

Debate

Swiss Legislation in the Era of Globalisation: A Quantitative Assessment of Federal Legislation (1983-2007)

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Introduction and methodology

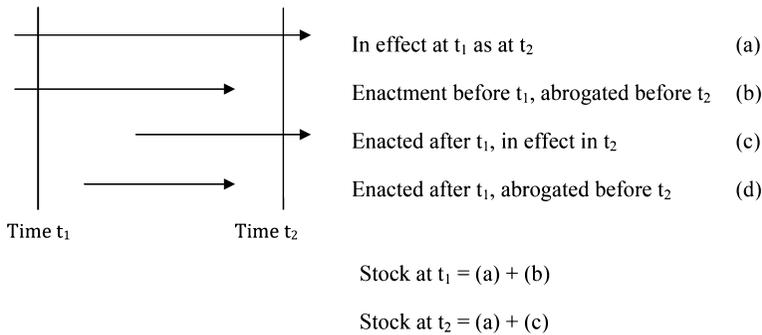
How do globalisation and internationalisation influence Swiss legislation? While the other contributions to this debate focus on direct and indirect effects of Europeanisation, the following article deals with the more general question of internationalisation. The development of international law as part of the Swiss legislation is observed over a long period of 25, partly of 60 years. Quantitative empirical findings are used to give some answers to the following questions: To what degree can the internationalisation of politics be identified in the federal legislation, and which are the domestic legal areas particularly affected by internationalisation? Moreover, internationalisation takes place in different forms of legislation (constitutional amendments, federal laws, federal ordinances and the ratification of international treaties) and implies different political actors. This leads to institutional questions: Does internationalisation lead to changes with regard to the power balance between the executive and the parliament? And what role does direct democracy play in the era of internationalisation of law?

Even though our data deal with international law in general, the latter is closely linked to the influence of the EU on Swiss law policies in the last two decades (Linder 2011, 2013). Since the beginning of bilateralism between Brussels and Bern, EU regulations have become by far the most important part of international law transferred and adopted as part of Swiss legislation. Thus, at least for the last two decades, our findings can be partly considered as representative “footprints” (Gava and Varone 2012) of EU law in Swiss legislation.

Methodologically, a quantitative analysis of the legislation process and of the development of law is not trivial. Laws and ordinances, the basic units of investigation, have a birth (enactment) and end with death (abrogation). Thus, the stock of law can be conceived as a population consisting of the basic units of laws and ordinances. Similar to the analysis of a natural population, the “census” of the stock of legislation must consider the different composition of the population at each point in time, and has to register the lifespan of every single normative act. Figure 1 visualises this methodological concept.

A quantitative assessment of legislation is not only interested in the development of the stock but also in the running law-making activity. Measuring the activities of law-making is further complicated by the fact that laws are subject not only to “births” and “deaths”

Figure 1: The quantitative analysis of legislation: Basic demographic method



but also to partial revisions of an already existing normative act. In fact, partial revisions of laws are by far more numerous than enactments of entire new laws. Therefore, the activities of law-making consist not only of enactments and abrogations, but are for a good part determined by partial revisions. Hence for a valid quantitative analysis of legislation, it is important to clearly distinguish between the stock of law and the law-making activity. This distinction, however, is neglected in many studies.

Data for this articles stem from two complementary studies on the quantitative development of Swiss legislation. The first study covered the period 1948-82 and focused on the question of “law inflation” at the federal and cantonal level (Linder et al. 1985). The second study covered the period 1983-2007 and paid particular attention to the relations between domestic and international law (Linder et al. 2009). In both studies, the distinction between “domestic” and “international” law follows the official classification. Thus, domestic law is defined by the autonomous production of Swiss federal norms in the ordinary legislation process, whereas international law originates from international negotiations (treaties) or from external law making authorities, thus corresponding to the so-called “direct” internationalization. With the adoption by Swiss authorities, the latter becomes part of binding Swiss federal legislation.

