

Democratic Participation in International Lawmaking in Switzerland after the ‘Age of Treaties’

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I INTRODUCTION

If someone were asked to name but one typical feature of the Swiss constitutional system, chances are high that the answer would be ‘direct democracy’. Indeed, Switzerland is arguably the state granting the most far-reaching democratic participation rights in the process of lawmaking; and this holds true for both domestic and international law. Since the late 1990s, the concept of ‘parallelism’ – the idea that the same degree of domestic democratic legitimacy should apply to the making of international law as it does to the enactment of domestic law – has been progressively implemented. As a result, from a comparative perspective, the Swiss legal framework on democratic participation in international lawmaking is unique in terms of the actors involved, the phases during which participation is possible, and the intensity and effects it features. Despite the breadth of this legal framework, it is simultaneously very narrowly designed: in its largest parts, it is geared towards just one source of international law – treaties. The ‘age of treaties’, however, seems to be over and informal lawmaking increasingly supersedes formal lawmaking.

In the introduction to this book, the editors note that the ‘horizons of international law have greatly expanded’ and that this expansion ‘affected the two most foundational organizing concepts of this body of law: sources and subjects’.¹ During the post-1945 period, states were the main players in international lawmaking, often acting under the auspices of an international organisation (IO), and treaties were the main vehicle to bring international legalisation forward. After the turn of the millennium, however, the

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¹ See the introductory chapter by Helmut Philipp Aust and Thomas Kleinlein, p. 10.

international institutional landscape changed dramatically and a series of new actors appeared, which notably participate in the production of norms. While these new participants in international lawmaking are as diverse as non-governmental organisations (NGOs), transnational corporations, industry associations and regulatory agencies, they share a commonality: not one of them possesses international legal personality (yet) and, consequently, they all lack treaty-making capacity. Their normative output is thus condemned to fall short of formal international law – they cannot regulate but through informal law.

The Swiss legal framework on democratic participation in international lawmaking, being a child of its time, is largely predicated on a very traditional understanding of international law. Yet, the mentioned structural changes in international law did not go unnoticed in politics and among the broader public. In recent years, there has been a growing awareness that the Swiss mechanisms for generating democratic legitimacy need to be adjusted in light of these new (complex) realities if they are to maintain their function. Still, building new bridges in the context of informal law has proven to be far more complex than it is for treaties: what we praise as the beauties of informal lawmaking – namely that the process and actors are not being forced into a rigid corset – turn out to be the beasts when it comes to grasping the phenomenon in constitutional and statutory terms. International informal lawmaking sets boundaries on democratisation ‘from below’ that do not exist for treaty-making; such limits arise, for example, from the fact that the state may not even sit at the negotiating table. Overall, informal lawmaking greatly complicates the relationship between sovereignty (including domestic democratic self-determination) and international cooperation – and, to some extent, their simultaneous realisation is no easier than squaring a circle. This insight is difficult to accept for a state like Switzerland, where democratic participation in lawmaking is part of its constitutional DNA. At the same time, one tends to forget that Switzerland is one of the most globalised countries of the world and not seldom a driving force behind informal lawmaking projects.

In order to fully grasp the significance of the turn to informal lawmaking for the Swiss legal framework, which governs democratic participation in international lawmaking, it is necessary to take a step back and understand its roots, development and context. Accordingly, this chapter sets the scene by demonstrating that foreign relations law exists in Switzerland, even if this label is rarely attached to the respective set of rules. It lays out two main categories of norms belonging to it, which are those providing substantive guidance for the conduct of foreign policy and those allocating powers in this realm. This will demonstrate that foreign relations are no longer understood as an exceptional

state activity subject to political discretion, and thus a prerogative of the executive, but rather as coming within the ordinary constitutional framework and being a competence jointly exercised by the government and Parliament; a result of a steady move towards normalisation² (Section II). It then goes on to describe that, mainly as a reaction to internationalisation, the democratic participation rights in international lawmaking were increasingly bolstered in the 1990s and the early years of the new millennium and the concept of ‘parallelism’, which testifies to the high degree of normalisation in the field of international lawmaking, was progressively implemented (Section III). It then discusses how the shift to informal lawmaking deprives this highly developed, but heavily treaty-oriented, democratic participation mechanism of much of its relevance, how the legislator has reacted to the rising importance of informal law, and what challenges potentially lay ahead in building new bridges (Section IV). A brief conclusion notes that not every boundary can be overcome with a bridge and that globalisation and international cooperation arguably come at a cost to democracy; yet such costs can be reduced with a domestic democratic participation framework, which is not anchored in traditional international lawmaking but reflects the complexities of contemporary international norm production (Section V).

II SWISS FOREIGN RELATIONS LAW: TOWARDS NORMALISATION

A Is There a ‘Swiss Foreign Relations Law’?

‘Foreign relations law’ has been defined as encompassing ‘the domestic law of each nation that governs how that nation interacts with the rest of the world’, most importantly with other nations and international institutions.³ As per Karen Knop, ‘[a]ll legal systems deal with foreign relations issues, but few have a field of “foreign relations law”.’⁴ This statement succinctly describes the current situation in Switzerland where foreign relations law has not yet emerged as a distinct field of study or law. So far, even the term ‘foreign

² See text belonging to n. 42 below for a definition of the term.

³ Curtis A. Bradley, ‘Foreign Relations Law as a Field of Study’ (2017) 111 *AJIL* 316–20 at 318; in similar terms: the chapter by Aust and Kleinlein, p. 9.

⁴ Karen Knop, ‘Foreign Relations Law: Comparison as Invention’, in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), p. 45; see also Campbell McLachlan, ‘Five Conceptions of the Function of Foreign Relations Law’, in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), p. 21.

relations law' has been sparsely used in writings on legal rules governing how Switzerland interacts with other subjects of international law.⁵ Similarly, courses specifically entitled 'foreign relations law' are a rare occurrence in Swiss universities as compared to American universities where such courses tend to be more commonplace.⁶ Nonetheless, a densely knit web of legal provisions governing Switzerland's interaction with other states and international actors is in place and continues to develop.

The Federal Constitution of 1999⁷ contains a series of provisions governing foreign relations, the entirety of which is denoted as the 'external constitution' ('*Aussenverfassung*'); a term firmly rooted in the constitutional discourse since the adoption of the current constitution.⁸ Indeed, the predecessor Constitution of 1874 regulated foreign relations only in fragments and left various aspects to constitutional practice.⁹ The Constitution of 1999 is the first federal constitution comprising a fairly comprehensive legal framework for the conduct of foreign relations, which justifiably deserves the designation as 'external constitution'. In terms of substance, the 'external constitution' can roughly be divided into provisions allocating authority and provisions containing substantive guidance for the conduct of foreign relations.¹⁰ These two sets of norms – to which we turn next – are specified and refined at the level of federal acts and ordinances. Further, in some fields, rules have also been developed through the case law of the Swiss

⁵ But see recently Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Leiden: Brill Nijhoff, 2019), pp. 65–6. It must be noted, however, that the term cannot be translated into German or French in a succinct way.

⁶ Aspects of foreign relations law are integrated in general courses; there is no equivalent to Staatsrecht III taught in Germany (on the latter, see Helmut Philipp Aust, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective', in Jacco Bomhoff, David Dyzenhaus and Thomas Poole (eds.), *The Double-Facing Constitution* (Cambridge: Cambridge University Press, 2020), p. 363). Exceptional in that sense is the course 'Foreign Relations Law in Comparative Perspective' taught by Roland Portmann at the University of St. Gallen, available at <https://tools.unisg.ch/handlers/Public/CourseInformationSheet.aspx/semester/FS19/eventnumber/8,492,1.00>, accessed 29 June 2020.

⁷ Federal Constitution of the Swiss Confederation of 18 April 1999, Classified compilation 101 (hereinafter: Constitution of 1999); the entire federal law is available at www.admin.ch/gov/en/start/federal-law/classified-compilation.html, accessed 29 June 2020 (where existing, the English translation, which does not have legal force, is cited).

⁸ For an early reference, see Giovanni Biaggini, 'Das Verhältnis der Schweiz zur internationalen Gemeinschaft: Neuerungen im Rahmen der Verfassungsreform' (1999) *Aktuelle Juristische Praxis* 722–9, passim; see also, e.g., Roland Kley and Roland Portmann, 'Vorbemerkungen zur Aussenverfassung', in Bernhard Ehrenzeller et al. (eds.), *Die Schweizerische Bundesverfassung: St. Galler Kommentar*, 3rd ed., 2 vols. (Zürich: Dike, 2014), vol. I, p. 1097.

⁹ See Biaggini, 'Internationale Gemeinschaft', 723.

¹⁰ Kley and Portmann, 'Aussenverfassung', p. 1097.

Federal Supreme Court.¹¹ In sum, foreign relations law is not (yet) treated as a discrete field of law or study in Switzerland, but certainly exists as a matter of fact.¹²

B Substantive Guidance for the Conduct of Foreign Policy

The Constitution of 1999 is novel in that it spells out general foreign policy objectives.¹³ Article 54(2), entitled ‘foreign relations’, represents the key reference point in terms of material guidance for the conduct of foreign policy.¹⁴ Substantive orientation can further be found in various other parts of the Constitution.¹⁵ The operationalisation and (to some extent) concretisation of these goals painted with broad brushstrokes takes place through an increasing number of federal statutes pertaining to foreign relations-related activities,¹⁶ the adoption of treaties, and by means of foreign policy decisions by the authorities.¹⁷

The constitutional statements providing substantive guidance for the conduct of foreign policy feature varying degrees of abstraction and normativity.¹⁸ Yet they share a commonality: they all testify to the legislator’s heightened awareness in the 1990s of globalisation and global interdependence and the consequent growing importance of foreign relations. This phenomenon led to an incremental blending of the internal and external dimension of a state’s policy¹⁹ and the increased difficulty of clearly separating internal forms of state

¹¹ As per Kley and Portmann, ‘Aussenverfassung’, p. 1107, the significance of court decisions in the context of foreign relations has increased in recent years.

¹² This holds equally true for other jurisdictions; see, e.g., Bradley, ‘Field of Study’, 319, for the United States.

¹³ Biaggini, ‘Internationale Gemeinschaft’, 723.

¹⁴ Bernhard Ehrenzeller and Roland Portmann, ‘Art. 54(2)’, in Bernhard Ehrenzeller et al. (eds.), *Die Schweizerische Bundesverfassung: St. Galler Kommentar*, 3rd ed., 2 vols. (Zürich: Dike, 2014), vol. I, p. 1125.

¹⁵ See, e.g., preamble, para. 4, and art. 2(1) and (4) setting out the goals to be pursued by the Confederation; foreign policy goals are further mentioned in provisions on specific subject matters, see, e.g., art. 101(1) on foreign economic policy.

