

# Switzerland

Nicolas Schmitt<sup>i</sup>

Denis de Rougemont characterized Swiss federalism as a “love of complexity.” The distinguishing feature of Switzerland is its diversity: There are 26 cantons, four national languages, and a kaleidoscope of cultures and religions as well as a varied geography (towns, countrysides, and mountain regions). Switzerland is not a nation in the traditional sense of the term but a *willensnation* forged by the desire of its citizens to renew constantly the links that unite them: “Together, we defend the right to remain different.”<sup>ii</sup> It is this very unity in diversity that makes Switzerland a paradigm of political integration. The Preamble to the Swiss Constitution expresses the determination of the cantons “to live together with our diversities, with respect for one another and in equity.” Indeed, it is the Constitution’s creation of governmental institutions and its definition of the nation’s democratic procedures that permanently contribute to national integration and to preserving the federal polity according to the wishes of its citizens.

## THE SWISS CONSTITUTION IN CONTEXT

Switzerland, covering an area 41,285 square kilometres (225 times smaller than the United States) and located in the heart of Europe, is home to 7,261,000 people, of whom 20.1 percent are foreigners. The country consists of 26 cantons and 2,900 municipalities. Forged over centuries, this political mosaic reflects Switzerland’s geographical, linguistic, and religious diversity and expresses a multitude of social and cultural contrasts.

Geographically, the country is divided into five zones. The Alps, which span from east to west, constitute a wide dividing line. The Alps may be vast, but they are sparsely populated due to their inhospitable living conditions. The Pre-Alps in the North are a zone of mountains of average altitude. They provide a transition to the third zone, Mittelland, a relatively narrow tract (50 to 100 kilometres) that stretches from Lake Geneva to Lake Constance. This zone is the most densely populated region and boasts the most fertile soils in Switzerland. It borders the fourth zone, comprising the Jura Mountains in the West and Northwest. On the south side of the Alps, the Canton of Ticino and parts of the Engadine Valley enjoy certain characteristics of Mediterranean culture. The importance of Switzerland’s mountainous landscape is underlined in Article 50 of the Constitution (Para. 3), which states that the Confederation shall take into account the possible consequences of its activities for the mountain regions in order to protect the ecological integrity of these regions.

Switzerland has four national languages -- German (spoken by 63.7 percent of Swiss), French (20.4 percent), Italian (6.5 percent), and Romansch (0.5 percent)<sup>iii</sup> -- each of which, in accordance with Article 4, is of equal importance. The remaining 8.9 percent of people in Switzerland speak other languages. In terms of their actual use, Article 70 (Para. 1) recognizes German, French, and Italian as the official languages of Switzerland. If the three official-language versions of a federal law differ, it falls to a judge to choose the one that best conveys the will of the legislator because no language has precedence over the others. Romansch speakers may use Romansch in their official dealings with the federal administration; thus in federal-government matters, Romansch is a semiofficial language.<sup>iv</sup> The Confederation wishes to preserve and promote linguistic diversity. According to Article 70 (Para. 3), the Confederation is obliged to provide financial support to the four plurilingual cantons in order to help cover the costs of working in multiple languages (e.g., bilingual schools, translation services, and publication of laws in several languages). There is also great diversity within two of the national languages. Swiss Germans usually speak

Schwyzertütsch, a German dialect of which there are more variations than there are German-speaking cantons. In Ticino various Italian dialects are spoken, particularly in the valleys. Only in French-speaking Switzerland (Suisse Romande) has “French from France” crowded out the regional patois. This language situation brings with it communication problems. Some Swiss believe that the solution lies with adopting English as the country’s lingua franca and with favouring the teaching of English in schools over the other national languages.

In terms of religion, Switzerland is equally diverse. There are Roman Catholics (41.8 percent of the Swiss population), Protestants (35.3 percent), Orthodox Christians (1.8 percent), Christian Catholics (0.2 percent),<sup>v</sup> Muslims (4.3 percent), and Jews (0.2 percent); other religious communities and citizens who state that they have no religion comprise 15.4 percent. Article 72 of the Constitution provides that the regulation of the relationship between church and state falls to the cantons. Articles 8 (equality) and 15 (freedom of religion) prohibit discrimination. Cantons are, therefore, constitutionally obligated to respect the principle of the confessional neutrality of the state, which is inherent in religious freedom, but public authorities are not required to be entirely neutral toward, or totally uninvolved with, religious affairs. After all, the Preamble to the Constitution declares: “In the name of almighty God!”

This flexibility has enabled the cantons to develop their relations with religious institutions in different ways, ranging from declaring their main religion or religions status in public law and maintaining close links between church and state to favouring a system of (relative) separation based on the French secular model.

Religion is no longer a reason for conflict in Switzerland. In 1848 the Protestants imposed their vision of the federal state; yet over time, Catholics became the majority, and Catholic federal councillors soon joined the government. The anticlerical clauses in the Swiss Constitution, such as a ban on Jesuits, gradually disappeared. The last anticlerical clause to disappear was a requirement that the Federal Council approve the creation of new bishoprics, which was repealed on 10 June 2001.

### *Creation of the Federal Polity*

In 1291 the first three cantons -- Schwyz, Unterwalden, and Uri -- founded a confederal alliance, although their pact of 1291 makes reference to an earlier *antiqua confoederatio* of 1273.<sup>vi</sup> These three were later joined by Lucerne in 1332, Zurich in 1351, Glarus and Zug in 1352 (when the allied communities first became known as Switzerland), Berne in 1353, Fribourg and Solothurn in 1481, Basle and Schaffhausen in 1501, and Appenzell in 1513. The last three cantons -- Geneva, Neuchatel, and Valais -- joined as part of the Pact of 1815 following the defeat of Napoleon.<sup>vii</sup> Thus it took more than 500 years to complete Switzerland’s integration process.<sup>viii</sup> After the short-lived war of the *Sonderbund* (i.e., Protestants versus the Catholic separatist league) in 1847, Switzerland, as we know it today, began to take shape. Its foundation rests on the first federal Constitution of 1848, which reflected the outcome of the Sonderbund War as well as the popular revolutions that had swept through Europe at the time. In 1874 a total revision of the Constitution, which was undertaken to correct problems with the 1848 version but which did not significantly alter the Swiss system, was approved by a double majority (the population and the cantons). Although subject to 155 partial revisions, it remained in force for 125 years. A new constitution, an “update” of the previous text undertaken to modernize the document and clarify the jumble of 155 revisions, was adopted by popular vote on 18 April 1999 and entered into force on 1 January 2000. In most basic respects, then, the Swiss political system has remained largely unchanged since 1848.

Although not as famous as their American counterparts, the founding fathers of the Swiss Confederation pursued a worthy and noble goal: to bring peace, security, freedom, and

reconciliation of diversity to their country by means of a modern federal constitution. They had to find a subtle compromise between creating national unity and preserving the specific diversities of the cantons, a preservation demanded by conservatives.

To this end, they drew on the federalism and bicameralism developed in the United States.<sup>ix</sup> They also drew on ideas from the 1798 Swiss Constitution, the 1830 French Revolution (and the regeneration that it brought to the Swiss cantons), the works of Jean-Jacques Rousseau, and the practical, imperial legacy of Napoleon Bonaparte. Indeed, a part of the 1848 achievement has its origins in the 1789 French Revolution and its introduction into Switzerland during Napoleon's invasion of 1798. The French imposed a constitution on Switzerland in 1798 that established a centralized state that was "one and indivisible," converted the cantons into administrative subdivisions of the new national government, created a single Swiss citizenship and universal democratic suffrage, introduced fundamental rights and liberties, and abolished traditional, hierarchical rights and privileges among citizens.

Beyond these outside intellectual influences, the authors of the 1848 Constitution were not subject to external pressures. This was fortunate because a heterogeneous country like Switzerland would have risked imploding if its larger neighbours had become involved in its affairs. Many Swiss resented the French invasion and, thereafter, the interferences of the allies who defeated Napoleon. This helps to explain the ambivalent attitude of the Swiss to the outside world. Sometimes, the country appears to close in on itself, as reflected in its delicate relations with the European Union and its long-standing neutrality. Yet not everyone in Switzerland wants isolation. Switzerland also operates a universalist policy based on neutrality in which Switzerland is seen as a member of the world and a global actor. Thus the Swiss welcomed, first, the League of Nations and, later, the European headquarters of the United Nations, plus a host of other international organizations, to locate in Switzerland. Switzerland's accession to the United Nations in 2002 following a popular vote extended this universalist approach.<sup>x</sup>

Before 1848 Switzerland was a confederation of sovereign cantons bound together by numerous alliance treaties. The 1848 Constitution created a real federation, characterized by certain undisputed structural principles: the rule of law, democracy, federalism, and the welfare state. The old alliance between the states was replaced by a compact among individuals as well as among peoples (i.e., the peoples of the cantons). Although the 1848 Constitution was rejected by eight cantons, due in part to the citizens' fear of its modernity, it soon acquired full legitimacy. Cantons were able to preserve their individual identities, even a certain patriotism, to the point that they could be considered microstates. In their constitutions, some cantons refer to themselves as a "Free State," "Sovereign Canton," "Republic and Canton," and the like. In the interests of national cohesion, it was decided to retain *Eidgenossenschaft* (Confederation) rather than *Bundesstaat* (federal state) as the official title of the country. Hence the formal title of the Constitution is the Federal Constitution of the Swiss Confederation.

