



Introduction to the Swiss Model of Federalism

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I would like to start my introduction by proposing two theses:

1. Without federalism, the Swiss Confederation would not exist
2. There is no general theory of federalism

Without federalism, the Swiss Confederation would not exist. This is above all a historical fact. The 25 cantons which joined together to form the Swiss federal state in 1848 were already states in their own right (some of them for several centuries) and were already linked with one another in a loose alliance of states. And the victors in the struggle for the creation of a federal state were wise enough to leave the cantons considerable autonomy, equality and effective participation in the forming of the collective will of the new central state.

One hundred and fifty-four years later, the idea that, without federalism, there would be no Switzerland, is so self-evident as not to require any lengthy proof. Without federalism, whatever the detailed criticisms that can be made of it, it is quite simply impossible to conceive of the Confederation as a state. For how should speakers of four different languages and, above all, members of four different cultures live together in such a small space peacefully and successfully as citizens of a state, if that state did not offer them the opportunity, as the preamble to our Federal Constitution puts it, "to live our diversity in unity, respecting one another." Actually, during my years in the Federal Council, I was constantly amazed to see how different not only mentalities could be, but even certain fundamental political standpoints, above all between language areas but also even between cantons. Let me sketch, even if briefly, a few examples: people in western Switzerland are more open to things that are foreign and new, including European integration, than

in German-speaking Switzerland. On the other hand, our west-Swiss fellow citizens apparently expect more from the state, even in this age of privatisation and liberalisation, than the average German-speaker. Over and over again, political controversies, with the help of the media, convulse one part of the country, but provoke only relatively mild reactions in the other, and vice versa, not to mention the canton of Ticino's own, and again different attitudes and reactions. The linguistic and cultural differences are admittedly not the only reason why federalism is an existential necessity for Switzerland, but they are the most important ones.

Turning to my second point: there is no general theory of federalism.

This introduction "The Swiss Model of Federalism" is all the more difficult as there is no general theory of federalism, not even of Swiss federalism. For example, while the constitutive elements of the liberal state under the rule of law are today generally recognised (bill of rights, equality, the principles of legality and proportionality, distribution of powers, legal protection), federalism is characterised by a degree of autonomy for member states – that is, the cantons – in their own areas and by their collaboration in the shaping of the will of the central state, but above all by flexibility and adaptability towards different historical, mental and political relations. There are no generally agreed criteria as to how much autonomy in the areas of distribution of powers, finance and organisation sub-units of the state must have and what form of collaboration in the shaping of the will of the central state should take in order for one to be able to rightly speak of a federal state. The multiple ways of constructing it are the attraction of federalism, which is more an idea than a concept with a fixed meaning. Thus, federalism – also in Switzerland – was and is an ongoing process of constantly finding a new equilibrium between the central state and its member states.

Basic conditions of the federal process

This federal process takes place in a predetermined, real frame controlled by constitutional law. In Switzerland, that means that the Confederation "faces" 26 cantons, six of which are half-cantons, with half a cantonal vote and only one representative in the council of States. The 26 cantons consist, in our three-tier state, of some 3000 municipalities. One of the cantons (Graubünden) is trilingual, three cantons are bilingual (Bern, Fribourg and the Valais), the other 22 are mono

lingual, 17 being German-speaking, 4 French-speaking and one Italian-speaking. The most populous canton, Zurich, has a population 83 times that of the smallest, Appenzell-Innerrhoden. The difference in prosperity, measured as per capita income, between the richest canton, Zug (Fr. 68'423) and the canton of Jura (Fr. 33'054) is considerable.

The constitutional law framework of the Swiss federalist process was brought up to date on 18 April 1999, when the cantons and the people accepted the new constitution. Besides the creation of a clear system of competences and a unifying of the language, this reform incorporated into the constitution several norms relating to the collaboration between Confederation and cantons, to which we will return.

