, a Swiss franc spent against a proposal has almost twice the effect of a franc spent supporting it. This corresponds to the results of E.R. GERBER (1999) for the United States. It shows that it is easier for interest groups to mobilise people against a proposal than for it.[63)]

[66] But this bias produced by the referendum is balanced by the accelerating effect of the initiative. It makes it possible to put problems that the parties (so far) ignore on the political agenda. For example, as early as 1979, the Swiss people were able to vote on a moratorium on nuclear energy at a time when all the parties represented in Germany's Bundestag stood almost united in favour of this form of energy. In Germany, it was necessary to found a new party especially devoted to this issue, while in Switzerland 'only' an initiative was needed to bring this problem into serious political discussion.

[67] The direct democracy in Switzerland has both a brake and a gas pedal. One could argue that the problem is that the brake is more powerful or too powerful. This may be the case at least for economic policy reforms. After all, such a reform is hardly demanded and made to

61. On the necessity of reforms in Germany, see for example the contributions in K.F. ZIMMERMANN (2006).

62. On the problems of German federalism, see for example G. KIRCHGÄSSNER (2007); on reform in Switzerland, see for example C. SCHALTEGGER and R.L. FREY (2003) and G. KIRCHGÄSSNER (2006).

63. Similar results for Switzerland, but referring to individual referenda, can be found in H.P. HERTIG (1982), E. GRUNER and H.P. HERTIG (1983), and C. LONGCHAMP (1991).

prevail through an initiative, but several reforms have failed in the recent past due to the referendum. But even if one takes this view, the question arises whether it does not nonetheless make sense to grant the status quo a certain priority.

[68] This is assumedly undisputed for constitutional issues (and thereby for the mandatory referendum on constitutional changes in Switzerland). After all, for this, all countries demand higher quorums than a simple majority; in Germany, both the Bundestag (lower house of parliament) and the Bundesrat (upper house of parliament) must approve the change with at least a two-thirds majority each. This is a much higher hurdle than in Switzerland, where a constitutional initiative requires only the majority of the votes cast (Volksmehr) and majorities in a majority of the cantons (Ständemehr). It is no coincidence that the Swiss Federal Constitution is changed much more frequently than the constitutions of Germany or even the United States. So one could even argue that the retarding component in Switzerland is too weak on constitutional questions.

[69] Things look a little different when it comes to the optional referendum on laws. Here one can argue that the status quo should not have an advantage over new proposals. But this argument, too, is problematic. For one thing, precisely the business world often demands that politics be steady and predictable. The status quo bias steadies policy. Apparently there is a tension in politics between its predictability and openness for new solutions. How this can be optimally solved is not a priori given. A certain bias toward the status quo, if it is not too strong, can definitely be advantageous.

[70] However, the decisive question from the standpoint of the theory of democracy is not whether the status quo has an advantage, but which systems elicits solutions that come closer to the population's preferences. In this respect, the direct-democratic system has unambiguous advantages.[64)] If reforms actually take longer in this system than in purely representative systems, from the perspective of the theory of democracy these are the costs of giving better consideration to the population's preferences. And it is completely open whether this entails economic disadvantages. Studies carried out for the individual states of the United States and for the Swiss cantons show the opposite: more powerfully structured direct popular rights lead – ceteris paribus – to better economic development. One could object that these studies refer solely to the level of the individual states and cantons and that this does not show whether these results can be transferred to the national level. But there are good arguments that it can, even if this is occasionally cast into doubt. In any case, however, Switzerland's development in recent years, as compared with the neighbouring states, does not lead to the conclusion that direct democracy entails substantial economic disadvantages over the long run.[65)]

64. Empirical studies of this can be found, for example, in W.W. POMMEREHNE (1978) and E.R. GERBER (1999).

65. This is true despite Switzerland's weak growth in the 1990s and in the first half of this decade. On this, see G. KIRCHGÄSSNER (2005). On the question of the degree to which direct democracy obstructs reforms, see also G. KIRCHGÄSSNER (2008).