Cantonal cohesion is a permanent concern for a country that fears the reemergence of conflicting alliances, such as those that led to the *Sonderbund* upheaval in 1847. Because the Confederation has only a few, restricted means to impose its views, the principle of confederal loyalty is of great importance. Article 44 (Para. 1) of the Constitution provides that the Confederation and the cantons shall support each other in the fulfillment of their tasks and also cooperate in general.<sup>xi</sup> This clause remains above all a political maxim<sup>xii</sup> because cantons enjoy a high level of freedom with regard to organizing and managing their institutions. Other clauses of the Constitution require cantons not to act in breach of federal law or against the interests of the Confederation and the other cantons (particularly Art. 48, Para. 3, and Art. 56, Para. 2).

Since 1848 no national conflict has threatened the internal order of the Confederation, although on ten occasions the federal government has been forced to deploy the armed forces in varying numbers in order to safeguard public order in certain cantons; the last time was in 1932 in Geneva. The question of secession has never arisen since 1848, even in the context of the one important territorial change that has occurred since 1848: the 1979 creation of the Canton of Jura, the breakaway French-speaking Catholic part of the mostly German-speaking and Protestant Canton of Berne. Creating this one canton required tough negotiations between the relevant parties, followed by a series of three popular referenda, which were finally ratified by the entire electorate of Switzerland. Fortunately, Switzerland was able to resolve this contentious issue peacefully, even if the process was often painful, particularly for Laufen, one of the seven districts in Jura.<sup>xiii</sup> The procedure followed to create the Canton of Jura proved very complicated, so much so that the 1999 Constitution contains an article (53) providing for a simplified procedure for territorial changes within one canton. Changes to the territories of several cantons or to their status remain subject to the Constitution's revised Article 1.

### *Updating the Constitution in 1999*

The protection of diversity as a unifying element of the Swiss people is by now a well-established idea (see the Constitution's Preamble or Art. 70, Para. 2). As democracy, federalism, and the search for consensus gradually became anchored in Swiss society and its Constitution, reforming the system became increasingly difficult.

The 1999 Constitution is, therefore, the result of a long process of attempting to update and rationalize the text. The Federal Assembly had first given the Federal Council the mandate to prepare a new constitution back in 1966. A proposal for a very modern text was submitted in 1977, but strong reservations were expressed during the consultation process largely because the proposed changes seemed to sacrifice the general clause, which privileged cantonal responsibilities, in favour of a detailed catalogue of federal and cantonal powers. The process was only relaunched on 3 June 1987 with a request from the Federal Assembly to "update" the 1874 text. This implied that the Constitution did not require fundamental changes but rather that the written and unwritten constitutional law, having lost its coherence after 155 partial revisions, should be presented in an understandable form by systematically restructuring the earlier Constitution and by harmonizing the style of its language. It was thus decided that the new constitution should be adopted for the year 2000.

The proposals of the Federal Council were subject to a consultation procedure in 1995 and 1996. Different versions of contentious proposals were presented for consultation in order to weed out the most contentious issues and thereby avoid the risk of the proposed new constitution being rejected by the population. The definitive text was not developed by a constituent assembly but by Parliament during the course of 1998. The new constitution was accepted by a popular vote of 59.2 percent and by majorities of voters in 13 cantons on 18 April 1999.<sup>xiv</sup> The new constitution entered into force on 1 January 2000.

The scope of the resulting text exceeded what had originally been planned. Updating the Constitution was not limited to a simple "facelift." New clauses were introduced, many reflecting existing practices that had never been set out in the Constitution. A number of these new clauses relate to federalism. In fact, during the 1990s, the cantons began to assert their rights more strongly, notably by founding the Conference of Cantonal Governments (CdC) in a convention of 8 December 1993. The CdC strove for better recognition of the cantons in the 1999 Constitution because many cantonal leaders felt that the cantons had transferred too many of their powers to the Confederation over the decades. They wanted to remind the Confederation that the cantons have, and should have, powers and identities of their own. The CdC's efforts were rewarded by the adoption of Articles 42-48 as well as of

Articles 55 and 56 of Title 3, “Confederation, cantons and municipalities.” These clauses clarify, secure, and in some ways, enhance cantonal autonomy and participation in the Confederation’s decision-making processes.

Nevertheless, several fundamental reforms did not find their way into the 1999 Constitution; instead, they were left for discussion at later dates. For example, a concept for reform of the justice system has been accepted but has yet to enter into force via implementing legislation. With regard to democracy, an ambitious project affecting democratic rights was toned down by Parliament before being accepted by popular vote on 9 January 2003. Its key innovation was to establish a “general initiative.”<sup>xv</sup> Reforms of federalism and governance are still in preparation. So far Swiss involvement in the European integration process has been confined mainly to the conclusion of bilateral agreements with the European Union (EU), some of which, in effect, partially integrate Switzerland with the EU.

## CONSTITUTIONAL PRINCIPLES OF THE CONFEDERATION

### *Status of the Cantons*

Elmer de Vattel was the first to call for the equality of states regardless of their size. Conforming to this principle, the Swiss cantons are member states with their own powers and the largest possible degree of autonomy -- in terms of their organization, funding, and definition of their tasks -- allowable within the limits of the constitutional and legal federal constraints imposed upon them (Art. 43). Despite the use of the term “sovereign” in Article 3, the cantons are not states in the sense of international law because they do not have “jurisdiction concerning jurisdiction” (*Kompetenz-Kompetenz*).

The 26 cantons listed in Article 1 are all constitutionally equal, including the six cantons with one representative rather than two representatives in the Council of States (Art. 150, Para. 2) and whose votes count as a half-vote for decisions on constitutional change (Art. 142). But this equality de jure hides significant de facto differences, leading to a certain imbalance in how public policies are implemented by the cantons. For example, the population of the Canton of Zurich is almost 100 times that of the Canton of Appenzell-OuterRhoden, which has led some experts to recommend a weighting of the cantons in terms of both popular votes and representation in the Council of States, as is the case in the German *Bundesrat*.

The Constitution contains two guarantees for the integrity of the cantons. The first is Article 1, which lists the cantons; the second is Article 53, according to which the Confederation is obliged to protect their existence, status, and territories. Some cantonal constitutions mention that the canton’s territory is guaranteed by the Confederation.<sup>xvi</sup>

According to Article 51, each canton shall have a democratic constitution, which must be approved by the population and can be revised on the request of the majority of the electorate. The democratic principle implies, as a minimum, a constitutional initiative, a mandatory constitutional referendum, and a parliamentary democracy for each canton. However, the doctrine is also largely held to imply the separation of powers. The cantonal constitutions and their partial revisions must be guaranteed by the Confederation, which is the case when they do not contravene federal law. There are few institutions that cantons are not allowed to set up. Cantonal constitutions appear very similar on the surface, but each canton includes its own specifics, often hidden in the details. Several cantons have recently adopted new constitutions in order to improve their governance structures and to strengthen their cantonal parliaments. These cantonal constitutions, however, are not equal to the Federal Constitution due to the primacy of federal law (Art. 49).

Judicial interpretation of cantonal constitutions as the final word on their meaning is not really an issue in Switzerland because the Swiss do not have such a judicial-review

tradition in either the federal or the cantonal arenas. It would be unthinkable, as well, to introduce a clause granting such a right to the cantonal parliaments, for example. Insofar as the Swiss Constitution reflects and incorporates the will of the sovereign people, only they can interpret it. Some cantons (e.g., Jura, Nidwalden, and Graubünden) have nevertheless set up constitutional courts. Yet the Federal Constitution obliges all authorities in charge of applying a law to make a so-called pre-judicial determination of the law's compatibility with any superior laws and the Constitution. In addition, authorities are barred from applying cantonal laws that contravene the allocation of powers between the Confederation and the cantons. This obligation follows from the primacy of federal constitutional law, and it is known as the pre-judicial control of norms or standards.

### *Allocation of Powers*

Article 3 of the Swiss Constitution has remained unchanged since 1848. This article provides that the cantons are sovereign insofar as their sovereignty is not constrained by the Constitution. This means that the cantons exercise the Confederation's residual powers -- that is, all powers that have not been transferred to the Confederation through the original Constitution or through a constitutional change accepted by a majority of the population and of the cantons (Art. 42, Para. 1). Furthermore, the Confederation exercises only those powers that are said to require uniform enforcement, as stipulated by Article 42 (Para. 2); however, although not stated explicitly, this clause is supposed to incorporate the principle of subsidiarity.<sup>xvii</sup>

Hence an important function of the Constitution is to catalogue federal powers. Conversely, it has been deemed appropriate to state explicitly that some powers fall to the cantons, which also means that they have the obligation to exercise them (e.g., Art. 78, Para. 1, on the protection of nature and natural resources within cantons; Art. 69, Para. 1, on culture; Art. 62, Para. 1, on education; and Art. 70, Para. 2, on the national languages).

The clarity of Article 3 may seem to imply, typologically speaking, that the allocation of powers is clear-cut. Yet the Constitution does not contain any official typology. That is, while the Constitution does have a list of powers, it does not clearly say which government shall exercise which powers. There are no clearly exclusive or shared powers. Clarification has been established instead through jurisprudence and doctrine, which characterize powers according to their *scope* and to their *effects*.