¹⁶ They cover a wide range of issues, such as Swiss army participation in international peace-keeping operations, development aid, the strengthening of human rights and the rule of law in third states, or the transfer of war material and related technology abroad; for a list of relevant statutes: Ehrenzeller and Portmann, ‘Art. 54(2)’, p. 1130.

¹⁷ Ehrenzeller and Portmann, ‘Art. 54(2)’, pp. 1130–4.

¹⁸ See Biaggini, ‘Internationale Gemeinschaft’, 723–4.

¹⁹ Raffaella Kunz and Anne Peters, ‘Constitutionalisation and Democratisation of Foreign Affairs: The Case of Switzerland’, in Anneli Alba and Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Berlin: Springer, 2019), pp. 1519 and 1499.

action from external forms²⁰ – an insight that, as we will see, provided momentum for the normalisation of foreign affairs.

C Allocation of Powers on Foreign Policy

The second category of provisions of the ‘external constitution’ allocates power between the various levels of government (Confederation and Cantons) and branches of government (executive, legislative and judiciary). These provisions, accounting for the lion’s share of the ‘external constitution’,²¹ are more chiselled and specific as compared to those providing substantive guidance for the conduct of foreign policy. Their content is forged by the tension between the executive’s claim (and need) for a certain degree of flexibility and swiftness when conducting foreign policy²² and the quest to give due weight to federalism and democracy. The more internationalisation has progressed and the more foreign policy has shaped the domestic political environment, the more fiercely the question of vertical and horizontal allocation of powers in foreign policy has been debated.²³ Overall, the tendency is to give more weight to democracy and federalism – after all, both are foundational principles of the Constitution²⁴ – in order to prevent them being undermined by the externalisation of many policy areas.

As Switzerland is a federal state – the Confederation consists of 26 Cantons, which are ‘sovereign except to the extent that their sovereignty is limited by the Federal Constitution’²⁵ – the Constitution of 1999 explicitly addresses the vertical separation of powers: foreign relations are, as per Article 54(1) of the Constitution, ‘the responsibility of the Confederation’, even for matters domestically falling within the competence of the Cantons.²⁶ This implies

²⁰ See the chapter by Aust and Kleinlein, p. 5.

²¹ Matthias Oesch, ‘Ein Europa-Artikel für die schweizerische Bundesverfassung’, in Andreas Glaser and Lorenz Langer (eds.), *Die Verfassungsdynamik der europäischen Integration und demokratische Partizipation* (Zürich: Dike, 2015), p. 165.

²² Critically on whether a *general* need for flexibility and swiftness exists in the conduct of foreign relations: Bernhard Ehrenzeller, *Legislative Gewalt und Aussenpolitik: Eine rechtsvergleichende Studie zu den parlamentarischen Entscheidungskompetenzen des deutschen Bundestags, des amerikanischen Kongresses und der schweizerischen Bundesversammlung im auswärtigen Bereich* (Basel: Helbing Lichtenhahn, 1993), pp. 330–1.

²³ Kley and Portmann, ‘Aussenverfassung’, p. 1103.

²⁴ Conseil fédéral (CH), Message relative à une nouvelle constitution fédérale du 20 novembre 1996, Feuille fédérale 1997 I 1, pp. 14–15.

²⁵ Constitution of 1999, art. 3.

²⁶ Giovanni Biaggini, *BV Kommentar: Bundesverfassung der Schweizerischen Eidgenossenschaft* (Zürich: Orell Füssli, 2017), p. 583; Walter Haller, *The Swiss Constitution in a Comparative Context*, 2nd ed. (Zürich: Dike, 2016), p. 71; Roland Portmann, ‘Foreign Affairs Federalism in

a certain erosion of cantonal competences as internationalisation progresses. It is against this background that the Constitution of 1999, by way of compensation, stipulates that the Confederation ‘shall respect the powers of the Cantons and protect their interests’.²⁷ Moreover, the Constitution foresees a role for Cantons in foreign policy affairs, albeit a subordinate one. Concretely, Article 55 confers Cantons participatory rights in foreign policy decisions by stipulating that the Cantons ‘shall be consulted’ if the respective decisions ‘affect their powers or their essential interests’;²⁸ and that the ‘Confederation shall inform the Cantons fully and in good time and shall consult with them’.²⁹ Further, Article 56, which governs relations between the Cantons and foreign states, authorises the Cantons to conduct their own foreign policy in fields in which they are competent according to domestic federalism and to conclude treaties in these areas,³⁰ which is fittingly dubbed ‘small foreign policy’ (*kleine Aussenpolitik*).³¹ This autonomous foreign policy competence and residual treaty-making capacity of the Cantons³² is of considerable practical importance since no less than fifteen Cantons border at least one foreign state.³³

As regards the horizontal separation of powers, the Constitution is primarily concerned with the allocation of foreign relations competences between the executive and legislative branches, viz. between the government (Federal Council) on the one hand and the Parliament (Federal Assembly) and, for certain matters, the people, or the people and the Cantons, on the other. While some constitutions are based on a rebuttable presumption in favour of executive competence, the Swiss Constitution today follows a shared power approach whereby foreign relations are a domain equally entrusted to the executive and the legislature.³⁴ This was not always the case. Under the

Switzerland’, in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), pp. 300–1.

²⁷ Constitution of 1999, art. 54(3).

²⁸ Constitution of 1999, art. 55(1).

²⁹ Constitution of 1999, art. 55(2); these participatory rights are specified in the Federal Act on the Participation of the Cantons in the Foreign Policy of the Confederation, Classified compilation 138.1 (author’s translation of: Loi fédérale sur la participation des cantons à la politique extérieure de la Confédération du 22 décembre 1999) (hereinafter: Cantonal Participation Act).

³⁰ Portmann, ‘Federalism’, p. 300.

³¹ Thomas Pfisterer, ‘Art. 55’ in Bernhard Ehrenzeller et al. (eds.), *Die Schweizerische Bundesverfassung: St. Galler Kommentar*, 3rd ed., 2 vols. (Zürich: Dike, 2014), vol. I, p. 1162.

³² Portmann, ‘Federalism’, p. 299.

³³ Biaggini, ‘BV Kommentar’, p. 600.

³⁴ On the two approaches: Thomas Giegerich, ‘Foreign Relations Law’ (last updated January 2011), in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, online edition, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e937>, accessed 29 June 2020, para. 20; on Switzerland, see Conseil fédéral (CH), Message

Constitution of 1874, foreign policy was understood to be a prerogative of the executive whereas the role of Parliament, the people and Cantons was essentially limited to the approval of certain categories of treaties.³⁵ In 1994, a revision of the Constitution of 1874 was initiated. Since previous attempts had failed, the mandate for this revision was very narrowly defined, essentially consisting in an ‘update’ (*mise à jour*, ‘Nachführung’) rather than a redesign: its primary objective was to systematise and streamline the content of the constitutional document and to bring it in line with the then-existing constitutional practice without, however, engaging in its substantive amendment.³⁶ Yet, capturing ‘existing constitutional practice’ and drawing a line between documenting the status quo and introducing novel elements proved challenging, and foreign relations law is exemplary in this regard. The provisions (re-)defining the role of Parliament in shaping foreign policy were among the most fiercely debated aspects because they were deemed by some to overstep the ‘updating mandate’.³⁷ Indeed, the provisions ultimately adopted reflect a paradigm shift³⁸ as regards the allocation of authority on foreign policy by entrenching a shared power approach. However, this change did not happen overnight but rather started crystallising in preceding years in legislation and practice.

In constitutional terms, the shared power approach is expressed as follows: Article 184(1) stipulates, from the government’s perspective, that ‘[t]he Federal Council is responsible for foreign relations, subject to the right of participation of the Federal Assembly’; while Article 166(1) states, from the Parliament’s perspective, that ‘[t]he Federal Assembly shall participate in shaping foreign

relative à une nouvelle constitution fédérale du 20 novembre 1996, Feuille fédérale 1997 I 1, p. 399, and Kley and Portmann, ‘Aussenverfassung’, p. 1105, para. 25.

³⁵ However, some authors argued that not the constitutional text but its interpretation led to such limited role for Parliament: see, e.g., Fritz Fleiner and Zaccaria Giacometti, *Schweizerisches Bundesstaatsrecht* (Zürich: Polygraphischer Verlag, 1949), pp. 525–6; and, fifty years later, Ehrenzeller, *Legislative Gewalt*, pp. 293–300, especially p. 298.

³⁶ Eva Maria Belser, ‘Einleitung’, in Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (eds.), *Bundesverfassung: Basler Kommentar* (Basel: Helbing Lichtenhahn, 2015), p. 11.

³⁷ Biaggini, ‘Internationale Gemeinschaft’, 722; Florent Tripet Cordier, ‘Art. 152’, in Martin Graf, Cornelia Theler and Moritz von Wyss (eds.), *Parlamentsrecht und Parlamentspraxis der Schweizerischen Bundesversammlung: Kommentar zum Parlamentsgesetz (ParlG) vom 13. Dezember 2013* (Basel: Helbing Lichtenhahn, 2014), pp. 1035–6; mentioning these provisions as an example where the updating of the constitutional text necessarily implies the taking on board of novel elements: Conseil fédéral (CH), Message relative à une nouvelle constitution fédérale du 20 novembre 1996, Feuille fédérale 1997 I 1, p. 47.

³⁸ Expression used by Jörg Künzli, ‘Art. 184(1)’, in Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (eds.), *Bundesverfassung: Basler Kommentar* (Basel: Helbing Lichtenhahn, 2015), p. 2683.

policy and supervise the maintenance of foreign relations'. In order to describe this (new) cooperative relationship, which was specified by, inter alia, the Parliament Act,³⁹ Swiss constitutional doctrine metaphorically refers to the executive and legislative as 'fingers of the same hand' (*'les doigts d'une même main'*,⁴⁰ *'Verhältnis zu gesamter Hand'*).⁴¹ The inclusion of a model of shared competences and intense cooperation between the executive and the legislative in the Constitution of 1999 marks a milestone in the overall trend of erosion of the executive's monopoly over large parts of foreign relations and is strong proof of a move towards normalisation.

D Towards Normalisation of Foreign Relations

In the context of foreign relations law, the term 'normalisation' is used to denote the phenomenon that 'the conduct of foreign relations is increasingly subjected to the constitutional and other legal standards that apply to other governmental action'.⁴² From the brief overview on the main content of the Swiss 'external constitution' follows that foreign policy is no longer regarded as 'exceptional'⁴³ but rather as coming within the 'normal' constitutional framework.⁴⁴

First of all, in Switzerland, the long-held view that the principle of legality – that is, subjecting the exercise of political and administrative powers to the law – does not apply to foreign policy is now outdated.⁴⁵ In the early 1990s,

³⁹ Federal Act on the Federal Assembly (Parliament Act) of 13 December 2002, Classified compilation 171.10, especially arts. 24 and 152; on the genesis and content of these provisions: Luzian Odermatt and Esther Tophinke, 'Art. 24', in Martin Graf, Cornelia Theler and Moritz von Wyss (eds.), *Parlamentsrecht und Parlamentspraxis der Schweizerischen Bundesversammlung: Kommentar zum Parlamentsgesetz (ParlG) vom 13. Dezember 2013* (Basel: Helbing Lichtenhahn, 2014), pp. 195–201, and Tripet Cordier, 'Art. 152', pp. 1029–44.

