

# Revista d'Estudis Autonòmics i Federals

*Núm. 9 - Octubre 2009*



# THE CURRENT SITUATION OF FEDERALISM IN SWITZERLAND

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## 1. Short historic overview of the development of Swiss Federalism

### **From 1291 to 1797**

When the modern Swiss Federation<sup>1</sup> was founded in 1848, the

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*Article received 25/06/2009; approved 16/07/2009.*

1. The founding fathers of the new constitution which changed the confederation into a federation did not change the original label *confederation* for different reasons, in

cantons had developed their own national identities, and the linguistic, religious, and economic diversity of modern Switzerland has its roots in these earlier states. The federal structure was the result of a compromise that was reached after a religiously-motivated civil war (the Sonderbund War), where the Protestant cantons, influenced mainly by French liberalism which favored a centralized liberal state, opposed the conservative Catholic cantons advocating a confederal arrangement based on the original alliance of sovereign cantons. Originally, the cantons were sovereign states cooperating within a loose treaty of alliance called the "confederation"<sup>2</sup> that emerged from an original 600-year-old treaty of alliance between three rural cantons which developed into a loose confederation with 13 cantons, some associate members and some subordinated territories.

### **1798 - 1848**

From 1798 to 1813, the revolutionary forces of France later run by Napoleon did not occupy Switzerland but imposed a centralized state structure run by a directory modeled on the French directory of 1795. This centralized state turned out to be unworkable, and therefore was somewhat federalized by Napoleon in 1803.

The brief experience with centralism has contributed to the deeply ingrained belief that Switzerland can only exist as a federal, strongly decentralized state. Although the federation has been continuously strengthened and centralized since the creation of the loose federal state in 1848, the cantons still enjoy a substantial degree of legislative, organizational, and financial autonomy which is matched by few other federal states.

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particular for reasons of translation. In German, Switzerland is also known as *Eidgenossenschaft*. This word cannot be translated into French, Italian or Romansh. They also stuck to the word *confederation* because although the constitution radically changed the system of cantonal sovereignty, this word confederation still suggests strong cantonal sovereignty.

2. The official name of Switzerland, "Swiss Confederation", points to the country's historical origin. As Switzerland is, from a legal point of view, a federal state and not a confederal arrangement, we will use the term "Federation" to refer to the country as a whole or to the federal level of government.

## 1.1. Three federal constitutions

### ***The Constitution of 1848***

The first constitution of the Swiss Confederation was adopted in 1848 after the short civil war in 1847. This constitution only transferred to the federation the powers which were absolutely necessary for the survival of the new confederation. The federation had no army, no currency, and no mandate to unify civil or criminal law. The cantons that agreed to form this new federation remained sovereign with regard to almost all important powers. However, in order to avoid a new hostile alliance of cantons, the new constitution explicitly prohibited any political alliance with external powers among the cantons within Switzerland.

This new constitution, which for the first time created a new state out of the previously sovereign members of the alliance, was a compromise between the liberal cantons influenced by the centralistic, democratic ideas of the French Revolution and the conservative cantons defending the ancient regime of the former cantonal aristocracies. Although Swiss federalism has radically developed since these times, the fundamental concept of the governmental system with a directory as the executive branch of government and the legislative branch with a second chamber (modeled on the American Senate) has never been changed, even though the constitution was substantially modified in 1874 and in 1999. The directory was adapted to Swiss needs from the Directory of Revolutionary France in 1795, with more directors to meet the interests of small cantons and Swiss diversity.

### ***The Constitution of 1874***

The first important development of federalism took place when the new constitution was adopted in 1874. This new constitution provided for many important cantonal powers to be transferred to the federal level. With the new constitution the confederation got its own army, its own coins (the monopoly of the federal government to issue banknotes was only introduced in 1891), an open free market, and the power to issue a common civil and criminal law. Procedural law remained cantonal, however.

Unlike the American Constitution, which is very difficult to change, the Swiss Constitution can be changed much more easily by a simple majority at national and/or cantonal level. Thus, since the Constitution of 1874 came into force, the federal constitution has been changed many times. Most of these changes – more than a hundred in total – gave important new powers to the federal government. Thus, the entire dynamic of federalism in Switzerland is reflected by popular votes accepting or rejecting constitutional amendments. Some of those amendments were made following a popular initiative, but only 12 out of 118 were adopted by the majority of the people and the cantons. Most of the constitutional amendments passed have therefore been submitted to direct democratic vote by the parliament. However, even though popular initiatives have been rejected, they have nonetheless often had an important legislative or even constitutional impact.

Besides the centralizing constitutional amendment, some other important modifications have been made since 1874. Some of those constitutional modifications broadened the direct democratic rights of citizens. The constitution of 1874 had already introduced the right of the people to ask for a popular legislative referendum. In 1891 the constitution introduced the popular initiative with the right of citizens to submit a constitutional amendment to a direct democratic vote by popular initiative. Later the legislative referendum was complemented with the Referendum for International Treaties. In order to avoid the misuse of emergency powers by the Government, a new amendment proposed by popular initiative required that even emergency constitutional and legislative amendments had to be submitted to a mandatory or facultative referendum of the people. The right of women to vote was unfortunately only adopted in 1970, although in certain, mainly French-speaking cantons it had been introduced earlier.

### ***The Constitution of 2000<sup>3</sup>***

Even in the 1960's, some leading politicians had asked for a total revision of the constitution, which had been written in the 19th

century and amended many times since then. Their main idea was not to change the political system but to draft a modern constitution readable by the citizens of our time. In 1987 the parliament delegated the task of drafting a new constitution, which was to be submitted to debate in both chambers of the parliament, to the Federal Council. On the basis of this procedure, the majority of the people of the cantons adopted a new constitution in April 1999, which is the constitution currently in force since January 1st 2000.<sup>4</sup>

As mentioned above, this new constitution did not make any major changes with regard to the governmental system. The most important changes in this new constitution, besides the modern wording, are those issues relating to federalism. In principle, the central powers of the federal government have been extended. In order to compensate the cantons for the loss of their powers, the rights of cantonal governments to participate within the federal decision-making process were increased. In general, one can argue that the new constitution did respect the balance of self-rule and shared rule by diminishing self-rule and expanding shared rule.

With regard to the financial powers of the federation, for a long time the constitution only provided the federal government with limited constitutional powers to levy indirect and direct taxes. The current tax powers of the federation will have to be renegotiated before 2020 as the current constitution limits the power of the federation to finance its assignments by direct and indirect taxes up to this time.<sup>5</sup>

## 1.2. Developments in Federalism since 2000

Although some important issues in the old constitution such as the judiciary, direct democracy, and finances needed to be changed with the new constitution, the federal government did not want to overload the basic new document for a new constitution in order to avoid having many and different adversaries in the popular vote. Thus, it postponed important modifications for some separate,

4. Fleiner, Misis and Töpperwien Kluwer, *Swiss Constitutional Law*, (The Hague, 2005).

5. See Swiss Constitution Art. 196 no.12, "Transitional Provisions" and Art. 126 no. 13-14.

later votes. Those main modifications focused on the judiciary (passed in 2000), direct democracy (passed in 2003) and reform of the financial system (passed in 2004). Some reforms, in particular with regard to federal powers in education, were proposed only after the new constitution had been adopted. With regard to federalism, we will deal with the most important modifications regarding the new financial order and with developments in the field of education. As the issue of the judiciary requires particular attention with regard to federalism, we will focus on the judiciary in a special section.

### ***The New Financial Order***

This is the most important development with regard to federalism since this new constitution was adopted by a constitutional referendum in 2004. It opted for a new financial order on one hand and on the other it decided to improve internal Swiss solidarity and provide for a fairer financial parity among the cantons. With regard to the new parity, even the peoples of some of the rich cantons agreed to support the poorer cantons with some of their income taxes. This new solidarity was an important symbol for the coherence of the cultural, linguistic, religious and historical diversity which still exists. Based on these new constitutional provisions, the federal government has to balance cantonal inequalities with regard to their financial performances (Art. 135).

