

## FEDERALISM IN SWITZERLAND: FROM IMMOBILITY TO SLOW CHANGE?

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SUMMARY: I. *Introduction*. II. *The Swiss federal political structures*.  
III. *The limits of Swiss federalism*.

It may be considered as an objection inherent in the principle that as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything and without which perhaps the wisest and freest governments would not possess the requisite stability.

Madison in *The Federalist Papers*, núm. 49.

### I. INTRODUCTION

Switzerland is considered to be a federalized plebiscitary democracy<sup>1</sup> To understand Swiss political policy, one must take into account its predominant feature: direct democracy. Among Western democracies in the post-war period, Switzerland is the only state in the world to apply direct democracy to every sphere of government activity. From 1848 to 2000 Swiss citizens have been called to polls on over 1,813 issues (834 obligatory ref-

<sup>1</sup> Watts, Ronald L., *Comparing Federal Systems*, 2nd edition, Ontario, Institute of Intergovernmental Relations-Queen's University, 1999.

erenda; 833 popular initiatives; and 146 optional referenda).<sup>2</sup> Swiss voters are called on to decide between seven and fourteen national question yearly, which are typically spread over three or four separate ballots. In addition, they are asked to vote in numerous cantonal and communal referenda. When elections of national, cantonal, and communal representatives are added to these, an average Swiss citizen is called to the polls more times in a single year than any other European citizen in a lifetime. Only in Australia, Italy and California, and a few other US Western states do referenda play such an important role in daily political life.

The explanation for Swiss attachment to direct democracy is its long-standing experience of direct vote, documented as existing in the canton of Schwyz since 1294. Popular *landsgemeinden* (legislative assemblies) were used in several mountain cantons from the thirteenth century onward. But population growth in the nineteenth and twentieth centuries rendered the *landsgemeinden* impractical in most cantons. Referenda and initiatives on key issues covering external and domestic policy came into common usage as a way of preserving the tradition of direct legislation. Major changes that have marked the postwar evolution of Swiss society are, without doubt, linked to this constraining element of power sharing, which is quite different from the Anglo-Saxon winner-take-all pattern.

On the political agenda of the last fifty years there has been a number of distinctive Swiss issues. One is the constitutional revision, which finally voted on and approved in 1999; another is the eternal debate of the nature of the balance between federal and cantonal power; another is the role of the Swiss army, the extent to which it should be supported financially, and whether civilian service alternatives should be provided for conscientious objectors. On November 26, 1989, more than a million voters, 35.6% of those going to the polls, supported an initiative to abolish the Swiss army, exceeding even the expectations of the antimilitary militants, even though the proposal was defeated, it nevertheless compelled government reforms.

Environmental protection is intensely debated political issue of all, especially in the aftermath of Chernobyl and the Rhine chemical disaster at Schweizerhalle in 1986. In the 1970s the antinuclear movement successfully stopped the construction of a power plant after several months of oc-

<sup>2</sup> For an explanation on these different form of popular consultation, please refer to the 2nd Part of this paper, chapter entitled "Direct Democracy or People's Rights at the Swiss Federal Level".

cupation of the site. When the Ecologist Party and the Social Democrats opposed the construction of a new nuclear power plants, the issue was divisive. A popular initiative against the construction of a new power plants failed in 1979, but the margin was razor thin. And protagonists of nuclear power were unable to win enough support for the continuation of the program. When in 1985 the federal chambers authorized the resumption of the construction of a nuclear power plant in Kaiseraugst, it encountered unanimous protest throughout Switzerland. The work was not resumed, and in 1989 the federal parliament dropped the project, paying over 350 million Swiss Francs in indemnities. In 1990 a compromise was finally found: the cantons and the people accepted a popular initiative for a ten-year moratorium on the authorization and construction of new plants. The moratorium will be submitted to vote for renewal in 2004, even though no demand to build any new nuclear power plants have been presented.

The 1990s have brought forward a new series of much debated questions dealing with parochial cultures. German cantons have experienced a renaissance of dialects that are barely understood by Swiss French or Italian speakers. Doubts have also arisen about the fiscal competence and general effectiveness of the federal government<sup>3</sup> Among the debated issues are the state of the social security system and the pension scheme. The growing problems of drug use and AIDS have also drawn much public attention. Nevertheless, the Swiss are discovering, as is the rest of the world,

<sup>3</sup> For the first time in the history of the Swiss Confederation, eight cantons are demanding a federal referendum on the new law on financial equalization, as there is a feeling that the federal government is imposing a model that does not necessarily take in account the cantons demands, and that the model was established without necessarily consulting the cantons. This shows to what extent the confidence between the cantons and the federal government is dropping.

Art. 141 stipulates the following:

1. The following are submitted to the vote of the People at the request of 50,000 citizens entitled to vote, or of eight Cantons:

- a. Federal statutes;
- b. Federal Statutes declared urgent with a validity exceeding one year;
- c. Federal decrees to the extent the Constitution or the statute foresee this;
- d. International treaties which:
  1. are of unlimited duration and may not be terminated;
  2. provide for the entry into an international organization;
  3. involve a multilateral unification of law.

2. The Federal Parliament may submit further international treaties to optional referendum.

that they cannot escape the tendencies of market liberalization and globalization, and that domestic policy and foreign affairs are more and more interdependent. Of course when mentioning this one thinks of the European Union, which has such a strong economical and political influence on Switzerland, as it is made up of Switzerland's neighbors and remains their main foreign market.

But let me please get back to the subject, which is the issue in this case: Federalism in Switzerland. My idea within this paper is not to necessarily go through a huge debate on the origins, evolution and modalities of the Swiss Federal Model.<sup>4</sup> There have been changes over the years and since Switzerland became a federation in 1848. Changes that were, and are, sometimes slow but changes nevertheless. What I really would like to do within this paper is talk about the recent changes in Swiss Federalism and highlight some of the major problem the Swiss Federal System is confronted with since the turn of the century. Of course there is one major handicap in proceeding this way, and that is: you cannot necessarily isolate the *federal strata* in Switzerland and totally ignore the two other political dimensions that accompany Swiss Federalism. That is: firstly and of up most importance, plebiscitary democracy, which I have already mentioned; and secondly, the constant research of consensus, A form of consensus that has pushed some specialists, such as Arend Lijphart, to talk of "consociationalism" when referring to the Swiss case<sup>5</sup> These three specific aspects are strongly linked and cannot necessarily be dealt with separately.

I have divided my paper into two parts. The 1<sup>st</sup> part is a detailed explanation of how the Swiss Federal Political Structure works. I have limited this description to the federal level as each one of the 26 Swiss Cantons are different, and if I went into the cantonal levels, there would be a need of describing the communal levels (known elsewhere as the local level). This would bring me into writing a book! Nevertheless, when required, I have made reference to the cantonal and communal levels so as to explain and clarify the example the best way possible.

The 2<sup>nd</sup> part of this paper is an in-depth illustration of functioning or non-functioning Swiss Federalism according to what issue one looks at,

<sup>4</sup> On the evolution and modalities of the Swiss Federal Model, please refer to: Steinberg, Jonathan, *Why Switzerland?*, 2a. ed., Cambridge, Cambridge University Press, 1996.

<sup>5</sup> An excellent article on Consociationalism was written Andeweg, Rudy B., "Consociational Democracy", *Annual Review of Political Science*, 2000.3, pp. 509-536.

especially in the area of Human Rights and democracy (equal representation). Indirectly, reference is made to the Swiss/European Union issue, which will have to be dealt with in 2004. In the back of my mind, when mentioning these three cases, I am thinking of the last federal elections in Switzerland, where the right populist Schweizerische Volkspartei (SVP) was rewarded with just under 27% of the vote, making it for the first time the biggest parliamentary party.

Finally and just out of interest I have established a chart showing how law is made, and how it works its way through the two chambers within the Legislative Assemblies. Often the system is considered complicated, slow and is undergoing strong criticism.