In terms of their *scope*, some federal powers are *global* (such as the protection of the environment, Art. 74); some are *restricted to principle* (e.g., land-use planning, Art. 75, and fiscal harmonization, Art. 129); others are *fragmentary*, such that only part of a power (e.g., health protection, Art. 118) has been delegated to the Confederation; and still others are merely *incentivizing*, such that the Confederation can provide incentives (e.g., financial) for cantonal action on certain matters (e.g., promoting understanding between linguistic communities, Art. 70, Para. 3, and protecting cultural heritages of national importance, Art. 78, Para. 3).

In terms of *effects*, some powers are (1) *exclusive* to the Confederation (e.g., customs, Art. 133, and money and currency, Art. 99); (2) *concurrent*, whereby the cantons have jurisdiction as long as the Confederation has not exercised its authority (e.g., maternity insurance, Art. 116, Para. 3); (3) *limited*, such that the federal legislator must limit itself to setting out principles (e.g., land-use planning, Art. 75); and (4) *parallel*, such that the exercise of a federal power does not affect the cantonal equivalent (e.g., languages, Art. 70, and income tax, Arts 128 and 129).

Over time, a number of jurisdictions (e.g., agriculture, energy, and transportation) have been transferred to the Confederation. Also, that cantons in principle enforce legislation adopted by the federal government (*fédéralisme d'exécution* or *Vollzugsföderalismus*) has

often led the Confederation to legislate so thoroughly that the cantons are rendered mere executive bodies. This is seen, for example, in relation to general environmental protection, such as combating air pollution -- an area in which the federal legislator leaves very little room for independent cantonal action. This trend could increase if Switzerland becomes a member of the European Union.

It is therefore not surprising that the most important political project under way in Switzerland is a new allocation of tasks and a reorganization of financial equalization (RPT), which has been studied for many years and is still unfinished. Along the way, Parliament has rescinded several parts of the reform for fear of provoking a backlash and possible rejection by a popular vote. One matter on which Parliament has exercised caution is possible transfers of financial burdens from the Confederation to the cantons and their taxpayers.

The aim of the RPT is twofold. First, it is designed to unbundle the financial burdens and tasks of the Confederation and the cantons. Under the current draft, the Confederation would have exclusive responsibility for six areas (e.g., national defence, national roads, agriculture, and old-age insurance), while the cantons would have exclusive responsibility for thirteen areas (e.g., special schools, student grants, school sports, noise control, traffic, and nursing homes). Collaboration between the Confederation and the cantons would be improved in twelve areas called joint tasks (e.g., hunting and fishing, flood protection, protection of nature, airports, and supplementary old-age pensions), and intercantonal cooperation would be strengthened in relation to nine joint cantonal tasks (e.g., jail sentences, universities, cultural institutions, waste treatment, urban public transportation, and services for the handicapped). Some proposals, however, remain controversial, in particular the "cantonalization" of residential homes and workshops for the disabled and the elderly, which would make the cantons responsible for these matters.

Second, the RPT aims to harmonize cantonal financial capacity. Whereas currently half of fiscal equalization occurs through subsidies, the reform provides that the financial capacities of the cantons would be equalized using three separate and independent financial-assistance instruments. The first would be an equalization of resources based on the fact that the cantons are ranked according to their income per-capita and categorized as cantons with either strong or weak resource potential -- in other words, as "rich" or "poor" cantons. The poor cantons would receive assistance from the rich cantons and the Confederation, the ideal effect being a growth in their capacity to provide public services close to the national norm as well as lower tax rates if appropriate. The second instrument would be a sharing of burdens with the aim of compensating cantons for expenditures linked to factors either geotopographical (e.g., mountain regions) or socio-democratic (e.g., major cities) over which the cantons have no control. Third, temporary adjustment assistance would serve to smooth the transition to the new system. But this is for the future.

Currently, one area that is difficult to ignore is security. The allocation of powers here is complex. The application of federal law and the enforcement of law and order are primarily organized and implemented by the cantons. Because this often carries a heavy financial burden, particularly for the smallest cantons, all cantons have signed mutual cooperation conventions, known as "concordats." The federal police force, which has long played an essentially administrative role, now has certain penal jurisdiction. In the event of an upheaval or a serious threat to public order, the army may be deployed (Art. 52, Para. 2).

From a judicial perspective, there have been no legal differences between Swiss citizens in terms of their origin (Art. 24) since 1798 despite the jurisdictional differences between the cantons and the fact that there are intercantonal disparities in terms of the laws applied to Swiss nationals and foreigners. The 1848 Constitution had provided for the mutual recognition of judgments, a procedure that became obsolete in 1912 with the new standardized Swiss Civil Code of Obligations. It is also due to the Swiss Penal Code, rather

than to the Constitution, that offenders are no longer “extradited” from one canton to another. Jurisdictional issues are also dealt with through statutory law.

### *Conflicts of Jurisdiction*

The Constitution explicitly recognizes in Article 189 (Para. 1d) the possibility of jurisdictional conflicts between the federal and cantonal authorities. The Federal Tribunal (supreme court) is responsible for resolving such cases. Its rule of conflict resolution was developed from doctrine and jurisprudence, which traditionally referred to the principle of the superior authority of federal law, now enshrined in Article 49 (Para. 1). Federal law takes precedence over cantonal law, where the latter contravenes the former. This principle implies that the cantons do not have the right to enact a law that is contrary to federal law. If a cantonal law already in force contravenes federal law, the cantonal authorities must refuse to enforce it; such a law is null and void for want of cantonal jurisdiction.

Although there are elements of competition, confederal life in Switzerland is underpinned by the idea that the cantons and the Confederation should not view each other as rivals but as partners working toward common goals. Conflicts are to be resolved through negotiation and searches for compromise, as stated in Article 44 (Para. 3). This clause is not a procedural norm but an exhortation; once opposing sides have formed, it may be too late to mediate.<sup>xviii</sup>

In concrete terms, mechanisms exist to prevent conflict. Thus the adoption of every federal law is preceded by a consultation procedure required by the Constitution and thus by intense political dialogue (Art. 147). Also, due to the small size of the country, persons in important positions often know each other, allowing them to iron out problems through informal talks. The intercantonal conferences, which bring together members of cantonal governments with responsibility for particular areas (e.g., education, health, or justice and the police), provide a platform for dialogue between all the parties concerned. These conferences can include the relevant federal councillors in their meetings, and there is always room on their agendas for discussing contentious issues.

## THE STRUCTURE AND FUNCTIONING OF THE INSTITUTIONS

### *The System in General*

The Swiss federal government consists of an assembly flanked by a collegial government.<sup>xix</sup> The legislature (Federal Assembly) is bicameral, with a National Council made up of 200 popularly elected representatives and a Council of States comprising 46 likewise elected cantonal representatives. The executive is the seven-member Federal Council, which, unlike in a parliamentary system, cannot be dissolved by the Federal Assembly. In turn, the Federal Council does not have the power to dissolve the Assembly. Each member of the Federal Council is elected individually by the Federal Assembly (Art. 175).

The election of the Federal Council by the people -- a possibility being discussed -- would necessitate several procedural guarantees to ensure the representation of minorities. Legally, it could prove incompatible with the ultimate supervision that Parliament imposes on the executive (Art. 169) because direct election of the Federal Council could potentially weaken Parliament. The existence of collegial governments in Switzerland, in both the federal and cantonal arenas, reflects a cultural disposition toward and the political necessity of reaching a broad consensus between all constituent parts of the country via the distribution of power.

The separation of powers is a fundamental principle because it is at the heart of republicanism. However, it is more implicit in the federal government than in the cantons, so much so that reality does not always correspond to the strict doctrine. Title 5 (Ch. 2, Sec. 3)



of the Constitution provides for an allocation of powers within the Confederation government. This should not be confused with the allocation of powers between the Confederation and the cantons. The relevant clauses show that the powers of the Federal Assembly and the Federal Council often overlap, as indicated in Table 1.

In these cases, the two institutions must exercise their powers jointly, regardless of certain functional differences. For example, although Parliament adopts laws, legislation is drafted mostly by the government. Increasingly, the Assembly has shown a tendency to ask for the executive's draft implementation regulations before adopting new laws. That is, the Assembly wants examples of regulations the executive would issue to implement a proposed law. In foreign affairs, as well, the Constitution allocates powers between Parliament and the government not according to binding rules but in terms of practicality and, particularly, of democratic legitimacy. As this model encourages cooperation, conflicts between the two powers are rare. The concept of "high supervision" of the executive by the Federal Assembly has an important role to play but requires time and energy.

### *The Federal Assembly*

Parliament, being the supreme authority of the Confederation (Art. 148), rules in the case of conflict between the Federal Council and the Federal Tribunal (Art. 173, Para. 1).