With the new financial order, the constitution also explicitly introduced the principle of subsidiary for the first time (Art. 5a). Parallel to the introduction of the principle of subsidiary, the constitution also provides for some basic principles as guidelines for the division of federal and cantonal powers (Art. 43a)

In 1848 the federal government was mainly financed by its own institutions such as the federal post office and customs. Since 1874 the federal government has never had unlimited power to levy taxes either on the income of the people or through a value added tax. The income of the confederation of Switzerland was always only possible with a constitutional amendment which is limited in time. The actual power of the confederation to levy direct and indirect taxes lasts until the year 2020.

## **Education**

The other most important development took place in the field of education. For a long time education has been considered the main domain of the cantons, who could only use their power to organize and develop education to preserve and develop their linguistic, religious, and historical identity at cantonal level. Only with regard to professional education did the federal government already have some implied powers from 1908 and expressly formulated powers from 1947<sup>6</sup>. The main focus of these competences was to guarantee equal opportunities with regard to professional education in order to have an open and equal market not to be disturbed by cantonal border lines throughout Switzerland.

With regard to university education, the cantons were always most reluctant to confer the power to establish a federal university on the federal government. Only in the field of technical university education had the cantons accepted a limited federal power.

With the new Article 61a of the federal constitution, the country decided in 2006 to transfer joint responsibility to provide for a high quality of education to the federation and to the cantons. Primary education remains principally a cantonal competence; professional education is to be regulated by the federal government and university education is under the joint responsibility of the federation and the cantons.

In order to manage these common responsibilities in the field of university education, a joint university council is established composed of the federation and the cantons. This council is responsible for the high quality of university education. Thus, Switzerland has for the first time set up a joint council of the federal and cantonal governments which has to make decisions to be implemented on the federal and on the cantonal level. The bill and proposal of the Federal Council for a new law taking into account the new joint powers of the federation and the cantons was submitted to the parliament in May 2009. In addition, the cantons will conclude a treaty with the confederation in order to assure their own legal basis for cooperation.

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6. Art. 43 ter g of the old constitution.



### 1.3. The Judiciary

#### ***The Civil Law System***

With regard to the Judiciary, Switzerland has followed the concept of federalism within the civil law system. Accordingly, unlike in the US and in some other common law federal countries, there is no dualism between the federal and the state judiciary. There is in Switzerland only one judiciary which has the power to apply federal and cantonal law. Unlike in Belgium where the Judiciary is centralized (though divided into a Flemish and a Walloon section), the main pillar of the Swiss judiciary are the cantonal courts organized by the cantons. The cantonal courts have the power to interpret and to apply federal law as well as the respective cantonal law. The Federal Supreme Court has mainly an appellate function with regard to the cantonal courts.

This basic system has not changed since the creation of the Swiss Federation. However, the power of the federal judiciary has been strengthened throughout the historic development of Swiss federalism. According to the Constitution of 1848, the Federal Supreme Court was composed of 11 judges working only part time. Today, mainly based on constitutional amendments for the improvement of the federal judiciary in 2000, the federal judiciary has been expanded by a new first instance criminal court competent to decide on criminal cases assigned to the federal judiciary by legislation, and a new first instance administrative court to decide on issues of federal administrative law with a right to appeal finally to the Federal Supreme Court.<sup>7</sup>

#### ***Cantonal Courts***

Civil law, criminal law, and even federal administrative law implemented by cantonal legislation are first controlled by cantonal courts. The cantons have the constitutional power and responsibility to implement federal law<sup>8</sup>. With regard to criminal law, it is the can-

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7. Federal Constitution 191a.

8. Constitution Art. 46.

tonal prosecutor who has to prosecute persons suspected of having violated criminal law and to charge them before the cantonal judge for having breached criminal law.

## **Criminal Law**

However, criminal law and criminal procedure were mainly cantonal until 1942. Since 1942, cantonal criminal codes have been replaced by a new federal criminal law. For a long time cantonal courts decided on criminal procedures on the basis of cantonal statutes. With the constitutional amendment of 2000, the federation has been granted the power to issue legislation on criminal procedure<sup>9</sup>. This statute has been adopted by the parliament but it can only be enforced when the new authorities (e.g. for investigation) provided for in this new procedural law are in place. The proposal for this legislation on criminal justice authorities is currently in parliament (June 2009).

## **Civil Law**

A very similar situation has developed with regard to civil law including family law, commercial law, and property law. A common commercial code was already implemented at the end of the 19th century. A federal civil code has been in force since the beginning of the 20th century. However, according to criminal law, federal civil law has been applied by cantonal courts on the basis of cantonal codes on civil procedure. With the constitutional amendment of 2000, the power to legislate on civil procedure has also been granted to the federation. A federal code on civil procedure is currently in preparation and will soon come into force.

## ***Organization of the Cantonal Judiciary***

With regard to the organization of the courts and the election of judges, as well as the implementation of the principle of an independent judiciary, the cantons are still sovereign regarding the or-

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9. Art. 123.

ganization of their own judiciary responsible for applying cantonal law and federal law subject to appeal to the Federal Supreme Court. In this respect, there still remain important diversities between cantons with aristocratic, democratic-republican, or rural traditions.

### **Public Law**

With regard to public law (constitutional law and administrative law), in 1848 the constitution had already granted limited power to the Federal Court to ensure cantonal authorities complied with the federal constitution. Accordingly, after 1875 citizens could sue their canton before the court for having violated the federal constitution. This power was institutionalized with the constitution of 1874 and since its implementation in 1875 it has been constantly broadened and improved by the federal legislator and by the court decisions of the Federal Supreme Court.

### **The Convention on Human Rights**

It must be mentioned in this context that Switzerland's membership of the Council of Europe and in particular its ratification of the Convention on Human Rights had an important impact with regard to the Swiss judiciary, especially with regard to access to justice as a fundamental right enshrined in Article 6 of the convention. Based on the jurisprudence of the European Court of Human Rights as well as on the jurisprudence of the Federal Supreme Court, cantonal and federal administrative law as well as criminal procedures had to be radically improved. As Switzerland implements international treaties on the basis of monism, the Federal Supreme Court could use the new powers granted to it by the Convention on Human Rights Treaty extensively, and declare this convention to be constitutional in level.

This development has also influenced federalism. In particular, it has centralized supervision by the Federal Court of cantonal criminal procedure and administrative law with regard to their responsibility to establish new administrative courts or to enlarge their powers in order to guarantee individual citizens access to the court. The new Article 29a, also adopted in 2000, has in fact introduced a fundamen-

tal right to access to court and to sue public authorities acting beyond or against legal powers.

### ***Lack of Constitutional Review of Federal Legislation***

There is still one important deficit with regard to the power of the judiciary which also has a certain impact on federalism. The Federal Supreme Court currently has no power to review the constitutionality of federal legislation. Moreover, in general it has no power to review acts of the federal parliament and of the federal council (executive)<sup>10</sup>.

Unlike the Spanish Supreme Court, the Federal Supreme Court of Switzerland cannot review federal statutes which might violate constitutionally guaranteed cantonal powers. With regard to fundamental rights, at least the European Court of Human rights can, to a certain degree, rectify this deficit. Thus, federalism in Switzerland is still only a matter of political decision. There is no court supervision which could impede the federal legislator intervening in constitutionally guaranteed cantonal sovereignty. However, Swiss history has shown that the popular power to ask for a referendum with regard to federal legislation has had an important impact in preventing the Swiss legislator from violating cantonal powers guaranteed by the constitution.