In the following, when speaking of “laws”, I mean the total of normative acts, i.e. formal laws (enacted by the parliament) as well as ordinances (enacted by the Federal Council) if not otherwise stated.

The internationalisation of federal law: an overview

The quantitative analysis shows the steady increase of international law over a period of 60 years (Figure 2): International treaties, representing less than one third of Swiss legislation, have experienced a permanent growth; today, they outnumber legislative acts from domestic law. The downward trend of the curve regarding domestic law for the last 20 years is somewhat misleading: The decreasing number of acts is partly due to a legislative policy to abrogate scattered smaller acts and to integrate them into single and larger pieces of legislation. Even with this in mind, the development of international law is impressive. Its growth, as we discuss later, partly implies the crowding out of domestic law. While the literature often associates the kick-off of the “second wave” of globalisation with the 1990s, our analysis shows that the internationalisation of law has started already after

Figure 2: Stock of domestic and international law 1948-2007 (number of acts in force)

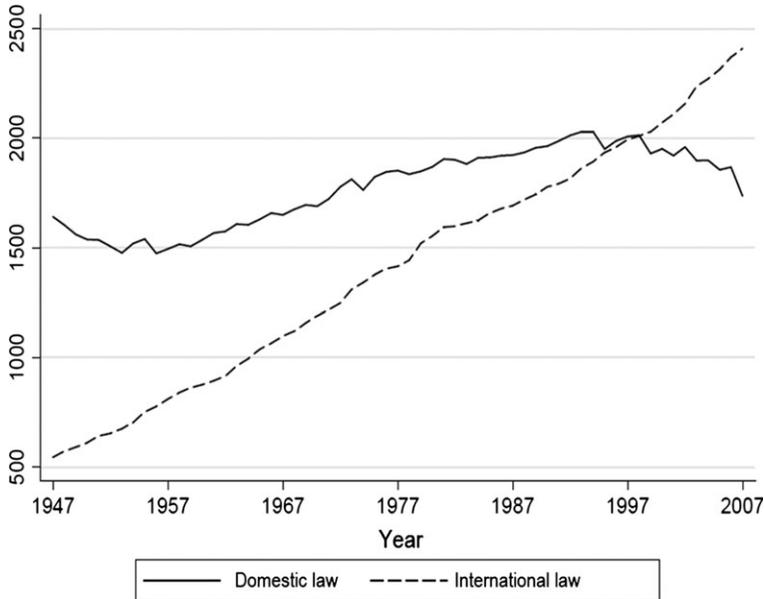
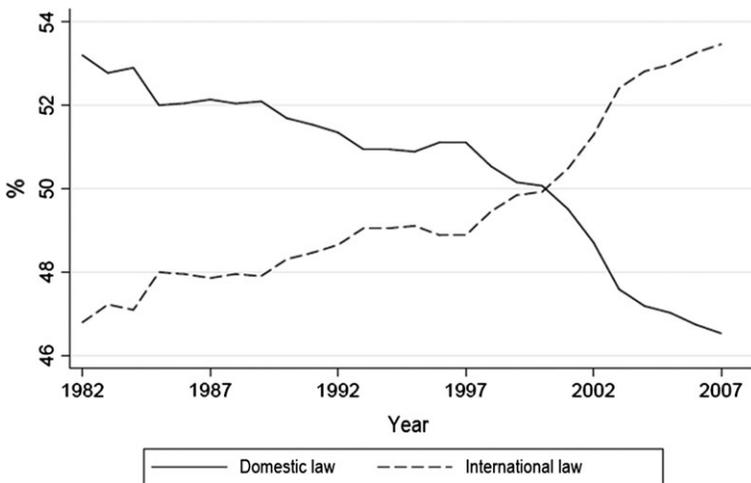


Figure 3: Relative share of domestic and international law in Swiss legislation 1982-2007 (pages of stock)



World War II six decades ago. Ever since, the stock of international law has demonstrated a stronger growth than the stock of domestic law.

