Mona Gubler

One or Several Types of Constitutional Law?

On the Hierarchy of Constitutional Norms

This article examines whether, despite the well-established principle of equal priority of constitutional norms, certain higher-ranking norms within the Swiss Federal Constitution are binding in the context of constitutional amendments. Drawing on Carl Schmitt, Jürgen Habermas, and Swiss constitutional doctrine, I argue that limits to constitutional amendments are inherent in the Federal Constitution, which is based on the rule of law and democracy as fundamental and equal constitutional principles. Increasing public awareness of this constitutional understanding will facilitate the reconciliation of democracy and the rule of law in practice.

Citation:
MONA GUBLER, One or Several Types of Constitutional Law?, sui generis 2024, p. 185

Mona Gubler, BLaw (Zurich), MLaw Double Degree Candidate (University of Zurich and University of Amsterdam), Junior Academic Assistant at the Chair for Public Law with a focus on International and Comparative Law and the Chair for Legal Sociology with particular emphasis on Media Law at the University of Zurich (mona.gubler@ius.uzh.ch).

I am grateful to Dr. Raffael Fasel for the inspiration and support during my master's thesis and for his encouragement and advice in writing this article, which is based on my thesis. I am also grateful to my colleagues Jennifer Angst and Lynn Bijlsma for their feedback on an earlier version of this article.

DOI: https://doi.org/10.21257/sg.264

I. Introduction

1 In contrast to Germany, where the eternity clause in § 79 para. 3 of the Basic Law[1] declares specific core contents of the constitution to be unalterable and thus establishes a distinction between ordinary provisions and higher-ranking core provisions,[2] the Federal Constitution of the Swiss Confederation (hereinafter "BV")[3] does not contain autonomous substantive barriers to constitutional amendments.[4] Thus, even constitutional amendments contradicting fundamental existing provisions can find their way into the constitutional text. According to the prevailing doctrine and jurisprudence, the relationship between new or amended constitutional norms and pre-existing constitutional norms is governed by the principle of equal priority of constitutional norms, also referred to as the principle of "one type of constitutional law" *(einerlei Verfassungsrecht)*.[5]

2 The central question examined in this article is whether there is still a hierarchy of constitutional norms in the BV, i.e., whether there are certain higher-ranking norms from which the people and Parliament cannot deviate during a partial revision *(Teilrevision)* of the BV. This theoretical question is of practical relevance, as the popular initiative for partial revision of the constitution not only frequently leads to constitutional amendments, but, in recent years, has also produced amendments that call into question fundamental principles of the rule of law.[6]

3 In contrast to recent discussions on extending the substantive barriers to constitutional revisions, which focus on the tension between international and national law,[7] I will focus on the BV in its domestic context. Applying a constitutional theoretical approach, I will argue that a hierarchy of constitutional norms and limitations on the will of the people can be derived from the BV itself and its underlying constitutional understanding *(Verfassungsverständnis)*. By analyzing the Swiss constitutional understanding and positioning it within CARL SCHMITT's typology of constitutional understandings, I will show that there is more than one type of constitutional law in the BV and that there is, in fact, no principle of equal priority of constitutional norms. I will argue that the Swiss constitutional understanding is a substantive one that recognizes limits to constitutional amendments since it acknowledges both the rule of law and democracy as fundamental constitutional principles. Drawing on JÜRGEN HABERMAS' theory of constituent power, which I will further develop with reference to opinions in Swiss constitutional doctrine, I will show why the principle of equal priority of constitutional norms is not only factually inaccurate but also undesirable from a normative point of view. I will conclude with an outlook on how the reconciliation of the rule of law and democracy could be facilitated in practice.

II. The Hierarchy of Constitutional Norms According to the Swiss Constitutional Understanding

4 The question of the hierarchy of constitutional norms is not regulated in the BV itself and, therefore, depends heavily on the Swiss constitutional understanding. The constitutional understanding lies behind the application of the constitution and includes assumptions about what the constitution is, why it exists, and how it is applied.[8] It thus has implications for the relationship between constitutional norms and the limits of constitutional amendments.[9] At least three elements of the prevailing doctrine, jurisprudence, and institutional practice that reflect the Swiss constitutional understanding are relevant to the hierarchy of norms in the BV.

1 German Basic Law of 23 Mai 1949 (100-1).

2 ULRICH PREUSS, The Implications of "Eternity Clauses": The German Experience, Israel Law Review 2011, p. 439 f.

3 Federal Constitution of the Swiss Confederation of 18 April 1999 (BV; SR 101).

4 STEFAN DIEZIG / ASTRID EPINEY, in: Waldmann/Belser/Epiney (eds.), Basler Kommentar Bundesverfassung, Basel 2015, Art. 192 N 5 (cit. BSK BV-AUTHOR).

5 Among others GIOVANNI BIAGGINI / THOMAS GÄCHTER / REGINA KIENER (eds.), Staatsrecht, 3rd ed., Zurich et al. 2021, § 9 N 8a; ULRICH HÄFELIN, Verfassungsgebung, in: Probleme der Rechtsetzung – Referate zum Schweizerischen Juristentag 1974, Basel 1974, p. 88 f.; PIERRE TSCHANNEN, Staatsrecht der Schweizerischen Eidgenossenschaft, 5th ed., Bern 2021, N 146; BGE 139 I 16 E. 4.2.1.

6 I use the term "rule of law" here and in the following in the sense of the German term "Rechtsstaatlichkeit", which encompasses both formal and substantive elements of the rule of law, see RENÉ RHINOW, Grundzüge des Schweizerischen Verfassungsrechts, Basel 2003, N 2356 and 2366. On the issue of problematic popular initiatives see, e.g., JÖRG PAUL MÜLLER / GIOVANNI BIAGGINI, Die Verfassungsidee angesichts der Gefahr eines Demokratieabsolutismus, ZBl 2015, p. 243 ff.; MARKUS SCHEFER / ALEXANDRA ZIMMERMANN, Materielle Schranken der Verfassungsgebung, LeGes 2011, p. 343.

7 MICHAEL LEUPOLD / MICHAEL BESSON, Gefährden Volksinitiativen die "gute Ordnung" der Verfassung?, LeGes 2011, p. 389; SCHEFER/ZIMMERMANN (n. 6), p. 345 f.; Bericht des Bundesrates in Erfüllung des Postulats 07.3764 der Kommission für Rechtsfragen des Ständerates vom 16. Oktober 2007 und des Postulats 08.3765 der Staatspolitischen Kommission des Nationalrates vom 20. November 2008 (BBl 2010 2263), p. 2317; Zusatzbericht des Bundesrats zu seinem Bericht vom 5. März 2010 über das Verhältnis von Völkerrecht und Landesrecht (BBl 2011 3613), p. 3620.