## **1.4. The Federal Units: The Cantons**

### ***Bottom-up Federalism***

Unlike Belgium, Canada, India and Australia, Switzerland is a federal state which was, like the US, a federation established from the bottom up. The sovereign cantons created the new federal state in 1848. With this new constitution, the cantons gave up their original sovereignty as independent states. Since the approval of the Constitution of 1848, the federation has been able to make decisions on its

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10. Art. 189 para.4.

relationship with the cantons and their status by a constitutional majority.

Although in theory the former alliance of the sovereign cantons was replaced by a somewhat modern federal constitution, one has to be aware that the making of the nation-state had first already taken place in many of the cantons shortly after the French July Revolution of 1830. However, it was mainly the liberal cantons which replaced the old aristocratic regime with a new parliament elected and legitimized by the people and with an executive council composed of five, seven, or even nine magistrates, also elected by the people.

As many of those modern liberal constitutions were a result of popular revolutionary movements within the cantons, they already provided direct democratic elements not only with regard to elections but also with regard to the adoption of constitutional amendments. Before the outbreak of the civil war in 1847, therefore, Switzerland was not only divided linguistically and religiously between the two Christian confessions – the Catholics and the Protestants – but also politically between the modern liberal and conservative cantons. Also, the Catholic cantons were, on the whole, less developed economically, and politically still devoted to the ancient, mostly aristocratic, governmental system.

### ***Cantonal Sovereignty***

Even with the new federal constitution, the cantons insisted on having their sovereignty explicitly respected by the new constitution (Art.3). This constitutional symbol of cantonal sovereignty has even endured to this day, with the new constitution of the year 2000 explicitly guaranteeing cantonal sovereignty. The other important principle also enshrined in this same article reflects bottom-up federalism and guarantees cantonal powers constitutionally as they can only be transferred to the federation by a specific constitutional amendment. As in the US Constitution<sup>11</sup>, cantonal powers cannot simply be limited by legislation, but only by a constitutional amendment. The federation does not even have a necessary and proper clause enabling fed-

eral competences to be enlarged by extensive constitutional interpretation.<sup>12</sup>

Thus, unlike the federal units of the Union of India, for example, the cantons still enjoy the right to establish their proper governmental system, to decide on the scope of autonomy of their municipalities, to determine the scope of direct democracy granted to the citizens, and to organize their own judiciary. In addition, cantons decide on their official languages (German, French, Italian and Romansh). The only limit of cantonal autonomy with regard to their freedom to determine their governmental system is their obligation to grant the cantonal people the power to make the constitution and to comply with federal law.

Unlike in Spain where Castilian is the official language throughout Spain and the regions have the power to add a second official regional language to the official Spanish (Castilian) language, the Swiss cantons are totally sovereign to determine the official language or languages of the canton from among the four national languages. Switzerland has no one official language valid in the entire country as in Spain. Although German is spoken by almost two thirds of the Swiss population, parents moving from a German-speaking canton to a French-speaking canton, for example, will have to send their children into a French-speaking school because the cantons, and in multilingual cantons the municipalities, have the power to decide in which language education takes place. Even in private schools children have to learn the official language of the canton for a specified minimum number of years.

Within their range of powers the cantons also had to find solutions to the conflicts around diversity within the canton, in particular with regard to the different religious and language communities. Moreover, cantons have the power to organize themselves. For this reason there are important differences among the cantons with regard to the scope of autonomy of municipalities, including districts and agglomerations. Municipalities of cantons influenced by French political culture are granted less powers in comparison to German-speaking cantons.

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12. Section 8 para 18 US Constitution.

In some cantons all legislative decisions have to be submitted to the vote of the citizens, while the majority of the cantons provide only for the option of a referendum. Cantons also differ with regard to the relationship between church and canton. While the cantons of Geneva and Neuchâtel have separated state and religion according to the French model of the republican secular state, many other cantons have either followed the Zurich model of Protestant tradition or the model of the Catholic tradition related to the local municipal church communities.

Besides their power to organize themselves by their own constitution, cantons have the power and responsibility to provide for security of the people, to guarantee mandatory primary education, to promote and protect their culture, to protect the environment and implement federal environmental standards, to build roads, and to provide – within the limits of the federal legislation – for cantonal development with regard to environment protection, housing, agriculture, and economy. The cantons are also the holders of public water and water resources (including hydro-energy), of forests, game, and fishing.

The new constitution even enlarged cantonal powers in the field of foreign relations. Cantons are now expressly empowered to conclude treaties with other local authorities on all issues which are within the scope of their autonomy.<sup>13</sup>

### ***Municipal Diversity within the Cantons***

Not only the new Federation, but also almost all cantons are enriched and challenged by their traditional internal religious and linguistic diversity. Many of those cantons have also been built bottom-up from more or less autonomous municipalities or local farmers' corporations. The peace treaties after the two civil wars between the Protestant and the Catholic cantons in the first half of the 16th century already established the principle of territoriality with regard to religion (which was not recognized until more than one century later in the peace of Westphalia for Europe). This principle of mutual tolerance respected

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13. Cf. European Convention for the International Cooperation of Local Authorities of Karlsruhe, 1982 and European outline Convention on Transfrontier Co-Operation between Territorial Communities or Authorities of Madrid, 1980.

the cantonal territory and to a certain extent the territory of at least some municipalities, so that even now some religiously diverse cantons observe different Catholic and Protestant holidays according to the traditional religion of the majority of the population. Thus, federalism in Switzerland is not only based on cantonal autonomy, but also within the cantons on the autonomy of the municipalities, which even today in multilingual cantons have different official languages and religious holidays according to their traditional territory and the language or religion of the majority of the municipal population.

With regard to their organization and powers, the situation of municipalities differs from one canton to the other. If one knows the specificity of municipalities one may even – without knowing the canton – recognize and identify their original canton. With regard to the size of their territory and population, one can observe important differences from one culture to the other. For example, the town of Zurich employs more civil servants than the smallest canton of Appenzell i.Rh. has inhabitants! Although cantons always contested any power of the federation to intervene in the affairs of the municipalities, the new constitution provides in its Article 50 a federal guarantee of communal autonomy. This guarantee, however, depends on the autonomy conferred on the municipalities by the respective cantonal constitution. Thus, although the federal constitution has for the first time in history explicitly granted the municipalities a constitutional guarantee, it has not interfered with the power of the cantons to determine the scope of autonomy granted to the municipalities.

In addition, Article 50 of the constitution even requires the federal government to respect the interests of the communes and to give special attention to the bigger towns which have specific responsibilities with regard to traffic, environmental protection, and expenditures for security and social affairs.

## **1.5. Jura: The Creation of a new Canton**

### ***Stability of Cantonal Territories***

Unlike Indian federalism which was most dynamic with regard to the decrease and increase of the amount of federal units, which have



changed since the creation of the Republic of India 1949 as a result of a conflict management respecting ethnic and linguistic borders, the original federal compact of Switzerland in 1848 fixed the borders of the cantons once and for all. In fact, at the time of the creation of modern Switzerland in 1848, several cantonal borders were disputed and several regions wanted to secede from their canton and to merge into a neighboring canton or even create an additional canton.

In order to establish sustainable peace after the civil war, the constitutions of 1848 and 1874 excluded any territorial changes to the cantons and required a guarantee from the federation of each canton's constitutionally recognized territory.

### ***The Claim of the Jura Region for Self-Determination***

Ever since the creation of Switzerland, the French-speaking population of the Jura region in the canton of Berne has always claimed the right of self-determination. However, this claim could only be implemented in the 1970's. Thus in 1977, for the first time in modern Swiss history, a new canton of Jura with three mainly French-speaking, Catholic districts emerged as the result of a long lasting historic conflict with the canton of Berne. In fact, originally this region was offered to the canton of Berne by the European powers assembled within the Congress of Vienna in 1815 in order to compensate Berne, originally the biggest Swiss canton, for the loss of its territories in the east and the loss of the French-speaking canton of Vaud, which had been taken away from Berne by Napoleon. Already at this time some politicians were aware that this gift to the canton of Berne was a mistake. Indeed, the Catholic districts, at least of this French-speaking region, never did fully integrate into the canton of Berne, and at the end of the 19th century some political leaders were already calling to resolve the conflict with a secession of this region.