⁴⁰ Conseil fédéral (CH), Message relative à une nouvelle constitution fédérale du 20 novembre 1996, Feuille fédérale 1997 I 1, p. 399.

⁴¹ Bundesrat (CH), Botschaft über eine neue Bundesverfassung vom 20. November 1996, Bundesblatt 1997 I 1, p. 392.

⁴² See the chapter by Aust and Kleinlein, p. 14; see further, e.g., Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 *Harvard Law Review* 1897–979 at 1901.

⁴³ The term 'foreign affairs exceptionalism' has been coined by Curtis A. Bradley, 'A New American Foreign Affairs Law' (1997) 70 *Colorado Law Review* 1089–107 at 1096, and stands for 'the view that the ... government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers'.

⁴⁴ See Portmann, 'Federalism', p. 302.

⁴⁵ On the development of this view, see Matthias Lanz, *Bundesversammlung und Aussenpolitik: Möglichkeiten und Grenzen parlamentarischer Mitwirkung* (Zürich: Dike, 2020), pp. 37–43.

Bernhard Ehrenzeller – author of the first comprehensive treatise examining the role of the legislative in foreign policy and advocate of a shared power approach – deplored that foreign affairs were, in various respects, perceived as ‘exceptional state activity’ and treated accordingly.⁴⁶ Indeed, at that time, Swiss practice and prevailing doctrine viewed foreign relations as an area that cannot be regulated by law.⁴⁷ Jean Monnier put it quite bluntly by writing that ‘foreign affairs are a subject matter inappropriate for codification’,⁴⁸ while Luzius Wildhaber warned that legislation related to foreign policy would risk lacking substance (or even be insubstantial altogether) and could at most pertain to the allocation of powers.⁴⁹ Bernhard Ehrenzeller criticised this ‘almost mythical perception of foreign policy as an area not susceptible to normalization’ that prevailed at the time.⁵⁰

Yet, at latest with the adoption of the Constitution of 1999, ‘a shift away from exceptionalism’ took place⁵¹ – to use a term coined by Curtis A. Bradley in this very period of time and describing a similar phenomenon occurring in the United States.⁵² As demonstrated, the Swiss Constitution provides substantive guidance for the conduct of Switzerland’s foreign policy (although still in a modest way as compared to the domestic policy sphere);⁵³ and the move towards normalisation is further evidenced by the ever-growing body of rules and statutes concretising and operationalising these foreign policy objectives.⁵⁴ All in all, the principle of legality – a cornerstone of the rule of

⁴⁶ Bernhard Ehrenzeller, *Legislative Gewalt und Aussenpolitik: Eine rechtsvergleichende Studie zu den parlamentarischen Entscheidungskompetenzen des deutschen Bundestags, des amerikanischen Kongresses und der schweizerischen Bundesversammlung im auswärtigen Bereich* (Basel: Helbing Lichtenhahn, 1993), p. 298 (in the original: ‘Sonderfall der Staatstätigkeit’).

⁴⁷ See, e.g., Luzius Wildhaber, ‘Legalitätsprinzip und Aussenpolitik’, in Edouard Brunner et al. (eds.), *Einblick in die schweizerische Aussenpolitik: Zum 65. Geburtstag für Staatssekretär Raymond Probst* (Zürich: Verlag Neue Zürcher Zeitung, 1984), p. 447.

⁴⁸ Jean Monnier, ‘Les principes et les règles constitutionnels de la politique étrangère’ (1986) 127/II *Revue de droit suisse* 107–247 at 157 (in the original: ‘la politique étrangère est une matière impropre à la codification’).

⁴⁹ Wildhaber, ‘Legalitätsprinzip und Aussenpolitik’, p. 455.

⁵⁰ Ehrenzeller, ‘Legislative Gewalt’, p. 299 (in the original: ‘die fast mythische Vorstellung von der Unnormierbarkeit der Aussenpolitik’).

⁵¹ Portmann, ‘Federalism’, p. 302; on today’s view that foreign relations are an area subject to and governed by law, see e.g., Astrid Epiney, ‘Beziehungen zum Ausland’, in Daniel Thürer, Jean-François Aubert and Jörg Paul Müller (eds.), *Verfassungsrecht der Schweiz – Droit constitutionnel suisse* (Zürich: Schulthess, 2001), p. 880; Künzli, ‘Art. 184(1)’, p. 2683.

⁵² Bradley, ‘New American Foreign Affairs Law’, 1104.

⁵³ See Oesch, ‘Europa-Artikel’, p. 166.

⁵⁴ See Lanz, ‘Bundesversammlung und Aussenpolitik’, p. 41; he argues that newer statutes (such as the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons of 18 December 2015, Classified compilation 196.1) evidence that foreign policy issues can be governed by law.

law and laid down in Article 5(1) of the Constitution of 1999 – today extends, as a general rule, to foreign policy.⁵⁵

The Constitution of 1999 has also heralded a shift towards normalisation as regards allocation of competences and brought foreign policy within the constitutional separation of powers framework. Foreign relations are no longer monopolised by the government but are a competence exercised jointly with Parliament. The latter has a right to steer foreign policy, notably by approving treaties⁵⁶ – a power explicitly mentioned in the Constitution⁵⁷ to which we turn now.

III ALLOCATION OF POWERS FOR TREATY-MAKING: TOWARDS DEMOCRATISATION

A Reaction to the Legalisation of World Politics

One of the encounters between international law and foreign relations law that has been identified by the editors is ‘procedure’.⁵⁸ Indeed, large parts of foreign relations law deal with procedure,⁵⁹ notably by distributing powers horizontally among the three branches of government;⁶⁰ and, within federal states, vertically between the various governmental levels.⁶¹ With international law having attained enormous importance, the rules allocating powers specifically for international lawmaking today form a core aspect of foreign relations law. A vast majority of constitutions adopted by nation-states include provisions allocating powers for the conclusion of treaties.⁶²

As regards the distribution of powers between the executive and legislative in treaty-making, ‘a sustained trend toward greater parliamentary involvement’

⁵⁵ Ehrenzeller, *Legislative Gewalt*, p. 371; as per Thomas Cottier, ‘“Tax Fraud or the Like”: Überlegungen und Lehren zum Legalitätsprinzip im Staatsvertragsrecht’ (2011) 130/*I Revue de droit suisse* 97–122 at 110, the principle of legality standards can be (and sometimes are) lowered in order to take the specificities of foreign policy into account.

⁵⁶ See Lanz, ‘Bundesversammlung und Aussenpolitik’, p. 43.

⁵⁷ Constitution of 1999, arts. 166(1) *juncto* 184(1).

⁵⁸ See the chapter by Aust and Kleinlein, p. 13.

⁵⁹ See the chapter by Aust and Kleinlein, p. 14.

⁶⁰ Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014), p. 7.

⁶¹ Giegerich, ‘Foreign Relations Law’, para. 39.

⁶² Tom Ginsburg, ‘Comparative Foreign Relations Law: A National Constitutions Perspective’, in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), p. 67.

has been identified and empirically backed.⁶³ Many constitutions require parliamentary authorisation before the executive consents to be bound by a treaty and the categories of international agreements necessitating prior approval have widened over time.⁶⁴ The shift from the executive's monopoly in treaty-making towards increasingly robust parliamentary participation can be observed in jurisdictions around the globe.⁶⁵ This transition from a complete separation of powers towards a shared power approach is commonly referred to as the 'democratisation' of the treaty-making process.⁶⁶

The main driver behind the democratisation of the treaty-making process is the growing importance of international law in the post-Cold War period.⁶⁷ With this, an increasing number of aspects previously regulated by domestic law became matters of international law. As a consequence, they fell to the executive, which, at that time, held primary responsibility for foreign relations and were thus removed from the legislature's ambit.⁶⁸ In order to reduce the democratic deficit resulting from globalisation and enhanced international cooperation and to re-institute the constitutional balance in the realm of lawmaking, steps towards (more closely) associating Parliament with the treaty-making process were considered a necessity.⁶⁹

B *The Concept of 'Parallelism' in Switzerland*

As regards the development of the Swiss rules allocating powers for international lawmaking, democratisation is indisputably the leitmotif as well. Already under the Constitution of 1874 and thus at a time when Swiss doctrine and practice considered foreign relations to be a prerogative of the executive, parliamentary approval was required for specific treaties.⁷⁰ As early as 1921, an

⁶³ Pierre-Hugues Verdier and Mila Versteeg, 'Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey', in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), pp. 137 and 142.

⁶⁴ See, e.g., Jenny S. Martinez, 'The Constitutional Allocation of Executive and Legislative Power over Foreign Relations', in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), p. 104.

⁶⁵ Verdier and Versteeg, 'A Global Survey', p. 142.

⁶⁶ Term used, e.g., by Luzius Wildhaber, *Treaty-Making Power and Constitutions: An International and Comparative Study* (Basel: Helbing Lichtenhahn, 1971), p. 9.

⁶⁷ In more detail, see text relating to n. 113 ff. below.

⁶⁸ See Anne Peters, 'The Globalization of State Constitutions', in Janne Nijman and André Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007), pp. 282–3, on the democratic deficiencies resulting from globalisation.

⁶⁹ See Giegerich, 'Foreign Relations Law', para. 51.

⁷⁰ See Odermatt and Tophinke, 'Art. 24', p. 197.

optional referendum for treaties not containing a withdrawal clause or concluded for a duration of more than fifteen years was introduced, a move towards democratisation triggered by massive protests against a previously concluded treaty of unlimited duration concerning the Gotthard tunnel.⁷¹ In 1977, treaties entailing accession to IOs or a ‘multilateral unification of the law’ became eligible for the optional referendum, while accession to organisations of supranational character or collective security were subjected to the mandatory referendum.⁷² This major step in the democratisation process was deemed necessary in light of the increasing number of treaties pertaining to matters previously governed by federal acts and thus removing them from parliamentary enactment and the popular referendum.⁷³

During the span of the last century, participatory rights in the treaty-making process have steadily been expanded. Yet, it was only in the late 1990s that a paradigm shift regarding democratic participation in international lawmaking occurred: the idea of reducing incongruities, which guided earlier reforms, gave way to the concept of congruence or – to use a word forged by the federal authorities in this context – ‘parallelism’ between domestic and international lawmaking.⁷⁴ The concept of ‘parallelism’ essentially entails applying the same degree of democratic legitimacy in the realm of treaty-making as is required for the enactment of domestic statutes, which means that similar democratic participation rights should be granted regardless of whether an important treaty or a federal act is being adopted.⁷⁵ Hence, it is not the form (treaty or federal act) but the normative content of a legal instrument that should be decisive for the question of whether it is subject to a referendum. This idea was (partially) implemented in 2003: in the domestic sphere, ‘[a]ll significant provisions that establish binding legal rules must be enacted in the form of a federal act’, which is subject to the optional referendum.⁷⁶ As a consequence, all treaties containing ‘important legislative provisions’ or the implementation of which requires the enactment

⁷¹ Yvo Hangartner and Andreas Kley, *Die demokratischen Rechte in Bund und Kantonen der Schweizerischen Eidgenossenschaft* (Zürich: Schulthess, 2000), pp. 435–6.