In the bicameral Parliament, the 200 deputies in the National Council are elected according to a standardized procedure, with each canton representing an electoral district. The largest cantons have many deputies (e.g., Zurich with 34 and Bern with 26), whereas the smallest cantons (i.e., Apenzell, Glarus, Obwalden, Nidwalden, and Uri) have only one deputy. Because the majority of the cantons have few deputies, changing the cantonal delegation in Berne would require a major political upheaval; thus the National Council's composition can be said to account for the stability of the Swiss Parliament. Over time, there have been changes to how the 46 deputies to the Council of States are elected, as this responsibility has gradually been taken from the cantonal legislatures and given to the people. Nowadays, they are elected by universal suffrage in each canton according to the procedure it has chosen (Art. 159, Para. 3). However, the deputies vote without instructions (Art. 161, Para. 1). The popular election of members of the Council of States implies that they are not cantonal representatives; rather, the Council is merely another forum representing the people and thus functions primarily as a means of ensuring checks and balances. The resulting need for greater cantonal representation was one of the reasons for the creation of the CdC in 1993.

The five most populous cantons theoretically have a blocking majority in the National Council. But the two chambers have exactly the same powers, unlike the chambers of the US Senate or the German *Bundesrat* (Art. 156, Para. 2). The supposed existence of a special relationship between the cantons and the Council of States has aided the cantons fight to maintain a degree of "committed" federalism in which the cantons have a voice and power. However, this effect is decreasing, and even though the links between federal members of Parliament and the cantonal governments remain close, almost all cantons prohibit members of their governments to sit in the Federal Assembly.

### *The Federal Council*

The Constitution sets out the legal basis for the federal administration (Arts 178 and 179) and the Federal Council (i.e., cabinet or government), which comprise the supreme executive authority of the Confederation (Art. 174). The Federal Council's powers are listed in Articles 180 to 187. The cantons are not directly represented in the Federal Council despite the clause providing that the Council represent the geographical and linguistic diversity of the country (Art. 175, Para. 4). The Federal Council is a coalition government of four main national

political parties. This is not stipulated by the Constitution but is the product of an unwritten agreement between the largest political parties, itself a result of the specific relations between the Federal Assembly, the Federal Council, and the people in a direct democracy. After 1848 the Free Democratic Party of Switzerland (PRD; liberal right) monopolized the government for 43 years. In 1891 the Federal Assembly elected a Catholic conservative to the Council for the first time, making way for what is now the Christian-Democratic Party (PDC). This was the first step toward the current system of coalition government. The PDC obtained its second seat in 1919. In 1929 the Federal Council saw the election of a member of the Agrarian Party, now the Swiss People's Party (UDC). The first appearance of the Socialist Party (PS) in government dates back to the Second World War, a period that was very favourable to the unions. This development culminated in the partial election of Thursday 17 December 1959 to appoint four new federal councillors. The Federal Assembly opted for a political composition that has become known as the "magic formula": two PRD members, two PDC, two PS, and one UDC. The relative stability of this political equilibrium meant that the "magic formula" remained intact until 2003, when it was called into question as a result of the polarization of Swiss politics: a rise in support for the UDC and the PS, and a loss of public support for the centre parties (PRD, PDC, and Liberal).

The federal elections of October 2003 confirmed a shift to the right. This was clearly in evidence during the reelection of the Federal Council on 10 December, when one of the two PDC representatives was replaced by a UDC candidate to reflect this party's share of the electoral vote. Opinion remains divided as to whether this is the death knoll for the "magic formula" or simply a temporary change to an otherwise stable system.

The stability of the government is due, in part, to the constitutional mechanisms by which it is guaranteed, particularly to the fact that its members are elected for four years (Art. 175, Para. 3), that they cannot be voted out of office during this time, and that they remain in office for an average of ten years. Its collegial nature allows minorities to be represented in the highest bodies of the Swiss polity. Yet this balancing of members of the Federal Council is less a constitutional obligation than a tradition (except for Art. 175, Para. 4), and candidates applying for a vacancy must satisfy several criteria relative to the seat to be filled (e.g., political party, canton, language, and gender).

The Federal Council functions according to the collegiality principle. Once a decision has been adopted, it is backed by the entire Cabinet even if some of its members do not agree on political or personal grounds. Cases of a "break-up of the collegiate" are very rare.

The collegial authority, the Federal Council, is polymorphous, combining the government of the country with the implementation of its policies; it is the head of state, prime minister, and government rolled into one. Each federal councillor is the head of a department, or ministry. This means a heavy workload for the seven members. Certain reform proposals envision a "two-tier" government, with the Federal Council supported by "deputy ministers." Other proposed reforms provide for an increase in the number of federal councillors.

### *The Federal Supreme Court and the Judicial System*

The highest court is the Federal Tribunal, or supreme court, governed by Articles 188 to 191. Its members are elected by the Federal Assembly, the procedures for which are set down in legislation. Article 188 (Para. 4) states that the official languages must be represented in the Tribunal. Because the Tribunal is made up of 39 judges from 26 cantons, it is clear that a fair representation of the different linguistic regions can be easily guaranteed. The supreme court's seat is in Lausanne, partly to symbolize its independence from Parliament and the government. The Federal Insurance Court has its seat in Lucerne. This court hears public-law cases involving social insurance (e.g., accident, disability, and old-age).

Article 189 of the Constitution catalogues the powers of the Federal Tribunal. Its decisions are final in Switzerland, although they may be subject to individual appeals to the European Court of Human Rights in Strasbourg for violations of rights upheld by the European Convention of Human Rights.

The most significant characteristic of the organization of the Swiss judicial system is that, with the exception of the Tribunal and a few federal appeals commissions, almost all judicial authority is a product of cantonal law. This very marked judicial federalism explains why there are 29 codes of criminal procedure in Switzerland.

In this context, the Federal Tribunal has a double role. First, it is the guardian of federal law. It enforces federal law and sees to its uniform application. The paths of appeal enable it to fulfil this function according to the areas of law: appeal, petition for annulment, or appeal of administrative law. Second, the Federal Tribunal is the guardian of the federal and cantonal constitutions. Legally, it exercises this role through public-law appeals filed against cantonal acts, be they cantonal laws or administrative decisions.

One feature of the system is that constitutional jurisdiction is not comprehensive because neither the Tribunal nor any other authority can review the constitutionality of federal laws and international treaties ratified by Switzerland (Art. 191). With regard to federal laws, this specificity has its origins in the fact that the authors of the 1874 Constitution gave precedence to the separation of powers and direct democracy over jurisdictional control. That is, neither the Tribunal nor any other authority can review the constitutionality of federal law. With regard to international law, this principle serves to ensure the international credibility of Switzerland. However, this principle is somewhat softened by the fact that federal law can be partially superseded by a restrictive interpretation of Article 191 either by the federal supreme court<sup>xx</sup> or by the electorate.<sup>xxi</sup> In concrete terms, the length of the legislative process and the consultative procedure makes it unlikely that laws with an element of nonconstitutionality will go undetected.

Less than three months after it entered into force, the new Constitution was subject to a reform of the justice system, accepted by popular vote on 12 March 2000. The aim is to alleviate the burden on the Federal Tribunal and, at the same time, to improve the legal protection of private individuals. It should relieve the Federal Council of its jurisdictional powers and enable the unification of civil and criminal procedures. This reform has not entered completely into force, as a number of relevant laws have yet to be adopted. A proposal for the total revision of the federal judiciary, however, provides for further decentralization. An administrative court of first instance, located in St Gallen, is to replace some 30 appeals commissions. In addition, a federal criminal court of first instance will be established in Bellinzona (Ticino).

### *Cantonal Institutions*

The cantons do not have a federal structure, and their parliaments are unicameral. The ancestral *Landsgemeinden* (people's assemblies that bring the citizens of a canton together in a public square once a year) have almost disappeared. For some observers, the *Landsgemeinden* "rather than a bill of rights or a declaration of freedoms" has been the "symbol of Swiss freedom."<sup>xxii</sup> The pressures of modern life and economics, as well as a reluctance of citizens defending minority positions to express themselves, have combined to erode this institution. A few years ago, Switzerland had five *Landsgemeinden*; now only two remain: in Glarus and Appenzell-OuterRhoden. They are, in some sense, only a visible expression of universal suffrage because even each of these cantons has a parliament.

The cantonal institutions are very similar to their federal counterparts, the principal difference being that all cantonal governments (i.e., executive officials) are elected by the people. Although the sizes of their governments and parliaments vary widely, all cantons

have a high degree of proportional representation, just like federal institutions. No political party holds absolute power in any canton, and the collegial cantonal governments provide adequate representation for minorities. Cantonal executive bodies are collegial, like the Federal Council. In Valais, for instance, the cantonal Constitution provides that members of the cantonal government be elected in a manner ensuring that the three regions of the canton are taken into account. The Canton of Berne guarantees one seat in the cantonal government to the French-speaking minority in the three districts of Bernese Jura.

### *Intercantonal Relations*

The mechanisms to prevent conflicts of jurisdiction reflect the complexity of intercantonal diplomacy. From a political point of view, two contradictory elements characterize relations between the cantons: On the one hand, federal and European requirements demand greater cooperation; on the other hand, the cantons wish to preserve their “sovereignty.”

All attempts at procedural centralization remain contentious, as they are considered a threat to federalism, particularly because the last century saw numerous cantonal powers pass to the Confederation. Given that changes are inevitable, notably due to economic globalization and people’s increased mobility, there is a growing need for intercantonal harmonization. This falls primarily to the cantons themselves but also, to some extent, to the Confederation. For example, legal conflicts between the cantons are resolved by the Federal Tribunal, although such conflicts are rare.