Accordingly, the central elements of the Swiss federal state are:

1. the autonomy and sovereignty of the cantons, which are not only decentralised administrative units of the Federal Government but also constituent states of the confederation
2. the allocation of responsibilities between federal government and cantons according to the basic rule set out in Art. 3 of the Federal Constitution, according to which the Confederation is competent only for matters which are attributed to it by the Constitution
3. federalism based on partnership, consisting of collaboration in solidarity with one another and mutual consideration between the Confederation and the cantons
4. participative federalism, whereby the cantons collaborate in shaping the will of the Confederation
5. "Vollzugsföderalismus", whereby the implementation of federal law is primarily in the competence of the cantons
6. the tree-tier structure of the state, with Confederation, cantons and municipalities, whereby the organisation of the municipalities is a matter for the cantons, but the Confederation must take into consideration the effects of its actions on the municipalities
7. Financial federalism, whereby the taxing powers are divided up between the Confederation and the Cantons and the Confederation shall leave sufficient

sources of financing to the Cantons and promote financial equalisation among the Cantons.

I would like now to go into detail on two of these elements, namely the distribution of powers and the collaboration of the cantons in shaping the will of the Confederation.

Distribution of powers

Two fundamental principles govern the distribution of powers between the Confederation and the cantons. One is the "Kompetenz Kompetenz" of the Confederation, which is a basic principle of any federal state. In the context of this competence, the Confederation can, by means of change to the Constitution (in Switzerland only with the agreement of a majority of the people and of the cantons), itself determine which tasks are allocated to it. The approximately 140 partial revisions of our old Constitution since 1874 have been concerned mostly with the creation of new federal competence in the areas of protection of the environment, regional planning, radio and television, nuclear energy, etc.. According to the new Federal Constitution, the Confederation in such cases must bear in mind the principle of subsidiarity. "The confederation shall assume the tasks which require uniform regulation and the Confederation shall leave the Cantons as large a space of action as possible, and shall take their particularities into account." (Article 42,46)

The second fundamental principle is contained in the old and the new Art. 3, which, on account of its importance, is often referred to as the basic federal norm of Switzerland. It states: "The Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution; they shall exercise all rights which are not transferred to the Confederation." Retention of this article was one of the main concerns of the cantons during the formulation of the new Constitution. The draft Constitution of 1977 –which proposed an "open" Constitution, in which separation of competences between Confederation and cantons was to be derived primarily from general objectives and "main responsibilities" – ran up against the determined opposition of the cantons. Art. 43 BV therefore stresses the sovereignty of the cantons as follows: "The Cantons shall define the tasks which they shall accomplish within the framework of their powers." And Art. 47 explain: "The Confederation

shall respect the autonomy of the Cantons", meaning their autonomy in the areas of tasks, finance and organisation.

All in all, one can, in consequence, certainly say that our Constitution, through the distribution of powers that I have just sketched, gives the cantons a strong position. The weaknesses of Swiss federalism spring from the widely differing size and, above all, financial strength of the cantons. Apart from material reasons, it was mainly financial reasons which over and over again led to the transfer of tasks from the cantons to the confederation. So far, the repeated attempts to transfer federal tasks back to the cantons have, as a whole, been relatively fruitless, perhaps because our fellow citizens fear that the prevailing levels of performance might be compromised if a task were to be transferred back to the cantons. The latter have, however, retained a dominant position in the areas of education, health and police. The – from our viewpoint – important financial autonomy enjoyed by the cantons is, in any international comparison, outstanding. On the other hand, the lack of a constitutional court is an institutional weakness of Swiss federalism. There is doubtless a need for reform. At the moment, Confederation and cantons are together seeking, in a major project "New Financial Equalisation", to arrive at a new division of tasks in combination with a new system for financial equalisation.

Collaboration of the cantons in shaping the will of the Confederation

Alongside the division of tasks, the collaboration of member-states in shaping the will of the central state is considered to be an essential feature of a federal state. In Switzerland, the cantons collaborate in many ways in shaping the will of the Confederation. For all changes to the constitution (total and partial revisions), referenda are required, and the proposed changes must receive the approval of the majority of the people and of the cantons. Happily, the majority of the cantons rarely votes differently from the majority of the people. Of the 337 referenda that involved changes to the Constitution carried out since 1874, only seven failed because a majority of the cantons did not give their approval. In each of these cases, it was a matter of transferring new competences to the Confederation, so that one can rightly say that, on these occasions, the requirement of approval by a majority of the cantons fulfilled its most fundamental function, namely the protection of cantonal sovereignty. In the politically important referendum on entry to the European

Economic Area (EEA) – which showed a record voter participation of 78% - the two majorities very nearly went along different paths (49,7% of "yes" votes and 16 "no" votes from the cantons), which, had it happened, would doubtless have imposed a heavy burden on our federal state. With the increasing move of population to the towns, in which some 70% of the people now live, great tensions might build up between the large, urban cantons and small, rural ones.