## II. THE SWISS FEDERAL POLITICAL STRUCTURES

The Swiss political structure is divided within three different political levels. The Confederation, is the term used in Switzerland to describe the State. The Confederation has authority in all areas in which it is empowered by the Federal Constitution, such as in foreign and security policy, custom and monetary affairs, national applicable legislation and certain other areas. Tasks which do not expressly fall within the domain of the Confederation are matters for the cantons.<sup>6</sup>

Switzerland consists of 26 cantons, six of which, namely Obwalden and Nidwalden, the two Appenzells and the two Basles, are divided into half-cantons. The cantons are the original States which joint together in 1848 to form the Confederation to which they ceded part of their sovereignty.

Each canton and half-canton has its own constitution, parliament, government and courts. The size of the cantonal parliaments varies between 58 and 200 seats, while the cantonal executives have either 5, 7 or 9 members. Direct democracy in the form of the *landsgemeinde* (open air people's assemblies) is now confined to the half-canton of Appenzell Innerrhoden and Glarus. In all the other cantons the people express their votes through the ballot box.

<sup>6</sup> For a detailed explanation of the federal institutions, please refer to:

1. Aubert, Jean-François, *Traité du droit constitutionnel Suisse*, Neuchâtel, Ides et Calendes, 1982.

2. Aubert, Jean-François, *Petite histoire constitutionnelle de la Suisse*, Bern, Francke, 1974.

All cantons are divided into communes, of which there are currently about 2842. Their number is in decline due to the creation of bigger cities and amalgamations between the communes. In 1980 there were roughly 3800 communes. They dropped to about 3000 by the year 2000, and even though the trend of bringing communes together has slowed down somewhat, these local identities continue to merge, mainly for economical reasons.

Around one-fifth of these communes have their own parliament; in the other four-fifths, decisions are taken by a process of direct democracy in the local assembly.

In addition to the tasks entrusted to them by the Confederation and the canton —such as the population register and the civil protection— the communes also have their own competencies in the areas of education and social affairs, energy supply, road building, local planning, taxation, etc. To a large extent, these powers are self regulated. As for the degree of autonomy granted to the communes, it is determined by the individual cantons and therefore varies considerably.

### *1. The federal political organization in Switzerland*

According to the Federal Constitution, the Swiss people —some 4.6 million citizens— are sovereign and ultimately the supreme political authority of the country. This concept includes that all Swiss adults —roughly 60% of the resident population— are eligible to vote. While those under the age of 18, and foreign nationals, do not have any political rights at the federal level.

The Swiss people elect the Parliament. That is the two Chambers of the Federal Assembly: the National Council with 200 members and the Council of States with 46 representatives. Together, the National Council and the Council of States constitute the Legislative Authority. Both are directly elected in all cantons by the people. The National Council, is elected in accordance with federal rules and the Council of States according to provisions differing from canton to canton. In both cases, the cantons form the constituencies.

Now Parliament elects the government and the Supreme Court. The collegial government is formed of seven members of the Federal Council as well as the Federal Chancellor, its chief of staff. The Supreme Court —which is made up of the Federal Supreme Court and the Federal Insurance Court— has thirty full-time and thirty part-time judges in the Supreme Court and nine full-time and nine part-time judges in the Insurance Court.

In the same manner as the Government, the Judiciary is elected by the Parliament *i. e.* the Federal Assembly which is composed of both Chambers.

In Switzerland, when talking about the separation of powers, legislative or executive, not to mention judicial powers, may not be exercised by the same persons. In effect, no individual may simultaneously belong to more than one of the three federal authorities —Parliament, Government or the Supreme Court—. However, for practical reasons each of the three authorities perform tasks which, strictly speaking, fall under the jurisdiction of another authority.

## 2. *Direct democracy or people's rights at the Swiss federal level*

There are very few countries —with the exception of some States in the USA— in which the people have such far-reaching rights of co-determination as in Switzerland.<sup>7</sup> The long democratic tradition, the comparatively small size, both in terms of geography and population, and ultimately also the high level of literacy and diversity of media are decisive in ensuring the proper functioning of this particular form of continuous consultation.<sup>8</sup>

Let us quickly run through the different modalities of consultation used at a federal level in Switzerland.

### *A. Elections*

All Swiss citizens over the age of 18 may take part in elections to the National Council both actively and passively. In other words, they may cast their votes and also stand for election themselves. Only federal civil servants are required to choose between their profession and elected office should they be elected. As for elections to the Council of States, they are not organized at the federal level; they are governed by cantonal provisions, but they do take place every four years on the same date.

Persons who are entitled to take part in parliamentary elections may also cast their vote in popular ballots, *i. e.* all citizens living at home or abroad over the age of 18, who have not been incapacitated on grounds of mental illness or mental debility, can vote.

<sup>7</sup> Kobach, Kris W., *The Referendum: Direct Democracy in Switzerland*, Aldershot, Dartmouth Publishing Company, 1993.

<sup>8</sup> Cronin, Thomas E., *Direct Democracy*, Cambridge, London, Harvard University Press, 1989 (especially chapter IV).

### *B. Referendums*

A referendum is compulsory for all amendments to the Constitution and for membership to some international organizations. A vote must be held in such cases and a double majority is required for adoption: namely, a majority of the popular vote, the votes cast throughout the country, and a majority of the cantons, cantons in which the majority of voters adopted the proposal.

The Swiss citizens are also entitled to pronounce on Parliamentary decisions after the event. Amended or new laws and similar decisions of Parliament as well as certain treaties in international law are only put to the vote if an optional referendum is sought. In this case, a popular ballot is held if 50,000 citizens so request. The signatures must be collected within 100 days of a decree's publication.

Often in Switzerland, an optional referendum is seen as a veto and has the effect of delaying and safeguarding the political the political process by blocking amendments adopted by Parliament or the Government or delaying their effect—the referendum is therefore often described as a “brake” applied by the people, though this could be a subject to debate.

### *C. People's initiatives*

Citizens may seek a decision on an amendment they want to make to the Constitution. For such an initiative to take place, the signature of 100,000 voters must be collected within 18 months. A people's initiative may be formulated as a general proposal or—much more often—be presented as a precisely formulated text whose wording can no longer be altered by Parliament or the Government.

The authorities sometimes respond to such an initiative with a counter-proposal (generally less far-reaching and the product of a large compromise) in the hope that the people and the cantons will support that instead.

Since 1987, the possibility of a double “yes” vote has existed in ballots on people's initiatives. Voters are now allowed to approve both the initiative and the counter-proposal. A deciding question determines which of the two texts will enter into force if both secure a popular majority and a majority of the cantons.

### *D. Petition*

Finally, all persons capable of forming judgment —therefore not just those eligible to vote— are entitled to address written requests, suggestions and complaints to the authorities.

The authorities in turn are required to take due note of such petitions and although it is not compulsory to provide an answer, in practice every petition is considered and does receive a reply. The petition usually relates to any activity of the State, and every year thousands of petitions are sent in!

### *3. The Parliament*

Switzerland has a bicameral Parliament at the federal level: These are the Federal Chambers, which together constitute the (United) Federal Assembly. The National Council represents the whole population and the Council of States, the member States —*i. e.* cantons— of the Confederation. This system reflects the two principles on which the structure of the State is founded: the democratic principle according to which every vote carries the same weight and the federalist principle by which all cantons are treated equally.

The people are represented in the National Council —also known as the larger Chamber— which has 200 seats.<sup>9</sup> The number of deputies from a canton (each of which is a constituency) depends on its population size. Zurich with the largest population has 34 seats, while Uri and Glarus, the half-cantons of Obwalden and Nidwalden and Appenzell Innerrhoden are entitled to just one representative each in the National Council. Proportional representation is used for elections in cantons with more than one seat.<sup>10</sup>

As for the cantons, they are represented in the Council of States —also known as the small chamber— which has 46 seats. 20 of the cantons elect

<sup>9</sup> In the 1999-2003 legislature which just ended on October 19th 2003, 48 members of the National Council (24%) are women as where 9 (19.5%) members in the Council of States.