4. Concluding Remarks

[71] Even if the discussion of the advantages and disadvantages of direct popular rights has clearly become more objective than it once was, it is still much polarised, in particular in Germany. Strict advocates, who in Germany can be found in particular in the proximity of the citizens' action group 'Mehr Demokratie e.V.' (More Democracy) and the 'Initiative and Referendum Institute Europe', now located in Marburg, stand against convinced opponents who either completely oppose such rights on the federal level[66] or want to limit it to the mandatory referendum on international treaties[67] or to the mandatory constitutional referendum.[68] The opponents explicitly reject introducing the instrument that grants citizens the greatest possibilities to control the government and the parliament, the optional referendum,[69] even though they concede that up to now the experiences with referenda in the Länder and local communities tend to be positive. For example, H.-P. HUFSCHLAG (1999, p. 266, p. 269) twice explicitly calls the experience gathered in Länder with referenda "encouraging", while he thinks referenda on the federal level are "neither necessary nor advisable" (p. 305). Of course, these authors also doubt that the experience gained on the cantonal or individual (American) state level can be transferred to the federal level.

[72] Those with this rejecting stance repeatedly point out the allegedly negative experiences in the Weimar Republic that were already mentioned above and that played a role, though a subordinate one, in the discussions in Germany's Parliamentary Council and in the Joint Constitutional Commission,[70] but they deal astonishingly little with the concrete experiences of other countries. The tendency is to argue formally that this would have been "to bid farewell to a system of majoritarian-parliamentarian nature"[71] or that it would weaken German federalism[72] or that this would merely increase the influence of organised special interest groups and/or parties. Finally, they assert that a system of popular legislating is incapable of compromise, since one can vote only yes or no, while the parliamentarian procedures are open for compromise solutions.[73]

[73] This argumentation overlooks that many European countries carry out referenda on the national level, even if not to a very great degree, without fundamentally changing the nature of their political systems. Switzerland with its consociational system is rather an exception,

66. See H.-P. HUFSCHLAG (1999, p. 305) and P. LERCHE (1995).

67. See for example S. JUNG (2001, p. 294).

68. See for example J. GIEHL (1996, p. 294).

69. Strict opponents of direct democracy also exist outside of Germany, of course, for example J. HASKEL (2001) in the United States and W. WITTMANN (1998, 2001) in Switzerland.

70. On the experiences in the Weimar Republic, see FN 2 above; on the discussion in the Parliamentary Council, see O. JUNG (1994); and on the discussion in the Joint Constitutional Commission, see H.-P. HUFSCHLAG (1999, p. 279 ff.).

71. S. JUNG (2001, p. 294); see also P. BADURA (1993, p. 120) and the discussion in T. PATERNA (1995, p. 135 ff.).

72. See for example H.-P. HUFSCHLAG (1999, p. 290 ff.) and T. PATERNA (1995, p. 135 ff.).

73. See for example H.-P. HUFSCHLAG (1999, p. 282 ff.).

after all. On the other hand, Germany is today already relatively close to the consociational model: since in recent decades the federal government has almost never had a majority in the Bundesrat (the upper house), crucial questions can often be decided only in cooperation between the government and the parliamentary opposition, although of course the latter does not have to assume responsibility for the decision. This is the reason for the political joint decision trap described by F.W. SCHARPF (1988).[74)]

[74] Second, these authors also overlook that direct democracy has contributed to strengthening federalism in Switzerland, in that the citizens have often rejected proposals that would have entailed a centralisation and/or a shift of expenditure to the cantons. Third, Switzerland's experience shows that direct popular rights tend to weaken the parties, because themes can be placed on the political agenda bypassing the parties, which impairs their monopoly over this field. That parties often try to exploit initiatives for their own purposes does not contradict this. It is also true that a suitable organisation is generally needed to begin a campaign for an initiative. But this is relativized by the fact that sometimes even very small, independent groups occasionally have success with their interests.[75)]

[75] In regard to the influence of special interest groups, no empirical evidence is presented for this assertion; it is pure speculation. Nor has there been any empirical study of this. But purely theoretically considered, interest groups tend to have a stronger position in the purely parliamentarian system than in semi-direct democracy, because in the former they need to persuade 'only' the representatives of the governing coalition in the relevant parliamentary commission and not, as in the case of a referendum, a majority of voters. As already mentioned above, the latter is not easy, and quite often economic special interest groups fail to do so, despite the use of substantial fiscal means.

[76] Finally, the argument of incapacity for compromise is valid at best for the initiative, but is not relevant for the referendum, in which only the compromise negotiated in the parliament is voted on. After all, in the various readings of a draft law in parliament, the parliamentarians also vote only either yes or no; so there is no reason why, after the completion of the parliamentarian process, the voters should not also vote yes or no in a kind of fourth reading. Switzerland's experience thereby shows that the constraint to find a compromise in parliament is much stronger under the threat of a possible referendum than in a purely parliamentarian system: resolutions that find the agreement of only a narrow majority in parliament have a high probability of failing in the referendum. As for the initiative, this argument holds for California, where the people present initiatives without the parliament being able to take a position on them. In Switzerland and in the German Länder, the parliament always has the possibility to present a counter-proposal. The same possibilities for compromise thus exist here as in the purely parliamentarian system. In the final vote, of course, one must always choose either yes or no, whether in the semi-direct democracy or the purely parliamentarian system.

