

# Where philosophy and the ideas of democracy and human rights meet: the complex “equation” of the Swiss political system and its international relevance

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## **Abstract:**

This article aims to demonstrate the important links that exist between democracy, human rights and philosophy. It presents the Swiss political system, which is constantly subjected to a tension between the respect of human rights and the respect of democracy, due to its semi-direct system of democracy. This article also highlights clearly the international relevance of the Swiss problem. Moreover, this contribution shows how much the question analysed is rooted in Western political philosophy and is, therefore, not ‘purely’ legal.

*Keywords:* political philosophy, human rights, democracy, law and politics, constitutional law, mandatory provision of international law, Switzerland.

## Introduction

I would like to demonstrate the important links between the ideas of democracy, human rights and philosophy. I will try to prove these connections by using the example of the Swiss political system<sup>1</sup>. Indeed, collisions between human rights and democracy are particularly frequent in the Confederation, due to its semi-direct system of democracy<sup>2</sup>.

The article is structured as follows: it starts with an overview of some features of the Swiss political system (Section 1). Next, it concisely describes the protection of human rights at international and national levels in the Swiss State (Section 2), subsequently highlighting one major consequence of the interactions between democracy and human rights in the Swiss political system (Section 3). The paper also presents the current Constitution's solution to regulate those interactions (Section 4) and determines the notion of *mandatory provisions of international law* (Section 5). After an intermediate conclusion (Section 6), the paper attempts to answer the question of whether new limits should be created for the Swiss constitutional system (Section 7). Before concluding, there will also be an attempt to demonstrate why the Swiss *equation* is relevant on an international level (Section 8).

## Main features of the Swiss political system

Switzerland is a semi-direct democracy<sup>3</sup> which has specific features, compared to a classical representative model<sup>4</sup>. Not only is the Swiss population called to express its opinion concerning major legislative and constitutional modifications, but it can also *propose* a complete or partial revision of its Constitution<sup>5</sup>. In practice, partial revisions of the Constitution are done more frequently, and since 1893, the Swiss population has voted over 180 times on such revisions<sup>6</sup>! As of 2012, 19 initiatives were accepted by the Swiss people and the Cantons, the federal entities of Switzerland. Thus, semi-direct democracy is not simply a *nice but futile* concept: it has a concrete and deep impact on the Swiss political system year after year.

The Swiss political system has therefore endorsed the words of Rousseau, when he argued that “the power to make laws belongs to the people, and it can only belong to them”<sup>7</sup>. In other words, in Switzerland, the people and the federal entities are truly *sovereign* according to Bodin's definition of the term, since they usually have the last word regarding legal and constitutional norms<sup>8</sup>. As a reminder, Bodin stated that “the power to give and break the law [...] is the only feature of sovereignty”<sup>9</sup>.

1 For an introduction to the Swiss political system, see e.g. Linder, Rolf / Iff, Andrea, *The Political System in Switzerland*, Berne, Federal Department of Foreign Affairs, 2011, p. 3 ff.

2 For a short presentation of this issue, see e.g. Lammers, Guillaume, *Les initiatives populaires contraires au droit international*, Berne, University of Berne, p. 29ff.

3 For an introduction to the Swiss semi-direct democracy, see e.g. Auer, Andreas / Malinverni Giorgio / Hottelier Michel, *Droit constitutionnel Suisse – L'Etat (vol. 1)*, 2<sup>nd</sup> Edition, Berne, Stämpfli Editions SA, 2006, p. 202 ff.

4 For more on the representative model, see e.g. Jaume, Lucien, “Représentation”, in: Alland, Denis / Rials, Stéphane (dir.), *Dictionnaire de la culture juridique*, Paris, Presses universitaires de France, 2003, pp. 1335-1339, p. 1335 ff.

5 See Art. 138, § 1 and 2, of the Swiss federal Constitution from 19 April 1999 (hereafter: Swiss Cst.).

6 According to the Federal Chancellery's website (<http://www.bk.admin.ch/index.html?lang=fr>, accessed 23 October 2012).