<sup>10</sup> Each party which wishes to take part in an election submits a list of candidates to each voter, the so called “party list”, which contains a number of candidates not exceeding the number of members for that canton. The electoral authorities also provide voters with a blank list as well, which contains as many spaces as there are members to elect. The voter can use the prepared party list or the blank list.

two representatives and six half-cantons (namely Obwalden and Nidwalden, the two Appenzells and the two Basles) each elect one representative. In all cantons —with the exception of the Jura— the people elect their deputies by a majority voting system.

*A. The Parliamentary Groups*<sup>11</sup>

Parliamentary groups are formed by deputies either of the same party or parties sharing the same political sympathies. At least five deputies are needed to form a Group.

GROUPS WITHIN THE NATIONAL COUNCIL  
AND THE COUNCIL OF STATES 1999-2003

<i>Groups</i>	<i>National Council</i>	<i>Council of States</i>	<i>Total</i>
Radical Free Democratic Group	42	18	60
Social Democratic Group	52	6	58
Group of the Swiss People's Party	45	7	52
Christian Democratic Group	35	15	50
Green Group	10	—	10
Liberal Group	6	—	6
Evangelical and Independents Group	5	—	5

<sup>11</sup> When drafting this paper the new Parliamentary Groups were still being negotiated and were not known. What was clear though was that the Liberal Group, which only got 4 deputies reelected, would disappear and must surely integrate the Radical Free Democratic Group.

Groups are entitled to appoint representatives to the parliamentary committees. Parliamentary group meetings serve to enable preliminary discussions on Council business with a view to agreeing the line to be followed during parliamentary debate. The committee members inform their colleagues in the parliamentary groups of the proposals laid before them.

### *B. The Parliamentary Committees*

The two Chambers each have their own 12 standing committees to prepare various issues before they go to Parliament for debate. Beside the below listed standing committees, special committees can also be set up to deal with certain important matters.

The 12 standing committees are:

- The Finance Committee (FC)
- The Control Committee (CC)
- The Foreign Affairs Committee (FAC)
- The Committee for Science, Education and Culture (CSEC)
- The Committee for Social Security and Health (CSSH)
- The Committee for the Environment, Spatial Planning and Energy (CESPE)
- The Defense Committee (DefC)
- The Committee for Transportation and Telecommunications (CTT)
- The Committee for Economic Affairs and Taxation (CEAT)
- The Political Institutions Committee (PIC)
- The Committee for Public Buildings (CPB)

All committees except for four are described as legislative committees concerned with legislation in their specific subject area. This usually involves discussing bills proposed by the Government on behalf of their respective Councils or the preparation of such bills themselves.

The two exceptions are the two Finance Committees which scrutinize the budget and the State accounts before they are discussed at the Council sessions; and the Control Committees which are supervisory bodies which examine reports on the conduct of business of the administration.

In contrast to the sessions of the two Councils, the meetings of the committees are not open to the public. The closed-door sessions are intended to encourage as open a discussion as possible among the members and to make consensus easier. After their meetings, the committees usually hold a press conference. The committees appoint a “rapporteur” to present their proposals to the Councils. Committee members whose opinions are in minority at committee meetings have the opportunity of presenting their positions in the form of a minority motion to the Councils.

As a rule, the Councils adopt the proposals of their committees. As such, it can be said that the essential political course of the state is steered by the committees.

The composition of the committees and the appointment of committee chairpersons are based on the strength of the various parliamentary groups and, to as great an extent as possible, on language and region. The committees of the National Council as a rule consist of 25 members. The committees of the Council of States, 13 on average. National Council members sit on one to two committees and members of the Council of States, on three to four committees. Committee members hold their seats for four years, after which they may be re-elected. Committee chairpersons may only serve for two years maximum.

### *C. The Parliamentary Procedures*

Every member of the National Council and the Council of States is entitled to speak during the sessions and to table motions. Members have at their disposal a range of instruments, some more effective than others, to ensure that their opinions and those of their electorate are heard.

Parliamentary Initiatives. The “right of initiative” enables members to propose articles amending the Constitution, laws or decrees. This can be done either by submitting a formulated draft or by moving for such a draft to be prepared in a general proposal.

A motion instructs the Federal Council to present a draft bill or decree or to take a certain measure. The motion must be signed by one or more deputies. If it is approved by the Chamber in which it originated and by the other Chamber, it becomes binding on the Federal Council. The Federal Assembly has the right to propose a motion concerning matters over which it has direct authority. Whether it also has this right in exercising its supervisory activities is debatable.

In 1986, the Council of States created a new procedure called the “recommendation” by which the Federal Council may be invited to implement a measure that falls within its exclusive jurisdiction or within a legislative area in which it has been empowered to act.

A council may instead decide to submit a motion to the Federal Council in the form of a “postulate”.

A postulate instructs the Federal Council to examine whether a draft bill or decree should be presented or whether a certain measure should be taken. A postulate can also require the preparation of a report. The approval of the second Chamber is not necessary for a postulate to be sent to the Federal Council.

An interpellation enables deputies to request information from the Federal Council on important events or problems relating to foreign or domestic policy or to the administration. An interpellation can be labeled as “urgent”.

A mandate requests the Federal Council performance mandate conferred upon certain administration offices. The mandate serves as a guideline which may be deviated only in justified cases. Unlike a motion or a postulate, a draft mandate, whether submitted by an individual deputy or by a committee, can be modified in the course of parliamentary debate. Before being referred to the Federal Council, the mandate must be approved by the other Chamber.

A miniature version of an interpellation, the “ordinary question” can be used by deputies to request explanations on issues of a federal nature. The Federal Council must provide a written answer to such questions before the next parliamentary session.

Within the National Council, and only within this Chamber, there exists a “question time” which takes place twice each parliamentary session. Any deputy may put a brief written question to the Federal Council in the first and second week of the session, which is then answered orally on the Monday afternoon of the following week.

Any deputy who has put a question may respond to the answer with a supplementary oral question, which must be answered immediately. Members of the Federal Council are known to dislike these “question time” as they are quiet often caught up with actuality and are put under severe scrutiny.

Finally, Parliamentary initiatives may be submitted by committees as well as by Council members. In the case of motions and postulates, the same also applies for parliamentary groups.

#### *D. The Main Tasks of the Federal Assembly*

The two Chambers above all debate any amendments to the Constitution, decide on the enactment, amendment or rescinding of federal laws, take other generally binding decisions of the Confederation and approve international treaties.

In the first session after the elections of the Federal Assembly, the two Chambers meet as the United Federal Assembly to elect the members of the Federal Council and the Federal Chancellor, as well as the judges to the Federal Supreme Court, the Federal Insurance Court and the Military Supreme Court.

Each year, the Federal Assembly elects the President of the Confederation and the Vice-President of the Federal Council from among seven members of the Federal Council.

If a seat in the Federal Council or one of the Federal Courts falls vacant, the Federal Assembly is convened to elect a successor. In the event of a military threat, it also elects a General to act as Commander-in-chief of the armed forces.

The two Chambers exercise ultimate supervision over the Federal Administration; they approve the federal budget and authorize the levels of revenue and expenditure. In addition, they scrutinize and approve the federal accounts.

Within other tasks, both Councils approve the list of permanent civil servants and the level of remuneration. Finally, they endorse all amendments to cantonal constitutions as long as they are democratic and comply with the Federal Constitution.

#### *4. The Federal Council*

The Swiss Government consists of the seven members of the Federal Council who are elected by the Federal Assembly for a four-year term. The President of the Confederation is selected for just one year and is regarded as *Primus inter pares* or first among equals during that time. He chairs the sessions of the Federal Council and undertakes special ceremonial duties.