8 HÄFELIN (n. 5), p. 77; WERNER KÄGI, Die Verfassung als rechtliche Grundordnung des Staates: Untersuchungen über die Entwicklungstendenzen im modernen Verfassungsrecht, Zurich 1945, p. 120; UWE VOLKMANN, Rechtsproduktion oder: Wie die Theorie der Verfassung ihren Inhalt bestimmt, Der Staat 2015, p. 35 ff.; see also MATTHIAS MAHLMANN, Wirkungsweisen von Verfassungsrecht – Verfassungsauslegung und die Gestaltungsmacht des Gesetzgebers, ZBl 2017, p. 6.

9 HORST EHMKE, Grenzen der Verfassungsänderung, Berlin 1953, p. 11 f.; KÄGI (n. 8), p. 60 f.

5 The most obvious element is the commonly but, as I will show, falsely presumed *principle of equal priority of constitutional norms*. According to this principle, there are *per se* no superior or inferior norms within the BV.[10] Except for constitutional norms reflecting *ius cogens*,[11] conflicts between different constitutional norms are not resolved by invoking a fixed hierarchy of values but through interpretation on a case-by-case basis.[12] By rejecting a hierarchy of constitutional norms, the principle is at the same time a prerequisite for the absence of autonomous substantive barriers to constitutional revision, since it excludes the concept of unconstitutional constitutional law.[13]

6 The abovementioned case-by-case resolution is guided through what is often termed *interpretation with a view to the unity of the constitution (Auslegung mit Blick auf die Einheit der Verfassung):* constitutional norms, while being selective and of equal rank, constitute, as a whole, the legal order of one community.[14] Hence, the interpretation of individual constitutional norms should not be carried out in isolation but should be guided by an understanding of the constitution as a unity of meaning to ensure a minimum level of consistency.[15] Since the BV is not a closed system of values, this unity must be constantly re-established on a case-by-case basis.[16] In doing so, the various constitutional concerns must be weighed against each other to maximize their effectiveness.[17] The goal is to establish practical concordance *(praktische Konkordanz).*[18] However, practical concordance is no longer possible when constitutional norms are formulated in a manner that prevents a balance with other constitutional norms.[19] Consequently, in a specific case of conflict, one provision may take precedence over another as a result of problem-oriented interpretation.[20] But which provision takes precedence? In particular: how much weight should be given to the popular will embodied in a constitutional amendment?

7 The answer to this question depends on the notion of *popular sovereignty,* which has implications for which norms enter the constitution and for the relationship between new and pre-existing constitutional provisions. The conflicts mentioned above frequently arise in the context of popular initiatives for partial revision of the BV in the form of an elaborated draft *(ausgearbeiteter Entwurf),*[21] which is the most prominent form of the popular initiative in practice.[22] This type of popular initiative not only allows the people to be largely involved in the decision-making process of constitutional amendments, but it also gives them considerable freedom in shaping the content of their concerns.[23] And as there are no autonomous substantive barriers to constitutional amendments, an amendment can also affect fundamental values already enshrined in the constitution.[24]

8 However, I argue that a closer look at the structural principles *(Strukturprinzipien)* of democracy, the rule of law and how they play out in practice shows that the orthodoxy of the equal priority of constitutional norms must be rejected. Structural principles are fundamental decisions of the constituent power that are not explicitly codified in the BV, but are contained as normative ideas in the written constitutional articles and underlie them.[25] It is recognized in both scholarship and case law that the principles of democracy and the rule of law are of equal value, and although tensions may arise, they are interdependent.[26] Thus, it is necessary to find a balance that gives both principles the greatest possible effect.[27] In practice, constitutional and democratic demands are situationally coordinated,[28] and conflicts with the rule of law are not simply accepted but addressed through implementation legislation and in the application of the law.[29] This has become increasingly relevant as harmonizing interpretation has been pushed to its limits by the growing number of popular initiatives deliberately seeking to challenge fundamental principles of the rule of law.[30] The fact

10 BSK BV-BELSER, Einleitung N 69.

11 TSCHANNEN (n. 5), N 149.

12 TSCHANNEN (n. 5), N 149; already BGE 56 I 327 E. 3.

13 YVO HANGARTNER, Unklarheiten bei Volksinitiativen – Bemerkungen aus Anlass des neuen Art. 121 Abs. 3-6 BV (Ausschaffungsinitiative), AJP 2011, p. 471 f.; LISA-MARIA KAISER, Gilt der Grundsatz "Einerlei Verfassungsrecht" (noch)?, IFF Working Paper Online Nr. 13, Fribourg 2016, p. 5 f.; KÄGI (n. 8), p. 61; TSCHANNEN (n. 5), N 448.

14 EHMKE (n. 9), p. 77; TSCHANNEN (n. 5), N 176.

15 TSCHANNEN (n. 5), N 176.

16 TSCHANNEN (n. 5), N 176.

17 TSCHANNEN (n. 5), N 176.

18 TSCHANNEN (n. 5), N 177; BGE 139 I 16 E. 4.2.2.

19 TSCHANNEN (n. 5), N 177; an example can be found in BGE 117 Ib 243 E. 3b.

20 TSCHANNEN (n. 5), N 149.

21 See Art. 194 BV and Art. 139 BV; KASPAR EHRENZELLER, Koordination von Verfassungsrecht im Widerspruch: Legislative Gestaltungskompetenzen bei angenommenen Volksinitiativen, Zurich et al. 2020, p. 60 f.

22 BIAGGINI/GÄCHTER/KIENER, (n. 5), § 24 N 63.

23 See EHRENZELLER (n. 21), p. 60.

24 BSK BV-EPINEY/DIEZIG, Art. 192 N 5; TSCHANNEN (n. 5), N 448.

25 BSK BV-BELSER, Einleitung N 48.

26 KASPAR EHRENZELLER, in: Ehrenzeller et al. (eds.), St. Galler Kommentar Bundesverfassung, 4th ed., St. Gallen 2023, Verfassungsinterpretation N 30 (cit. SGK BV-AUTHOR); TSCHANNEN (n. 5), N 248; Botschaft über eine neue Bundesverfassung vom 20. November 1996 (BBl 1997 I 1 ff.), p. 16 f.

27 BIAGGINI/GÄCHTER/KIENER (n. 5), § 8 N 49; TSCHANNEN (n. 5), N 251; see also REGINA KIENER / MELANIE KRÜSI, Bedeutungswandel des Rechtsstaats und Folgen für die (direkte) Demokratie am Beispiel völkerrechtswidriger Volksinitiativen, ZBl 2009, p. 246 f.

