



**International Covenant on
Civil and Political Rights**

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Human Rights Committee

**Concluding observations on the fourth periodic report of
Switzerland**

Addendum

**Information received from Switzerland on follow-up to the
concluding observations***

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* The present document is being issued without formal editing.



I. Recommendation, paragraph 7 (a): monitoring of the compatibility of citizens' initiatives (*initiatives populaires*) with the obligations arising from the Covenant

1. The common core document forming part of the reports of States parties of Switzerland, adopted by the Federal Council on 12 October 2016, deals with the incorporation of international human rights instruments (paras. 102 et seq., p. 28), the direct justiciability of the provisions of human rights instruments in national courts (paras. 104 et seq., p. 28) and citizens' initiatives (paras. 106 et seq., p. 29). The Government of Switzerland would like to refer back to the document and add the following.

2. When dealing with citizens' initiatives, the Federal Council and the Federal Assembly thoroughly examine their compatibility with international law. If the initiative violates the peremptory rules of international law, it must be declared totally or partially void by the Federal Assembly (1). It is possible, on the other hand, to put citizens' initiatives that are at variance with non-peremptory rules of international law to a vote. In this case, the Federal Assembly may recommend their rejection. It may also draw up a counterproposal in order to submit another version to the people and the cantons that is consistent with international law. If the counterproposal is approved, that version becomes valid constitutional law. This may result in a conflict of norms between the Constitution or a federal law and international law.

3. In recent years, the people and the cantons have on several occasions approved citizens' initiatives that have raised questions of compatibility with certain provisions of international law (2). In implementing initiatives approved by referendum, every effort is made to avoid a possible conflict between the international obligations of Switzerland and constitutional law by means of an interpretation in accordance with international law, which is possible in many cases. Examples of this include initiatives on expulsion and on life imprisonment for persons convicted of sex offences and violent crimes who are considered very dangerous and not responsive to rehabilitation (3).

4. Where the new provision of the Constitution leaves no scope for the legislature to implement it in accordance with international law, the people and the cantons have the option of amending or repealing the constitutional rule at variance with international law (4).

5. These options give Switzerland political leeway, which it has used up to now, often successfully.

6. The Federal Council and the federal administration have on many occasions examined the relationship between international law and domestic law in general and the problem of citizens' initiatives on amendments at variance with international law in particular. In 2010, the Federal Council conducted a thorough assessment of the issue and published the results in a report (5). It identified problems that citizens' initiatives at variance with international law raise and looked into solutions applicable at the stage of invalidation of the initiative and its preliminary examination. It concluded that the regulations and practices have worked thus far. In its additional report of 30 March 2011 on the relationship between domestic law and international law (6), the Federal Council recommended that the substance of citizens' initiatives should be scrutinized beforehand and proposed adding respect for the essence of the fundamental rights enshrined in the Constitution to the substantial limits on the revision of the Constitution. After receiving the Federal Council's additional report, the commissions of the political institutions of the National Council and the Council of States put forward two motions instructing the Federal Council to prepare a draft containing the necessary constitutional and legislative amendments on the basis of its two proposals. However, the motions were critically received when consultations on them were held. Therefore, the parliament withdrew the two motions in question in June 2016 (7). The parliament also concerned itself with the issue of the compatibility of citizens' right to propose legislation with observance of international law. The Political Institutions Committee of the Council of States examined the need to reconsider the conditions of validity of citizens' initiatives. After holding

hearings, it decided to promote ad hoc reforms of the law. Several parliamentary questions related to the rank of international law in the hierarchy of rules of domestic law were also brought in recent years.