74. On the problem of concordance, see also G. KIRCHGÄSSNER (2013).

75. See, as an example, the aforementioned initiative "Lifelong detention for extremely dangerous perpetrators of sexual and violent crime who cannot be therapised", which was launched by two women and, to many people's surprise, achieved a majority of the popular and of the cantonal votes on 8 February 2004.

[77] Despite all the problems that can be connected with direct popular rights, it turns out that many of the arguments advanced against it are not convincing. On the other hand, one should neither idealise direct democracy, nor overestimate its positive effects. One should also be reserved about the future role of the electronic media for direct democracy. Some people envision a vitalisation, because in the future it will become ever simpler to ask ever more citizens, even on short notice, about their political opinion. Technology gives us the means to carry out referenda in ever larger states with ever shorter preparation time and with ever lower costs.[76)] For example, it is conceivable that in the future the citizens will take part in referenda from home with the aid of their PCs. One could be tempted to use this as a means of combating the often-lamented voting fatigue and disenchantment with politics.

[78] But such a purely technocratic perspective forgets that the social discourse that precedes each referendum and in which the citizens take in and assimilate relevant information is essential for the success of a direct democracy. Since available time is scarce, such a discourse can be carried out only about important issues; the number of referenda that can sensibly be carried out in a given time period finds a natural limit. A referendum mechanism in which the population is (almost) constantly asked its opinion and in which the answers to these questions is decisive would almost inevitably lead to a situation in which the voters would tend to decide rather randomly. Then there is the danger that those who lost in the decisions might acknowledge their legality, but no longer their legitimacy. In the long run, this would undermine the population's acceptance of direct democracy.

[79] It is quite apparent: direct democracy in not without problems. This is true of the way it is practiced in Switzerland, but also of all the other variants: certain problems are system-immanent. But every other political system has its problems as well, including purely representative democracy. If, as WINSTON CHURCHILL put it, democracy is the worst form of government except for all the others that have been tried, then perhaps direct democracy is the worst form of democracy, except for all the others. After all, the desire, notable today in many countries, that citizens should have a greater direct say in the political process is often fuelled by deficits in the representative system.

[80] But this does neither imply that every arrangement of direct democracy makes sense, nor that one ought to schedule referenda arbitrarily. For direct democracy to function well, attention should be paid to the following:

(i) Direct democracy is to be understood as a system in which the citizens (can) make use of their due rights of their own accord. This is to be embedded in a process in which an intensive societal discussion process can precede the referendum, so that the voters can be sufficiently informed. In this process, the government and parliament should also be able to contribute 'counter-proposals' to initiatives. In contrast, occasionally scheduled referenda in which the government, from above, 'generously' permits citizens to share in deciding individual questions, make little sense. They are often exploited for other

76. On such ideas, see A. TOFFLER (1980) and I. BUDGE (1996).

concerns, and the public discourse might also revolve around problems quite different from the pressing question.

(ii) Direct democracy must be institutionally structured in such a way that it is manageable, on the one hand, and does not lead to blockades, on the other. So participation quorums should not be instituted; where one thinks quorums make sense, they should be quorums of agreement. In addition, unanimity is hardly compatible with direct popular rights. This is especially true for the European Union. If constitutional questions should be presented to the citizens in the future, the unanimity principle should be replaced by a system of qualified majorities of both the population and the states.

(iii) Conflicts with individual human rights or with international law that can arise by initiatives should be avoided, if possible, or, if they arise, should be regulated by a sensibly structured constitutional jurisdiction. It is frustrating for participants and reduces people's readiness to engage in politics when supporters of an initiative engage themselves for an issue, gain the agreement of the voters, and then must learn that their interest cannot be implemented because of conflicts with international human law. This can be avoided by arranging that proposals are examined for their constitutionality at an early stage, thus offering the possibility of formulating initiatives in such a way that they do not conflict with international law.

If all this is taken into consideration, the problems connected with direct popular rights can hardly outweigh their advantages. One need not fear that reforms will fail because of it, and a fiscal reservation is superfluous, though sensible rules to prevent going into excessive debt should be introduced at all governmental levels.

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