A closer look at the period 1982-2007, using the more reliable indicator of number of pages for the evolution of the stock of legislation, confirms the general picture. Figure 3 shows the relative proportion of domestic and international law. Also in this perspective, the quantitative progress of international law is remarkable: While in 1982, domestic law

Table 1: Internationalisation of law in selected policy fields (pages of stock)

Policy field	Proportion of international law in percent		Change (Percentage points)	Stock size of law 2007 (pages)	
	1982	2007		Domestic	International
International cooperation (economic and technical)	96	97	+1	51	1751
Double taxation	91	95	+4	93	1658
Science and research	84	92	+8	64	745
International private law	92	89	-3	48	372
Customs	77	81	+4	1079	4633
Intellectual property rights	77	77	0	389	1319
Immigration	78	76	-2	387	1208
Transport	48	63	+15	2645	4539
Communication	51	61	+10	390	617
Penal system	0	59	+59	31	44
Forestry	40	57	+17	144	191
Social insurance	46	55	+9	1385	1721
Culture, language, arts	0	52	+52	151	163
Defence, national security	35	48	+13	1001	923
Commerce	55	48	-7	1400	1281
Insurance	0	43	+43	118	90
Environment	14	43	+29	1279	956
Agriculture	14	28	+14	1749	678
Health*	42	23	-19	2381	719
Land use planning	0	23	+23	47	14
Education	3	20	+17	688	167

Notes: The selection of the 21 policy fields was made on the criteria of high internationalisation (>75 percent) or of major changes in internationalisation (> 9 percentage points or < -5 percentage points).
*without environment

was predominant with 53 percent of the total stock, 2007 marks the time-point in which the relation is exactly reversed, federal legislation being now composed of 53 percent of international law. The acceleration of internationalisation after 1997 corresponds to the era bilateral treaties with the EU and related Europeanisation of law, which in particular superseded domestic economic law.

Internationalisation of particular policy fields

Table 1 compares the different degrees of internationalisation in 1982 and in 2007 for 21 policy fields. At the top of the table, we note seven policy fields, which by their very nature belong to traditional fields of international relations (international cooperation, double taxation, science and research, international private law, customs, intellectual property rights, immigration). With the exception of science and research as well as customs, the high internationalisation of these policy fields shows only minor changes.

The latest period of globalisation, however, has led to the internationalisation of new policy fields that were traditionally dominated by domestic law. Schneider (1998: 69) and Cottier et al. (2001: 3f.) mention, among others, environment, national security and transport. This is in line with our findings: The share of international law in the field of environment has tripled, while in transport and in defence it has grown by one third. Other fields of high internationalisation of law are (university) education, agriculture and forestry. In all these fields, international law is partly crowding out domestic regulation.

In the last 30 years, internationalisation has penetrated policy domains that previously were purely domestic. This regards the penal system, culture, insurance and land use planning.

Finally, we see that the proportion of international law has decreased in the domains of commerce and health. Their “re-nationalisation” results from the much stronger growth of domestic law.

In summary, it can be stated that the internationalisation of law starts from different levels and is progressing differently in every policy field.

Institutional question I: Power shift from parliamentary to executive democracy?

Constitutionalists and political scientists generally agree that internationalisation strengthens the powers of the executive while the influence of parliament on the shaping of the legislation is decreasing. How does this hypothesis hold in the light of a quantitative analysis?

Figures 4 and 5¹ show the relative proportion of legislative activities² of the Federal Council and of the Swiss parliament from 1982-2007. The legislative activity is accredited to the authority having the competency of the last decision.

First of all, the quantitative analysis reveals an important implication of different characteristics and procedures for domestic and international law. Domestic law is characterised by a high number of ordinances of the Federal Council and of the federal departments, which sum up to about 80 percent of all normative acts. Ordinances or secondary laws concretise the substance of formal parliamentary law, and in practice we find multiple ordinances for one single law. This explains the high proportion of final decisions in the hands of the executive. In contrast, international law is formally characterised by treaties with a foreign state or authority, normally consisting of “primary” norms and subject to parliamentary approval. While we also find treaties of “secondary” norms of administrative-technical nature, the federal constitution sets narrow limits to enactments by the executive. This accounts for the fact that parliament has the last word in about half of the decisions in international law, on average.