The Council of States, as our second parliamentary chamber is called, to which every canton sends two representatives chosen by the people, is, unlike Germany's second chamber, not a body bound in its activities by directives of the "Länder" but, on the American model, an independent organ of the Confederation. Although, in the Council of States, cantonal and party-political influences mix, on the whole the Council fulfils the role of guardian of federalism. While the members of the Council of States are chosen by the simple majority system, the members of the lower chamber are chosen by proportional representation.

When legislation is being framed, the cantons must be invited to express themselves in what could be called the discussion stage of the process. "The Cantons and the political parties shall be heard in the course of the preparation of important legislation" (Art. 147). In view of the large numbers of people addressees in these procedures and of the divergences between the positions of the 26 cantons, the latter have in recent times successfully endeavoured to bundle their votes. In 1993, they founded the Conference of Cantonal Governments in order to ensure that the voice of the cantons was as united as possible in the discussion of important business, such as the preparation of the new Federal Constitution or questions relating to European integration. Moreover, since 1998, there have been regular meetings between a delegation of the Federal Council and the representatives of the Conference of the Cantons in "federalist dialogue" for exchanges of views on topics relating to federal collaboration. The rules of cooperative federalism – which were previously unwritten constitutional law - have now been incorporated into the new Constitution (esp. Art. 44 and 48). "The Confederation and the Cantons shall collaborate, and shall support each other in the fulfilment of their tasks. They owe each other mutual consideration and support. They shall grant each other administrative and judicial assistance. Disputes between Cantons, or between Cantons and

the Confederation shall, as far as possible, be resolved through negotiation or mediation."

Special emphasis should be placed on the new rights, enshrined in the Constitution, of the cantons to collaborate in matters of foreign policy. Foreign policy was and is a federal matter. The cantons could only operate in the area of so-called minor foreign policy, i. e. they had the right to sign, with foreign authorities, treaties pertaining to their area of competence provided they used the mediation of the Confederation, and to deal directly with subordinate authorities in foreign countries. Above all in the context of the increasing internationalisation of law, the cantons found themselves more and more limited in their very own area of competence, so they rightly demanded more say in the preparation of foreign policy decisions. Reflecting a practice followed since the preparation of the EEA treaty, Art. 55 states: "The Cantons shall participate in the preparation of decisions of foreign policy which concern their powers or their essential interests" and "The position of the Cantons shall have particular weight when their powers are concerned. In these cases, the Cantons shall participate in international negotiations as appropriate."

I have been able to give you only a very incomplete picture of the central elements of Swiss federalism. Thus, I have had to omit a discussion of horizontal cooperative federalism among the cantons, of the important legislation on languages, of federal guarantees, etc. It is striking that the new Federal Constitution contains no specific norms for the protection of minorities. This may be connected with the fact that we like to see Switzerland – according to the division criterion (language, religion, parties) – as an aggregation of constantly changing minorities, which doubtless facilitates considerably the task of living together in peace.

But one could also say that Switzerland's whole political system, with its rights of referendum and initiative, its federalism, its extensive liberties and many other things, is designed to protect minorities. Thus, Latin Switzerland, without there being any corresponding clause in the Constitution, regularly occupies two, often even three of the seats in the seven-person Federal Council.

To conclude, I should like to attempt an overall appraisal of the Swiss Model of Federalism. As Professor Ronald Watts, in his informative book "Comparing Federal Systems", rightly says, measuring the comparative degree of federal autonomy of member states is extremely complex on account of the multiplicity of indices (legislative, administrative, financial decentralisation, participation in federal decision making). But even he comes to the conclusion that, all in all, Switzerland is one of the most decentralised federal states in the world.