7 Rousseau, Jean-Jacques, *Du contrat social*, Paris, Editions Flammarion, 1992, p. 85 (author's translation).

8 See e.g. Gonin, Luc, “La notion d'Etat, un concept déterminé ? L'apport de Machiavel, Bodin et Hobbes à la détermination progressive de la notion d'Etat”, in: Cashin Ritaine, Eleanor / Maître, Arnaud Elodie (edit.), *Notions-cadre, concepts indéterminés et standards juridiques en droit interne, international et comparé*, Bruxelles et al., Editions Bruylant and Schulthess, 2008, pp. 349-377, p. 361 f.

9 Bodin, Jehan, *Les six livres de la République*, Darmstadt, Scientia Aalen Verlag, 1977, p. 223 [author's translation].

## National and international protection of human rights in the Swiss political system

There are three main levels of protection of freedoms and liberties, or human rights, in Switzerland<sup>10</sup>. The first one is the “cantonal” level, meaning the sub-national level<sup>11</sup>. Almost every Canton has a Constitution containing norms to protect those freedoms and liberties<sup>12</sup>. On the second level, the federal Constitution has also included, since 1999, a significant catalogue of freedoms and civil rights<sup>13</sup>. On the third level, in addition to these two “national” sources of protection, the Swiss population is also able to invoke provisions rooted in international law. For example, Switzerland is a member of the Council of Europe and recognizes the jurisdiction of the European Court of Human Rights<sup>14</sup>. It also has, amongst other international treaties, ratified UN Covenants no. 1<sup>15</sup> and no. 2, protecting a substantial number of human rights<sup>16</sup>.

Thus, in the same way as many other countries, Switzerland refuses to be a *Leviathan State*, which has its origins in Hobbes’ political thought<sup>17</sup>. On the contrary, this country has been deeply imbued with the ideas of freedom and equality, as developed in France and the United States in the late 18<sup>th</sup> century<sup>18</sup>.

10 No strict distinction is made in this article between domestically protected liberties and human rights which benefit from international protection. Indeed, at least on a European level, human rights also enjoy a judicial review thanks to the European Court of Human Rights (hereafter: ECtHR). Therefore, in the author’s opinion, a clear scientific distinction is no longer justified. For more on the internationalisation of “constitutional law”, see e.g. Hertig Randall, Maya, “L’internationalisation de la juridiction constitutionnelle: défis et perspectives”, in: *Zeitschrift für Schweizerisches Recht*, vol. 129 no. II/2, Basel, 2010, pp. 221-380, p. 242 ff. (with various references).

11 Switzerland is composed of 26 sub-national entities called *Cantons* (Linder, Rolf / Iff, Andrea, *The Political System in Switzerland*, op. cit., p. 3).

12 See, amongst others, art. 9 to 29 of the Bern Canton Constitution of 6 June 1993 (Federal legislation [hereafter: RS] no. 131.212); art. 9 to 18 of the Zürich Canton Constitution of 27 February 2005 (RS 131.211); art. 7 to 33 of the Neuchâtel Canton Constitution of 24 September 2000 (RS 131.233).

13 Art. 7 to 36 form the federal catalogue of fundamental rights. For more on these rights, see also Seiler, Hansjörg, “Verfassungsgerichtsbarkeit zwischen Verfassungsrecht, Richterrecht und Politik”, in: *Zeitschrift für Schweizerisches Recht*, vol. 129 no. II/2, Basel, 2010, pp. 381-546, p. 406 ff.

14 See e.g. Auer, Andreas / Malinverni Giorgio / Hottelier Michel, *Droit constitutionnel Suisse – Les droits fondamentaux (vol. II)*, 2<sup>nd</sup> Edition, Berne, Stämpfli Editions SA, 2006, p. 44 ff.

15 Full title: “International Covenant on Economic, Social and Cultural Rights” dated 16 December 1966 (RS 0.103.1).

16 Full title: “International Covenant on Civil and Political Rights” dated 16 December 1966 (RS 0.103.2).

17 For more on this topic, see Hobbes, Thomas, *Leviathan: or the Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil*, Ulan Press, 2011. See also Berns, Laurence, “Thomas Hobbes – 1588-1679”, in: Strauss, Leo / Cropsey Joseph (edit.), *Histoire de la philosophie politique*, Paris, Presses universitaires de France, 1994, pp. 433-459, p. 433 ff.