28 SGK BV-EHRENZELLER, Vorbemerkungen zu Volk und Ständen, N 12.

29 Cf. BIAGGINI/GÄCHTER/KIENER (n. 5), § 23 N 77.

30 HEINRICH KOLLER, Wunsch und Wirklichkeit im Umgang mit Volksinitiativen – Methodik der Umsetzung anhand von drei Beispielen,

that the Federal Supreme Court and the legislator take principles of the rule of law into account, even when a new constitutional norm excludes such considerations,[31] suggests that the priority of certain contents of the rule of law is implicitly assumed when conflicts can no longer be resolved through harmonizing interpretation.[32]

9 BGE 139 I 16, which concerned Art. 121 paras. 3-6 BV, a provision introduced into the BV by the popular initiative "on the expulsion of foreign criminals" and providing for an expulsion mechanism for foreigners who have committed certain crimes, illustrates this point. It also shows that in cases where a new constitutional provision is formulated uncompromisingly, reconciling it with other constitutional provisions arguably goes beyond recognizing hierarchies in concrete cases.[33] Rather, the central question was whether the newly introduced Art. 121 paras. 3-6 BV is absolutely applicable and excludes a balancing with other interests,[34] i.e., whether the popular will embodied in the constitutional amendment should be given priority. By referring to the overall constitutional context and to the principles of the rule of law in particular, which also include obligations under international law, the court adhered to the principle of proportionality and rejected direct applicability.[35] Notably, it did so despite the clear wording of the newly introduced Art. 121 paras. 3-6 BV, the intention of the initiators of the initiative "on the expulsion of foreign criminals" to exclude a proportionality test, and the rejection of the counterproposal, which provided for a proportionality test.[36] In my opinion, this constitutes a genuine breach of the principle of equal priority of constitutional norms. By rejecting that Art. 121 paras. 3-6 BV is absolutely applicable, the court excluded the envisaged expulsion mechanism not only in the specific case of conflict but in general. Subsequently, the legislator came to a similar conclusion and introduced a hardship clause in the implementing legislation (Art. 66a para. 2 SCC)[37]. Against this background, it seems questionable whether there really is a principle of equal priority of constitutional norms. It becomes apparent that in cases where constitutional norms are formulated in uncompromising terms, the application of established means of constitutional interpretation conceals more than it reveals. Thus, a closer examination of the theoretical underpinnings of the Swiss constitutional understanding is warranted. Furthermore, a theoretical examination of the principle of "one type of constitutional law" contributes to the ongoing discussions on the controversial issue of the limits to the popular will in the course of partial amendments, as theoretical considerations overall play a marginal role in the Swiss specialized legal literature.[38]

III. The Swiss Constitutional Understanding in Schmitt's Theoretical Framework

Why is the principle of equal priority of constitutional norms not adhered to in practice? As I propose in this section, SCHMITT's typology of constitutional understandings[39] can help us answer this question from a descriptive point of view. Applying his distinction between the relative and the absolute understanding of the constitution to the Swiss constitutional understanding regarding the hierarchy of constitutional norms will allow me to show why the principle of equal priority of constitutional norms is untenable. Next, I will discuss SCHMITT's positive concept of the constitution to better understand the role of politics in the BV. Although SCHMITT is a highly controversial thinker due to his role in the early Nazi regime[40] and his concept of democracy centred around the identity of the people,[41] his work remains valuable as it highlights the centrality of the question of democratic legitimacy in modern societies.[42] For our purposes, the different understandings of the meaning of a constitution outlined in his work *Constitutional Theory (Verfassungstheorie),* which are linked to different accounts of the relationship between legality and legitimacy,[43] provide a valuable framework for inquiring more deeply into the role that law and politics play in the Swiss constitutional understanding. 10

LeGes 2015, p. 545 f.; GORAN SEFEROVIC, Volksinitiative zwischen Recht und Politik: Die staatsrechtliche Praxis in der Schweiz, den USA und Deutschland, Zurich et al. 2018, p. 188.

31 See BGE 139 I 16; on the use of hardship clauses by the legislator see EHRENZELLER (n. 21), p. 91 f.

32 See in this regard also KAISER (n. 13), p. 10 and 16.

33 See above, mn. 6.

34 BGE 139 I 16 E. 4.2.2.

35 BGE 139 I 16 E. 4.2.2, E. 4.3.2, E. 4.3.3 and E. 4.3.4.

36 For the latter see Bundesbeschluss über die Aus- und Wegweisung krimineller Ausländerinnen und Ausländer im Rahmen der Bundesverfassung (Gegenentwurf zur Volksinitiative "Für die Ausschaffung krimineller Ausländer [Ausschaffungsinitiative]") (BBl 2010 4243), p. 4244.

37 Swiss Criminal Code of 21 December 1937 (SCC; SR 311.0).

38 See, e.g., HANGARTNER (n. 13), in particular p. 472 ff.; MARTIN SCHUBARTH, Ungeschriebene Schranken der Verfassungsrevision?, in: Eigenmann/Poncet/Ziegler (eds.), Mélanges en l'honneur de Claude Rouiller, Basel 2016, p. 221 ff.; PETER UEBERSAX, Zur Zulässigkeit der Durchsetzungsinitiative – eine Einladung zur Reflexion, ZBl 2014, in particular p. 608 ff.; BERNHARD WALDMANN, Die Umsetzung von Volksinitiativen aus rechtlicher Sicht, LeGes 2015, in particular p. 528 f.

39 CARL SCHMITT, Verfassungslehre, 11th ed., Berlin 2017, p. 3 ff.

40 CARL SCHMITT, Constitutional Theory – Translated and edited by Jeffrey Seitzer/Foreword by Ellen Kennedy, Durham et al. 2008, Foreword.

41 SCHMITT (n. 39), p. 238 ff.

42 SCHMITT (n. 40), Foreword; see also MARTIN LOUGHLIN, On Constituent Power, in: Dowdle/Wilkinson (eds.), Constitutionalism beyond Liberalism, Cambridge 2017, p. 164 ff.

43 Cf. SCHMITT (n. 40), Foreword.

1. The Constitution in an Absolute Sense

11 The absolute concept of the constitution describes an understanding that views the constitution as a unified whole: either as a unity in the existential sense or as a unity in the ideal sense.[44]

12 The understanding of the constitution as unity in the existential sense refers to the concrete state as a political entity or to the particular form of rule that is inseparable from that political existence.[45] In both cases, it encompasses the overall state of political unity and order as a state of being: the state is the constitution.[46]

13 The understanding that refers to a unity in the ideal sense, on the other hand, views the constitution as something normative, an "ought".[47] The constitution represents a "unified, closed system of highest and ultimate norms" that regulates the entire life of the state and from which all other norms are derived.[48] Its validity derives from certain logical, moral, or other substantive qualities.[49] The state is understood as a legal order based on the constitution as a basic norm. Here, the constitution is the state, not the other way round.[50]