### ***How Can A New Canton Emerge Out Of An Old Canton?***

The procedure for the creation of this new canton could be considered as a model for other similar territorial conflicts facing secessionist movements. As a first step, the canton of Berne amended its constitution and granted the Jura region the democratic right of

self-determination based on a cascade of three steps of popular votes: the first step was a popular referendum on the issue of secession within the entire region. The decision of the majority of the region, however, was not definitively binding on those districts and municipalities in which the majority of the voters rejected secession. Those districts could then initiate a new referendum in order to remain, based on their right of self-determination, within the canton of Berne. In the end even the border municipalities were given the right of self-determination granting the majority of the population the possibility to reject the majority vote of the district and to decide by democratic vote either to join the new canton or to remain within the canton of Berne.

### ***The Final Result of the Different Votes on Secession***

The territory of the new canton shaped by these different votes did not divide the two new cantons in linguistic but religious terms. In fact, only the traditional religious area of the Catholic French-speaking districts and municipalities decided to secede from the old canton in order to create the new canton of Jura. If countries threatened by secessionist movements had followed this principle of majorities breaking down to small municipalities many terrible recent conflicts, like those of the former Yugoslavia, Sudan, and Sri Lanka, may have been avoided.

However, with the creation of a new 26th canton of Switzerland the conflict was not definitively solved. In particular, the opinions of the peoples within the districts of the old, mainly German-speaking canton/s have varied during the last 30 years. In addition, the new canton of Jura is always prepared to welcome the citizens of those districts within its territory.

### ***Seeking a Solution to Overcome the Division of the Jura***

In order to find a sustainable, peaceful solution, a parliamentary advisory assembly composed of representatives of the entire region was created. This assembly had the task of finding a peaceful solution that was acceptable to all in order to put an end to this conflict. In fact, the assembly was unable to agree on one solution. It proposed

two contradictory solutions: one to create a new common canton of the entire French-speaking region, and one to enlarge the already existing autonomy of the remaining French region within the canton of Bern. Thus Switzerland will in the near future still face some major challenges with regard to the borders of the canton of Berne. However, whatever solution is found, the number of the 26 federal cantons including 6 half-cantons will not change.

### ***Lessons to be learned from the Jura Case***

The important lesson to be learned from this secessionist conflict is that within a multicultural country there are never straightforward solutions to ethnic conflicts. Most important, however, is that countries facing such conflicts can find legitimate, democratic procedures acceptable to the majority of the population concerned.

### ***The New Constitutional Provision 53***

The basically peaceful management of the Jura conflict by the canton of Berne has led the federal government to introduce an important provision in the new constitution to regulate similar conflicts within cantonal territories peacefully. For the first time the new Article 53 of the federal constitution provides for a democratic procedure which enables peoples of different territories preferring to change the cantonal border lines and gives those regions a collective constitutional right of self-determination. If the majority of the population and of the cantons concerned agrees, and if the sovereign power in Switzerland agrees, the proposal of the peoples of this region will be implemented.

## **2. Diversities building up Switzerland**

If one were to characterize Swiss Federalism in comparison to US or German Federalism, one would have to consider Swiss Federalism as a legitimate federal system which accommodates traditional diversities and holds those diversities together by direct democracy, autonomy of the municipalities and cantons, and by the participation of those diversities within the decision-making process on the federal and cantonal

level. As these factors are manifold, we will first give a short overview of those diversities enriching and challenging Swiss Federalism.<sup>14</sup>

## 2.1. Religion

### *The First Compromise on Religion*

The most ancient diversity, which forced the early Confederal Alliance in the middle ages to find a fundamental compromise, was the diversity between urban and rural cantons. The diversity which later caused the most violent conflicts in the 16th century was the religious diversity between the two Christian confessions, the Catholics (today 42%) and the Protestants (today 33%). The compromises concluded in freedom treaties after a civil war in the early 16th century still have repercussions on modern federalism. The decision of 1529 (later partially revoked by the second peace of Kappelen “Kappeler Landfrieden”) gave cantons and even municipalities the power to decide on their official religion. This early principle of religious territoriality has been applied in many small territories with the effect that some cantons still have clear Protestant or Catholic majorities and some cantons are even religiously divided between rather Catholic or rather Protestant municipalities. This religious diversity has influenced a concept of intense relationship between the state and the religious communities and it directly or indirectly led, mainly in Protestant cantons, to the various democratic developments. Even today, cantons still distinguish with regard to the different democratic rights of the citizens. Moreover, religious diversity added a new diversity based on different concepts of the state and different tools of democratic participation by citizens.

### *Neutrality*

The bitter conflicts among the different confessions even led to the first concepts of Swiss foreign policy: In 1647 the Swiss, in order

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14. See: Fleiner, and Hertig, *Global Dialogue on Federalism* vol. 7 on diversity, chapter on Switzerland (forthcoming).

to avoid further involvement into the religious Thirty Years' War in neighboring Germany, decided to abstain from these conflicts and to opt for a largely neutral position with regard to these conflicts. Thus, even Swiss neutrality, with its roots going back to the formal decision of the Vienna Congress in 1815, is not a consequence of foreign policy interests of Switzerland but the only foreign policy possible for a country challenged by internal diversities which are linked to conflicting neighboring countries.

### **Modern Religious Communities**

Currently there are two major traditional religions (42% Roman Catholics and 33% Protestants) in Switzerland, not to mention the tiny minority of Jewish and older Christian religions. Amounting to a fifth of the population, foreign nationals further enhance the country's diversity: 4% are Muslims, 2% are Orthodox, and 0.3% are Buddhists. While the traditional religions have been concentrated in more or less homogeneous territories, at least on the municipal level, the people belonging to recently-arrived religious communities are scattered throughout Switzerland but mainly live in larger agglomerations.

### **Cantonal Autonomy<sup>15</sup>**

With regard to the traditional religions of Switzerland, cantons enjoy extensive autonomy. The relationship between the religious communities and the state is defined within the cantonal constitution. Some cantons recognize and also privilege traditional communities such as Protestants, Catholics, the Old Christian Church, and a few cantons also the Jewish religious community. The federal constitution guarantees freedom of religion<sup>16</sup>.

Switzerland has no establishment clause similar to the first amendment of the American Constitution. Thus, the federal constitution allows cantons to privilege traditional religious communities to

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15. Fleiner, *Distribution of Powers and Responsibilities in Federal Countries, Switzerland, A Global Dialogue on Federalism* vol 2 (Montreal, 2006).

16. Art. 15.

a certain extent. However, the federal constitution explicitly compels the federal and cantonal authorities to ensure peace among religious communities.<sup>17</sup>

The Constitution of 1874 imposed an obligation on the cantons to run public but secular schools. Thus, public schools could not be run by church communities as in many other European countries. For more than 100 years, the majority of children have followed public curricula run by the municipalities. This obligation has been abolished with the new constitution, but modification does not in fact enlarge the cantonal powers as the cantons are in any case obliged to respect the fundamental right of religious freedom within their public schools.

## 2.2. Language

### ***The Historical Emergence of Multilingual Switzerland***

Following occupation by the French army after the French revolution and during the reign of Napoleon, the small territory of Switzerland, with a surface area of only 41,290 km<sup>2</sup> and a population of 7.3 million inhabitants (less than several metropolitan areas of today's globalized world), developed into a multilingual federation with four different national languages: 64% German, 20% French, 6.5% Italian, and 0.5% Romansh<sup>18</sup>. The remaining 9% are languages of foreign migrants such as Serbo-Croat (1.4%), Albanian (1.3%), Portuguese (1.2%), Spanish (1.1%), English (1%), and Turkish 0.6%, as well as many minority languages.