The cantons increasingly conclude concordats on matters necessitating interdependence and institutionalize their cooperation, often with the help of the Confederation. The Constitution is accommodating in this area, particularly through Article 48, which authorizes largely intercantonal treaties, to such an extent that the project to reorganize financial equalization (RPT) envisages the possibility of granting these treaties general binding force in certain circumstances. An interesting example, due to its importance and complexity, concerns university policy. A “triangular” structure has been adopted. The aim was to give the Confederation, the university cantons, and the universities a joint body vested with real decision-making powers in this area of shared responsibility. The new federal law on assisting universities has therefore delegated powers to the Swiss Universities’ Conference. The university cantons had to conclude a concordat containing a parallel delegation rule, and an administrative convention organizes the joint body and governs the details of its activities.

The Confederation is also concerned with harmonization, notably through the creation of a unified Swiss economic area (Art. 95, Para. 2). This aspiration dates back to 1848, but until now its achievement has been limited de facto, in certain sectors, by the immobility of the workforce. In the current era of globalization, the European Union has helped to speed up this process by introducing greater freedom of movement of persons, goods, and services. This poses a challenge for Swiss federalism because it entails, among other things, the mutual recognition of titles and certificates.

### *The Municipalities*

Switzerland is a three-tier federation: confederation, cantons, and municipalities. The latter are the “basic units” of society, and their importance is evident notably in the fact that anyone who has municipal citizenship necessarily has Swiss citizenship (Art. 37, Para. 1) because to obtain citizenship in Switzerland, one must first obtain citizenship in a Swiss municipality. (There is no dual cantonal and Swiss citizenship.) In this regard, a recent controversy has been the naturalization process. Some municipalities employ procedures involving a secret ballot; this has often led to people from some Eastern European countries being refused Swiss citizenship. Subject to an appeal against a municipality in the Canton of Lucerne, the Federal

Tribunal ruled on 9 July 2003 that such a procedure is no longer acceptable.<sup>xxiii</sup> This judgment was criticized by some politicians and experts who are opposed to preventing the population from exercising its democratic right.

The Constitution has never contained many clauses pertaining to municipalities. They are mentioned four times in the 1874 Constitution and five times in that of 1999. This is because most authors of the Constitution judged that, as the status of the municipalities falls under cantonal law, cantons should remain the main interlocutors. Until 1999 municipal autonomy was not guaranteed by the Constitution but through the jurisprudence of the Federal Tribunal. A section of the Constitution now deals with municipalities, although it consists of only one article (Art. 50), of which the first paragraph states that municipal autonomy is guaranteed within the limits fixed by cantonal law. This implies that the status of the municipalities varies from canton to canton. Furthermore, the Confederation must take into account the consequences of its activities on the municipalities as well as on towns, agglomerations, and mountain regions (Art. 50, Para. 3).

### POPULAR SOVEREIGNTY AND DIRECT DEMOCRACY

Like its predecessors, the 1999 Constitution attaches great importance to the political rights of the population, notably when it declares that their protection is one of the aims of the Confederation (Art. 2). In Title 4 the Constitution defines the composition of the federal electorate and lists its prerogatives, namely the rights to participate in the elections for the National Council and in votes on federal questions (e.g., national referenda), to launch and to sign popular initiatives, and to call for a referendum. These rights are then specified in detail. The Constitution thus respects popular sovereignty. However, this does not mean that the population can decide on everything. In fact, what best characterizes popular sovereignty in its truest sense is the autonomy granted to the people because, according to the framework in which sovereignty is proposed by the Constitution, the people can express their opinion independently of any other state body.

#### *Brief Historical Background*

During the 1830s many cantons adopted liberal constitutions that expressed the principle of pure representation. That is, the people could only influence affairs of state during periodic legislative elections and through rights of petition, which still had a certain importance. In cantons where the Liberals held the majority in Parliament, there was intense legislative activity aimed at reforming the state according to the rationalist principles of natural law. However, these reforms were often imposed somewhat dogmatically, with little consideration for the opposing views of Catholics, Protestant conservatives, small tradesmen, and farmers. These conservative circles felt that the Liberals were moving too quickly and soon realized that periodic elections were not sufficient to afford them a lasting influence on government policy in the spirit of Rousseau's "general will."

Certain theorists contended that the representative system favoured by the Liberals contradicted the principle of popular sovereignty anchored in the Constitution. They also argued that this system enabled a new aristocracy to appear, albeit a slightly improved version of its predecessor. Hence a section of the population, having come to see the representative system as a substitute for ancient oligarchies, rejected it. Furthermore, the majority of the Liberal constitutions contained clauses that forbade revisions for a long period of time, to the extent that the path to constitutional change was too long for the coordination of the will of the people with government policy. There were riots, some motivated by revolutionary aims.

Some cantons tried to find a more civilized approach -- for example, through the introduction of a veto that allowed citizens to block laws they opposed. Until the 1860s, the

representative principle largely dominated. Only when the Democrats finally succeeded in denouncing the parliamentary sovereignty of the Liberals could the position of the population in the legislative process be strengthened through the introduction of the legislative initiative and referendum.

### *Concepts of Direct Democracy*

Direct democracy denotes a political regime in which the authorities are not only elected by the citizens, but also bound by their decisions. Therefore, in addition to elections (a classic feature of the representative system), there are popular votes in Switzerland that enable the people to express their opinion on specific issues.

Swiss direct democracy, combining elections and popular votes, establishes a dialogue between elected representatives and the people. The electorate must be consulted and can decide conclusively, hence the title “sovereign people.” However, parliaments and governments, federal and cantonal, are involved at the beginning and the end of voting procedures, enacting texts that will be subject to referenda and possibly proposing countermeasures with respect to the tabled initiatives. In all cases, the elected officials implement the decisions of the ballot. This dialogue even exists in the two cantons that have kept the *Landsgemeinde*.

Two institutions allow the population to exercise its direct democratic rights: the popular initiative and the popular referendum. The former is exerted *at the beginning* of a legislative procedure, the latter *at the end*. To a certain degree, this is guaranteed by the Federal Constitution (Arts 138-42). However, it should be noted that cantonal law offers a broader guarantee with respect to cantonal initiatives and referenda.

### *The Popular Initiative*

The popular initiative is the right, attributed to a certain number of citizens, to submit a constitutional proposal (nonconstitutional legislative proposals having been excluded at the federal level until 2003) to the electorate; by extension, the term also denotes the subject of the proposition -- that is, the text to be approved by the voters. The option of calling for a total revision of the Constitution through a popular initiative is a legal right set out in the Federal Constitution (Art. 139 for the Confederation and Art. 51, Para. 1, for the cantons). For federal matters, there was no other type of initiative before the introduction in 2003 of the “general initiative.” This did not stop the cantons from introducing the “legislative initiative,” the “cantonal constitutional initiative,” and others.

The procedural details are complex and varied. An initiative must have a certain number of signatures, gathered by an initiative committee, which is also authorized to withdraw the initiative. This number varies according to cantons not only in absolute terms (1 to 15,000 signatures in various cantons; 100,000 signatures for the Confederation), but also as a percentage of the number of eligible voters (0.007 percent to 4.6 percent). The partial initiative deals with a subject that is defined more or less broadly by the Constitution. It can be “set out in general terms” or “formulated in full” (Art. 139, Para.) -- a procedure not possible for a total revision -- giving rise to two distinct procedures. In all cases, however, its validity is subject to certain formal and material criteria -- notably unity of form and of substance. It is put to a ballot, the practical details of which differ according to whether a countermeasure has been proposed. To be enacted, an initiative on the Constitution needs a majority vote of the people of Switzerland plus a majority of the people’s votes in a majority of the cantons.

### *The Popular Referendum*

The popular referendum is the right of citizens to express their opinion on a law already adopted by an elected body, generally Parliament; a new law cannot be enforced until it has been subject to popular scrutiny. To be successful, a federal referendum must garner a majority of the vote of the people of Switzerland and a majority of the people's votes in a majority of the cantons. The referendum procedure can be triggered automatically (compulsory referendum) or at the request of a certain number of citizens (optional referendum). The compulsory referendum exists in all cantons because it is prescribed in Article 51 (Para. 1) of the Constitution. The adoption of a federal constitution or a cantonal constitution, as well as any changes to them, must be approved by the people via a compulsory referendum, regardless of the procedure that has led to constitutional change. Nevertheless, the cantons can widen or narrow the scope of a constitutional referendum by making the content of their constitutions more or less precise. There is no compulsory referendum relating to federal legislation, but it does exist in eight cantons where the citizens, together with the legislative authority they have elected, are thus the ordinary legislator. Increasingly, the compulsory legislative referendum is being replaced by the optional referendum due mainly to the fall in voter turnout. Otherwise, a few cantons provide for a compulsory referendum on matters of public finance (e.g., taxing, spending, or borrowing).

The optional referendum exists for federal legislation but is not required for the cantons. Nonetheless, all cantons have instituted it, thus exceeding federal requirements. Similar to the popular initiative, an optional referendum can be triggered by a fraction of the electorate (50,000 signatures for the Confederation). Having been adopted by Parliament, a law that is subject to an optional referendum is published in the *Official Gazette*, including the expiration date for the submission of a referendum request as well as the length of time that can be taken to collect the signatures (from 30 days to three months). In general, such a law cannot be enforced until it is known whether a request for a referendum has been submitted and, when applicable, until the electorate has spoken. Article 165, however, allows for emergency legislation that changes the nature of a referendum from suspensive to rescinding. Otherwise, unlike the many US states that during the early twentieth century adopted the recall of elected officials, along with Swiss-style initiative and referendum procedures, only a few cantons have adopted the popular recall of elected officials during their tenure in office, and no canton has yet removed an elected official from office via a popular recall vote.