2. The Constitution in a Relative Sense

14 The relative understanding of the constitution does not refer to the constitution as a unified whole but equates it with an assortment of individual written constitutional *laws*.[51] According to SCHMITT, this understanding is adopted when people no longer believe in a closed system of true and final norms but are aware that the content of written constitutions depends on political and social circumstances.[52] The content of the individual constitutional laws that together form the constitution is irrelevant: their formal entrenchment is decisive, not whether fundamental matters are regulated.[53] This formal criterion guarantees a certain stability of the constitution, but only as long as there is no sufficient majority to change entrenched norms.[54] Since the amending power can change the constitution at will as long as the formal requirements for amendment are met, everything written in a constitution becomes equally relative, and the truly fundamental provisions are reduced to mere details of the constitution.[55]

3. Untenability of the Principle of Equal Priority of Constitutional Norms

In my view, SCHMITT's distinction between the absolute and the relative understanding of the constitution reveals why the principle of equal priority of constitutional norms cannot adequately capture the relationship between constitutional norms. The Swiss constitutional understanding of the hierarchy of constitutional norms attempts to reconcile two opposing understandings: while the principle of equal priority of constitutional norms is an expression of a relative understanding, the interpretation with a view to the unity of the constitution reflects an absolute understanding of the constitution. 15

The consequence of the principle of equal priority of constitutional norms is that all provisions that successfully pass the revision procedure become part of the constitution. Their content is irrelevant (except in the case of a violation of *ius cogens*); they are considered legitimate and have constitutional rank once they meet the formal requirements. As a result, the instrument of the popular initiative is often used to provide greater legitimacy to all kinds of political concerns.[56] As SCHMITT recognized, this simultaneously relativizes the fundamental provisions of the constitution.[57] It is, therefore, not surprising that, in recent years, there has been an increasing number of popular initiatives challenging fundamental constitutional principles. After all, on a strictly relative understanding of the constitution, there simply are no such principles. 16

However, as the courts' practice of interpreting the constitution with a view to its unity shows, the Swiss constitutional understanding is not entirely based on such a relative understanding. Rather, it is assumed that the constitution represents the legal order of *one* community and that, therefore, the unity of the constitution must always be re-established with a view to concrete problems and situations.[58] It is interesting to note here that the unity of the political community is not equated with the constitution, as is the case with an understanding of the constitution as a unity in the existential sense. Instead, reference is made to political unity to explain the need for a certain unity of meaning – i.e. unity in an ideal sense – of the constitution as the overall legal order of that political unity. However, fixed hierarchies of values are rejected 17

44 SCHMITT (n. 39), p. 3.
45 SCHMITT (n. 39), p. 4 f.
46 SCHMITT (n. 39), p. 3 ff.
47 SCHMITT (n. 39), p. 7 (translation by author).
48 SCHMITT (n. 39), p. 7 (translation by author).
49 SCHMITT (n. 39), p. 9.
50 SCHMITT (n. 39), p. 7.
51 SCHMITT (n. 39), p. 11.
52 SCHMITT (n. 39), p. 10.
53 SCHMITT (n. 39), p. 11 and 16.
54 SCHMITT (n. 39), p. 18.
55 SCHMITT (n. 39), p. 11 f.
56 Already KÄGI (n. 8), p. 59 f.
57 See above, mn. 14.
58 See above, mn. 4 ff.

because of the equal priority of constitutional norms, and unity in the ideal sense is instead understood as a dynamic concept open to new developments. At the same time, a minimum degree of consistency should be guaranteed between the various selective constitutional norms in individual cases. This is the point at which the relative and the absolute understanding of the constitution can no longer be reconciled: the unity of the constitution in the sense of a minimum degree of consistency presupposes a certain consensus on constitutional values within a community.[59] However, such a basic consensus cannot be relied upon if the concept of the constitution is simultaneously relativized to a multiplicity of individual norms. As a result, constitutional norms can no longer be harmonized, and certain fundamental principles are nevertheless relied upon. Thus, even if, on paper, a relative concept of the constitution is adhered to and the principle of equal priority of constitutional norms is assumed, in practice, the concept of the constitution is given a substantive meaning.[60]

4. The Constitution in a Positive Sense

18 Adherence to a substantive understanding of the BV has implications for the will of the people, which, in SCHMITT's account, is located in the political sphere. Regarding the role of the political within a constitution, SCHMITT's positive concept of the constitution offers further insights.

19 For SCHMITT, the concept of the constitution depends on a distinction between the *constitution* and *constitutional law*.[61] The *constitution* originates in the political will of the people (or the prince) as *constituent power*.[62] With the act of constitution-making, the constituent power decides on the form and nature of its concrete existence as a whole.[63] Crucially, the constituent power precedes the constitution and is free from procedural or substantive constraints.[64] *Constitutional laws,* including the provisions governing the procedure for amending the constitution, are secondary to the constitution.[65] The *constituted power* is limited by the fundamental political decisions of the *constituent power*. It can amend constitutional laws only to the extent that the continuity and identity of the constitution as a whole are preserved.[66] However, constituent power is not eliminated once it is exercised.[67] In a democracy, the people are the subject of constituent power and, as such, must be distinguished from the people within the constitution, exercising powers regulated by constitutional laws.[68] At the same time, the people cannot be reduced to a mere organ of the state and continue to exist as an unorganized, directly and genuinely present entity alongside the previously defined normative system.[69]

5. The Swiss Constitutional Understanding: A Positive Understanding?

Is the Swiss constitutional understanding an expression 20
of a positive understanding in the SCHMITTIAN sense? The fact that it presupposes the existence of substantive limits to constitutional amendments in practice and thereby relies on the structural principles of the rule of law and democracy as fundamental decisions of the constituent power suggests that it does. The structural principles that form the constitution in the narrow sense limit the constitution-amending power, which can enact new constitutional laws but is bound by the structural principles.

What would appear to speak against a positive under- 21
standing is that the people are often referred to as the "constitution-maker" *(Verfassungsgeber)* in the context of mere constitutional amendments.[70] Due to the low substantive barriers of constitutional amendments, there is effectively a convergence of constitution-making and constitution-amending powers.[71] Indeed, some scholars go as far as to equate the two powers.[72] However, even advocates of an absolute understanding of the people's power, who demand that the will of the people should be unrestricted in content, accept the limits on constitutional revision enshrined in the BV.[73] Thus, when the people are referred to as the "constitution-maker" in the context of partial revisions, this does not imply a materially and formally unbounded constituent power in the SCHMITTIAN sense. Yet, it does emphasize that, even in the context of constitutional revision, which is regulated

59 Cf. KÄGI (n. 8), p. 29.

60 KÄGI (n. 8), p. 62, "It is precisely the practical problems that show the untenability of the theory of 'one type of constitutional law' (…)" (translation by author).