⁷² See Hangartner and Kley, *Demokratischen Rechte*, p. 436.

⁷³ See Conseil fédéral (CH), Message concernant de nouvelles dispositions sur le référendum en matière de traités internationaux du 23 octobre 1974, Feuille fédérale 1974 II 1133, pp. 1146–7.

⁷⁴ Oliver Diggelmann, ‘Verletzt die “Standardabkommen-Praxis” der Bundesversammlung die Bundesverfassung?’ (2014) 115 *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 291–323 at 294.

⁷⁵ See, e.g., Conseil fédéral (CH), Message concernant la loi fédérale sur la compétence de conclure des traités internationaux de portée mineure et sur l’application provisoire des traités internationaux du 4 juillet 2012, Feuille fédérale 2012 6959, pp. 6973–4.

⁷⁶ Constitution of 1999, art. 164(1) *juncto* art. 141(1)(a).

of federal acts, were equally made eligible for the optional treaty referendum.⁷⁷

While initially developed in the context of the optional referendum, the concept of ‘parallelism’ later became a general guiding principle for the allocation of powers regarding international lawmaking,⁷⁸ and even for rules governing the relationship between the Swiss legal order and international law more generally.⁷⁹ The idea of ‘parallelism’ is essentially the Swiss response to the hollowing out of (direct) democracy and cantonal autonomy brought about by internationalisation. It constitutes the benchmark to be attained in the effort to democratise international lawmaking ‘from below’.

C *Far-Reaching Democratic Participatory Rights*

Since foreign relations law is ‘undoubtedly shaped by the specific elements of each state’s constitution’⁸⁰ and direct democracy being a hallmark of the Swiss constitutional system, it is hardly surprising that democratic participatory rights in international treaty-making are well-developed. From a comparative perspective, the participatory rights are arguably even unique in terms of the actors involved, the phases during which participation is possible, and regarding their intensity and effect.⁸¹ As we will see, not only the bicameral Parliament, but also the people, Cantons, and even interested groups and political parties – albeit to a very limited degree – are granted certain participatory rights. Importantly, participation is not limited to the approval of treaties, but extends from the initiation and negotiation phase to the provisional application and termination of treaties.

⁷⁷ Conseil fédéral (CH), Message relatif à l’initiative populaire ‘Pour le renforcement des droits populaires dans la politique étrangère (accords internationaux: la parole au peuple!)’ du 1er octobre 2010, Feuille fédérale 2010 6335, p. 6359.

⁷⁸ See, e.g., the pending proposal to further implement the concept in the context of the *mandatory* referendum: Conseil fédéral (CH), Message concernant le référendum obligatoire pour les traités internationaux ayant un caractère constitutionnel du 15 janvier 2020, Feuille fédérale 2020 1195.

⁷⁹ E.g., regarding the publication of legal acts, see Conseil fédéral (CH), Message relatif à la modification de la loi sur les publications du 28 août 2013, Feuille fédérale 2013 6325, p. 6343.

⁸⁰ McLachlan, *Foreign Relations Law*, p. 10; see also the chapter by Aust and Kleinlein, p. 14, on the embedment of allocation of authority rules in the constitutional structures and domestic legal cultures.

⁸¹ See Kunz and Peters, ‘Democratisation in Switzerland’, p. 1508 (on the ‘intensity of parliamentarisation’); Anne Peters and Raffaella Kunz, ‘Voting Down International Law? Lessons from Switzerland for Compensatory Constitutionalism’, *Völkerrechtsblog*, 3 December 2018, p. 2 (on Switzerland probably having the ‘most far-reaching democratic participation rights for its citizens’); and Portmann, ‘Federalism’, p. 311 (on the unique interplay between federalism and direct democracy).

The initiative to participate in, or even launch, a treaty-making process with other like-minded states stems, as a general rule, from the Federal Council. Yet Parliament, through means of parliamentary procedural requests,⁸² may urge the government to join a given treaty-making process.⁸³ The ultimate decision on the commencement of treaty negotiations remains, however, with the Federal Council.⁸⁴ Even the people can trigger treaty negotiations by requesting an amendment of the Constitution, which directs the government to commence specific negotiations.⁸⁵ The popular initiative ‘Yes to Europe!’, for example, entailed a constitutional amendment stipulating that ‘[t]he Federal Government shall enter into accession negotiations with the European Union without delay’.⁸⁶

If the treaty is of major importance, the so-called consultation procedure is carried out at this early stage (as compared to lesser but still ‘significant’ treaties, for which the procedure only takes place prior to the submission of the treaty to Parliament for approval). This procedure allows any person and any organisation to express its views on the treaty to be negotiated (or to be ratified if the procedure takes place at the later stage).⁸⁷ Specific stakeholders – notably the Cantons, political parties and national umbrella organisations for the economic sector – are specifically invited to participate in the procedure,⁸⁸ the purpose of which is to associate a broad circle of actors ‘in the shaping of opinion and the decision-making process’ and ‘to provide information on material accuracy, feasibility of implementation and public acceptance of a federal project’.⁸⁹ The latter aspect is not to be underestimated in light of the looming referendum.⁹⁰

As mentioned, foreign relations are a federal power, which even extends to matters for which, in the internal policy sphere, the Cantons are competent. Internationalisation thus encroaches on the competences of the Cantons,

⁸² On the different means, see Parliament Act, art. 118 et seq.

⁸³ Lanz, ‘Bundesversammlung und Aussenpolitik’, pp. 165–6.

⁸⁴ CH, Directorate for European Affairs DEA, ‘Yes to Europe!’, last updated 27 November 2017, www.eda.admin.ch/dea/en/home/europapolitik/abstimmungen/ja-zu-europa.html, accessed 1 July 2020 (initiative was rejected in a popular vote).

⁸⁵ Roger Nobs, *Volksinitiative und Völkerrecht. Eine Studie zur Volksinitiative im Kontext der schweizerischen Aussenpolitik unter besonderer Berücksichtigung des Verhältnisses zum Völkerrecht* (Dissertation University of St. Gallen, 2006), pp. 138–43.

⁸⁶ Chancellerie fédérale (CH), ‘Initiative populaire fédérale “Oui à l’Europe!”’, www.bk.admin.ch/ch/d/pore/vi/vis254t.html, accessed 1 July 2020.

⁸⁷ Constitution of 1999, art. 147; Federal Act on the Consultation Procedure (Consultation Procedure Act) of 18 March 2005, Classified compilation 172.061, art. 4(1).

⁸⁸ Consultation Procedure Act, art. 4(2).

⁸⁹ Consultation Procedure Act, art. 2(2).

⁹⁰ Haller, *Swiss Constitution*, p. 244.

which are, by way of compensation, granted a series of participatory rights.⁹¹ Apart from associating them to the consultation procedure pertaining to treaties, the Cantons must, as a rule, be consulted before treaty negotiations start.⁹² The Federal Council must consider their comments; if the treaty to be negotiated affects cantonal competences, it must attach particular weight to them and provide reasons if it deviates from their positions.⁹³

The determination of the negotiation mandate is an executive competence, yet the Federal Council must consult the Foreign Policy Committees⁹⁴ on 'the guidelines and directives relating to mandates for important international negotiations before it decides on or amends the same'.⁹⁵ Further, the government 'shall inform these committees of the status of its plans and of the progress made in negotiations'.⁹⁶ At times, parliamentarians also seek to influence ongoing negotiations by means of parliamentary procedural requests, by which the executive is, however, not legally bound.⁹⁷ If a treaty affects the competences (and not only the interests)⁹⁸ of the Cantons, they must be involved in the preparation of the negotiation mandate and 'shall participate in negotiations in an appropriate manner'.⁹⁹

While the signing of treaties falls within the competence of the Federal Council,¹⁰⁰ the Constitution of 1999 establishes a presumption that they must be approved by Parliament.¹⁰¹ Importantly, the Federal Assembly must not only approve the conclusion and amendment of treaties, but – since December 2019 and in an effort to further implement the concept of 'parallelism' – also the withdrawal from them.¹⁰² An exception to parliamentary approval exists if the Federal Council is authorised to conclude, amend or withdraw from a treaty at its own behest by virtue of a federal act or an international treaty approved by

⁹¹ See text relating to n. 27 ff. above.

⁹² Cantonal Participation Act, art. 4(2).

⁹³ Cantonal Participation Act, art. 4(3).

⁹⁴ 'Committees' are 'groups formed from a set number of members of Parliament' whose 'principle task is to discuss the items of business assigned to them before these are debated in the chamber'; the National Council has twelve permanent committees and the Council of States has eleven: Lexicon of Parliamentary Terms, 'Committees', www.parlament.ch/en/ü-ber-das-parlament/parlamentswörterbuch, accessed 1 July 2020.

⁹⁵ Parliament Act, art. 152(3).

⁹⁶ Parliament Act, art. 152(3).

⁹⁷ For examples, see Lanz, 'Bundesversammlung und Aussenpolitik', p. 168.

⁹⁸ Biaggini, 'BV Kommentar', p. 597.

⁹⁹ Constitution of 1999, art. 55(3); Cantonal Participation Act, art. 5(1).

¹⁰⁰ Constitution of 1999, art. 184(2).

¹⁰¹ Constitution of 1999, art. 166(2); Parliament Act, art. 24(2).

¹⁰² Parliament Act, art. 24(2).