### *Utility and Necessity*

One merit of direct democracy is to confer a share of public responsibility on the population at large. Furthermore, it underpins one of Switzerland's special characteristics: collegial governments. Direct democracy encourages politicians to find solutions that are as acceptable as possible in order to avoid the risks involved in a popular vote, hence the constant search for consensus. Before the introduction of the popular referendum in 1874, the Federal Council was made up of representatives from a single party. Subsequently, it had to integrate representatives from other parties to broaden its basic legitimacy.

Direct democracy is also the driving force of political life. Although initiatives are rarely accepted by voters, their launch, and the discussions to which they give rise, moves debate forward. A telling example was the initiative to abolish the Swiss army in 1989. It was rejected, but its impact caused the government to undertake a sweeping reform of the army in 1995.

Finally, in a country as diverse as Switzerland, the increase in the number of subjects that do not cut along traditional divides often enables classical ethnic and religious divisions

to be blurred rather than exacerbated. Votes are so frequent (almost every three months) and concern so many different subjects (e.g., highway speed limits, new military aircraft, status of imported wine, swamp protection, tax increases or reductions, nuclear-power plants, and life sentences for murdering sex offenders) that the proponents and opponents of various measures often divide along class, gender, age, and other such demographic lines rather than along Catholic versus Protestant lines or French-speaking versus German-speaking lines. Today, classical religious and ethnic divides show up on only a few issues, such as European integration, which is generally supported by the Swiss French and opposed by the Swiss Germans.<sup>xxiv</sup>

Direct democracy, however, also has some disadvantages. The desire to consider all opinions in order to avoid a referendum slows down the legislative process. Furthermore, voter participation rates tend to be low (averaging about 40 percent) due to the frequency of referenda and to the fact that often the subject is not disputed, is of little interest, or is complex. In fact, then, questions are often decided by a minority of the Swiss population, with some very technical proposals testing the limits of direct democracy. Finally, it must be admitted that, practically, only lobbyists, political parties, and large pressure groups have the necessary political instruments to launch (and especially to win) an initiative or referendum; this removes direct democracy slightly from regular citizens.

### PROTECTION OF BASIC RIGHTS

Basic rights, such as those enshrined in substantive law, are found in the Federal Constitution, in the cantonal constitutions, in the European Convention on Human Rights, and in United Nations' protocols as well as in a series of specific international conventions and in constitutional jurisprudence defining their scope and limits.

The protection of individual rights is based on the US model. However, before 1999 the situation had been less clear-cut because several rights were enshrined and developed only by the Federal Tribunal, often on the basis of Article 4a of the 1874 Constitution, which provided for the equality of citizens before the law. Nowadays, the new Constitution contains a detailed Bill of Rights (Arts 7-34). But it does not contain any typology of these rights, just as there is no typology for the allocation of powers; this was left up to development through legislative and judicial doctrines.

The list begins with the principle of human dignity, which is the cornerstone of the whole system. It then distinguishes freedoms, the rule of law, social rights, and political rights.

The list of *freedoms* includes freedom of religion and conscience, opinion and information, the press and media, languages, science, art, assembly, association, and residence as well as economic freedom and freedom to unionize. In principle, the protection of these rights is not absolute, although government limitations of these rights are subject to the strict conditions provided for in Article 36.<sup>xxv</sup>

Among the *guarantees of the rule of law*, there are the rights, among others, to equality before the law, to protection against arbitrariness, and to procedural guarantees as well as the right to petition government officials.

*Social rights*, such as those stipulated in Article 12 (right to aid in distress) and Article 19 (right to a basic education), must be clearly distinguished from the social objectives set out in Article 41, which has its own specific chapter. This chapter provides, for example, that all persons be covered by social security and guaranteed basic health care. Yet the fourth paragraph limits the scope by specifying that these social objectives cannot be interpreted as conferring any special rights to state services.

Article 34 does not directly grant *political rights*, such as the right to vote, because they are governed by cantonal constitutional law and by Article 136 of the Federal



Constitution. Nevertheless, Article 34 provides for the free and regular exercise of political rights, where they exist.

In accordance with Article 35, basic rights must be implemented throughout the entire legal system. Doctrine accepts, however, that they do not have a horizontal effect; that is, they cannot be invoked directly by private persons, with the exception of Article 8 (Para. 3, Phrase 3) relative to the right to equal pay for men and women. The basic rights do not per se protect individuals against rights infringements by other individuals.

The application of these rights is carried out by the appropriate procedural instruments established by both the cantonal and the federal governments (Art. 35).

The Constitution ensures only a few substantive rights (e.g., Art. 19, on the right to a basic education, and Art. 28, Para. 3, on the right to strike) that can be invoked in court. There is no tradition of collective rights in Switzerland. This was reflected in the difficulty of including the right to strike in the 1999 Constitution.

The constitutions of the cantons also contain bills of rights, but the cantonal guarantees of basic rights do not have their own legal significance relative to the corresponding federal guarantees. Cantonal rights have a basically educational function; in the past, they often inspired extensions of federal basic rights. Traditionally, any new features of federal constitutional law had first been introduced and “tested” in one or more cantons. This was true not only for basic rights, but also for political rights, direct democracy, organization of the government and Parliament, and administrative jurisdiction. As such, the cantons have been what US Supreme Court Justice Louis Brandeis called “laboratories of democracy.”<sup>xxvi</sup>

That cantonal guarantees can surpass the protection of rights set down in the Federal Constitution is uncontroversial. Some cantons, for instance, have added the right to information, a requirement that government publish all administrative acts, or protection against laws applied retroactively. In Bern constitutional rights are declared to be inviolable, something that is specific to this canton. In addition, the rights recognized by the European Convention on Human Rights, ratified by Switzerland on 28 November 1974, are regarded in Swiss law as constitutional rights in the sense of Article 189 (Para. 1a). This was quickly accepted by the Federal Tribunal for procedural reasons. Finally, the International Protocol on Civil and Political Rights of 16 December 1966 entered into force in Switzerland on 18 September 1992.

## TAXES AND FINANCES

### *Taxation*

Fiscal authority is divided between the Confederation, the cantons, and the municipalities. Each order of government has direct access to several sources of revenue (vertical coordination). The allocation of fiscal powers and tax revenues between cantonal and municipal jurisdictions, when the tax base covers several cantons or several municipalities (horizontal coordination), is carried out on request by the Federal Tribunal.<sup>xxvii</sup> The only clause in the Constitution that deals with horizontal coordination is that which prohibits intercantonal double taxation (Art. 127, Para. 3).

In principle, direct taxes are the reserve of the cantons, while indirect taxes belong to the Confederation. The latter, however, can levy direct taxes on the incomes of individuals, on net profits, and on the capital and reserves of corporations for a limited, but regularly extended, period of time. The current direct federal tax (IFD) will be in effect until the end of 2006, as per Article 196, Ch. 13. The maximum rates are fixed by the Constitution (Art. 128). Taxation and tax collection are carried out by the cantons, which can retain three-tenths of the gross IFD revenue. The Confederation can define the principles of cantonal direct-tax harmonization. It has no say, however, on tax scales, tax rates, and exemptions

(Art. 129). Tax harmonization is therefore only a concept in the Federal Constitution, which has subsequently been implemented by federal and cantonal law.

Indirect taxes (Arts 130-33) are exclusively the responsibility of the Confederation. It can levy a value-added tax (VAT), special consumption taxes, stamp duties, and a withholding tax on income from financial assets, on lottery winnings, and on insurance payments. Customs duties are also an exclusive federal responsibility.

The fiscal sovereignty of the cantons is limited only by the jurisprudence of the Federal Tribunal and the few constitutional norms mentioned above. Nevertheless, considerable efforts are being made by all governments to promote harmonization. The undertaking is very delicate. A series of such fiscal measures, adopted by the Federal Assembly in June 2003, produced the first-ever national referendum launched by 11 cantons (although only 8 are needed to launch such a referendum), in which the federal fiscal package was rejected by 60 percent of the voters and all 26 cantons in May 2004.

### *Borrowing*

The Constitution does not contain any clause on government borrowing. However, both the federal government and the cantonal governments are permitted to borrow, although not from the Central Bank, which is prohibited from extending credit to federal or cantonal governments in accordance with the federal law on the Swiss National Bank. Currently, the Constitution does not force the federal government to present a balanced budget every year. However, Article 126 provides that the Confederation must balance its expenditure and receipts in the medium term.<sup>xxviii</sup> The Federal Constitution does not impose a limit (borrowing limit or budgetary balance) on the cantonal authorities. Nevertheless, some cantons (particularly Berne, Fribourg, and Vaud) have constitutional requirements demanding that the operating budget be balanced, while capital-investment expenditures may be financed through borrowing.