### *A. The Role of the Federal Council*

As the highest executive authority of the country, the Federal Council is primarily responsible for the activities of Government. It must continuously

- assess the situation arising from developments in the State and society and from events at home and abroad;
- define the fundamental goals of state action and determine the resources needed to attain them;
- plan and co-ordinate Government policy and ensure its implementation;
- represent the Confederation at home and abroad.

Furthermore, the Federal Council must regularly and systematically scrutinize the working of the Federal Administration in order to ensure its efficiency as well as the legality and practicality of its activities.

The Federal Council also takes part in the legislative procedure by

- leading the preliminary proceedings of legislation;
- submitting federal laws and decrees to the Federal assembly;
- enacting regulations in so far as the Federal Constitution or federal law empowers it.

Finally, the Federal council hears and determines matters of administrative law in so far as provision is made in federal legislation on administrative jurisdiction.

It drafts the budget and the State accounts and approves cantonal decrees in controversial cases as long as this is provided for in a federal decree requiring a compulsory referendum. The Federal Council takes administrative action only in exceptional cases.

### *B. The Functioning of the Federal Council*

The Federal Council generally meets for one ordinary session each week and takes decisions on some 2,000 to 2,800 matters per year. In addition to the extraordinary sessions, which are convened at short notice as and when the need arises, a number of special meetings are also held each

year, which are dedicated to the consideration of especially complex and important issues.

The sessions of the Federal council are chaired by the President of the Confederation, or in his absence, by the Vice-President. They can last between one and ten hours.

The Departments and the Federal Chancellery prepare the agenda, but it is the Federal Council that takes the decisions as a collegial body. Each member of the Federal Council has one vote. The Federal Chancellor is entitled to propose motions and speak, but has no vote.

As a general rule, the Federal Council avoids taking votes as such; a majority position often already emerges from the opinions expressed during the discussions.

The so-called magic formula and the collegial principle in effect turns the Federal Council into a small version of parliament with the main parties represented on a largely proportional basis<sup>12</sup> As a result, the collegial principle also serves the function today of enabling compromise solutions to be found on which majority agreement is possible.

## 5. *The Federal Justice*

As the highest legal instances in Switzerland, the Federal Supreme Court and the Federal Insurance Court represent the judicial authority, one of the three state authorities alongside the legislative authority embodied by the Federal Assembly and the executive authority embodied by the Federal Council.

### *A. The Federal Supreme Court*

Has the responsibility of ensuring that federal law is uniformly applied and that the cantons do not overstep the limits set by the Confederation in the introduction and application of laws and the administering of justice.

<sup>12</sup> The seven members of the Federal Council are representatives of four different political parties. It is the same composition since 1959. The four biggest parties forming the Federal Council under the “magic formula”: two radicals, two Christian Democrats, two Social Democrats and one member of the Swiss People’s Party. Radical. An unwritten law requires that at least two members should come from French or Italian speaking regions. This might change on December 10th 2003 as explained in the conclusion.

The Federal Supreme Court also has responsibility for protecting the constitutional rights of the citizen.

It is the final instance in resolving legal disputes between the citizen and the state, between citizens, between cantons and between the Confederation and the cantons. It is responsible for all areas of law: criminal, debt and bankruptcy as well as constitutional and administrative law (with the exception of social insurance law).

Through its decisions, the Federal Supreme Court contributes to the continuing development of law and its adaptation as situations change.

#### *B. The Federal Insurance Court*

It is a branch of the Federal Supreme Court responsible for social insurance cases, but organizationally it is independent of the Federal Supreme Court. It has the responsibility for the harmonized interpretation of the fragmented social insurance laws as well as their development.

#### *C. The Cooperation between the Two Courts*

The two courts co-ordinate their decisions by exchanging views and by holding an annual conference and co-operate in court administration by publishing the fundamental judgments in the Official digest.

#### *D. The Federal Judges*

The highest legal authority in the country consists of 41 full-time and 41 part-time federal judges. Of the 30 full-time judges in Lausanne, 5 are women; of the 11 in Lucerne, 2 are women.

Their appointment by the Federal Assembly is based on linguistic and regional criteria and until now has voluntarily followed the proportional representation of the major political parties. At the present moment, the two courts have one Romansh-speaking member, three Italian speakers, twelve French speakers and twenty-five German speakers.

#### *E. The Court Registrars*

There are 129 court registrars at the two courts (86 at the Federal Supreme Court and 43 at the Federal Insurance Court) who help the judges

prepare their rulings, keep minutes of the sessions, compile judgments, draft court decisions, orders and circulars and prepare specific documents for publication.

### *6. Reform of the Swiss Federal Judiciary*

On March 12, 2000, the Swiss people, by popular vote, adopted constitutional provisions to reform the Swiss federal judiciary, thereby approving the second step of the Federal Council's constitutional reform program. The following section addresses the most significant elements of the recently adopted reform package:

First, the Federal Supreme Court will benefit from a reduced caseload in order to preserve the quality of its jurisprudence. Since Swiss cantonal courts can apply federal law, the Federal Supreme Court, to assure uniform interpretation of federal law, generally has no discretion in whether or not to take a case brought before it. Switzerland has no system similar to that of the United States, where the U.S. Supreme Court may grant or deny a writ of certiorari. As a result, an increase of the number of appeals to the Federal Supreme Court directly impacts its caseload.

Moreover, prior to the adoption of the reform of the judiciary, the Federal Supreme Court also acted as a trial court of first instance, rather than as an appellate court, in certain matters of federal criminal and administrative law. Such lengthy trials tied up a great deal of the Court's resources, which could have instead been more efficiently spent on reducing the court's backlog. To address and solve these issues, a new article (Article 191a) was inserted into the Federal Constitution calling for both the establishment of a federal criminal court and federal administrative bodies with judicial competence<sup>13</sup> It will also provide the federal government with the power to create additional judicial authorities. In other words, the Federal Supreme Court will become, upon implementation of the new constitutional provisions, a pure appellate

<sup>13</sup> Art. 191a stipulates the following:

1. The Confederation shall provide for a federal criminal court which shall judge as a trial court criminal cases that are subject by statute to federal jurisdiction. The statute may provide for further grounds for jurisdiction of the Federal Criminal Court.

2. The Confederation shall provide for federal judicial authorities to judge disputes of public law arising within the administrative jurisdiction of the Federal Administration.

3. Further federal judicial authorities may be established by statute.

court, only reviewing cases which have been previously decided by lower judicial authorities. Additionally, for the first time, the principle of judicial independence will be codified on the constitutional level (see Article 191c).<sup>14</sup> Up to now, this principle was not expressly stated in the Constitution but merely mentioned in a federal statute.

Second, as a corollary to the changes affecting the federal judiciary, a new fundamental right will be included in the new Constitution. A new article (Article 29a) will guarantee, as a matter of constitutional law, that every individual has the right to have his or her case heard and decided by an independent court of law.<sup>15</sup> In practice, this new fundamental right does not constitute a substantial change, because only very few cases, predominantly in the area of administrative law, were ultimately decided by governmental agencies (authorities comparable to U.S. administrative law judges) or even by the Federal Council.

Third, the Swiss Confederation, for example, the federal legislature, is now empowered to enact a single uniform law of civil and criminal procedure to be used throughout Switzerland. Up until now, the law of civil and criminal procedure was a matter of cantonal law. As a result, a country approximately twice the size of New Jersey had no less than 27 different codes of civil procedure and 29 different codes of criminal procedure (if one counts all cantonal and federal procedural codes), partially modified by various singular procedural rules contained in a variety of federal laws and international treaties or developed by the Federal Supreme Court. Such a lack of transparency has become more and more of an obstacle to law enforcement and has raised issues of equal treatment. A new constitutional provision addresses these problems by conferring legislative power in the area of civil and criminal procedure to the federal government (Articles 122 and 123).<sup>16</sup>

<sup>14</sup> Art. 191c stipulates the following:

All judicial authorities shall be independent in their judicial activity and bound by law only.