7. On 12 August 2016, a citizens' initiative entitled "Swiss law instead of foreign judges" (initiative for self-determination) was brought in, which sought to establish the primacy of the Constitution over international law except where it involves peremptory norms of international law. The Federal Council found, among other things, that this initiative is likely to exacerbate problems affecting the relationship between international and domestic law and prevents it from seeking, as it does today, pragmatic and individual solutions, taking into account the requirements of the Constitution and the commitments of Switzerland, for implementing constitutional provisions contrary to international law. It invited the Federal Chambers to submit this initiative to the people and the cantons without either a direct or indirect counterproposal while recommending that it be rejected (8). The Federal Assembly also decided, on 15 June 2018, to recommend that this initiative be rejected (9).

II. Recommendation, paragraph 7 (b): thorough review of national laws that are at variance with the Covenant with a view to their revision

8. New regulations cannot be introduced into the existing legal system without taking into account fundamental rights and international law, which are an essential element of our legal system. Government messages to the parliament must include, if necessary, a chapter devoted to examining of the compatibility of a draft legislative act with the international commitments taken on by Switzerland. When new laws or amendments to existing laws are drafted, they are also submitted to the cantons, political parties represented in the parliament, umbrella organizations of municipalities, towns and mountain regions, umbrella organizations of businesses and other interested parties, including non-governmental organizations. Any other person or organization may also participate in the consultations and express an opinion. Before external consultations are held, internal consultations occur in two successive phases, which are aimed at: similar offices and organizational units; and departments. The preventive monitoring of constitutionality done by the federal administration is therefore particularly important for proposed federal legislation. Similarly, the federal authorities or the Federal Assembly must ensure that cantonal legislative acts do not run counter to international law.

9. As noted above, the Federal Council and the parliament have, in principle, succeeded in taking international requirements into account when implementing citizens' initiatives. Provisions of domestic law for which there remain problems with compatibility with international law are therefore rare. A case in point is article 72, paragraph 3, of the Constitution on the ban on the construction of new minarets in Switzerland, which was introduced in 2009, contrary to the recommendations of the Federal Council (see the fourth periodic report of Switzerland of 7 July 2016, para. 177). Following the approval of this initiative, various legislative proposals (*interventions*) were brought forward aimed at replacing the ban provision with a general article on religions. However, these proposals came to nothing. Appeals to the Federal Supreme Court and the applications to the European Court of Human Rights against the ban on the construction of minarets as such were declared inadmissible on procedural grounds (10). The only specific project for the construction of a minaret presented to date could not be carried out for reasons relating to building regulations (11). So far, the European Court of Human Rights has not received an admissible application concerning this ban.

10. There are no plans to conduct a systematic review of the few provisions that pose problems of compatibility with the Covenant with a view to their revision.

III. Recommendation, paragraph 15: national human rights institution

11. In June 2016, the Federal Council was apprised of the options studied for a lasting arrangement and commissioned the relevant departments to draft a preliminary bill for a national human rights institution according to the “status quo +” model, which is based on the development of a pilot project while addressing the shortcomings identified during the evaluation of the project. Unlike the pilot project, the institution must have a legal basis and be free to decide on the core funding allocated.

12. A preliminary bill gives concrete expression to the “status quo +” option. It provides that the responsibilities of the future national human rights institution will continue to be assumed by a centre attached to one or more universities. Unlike the current solution, the financing granted to the institution by the Confederation will no longer be linked to the purchase of services in the form of commissions. The preliminary bill constitutes a legal basis for granting the institution a subsidy in the form of financial assistance and sets the conditions under which it will be allocated. The amount of this financial assistance is estimated at 1 million Swiss francs per year, which corresponds to the amount paid under the pilot project. The universities to which the national human rights institution is attached are expected to provide the necessary infrastructure, particularly computer facilities and equipment, free of charge as a condition for being granted financial assistance.

13. With respect to the law on the provision of financial assistance to a centre of one or more universities, the proposed mechanism concerns the mandate of the national human rights institution and the main conditions for granting financial assistance; it does not, however, deal with the details of the organization and functioning of the institution.