### *Distribution of Revenue and Expenditure*

In 2001 (latest statistics available), the income and wealth taxes levied by the cantons and municipalities generated US\$40.4 billion. The direct federal tax produced US\$9.8 billion, of which US\$2.9 billion was redistributed to the cantons. Revenue from the IFD, special consumption taxes, and the withholding tax is partially shared among the cantons to guarantee them a source of additional income. For most taxes, sharing is done as a function of the financial strength of the cantons because the Confederation supports financial equalization (Art. 135, Para. 1).

The cantons can also count on two-thirds of Swiss National Bank profits (Art. 99, Para. 4), divided up according to the population and financial strength of each canton. The recent sale of part of the National Bank's gold reserves has generated substantial returns, the distribution of which is a source of fierce debate.

With the exception of the curb on debts provided for in Article 126 and in Article 130 (Para. 2), which stipulates that 5 percent of the VAT revenue be used in favour of lower-income groups, the Constitution sets only a few limits on the freedom of federal, cantonal, and local authorities to spend their revenues.

## FOREIGN AFFAIRS AND DEFENCE

### *Foreign Affairs*

In regard to foreign affairs, the 1999 Constitution is more explicit than its predecessor. Article 54 (Para. 1) clearly states that foreign affairs is the responsibility of the Confederation. Even though this was effectively the case in the nineteenth century, too, the 1874 Constitution did not contain such an unambiguous declaration.

Articles 184 and 185 of the Constitution set out the powers of the Federal Council with respect to both foreign affairs and internal and external security. However, the Constitution does not address the issue of neutrality, a complex concept of international public law and policy, which refers to the nonparticipation of a state in the wars of other states. Neutrality is inextricably linked to the history of the Swiss Confederation and has marked its destiny for centuries. Since the Swiss defeat by the French at Marignano in 1515, the guiding principle of Swiss foreign and security policies has been noninterference in the affairs of others. Neutrality was also a requirement of domestic policy in a confederation of states with different religious beliefs and interests.

Over the centuries, neutrality became an integral part of the legal and political order in Switzerland, and it was recognized in 1815 by the great powers as being “in the true political interests of all of Europe.” Later, thanks in particular to permanent neutrality, Switzerland was able to resist most of the upheavals of the nineteenth century and even the ravages of the two world wars. This is undoubtedly why neutrality is engraved so deeply in the minds of Swiss citizens. Yet it has never been declared a constitutional aim. Since 1977, however, there has been a requirement for a compulsory referendum on international treaties that would provide for Swiss membership in collective security organizations or supranational communities (Art. 140, Para. 1b). In this way, the Constitution indirectly includes the subject of neutrality.<sup>xxix</sup>

The Constitution contains several references to the openness of Switzerland to the world (e.g., Preamble; Art. 2, Para. 4; and Art. 54, Para. 2). Switzerland is a member of the United Nations and its specialist bodies, the Council of Europe, the European Free Trade Association (EFTA), the Organization Internationale de la Francophonie (OIF), and the World Trade Organization (WTO). It is even a partner of the European Union through bilateral agreements, which had been preceded since 1972 by a free-exchange treaty with the then European Economic Community (EEC). The Constitution makes no mention of relations between Switzerland and Europe. These relations are not made any easier by the compulsory referendum on new collective-security and supranational treaties; accession to the European Union would have to be approved by popular vote with a double majority (the population and the cantons), making this a sensitive political issue.

For many years, the cantons have developed a dense network of cross-border relations, and their openness to external relations is recognized by the Constitution. Article 55 deals with their participation in deciding foreign policy, which includes European issues. Article 56 concerns the cantons’ relations with foreign states. From the perspective of federalism, the development of supranational institutions has strengthened the cantons through what one might call a reaction in anticipation, which can be attributed to the CdC. That is, the CdC has sought to bolster cantonal powers against challenges to these powers likely to arise from future treaties and supranational obligations. Given that foreign affairs are by nature the “domain of princes,” they are an ideal ground on which to acquire cantonal powers and, thereby, to reaffirm cantonal sovereignty as expressed in Article 3.

### *Defence*

The 1848 Constitution allowed for the creation of a federal army made up of cantonal troops. The 1874 Constitution unified the army without centralizing it completely. Nowadays, national defence is exclusively under federal jurisdiction, with only a trace of cantonal military sovereignty. The Constitution states that (1) military legislation, (2) organizing, training, and equipping the armed forces, and (3) mobilizing the armed forces are federal responsibilities. Yet Article 60 (Para. 2) alludes to the possible existence of “cantonal troops,” which will soon disappear as a result of the complete reorganization of the Swiss army according to the so-called Army XXI model.

The Swiss army is a useful tool of social integration because it is essentially an army of conscripts; every Swiss man is a citizen-soldier (Art. 58, Para. 1, and Art. 59, Para. 1). The Constitution allows for four categories of professional soldiers, categories that can be extended to include operators of complex and expensive equipment. The Constitution also allows for alternative civilian service for conscientious objectors,<sup>xxx</sup> although it was only in 1992, after the failure of various parliamentary and popular initiatives, that a generally well-received solution could be found for the age-old issue of conscientious objectors. Another recent development in the army's activities, in addition to its traditional task of defending the country, is foreign peacekeeping activities, depending on the political willingness of the federal legislator. In June 1999 the Federal Council decided to assist the UN peacekeeping force in Kosovo by providing an army corps of 220 volunteers, known as SWISSCOY. In June 2001 the Swiss population accepted a change to the Constitution that authorizes the arming of Swiss soldiers during peacekeeping missions abroad.

### CONSTITUTIONAL AMENDMENTS

Constitutional amendments (formally governed by Articles 192-95) represent a classical form of political decision making in Switzerland. In terms both of their political impact and of their underlying procedures, they represent the essence of Swiss federalism.

A partial revision (i.e., a change to only one part of the Constitution) can be proposed by the Federal Assembly (often at the request of the Federal Council, which submits a message to the Assembly) or by the people (Art. 194, Para. 1) through a popular initiative. The text of the Constitution provides for a basic rule that guarantees subsidiarity; that is, any constitutional amendment must obtain a double majority (the population and the cantons; Art. 140, Para. 1a, and Art. 142, Para. 2). Votes that attract only a single majority have been rare (eleven in total), but they are on the increase.

The Constitution does not expressly provide that certain clauses are inviolable. Only the peremptory norms of general international law could be inviolable despite the difficulty in determining the content of the *ius cogens* (see Art. 193, Para. 4, and Art. 194, Para. 2). One might, of course, argue in support of certain fundamental structural principles being peremptory.

There have been numerous partial amendments, and they continue to accumulate. The 1848 Constitution was amended only once, in 1865; that of 1874 was amended 155 times; and since entering into force in 2000, the 1999 Constitution has already been amended six times, and 25 provisions have been altered. Since the first federal referendum in 1866, some 510 questions have been submitted to the electorate, the first half between 1866 and 1970, and the second half from 1970 to today. This means that the average frequency of popular votes has quadrupled in 30 years. However, the rate of acceptance and rejection has not changed over time. More than seven times out of ten, the people have voted in line with the authorities' recommendations.

Some of the authorities' notable referendum successes have concerned important subjects, such as new taxes, creation of the Canton of Jura, and membership in the UN. Yet, as Federal Councillor Arnold Koller declared, "The Swiss do not seem to have an irresistible desire for change,"<sup>xxxii</sup> so much so that the Constitution progresses slowly along the path of modernity, its pace dictated by pragmatism and a deep suspicion of ideologies. Since 1848 the number of cantons that have not accepted the Swiss Constitution has continued to grow; the 1848 Constitution was rejected by eight cantons,<sup>xxxiii</sup> the 1874 Constitution by ten cantons,<sup>xxxiv</sup> and the 1999 Constitution by twelve cantons.<sup>xxxv</sup> This means that 6 cantons out of 26 (Appenzell-Inner Rhoden, Obwalden, Nidwalden, Schwyz, Valais, and Uri) have never accepted any of modern Switzerland's three constitutions.

## CONCLUSION

With its adoption in 1848, the Swiss Constitution transformed a centuries' old confederation into a federal state -- for only the second time in modern history (the first time was in the United States). This was, in some sense, revolutionary because it happened within a European context characterized by numerous outspoken liberal movements, none of which enjoyed comparable success in the nineteenth century.

In time, the revolution settled down, with the Swiss turning toward traditionalism and conservatism. This was confirmed by the difficulty in radically modifying the original 1874 text; the 1999 Constitution is a mere "update" of the 1874 original. Thus the Federal Constitution has successfully integrated the specificities and needs of Swiss citizens thanks to its creation of adept institutions and the flexibility of the revision methods it prescribes. In the absence of a "Swiss nation" in the customary sense, the Constitution created a *willensnation* while insisting on the importance of diversity. In doing so, it made federalism the foundation on which modern Switzerland could develop and prosper. In 1935, against the background of a troubled political situation, 72.7 percent of the electorate rejected the only popular initiative ever submitted on the total revision of the Constitution; this had been launched by ultra-conservative forces taking their lead from the rise in nationalism elsewhere in Europe. Its clear rejection showed to what point the Swiss were committed to the democratic and liberal order established by the 1874 Constitution. However, the 155 partial amendments to the Constitution since 1848 and the changes they implied are a reminder that Swiss federalism is a system in perpetual movement. At the dawn of the twenty-first century, it must rise to new challenges.