<sup>15</sup> Art. 29a stipulates the following:

Every person has the right to have legal disputes judged by a judicial authority. The Confederation and the Cantons may in exceptional cases exclude judicial proceedings.

<sup>16</sup> Art. 122 stipulates the following:

1. Legislation in the field of civil law and civil procedure is a federal matter.
2. The organization of the judiciary and civil justice are cantonal matters unless otherwise provided by statute.

Finally, it should be noted that the federal legislature did not pass the Federal Council's proposal to extend the scope of the Court's judicial review to include federal statutory law enacted by the Swiss parliament. In other words, the Court will still be bound to apply federal statutory law, even if such law violates the Federal Constitution (see Article 190). Nevertheless, the Federal Supreme Court is still empowered to review cantonal legislation, as well as Federal Council Ordinances and federal regulations issued by administrative agencies. This limited judicial review for constitutionality of laws made on the federal level is an expression of the long-standing Swiss democratic tradition, which values democratic compromise over judicial law-making, thereby avoiding—to a certain extent—a counter-majoritarian dilemma.

### III. THE LIMITS OF SWISS FEDERALISM

#### 1. *The New Swiss Constitution*

Switzerland started the new millennium with a new legal foundation. On January 1<sup>st</sup>, 2000, the new Swiss Federal Constitution entered into force, replacing the Constitution of 1874. Already in the 1970s, the Federal Council created an expert commission to draft a new constitution, since it was widely recognized that reform of the constitutional system was necessary in order to maintain the efficient functioning of the federal government. Moreover, the Constitution of 1874 could no longer be considered a transparent codification of Swiss Constitutional law. It had undergone over 140 revisions; Switzerland does not have an amendment system, so changes were actually incorporated into the text of the article which was being modified. In addition, the growing impact of international law and the evolution of constitutional law as interpreted in the Federal Tribunal's case law were not reflected in the text of the Constitution of 1874. For example, some fundamental rights, such as the freedom of speech and the freedom of assembly, were not explicitly mentioned, even though these

Art. 123 stipulates the following:

1. Legislation in the field of criminal law and criminal procedure is a federal matter.
2. The organization of the judiciary, criminal justice, and execution of criminal penalties and measures are cantonal matters, unless otherwise provided by statute.

rights were respected in practice and acknowledged by the Federal Tribunal as being implied in the Constitution.

Therefore, the Federal Council devised a plan to reform the Swiss constitutional system. However, it soon realized that a substantive revision of the Constitution of 1874 addressing all relevant issues at once was not feasible as a political matter, and, therefore, deemed it best to break the reform project down into several smaller steps. In line with a Federal Assembly mandate of 1987, the Federal Council first concentrated on formalities and put forth a proposal to formally revise the Constitution of 1874 in order to “re-codify” Swiss constitutional law. In other words, the first step of the reform project was to formally “update” the written constitution rather than to change its substance, so as to minimize the political risk of losing an important popular vote and avoid jeopardizing any subsequent substantive reforms with overly ambitious revisions. For these reasons, the new Constitution, approved by popular vote on April 18, 1999, and entered into force on January 1<sup>st</sup>, 2000, was designed to make current constitutional law more transparent, to bring it into a systematic order, and to adjust its language and terminology to modern standards.<sup>17</sup>

Following a preamble and general provisions (Articles 1 to 6) and preceding the articles regarding the organization of the legislative, executive, and judicial branches of the federal government (Articles 143 to 191), the new Constitution now formally and explicitly separates and codifies the four traditional pillars of Swiss constitutional law: i) *Democracy*: Articles 136 to 142 address the participation of the Swiss people in the federal government, by providing rules governing popular initiatives for total or partial revision of the Federal Constitution and mandatory or optional referenda against federal statutes; ii) *Rule of Law*: Articles 7 to 36 address general principles of governmental actions and provide an extensive catalogue of fundamental rights; iii) *Social Welfare*: Article 41 declares certain “social goals” to be achieved by the Federal and Cantonal governments; iv) *Federalism*: Articles 42 to 135 address the

<sup>17</sup> The actual text of the 2001 Swiss Federal Constitution may be found on the following Website [<http://www.admin.ch>]. Please note that only the German, French, and Italian versions are authentic and legally binding. The English version is merely an informal translation without binding force.

relationship between the Swiss Confederation and the 26 Cantons, as well as municipalities, and enumerate the federal legislative powers.<sup>18</sup>

But the truth is that this reform is considered and “clean-up” of the text but in no way does it necessarily bring about any solutions to the actual problems “federalism” and plebscitary democracy are confronted with.

## 2. *The Weakness of Federal Authorities, or how a Canton Can deny Human Rights to its Citizens*

In the nineteenth century Switzerland was one of the first countries to attain a democracy that was free of property—and other restrictions on an adult male’s right to vote—. The realization of women’s equal rights in Switzerland, however, was a long and difficult process. The first attempts to introduce women’s suffrage at the cantonal level failed in 1920-1 in Neuchâtel, Basle, Glarus, Zurich, Geneva and St. Gallen. In 1929 a petition demanding women’s suffrage at the federal level was handed in with a quarter of a million signatures. This petition led to nothing. In 1959, in a popular vote, Swiss men voted two to one against women’s suffrage. In 1971 Switzerland became one of the last countries to give women the right to vote, but it was a further ten years before women were given equal rights and constitutional protection against discrimination.<sup>19</sup>

People often ask why recognition of women’s political and civil rights took so long in Switzerland. One answer may be that women’s organizations, after their early setbacks in the 1920s, had lost much of their courage to demand equal rights.<sup>20</sup> Another reason may be that Swiss society is generally more conservative than others. In fact the Swiss, who had had to defend their traditional values and autonomy during the First and Second World War and had never suffered a social revolution in the twentieth century, were particularly late in recognizing the need for a change in

<sup>18</sup> Fleiner, Thomas *et al.* (eds.), *La nouvelle Constitution suisse: fédéralisme, droits fondamentaux, droit économique et structure de l’État*, Institut du Fédéralisme, PIFF 26, 2000.

<sup>19</sup> Fleiner, Thomas, *Les droits de l’homme: un point de vue Suisse*, Fribourg, Institute of Federalism, PIFF 21, 1999.

<sup>20</sup> On the early politics of Swiss women’s organizations, Mesmer, Beatrix *Augeklammert, Eingeklammert. Frauen und Frauenorganisationen der Schweiz des 19. Jahrhunderts*, Basel, Helbling und Lichtenhahn, 1988.

women's societal position.<sup>21</sup> When in 1958 Iris Von Roten published *Frauen im Laufgitter*—a very critical report on the economic, political, sociological and sexual situation of Swiss women—the author and her feminist work were destroyed by the media and were effectively silenced. Only in 1991, when the almost forgotten book was re-edited, was *Frauen im Laufgitter* hailed as the Swiss equivalent of Simone de Beauvoir's *Le deuxième sexe* (1949) or Betty Friedan's *The Feminine Mystic* (1963). This clearly illustrates the late change of mind about the position of women in Swiss society.

From the perspective of a political scientist another factor should be recalled. The problem of the introduction of women's suffrage was that women were not able to participate in the decision. Men alone decided whether they were willing to abandon their historical privilege and share their political rights with women. In parliamentary democracies that situation is easier to deal with. A party that wishes to introduce women's suffrage can combine this proposition with other issues, for instance job security or minimal wages, in its election program. Thus a worker fearing for his job would probably vote for that party, even if he was at odds with the idea of women's suffrage. Should that party win the election the introduction of women's suffrage would be likely, because once introduced the new voting power of women would most probably go to support the government that had enfranchised them. This procedure was not possible in Switzerland, where women's suffrage had to be introduced by popular vote.

