

# Swiss Confederation

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Switzerland's federal constitution, adopted in 1848 after a civil war, was a compromise that sought to accommodate both the liberals (mainly Protestants) promoting a unitary state and the conservatives (mainly Roman Catholics) defending the former Confederation. In addition, the Constitution had to accommodate the linguistic diversity among the four official language groups.<sup>i</sup> Based on a highly decentralized federalism, the Cantons (the constituent units of the federation) maintained their far-reaching original autonomy, now as self-rule within a federation, and continued to share their sovereignty with the federation. The constitutional concept of Switzerland's distribution of powers reflects a "bottom-up" construction of the federation and depends, finally, on the residual powers of the Cantons and, in some instances, even municipalities. As a logical consequence the Swiss Constitution does not distribute the powers between the Confederation and the Cantons in a final list, and it does not provide powers for the Cantons.<sup>ii</sup> In principle it determines exclusively the powers delegated to the Confederation.<sup>iii</sup> Where new powers are delegated to the federal government, they are formulated carefully so that, even within a delegated power, the Cantons still retain some part of their sovereignty. This chapter first addresses the basic constitutional principles behind Swiss federalism and the principal guidelines for the distribution of powers before taking a more in-depth look at the system of distribution of powers, including the autonomy of the Cantons and the specific powers of the Confederation, one of which (i.e., the fiscal system) has undergone important changes as a result of a referendum in late November 2004.

## BASIC CONSTITUTIONAL PRINCIPLES<sup>iv</sup>

### *The Historical-Cultural Context*

The origins of Switzerland go back to the thirteenth century, but modern Switzerland was initiated by Napoleon's intervention in 1800 and properly started with the Constitution of 1848. With this Constitution the sovereign Cantons decided, after a civil war, to establish peace by forming a strongly decentralized federation, which was even - though in scientific terms wrongly - labelled a "Confederation."<sup>v</sup> Thus France, for a long time the only republican democratic neighbour, had a strong influence on the legal system of the Confederation and, in particular, on the legal systems of the French-speaking Cantons. The influence of Germany, another neighbour of Switzerland, gained strength in the second half of the twentieth century. Thus Switzerland is embedded in a civil law system of both French and German origin.<sup>vi</sup>

Since the foundation of modern Switzerland the Constitution has only been totally revised twice, in 1874 and in 1999, respectively. In between those general revisions the Constitution has been partially revised more than a hundred times. Most of these revisions were intended to strengthen the powers of the federal government. In 1848, however, the main

principle for the distribution of powers was to give to the Confederation the minimum of powers necessary to survive as a union of Cantons. The weakness of Swiss defence policy during the German-French war at the end of the nineteenth century was one of the principal reasons for constitutional change; that is, to provide a stronger federal government. The slogan of this revision was: “one army, one market and one law” (civil law and commercial law). The 1999 revisions have been promoted as a new edition of this slogan, intended to give the old Constitution modern wording without making any basic changes.

With regard to federalism, the clear tendency to more centralization has been balanced by increased opportunities for the Cantons to participate in the decision-making process at the central level, the point being to maintain the balance between shared rule and self-rule. The procedures for constitutional amendments and for a total revision of the Constitution differ slightly. However, as a general rule, in both cases the approval by simple majority of the National Council and the Council of the Cantons (the first and second chambers of the Federal Assembly, respectively) is required, as is the final ratification by the simple majorities of the people and of the Cantons (without any minimal quota as in some other countries). Constitutional amendments can be initiated either by the members of the Federal Assembly (Parliament), by the Federal Council (the Executive), or by 100,000 voters. If the amendments are initiated by the voters (a popular initiative), then the proposal must be submitted to a mandatory referendum of the people and counted both nationally and within their individual Cantons, even if the Federal Assembly rejects the proposal or makes a counterproposal. Thus the further centralizing of constitutional powers in the federal government was part of a continuous political process legitimated by the sovereign people (the majority of the voters of the Swiss people and the peoples of the Cantons). In the United States and other federations, and in the European Union, because the amendment procedure is so burdensome, the courts have a role in deciding the distribution of powers through interpreting the Constitution or the Union treaty. However, the Swiss direct democratic procedures provide a broad legitimacy to amendments, and, based on this legitimacy, their implementation has been generally accepted throughout the country. Thus distribution of powers in the Swiss Confederation may be regarded as being closer to the democratic wishes of the people than that provided in many other federations.