### ***Language Rights are also Collective Rights***

Switzerland only exists on the basis of its diversity, namely, the respect of the four traditional national languages. Three of these

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17. Art. 72 para.2.

18. See the official statistical information at: [http://www.bfs.admin.ch/bfs/portal/de/index/infothek/lexikon/bienvenue\\_\\_\\_login/blank/zugang\\_lexikon.topic.1.html](http://www.bfs.admin.ch/bfs/portal/de/index/infothek/lexikon/bienvenue___login/blank/zugang_lexikon.topic.1.html).

national languages are at the same time the official languages of the neighboring countries around Switzerland: Germany and Austria for German, France for French, and Italy for Italian. For more than 200 years Switzerland has been identified as a multilingual country. The liberty of language enshrined in the constitution is thus not only limited to an individual right, it is also considered a collective right, protecting language communities against infiltration by other languages within their territory.

### ***Cross-cutting Cleavages***

With regard to the current challenges, one can certainly consider that the conflict between religious communities dividing Switzerland in earlier times is largely fading away. On the other hand, language has become the real challenging and dividing factor within Swiss society. However, one can also interestingly observe that compared with many other countries divided by current ethnic conflicts, the cantonal border lines (except for the Jura) have neither been determined by language nor by religion. The Swiss cantons were generally not homogeneous in either religion or language. Cross-cutting cleavages of cantonal diversity are probably the most important social factor impeding the political division of the country.

So far, the Swiss Constitutional Federal Order has been successful in achieving a subtle balance between unity and diversity. Due to the linguistic and cultural affinities of the French-, German-, and Italian-speaking parts with one of Switzerland's neighboring countries, the politics of neutrality has throughout history prevented the old confederal alliance and the modern federation from alienating religious and linguistic communities and prevented European conflicts from upsetting the subtle balance of Swiss diversities.

## **3. The Development of Principles in a Federal Country facing Diversity**

Modern constitutionalism is based on the concept that human beings are universally equal. Factors such as cultural peculiarities are either denied (e.g. Civic States – France) or ignored as politically irrelevant (US melting pot). At most, culture may be considered as a

nation-building factor for culturally homogeneous nations (Germany). Switzerland, with several religions and languages, could not take over one of these national concepts.<sup>19</sup> As a multicultural state, it can neither ignore culture as a political factor for national legitimacy nor can it deny the reality of its diversity. Cultural communities in Switzerland claim to be recognized not only as private but also as political communities. The different cultures have to be valued as an essential political element of the federation. All different language communities need to consider the federation as their own homeland. In the following pages we will examine how the modern Swiss Federation with its constitution builds on and meets those challenges.

### 3.1. Legitimacy

#### ***A Composite Nation***

The political system of Switzerland<sup>20</sup>, which builds upon the cultural diversity of its different communities, requires a new foundation for legitimacy – namely, a legitimacy based upon the concept of a composite nation. Up to now, the classical concept of the nation united by the social contract has been based upon a “them and us” mentality. The *us* is united on the basis of commonly-recognized political and cultural values (what is good for us) or on the basis of universal values that the people within a particular territory together can hold.

A composite nation needs a social contract that can unite diverse cultural communities through commonly recognized values. At the same time, this social contract must recognize the cultural values and independence of each of the particular communities. The common values establish what is recognized as good for a given cultural community (good for us) and also good for the various communities living within the state (good for the others), but not necessarily good for all human beings in the sense of universality.

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19. Fleiner and Basta Fleiner, *Constitutional Democracy in a multicultural and globalized World*, (Springer, 2009); in particular chapter 8 p. 511 et seq.

20. Fleiner and Basta Fleiner, *Federalism and Multiethnic States: the Case of Switzerland*, Publication of the Institute of Federalism, (Fribourg, PIFF 16a 2000).



Article 1 of the former Swiss Constitutions<sup>21</sup> defined the Swiss nation explicitly as mentioned in the preamble that follows:

“Together, the peoples of the 23 sovereign cantons of Switzerland united by the present alliance, to wit: Zurich, Berne, Lucerne, Uri, Schwyz, Unterwalden (Upper and Lower), Glarus, Zug, Fribourg, Soleure, Basle (City and Rural), Schaffhausen, Appenzell (both Rhodes), St. Gall, Grisons, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchatel, Geneva and Jura, form the Swiss Confederation.” The “nation” is thus composed of the peoples of the different cantons. The two most prominent neighbors of Switzerland — France and Germany, have totally contradictory answers to the question of to whom the state belongs. According to the German preamble, the state belongs to the German people: “the German People have adopted, by virtue of their constituent power, this Constitution”

It is well known that the German Constitution based on the homogeneity of its people has become a model for many countries, following the idea that the pre-constitutional peoples have an inherent right to self-determination. This concept is basically opposed to the civic concept of the French nation which is based on the territory and the concept of the *a-cultural*, purely political citizen. If Switzerland had followed either of its two most important neighbors, it would have become the country ruled by the majority of the German-speaking Swiss tolerating the different smaller minorities (German model) or it would have followed the civic concept (French model) and then would have had to deny the multilingual and multi-religious reality of Swiss society. Moreover, if Switzerland had followed the Spanish concept based in Article 2 on the Spanish nation recognizing the different nationalities, it would have had to discriminate against the three minority languages as languages belonging to nationalities and thus not on an equal footing with the German language.

The Swiss Constitution’s answer to this challenge is to legitimize the federation based on the peoples of the cantons which themselves are often held together by different language and religious communities. The Swiss Confederation is thus a nation composed of different

peoples. It thus follows the new ideas of the Council of Europe, which rejects both the ethnic and the purely civic concept of the nation and encourages states to find a compromise between the civic and the ethnic concept of the nation-state.<sup>22</sup>

There has however been an important development with the new constitution. The constitution of 2000 proclaims in its preamble that the Swiss people and the cantons are the basis of the confederation. This new faith in the Swiss people clearly shows that there has been an important step toward stronger integration of the multicultural peoples of Switzerland. Such unity of the Swiss people, even in connection with the cantons, would most probably not have been possible during the entire 19th century. During this period Swiss society was too strongly divided to accept being part of one common people.

### ***Taking Diversity Seriously***

The current multicultural reality of societies requires states to take different communities based on language, religion, and culture seriously in political terms. Of course any state would proclaim itself to take diversity seriously. But if different communities are only tolerated as in the ethnic nation concept, or if they are marginalized into privacy as in the American melting pot system, they are in fact not taken seriously as political entities. If communities are taken seriously, they need to participate politically in order to identify with their state, to legitimize its constitutional system, and also to be recognized as political entities forming part of the state structure as a whole.

The new Swiss constitution proclaims even in its preamble:

*"We, the Swiss People and cantons[,...]. are determined to live our diversity in unity respecting one another".*

Without diversity Switzerland would and could not exist. The identity of Switzerland is determined neither by a homogeneous people nor by a civic nation composed of individual political citizens, but

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22. Cp. Doc. 10762.

rather a society composed of different identities which only identifies with the reality of its diversity. Thus, Switzerland is, along with the “rainbow” country South Africa and some others<sup>23</sup>, one of the very few countries which identify themselves through diversity and not through unity.

Many countries promote and enhance the cultural heritage of the majority culture. The common language is considered an essential element to guarantee homogeneity and democratic communication as proclaimed in the famous Maastricht decision of the German Constitutional Court.<sup>24</sup> In those states, minority-language speakers are tolerated at best as guests who are allowed to use the mother tongue as a second language for private needs; in worst cases they are feared as potential enemies who might in some future outnumber the existing democratic majority and overthrow the ruling majority.