Parliament.¹⁰³ Essentially, the executive is allowed to do so for treaties of ‘limited scope’.¹⁰⁴ When approving a treaty, the Federal Assembly can also approve, amend, reject or request reservations; and the Federal Council is, generally, obliged to comply.¹⁰⁵ A recent addition to Parliament’s participation tool-kit is the obligation of the Federal Council to consult the Foreign Policy Committees on the provisional application of a treaty later subject to parliamentary approval. If both Committees are against provisional application, the Federal Council must refrain therefrom.¹⁰⁶

Finally, and this is a Swiss idiosyncrasy, various categories of treaties are subject to a popular referendum. If a treaty entails accession to an organisation for collective security or of a supranational nature, the mandatory referendum applies. Mandatory means that the referendum is carried out *ex officio*, that is, without the need for a referendum request; and its adoption requires a double majority of the people and the Cantons.¹⁰⁷ So far, the only mandatory referendum held was in 1986, concerning Switzerland’s accession to the United Nations.¹⁰⁸ The optional referendum, the adoption of which only requires a majority of the people, is carried out solely at the request of 50,000 voters or eight Cantons. Subject to the optional referendum are treaties that are of unlimited duration and may not be terminated, treaties leading to the accession to an IO, and treaties containing important legislative provisions, or whose implementation requires the enactment of a federal act.¹⁰⁹ If no referendum is requested or the treaty passes the vote, the Federal Council is authorised to proceed to ratification.¹¹⁰ Switzerland being a monist state, treaties take effect domestically as soon as they bind the state at the international plane.¹¹¹ All treaties eligible for the mandatory or optional referendum, and other treaties ‘that enact law or confer

¹⁰³ Constitution of 1999, art. 166(2); Parliament Act, art. 24(2); Government and Administration Organisation Act of 21 March 1997, Classified compilation 172.010, art. 7a(1).

¹⁰⁴ Government and Administration Organisation Act, art. 7a(2)–(4).

¹⁰⁵ Claude Schenker, Département fédéral des affaires étrangères (CH), ‘Guide de la pratique en matière de traités internationaux’, édition 2015, available at www.eda.admin.ch/dam/eda/fr/documents/publications/Voelkerrecht/Praxisleitfaden-Voelkerrechtliche-Vertraege_fr.pdf, accessed 1 July 2020, p. 35.

¹⁰⁶ Parliament Act, art. 152(3bis) and (3ter); the provision entered into force on 2 December 2019.

¹⁰⁷ Constitution of 1999, art. 140(1)(b).

¹⁰⁸ Biaggini, ‘BV Kommentar’, p. 1121.

¹⁰⁹ Constitution of 1999, art. 141(1)(d).

¹¹⁰ Constitution of 1999, art. 184(2).

¹¹¹ Ammann, *Domestic Courts and the Interpretation of International Law*, p. 72.

legislative powers', must be published in the compilations of federal legislation.¹¹²

D *A Child of Its Time: A Strong Treaty Focus*

In Switzerland, the democratisation of international lawmaking 'from below' – along the lines of the concept of 'parallelism' – is rather advanced. Very broadly speaking, the allocation of authority in international treaty-making is no longer fundamentally different from domestic lawmaking. Normalisation and democratisation of this subset of rules of Swiss foreign relations law is accomplished to a high degree.

Yet, a limitation of the legal framework on democratic participation in international lawmaking is palpably obvious. It is geared towards just one source of international law: treaties. This treaty focus is plausible if we consider the context in which these rules originated and developed. While participatory rights have steadily expanded over the last century, they experienced a more rapid growth in the 1990s and the first years of the new millennium. This boost mirrors the 'legalisation' of world politics¹¹³ and how international law was 'on the rise' both qualitatively¹¹⁴ and quantitatively¹¹⁵ speaking during this period.

This 'move to law' that arose in world politics¹¹⁶ after the end of the Cold War has most notably been brought about by the conclusion of treaties. This period of time 'witnessed a striking proliferation in treaties' codifying more traditional topics of international law as well as newer ones previously understood as being unsuitable for international regulation, such as international criminal law.¹¹⁷ A sharp increase in the number of treaties concluded can also be observed in Switzerland. In the first half of the 1980s, Switzerland entered

¹¹² Federal Act on the Compilations of Federal Legislation and the Federal Gazette (Publications Act) of 18 June 2004, Official compilation 170.512, art. 3(1).

¹¹³ Judith Goldstein et al., 'Introduction: Legalization and World Politics' (2000) 54 *International Organizations* 285–399 at 386; Edith Brown Weiss, 'The Rise or the Fall of International Law?' (2000) 69 *Fordham Law Review* 345–72 at 351.

¹¹⁴ See, e.g., Heike Krieger and Georg Nolte, 'The International Rule of Law-Rise or Decline? Approaching Current Foundational Challenges' in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds.), *The International Rule of Law: Rise or Decline?* (Oxford: Oxford University Press, 2019), pp. 12–13.

¹¹⁵ See, e.g., Kenneth W. Abbott, Jessica Green and Robert O. Keohane, 'Organizational Ecology and Institutional Change in Global Governance' (2016) 70 *International Organization* 247–77 at 247; and Goldstein et al., 'Legalization and World Politics', 386.

¹¹⁶ Goldstein et al., 'Legalization and World Politics', 385.

¹¹⁷ José E. Alvarez, 'The New Treaty Makers' (2002) 25 *Boston College International and Comparative Law Review* 213–34 at 216.

into around seventy treaties yearly; in the early 1990s, the number was already at 135, meaning that the figure nearly doubled in less than a decade. Between 2000 and 2003, the sheer number of roughly 210 treaties were concluded per year, which represents a growth of 55 per cent compared to the early 1990s.¹¹⁸ It is against the backdrop of this changing international landscape with a ‘gigantic treaty network’¹¹⁹ under construction, that the Swiss concept of ‘parallelism’ came into being and a major expansion of democratic participation rights took place. Being a child of its time, it is nothing but understandable that the respective rules are heavily oriented towards treaties.

The years leading up to the turn of the millennium were characterised by a belief (in hindsight, some even term it a ‘mantra’)¹²⁰ among international law scholars that the legalisation trend would persist and that international law, and therewith the treaty ‘production rate’, would continue to grow exponentially.¹²¹ Yet, ‘times are changing’ – as Andreas Zimmermann wrote in allusion to the Bob Dylan song – and the then ‘prevailing euphoria’ among international law scholars as to international law becoming increasingly and steadily more efficient, value-oriented and richer in content has since abated.¹²² The contemporary views about the state and future of international law are more pessimistic: the discourse of international law being ‘on the rise’ turned into whether international law is ‘in decline’.¹²³ Whether the manifestation of signs of crisis indicate the beginning of a general downward trend across all sub-branches of international law remains to be seen. What is already empirically proven, though, is the stagnation of *formal* international law.¹²⁴ The number of adopted treaties has fallen dramatically: between 1950 and 2000, the number of multilateral treaties deposited with the UN Secretary General per year was never below thirty-four; between 2005 and 2010, the count was at nine per year, and not a single multilateral treaty was deposited in

¹¹⁸ Oliver Diggelmann, *Der liberale Verfassungsstaat und die Internationalisierung der Politik: Veränderungen von Staat und Politik in der Schweiz* (Bern: Stämpfli, 2005), p. 2.

¹¹⁹ Alvarez, ‘The New Treaty Makers’, 218 (citing Roy Lee, ‘Multilateral Treaty-Making and Negotiation Techniques: An Appraisal’, in Bin Chang and Eduard Brown (eds.), *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on his Eightieth Birthday* (London: Stevens, 1988), p. 158).

¹²⁰ Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, ‘When Structures become Shackles: Stagnation and Dynamics in International Lawmaking’ (2014) 25 *The European Journal of International Law* 733–63 at 733.

¹²¹ See, e.g., Alvarez, ‘The New Treaty Makers’, 217.

¹²² Andreas Zimmermann, ‘Times Are Changing – and What About the International Rule of Law Then?’, *EJIL: Talk!*, 5 March 2018, p. 3.

¹²³ See, e.g., Krieger and Nolte, ‘The International Rule of Law-Rise or Decline?’, *passim*.

¹²⁴ Pauwelyn, Wessel and Wouters, ‘When Structures become Shackles’, 734.

2011, 2012 or 2013.¹²⁵ A certain ‘treaty fatigue’ has spread across the international community.¹²⁶

IV TURN TO INFORMAL INTERNATIONAL LAWMAKING: BRIDGES UNDER CONSTRUCTION

A Informal International Law Superseding Formal International Law

While formal lawmaking through the adoption of treaties is in decline, the demand for rules governing transnational or global phenomena is on the rise.¹²⁷ This growing need for norms is notably catered to by what is referred to as ‘informal law’ – that is, instruments which fall short of the traditional sources of international law¹²⁸ but are normative in the sense that they ‘steer . . . behaviour or determine . . . the freedom of actors’.¹²⁹ Importantly, informal lawmaking, which progressively supersedes formal lawmaking,¹³⁰ not only differs from the latter in terms of the normative output it produces, but also regarding the process and actors involved. Informal lawmaking has been defined as:

Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (*process informality*), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (*actor informality*) and/or which does not result in a formal treaty or other traditional source of international law (*output informality*).¹³¹

Informal law is not a new means for regulating international cooperation,¹³² but its occurrence and crowding out effect on formal law (most notably treaties) significantly increased after the turn of the millennium – such that informal lawmaking has been termed a ‘signature development’ of

¹²⁵ Pauwelyn, Wessel and Wouters, ‘When Structures become Shackles’, 734–5.

¹²⁶ Pauwelyn, Wessel and Wouters, ‘When Structures become Shackles’, 739.

¹²⁷ See Ayelet Berman, ‘Is There a Stagnation in International Law?’ (2015) 109 *Proceedings of the Annual Meeting (American Society of International Law)* 71–74 at 73.

¹²⁸ Berman, ‘Stagnation in International Law’, 71.

¹²⁹ Joost Pauwelyn, ‘Informal International Lawmaking: Framing the Concept and Research Questions’, in Joost Pauwelyn, Ramses A. Wessels and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012), p. 16.

¹³⁰ Pauwelyn, Wessel and Wouters, ‘When Structures become Shackles’, 734.

¹³¹ Pauwelyn, ‘Informal International Lawmaking’, p. 22.

¹³² Berman, ‘Stagnation in International Law’, 73.

contemporary global governance.¹³³ While various reasons account for the rise of informal international law,¹³⁴ the ‘dramatic’ changes in institutions of global governance¹³⁵ in recent years are a key factor. Traditionally, the main players in international lawmaking were states and IOs; the latter, occasionally referred to as ‘treaty machines’, played a central part in treaty-making.¹³⁶ José Alvarez noticed that the proliferation of treaties has been ‘aided and abetted by the concomitant rise in intergovernmental organizations’ and that the age of treaties is therefore ‘not incidentally also the age of IOs’.¹³⁷ In the early 2000s, however, the formation of new IOs slowed markedly.¹³⁸ Simultaneously, the number of non-state actors active at the international level – notably in the ‘production of normativity’¹³⁹ – multiplied. They are a diverse group, ranging from NGOs and transnational corporations to industry associations and regulatory agencies.¹⁴⁰ As they have yet to acquire international legal personality, they lack treaty-making capacity; as a consequence, any normative instrument they adopt is informal in nature.¹⁴¹

B *The Development of ‘Soft Participatory Rights’ for ‘Soft Law’*

In recent years, awareness of the potential of informal law (similar to that of formal law) to limit the domestic policy space has grown considerably among Parliament and the broader public. For a while, the Migration Pact was the epitome of the ‘encroachment potential’ of informal law. Meanwhile, the discussion moved beyond this specific instrument and turned into a more principled one: how to involve Parliament more closely in ‘soft law projects’.¹⁴²

¹³³ Jean Galbraith and David T. Zaring, ‘Soft Law as Foreign Relations Law’ (2014) 99 *Cornell Law Review* 735–94 at 745.