The two figures show diverging trends: While for the final decisions on international treaties, the influence of the Federal Council is as expected growing, the opposite is true for the domestic law; for the latter, the quantitative analysis suggests a growing decision-making power of parliament. This is at first sight surprising.

Let us first comment on the international law. The strong and irregular peaks of parliamentary or executive influence reflect special events, such as packets of formal revisions or

¹ The figures are somewhat redundant because – omitting referenda which are statistically insignificant – the number of decisions of both authorities always add up to 100 percent. However, the development is better illustrated with two lines in the figure.

² Legislative activity is defined by the sum of enactments of new laws, total and partial revisions.

Figure 4: Final decisions on domestic law: Shares of the Federal Council and of Parliament

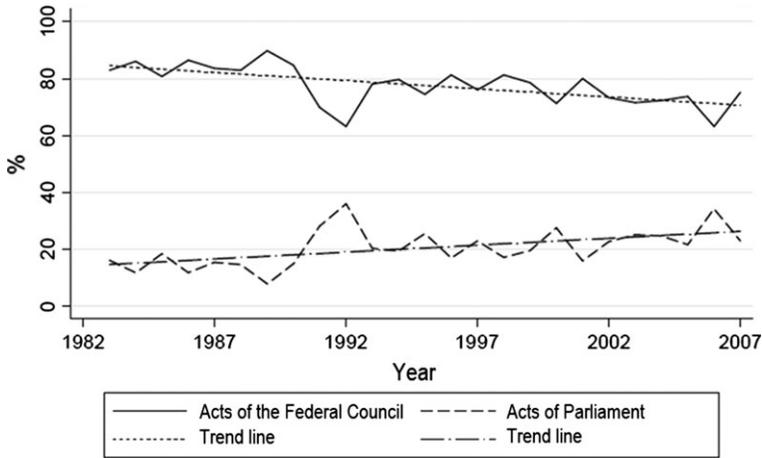
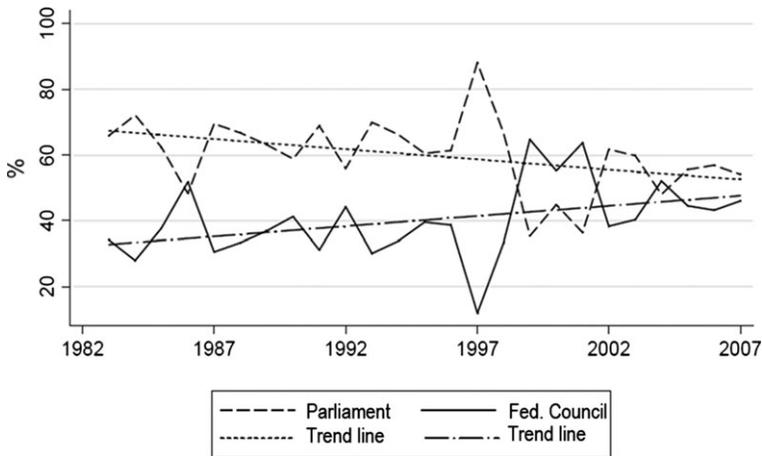


Figure 5: Final decisions on international treaties: Relative share of the Federal Council and of Parliament



the enactment of bilateral treaties. In the long run, however, the quantitative trend corroborates the hypothesis of growing executive power.

For the more regular trend of growing parliamentary influence in domestic law, we see two explanations. The first is that parliamentary reforms of the early 1990s have strengthened the power and influence of the legislature. Indeed, the reform of standing committees, further elements of professionalisation and new procedures could all add to a stronger parliament (Lüthi 1997). The second explanation is that domestic law is revised more quickly, and that a good part of the last decisions of parliament represent rather incremental, small

revisions of existing laws. Moreover, “autonomous adaptations” of EU law, after the enactment by way of revisions through the legislature, are formally categorised as domestic, not international law.