The Swiss Constitution has its roots in nineteenth-century liberalism. In particular, the cantonal constitutions installed after France’s July revolution of 1830 have been shaped by modernity. With regard to individual rights, the federal Constitution adopted the ideology of negative individual rights (i.e., freedom from the state). The actual Constitution has an impressive catalogue of individual rights guaranteed by the federal court. However, the federal court has no power to protect individuals against the democratic majority of the legislature. The only legal protection against the violation of individual rights by the legislature is based in the International Treaties on Human Rights. International law is part of the law of the land and thus, based on international treaties, the courts can protect the human rights of individuals against the legislature.<sup>vii</sup>

The Swiss concept of liberty has four dimensions: (1) liberty from the state (negative rights); (2) liberty within the state (democracy understood as a right of individual self-determination within the state); (3) liberty by the state (social rights with soft guarantees in the Constitution); and (4) liberty to the state (collective rights of language groups and religious communities [based on the principle of territoriality] and the right to autonomy of municipal corporations).

Switzerland first decided to install a federal system as a way of managing conflict between the two major Christian denominations: the Protestants and the Roman Catholics. The territorial borders of the religious communities and the language communities are only partially identical with the borders of the Cantons. In order to guarantee peace among the different religious communities the federal Constitution guaranteed individual freedom of religion at the federal level. However, this guarantee has not had the same impact as has the establishment clause of the United States Constitution. The Cantons retain the autonomy to decide on the relationship between church and state. As a consequence, in Switzerland there are at least four different systems regulating the relationship of church and state. The traditionally Protestant Cantons of Neuchâtel and Geneva basically aligned themselves with the concept of secularization used in formerly Roman Catholic France. The mainly Protestant German-speaking Cantons provided constitutional status for religious communities made up of citizens belonging to Protestant churches. The mainly Roman Catholic Cantons provided religious associations of Roman Catholic citizens on the municipal level and privileged the Roman Catholic Church at the cantonal level (e.g., in primary and secondary education). The Cantons with both religious communities developed the concept of two different communities, with each having some kind of public status. Since the 1970s, and in particular since Switzerland ratified the European Convention on Human Rights, major developments have taken place on the cantonal level as the cantons now provide equal status for other religions (such as Judaism).

Another of Switzerland's important founding concepts is that of neutrality. The Swiss concept of neutrality was mainly a strategy to reduce, as much as possible, the influence of the country's big, culturally linked neighbours on its language communities. To the degree to which the neighbouring states respected this principle of neutrality, Switzerland could maintain its inner diversity. In order to avoid Switzerland breaking up along ethnic lines, the old (1848) Constitution prohibited Cantons from concluding political treaties with foreign countries or concluding interstate compacts that had political content. The present (1999) Constitution does not expressly prohibit such compacts as former enemies have, through a long nation-building process, become friendly adversaries.

In general, in order to reach a compromise between self-rule and shared rule, the drafters of the original federal Constitution agreed to leave as much power as possible at the cantonal level. Even the more than 100 twentieth-century amendments have been the result of a compromise between centripetal and centrifugal pressures. The interests of social justice, equal rights, and nation building have all promoted centralized decision making. However, minority interests (language or religion), conservative ideologies, and the desire to keep as much democratic local control as possible were pressures that promoted confederal solutions.

## PRINCIPLE GUIDELINES FOR THE DISTRIBUTION OF POWERS

### *Direct democracy*

Whoever examines the distribution of powers in Switzerland will notice, at first view, the country's astonishing difference from all other federal countries. While in most federal Constitutions the catalogue providing the distribution powers is short, plain, and clear, the Swiss Constitution provides a special and rather detailed article for each particular power (more than

fifty articles with several sentences each)(see tables at end of chapter). Most of these articles not only grant general power to the federal government but also provide for the competences of the Cantons, which are to be respected by the federal legislature when it implements its power. The main reason for this complexity is the system of direct democracy, which requires compromise for each new federal competence.