¹³⁴ See, e.g., Brown Weiss, ‘The Rise or the Fall of International Law?’, 352.

¹³⁵ See Abbott, Green and Keohane, ‘Organizational Ecology and Institutional Change’, 247 and 271.

¹³⁶ José E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005), pp. 275–6.

¹³⁷ Alvarez, ‘The New Treaty Makers’, 217.

¹³⁸ Abbott, Green and Keohane, ‘Organizational Ecology and Institutional Change’, 247.

¹³⁹ See the chapter by Aust and Kleinlein, p. 11.

¹⁴⁰ Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *Leiden Journal of International Law* 579–610 at 592–3.

¹⁴¹ Berman, ‘Stagnation in International Law’, 73.

¹⁴² See The Federal Council (CH), ‘Parliament to be more closely involved in soft law projects’, 27 June 2019, www.admin.ch/gov/en/start/documentation/media-releases.msg-id-75590.html, accessed 1 July 2020.

While the debate on democratic participation in informal lawmaking gained momentum with the Migration Pact, it is far from novel in Switzerland. Rather, the role of Parliament in the making of 'non-binding instruments' has been discussed time and again – often in connection with 'soft law' in the fields of banking, finance and tax. As early as 1985, a member of Parliament requested the Federal Council to consider rejecting an OECD recommendation on banking secrecy.¹⁴³ The request was rebuffed with the competent Federal Chancellor replying that the government did not intend to enter into a binding obligation and, consequently, had no reason to consult Parliament 'in advance – and certainly not in advance! – on what it must do'; rather, it would be for the executive to decide on Switzerland's position as long as it did not legally oblige the country.¹⁴⁴ The answer is reflective of the allocation of powers as it stood under the Constitution of 1874, where foreign relations matters were a prerogative of the executive.

It was only under the Constitution of 1999, which conceives foreign relations as a shared competence requiring close cooperation between the executive and legislative branches, that things changed. In 2002, the Parliament Act was adopted, Article 152 of which obliges the executive to inform the Foreign Policy Committees 'regularly, comprehensively and in good time of important foreign policy developments'; and to consult and update them on 'important plans' ('orientations principales', 'wesentliche Vorhaben').¹⁴⁵ As per the common understanding, the notion of 'important plans' includes 'soft law' projects of a certain significance.¹⁴⁶ Yet, the implementation of Article 152 of the Parliament Act has been far from frictionless; Parliament – or at least some of its members – has felt bypassed by the government on more than one occasion.¹⁴⁷

As a consequence, the notion of 'important plans' of Article 152(3) of the Parliament Act was clarified by including Article 5b in the Government and Administration Organisation Ordinance in 2016, which defines two instances in which the Foreign Policy Committees must be consulted. First, if the implementation of recommendations of IOs or multinational fora requires

¹⁴³ Bulletin officiel de l'Assemblée fédérale (CH), Conseil national, 1985, vol. III, Interpellation urgente Eisenring: Recommendation de l'OECD concernant le secret bancaire (85.435), p. 1070.

¹⁴⁴ Interpellation urgente Eisenring: Recommendation de l'OECD concernant le secret bancaire, p. 1075 (author's own translation).

¹⁴⁵ Parliament Act, art. 152(3); the Foreign Policy Committees and other parliamentary committees can also *request* to be informed and consulted: Parliament Act, art. 152(5).

¹⁴⁶ Tripet Cordier, 'Art. 152', p. 1040.

¹⁴⁷ For a detailed account, see Francesco Naef, 'Soft Law und Gewaltenteilung: Über die Kunst der Legiferierung durch die Katzenklappe' (2015) 8 *Aktuelle Juristische Praxis* 1109–21 at 1115–19.

the enactment or substantial revision of a federal act. Second, if a failure to implement exposes Switzerland to risk of serious economic disadvantage, sanctions, isolation or damage to its political reputation, or if other serious disadvantages for Switzerland are to be expected.¹⁴⁸ This long-winded wording not only testifies to the fact that informal law may exert a certain compliance pull on states, but also to the difficulty of defining instances that trigger consultation rights in abstract terms.

The newly introduced provision soon came under fire, in part for enshrining parliamentary rights in an ordinance, which can be modified or revoked by the government alone, rather than a formal law.¹⁴⁹ Moreover, despite the more detailed description of the instances in which Parliament must be consulted, it again felt bypassed – notably in the context of the Migration Pact. It is against this background that the Foreign Policy Committee of the Council of States tasked the government to report on the ‘growing role of soft law in international relations’ and ‘the resulting creeping weakening of Parliament’s democratic rights’ and to consider possible amendments of Article 152 of the Parliament Act.¹⁵⁰ All things considered, the propositions put forward in the report to better associate Parliament in the making of ‘soft law’¹⁵¹ are neither novel nor revolutionary, yet the report’s significance may lay elsewhere. While the Federal Council has long been rather reserved about further increasing parliamentary participation in the field of ‘soft law’, it now ‘considers it a priority to create the necessary conditions for Parliament to better assess soft law instruments and, on this basis, to exercise its right to participate in a more targeted manner.’¹⁵²

C Demands for ‘Hard Participatory Rights’ for ‘Soft Law’

The democratisation of informal lawmaking ‘from below’ is arguably more developed in Switzerland than in many other jurisdictions, but it is still

¹⁴⁸ Ordonnance sur l’organisation du gouvernement et de l’administration du 25 novembre 1998, Recueil systématique 172.010.1.

¹⁴⁹ See, e.g., Conseil national (CH), Groupe PDC, interpellation 18.4112, ‘Participation du Parlement aux décisions portant sur du droit souple: Absence de ligne claire du Conseil fédéral’, 28.11.2018.

¹⁵⁰ Conseil des Etats (CH), Commission de politique extérieure, postulat 18.4104, ‘Consultation et participation du Parlement dans le domaine du droit souple (“soft law”)', 12 November 2018 (author’s own translations).

¹⁵¹ For the various options, see Conseil federal (CH), ‘Consultation et participation du Parlement dans le domaine du droit souple (“soft law”)', Rapport du Conseil federal en réponse au postulat 18.4104, Commission de politique extérieure CE, 12 novembre 2018 (hereinafter: Federal Council, ‘Soft Law Report’), pp. 18–19.

¹⁵² Federal Council, ‘Parliament to be more closely involved in soft law projects’.

relatively embryonic when compared with democratic participation in treaty-making. In terms of actors, only parliamentary committees (and, among them, mainly the Foreign Policy Committees) are granted information and consultation rights – not Parliament as a whole, let alone the people, Cantons or broader public.¹⁵³ As regards the phases and intensity, solely a right to be informed and consulted during the making of informal law is granted, but not the veto power that Parliament, the people and Cantons possess vis-à-vis certain categories of treaties through parliamentary approval or referenda. Broadly speaking, nothing more than ‘soft participatory rights’ are available for ‘soft law’, while ‘hard participatory rights’ are reserved for ‘hard law’ – that is, treaties. For a long time, the discussion surrounding the expansion of democratic participation rights centred on the scope of information and consultation rights. With the Migration Pact, however, the reform discussion took on a new dimension: a rather widely supported claim for ‘hard participatory rights’ in informal lawmaking was formulated. No less than three different parliamentary committees – the composition of which reflects the strength of the political parties of the respective parliamentary chamber¹⁵⁴ – instructed the Federal Council not to sign the Migration Pact during the UN Conference in Morocco in December 2011 and to submit it to Parliament for approval.¹⁵⁵ Individual requests even tabled the question whether the people and Cantons, by means of popular referendum, should have the final say on Switzerland’s participation.¹⁵⁶

To shrug off the call for ‘hard participation’, which took shape in the context of the Migration Pact, as a purely populist manoeuvre would not do the matter justice.¹⁵⁷ Admittedly, had the Pact pertained not to migration, but say civil aviation, it would have sparked very little debate;¹⁵⁸ moreover, various parliamentary requests on the matter had populist undertones. For example, the Swiss People’s Party unleashed a barrage of criticism about Switzerland’s

¹⁵³ As it is the case for treaties, see above Section III.C.

¹⁵⁴ Parliament Act, art. 43(3).

¹⁵⁵ Conseil national (CH), Commission des institutions politiques, motion 18.4093, ‘Pacte de l’ONU sur les migrations: Soumettre à l’Assemblée fédérale la décision d’approbation’, 19 October 2018; Conseil des Etats (CH), Commission des institutions politiques, motion 18.4103, ‘Pacte de l’ONU sur les migrations: Soumettre à l’Assemblée fédérale la décision d’approbation’, 8 November 2018; Conseil des Etats (CH), Commission de politique extérieure, motion 18.4106, ‘Pacte mondial des Nations Unies sur les migrations: Soumettre à l’Assemblée fédérale la décision d’approbation’, 12 November 2018.

¹⁵⁶ See, e.g., Conseil national (CH), A. Glarner, interpellation 18.3842, ‘Pacte de l’ONU sur les migrations: Participation démocratique et validité intraétatique’, 26 September 2018.

¹⁵⁷ Peters and Kunz, ‘Voting down international law?’, p. 4.

¹⁵⁸ Federal Council, ‘Soft Law Report’, p. 16.

leading role in the making of the Pact – even asking whether the Swiss ambassador should incur liability for having facilitated the process.¹⁵⁹ Hence, to some extent, the debate on democratic participation in informal lawmaking has been hijacked by the right-wing populist party in order to make political capital. At the same time, various requests – especially those emanating from parliamentary committees¹⁶⁰ – seem to have been truly spurred by the concern that informal lawmaking suffers from democratic deficits. It is arguably this broader, cross-party call for ‘hard’ participation that ultimately led to the Federal Council’s decision not to sign the Pact in December 2018 and to submit the decision to Parliament. Yet the government tried its best not to set a precedent, stressing that according to the current rules on allocation of powers, namely Article 184(1) of the Constitution, it is authorised to sign the Pact in its own competence, and that the decision to submit it to Parliament was taken solely for political (not legal) reasons. Consequently, the Federal Council formally rejected the parliamentary requests asking for the Pact’s submission to Parliament but acted in conformity with the requests as a matter of fact.¹⁶¹

At this juncture, it is difficult to tell whether the decision to submit the Migration Pact to Parliament for approval (which, as of January 2021, has yet to happen) broke through the glass ceiling in terms of limiting participation in informal law to ‘soft participatory rights’. At the time of writing, discussions on whether to grant ‘hard participatory rights’ are ongoing. A parliamentary initiative submitted in the National Council, which requests adaptation of the rules on allocation of authority in a way that foresees parliamentary approval for ‘soft law’, is currently pending. Concretely, it suggests to submit to Parliament those informal instruments that involve compliance-monitoring, from which reporting obligations arise, if non-compliance may constitute a breach of the principle of good faith, or if its implementation is likely to require the enactment or amendment of a federal act.¹⁶² In the Council of States, the Foreign Policy Committee suggested to establish a sub-commission specifically tasked with evaluating the need for legislative action in order to ensure parliamentary participation in informal lawmaking.¹⁶³ As a

¹⁵⁹ Conseil national (CH), T. Matter, question 18,5601, ‘Pacte de l’ONU sur les migrations: Conséquences pour les responsables’, 26 November 2018.