Thus, with regard to the question of power shifts between parliament and the executive, the quantitative analysis suggests two different trends: an increasing influence of the Federal Council in the realm of international law, and a stronger parliament in domestic legislation. Yet these trends must be interpreted differently. The thesis of power shift to the executive is supported by qualitative arguments: In international law, the role of parliament is considerably reduced by the fact that the legislature can only approve or reject a treaty as a whole, whereas the political initiative for new international treaties and the shaping of their substance is in the competency of the Federal Council and a matter of diplomatic negotiations. With regard to the stronger position of the parliament in domestic law we should be more cautious. In the practice of making Swiss laws “euro-compatible” and in the “autonomous adaptations” of EU law, the parliament has formally the last word. However, decision-shaping (or simple copy-paste of EU regulations)³ rests mainly in the hands of the government. Thus we have some doubts whether the growing proportion of last decisions can be interpreted as a real increase of the power of parliament.

Institutional question II: Growing impact of direct democracy in international legislation?

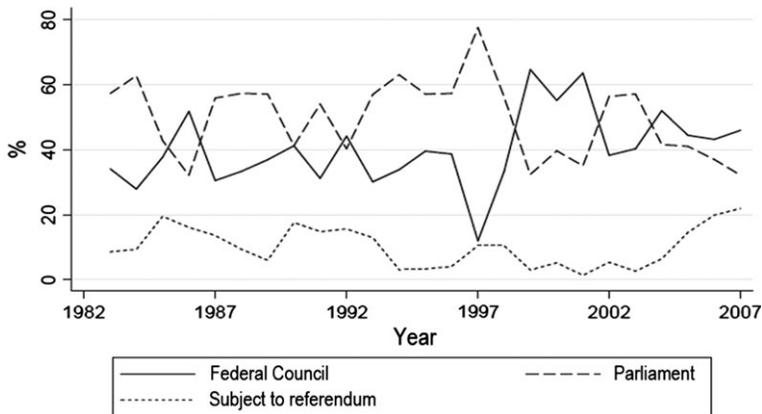
One hundred years ago, the people had no say in foreign policy. And, also, the role of parliament was limited. In his “Kommentar zur Schweizerischen Bundesverfassung” of 1905, Walther Burckhardt wrote that an international treaty concluded by the Federal Council remains valid even though Parliament would refuse approbation. This statement represents a widespread opinion of European constitutionalists in the 19th century: Foreign policy should lie in the competency of the executive exclusively, in order to defend at best national interests in a world of belligerent states. With the strong evolution of law in international relations, and with the interdependence of domestic and international policies, things have fundamentally changed. The role of Parliament has strengthened, and thanks to three revisions of the Constitution in 1921, 1977 and 2003, the people received an increasing co-decision right on decisions on international law. Today, the Constitution grants the direct participation of the people (and the cantons) in international affairs in a similar way as it does for domestic law: Similar to constitutional reforms, the most important treaties are subject of the obligatory referendum, and with the last revision of 2003, the optional referendum was extended to all treaties containing important legal norms or requiring implementing federal legislation.⁴

As shown in Figure 6, the intentions of the revision of 2003 to widen the people’s access to the last decision in foreign affairs have been successful. As shown by the lowest, dotted line, the period before 2003 is characterised by a diminishing rate of international treaties subject to the optional referendum. Since then, however, this trend is significantly reversed.

³ W. Hauck (2005), a qualified observer, has criticised the federal administration for being unable to translate EU law into the short and concise language of Swiss law, and for using instead the easy “copy- paste” method. Based on convincing examples, the author complains that this direct import of complicated and bureaucratic EU law destroys Swiss law culture. At least in the quantitative dimension, Hauck cannot be wrong: While Swiss international law counts for less than 30’000 pages, EU economic law alone comprises more than 85’000 pages.

⁴ For further details see: Haller (2009), or Aubert and Mahon (2009).