Moreover, in order to prevent one issue from riding on the back of another, and to ensure that voters have the opportunity to express their preferences clearly, the constitution prohibits the combining of different questions in a single popular vote. Thus, when attempting to introduce women's suffrage in 1959, the federal authorities were not able to offer men some sort of incentive to share their electoral monopoly with women. All that the government was able to do was to convince men that women were equal or that human rights should be universal. The most helpful thing, however, was the example provided by the cantons and a number of communes which, during the 1959 voting and later, introduced women's

<sup>21</sup> The first sociological report on the position of women in Swiss society dates from 1974. Held, Thomas and Levy, René, *Die Stellung der Frau in Familie und Gesellschaft*, Huber, Frauenfeld, 1974.

suffrage at the lower level. In 1971 the federal government tried again. This time it was a success.<sup>22</sup>

A few bastions of all male democracy withstood all attempts at persuasion, which they perceived as outside interference. The *landsgemeinde* of the canton of Appenzell Innerrhoden steadfastly refused to introduce women's suffrage until 1990. Finally, when deciding on an appeal brought by a number of Appenzell women, the Federal Court ruled that this situation was unconstitutional. Moreover the court intervened drastically: it redefined Appenzell Innerrhoden's constitution in such a way that it gave women the right to participate at the next *landsgemeinde*.<sup>23</sup>

One may ask why this process took so long. Was there no possibility of the federal government intervening earlier to end the unconstitutional situation in Appenzell Innerrhoden? Theoretically the answer is yes. The Swiss federation has several means of intervening if cantons fail to comply with federal law. In the event of public disorder it can send in troops. Under certain circumstances it can also withdraw subsidies. Both sanctions, however, would not have been of much help in this case. Moreover they are used very rarely—official relations between the federation and the cantons being very delicate—. Federal authorities deal with the cantons with almost as much respect as they deal with foreign states. More common is intervention by the Federal Court. Since every cantonal decision is subject to the charge that it violates federal constitutional law, the court's role in implementing equal protection is most important. Indeed as the Federal Court deals with basic rights—freedom of press, freedom of speech, the right to own property, freedom of association, equal protection by and due process of the law, and *habeas corpus*—it is probably the strongest authority of the central state. It says what can and can not be done under the flag of federalist autonomy. In setting common standards of constitutional law

<sup>22</sup> This interpretation is not at odds with Banaszak, Lee Ann, "The Influence of the Initiative on the Swiss and American Women's Suffrage Movements", *Schweizerisches Jahrbuch für Politische Wissenschaft*, no. 31, Bern, Haupt, 1991, pp. 187-207. The author compares the influence of the initiative together with various dimensions of the political opportunity structure and finds that the Swiss women's suffrage movement lacked the support of other movements and parties. The reason for this was weak, and in many cantons nonexistent, party competition.

<sup>23</sup> Möckli, Silvano and Stahlberger, Peter, "Die schweizerischen Landsgemeinde-Demokratien", *Staat und Politik*, no. 34, Bern, Haupt, 1987, pp. 237-260.

and equal protection, it acts as a counterbalance to the political variety of the cantons.

The case of women's suffrage, however, was rather special. When introduced at the federal level in 1971, the amendment provided for a certain delay on the part of the cantons to allow them to adapt their own regulations. This was done for two reasons. First, the delay-clause was likely to improve the chances of a successful popular vote on the federal amendment. Second, it symbolized the hope that the male majority in those cantons that still refused women's suffrage would change their minds more quickly if the federal authorities refrained from exerting pressure. This hope was fulfilled in several cantons, but not in Appenzell Innerrhoden, where the Federal Court finally had to decide on this substantive issue and also to declare that the transitional period, after almost 20 years, had finally run out.<sup>24</sup>

The belief of Swiss political culture that it is better to refrain both from coercive power and from direct confrontation between cantonal and federal authorities seems to be indestructible, at least among the political elite. It is significant that the women's suffrage case was brought to the Federal Court by a few "ordinary women" who had the guts to resist threats of harassment when doing so. The Swiss political elite, on the other hand, was not very creative in finding means of helping the Appenzell Innerrhoden women. They even renounced symbolic politics. When it was the turn of an Appenzell Innerrhoden member of the Federal Court to become president in 1989, parliament could have said: we do not wish a representative of this canton to be head of our state as long as it denies women's essential human rights. Nobody did. When it comes to its smallest member-states, the federation speaks softly and does not carry a big stick.

In a more general way the question of how to enforce and implement human or civil rights poses problems in every federal state. Its central authorities have to guarantee equal rights, but they also have to protect minority rights and the historic particularities of local cultures. If equalization is a question of money, it poses no problem. Money is divisible, and economic equalization can therefore be negotiated through compromises. This is not always so with the equalization of human or constitutional rights. Politically, problems of ethical values are often perceived as binary questions. There is either the right to have an abortion or there is not. The death pen-

<sup>24</sup> Decision of the Federal Court no. Ib/294/1990 of November 27th, 1990.

ality is either constitutional or it is not. Possibilities of compromise are limited. Because of the fundamental nature of these questions, and because of their importance for the whole of society, governments sometimes decide their constitutionality for the whole of the society.

If federal states, because of specific values predominating in their society, insist on a single solution for all, is there a right to difference in the name of federalism? Given the perspective that human rights are fundamental and universal, there can be no tolerance for federal particularities which deny them. Federal states should then be forced to comply with the solution made for all. But such solutions can evoke fundamental conflicts.

If ethical question is highly controversial, the conflict can threaten other values – social peace for instance. In federal systems it may therefore be prudent to avoid single solutions when the issue is very controversial. Moreover, if human rights are perceived as an historical product of economic, social and cultural development and not as God-given, there may be an argument for different solutions in federal states. Autonomous solutions for particular member-states may not only prevent conflicts, but also allow the development of the endogenous cultural patterns that are necessary to make human rights effective in daily life. According to the constitutionalist Walter Kälin, the Swiss Federal Court seems to follow both lines: after an initial “unifying” period, it has later tried to value not the federal, but also the cantonal tradition of constitutional rights, allowing regional and particular solutions.<sup>25</sup>

Nevertheless, in Switzerland today, if the issue over women’s right to vote has been solved, other questions on the unbalancing effects of federalism on democracy are popping up.

### 3. *Federalism versus democracy*

Why one citizen from a small canton like Uri outweighs 34 citizens from Zurich, or if you prefer to what extent is Federalism compatible with Democracy? As it has already been said in the introduction, federalism is an important institutional mechanism in Swiss democracy for protecting minorities and dealing with cultural divisions. However this institutional arrangement implies a conflict between two principles of decision-making.

<sup>25</sup> Kälin, Walter, *Verfassungsgerichtsbarkeit in der Demokratie*, Bern, Stämpfli, 1987.

Democracy insists on the equal representation of every individual, that is, one person one vote, whereas federalism in the Swiss case guarantees equal representation to the member-states of the federation, that is, an equal vote for every state. If the two modes of decision-making are used to decide the same question, they can lead to different results. Here can be a collision between the principles of democracy and those of federalism.<sup>26</sup> In Switzerland such collisions may happen not only in parliamentary decisions when the Council of the States and the National Council disagree, but also in a popular vote, when the majority of cantons and the majority of the people may not necessarily coincide.<sup>27</sup>

Most of these collisions are recent. The number of polls on constitutional matters has increased by about 100 % every 20 years since 1930. constitutional amendments, once an exception, have become the norm for the introduction of new activities by the central government. This leads to a greater risk of collision between the democratic and the federalist majority.