18 Indeed, those ideas had a strong impact in the American Revolution and the evolution of the United States. The Declaration of Independence from 4 July 1776 states explicitly in its second paragraph that: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness” (for more on that topic, see also Henkin, Louis / Neuman, Gerald L. / Orentlicher, Diane F. / Leebron, David W., *Human Rights*, New York, Foundation Press, 1999, p. 134 ff.). A similar affirmation can be made for the French Revolution and its aftermath. Thus, art. 1 of the Declaration of the Rights of Man and of the Citizen from 26 August 1789 unmistakably states that: “Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good”.

State and on its system of protection of human rights. In this regard, Albert Cohen, the famous French writer of the 20<sup>th</sup> Century, said that “Judaism and Christianity share[d] the same desire to transform the ‘natural man’” into what he calls a “human man”<sup>19</sup>. In the author’s opinion, human rights clearly promote such a transformation<sup>20</sup>. One might also wonder whether the Apostle Paul’s radical affirmation of the equality of men influenced the current understanding of law in Switzerland and whether, at least indirectly, it may have favoured the strengthening of fundamental rights<sup>21</sup>.

## One major consequence

One major consequence of the strength of the ideas of democracy and human rights in Switzerland is that they may collide in a particularly violent way. For example, should it be possible for the Swiss population and the Cantons to vote on a constitutional ban on minarets in the name of democracy, or should such a constitutional amendment be forbidden in the name of human rights? Furthermore, may a popular initiative seek to introduce in the Constitution the automatic deportation of certain categories of foreign criminals, or should such an initiative be invalidated because it is contrary to the principle of *non-refoulement*? (Reminder: this principle prohibits the expulsion of aliens to countries where they risk heavy persecution)<sup>22</sup>.

Though these questions might seem theoretical, they are not. On the contrary, in 2009 a majority of Swiss citizens and Cantons accepted a constitutional modification prohibiting the construction of new minarets. One year later, they also accepted the principle of automatic expulsion of foreign criminals guilty of serious crimes. Therefore, it is no exaggeration to affirm that the Swiss political system *equals* a complex equation in the matter. Switzerland must, hence, decide from time to time between the respect of democracy and compliance with human rights<sup>23</sup>.

The next part examines the actual solution proposed by the Swiss Constitution to solve this complex *equation*.

19 Cohen, Albert, “Carnets 1978”, in: Cohen, Bella / Peyrefitte Christel (edit.), *Œuvres*, Paris, Editions Gallimard, 1993, pp. 1115-1204, p. 1174. See also Gonin, Luc, “Au-delà du juriste : Albert Cohen, l’homme qui dépassait les frontières”, in: Hottelier, Michel (edit.), *Albert Cohen – L’écrivain au service de l’Etat de droit : Actes du colloque organisé le 18 février 2011 par la Faculté de droit et la Fondation Mémoire Albert Cohen*, Geneva / Zurich / Basel, Editions Schulthess, 2011, pp. 65-86, p. 78.

20 Indeed, they try to protect the human dignity that belongs to everyone. On the specific value attributing to human dignity, see e.g. Mahon, Pascal, “Art. 7 – Dignité humaine”, in: Aubert, Jean-François / Mahon, Pascal (edit.), *Petit commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999*, Zurich / Basel / Geneva, Editions Schulthess, 2003, 67-71, p. 69 ff.

21 As a reminder, the Apostle Paul stated in particular that: “There is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for you are all one in Christ Jesus” (Galatians 3.28).

22 For more on the *non-refoulement* principle, see for instance Allain, Jean, “The *Jus Cogens* Nature of Non-Refoulement”, in: *International Journal of Refugee Law*, vol. 13 issue 4, 2001, pp. 533-558, p. 538 ff.

23 Human rights have sometimes, though not frequently, prevailed over the democratic principle. For example, they prevailed when some citizens wanted to introduce a norm in the federal Constitution which authorized the expulsion of asylum seekers without giving them the right to a judicial review of their case (FF 1994 III 1471 and 1996 I 1305). The Parliament invalidated that constitutional initiative because it noticeably violated the *non-refoulement* principle.