Figure 6: Proportion of international law subject to optional referenda



Note that the trend-line for referenda shows the rate of treaties *open* to the referendum but does not represent the rate of effective popular votes, which is much smaller. This is because the optional referendum challenge materialises in a small fraction of all cases only. Even so, the mere possibility of a wider access to the treaty referendum implies dramatic changes. For instance, when Switzerland ratified the European Convention of Human Rights in 1974, the issue was not submitted to a popular vote despite the important legal norms of the treaty. We could not imagine this today (Haller 2009: 237). Under the new referendum clause of 2003, however, even the modification of bilateral treaties with the EU (such as the extension of the agreement on the free movement of persons with new EU member states) is subject to the optional referendum.

For all treaties containing important legal norms or requiring implementing federal legislation, we have to expect that the referendum challenge will materialise if the political issue is controversial. In this perspective, Swiss foreign policy will face new risks and chances as well.

The risk is that the wider referenda possibilities will restrict the room for negotiation of the government in international relations, and that after the rejection of a treaty in a popular vote the government cannot count on a new window of opportunities for re-negotiation. The future of our relations with the EU illustrates this risk. In the worst case, it could lead to a growing political isolation of Switzerland. Yet the veto-device of the referendum can also be seen as a chance. Direct democracy, in the past, was an instrument of political opposition against local, cantonal or federal governments. The on-going processes of globalisation and of internationalisation of law are, however, characterised by global elitism and thin democracy. Their institutions lack the essential change of power. Swiss political rights of direct participation in foreign affairs offer one of the rare instruments to fill this democratic vacuum. Direct democracy can play a new role – also a new role of opposition. Despite the risks mentioned above, it is not a priori wrong but legitimate to conceive and to use popular rights as a countervailing power against the agents of globalisation (Linder 2011: 423ff.).

References

- Aubert, J.-F. and P. Mahon. (2009). *Petit commentaire de la Constitution fédérale de la Confédération Suisse*. Zürich: Schulthess.

- Cottier, T., D. Achermann, D. Würigler and V. Zellweger. (2001). *Der Staatsvertrag im Schweizerischen Verfassungsrecht – Beiträge zu Verhältnis und methodischer Angleichung von Völkerrecht und Bundesrecht*. Bern: Stämpfli.
- Gava, R. and F. Varone. (2012). So close, yet so far? The EU's footprint in Swiss Legislative Production. In Brouard, S., O. Costa and T. König (Eds.), *The Europeanization of Domestic Legislatures: The Empirical Implications of the Delors' Myth in Nine Countries*. New York: Springer (197–221).
- Haller, W. (2009). *The Swiss Constitution in a comparative context*. Zurich and St. Gall: Dike.
- Hauck, W. (2005). Gesetzgebung für statt gegen Bürger: Der Kampf um die Verständlichkeit von Vorschriften. *NZZ*, September 5. Zürich.
- Linder, W. (2011). Europe and Switzerland: Europeanization without EU membership. In Trampusch, C. and A. Mach (Eds.), *Switzerland in Europe: Continuity and Change in the Swiss Political Economy*. New York: Routledge (43–59).
- Trampusch, C. and A. Mach. (2013). Switzerland and the EU: the puzzling effects of Europeanisation without institutionalisation. *Contemporary Politics* 19(2): 190–202.
- Linder, W., O. Hümbelin and M. Sutter. (2009). *Die Entwicklung der eidgenössischen Gesetzgebungstätigkeit 1983–2007: eine quantitative Analyse*. Bern: Institut für Politikwissenschaft.
- Linder, W., S. Schwager and F. Comandini. (1985). *Inflation législative? Une recherche sur l'évolution quantitative du droit suisse 1948–1982*. Lausanne: IDHEAP.
- Lüthi, R. (1997). *Die Legislativkommissionen der Schweizerischen Bundesversammlung. Institutionelle Veränderungen und das Verhalten von Parlamentsmitgliedern*. Bern: Haupt.
- Schneider, G. (1998). *Vom Sonderfall zum Normalfall – Eine Einführung in die Aussenpolitik der Schweiz*. Zürich: Pro Helvetia.

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