### ***A Fatherland or Motherland of Minorities***

If a state wants to take the diversity of languages and cultures seriously, it cannot treat minorities only as tolerated guests; rather, it must give each of the various language and cultural communities a constitutionally recognized status and acknowledge the cultural communities as being an essential part of the state. Cultural communities will only be able to recognize the state in which they live as being their homeland if they are able to contribute to the constitutional system of the state and to identify with it as their home state.

There is no person in Switzerland who does not belong to at least one minority. German-speaking citizens in the canton of Fribourg, which has mostly French-speaking citizens, belong to the German-speaking minority in the canton and to the German-speaking majority in Switzerland. Even a German-speaking Protestant in the canton of Zurich belongs to the Protestant minority in Switzerland but to the Protestant majority in Zurich. These overlapping cleavages often descend from the top down until they reach the hierarchically lowest municipal level.

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23. E.g. multiethnic Nepal or multicultural Russia.

24. BVerfGE 89, 155.

The present constitutional system of citizenship accommodates such diverse feelings of identity. In fact, even with the new constitution, Switzerland has remained the only country in the world which provides for three levels of citizenship. According to Article 37 of the current constitution, each Swiss citizen must at the same time be a citizen of the canton as well as of the municipality.

In the above-mentioned decision-making process for the new canton of Jura, small communities such as municipalities with less than 100 inhabitants were granted the right to decide on their proper state "status". As a consequence, they could decide to which canton they wanted to belong. In one case, municipalities in the district of Laufen-tal even had the possibility either to remain within the new canton of Jura, to stay with its original canton of Berne, or to merge with another neighboring canton. After several votes<sup>25</sup> the people of the district of Laufen decided in 1994 to merge with the neighboring canton of Basel (Landschaft) and to consider this canton their fatherland.

The European Union introduced its new currency, the euro, the legal tender of each member state belonging to the euro zone. All countries belonging to the euro zone have labeled this common currency with the same wording: euro. Unlike this common label of the euro, one can read the word Swiss franc in German, French, Italian and Romansh on each banknote in Switzerland. Because there would not be enough space for four languages on the five-franc pieces, one can actually read the name of the Confederation in Latin, which was the lingua franca in the middle ages. These may be small symbols but such symbols are important to enable even the smallest minority to identify with its country and to consider its country as its father- or motherland.

### ***Citizenship: Multiple Loyalty***

Most states demand absolute loyalty of their citizens to the basic values of the nation and therefore prohibit dual or multiple citizenship. On the other hand,, states which recognize the political

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25. One was even annulled by the Federal Supreme Court: BGE 114 Ia 427.

value of their different cultural communities have to accept, at least internally, that citizens will have double loyalty: loyalty to their cultural community on one hand, and loyalty to the political state on the other. At the same time, citizens must be able to exhibit loyalty in relation to their cultural community based in another state. The recognition of such double or multiple loyalties must find its expression in a concept of citizenship which accepts dual or multiple citizenship. The common citizenship of the European Union may mark the first step towards such recognition of multiple citizenship within it.

Except for the small minority of the Romansh-speaking people, each of the traditional cultures of Switzerland are more or less culturally related to our neighbor states: Germany, Austria, France, and Italy. Promotion and support of these cultures calls for intense cultural cooperation with the respective neighbor countries. Although the Swiss may identify with the political order of Switzerland, they often feel close to the culture of their respective neighbor state.

Citizens' feelings of loyalty towards their neighbor states is in many conflictive areas of the world considered as one of the most dangerous causes of international or civil wars. In many of those areas, citizenship regulations are one of the causes of such conflicts. Countries which offer or even recognize citizens of a neighboring country as belonging to their culture or as kin-state citizens will create important international tensions. The same is the case when countries grant special privileges to their cultural community living in a neighbor state.

In Switzerland, multiple loyalties have some tradition; in fact, the new law on citizenship no longer prohibits multiple citizenships, unlike the previous statute. Switzerland participates in the summit of states representing the francophone peoples. The Federal Government of Switzerland also participates in summits of the German-speaking countries. On the other hand, even the parliamentary assembly of the canton of Jura participates in the Parliamentary Francophone Assembly.

Most states are built on the basis of the exclusive loyalty of their citizens, who may even be asked to sacrifice their lives for the military defense of their country. Dual citizenship is therefore often prohibited. A state which recognizes the political value of its different cultural communities will have to be based on a concept of multiple

loyalties, a concept that will have to rely on double or even multiple citizenships, like for instance citizenship of the European Union.

### **3.2. The Rule of Law**

#### ***The Right to be Different***

The prevailing concept of equal rights is based on the assumption that all human beings are equal and should be treated equally, and that all individuals should have equal opportunities within the political community. However, in multicultural states people want to have equal opportunities within their cultural community. They also want their community to be treated equally in comparison to other bigger or smaller cultural communities, for example in terms of equal language rights. In terms of their cultural peculiarities, people want to be recognized and respected as different. Members of minority cultures claim equal rights as citizens without any discrimination or stigmatization. The value of their culture has to represent the same quality irrespective of the inferiority in the number of their kinsmen. Cultural diversity needs to be considered a value and not a burden.

The Swiss Constitution guarantees in its Article 4 that all national languages have equal recognition, although the number of kinsmen speaking these languages differs enormously. One also has to admit, of course, that in Article 70 of the constitution the Romansh language spoken by only 0.5 % of people does not have the same value as an official language compared to German, French and Italian. Paragraph 5 of this provision is important with regard to the development of federalism however, as it compels the federal government to foster all measures of the respective cantons to promote and defend Romansh (canton of Grison), and Italian (cantons of Ticino and Grison), the two languages which look doomed to die out.

#### ***Collective Rights***

Individuals belonging to different cultural communities want not only to be treated equally as individuals; they also expect their cultural community and themselves as members of that community

to be treated as equal to members of other communities. If a minority culture is not recognized as having equal cultural value to the majority culture, the members of the minority culture will feel discriminated. Harmony between the different cultural communities is primarily based on the equal cultural and political recognition of the collective value of the different communities. The collective value of culture has to be equally recognized for all cultural communities regardless of numbers or statistics. The multicultural state needs to strike a fair balance between the freedom of the individual and the claim of the community for its autonomy and respect.

The smallest collectivities having specific collective rights in Switzerland are the municipalities with a constitutional right to autonomy. As mentioned above, municipalities have been the territorially guaranteed homeland for different religious (including Jewish) and language minorities. Article 16 of the new language legislation of the canton of Grison, with three official languages (German, Italian and Romansh), since 2008, stipulates that if 40% of inhabitants of a municipality speak one language, this language will be the only official language of the municipality. If 20% speak the same language, the municipality will be bilingual.<sup>26</sup> These provisions are clearly focused on the protection of the smallest endangered languages, Romansh and Italian.

In 1990 the Federal Supreme Court upheld an order for the owner of a restaurant in the small municipality of Disentis, which had Romansh as its official language, to remove a sign on his building written in Italian, as the official language of the municipality was Romansh.<sup>27</sup> This principle of territorial protection of language, which is of course also a collective right of language communities, is now even enshrined in Article 70 of the new constitution.

### ***Liberty and Peace***

The aim of the liberal state is to protect, maintain, and promote individual liberty. A state composed of different cultural communities

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26. 492.100 Sprachengesetz des Kantons Graubünden, Legge sulle lingue del Cantone dei Grigioni, Lescha da lingua dal chantun Grischun (2006) Art. 16.

27. BGE 116 Ia 345.

should additionally aim to maintain peace among the different communities. The constitution will have to perform a difficult balancing act between individual liberty on one side and peace among the different communities on the other side (e.g. individual liberty of language versus territorial protection of minority language).