This brings us to relations with the European Union. Will the EU continue to agree to negotiate increasingly complex bilateral agreements with such a small country as Switzerland, located in the heart of Europe and rich in federalist experience? This remains a very sensitive issue for the Swiss. Because the country suffered less than others from the ravages of the two world wars, some Swiss citizens do not fully appreciate the significance of building a united Europe, and they believe that a degree of Swiss insularity in the heart of the EU could be an advantage, notably in economic terms. However, it is undeniable that substantial reforms of political institutions would be necessary prior to Swiss membership in the EU. The cantons would see an increase in constraints on their sovereignty, an increase in purely executive tasks, a weakening of parliamentary democracy and thus of direct democracy, and greater restrictions on municipal autonomy. Consequently, enhanced participation in the European integration process would likely strengthen cooperation within the Confederation by obliging the cantons and the Confederation to cooperate more quickly on various matters. The cantons may fear that their sphere of autonomy would shrink to a simple executive federalism. It would be a difficult undertaking to find a counterbalance to these developments.

Finding consensus has become more difficult due to the growing polarization of Swiss politics, which is reflected in the composition of the Federal Assembly. The centre is losing ground to the left and right of the political spectrum. The change in the composition of the Federal Council in December 2003 after 44 years of continuity illustrated this vividly. Swiss politics, once rather subdued, are becoming increasingly like those of its neighbouring European countries.

Hopefully, Switzerland will find solutions in this new century that are as workable as those adopted in the nineteenth century and as instrumental in its success. "The habit of concerning themselves with government has inspired in the Swiss a feeling of public duty and patriotic pride unknown among other people ... This little country holds a great place in the history of political institutions worldwide."<sup>xxxv</sup>

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<sup>i</sup> The author wishes to thank Augustin Macheret, professor of public law, former member of the Government of the Canton of Fribourg, and former president of the Conference of Governments of Western Switzerland (Conférence des Gouvernements de Suisse occidentale), who proved invaluable help in rendering a very complex subject both succinct and more understandable. The author's thanks also go to Professor Bernhard Waldmann, head of the National Centre of the Institute of Federalism, and to Me Adriano Previtali.

<sup>ii</sup> Denis de Rougemont, *La Suisse ou l'histoire d'un peuple heureux* (Lausanne: L'Age d'Homme, 1990), p. 18.

<sup>iii</sup> Romansch is spoken only in the Canton of Graubünden, the only trilingual canton in Switzerland, where it is the official language alongside German and Italian. Romansch is not so much a single language as it is a collection of five dialects. Migration and economic development have increased the number of German speakers in the canton, to the extent that Romansch is gradually disappearing, exacerbated by the fact that it does not benefit from sharing the linguistic culture of a large neighbouring country.

<sup>iv</sup> The recognition of Romansch in 1938 further reflected Switzerland's commitment to diversity in unity. The federal message that proposed this constitutional change inverted Hitler's Aryan rhetoric of "ein Volk, ein Reich, ein Führer," as it aimed to strengthen Swiss national unity not through racial homogeneity and ideological uniformity but through the recognition of diversity. This amendment was approved by a large majority of Swiss voters.

<sup>v</sup> Christian Catholics represent a small minority of Catholics who did not recognize two major doctrines concerning the supremacy of the pope, adopted in 1870 at the Vatican I Ecumenical Council.

<sup>vi</sup> William E. Rappard, *Collective Security in Swiss Experience, 1291-1948* (London: George Allen and Unwin, 1948), p. 4.

<sup>vii</sup> Aargau, Graubünden, St Gallen, Thurgau, Ticino, and Vaud had become part of Switzerland in 1803.

<sup>viii</sup> William Martin, *Switzerland: From Roman Times to the Present* (New York: Praeger, 1971).

<sup>ix</sup> James H. Hutson, *The Sister Republics: Switzerland and the United States from 1776 to the Present* (Washington, DC: Library of Congress, 1991).

<sup>x</sup> See also, for example, the essays on "The Idea of Switzerland" published in *Granta* 35 (Spring 1991).

<sup>xi</sup> See also Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (New York: St Martin's Press, 1994).

<sup>xii</sup> This maxim rests on the principle of good faith in Article 5, Para. 3 of the Federal Constitution.

<sup>xiii</sup> Jura, part of the Canton of Bern, is made up of seven districts. The three southern districts have remained with Berne; the three in the north make up the new canton; and the seventh, Laufen, which is German-speaking and further away, chose to leave the Canton of Berne and to join the nearest canton, Baselland.

<sup>xiv</sup> The refusal of cantons to accept a constitution has never had significant political consequences because the dissenting cantons nevertheless accept the decision of the majority of voters and cantons.

<sup>xv</sup> The general initiative expresses an intention and is not concerned with integration of the proposed initiative in the legislation. It is for Parliament to decide whether the initiative should be implemented at the constitutional or the legislative level. Of importance is that the intention be realized. If the promoters of the initiative feel that Parliament has not been faithful to the content of the initiative, they can take their case to the Federal Tribunal (supreme court), which will not impose its solution but will invite Parliament to legislate in accordance with the initiative.

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<sup>xvi</sup> Consequently, Article 138 of the 1977 Constitution of Jura, providing that the new canton could welcome any new part from the Canton of Berne, which is legally separated from the latter, did not receive a guarantee from the Federal Assembly (Art. 51, Para. 2, of the Federal Constitution).

<sup>xvii</sup> The principle of subsidiarity demands that any government function that can be performed adequately and sufficiently by the smallest unit of government closest to the people (e.g., municipal government) should be performed by that government rather than by a larger unit of government such as that of a canton or of the Confederation.

<sup>xviii</sup> A well-documented example was the fiscal dispute between Vaud and Geneva, which could not be resolved through mediation. Therefore, it was the subject of an appeal under public law in the Federal Tribunal (Art. 83 OJF, ATF 125 I 458).

<sup>xix</sup> For further background, see also Nicolas Schmitt, *Federalism: The Swiss Experience* (Pretoria: HSAC Publishers, 1996); Oswald Sigg, *Switzerland's Political Institutions* (Zürich: Pro Helvetia, Arts Council of Switzerland, 1991); Hans Huber, *How Switzerland is Governed* (Zürich: Schweizer Spiegel Verlag, 1968); George Arthur Coddington, *The Federal Government of Switzerland* (Boston: Houghton Mifflin, 1961); and George Sauser-Hall, *The Political Institutions of Switzerland* (Zürich and New York: Swiss National Tourist Office, 1946).

<sup>xx</sup> For example, the Federal Tribunal can examine pre-judicially federal laws for compliance with the European Convention on Human Rights; likewise, the interpretation of the convention must also comply with the Constitution.

<sup>xxi</sup> This will be the case if the RPT is approved.

<sup>xxii</sup> Benjamin R. Barber, *The Death of Communal Liberty: A History of Freedom in a Swiss Mountain Canton* (Princeton: Princeton University Press, 1974), p. 11.

<sup>xxiii</sup> Rule of the Federal Tribunal: ATF/BGE, 129, I, 217.

<sup>xxiv</sup> See also, Yannis Papadopoulos, "Connecting Minorities to the Swiss Federal System: A Frozen Conception of Representation and the Problem of 'Requisite Variety,'" *Publius: The Journal of Federalism* 32 (Summer 2002): 47-65.

<sup>xxv</sup> All limitations of a basic right must have a legal basis, justified in the interest of the public and proportionate to the stated aim. However, the essential character of basic rights remains inviolable.

<sup>xxvi</sup> *New State Ice Co. v Liebman*, 285 US 262, 311 (1932).

<sup>xxvii</sup> See note 17.

<sup>xxviii</sup> This concerns a "curb on debt," which was accepted by popular vote on 2 December 2001 but which has yet to be written into the law.

<sup>xxix</sup> See Article 173, Para. 1a, and Article 185, Para. 1, which also refer to the obligations of the Federal Assembly and the Federal Council to preserve Switzerland's neutrality.

<sup>xxx</sup> The federal law on alternative civilian service is currently being amended.

<sup>xxxi</sup> Presentation of the project on the revision of the Constitution in *Le Nouveau Quotidien*, 27 June 1995.

<sup>xxxii</sup> Appenzell-InnerRhoden, Nidwalden, Obwalden, Schwyz, Ticino, Uri, Valais, and Zug.

<sup>xxxiii</sup> Appenzell-InnerRhoden, Fribourg, Lucerne, Nidwalden, Obwalden, Schwyz, Ticino, Uri, Valais, and Zug.

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<sup>xxxiv</sup> Aargau, Appenzell-OuterRhoden, Appenzell-AusserRhoden, Glarus, Nidwalden, Obwalden, St Gallen, Schaffhausen, Schwyz, Thurgau, Uri, and Valais.

<sup>xxxv</sup> Charles Seignobos, *Histoire politique de l'Europe contemporaine, 1814-1914*, 7th ed., vol. 1 (Paris: Armand Colin, 1924), p. 323.

Table 1

Allocation of powers within the Swiss government

Jurisdiction	Powers allocated to the Federal Assembly	Powers allocated to the Federal Council
Legislation	Arts 164 and 165	Arts 181 and 182
Foreign affairs	Art. 166	Art. 184
Finances	Art. 167	Art. 183
Federal-cantonal relations	Art. 172	Art. 186
Other	Art. 173	Art. 187