61 SCHMITT (n. 39), p. 20.

62 SCHMITT (n. 39), p. 21.

63 SCHMITT (n. 39), p. 21.

64 SCHMITT (n. 39), p. 76.

65 SCHMITT (n. 39), p. 98.

66 SCHMITT (n. 39), p. 98 and 103.

67 SCHMITT (n. 39), p. 77.

68 SCHMITT (n. 39), p. 238 f.

69 SCHMITT (n. 39), p. 242.

70 See e.g. EHRENZELLER (n. 21), p. 12; STEFAN VOGEL, Verfassungsgebung: Eine Standortbestimmung aus schweizerischer Sicht, in: Uhlmann (ed.), Rechtsetzung und Verfassungsgebung – Kolloquium zu Ehren von Kurt Eichenberger, Schriften des Zentrums für Rechtsetzungslehre, Vol. 1, Zurich 2013, p. 27; BGE 139 I 16 E. 4.2.1 and E. 5.3.

71 VOGEL (n. 70), p. 25.

72 OLIVER DIGGELMANN, "Der Souverän hat entschieden." Zur Archäologie einer politischen Formel, in: Good/Platipodis (eds.), Direkte Demokratie: Herausforderungen zwischen Politik und Recht, Festschrift für Andreas Auer zum 65. Geburtstag, Bern 2013, p. 20; RENÉ RHINOW / MARKUS SCHEFER / PETER UEBERSAX, Schweizerisches Verfassungsrecht, 3rd ed., Basel 2016, N 443.

73 For an overview of the existing barriers to constitutional amendments see BIAGGINI/GÄCHTER/KIENER (n. 5), § 7 N 50.

by constitutional law, the people make political decisions. This understanding is in line with SCHMITT insofar as the constituent power of the people remains in place, but it is different from SCHMITT insofar as it appears regularly and, more importantly, in a legally regulated procedure. It is again similar to SCHMITT's understanding in that the power to amend the constitution is not unlimited. But it differs from his conception in that this limitation is not justified by the superiority of the political over the normative. Rather, the structural principles of the BV, while being an expression of the constituent power's will, are also an expression of a certain normative understanding. The fundamental constitutional principles of democracy and the rule of law are reconciled without one principle taking precedence.

22 Against this backdrop, how can a self-commitment of the people to fundamental constitutional principles be justified in the context of partial revisions? In other words, what are the normative reasons for setting substantive limits to constitutional amendments by referring to structural principles of the BV?

IV. Democracy and the Rule of Law as Fundamental Constitutional Principles

23 In the following, I will refer to HABERMAS' theory of the co-originality of private and public autonomy[74] and develop it further in light of Swiss constitutional doctrine to substantiate normatively what I have mainly drawn out descriptively in the previous part. HABERMAS' theory lends itself to this inquiry as it can derive a commitment to fundamental constitutional principles without presupposing a supreme political will that precedes the rule of law while at the same time refraining from marginalizing the role of the sovereign will of the people.[75] The latter distinguishes his theory from legal positivism[76] and thus, despite all the differences, creates a link between his theory and SCHMITT's positive concept of the constitution.[77] Specifically, HABERMAS' theory allows us to answer the question of why the Swiss constitutional understanding assumes that the principle of democracy and the principle of the rule of law are fundamental and equal and why successful partial revisions are not always implemented according to their wording.

74 JÜRGEN HABERMAS / WILLIAM REHG, Constitutional Democracy: A Paradoxical Union of Contradictory Principles?, Political Theory 2001, p. 766 ff.

75 HABERMAS/REHG (n. 74), p. 778.

76 See LOUGHLIN (n. 42), p. 152.

77 See SCHMITT (n. 40), Foreword.

1. Habermas' Discourse Theoretical Approach

HABERMAS' theory of constituent power proceeds from 24
the question of the relationship between democracy and the rule of law.[78] Using a discourse-theoretical approach, he attempts to find a middle ground between an understanding according to which the constitution is the expression of the unlimited will of the people and an understanding according to which the sovereignty of the democratic lawmaker is limited by human rights.[79] While the first understanding stresses public autonomy, the second emphasizes private autonomy.[80] According to HABERMAS, however, the relationship between democracy and the rule of law represents only an apparent paradox.[81] His argument essentially rests on two theses: that private and public autonomy are equally original and that the constitution is a generational project based on a founding act that initiates an ongoing process of constitution-making.[82] This gives the constitution the procedural sense of establishing forms of communication through liberal rights of freedom and rights of political participation that enable the public use of reason and a fair balancing of interests.[83] Thus, the rule of law neither precedes nor can be derived from the will of the sovereign but is inherent in political self-legislation.[84]

a) Co-Originality of Private and Public Autonomy

Co-originality of private and public autonomy means that 25
the two concepts require each other but do not impose limits on one another.[85] Private autonomy, in the sense of equal individual freedom, is a prerequisite for citizens to exercise their public autonomy as guaranteed by their political rights.[86] At the same time, private autonomy is only safeguarded if citizens make appropriate use of their political rights.[87] Citizens, as addressees and authors of the law, are therefore not entitled to exercise their freedom of choice arbitrarily, but to autonomy in the sense of reasonable will-formation oriented towards the common good.[88] Although their orientation toward the common good cannot be legally required, it is a rational expectation.[89]

78 HABERMAS/REHG (n. 74), p. 766.

79 HABERMAS/REHG (n. 74), p. 766 f.

80 HABERMAS/REHG (n. 74), p. 767.

81 HABERMAS/REHG (n. 74), p. 768.

82 HABERMAS/REHG (n. 74), p. 767 f.

83 HABERMAS/REHG (n. 74), p. 771.

84 HABERMAS/REHG (n. 74), p. 778.

85 HABERMAS/REHG (n. 74), p. 767.

86 HABERMAS/REHG (n. 74), p 767.

87 HABERMAS/REHG (n. 74), p. 767.

88 HABERMAS/REHG (n. 74), p. 767.

89 HABERMAS/REHG (n. 74), p. 767 and 780.

26 To better understand this, it is helpful to look at how HABERMAS conceptualizes the act of constitution-making. He understands the normative foundations of constitutional democracy as the result of a deliberative decision-making process carried out under given historical conditions to create "a voluntary, self-determining association of free and equal citizens."[90] In this process, the founders attempt to find a reasonable answer to the question of what rights they must grant each other if they want to legitimately regulate their coexistence through positive law.[91] Understanding themselves as future addressees of the law, they first recognize that they must introduce (abstract) basic liberal rights of freedom.[92] However, for the community to be based on self-determination, they must also be able to recognize themselves and future generations as the authors of these rights.[93] Therefore, a further category of fundamental rights is needed, which allows for equal opportunity to participate in political lawmaking.[94] This first phase of reflection on the meaning of the practice of constitution-making serves to clarify what rights are needed to express the common practice of a self-determined association of free and equal citizens.[95] This phase is followed by a second phase, the actual act of lawmaking, which takes into account interests that emerge only under the given historical circumstances.[96] Liberal rights of freedom thus guarantee that something like law can exist at all, but without political rights, the law could not be given concrete content.[97]