## The current constitutional solution

According to Art. 139 of the Swiss Constitution, a constitutional amendment proposed by Swiss citizens must meet three conditions if it does not want to be declared invalid by the Parliament<sup>24</sup>.

Firstly, the initiative has to comply with the requirement of consistency of form<sup>25</sup>. This condition requires the initiative either to take the form of a general proposal – which means that Swiss authorities would draft the new constitutional norm in case the proposal is accepted –, or the form of a specific draft of the proposed provision<sup>26</sup>. If the second alternative is chosen, the population and the Cantons vote on the new constitutional text itself. This formal requirement has no direct impact on the interactions between human rights and democracy.

“Consistency of the subject matter” is the second condition<sup>27</sup>. This requirement excludes initiatives from dealing with two different topics. The main purpose of this rule is to protect the citizens’ right of vote<sup>28</sup>. In fact, by banning the presence of two different themes in a same initiative, the Swiss Constitution prevents citizens from being in favour of one part of the constitutional amendment, but not of the other<sup>29</sup>. This second condition does not have a major impact on the relationship between democracy and human rights.

The third condition has closer ties with our issue. Thus, a popular initiative cannot infringe “mandatory provisions of international law”<sup>30</sup>. The main problem with this requirement is that the Constitution does not explicitly state what “mandatory provisions of international law” are exactly<sup>31</sup>. For instance, does this expression only include the prohibition of genocide, slavery and torture, or does it also include the general principles of humanitarian law? In addition, does it only comprise some human rights or all of them<sup>32</sup>? Accordingly, the exact definition of this third condition is fundamental for us to solve our “equation”<sup>33</sup>.

24 See, amongst others, Aubert, Jean-François, “Art. 139 – Initiative populaire tendant à la révision partielle de la Constitution”, in: Aubert, Jean-François / Mahon, Pascal (edit.), *Petit commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999*, Zurich / Basel / Geneva, Editions Schulthess, 2003, pp. 1088-1101, p. 1091 ff.

25 See art. 139 § 3.

26 Ibid., § 2.

27 Ibid., § 3.

28 See Mahon, Pascal, *Droit constitutionnel I – Institutions, juridiction constitutionnelle et procédure*, 2<sup>nd</sup> Edition, Neuchâtel, Faculty of Law Press, 2010, p. 47.

29 For more on this matter, see also Rentsch, Hans, “Strapazierte Einheit der Materie”, in the newspaper “*Neue Zürcher Zeitung*”, dated 23 January 2012.

30 See art. 139 § 3.

31 For more on that topic, see e.g. Zimmermann, Tristan, “Quelles normes impératives du droit international comme limite du droit d’initiative par le peuple?”, in: *Pratique juridique actuelle*, Zurich / Sankt Gallen, 2007, pp. 748-760, p. 750 ff.

32 For more on these topics, see e.g. Hangartner, Yvo, “Art. 139 (neu) – Abs. 2”, in: Ehrenzeller, Bernard and others (edit.), *Die Schweizerische Bundesverfassung – Kommentar*, 2<sup>nd</sup> Edition, Zurich and others, Editions Dike and Schulthess, 2008, pp. 2159-2169, p. 2161 ff.

33 See e.g. Gonin, Luc, “L’affirmation de l’existence d’un jus cogens regional – Hérésie juridique et risque inconsidéré?”, in: Meier, Philippe / Papaux, Alain (edit.), *Risque(s) et droit*, Geneva / Zurich / Basel, Editions Schulthess, 2010, pp. 217-230, p. 236 ff.

There is a fourth condition, though it is not written in the Constitution itself: a constitutional amendment must be achievable. In other words, an initiative cannot propose to introduce a constitutional provision imposing highly unrealistic duties on the State<sup>34</sup>. In this context, it must be noted that the Swiss Parliament has a very broad understanding of the word *achievable*. This fourth condition also has no direct impact on the interactions between human rights and democracy.