For the sake of peace, it might be necessary, for example, to restrict individual language rights in order to uphold the collective rights of a minority that fears for the survival of its culture. Peace will also be fostered by the recognition of collective rights to cultural autonomy and limited territorial autonomy for different communities, such as that which is accorded to the cantons and municipalities in Switzerland. In order to improve the responsibility of the confederation to pursue peace among the different cultural communities, Article 70 of the constitution transfers the obligation to seek good understanding between the different language communities<sup>28</sup> to the Confederation and the cantons. In article 72 the Confederation and the cantons are clearly obliged to *"take measures to maintain public peace between the members of the various religious communities."*

### 3.3. Shared Rule

#### ***Participation of minority cultural communities in constitution making***

Constitution making in multicultural states can only succeed in justifying, establishing, or limiting the power of the state if the constitutional principles are perceived by all cultural communities as being legitimate. This legitimacy can only be achieved if the various cultural communities are given the right to participate on an equal footing in the constitution making process, and are therefore able to identify with the state and its constitution. Such legitimacy can only be achieved if the different communities participate in the decision-making process with a real chance to get their proposals to be accepted. The second chamber, which like the American Senate is com-

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28. Art. 70 para. 2: 3 "The Confederation and the Cantons shall encourage understanding and exchange between the linguistic communities."



posed of two members per canton (half cantons have one member), has the same powers as the national chamber. Having the same powers as the national chamber the second, cantonal chamber has to ratify any constitutional amendment. Without its consent no amendment can be submitted to the vote of the people and the cantons.

Moreover, any constitutional reform necessarily needs the approval of the majority of the national voters, and the majority of the cantonal voters also have to approve the amendment. With regard to the state status of local communities, Article 53 of the constitution stipulates expressly that for any modification of border lines which may also modify the state status of local municipalities, the concerned community has to approve this, as well as the cantonal community which might also be affected if part of its cantonal territory changed.

### **Power Sharing between Cultural Communities**

In multicultural states a system of government based on the pure majoritarian principle according to the “winner-takes-all” concept will not be able to achieve lasting legitimacy in the eyes of minority communities. Under such a system, minorities will feel permanently marginalized. The pure majority principle, according to which a democratic winner with 51 percent of the votes can acquire 100 percent of the state power, has to be modified in order for the principle of democracy to be acceptable to minority cultural groups. Such moderation can be achieved by introducing elements of power sharing, thereby enabling minorities that would otherwise be permanently excluded from participation in the political decision-making process to have their say and to actively contribute to the common welfare of the state.

With regard to general participation in the federal decision-making process, the new federal constitution has shifted the federal balance of self-rule to give more weight to the shared rule principle. It has centralized different, originally cantonal powers, but at the same time it has strengthened the cantons’ possibilities of participating in the decision-making process at federal level. Thus, the new federal constitution does compel the federal government on principle to consult the cantonal governments in any important matter and in particular with regard to any proposed legislative decision (Art. 45).

As a principle, the constitution requires good cooperation between the federal government and the cantons. Any dispute should be solved peacefully by mediation<sup>29</sup>. With regard to foreign policy, Article 55 is inspired by the corresponding articles of the German and Austrian constitutions, taking into account the wish of the federal units to be informed and to present their interests in the participation of their government within the decision-making process of the European Union. Accordingly, the federal government has to include the cantons in all issues of foreign policy which might concern their powers and their interests; they have to be informed and the government is mandated to take their proposals into account.

For more than one and a half centuries cantonal governments, and even cantonal administrations have cooperated in more or less advisory or consultative conferences. Since 1993, forced by the Swiss integration policy, a permanent conference of the cantonal governments has also been set up to act as a general link between the cantonal and the federal executives. However, this new institution is still quite different from the Canadian rule by intergovernmental relations.

### 3.4. Self-Rule

#### *Autonomy*

Cultural and language communities must be able, through territorial autonomy or group autonomy, to independently and autonomously regulate matters relating to their own cultural development and cultural heritage. Moreover, they must be empowered to implement, within their own cultural community, decisions made at the highest level on the basis of the principle of shared rule. This entails autonomy over matters such as education, court jurisdiction, administration and police. As already mentioned, the new constitution has, in principle, diminished the powers of the cantons and enlarged the central powers of the federal government.

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29. Art. 44 para. 3: "Disputes between Cantons or between Cantons and the Confederation shall wherever possible be resolved by negotiation or mediation."

However, in some instances, the autonomy of cantons has also been slightly strengthened. With the new financial reform of federalism, the constitution has enshrined the principle of subsidiarity (Art. 5a). In addition to this provision, the new Article 43a, also as a consequence of the financial reform, clearly defines some mainly financial criteria for new decisions on the division of powers between the confederation and the cantons. The main idea is therefore to divide powers according to financial possibilities and — to an extent following the Spanish (Cst. Art. 130 para 1), and the German (Cst. Art. 72 para 2) models — as to the right of inhabitants to have at least their basic needs assured by the authorities (Art. 43a).

With regard to the financial possibilities of the cantons, the constitution compels the confederation to provide for enough financial means so that cantons can finance their traditional obligations. (Art. 47 para.2)

The federal constitution has also taken into account that many cantonal solutions are based on treaties regulating their multilateral or bilateral cooperation. The old constitution merely prohibited political treaties between the cantons and reserved the right to conclude other treaties. The new constitution — at least with regard to its wording — empowers the cantons to conclude treaties among themselves. Since 2004 they are also empowered to set up common institutions with legislative powers and they can ask the confederation to declare multilateral treaties, which do not have the consent of all cantons, which generally bind even the cantons which have rejected them.

### ***Fostering Diversity***

A multicultural state can only establish sustainable legitimacy if it does not just tolerate diversity, but actually promotes and fosters diversity and accords it a value that can bring all cultural communities together into a common polity. This aim will only be fulfilled if each cultural community is convinced that its own internal values will be better realized within the existing common state than in its own state established through secession and self-determination. The development of polyphonic music has long been regarded as a sign of high culture and civilization. In the field of politics and democracy, how-

ever, many states and peoples still prefer monotony to polyphony. Federal states on the other hand are examples for the development of more complex forms of political order. Analogous to polyphony in music, they can be considered as an expression of the complexity of human reality. Federal states do not suffocate diversity with monotony but promote diversity as a value of a "polyphonic" federal state.

Article 2 para. 2 of the constitution requires the federal government to foster the diversity of the country. It gives the federal government a new role with regard to the internal diversity of the country, including the diversity caused by migration, but it also obliges the federal government to undertake all measures not only to uphold the existing diversity, but even to promote diversity in order to enable each community to develop its proper identity.

### **3.5. Democracy**

#### ***Self-determination of Individuals as a Democratic Aim***

Democracy should not be reduced to a state principle, the sole purpose of which is to produce an efficient majority. Rather, democracy should be seen as serving liberty and as establishing through public discourse the legitimacy of procedures and institutions for political consensus-building according to the famous Gettysburg address by president Lincoln: "with the people, by the people, and for the people". A consensus-oriented democratic process, in which decisions are made from the bottom up, is based on the conviction that each decision of the policy should provide for the single individual as much self-determination as possible, whether this be through individual liberty or through optimal participation in the community.

The smaller the community in which decisions are made, the less individual self-determination is limited. Within the small group, the single individual has the greatest chance of contributing to the design of the polity and to exercise freedom within the group. The federal division of democracy into two or three levels of democratic units, which can even be extended to the international level, provides for an optimal balance of self- and co-determination. It guarantees that

the broadest possible consensus will be sought for the decisions at each respective level in order to guarantee the greatest possible self-determination.