b) The Constitution as a Generational Project

27 A concept of constituent power based on a founding act can justify the co-originality of individual and collective self-determination, but it is subject to the objection of circularity.[98] If the standard for legitimacy is that law has come about in a procedure of democratic opinion- and will-formation which justifies the presumption that the results are reasonably acceptable, this means that the legitimacy of the outcome of the founding act also depends on the rules that specify this discourse.[99] According to HABERMAS, however, this does not represent an endless regress if the constitution is understood as a future-oriented and open generational project.[100] The internal connection between will and reason, which follows from the co-originality of private and public autonomy, develops only in a self-correcting historical learning process.[101] The norms laid down in the constitution are constantly being developed and adapted to the given circumstances.[102] But there is a common standard from which all generations proceed: the shared practice, established by the founding act and enshrined in the text of the constitution, of creating a self-determining community of free and equal citizens.[103] Public self-determination must, therefore, be understood as a long-term process for the realization and gradual elaboration of a system of fundamental rights.[104]

c) The Swiss Constitutional Understanding in the Light of Habermas

28 The preceding provides normative reasons for why the Swiss people decided to give themselves a democratic constitution based on the rule of law: in an ideal theory, they did so to create a self-determined community of free and equal citizens based on law.[105] At the same time, it can explain why democracy and the rule of law are fundamental and equal constitutional principles: they are fundamental because the goal of a self-determined community of free and equal citizens based on law cannot be achieved without them, and they are equal because neither principle could be realized without the other. Human rights are therefore not to be understood as a constraint on the democratic constitution-maker: they are inherent in a democratic constitution because their observance not only promotes individual self-determination, but also public self-determination.

29 HABERMAS's theory can also make sense of why, even in the context of partial revisions in which the people have already been constituted, the people are often referred to as "constituent power". In his account, the fundamental decision of a self-determined community of free and equal citizens can only be realized in the light of real-life circumstances and over time. In other words, constitution-making is not exhausted in a single political decision, but it is a continuous learning process guided by normative principles and carried out through a multiplicity of democratic decisions.

2. Democracy and the Rule of Law in Swiss Constitutional Thought

30 An understanding according to which the equal status of democracy and the rule of law as fundamental principles

90 HABERMAS/REHG (n. 74), p. 772.
91 HABERMAS/REHG (n. 74), p. 772.
92 HABERMAS/REHG (n. 74), p. 777.
93 HABERMAS/REHG (n. 74), p. 777.
94 HABERMAS/REHG (n. 74), p. 777.
95 HABERMAS/REHG (n. 74), p. 778.
96 HABERMAS/REHG (n. 74), p. 778.
97 HABERMAS/REHG (n. 74), p. 777.
98 HABERMAS/REHG (n. 74), p. 773.
99 HABERMAS/REHG (n. 74), p. 774 and 779.
100 HABERMAS/REHG (n. 74), p. 774.
101 HABERMAS/REHG (n. 74), p. 768.
102 HABERMAS/REHG (n. 74), p. 774.
103 HABERMAS/REHG (n. 74), p. 775.
104 HABERMAS/REHG (n. 74), p. 778.
105 I refer to the Swiss people since the question raised at the beginning of this section refers to the Swiss context. However, as this is a general theory of how constitution-making ideally works, the same normative considerations can also be applied outside the Swiss context.

of the constitution does not constitute an irresolvable contradiction can be found not only in the philosophy of HABERMAS, but also in the work of Swiss constitutional scholars. Already for ZACCARIA GIACOMETTI, the constitution was not a decision of arbitrary content but rather the expression of an idea of the state that envisions the same goal as HABERMAS' constitutional assembly: a self-determined community of equal and free citizens based on law.[106] He, too, recognized that this idea can only be realized if both individual and collective self-determination are guaranteed and that political freedom is not possible without individual freedom.[107] When recent doctrine refers to GIACOMETTI in the context of the (inter)relationship between the rule of law and democracy,[108] it also refers to this idea of the state. The basic assumptions from which the equal status of democracy and the rule of law are derived are thus not only emphasized by HABERMAS but are also firmly anchored in Swiss constitutional thought.

31 Moreover, as I will show below, a look at selected[109] Swiss doctrinal views make it possible to expand HABERMAS' argument in three respects: the function of human rights, the role of constituted organs in elaborating the will of the people and the role of politics.

a) Fundamental Rights as Compensatory Mechanism

32 A look at real-life democratic processes shows that human rights are not only an enabling condition for democratic constitution-making in collective self-determination, but their essential content also serves as a compensatory mechanism.

33 For democratic processes to function in practice, limitations on the ideal of equal participation in political lawmaking are inevitable.[110] Therefore, there are always people whose claim to equal relevance is violated and who must be protected from the excessive exercise of power.[111] Even if an individual does not always have the opportunity to act as a co-author of the state's legal order, they must at least be guaranteed that the law does not violate elementary aspects of their personality.[112] Since no one can be expected to renounce such aspects, they constitute the limit of an individual's hypothetical consent to general laws.[113] MARKUS SCHEFER and ALEXANDRA ZIMMERMANN conclude from this that the essence of fundamental rights necessarily constitutes a barrier to the revision of a democratic constitution.[114]

In my view, this underscores what HABERMAS also em- 34
phasizes: democracy is only possible when both participation rights and human rights are guaranteed. Guaranteeing human rights becomes even more critical when equal participation in democratic decision-making processes cannot be fully realized in practice. It is on this ground that the absolute protection of the essence of fundamental rights against interference by the electorate can be justified. Far from being an inappropriate encroachment on the democratic rights of the citizens, such restrictions are necessary because they protect a minimum degree of individual self-determination indispensable to a democracy.[115]

b) Separation of Powers: The Role of Constituted Organs in Implementing the Will of the People

The separation of powers serves to prevent the abuse of 35
power and ultimately pursues the same goal as fundamental rights: securing individual freedom.[116] What are the implications of this for popular sovereignty?

According to JEAN-JACQUES ROUSSEAU, the people, as a 36
body of citizens, hold the ultimate decision-making power and cannot alienate it.[117] This does not mean, however, that their power is unlimited. The constitution is the expression of the common will of a polis, which, since it must concern everyone equally, can only be expressed in general principles.[118] Equality of rights, as an aspect of the democratic ideal, can only be realized if everyone who agrees to a law can expect to be affected by it in the future.[119] The people are, therefore, called upon to legislate but not to judge concrete situations of interest and specific conflicts of values.[120] JÖRG PAUL MÜLLER and GIOVANNI BIAGGINI apply this idea to the BV and argue that it is also

106 According to him, the BV embodies a liberal idea of the state that recognizes the personality of the individual within the state, see FRITZ FLEINER / ZACCARIA GIACOMETTI, Schweizerisches Bundesstaatsrecht, Zurich 1949, p. 30.