### **The notion of mandatory provisions of international law**

So far, the Swiss Parliament has opted for a quite restrictive approach to the concept of *mandatory provisions of international law*. Therefore, when it had to decide on the constitutionality of the initiative to ban minarets, it did not consider it to be in violation of those provisions<sup>35</sup>. It reached a similar conclusion when it had to determine the constitutional validity of the popular initiative for the automatic expulsion of some categories of criminal foreigners<sup>36</sup>. Consequently, due to the Swiss Parliament's relatively favourable approach to democracy, there are rather significant risks of conflict between democracy and human rights in Switzerland. The position of the legislative power is thus, on a philosophical level, influenced by Rousseau, who emphasized along with others the importance of democracy<sup>37</sup>.

### **Intermediate conclusion**

As we have seen, the Swiss political system provides for restrictions on direct democracy in the Constitution. However, these are not sufficient to exclude any risk of conflict with human rights. On the contrary, recent constitutional practice highlights the dangers of concrete collision. Therefore, one crucial question arises: Should new limits be introduced in the Swiss political system? This question is actually far more political and philosophical than strictly legal, which is what the following section attempts to demonstrate.

### **The question of new limits on direct democracy**

Many options have been proposed in recent years to reduce the possibility of conflicts between human rights and democracy in Switzerland. One major proposal was to forbid any popular attempt to modify the Constitution which would violate internationally

34 See Hangartner, Yvo, "Art. 139 (neu) – Abs. 2", op. cit., p. 2166.

35 For more on the initiative for the ban on new minarets, see e.g. Masméjan, Denis, "L'initiative contre les minarets repose la question du respect du droit international", in "Le Temps" newspaper, dated 4 May 2007.

36 For more on this initiative, see e.g. Benoît, Anne, "Les règles impératives du droit international comme limite matérielle à la révision de la Constitution fédérale", in: Cashin Ritaine, Eleanor / Maître, Arnaud Elodie (edit.), *Notions-cadre, concepts indéterminés et standards juridiques en droit interne, international et comparé*, Bruxelles et al., Editions Bruylant and Schulthess, 2008, pp. 329-348, p. 341 f.

37 It must be nevertheless stated here that Rousseau was very critical of representative democracy. In fact, the philosopher vehemently defended the idea of direct democracy (see Rousseau, Jean-Jacques, *Du contrat social*, op. cit., p. 122 f.).

protected liberties and freedoms<sup>38</sup>. Undoubtedly, such a proposal would solve the complex equation that Switzerland faces. Nevertheless, in my opinion, this proposal raises various important problems.

Firstly, who would be competent to decide that a popular initiative violated human rights? The Parliament or the Judicial Power<sup>39</sup>? If the Parliament were in charge, one might wonder whether that organ had enough legal knowledge to deliberate on such difficult questions. Nevertheless, this institution has an important democratic legitimacy. If it were the Judicial Power, one might ask why it should only be up to an elite of few to decide, rather than a majority of citizens, or their representatives. Would it be on the basis of their legal expertise?

Concerning legal expertise, one must admit that judicial decisions on human rights are often rather political than legal<sup>40</sup>. For example, abortion can be considered as constitutional by a judge who asserts that a woman's freedom to choose must prevail, while another one may insist that every foetus' right to live must be legally protected<sup>41</sup>.

Thus, a general invalidation of the power of popular initiatives by the judicial Power seems to be, at the very least, questionable. Indeed, giving such power to a constitutional tribunal is primarily a philosophical and political decision and not, mainly, a legal-technical decision<sup>42</sup>. In fact, granting such a prerogative to the courts raises the philosophical question of the distribution of power within the State and the related issue of supreme authority within a Nation<sup>43</sup>.

Secondly, one might raise the question of whether it is wise to greatly limit democracy for *objects* as undefined as human rights<sup>44</sup>. History has shown that the limitation of democracy, in general, has not helped the common good, far from it<sup>45</sup>. Indeed, the concentration of powers represents one of the main problems for the rule of law and Modern political powers have constantly tried to create institutional check and balance systems<sup>46</sup>. By doing so, modern States do not embrace the Machiavellian philosophy of law,

38 Benoît, for example, proposes a solution that goes in this direction. She proposes to forbid any initiative which would violate the European Convention on Human Rights (hereafter: ECHR) (RS 0.101). See Benoît, Anne, "Les règles impératives du droit international comme limite matérielle à la révision de la Constitution fédérale", *op. cit.*, p. 347 f.