In Switzerland, challenged and enriched by diversity, minority communities would be condemned to a permanent lower status if democracy were only considered as a tool to produce efficient majorities. In fact, a “winner-takes-all” democracy has never been successful in Switzerland. The Swiss consider that democracy does not only regulate decision-making procedures, but is even considered as a better guarantee of liberty than a constitutional court. Because the people can decide on legislation and on constitutional issues, they can determine to what extent they accept legislative or constitutional limitations of their liberty.

According to the preamble of the constitution, the Swiss people and the cantons “*know that only those who use their freedom remain free*”. A state which adheres to such values will not accept any development which might install the tyranny of the majority. The main reason why the Swiss Confederation has remained strongly federal and decentralized despite the international and social development of the welfare state, which would have suggested much stronger centralization, is mainly due to direct democracy which will also in future prevent the central government making any centralist proposal which has no sound, rational justification.

### ***The Value of Compromise as an Alternative to “Winner-takes-all” Democracy***

Most democracies enable a winning party or governmental coalition to assume 100 percent of the state power on the basis of support from 51 percent or less of the voters (e.g. the United Kingdom). In a multicultural state this system needs to be adapted in order to accommodate the reality of cultural diversity. Pure majoritarianism suppresses diversity. Diversity can only flourish in a culture oriented towards consensus and compromise. The political decision-making process and political institutions have to be guided by the idea that a compromise which produces broad agreement has a higher value with regard to justice than a small majority. This of course presupposes a political culture that respects compromise as a quality and a

strength rather than a weakness, because compromise enables the achievement of a higher consensus and thus a more comprehensive majority. The small majority of 51 percent within a multicultural democracy must accept compromises in order to achieve the consensus of a much larger majority. Decision-making procedures and political institutions must be guided by the value of compromise as an instrument for conflict management.

The development of Swiss federalism is clear evidence for this basic principle. The beginning of the early confederation of the 15<sup>th</sup> century was already based on a compromise between town and rural areas. The religious conflicts in the 16<sup>th</sup> century ended with a compromise which again enabled peaceful cooperation. The first constitution of 1848 was a basic compromise between the conservative Catholic and the liberal Protestant cantons. Finally, the new constitution is also a compromise which takes into account the basic conviction of the preamble of the constitution: "*that the strength of a people is measured by the welfare of the weakest of its members.*"

### **Conflict management<sup>30</sup>**

Democratic procedures should not only serve to produce efficient and legitimate decisions. They must also be conceived as tools for managing conflict between different communities. This requires that the procedures are designed in such a way as to facilitate the resolution of disputes through rational discourse. This means that categorical conflicts need to be minimized through appropriate state structures and procedures, so that conflicting groups will feel sufficiently secure that they will opt to engage in discourse rather than resorting to violence.

The new Article 44 of the constitution on the principles of cooperation between the cantons and the confederation thus stipulates as follows:

1 The confederation and the cantons shall collaborate, and shall support each other in the fulfillment of their tasks.

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30. Wolf Linder, *Swiss Democracy, Possible Solutions to Conflict in Multicultural Societies*, (New York 1994).

2 They owe each other mutual consideration and support. They shall grant each other administrative and judicial assistance.

3 Disputes between cantons, or between cantons and the confederation shall, to the extent possible, be resolved through negotiation or mediation.

### **3.6. Future Challenges to Swiss Federalism**

In a period of globalization and of the fading away of the traditional nation-state, Swiss federalism is of course confronted with many major challenges. The main and most immediate challenge is presented by the relationship of Switzerland with the European Union. The majority in Switzerland is still of the opinion that a full integration into this supra-national organization would endanger federalism, direct democracy and the traditional identity of Switzerland. Many powers of the European Union are currently at least partially within the constitutional competences of the cantons, and this is the federal challenge. Often, directives of the European Union which have to be implemented by the member states would be subject to a popular referendum on a federal or cantonal basis; in addition, decisions of the European Union are often made by the member states' executives and prepared by member states' administrations. The challenge of the referendum to the strong tendency towards executive decisions is the democratic challenge. For centuries Switzerland was almost the only democracy facing neighboring countries with a monarchical tradition. To realize that all of a sudden Europe is just as democratic as Switzerland is the identity challenge.

Analyzing the long history of Swiss federalism, I am convinced, however, that the federal and democratic institutions will provide for a most open, dynamic future for today's Swiss society which can also enable Switzerland to adapt its institutions without losing its identity, the federal system and the principle of direct democracy. Just as small member states such as Ireland and Denmark did not give up their identity, a small federal state like Switzerland should be able to adapt its institutions without losing its political strength and participate within the European community, which has developed as a multicultural European alliance in a very similar way to the Swiss Confederation.

## ABSTRACT

Swiss Federalism builds on the traditional and to a certain extent also the modern diversities. Since middle age the Swiss confederation has always been enriched and challenged by economic, religious, cultural and linguistic diversities. Since the foundation of Switzerland as a state of modernity in 1848 the constitution has been more than 100 times modified with specific provisions. In addition there have been two total revisions in 1874 and in 1999. With the new constitution the federal balance between shared rule and self rule has slightly been changed. It has centralized some of the powers and compensated the loss of self rule with more shared rule and thus given cantons more possibilities to participate within the federal decision making process. With regard to the diversities the new federal constitution has introduced important provisions in order to strengthen the federal legitimacy and to provide democratic tools for conflict management.

**Key words:** Confederation; legitimacy; cantonal sovereignty; self-rule; shared rule; collective rights; direct democracy; compromise; bottom up federalism; municipalities; constitutional review; judiciary.

## RESUM

El federalisme suís es basa en diversitats tradicionals i, en certa manera, també en diversitats modernes. Des de l'edat mitjana, la Confederació Suïssa s'ha anat enriquint mentre feia front a reptes de diversitats econòmiques, religioses, culturals i lingüístiques. Des que Suïssa es va fundar com a estat modern, el 1848, la Constitució del país ha estat esmenada més de 100 vegades amb disposicions específiques. A banda d'això, ha estat revisada completament dues vegades, el 1874 i el 1999. Amb la nova Constitució, l'equilibri federal entre el govern compartit i l'autogovern ha canviat lleugerament. S'han centralitzat alguns poders, i la pèrdua d'autogovern s'ha vist compensada amb més govern compartit, la qual cosa dona als cantons l'oportunitat d'augmentar la participació en els processos de presa de decisions d'àmbit federal. Pel que fa a les diversitats, la nova Constitució federal ha introduït disposicions importants dirigides a consolidar la legitimitat federal i facilitar eines democràtiques per a la gestió de conflictes.

**Paraules clau:** Confederació; legitimitat; sobirania cantonal; autogovern; govern compartit; drets col·lectius; democràcia directa; compromís; federalisme ascendent; municipis; revisió constitucional; poder judicial.



## RESUMEN

El federalismo suizo se basa en diversidades tradicionales y hasta cierto grado, también modernas. Desde la Edad Media, la Confederación Suiza se ha ido enriqueciendo afrontando retos de diversidades económicas, religiosas, culturales y lingüísticas. Desde que Suiza se fundó como Estado moderno en 1848, su Constitución se ha enmendado más de 100 veces con disposiciones específicas. Además, ha sido revisada por completo dos veces, en 1874 y en 1999, respectivamente. Con la nueva Constitución ha cambiado ligeramente el equilibrio federal entre el gobierno compartido y el autogobierno. Algunos de los poderes se han centralizado, y la pérdida de autogobierno ha sido compensada con más gobierno compartido, lo que da a los cantones la oportunidad de una mayor participación en los procesos de toma de decisión a nivel federal. Con respecto a las diversidades, la nueva Constitución federal ha introducido importantes disposiciones con el fin de fortalecer la legitimidad federal y proporcionar instrumentos democráticos para la gestión de conflictos.

**Palabras clave:** Confederación; legitimidad; soberanía cantonal; autogobierno; gobierno compartido; derechos colectivos; democracia directa; compromiso; federalismo ascendente; municipios; revisión constitucional; poder judicial.