¹⁶⁰ See n. 155 above.

¹⁶¹ See the answer of the Federal Council provided in response to the three motions mentioned in n. 155 above.

¹⁶² Conseil national (CH), Groupe de l’Union démocratique du centre, initiative parlementaire 18,466, ‘Approbation du droit non contraignant par l’Assemblée fédérale’, 29 November 2018.

¹⁶³ Conseil des Etats (CH), ‘Nouvelle législature: Perspectives en matière de politique extérieure’, Communiqué de presse, 14 January 2020, www.parlament.ch/press-releases/Pages/m-m-apk-s-2020-01-14.aspx, accessed 6 July 2020.

result, both parliamentary chambers are currently considering how meaningful ‘soft participation’ in informal lawmaking could be granted and whether ‘soft law’ is even amenable to ‘hard participatory rights’.

D Challenges in Building New Bridges

To sketch out detailed construction plans for building new bridges between informal international lawmaking and domestic democratic participation proves challenging. Applying the provisions available in the context of treaties by analogy¹⁶⁴ will not work in many cases, while designing specific rules for informal lawmaking is no easy feat. This is not surprising given that the phenomenon is negatively defined as lawmaking that dispenses with certain formalities traditionally linked to international law,¹⁶⁵ coupled with the complicating factor that informality can relate to different elements – actors, process and output.¹⁶⁶ This makes informal lawmaking a multifaceted and complex phenomenon that is ‘hard to grasp in domestic constitutional terms’.¹⁶⁷ Still, discussion has started on how to extend ‘soft participation rights’ and whether to grant ‘hard participation rights’ in informal lawmaking.

The Swiss debate turns on ‘soft law’;¹⁶⁸ hence, there seems to be common ground that only ‘legislative’¹⁶⁹ informal instruments, and not those dealing with a concrete situation, should qualify for ‘hard participatory rights’ – even though this is not the case for treaties.¹⁷⁰ Otherwise, Parliament would stray too far into the territory of the executive, which – despite the far-reaching soft participatory rights of Parliament¹⁷¹ – retains the ultimate decision-making power for the ‘operational conduct’ of foreign policy.¹⁷² Consensus also seems

¹⁶⁴ As has been done for other *formal* sources of (international) law: Anna Petrig, ‘Sind die parlamentarische Genehmigung und das Referendum im Außenbereich auf völkerrechtliche Verträge beschränkt? Eine Untersuchung anhand von Kompetenztransfers an Völkerrechtsakteure’ (2018) 78 *Heidelberg Journal of International Law* 93–146.

¹⁶⁵ See definition in text relating to n. 131 above.

¹⁶⁶ Joost Pauwelyn, Ramses A. Wessels and Jan Wouters, ‘An Introduction to Informal International Lawmaking’, in Joost Pauwelyn and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012), p. 2.

¹⁶⁷ Peters and Kunz, ‘Voting Down International Law?’, p. 4.

¹⁶⁸ See, e.g., Federal Council, ‘Soft Law Report’, *passim*.

¹⁶⁹ The term is defined in Parliament Act, art. 22(4).

¹⁷⁰ E.g., a treaty determining a border that is of unlimited duration and that may not be terminated is eligible for the referendum as per Constitution of 1999, art. 141(1)(d)(1); see also Publications Act, art. 3(2) stating ‘The Federal Council may decide that treaties . . . that are not legislative in their nature be published in the AS.’

¹⁷¹ Constitution of 1999, art. 166(1).

¹⁷² Lanz, ‘Bundesversammlung und Aussenpolitik’, p. 223.

to emerge that the ‘importance’ of an informal instrument should be the criterion used to decide whether and to what degree democratic legitimacy is necessary (*critère de l’importance*, *Kriterium der Wesentlichkeit*), which aligns well with the standard already applying to (domestic and international) formal law.¹⁷³ Such a material criterion may dispel the argument that expanding democratic participation to informal law would flood Parliament with submissions – by comparison, only 5 per cent of all treaties concluded by Switzerland are approved by Parliament, while the other 95 per cent are of ‘limited scope’ and thus fall in the sole competence of the executive.¹⁷⁴ True, to specify the criterion of ‘importance’ is far from clear and the assessment may change over time;¹⁷⁵ yet the challenge is not idiosyncratic to informal law but exists equally with regard to formal law. Under domestic law, Article 164(1) of the Constitution sets out which matters must be regulated in federal acts, which are enacted by Parliament and subject to the optional referendum. The provision is applied by analogy in order to assess whether a treaty contains ‘important legislative provisions’ and is thus eligible for the optional referendum.¹⁷⁶ While various commentators have expressed doubt as to whether Article 164 of the Constitution provides (much) guidance at all,¹⁷⁷ having a (partly deficient) abstract definition of the instances where ‘hard participation rights’ apply is still preferable over putting the decision entirely at the discretion of the authorities. Apart from considerations of treating equal cases equally,¹⁷⁸ a high value is attached to the idea that the referendum should not feature a ‘plebiscitary’ character – which, in Swiss parlance, means that its exercise must not depend on the will of the authorities,¹⁷⁹ but

¹⁷³ See Federal Council, ‘Soft Law Report’, pp. 14–16; the referendum on accession to an IO is an exception to the rule: see Anna Petrig, ‘Das Referendum zum Beitritt zu internationalen Organisationen: Nach 40 Jahren Bestand ein (überflüssiges) Relikt?’ (2017) 136/1 *Revue de droit Suisse* 339–66 at 359–63.

¹⁷⁴ Kathrin Alder and Lukas Leuzinger, ‘Schweizer Selbstbestimmung: Die wichtigsten Fakten zu den internationalen Verträgen’ *Neue Zürcher Zeitung online* (Zürich, 15 November 2018) www.nzz.ch/schweiz/die-bedeutung-des-internationalen-rechts-in-zahlen-ld.1433328?reduced=true, accessed 6 July 2020.

¹⁷⁵ See concerns expressed in Federal Council, ‘Soft Law Report’, pp. 15–16.

¹⁷⁶ Bundesamt für Justiz (CH), Gutachten vom 6. Januar 2004 zuhanden der ausserpolitischen und staatspolitischen Kommissionen von National- und Ständerat, überarbeitet im Mai 2004, VPB 2004 Nr. 4, p. 1077, at 1087.

¹⁷⁷ See, e.g., Pierre Tschannen, ‘Art. 164’, in Bernhard Ehrenzeller et al. (eds.), *Die Schweizerische Bundesverfassung: St. Galler Kommentar*, 3rd ed., 2 vols. (Zürich: Dike, 2014), vol. II, p. 2684.

¹⁷⁸ Constitution of 1999, art. 8(1).

¹⁷⁹ This essentially happened with the Migration Pact.

be granted if predefined criteria are met. For some authors, this even amounts to a feature of direct democracy.¹⁸⁰

Turning back to the requirements for subjecting informal law to ‘hard participatory rights’, it seems that only those with a high degree of normativity should qualify: if normativity is low, the impact on the domestic sphere is negligible and thus no enhanced democratic legitimacy is warranted. In its ‘Soft Law Report’, the Federal Council proposes a matrix for assessing the normativity of an informal instrument. The y-axis measures the ‘will to shape’ (*volonté d’agir*, ‘*Gestaltungswille*’), while the x-axis indicates the degree of ‘will to enforce’ (*volonté d’imposer*, ‘*Durchsetzungswille*’) a specific instrument; the higher an instrument figures on the two axes, the higher its normativity.¹⁸¹ With this, the long-held argument against democratic participation in the making of ‘soft law’ – that it is not legally binding – seems to have finally lost its persuasive power and the normativity of informal law is being recognised.

The Swiss debate has circled around the concept of ‘soft law’ and is thus mainly concentrated on the output.¹⁸² However, in order to conceptualise democratic participation properly, the focus should not just be on ‘law’ – but on ‘lawmaking’. Actors and processes – that is, the chain of activities and decisions leading to a specific output and the forum in which this takes place – are of equal importance. This is why the concept of ‘informal lawmaking’, which captures all these dimensions, is more beneficial to framing the discussion on democratisation ‘from below’ as compared to ‘soft law’ (apart from the fact that there is often nothing particularly ‘soft’ about informal law).¹⁸³ Since the current debate has been intensified by the legal quagmire surrounding the Migration Pact, the perception of actors and processes in informal lawmaking – which impact potential bridges and boundaries for domestic democratic participation in informal lawmaking – may be slightly distorted. It is indeed a rather simple game to subject the Pact to ‘hard participatory rights’, that is, to parliamentary approval and even a referendum. The treaty analogy works well since there is neither actor informality (states adopted the instrument within the UN system) nor process informality (the negotiations took place in proceedings that could equally apply to a treaty and the Pact was ultimately adopted and signed by states at an intergovernmental conference). The sole distinction from formal

¹⁸⁰ See, e.g., Andreas Auer, Giorgio Malinverni and Michel Hottelier, *Droit constitutionnel suisse*, 3rd ed., 2 vols. (Berne: Stämpfli, 2013), vol. I, pp. 204–5.

¹⁸¹ Federal Council, ‘Soft Law Report’, p. 12.

¹⁸² See, e.g., Federal Council, ‘Soft Law Report’, *passim*.

¹⁸³ See, e.g., Pauwelyn, Wessel and Wouters, ‘When Structures become Shackles’, 743.

law is that the Pact falls short of a treaty.¹⁸⁴ In many instances, however, both process and/or actor informality will be much more pronounced, which makes democratic participation more challenging – if not entirely meaningless or impossible.