39 For the moment, this complex task lies with the Parliament according to art. 139 § 3 Swiss Cst.

40 Indeed, as Moor demonstrated, "written rules do not contain the whole law" (Moor, Pierre, *Pour une théorie micropolitique du droit*, Paris, Presses universitaires françaises, 2005, p. 64 [author's translation]). Therefore, Montesquieu's affirmation according to which "judges are no more than the mouth that pronounces the words of the law" is not correct; on the contrary, judges do participate in the creation of law (Montesquieu, Charles-Louis, *De l'Esprit des lois (vol. I)*, Paris, Editions Gallimard, 1995, p. 337).

41 See e.g. Moor, Pierre, *Pour une théorie micropolitique du droit*, *op. cit.* p. 21.

42 Seiler, amongst others, highlights the interactions between law and politics in the field of fundamental rights (Seiler, Hansjörg, "Verfassungsgerichtsbarkeit zwischen Verfassungsrecht, Richterrecht und Politik", *op. cit.*, p. 518 f.).

43 For a general introduction, see e.g. Benwell, Richard / Oonagh, Gay, *The Separation of Powers (SN/PC/06053)*, London, House of Commons' Library, 2012, p. 2 f. See also Dorf, Michael C. / Morrison, Trevor W., *The Oxford Introductions to U.S. Law – Constitutional Law*, Oxford / New York, Oxford University Press, 2010, p. 95 ff.

44 On that topic, Seiler asserts even that human rights are "highly undetermined" (Seiler, Hansjörg, "Verfassungsgerichtsbarkeit zwischen Verfassungsrecht, Richterrecht und Politik", *op. cit.*, p. 447).

45 In the author's opinion, political Modernity should therefore be considered as a perpetual struggle against the concentration of powers (see e.g. Gonin, Luc, *L'obsolescence de l'Etat moderne – Analyse diachronique et contextuelle à l'exemple de l'Etat français*, *op. cit.*, p. 39 ff.).

46 This attempt is particularly evident in the United States, where "the drafters of the Constitution sought to establish a system of checks and balances to ensure the political independence of each branch" (Nowak, John E. / Rotunda, Ronald D., *Principles of Constitutional Law*, 3<sup>rd</sup> Edition, St. Paul, Thomson/West Editions, 2007, p. 71).

but rather endorse the principle of separation of powers<sup>47</sup>. Therefore, it is the author's opinion that every attempt to *stifle* the voice of democracy should be carefully examined, before being carried out.

Thirdly, human rights are understood in quite a *dynamic* way by judicial authorities, especially on the regional level. The European Court of Human Rights itself writes that the ECHR should be applied in such a way<sup>48</sup>. Therefore, a limitation of the possibilities of constitutional amendments by the people would bring uncertainty in the Swiss national system. Indeed, what might have been considered constitutional, or conventional, two decades ago, might not be accepted any more today or in ten years' time, even if the norms which are applied do not change in the meantime. Accordingly, such an evolution would not promote the security of law, one of the main aims of a Modern State<sup>49</sup>. It would also, in addition, foster judicial activism rather than public debate.

Finally, it must also be said that thanks to the adaptability of the Swiss constitutional system, this country has experienced a very long period of civil peace<sup>50</sup>. Needless to say, that is not true of all European countries. Therefore, the weakening of this constitutional adaptability is problematic because it may lead, in the long run, to less civilized forms of violence. In fact, the Swiss population might have the impression that it has less and less political and legal means to influence its own reality. Moreover, this evolution would promote populist political parties<sup>51</sup>. Such developments cannot be for the best of the population as a whole, nor favourable to societal, cultural or religious minorities.

Hence, the prohibition of any popular attempt to modify the Constitution which violates internationally protected human rights is not an optimal solution to reduce, in the long term, the tension between those liberties and democracy. Indeed, as has been shown, a significant restriction of popular rights raises too many legal, political and philosophical problems.