14. Based on the experiences of the pilot project, the preliminary bill specifies the tasks of the institution, as follows:

- Information and documentation
- Research
- Drafting of views and recommendations
- Encouragement of dialogue and collaboration between services and organizations active in the implementation and promotion of human rights
- Human rights education and awareness-raising
- International exchanges

15. As with the pilot project, provision has been made for the institution to provide paid services within the scope of its mandate to the authorities and private organizations.

16. The preliminary bill provides that the various social forces involved in the implementation and promotion of human rights are to be represented in the organization of the national human rights institution.

17. The financial assistance of the Confederation must be paid on the basis of an open-ended contract, which regulates in particular the amount of the financial assistance, the terms of payment and the grounds for terminating a contract.

18. The preliminary bill guarantees the independence of the institution in the performance of its tasks with regard to the universities to which it is attached and the Confederation. The explanatory report states that independence can be guaranteed in particular by giving the institution its own legal personality in the form of an association or a foundation.

19. In a decision of 28 June 2017, the Federal Council submitted the preliminary bill for consultation to the cantons, political parties and interested organizations. The consultation was completed in late October 2017. The vast majority of positions were in favour of the preliminary bill in principle. By weighing the responses, the thrust of the project was also confirmed. According to the applicable procedure, the report on the results of the consultation is to be published along with the bill and message to the parliament. The

relevant departments are currently in the process of finalizing the draft legislation on the establishment of the institution.

IV. Recommendation, paragraph 29 (a) and (b): independent complaints mechanism

20. On this point, the following should be recalled.

21. Under the Swiss federal system, it is the cantons that have primary responsibility for processing complaints against the police. They are free to define the procedures that they deem appropriate within their remit provided that such procedures are compatible with federal law and international law.

22. The investigation of criminal complaints against the police is broadly regulated by the Swiss Code of Criminal Procedure (Systematic Compendium of Federal Law, RS 312.0). The Code guarantees that such complaints are dealt with by an independent criminal justice authority, namely the public prosecutor's office (12). The public prosecutor's office is required by law to initiate and conduct proceedings without delay when it becomes aware of offences or evidence that offences have been committed (13). The injured party may file her or his complaints with the public prosecutor's office directly (14). Reports do not therefore have to be made through the police. Criminal justice authorities, including police officers, are required to report any offences that come to light in the course of their official activities to the competent authorities (15).

23. The principle of independence is also given concrete expression by the grounds set out in the Code for recusal (16). The injured party may submit a request for the recusal of a person acting for a criminal justice authority to the office conducting the proceedings if there are grounds to suspect that he or she may not be impartial. If the request is opposed in a case involving the police, the matter is referred to the public prosecutor's office for a final decision.

24. The Federal Supreme Court confirmed that any person who claims with justification to have been treated in an inhuman or degrading manner by a police officer is entitled to a prompt, impartial, effective and thorough official inquiry, which must make it possible to clarify the circumstances and identify and punish those responsible (18). The right to an effective and thorough official inquiry requires the authorities to take all reasonable steps to obtain evidence regarding the facts in question, such as the hearing of the persons involved, eyewitness statements, expert opinions, medical reports, etc. In addition, the authorities must act swiftly and diligently (19). Any failure in investigations that compromises the authorities' ability to establish facts or responsibilities may constitute a violation of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Convention; RS 0.101). In several recent judgments, the Federal Supreme Court has referred the case back to the cantonal authority for an inquiry that meets these requirements (20). However, the Federal Supreme Court has decided not to give an authoritative decision on the need to establish specific appeals mechanisms for incidents involving the police (21).