107 See FLEINER/GIACOMETTI (n. 106), p. 30 f.; ZACCARIA GIACOMETTI, Die Demokratie als Hüterin der Menschenrechte (1954), in: Kölz (ed.), Zaccaria Giacometti (1893-1970): Ausgewählte Schriften, Zurich 1994, p. 6 f.

108 Explicitly KIENER/KRÜSI (n. 27), p. 246 f.; implicitly TSCHANNEN (n. 5), N 249 ff.

109 These doctrinal views were selected because they are based on a similar understanding of democracy to Habermas' and are therefore suitable for casting further light on his theory in relation to the Swiss constitutional context.

110 SCHEFER/ZIMMERMANN (n. 6), p. 347; for an elaboration of the reasons for this see also JÖRG PAUL MÜLLER, Demokratische Gerechtigkeit: Eine Studie zur Legitimität rechtlicher und politischer Ordnung, München 1993, p. 148.

111 SCHEFER/ZIMMERMANN (n. 6), p. 347.

112 SCHEFER/ZIMMERMANN (n. 6), p. 349.

113 SCHEFER/ZIMMERMANN (n. 6), p. 348 f.

114 SCHEFER/ZIMMERMANN (n. 6), p. 348 f.

115 SCHEFER/ZIMMERMANN (n. 6), p. 345 f.

116 MÜLLER/BIAGGINI (n. 6), p. 237.

117 JEAN-JAQUES ROUSSEAU, Vom Gesellschaftsvertrag, Stuttgart 1977, 2nd book, 1st chapter.

118 MÜLLER/BIAGGINI (n. 6), p. 239 f.; ROUSSEAU (n. 117), 1st book, 6th chapter.

119 MÜLLER/BIAGGINI (n. 6), p. 239; SCHEFER/ZIMMERMANN (n. 6), p. 247.

120 EHRENZELLER (n. 21), p. 298; MÜLLER/BIAGGINI (n. 6), p. 240; ROUSSEAU (n. 117), 3rd book, 4th chapter.

relevant in the context of popular initiatives for partial revision. The BV assumes that constitution-making is of a general nature: the legislature is responsible for concretizing the constitution, while the judiciary and the executive are tasked with applying the law to concrete cases.[121] This separation of powers is based on the insight that an accumulation of power in any one organ or decision-making procedure is dangerous if some countervailing power does not oppose it.[122] This also applies to the accumulation of power by parties and the voters they mobilize.[123] Furthermore, the division and multi-level nature of the realization of law resulting from the separation of powers also has a rationalizing effect.[124] It creates an important space for reflection and deliberation between the enactment and application of the law, thus making it possible to take into account the overall context of the constitution.[125]

37 In my view, therefore, the separation of powers serves a similar function to that of fundamental rights in the compensatory role which I discussed above. Democratic processes of opinion and will formation are never perfect in practice, and it is, therefore, possible that constitutional norms that are not general in nature and violate the rights of certain individuals will be adopted. Separating powers ensures that shortcomings in the democratic will formation can be corrected retroactively through additional stages of reflection and deliberation. Moreover, it is only in a system based on the separation of powers that the core contents of fundamental rights can be enforced against a rogue popular will, so that they can fulfil their protective function. The constituted bodies appointed by the people are bound by the entire constitution, including fundamental rights, and not only by the newly enacted provision. The rationalizing process of deliberation, which the constitution makes possible, thus, does not end with the adoption of a new constitutional provision but continues in its legislative implementation and judicial application. Therefore, a democratic constitution requires not only human rights and political participation rights that enable rational will-formation. It also requires a separation of powers to allow the rational elaboration of the will of the people by the constituted organs.

38 HABERMAS theory can explain why the expectation that collective self-determination should be exercised with a view to the common good is rational. The separation of powers argument complements HABERMAS' argument because it justifies why the constituted organs can moderate a rogue popular will by subsequently striking a balance between individual and collective self-determination when the electorate fails to meet this expectation. This does not mean that the people are deprived of their power to make the constitution. It does mean, however, that the further elaboration of the constitution in the course of the ongoing constitution-making process is always carried out jointly by the people and its constituted organs. The people are not the sole guardians of the constitution. Instead, a minimum of freedom by the state and before the state is guaranteed by the people and the constituted bodies together "in separate procedures, but each with specific qualifications and in joint responsibility".[126]

c) The Role of Politics

What is the role of political participation rights in the collaborative process of ongoing constitution-making involving both the people and the constituted organs? 39

According to KURT EICHENBERGER, the task of the constitution as the basic legal order of the state is to create and maintain a legal order that guides political unity.[127] However, the limitations of human capacity necessitate the possibility of revising this basic legal order.[128] Although EICHENBERGER rejects the notion of eternal norms, he recognizes that the meaning and significance of a constitution require a certain degree of consistency.[129] The constitution ensures such stability through its structural principles and its emphasis on maintaining a balanced relationship between individual and collective freedom.[130] Adherence to the fundamental ideas underlying the constitution ensures the rationality indispensable to the life of the state.[131] However, the meaning and significance of a constitution also depend on it not becoming stagnant.[132] It must be responsive to social consensus and adaptable to changing needs to remain effective.[133] Politics is the driving force behind this dynamic.[134] Therefore, the state and the constitution are interrelated and mutually dependent.[135] A functioning constitutional state leaves the constitution and politics their own spheres of activity and action while taking into account their interdependence.[136] 40

121 MÜLLER/BIAGGINI (n. 6), p. 245.
122 MÜLLER/BIAGGINI (n. 6), p. 246.
123 MÜLLER/BIAGGINI (n. 6), p. 246.
124 MÜLLER/BIAGGINI (n. 6), p. 246 f.
125 MÜLLER/BIAGGINI (n. 6), p. 247.
126 EHRENZELLER (n. 21), p. 355; based on the formulation in Botschaft über eine neue Bundesverfassung (n. 26), p. 507 (translation by author).
127 KURT EICHENBERGER, Sinn und Bedeutung einer Verfassung, ZSR 1991, Vol. 2, p. 179.
128 EICHENBERGER (n. 127), p. 163.
129 EICHENBERGER (n. 127), p. 163, 181 f. and 249.
130 EICHENBERGER (n. 127), p. 252 f.
131 EICHENBERGER (n. 127), p. 258.
132 EICHENBERGER (n. 127), p. 182.
133 EICHENBERGER (n. 127), p. 208 and 220.
134 EICHENBERGER (n. 127), p. 228.
135 EICHENBERGER (n. 127), p. 151.
136 EICHENBERGER (n. 127), p. 227 and 231.

41 Although EICHENBERGER believes that a dialectical synthesis of law and politics is impossible,[137] he sees the fundamental content of the constitution as a standard towards which a rational society must orient itself in order to preserve the meaning of the constitution. The political entity reserves the ability to amend the constitution because it recognizes limited human capacity, not because it places itself above the law. And such a corrective process, which is in the spirit of HABERMAS' historical learning process, is only possible if certain intergenerational standards exist that are maintained by the stability of the constitution.