In treaty-making, states are the main actors: they negotiate, adopt, sign and ratify treaties. In informal lawmaking, this may be very different; states may be just one of the actors involved or even be absent altogether from the negotiating table. The latter holds true if informal law stems from what Michael Bothe aptly refers to as ‘private norm entrepreneurs’.¹⁸⁵ In the field of the law of armed conflict, for instance, a series of informal meetings have taken place over the past decades, during which (often old-fashioned) international rules were clarified, restated or updated in light of new technological or societal phenomena.¹⁸⁶ Interestingly, Switzerland was an active player in this field of law in the ‘age of treaties’ and continues to be one in times of informal lawmaking. The experts attend these processes in a purely personal capacity,¹⁸⁷ and states are not official participants, but may – for the sake of legitimacy, authority and thus efficiency of the instrument in question – still be involved, be it consultations on drafts or as observers (especially states sponsoring the process¹⁸⁸).¹⁸⁹ Since states do not sit at the negotiating table, at least not officially, these processes may not even fall under the definition of informal lawmaking provided above, which requires ‘[c]ross-border cooperation between *public* authorities’.¹⁹⁰ Yet, to pretend that the output produced has no normative value also seems to miss the point.¹⁹¹ Be that as it may, this

¹⁸⁴ Discussing whether it is a treaty or an informal instrument: Anne Peters, ‘The Global Compact for Migration: to Sign or Not Sign?’ EJIL: Talk!, 21 November 2018, pp. 2–3.

¹⁸⁵ Michael Bothe, ‘Private Normunternehmer im Völkerrecht: Gedanken zur Fortentwicklung des Völkerrechts durch nicht-staatliche Institutionen’, in Holger P. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Leiden: Martinus Nijhoff, 2012), pp. 1399–412, passim; the term ‘norm entrepreneur’ seems to go back to Cass R. Sunstein, ‘Social Norms and Social Roles’ (1996) 4 *Columbia Law Review* 903–68.

¹⁸⁶ Bothe, ‘Private Normunternehmer’, pp. 1402–4.

¹⁸⁷ See, e.g., The Programme on Humanitarian Policy and Conflict Research (HPCR), *Manual on International Law Applicable to Air and Missile Warfare* (Cambridge: Cambridge University Press, 2013), p. xi.

¹⁸⁸ See, e.g., the invitation of donor countries (among them Switzerland) to participate in the deliberations of the following manual: HPCR, *Manual on International Law Applicable to Air and Missile Warfare*, p. xi.

¹⁸⁹ Bothe, ‘Private Normunternehmer’, pp. 1407–8; e.g., also in the case of the *Manual on International Law Applicable to Air and Missile Warfare*, see p. 1404.

¹⁹⁰ See definition in text relating to n. 131 above (emphasis added).

¹⁹¹ See, e.g., the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*; Natalino Ronzitti, ‘Naval Warfare’ (last updated June 2009), in Rüdiger Wolfrum (ed.), *Max*

type of informal lawmaking suggests that certain features of informal lawmaking may set boundaries for domestic democratic participation.

In terms of process, a key difference between informal lawmaking and treaty-making is that a formalised procedure exists for the latter.¹⁹² For treaties it is thus much easier to determine where to build bridges along the route from initiating negotiations to the entry into force of an instrument. Informal lawmaking is not subjected to a standardised procedure, and this is praised as its competitive advantage vis-à-vis treaties. Moreover, at the outset, how a specific process should evolve is often (deliberately) left open and is only specified as it goes along. Such a 'wait-and-see approach' lowers the entry hurdle for negotiations and allows for adjustments – towards more or less formality – along the route. The Montreux Document is exemplary as a process of informal lawmaking in which formality increased over time. When it was launched by Switzerland and the International Committee of the Red Cross in 2006, a group of only seventeen states – those most affected by the phenomenon – were involved in the negotiations, which were of a rather informal character.¹⁹³ Today, the instrument can be 'supported' by any state or IO by submitting a letter or diplomatic note, based on a template, to the Swiss Federal Department of Foreign Affairs.¹⁹⁴ While very informal at the beginning, the process in the end is nearly the equivalent of signing and ratifying a treaty. At the outset, domestic democratic control would have only made sense for the seventeen participating states, while today any state can 'support' the document and could, before doing so, request parliamentary approval. Whether democratic participation 'from below' is possible and meaningful must thus be assessed for a specific process and the answer may change over time – a striking contrast from the route taken for treaties.

A further (and certainly not last) difference between treaties and informal instruments pertains to the possibility that states can dodge the latter's effects and implement a domestic 'disapproval' of the instrument at the international

Planck Encyclopedia of Public International Law, online edition, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e342>, accessed 6 July 2020, para. 2, writes that this 'private codification' has 'over time, acquired considerable weight and several navy manuals refer to it as an authoritative statement of existing law'.

¹⁹² See Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

¹⁹³ *The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict*, www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20192511-montreux-document_EN.pdf, accessed 6 July 2020, pp. 9 and 41.

¹⁹⁴ Montreux Document Forum, 'How to Join', www.mdforum.ch/en/how-to-join, accessed 6 July 2020.

level. If Parliament or the people do not approve a specific treaty, the Swiss Federal Council will simply abstain from ratifying it and no legal obligation accrues from it for Switzerland. For informal law, it is much more difficult to explain how, why, when and who comes into the maelstrom of its normativity. At times, it may be possible to formally endorse, sign or support the instrument – whether refraining from doing so is sufficient to dispel its effects is debatable. The Federal Council correctly notes in its report that informal law may even impact states not having participated in the making of a specific instrument.¹⁹⁵ This triggers the question of what the executive is obliged to do at the international level if Parliament or the people rejects a specific informal instrument.

V CONCLUSION

This discussion suffices to demonstrate that designing meaningful mechanisms for generating democratic legitimacy is much more difficult in the context of informal international lawmaking than it is for formal international lawmaking. Yet, if these mechanisms shall continue performing their function, it is necessary to adapt them to structural changes of international law as expeditiously as possible. Otherwise the pendulum will swing back and the executive will regain powers in international lawmaking, which have been pushed back over the years in favour of greater involvement of Parliament, the people and Cantons.

The expanding horizons of international law in terms of actors and sources have repercussions on foreign relations law across the globe. The impact of informal lawmaking on the democratisation of international law ‘from below’, however, appears to have not yet received the necessary academic and practical attention. This is surprising in light of the great value attached to the democratisation of international lawmaking in the context of treaties and the fact that most jurisdictions’ mechanisms do not apply to informal law.¹⁹⁶ Academic literature is a mirror to this finding: it is extremely rich in terms of parliamentary involvement in treaty-making, but very scant when it comes to informal lawmaking. By way of example, Alejandro Rodiles recently wrote that the trend towards informal lawmaking ‘has gone completely unnoticed by the

¹⁹⁵ Federal Council, ‘Soft Law Report’, p. 8.

¹⁹⁶ As per Leonard F. M. Besselink, ‘Informal International Lawmaking: Elaboration and Implementation in the Netherlands’, in Ayelet Berman et al. (eds.), *Informal International Lawmaking: Case Studies* (The Hague: Torkel Opsahl Academic EPublisher, 2012), p. 106, informal law does not require parliamentary approval in any Western state.

Mexican literature'.¹⁹⁷ Jean Galbraith and David T. Zaring likewise note that in the United States, there is 'exhaustive academic literature' on treaties and that 'similar literature exists with regard to the foreign relations law dimensions of customary international law', but informal international instruments 'by contrast, get barely a nod in the foreign relations law literature'.¹⁹⁸ Arguably, the discussions on the lack of democratic control of the Migration Pact was a catalyst for more intense debate in the future.¹⁹⁹

Comparative foreign relations law certainly has the potential to unearth the various facets of the problem and to enlarge the pool of potential solutions on how to democratise informal international lawmaking 'from below'. Yet, even if the most perfect bridges were built – in such a combined and common effort – the very characteristics of international informal lawmaking sets some insurmountable boundaries. This leads back to the two central questions raised by the editors in the introduction to this book: 'To what extent is the field of foreign relations law shaped by the normative expectations and structures of international law? Conversely, in how far is international law a product of the combined processes governed by foreign relations law and construed in light of domestic law?'

Domestic mechanisms on democratic participation can only fulfil their purpose if they mirror the structures of international law – notably its sources – as accurately as possible. The Swiss rules on democratic control of treaty-making are a good example: having been drafted during the 'age of treaties', they had to be adapted and are still in process of being reviewed so as to be fit for purpose in the age of informal lawmaking. As regards the impact on international law 'from below', a crucial difference seems to exist between formal and informal lawmaking. As regards formal sources, notably treaties and customary international law, states are the masters of their creation.²⁰⁰ Hence, states – through their domestic (foreign relations) law – have a better grip and control of the process. They may similarly monopolise the creation of informal law if actors and/or process feature a very low degree of informality (as in the case of the Migration Pact), but may not be even officially on board if

¹⁹⁷ Alejandro Rodiles, 'Executive Power in Foreign Affairs: The Case for Inventing a Mexican Foreign Relations Law', in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), p. 128.

¹⁹⁸ Galbraith and Zaring, 'Soft Law as Foreign Relations Law', 753.

¹⁹⁹ See, e.g., Frank Schorkopf, 'Der Deutsche Bundestag und der Migrationspakt: Anlass zur Stärkung der parlamentarischen Beteiligung an völkerrechtlichen Soft Law-Prozessen?' (2019) 3 *Zeitschrift für Ausländerrecht und Ausländerpolitik* 90–96, *passim*.

²⁰⁰ See Bothe, 'Private Normunternehmer im Völkerrecht', p. 1404, on states' monopoly in the creation of formal international law.

the actors and/or processes are characterised by a high degree of informality (like the example of ‘private norm entrepreneurs’ suggests). Informal lawmaking may thus, in some instances, have much more of a ‘life of its own’ than formal law and be immune to democratisation ‘from below’. Hence, in the context of informal lawmaking, bridges can be built, but not every boundary can be overcome.

Internationalisation came at a cost to democracy in the ‘age of treaties’, and such costs will increase further in times of informal international lawmaking. The increased use of informal lawmaking will exacerbate the tension between sovereignty – understood as a ‘placeholder for constitutional values, in particular domestic democratic self-determination’²⁰¹ – and cooperation. However, when discussing (the limits of) democratisation ‘from below’, one tends to forget that Switzerland not only ranks number one in certain globalisation indexes,²⁰² but it is not seldom a driving force behind (laudable) informal lawmaking processes. This situation is exemplary for Dani Rodrik’s more generalised finding that ‘we cannot simultaneously pursue democracy, national determination, and economic globalization’²⁰³ – or, to put it more bluntly, you can’t have your cake and eat it too.

²⁰¹ See the chapter by Aust and Kleinlein, p. 17.

²⁰² In the KOF Globalisation Index 2019, which measures the economic, social and political dimensions of globalisation, Switzerland ranks number one in the overall index combining de facto and de jure globalisation: ETH Zurich, ‘KOF Globalisation Index’, <https://kof.ethz.ch/en/forecasts-and-indicators/indicators/kof-globalisation-index.html>, accessed 7 July 2020.

²⁰³ Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, and Democracy Can’t Coexist* (Oxford: Oxford University Press, 2011), p. xviii.