Moreover the differences in population size between cantons have increased because of migration from rural to urban regions. This has had an effect when popular voting requires a double majority. It increases the importance of the federal principle, while the weight of the democratic principle is reduced. Whereas in 1848 one person from the small canton of Uri cancelled out 17 persons from the largest canton, Zurich, when the majority of the cantons was counted, today it is 34 persons.<sup>28</sup> Theoretically the smallest federalist veto power (51 % of the votes in the smallest cantons against all the other votes) represents just 9% of the Swiss population. This means that 9% of the population could block democratic majorities of 91% in all popular voting on constitutional amendments. In reality it would be unlikely to find a 51% against in the small cantons and 100% for in the large cantons. We can nevertheless determine the practical “minimal veto power” from the votes are in six out of eight cases the cantonal majority blocked a democratic majority. Riamund Germann has done this for five

<sup>26</sup> The following paragraphs are based on Germann, Raimund, “Die Europatauglichkeit der direktdemokratischen Institutionen in der Schweiz”, *Schweizerisches Jahrbuch für politische Wissenschaft*, no. 31, Bern, Haupt, 1991, pp. 257-280.

<sup>27</sup> Fleiner, Lidija Basta and Fleiner, Thomas (eds.), *Federalism and Multiethnic States: The Case of Switzerland* (2nd revised edition), Fribourg, Institute of Federalism, PIFF 16 2000.

<sup>28</sup> *L'Année Statistique Suisse 2002*, Zürich, Verlag Neue Zürcher Zeitung, 1991.

voting in the twentieth century, calculating the no-votes from the 11.5 smallest cantons as a percentage of all votes cast.<sup>29</sup> We see that the practical veto power of the small cantons represents a democratic minority of just 20-25%.

The cases studies were important and controversial. Political analyses show that the voting behavior of the cantons on specific issues is relatively stable. One of the issues where small rural cantons vote differently from large urban cantons is foreign policy. When voting on a trade agreement with the European Community (1972), membership in the United Nations (1986) and the Bretton Woods Institutions (1992), the small cantons maintained classical attitudes of neutrality or autonomy and preferred non-engagement in foreign policy, whereas the large cantons were open to Swiss participation in international affairs and organizations. As political scientists had predicted,<sup>30</sup> this pattern also held in the votation on Swiss membership of the European Economic Area (EEA), where 50.3% and 19 cantons rejected the treaty; 30% of all votes, coming from the small cantons, were enough to block a federalist vote in favor. For a “yes” to the treaty, on the other hand, a very strong majority of 59% of the people would have been necessary to reach a minimum majority of 12 cantons. It is evident, therefore, that every future government proposal to join the European Union will meet a particular difficulty when it comes to the popular vote. A simple majority of the people will no suffice. To participate in the European Integration a very strong preference of 55-60% of the people will be necessary to achieve the compound democratic and federalist majority required for the constitutional change.

To what extent is it justified that a small minority can overrule the democratic majority? “Do not mix up two different things”, would say protagonists from the small cantons. To protect minorities against democratic majorities is the very aim and legitimacy of federalism. If you accept its principle of “one state, one vote”. You have to accept a federalist majority no matter how small a part it may be of the democratic electorate. “Of course, minority rights are important”, others might suggest. They might

<sup>29</sup> Germann, Raimund, “Die Europatauglichkeit der direktdemokratischen Institutionen in der Schweiz”, *Schweizerisches Jahrbuch für politische Wissenschaft*, no. 31, Bern, Haupt, 1991, p. 266.

<sup>30</sup> Among others, Raimund Germann predicted a blocking federalist majority of 33% of the votes, and a majority of the cantons for the EEA Treaty if only 57% of the people voted for it.

object, however, that a federalism weighing the votes of some persons 34 times more heavily than those of others is denying democracy and its principle of “one person, one vote”.

Every federal democracy is faced with this problem. There is a contradiction, and a trade-off, between the principle of equal rights of the member states and that of “one person, one vote”. It is not possible to find a general answer to the question of to what extent federalism may depend on a country’s historical situation, and on the importance a federation gives to minority rights or to the autonomy of its member states. The collision between democratic and federalist majority rule may be settled more easily in bicameral parliamentary decisions, where there are ways of negotiating between two chambers, than in popular voting which lack this possibility. Some countries may not be worried by and therefore not become aware of the problem of the collision between federalism and democracy. In the USA the difference between the smallest and the largest states can reach a ratio of one to fifty or more, as in Switzerland. But small states such as Alaska, Wyoming, Vermont and Delaware do not often form themselves into a coalition in the way it is done amongst small cantons in Switzerland.

There is, however, an important lesson to be drawn from the Swiss example. Because of migration among cantons the weight of the principle of federalism has increased in comparison with democratic majority rule. One could argue that this is against the logic of Swiss history, because the classical federal cleavages of religion and languages have reduced during the past hundred years. Why not therefore reassess the relative importance of federalism and democracy? Why not go back to the equilibrium, for instance of 1848?

Solutions could be found by redistributing the seats in the Council of States. Given the increasing difference in the population size of cantons, one could modify their equal representation, for instance, giving larger cantons three seats, the middle-sized cantons two seats and the small cantons one seat. The majority of the cantons in a popular voting would be calculated the same way. Or one could imagine rules for a division of power that would allow the federation to undertake new activities without amending the constitution in every single case. Changing the rules of federalism is a game to be played under the existing rules of federalism, and there is no reason for minorities to renounce to their long-held minority rights when asked to do so.

The institution-building of federalism has to be considered carefully. Long-standing *equilibria* between the principles of democracy and federalism may change under circumstances not foreseeable at the moment. The institution of federalism can be a one-way street. Federal minority rights may be reinterpreted and adjusted to new situations by constitutional courts, but once introduced, they cannot be revoked by the democratic majority.

Even though solutions are being tabled and discussed, the one question the Swiss are asking themselves is: A deteriorating economical environment bound to tear the communities apart?

#### 4. *The Economic Environment in Switzerland*

Since the beginning of the year 2003, Switzerland's economy is stagnating, unemployment is rising, Martin Ebner, a fêted financier, has stumbled, and many Swiss insurers and banks are struggling. Last year saw the first labour unrest in 50 years. This September 25,000 people marched in Bern against pension cuts. So it is not surprising that the Swiss People's Party (SVP), an anti-foreigner party whose best-known spokesman is Christoph Blocher, may win the most votes in elections on October 19th. The SVP wants to keep foreigners out of Switzerland and Switzerland out of the European single market.

What has gone wrong in a country that was once a byword for prosperity? As in Germany, consensus politics and cosiness in corporate Switzerland, once the basis of the economy's success, have become an obstacle to reform. Old friends sit on each other's boards and back each other's management decisions, however misguided. Consensus has now started to crumble, but only slowly. Company boards are becoming more international. Last year's protests could herald more labour unrest.

Some argue that Switzerland's non-membership of the European Union makes it less competitive. If it were in the EU, Switzerland would have to reform its protected domestic market. To it is easier for a German lawyer to work in France than for a lawyer from Geneva to set up shop in Zurich. But others, such as Mr Christoph Blocher, say the country would lose what is left of its competitive edge, as well as being swamped by immigrants, if it joined the EU.

Despite today's malaise, many countries would love Switzerland's problems. The country's three linguistic groups and its large contingent of foreigners (one-fifth of Switzerland's 7 million inhabitants) get along well. Many Swiss multinationals, such as Nestlé, a food manufacturer, or the drug giants Roche and Novartis, are doing fine. Unemployment is 3.7%, compared with over 9% in France and Germany. Even so, Switzerland will have to work harder at reform. That is a better cure than the isolationist fix that the SVP is campaigning for. After all, some of Switzerland's proudest corporate names, such as Swatch, a watchmaker started by the Beirut-born Nicolas Hayek, owe their existence to foreigners.

### *Implications for the future european integration*

In 1991-92 the European integration process reached a new stage when the countries of the European Free Trade Association signed the European Economic Area (EEA) treaty with the European Community. The Swiss Federal Executive, which was in favor of integration, not only signed the treaty, but was willing to negotiate on the eventual joining the (then) European Community. In December 1992, however, a popular vote rejected the EEA treaty: This halted the government's plan to integrate today's European Union and left the country politically divided.