42 It can still be criticized that HABERMAS' conception of constitution-making as the elaboration of a system of fundamental rights in a historical learning process does not adequately consider the inherent dynamics of politics, especially in the context of constitutional amendments through popular initiatives. The popular initiative for a partial revision of the BV in the form of the elaborated draft is based on a political logic of its own, which plays a vital role in the acceptance of the constitution: as a "right of dissent" against existing forms of legitimate state power, it allows the people to influence the content of state activity against the will of the constituted organs.[138] This aspect must be considered when the constituted bodies seek to reconcile democracy and the rule of law following the approval of a popular initiative that conflicts with individual self-determination. The pacification of the political conflict underlying the adoption of a popular initiative presupposes the people's approval and acceptance of the balance that has been struck.[139] Consequently, while state power can never be justified solely by collective self-determination,[140] a sustainable subsequent balance between individual and collective self-determination through the constituted organ depends on a minimum degree of acceptance among the population.[141]

V. Conclusion and Outlook

43 Even if autonomous substantive barriers to constitutional amendments are not explicitly anchored in the BV, certain constitutional contents are binding in the context of partial revisions and, in this sense, enjoy higher priority. As I have argued, these include the separation of powers and the core of human rights. These contents are hierarchically superior because, by eliminating them, the democratic constitution-maker would undermine its own foundations.[142] Limits to constitutional revision are, therefore, neither imposed from above by a supreme political or normative force nor from the outside by the requirements of international law. Instead, they are inherent in a constitution based on the rule of law and democracy as fundamental and equal principles.

44 Since the people are not the sole guardians of the constitution, but perform this task together with the constituted bodies, the latter can relativize adopted popular initiatives if the people do not fulfil their part and disregard human rights and the separation of powers. However, the rational connection between collective and individual self-determination alone does not guarantee the necessary acceptance of such measures by the people. They must also be aware of this connection.

45 Therefore, the question arises as to how the prevailing Swiss constitutional understanding can be brought closer to the people. Although democracy is impossible without a commitment by the people to the basic values of the constitution,[143] I do not believe that only the electorate itself can do something about the derailment of direct democracy.[144] The constituted organs and scholars also have a responsibility to sensitize the general population to the concerns of the rule of law.[145] It is a matter of promoting public awareness of the fact that there are certain fundamental principles that stand out from the mass of less significant norms and without which neither self-determination nor freedom can be guaranteed.[146] In my opinion, this is not possible by adhering to the principle of "one type of constitutional law". Thus, the constitutional-theoretical assumptions underlying constitutional interpretation should be disclosed.[147] Not only are the limits of the separation of powers and the core of human rights adhered to in practice but there are convincing normative reasons for doing so. In principle, all constitutional interests are given the greatest possible effectiveness, but since both the principle of democracy and the rule of law form the foundation of the BV, this is subject to the preservation of a minimum degree of individual self-determination.

137 EICHENBERGER (n. 127), p. 240.

138 EHRENZELLER (n. 21), p. 31; MATTHIAS KRADOLFER, Einheit und Konkordanz der Verfassung, ZBl 2022, p. 24 (translation by author).

139 EHRENZELLER (n. 21), p. 75 and 380.

140 Cf. EHRENZELLER (n. 21), p. 281.

141 See also JÖRG PAUL MÜLLER, Die Zukunftstauglichkeit der Demokratie, in: Brühlmeier/Mastronardi (eds.), Demokratie in der Krise: Analysen, Prozesse und Perspektiven, Zurich 2016, p. 308.

142 Cf. FLEINER/GIACOMETTI (n. 106), p. 706.

143 PIERRE TSCHANNEN, Mehr Volk, weniger Staat: Direkt anwendbare Verfassungsinitiativen im Bund, in: Belser/Waldmann (eds.), Mehr oder weniger Staat?, Festschrift für Peter Hänni zum 65. Geburtstag, Bern 2015, p. 141.

144 See TSCHANNEN (n. 143), p. 141.

145 KIENER/KRÜSI (n. 27), p. 255; MÜLLER/BIAGGINI (n. 5), p. 250.

146 DANIEL THÜRER, Integrative Beziehung von Völkerrecht und Landesrecht: Zu einem neuen, wegweisenden Entscheid des schweizerischen Bundesgerichts, in: Jochum/Fritzemeyer/Kau (eds.), Grenzüberschreitendes Recht – Crossing Frontiers, Festschrift für Kay Hailbronner, Heidelberg 2013, p. 643.

147 Cf. MAHLMANN (n. 8), p. 23.

46 Ultimately, it would be desirable to explicitly enshrine the core content of fundamental rights and the separation of powers as autonomous substantive barriers to constitutional revision. Although these limits exist independently of their legal anchoring and are effectively already recognized in the institutional practice of the court and the legislature, such a "conscious self-limitation"[148] would make explicit and thus reaffirm a core insight of the constitutional understanding underlying the BV: collective and individual self-determination are interdependent, and adherence to core contents of the rule of law is therefore also in the spirit of democracy.

148 LORENZ LANGER / ANDREAS TH. MÜLLER, *Ius cogens* und die Werte der Union, in: Häberle (ed.), Jahrbuch des öffentlichen Rechts der Gegenwart, Tübingen 2013, p. 288 (translation by author).

Abstract

Dieser Artikel untersucht, ob es trotz des etablierten Grundsatzes der Gleichrangigkeit von Verfassungsnormen bestimmte höherrangige Normen in der Schweizer Bundesverfassung gibt, die im Rahmen von Verfassungsänderungen verbindlich sind. In Anlehnung an Carl Schmitt, Jürgen Habermas und die schweizerische Verfassungslehre argumentiere ich, dass die auf Rechtsstaatlichkeit und Demokratie als grundlegende und gleichberechtigte Verfassungsprinzipien basierende Bundesverfassung selbst Grenzen für Verfassungsänderungen vorgibt. Die Stärkung des öffentlichen Bewusstseins für dieses Verfassungsverständnis wird die Vereinbarkeit von Demokratie und Rechtsstaatlichkeit in der Praxis erleichtern.

Abstract

Cet article examine si, en dépit du principe d'égalité des normes constitutionnelles, certaines dispositions de la Constitution suisse peuvent être considérées comme supérieures et contraignantes lors des modifications constitutionnelles. En s'appuyant sur les travaux de Carl Schmitt, de Jürgen Habermas, ainsi que sur la doctrine suisse, il apparaît que la Constitution fédérale, qui repose sur l'État de droit et la démocratie en tant que principes constitutionnels fondamentaux et égaux, impose elle-même des limites aux révisions constitutionnelles. Une meilleure compréhension de cette caractéristique par le public permettrait, en pratique, d'accroître la compatibilité entre la démocratie et l'État de droit.