25. The European Court of Human Rights also handed down several judgments in which it examined the question of the independence of the inquiry in relation to allegations of police violence (22). According to the Court's established precedents, where an individual claims with justification to have been subjected by the police or other comparable State services to treatment that runs counter to article 3 of the Convention, that article requires that there be an effective official inquiry, which must be capable of leading to the identification and punishment of those responsible. In addition, the inquiry must be conducted independently of the executive branch. The independence of the inquiry implies not only the absence of a hierarchical or institutional link but also real independence. The Court has given opinions in three Swiss cases on the issue of the effectiveness of an inquiry in connection with allegations of police violence. It found that the officers responsible for the inquiry lacked independence in only one case, prior to the entry into force of the Code of Criminal Procedure (23). In the second case, it found that the inquiry into an incident of police violence was not carried out with the necessary diligence because of the decision not

to seek a second independent expert opinion on the police report. In the last case, the Court stressed that the incident giving rise to the application was immediately investigated by the public prosecutor's office and that the Swiss authorities cannot be accused of not having promptly and seriously taken into account the allegations of ill-treatment made by the applicant (no violation) (25). Nor does the jurisprudence of the European Court of Human Rights provide for an obligation to establish specific appeals mechanisms in the event of incidents involving the police.

26. Appeals within the meaning of article 393 of the Code of Criminal Procedure made directly to the competent cantonal court also constitute an ordinary legal channel for appeals against decisions and procedural acts of the police and the public prosecutor's office.

27. Disciplinary action related to police conduct is handled by the supervisory authority as part of administrative procedure.

28. It is also worth mentioning the State liability procedure, which is aimed in particular at guaranteeing the alleged victim the right to claim compensation and reparation for non-material damage caused unlawfully, even in the absence of any fault on the part of the perpetrator of the damage.

29. The Swiss judiciary is independent at all levels of government. Many cantons are therefore of the view that it is not useful to establish additional mechanisms to deal with complaints against the police. However, some cantons have adopted additional measures, such as stipulating that hearings may be conducted only by representatives of the public prosecutor's office, by an officer of a police force not involved in the case or, as in Geneva, by a special police unit dedicated to cases of this kind (Inspectorate General of Services). Certain other cantons have established alternative mechanisms to those envisaged under the Code of Criminal Procedure for managing complaints against police officers (26). A proposal (*postulat*) was very recently submitted to the Grand Council of the Canton de Vaud, or Vaud cantonal parliament, to examine and report on the establishment of an independent mechanism to assess the complaints of victims of police violence (27). The cantons also have informal complaints mechanisms, such as a citizen's complaint mechanism, which allows complaints about the conduct or act of a police officer to be made directly to the police, or to the supervisory authority, which is an authority independent of the police.

30. In the context of the last universal periodic review of Switzerland, in April 2018, the Federal Council accepted recommendation 146.57 requesting Switzerland to "Establish an independent mechanism empowered to receive complaints relating to violence and ill-treatment by law enforcement officers, and conduct timely, impartial and exhaustive inquiries into such complaints" (29).

V. Recommendation, paragraph 29 (c): statistics

31. There has been no development on the issue of a national police abuse database since the submission of the fourth periodic report of Switzerland (see the periodic report of Switzerland of 7 July 2016, para. 112).

32. The handling of complaints against police officers is regulated at the cantonal level and there is therefore no national database or corresponding register. Most cantons keep internal statistics of all complaints received.

33. Police crime statistics compiled by the Federal Statistical Office in cooperation with the cantonal police authorities provide information on the number, structure and development of recorded offences and accused persons. The Office records all acts of abuse of power and specifies whether or not an act was committed in the exercise of duties, without, however, indicating the profession of the perpetrator. Acts of violence committed by the police, insofar as they do not involve the use of force in accordance with legal requirements, constitute in principle abuse of power within the meaning of article 312 of the Swiss Criminal Code. There is a coincidence of offences under article 312 of the Criminal Code and offences constituting acts of violence such that a possible conviction is

rendered on the basis of the two offences in question. Therefore, such acts are recorded in the statistics under article 312 of the Criminal Code. Since the coincidence of several offences is not recorded as such in the statistics, it is only possible to determine on a case-by-case basis, with reference to the date of the act and other pieces of information, whether an abuse of power also constitutes another offence.