There is a more promising solution: that of banning only constitutional amendments which are not compatible with the essence of human rights<sup>52</sup>. Indeed, no democracy, whether it be direct, semi-direct or indirect, desires to attack the very heart of those rights. In fact, such an assault would be contrary to the spirit itself of democracy, a political regime that unquestionably puts the individual at its centre. Such a solution certainly does not erase all problems. Nonetheless, it prevents democracy from degenerating into a despicable political system. The proposed solution would also have the benefit of being quite proportionate, defending both democracy and human rights.

47 For on an introduction on Machiavelli's philosophy, see e.g. Lescuyer, Georges, *Histoire des idées politiques*, 14<sup>th</sup> Edition, Paris, Dalloz Editions, 2001, p. 173 ff.

48 For instance, the ECtHR stated in the *Goodwin* case that: "It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective [...]. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement" (ECtHR [Great Chamber], *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, dated 11 July 2002, § 74).

49 For more on the related idea of predictability of the law, see Moor, Pierre, *Pour une théorie micropolitique du droit*, op. cit., p. 56.

50 The last civil war, the so-called "Sonderbund-war", took place in 1847 (see Mahon, Pascal, *Droit constitutionnel I – Institutions, juridiction constitutionnelle et procédure*, op. cit., p. 54).

51 Due in particular to globalization, Switzerland has already witnessed a clear strengthening of the nationalist right over the last decades.

52 For more on the essence of human rights, see e.g. Zimmermann, Tristan, "Le noyau intangible des droits fondamentaux : la quête d'une définition", in: Cashin Ritaine, Eleanor / Maître, Arnaud Elodie (edit.), *Notions-cadre, concepts indéterminés et standards juridiques en droit interne, international et comparé*, Bruxelles et al., Editions Bruylant and Schulthess, 2008, pp. 299-326, p. 307ff.

## The international relevance of the Swiss *equation*

In the author's opinion, the difficulties faced nowadays by Switzerland also concern other countries, such as Spain, France, Germany or United Kingdom in the next few decades. Indeed, though the problem of the interactions between democracy, freedom and liberties is quite acute in a direct democracy, it is not completely absent from representative democracies.

For instance, do national Parliaments have the right to prohibit the wearing of *burqas* in public spaces although there is a regional system of protection of human rights<sup>53</sup>? And may an elected Congress impose the presence of a crucifix in every school in a Catholic country? Would these measures consistent with freedom of religion<sup>54</sup>? Furthermore, which are the exact limits of freedom of expression? For example, may a national law prohibit criticism against the royal family?

These questions underscore the fact that the dilemmas faced by Switzerland today concern the rest of Europe too. Actually, they concern all democratic countries. Thus, Switzerland is maybe, for once, ahead of its time, underlining future challenges for other States.

## Conclusion

This article shows that what seemed to be a "purely legal" question is strongly linked to philosophy in general, and in particular, political philosophy. Indeed, the solution adopted by Modern States to solve the issue which has been discussed previously relies heavily on philosophical convictions.

Therefore, the problem addressed in this paper requires each and every one to reflect on the exact role of the individual in the political order. It compels, furthermore, every citizen to think about the exact role of political power: Must it only ensure civil peace in general or should it take extensive measures in favour of minorities? Finally, it raises the issue of who should have the final word in a democratic order. Is it the people? The Parliament? Or the judges? The answer to this question is highly political and philosophical too.

Thus, it is no exaggeration to argue that the chosen topic is not limited to human rights, and that it is also not only about democracy. In reality, and as this paper has attempted to demonstrate, it primarily concerns political philosophy as such and general Theory of law.

<sup>53</sup> Belgium was the first European State to forbid wearing *burqas* in public spaces, in July 2011 (see art. 563bis of the national criminal Law).

<sup>54</sup> See, in particular, the following cases: *Lautsi I* (ECtHR, *Lautsi v. Italy*, Application no. 30814/06, dated 3 November 2009) and *Lautsi II* (ECtHR [Great Chamber], *Lautsi v. Italy*, Application no. 30814/06, dated 18 March 2011).