Finally on May 21, 2000, the Swiss people voted in favor of the adoption of seven bilateral agreements between Switzerland and the European Union concluded on June 21, 1999. The agreements are the results of negotiations between the Swiss Federal Council and the European Union; negotiations which were triggered by the popular vote of December 6, 1992, in which the Swiss people declined to join the European Economic Area. In its negotiations with the European Union, the Swiss Federal Council attempted to recapture the economic benefits of a more intensive cooperation with the European Union, while respecting the concerns which led the Swiss people to vote against the European Economic Area. Therefore, these seven bilateral agreements will be very important for Switzerland in terms of its future foreign policy concerning European integration. In fact, the bilateral agreements were subject to a popular vote only because the opposition managed to get (at least) 50,000 Swiss citizens to sign a petition for such a vote to be held (optional referendum; see Article 141 of the Constitution) after the Swiss parliament had approved the

agreements by an overwhelming majority vote in both chambers. The seven bilateral agreements cover the following areas:

The first agreement deals with *civil aviation* and is aimed at harmonizing regulations for intra-European air transport based on European Union law. The agreement essentially defines the terms and conditions of access to the deregulated European civil aviation market by Swiss Airlines (a new airlines company which replaced Swissair).

The second agreement is concerned with *overland transportation*. The agreement calls for coordination of overland transportation policy between Switzerland and the European Union and is designed to ensure a gradual reciprocal opening of the markets for transportation of both persons and goods by road and by rail.

The third agreement relates to the *free movement of persons*. It would establish freedom of movement between Switzerland and the European Union, resulting in a gradual opening of their respective labor markets. This agreement is the most controversial in terms of domestic policy, since certain political parties fear that foreigners from low-wage countries will migrate to Switzerland and compete with Swiss workers, thereby decreasing wages on the Swiss labor market. In order to address these concerns, Switzerland will pass supplementary legislation, so-called “companion measures”, in order to protect Swiss workers against “wage dumping”.

The fourth agreement involves *European research programs*. This agreement will allow Swiss research institutes, universities, and private companies to participate fully in the activities of the fifth European Union Framework Research Program.

The fifth agreement deals with issues of *public procurement*. Switzerland and the European Union will agree to broaden the scope of the WTO Government Procurement Agreement concluded in Marrakech on April 15, 1994, applying it to the sectors of telecommunications, energy, railways, and transportation, including procurement by local authorities.

The sixth agreement addresses *technical barriers to trade*. The purpose of the agreement is to establish mutual recognition of proof of conformity with established quality standards for most industrial products. Where Swiss law is equivalent to European Union law, one single test will be sufficient to introduce a wide range of products into the stream of commerce. Where Swiss requirements deviate from European Union requirements, two tests will still be needed, however both tests may be performed by Swiss certification bodies.

The seventh agreement regards *trade in agricultural products*. This agreement is tailored to reduce or eliminate non-tariff trade barriers in order to improve both Swiss and EU access to one another's agricultural markets. The Swiss government is also planning on issuing a number of unilateral "companion measures," with the objective of strengthening the competitive position of Swiss agricultural products.

In terms of the legal framework, there are three points to note.

*First*, despite the fact that the seven agreements have their own separate legal bases, they are inseparably linked to one another, since the rejection of one single agreement would make the implementation of the remaining six agreements impossible.

*Second*, the agreements do not call for a transfer of legislative powers to a supranational entity, although in the area of civil aviation, Switzerland agreed to adopt European Union law, which is applied and interpreted by authorities of the European Union, especially in the area of competition law.

*Third*, the agreements will be administered by Joint Committees composed of representatives of both Switzerland and the European Union. The Committees operate by mutual agreement and have decision-making powers only as provided in the agreements themselves. Implementation of Joint Committee decisions, however, is left to the parties, pursuant to their own regulations.

As for the possibility of Switzerland joining the European Union, the decision will have to be taken in 2004, by the Federal Government. Either Switzerland's 1992 demand to join is confirmed or they will have to drop the request. This question of joining an enlarged European Union, is bound to bring about more tension within Parliament and divide further the linguistic communities, as the francophone favor the integration, while the German and Italian linguistic communities are more reserved on the idea.

## 5. *Some concluding remarks*

What is the "elasticity of federal solidarity"? Have we probably reached it's limits in Switzerland?

At the moment of drafting this article, Switzerland had just held federal elections. The truth is there was a major change in the political party land-

scape of the country. The Schweizerische Volkspartei (SVP)<sup>31</sup> was rewarded with just under 27% of the vote, making it for the first time the biggest parliamentary party. That has boosted the legitimacy of its demands for more say in the Swiss government, alongside the centre-right Radicals, the Christian Democrats and the Socialists. The outcome may yet upset 44 years of political stability.

Christoph Blocher, the champion of isolationism who has driven the SVP to the right over the past decade, will stand for a second ministerial post for the party when parliament chooses the seven-member federal council on December 10th (there is no formal prime minister). He insists that his supporters do not have anything against foreigners with work permits: they object only to illegal immigrants. Just as well, for the polymers firm that made Mr Blocher's fortune depends on the fifth of Switzerland's population who are foreign residents to keep its factories going, as do many of the country's hotels, farms and businesses. As for asylum-seekers, in a referendum last year Swiss voters rejected plans to make it harder for them to come into the country, albeit by a tiny majority.

The headline-grabbing advert, which came at the tail-end of a lacklustre campaign, might have won the SVP some votes in western, French-speaking border areas, where it had been weak. But the number of asylum-seekers has anyway fallen by over half since the end of large-scale fighting in the Balkans. Membership of the European Union, another object of the SVP's ire, was on the political agenda well before the election. Voters nevertheless put a stagnant economy, rising unemployment and pension worries at the top of their concerns, according to opinion polls. Under Mr Blocher's guidance, the SVP duly added demands for lower taxes and less state pampering to its programme.

The SVP has risen from a steady 11% or so of the poll before 1991 mainly by sucking votes away from smaller far-right parties. Now it has started to do the same to the flailing centre-right, especially the Radicals. The Radicals have usually been in charge of the economy, and have therefore taken the blame for slow growth and rising unemployment. The Radical interior minister, Pascal Couchepin, lost further support by bluntly pro-

<sup>31</sup> Like all parties in Switzerland, the Schweizerische Volkspartei has three names, a different one in each national language. In German it is the Schweizerische Volkspartei; in French it is called the Union démocratique du centre (UDC); in Italian the party is called Unione democratica di centro (SVP, UDC).

posing an increase in the retirement age from 65 to 67 and also yet another rise in health-insurance premiums.

For all the publicity about Mr Blocher's progress, the left has also quietly made gains. The Social Democrats finished with 23% of the vote. After an exceptionally hot summer that melted some of Switzerland's Alpine glaciers, the Greens also did well, scoring 7.4% of the vote.

Some fear that a growing divide between left and right, with little between, could make the consensus that underpins Switzerland's system of government harder to achieve. One hope is that the other parties put aside their qualms and allow the uncompromising Mr Blocher into the federal council-only for him to find his voice stifled by one of those enduring Swiss traditions that he so vehemently defends: collegiality.

For the moment the Swiss Federal Political establishment is shaken, mainly on several domestic issues such as economic and social policy. This has already led to the polarization of political parties in Switzerland. This could bring about changes in executive power sharing or even an end to a large consensus democracy.

Some observers do not exclude the possibility of a realignment of the Swiss political scene into three main forces: a new national conservative party could draw members from all governmental parties and seek a new clientele with populist preferences; liberal Christian Democrats and some radicals could merge into a new center force, with a Swiss People's Party on the extreme right, and the Social Democrats, including the greens, would represent the political left. In this case, Switzerland, as Karl Deutsch put it over 30 years ago, is in a critical situation between "innovation and stagnation",<sup>32</sup> or should we say "from immobility to slow change"?

<sup>32</sup> Deutsch, Karl, *Die Schweiz al paradigmatischer Fall politischer Integration*, Bern, Haupt, 1976.