Swiss consensus democracy operates as a bottom-up process. This process starts with the self-determination of the individual and rises upwards through the levels of municipal, district, and cantonal communities before concluding at the federal (or even international or supranational) level. Decisions at the federal level should enable as many citizens as is possible (and efficient) to participate in the decision-making process. From this point of view, democracy can be considered as complementary to federalism as it enhances the principle of subsidiarity with regard to the distribution of powers. It provides an adequate distribution of powers not only between Confederation and Cantons but also between Cantons and municipalities. A thorough analysis of the distribution of powers determined in specific constitutional articles reveals, in almost any decision, the underlying concept of compromise between Cantons and federation, between the major parties, between the regions, and between the communities.

In Switzerland democratic procedures are not intended only to produce effective and legitimate decisions for Swiss society. In our multicultural society they must also function as tools for managing potential conflicts between the different communities. Our governmental system must be democratic, and democracy has priority over limited government as well as, to a certain extent, over the rule of law. This priority of democracy over other values of good government is due to the fact that, in Switzerland, all socio-cultural conflicts have always been resolved by the democratic decisions of the people rather than by constitutional principles or by the decisions of a constitutional court. For example, in many countries the conflict between the prohibition of abortion and freedom of choice has been decided by a constitutional court or by the supreme court; in Switzerland it has been decided by different democratic referendums.

The very fact that the Constitution can only be amended if the amendments are ratified by the majority of the people of the Cantons has a direct influence on the distribution of powers. All important social, technical, industrial, and international developments are disputed not through elections based on party programs but, rather, through constitutional amendments -- either initiated by popular initiatives or by the federal government. New societal demands can often be answered only by assigning new constitutional powers to the federal government. Accordingly, all important constitutional amendments provide both the new federal powers and the basic guidelines that determine the aims, tools, and measures to be used by the federal legislature in implementing the new constitutional article. Thus, constitutional articles providing new federal powers often contain a description of the powers, their limits, the rights reserved to the Cantons, the goals to be achieved, and (often) the measures to be taken. In this way, the competences delegated to the federal government, and in particular to the federal legislature, are “earmarked.” Very often the decision to delegate new powers to the federal government can only win the approval of the people if these specific powers are clearly limited and take special note of specific cantonal interests (such as those of the rural Cantons, the French-speaking Cantons, the export-oriented Cantons, the underprivileged Cantons, and so on).

Major social problems and developments have always resulted in initiatives drafted by concerned civil interest groups or parties. Since 1848, even though out of a total of 142 initiatives only eleven have been adopted while 131 have been rejected, most of the latter have

had an impact on further constitutional developments. This is because either the Federal Assembly drafted a counterproposal or the idea in the initiative was later introduced in a government-sponsored constitutional referendum and was incorporated into legislation.

The fact that the Swiss Constitution does not provide for general emergency powers is another consequence of direct democracy. The Swiss people and the peoples of the Cantons would never accept the Federal Assembly or the Federal Council having general emergency powers. The only reference to “emergency” concerns the power of Federal Assembly to enact urgent legislation. In 1939, during the Second World War, the Federal Council was empowered by a unanimous Federal Assembly to enact all legislation necessary to protect Switzerland and its citizens. Thus it was decided, without any constitutional basis, that in cases of undisputed emergency all parties would agree to give the necessary power to the Federal Council. The Federal Council, though, must always remember that this power is not covered by the Constitution and that it applies only for the duration of the specific emergency.

### *Multiculturalism and Diversity*

We know that some constitutions are based on the homogeneity of the culture of their people, which enhances the cultural heritage of the country. A common language is often considered an essential element to guaranteeing homogeneity and democratic communication. Other states ignore culture as a nation-building factor. Their constitutions are based on a set of universal values uniting all citizens as political beings within a specific territory (e.g., France). Finally, immigration states (i.e., states that have arisen due to immigration) have to integrate the various cultures of diverse migrant peoples within one constitutional design. Often they exclude the cultures of indigenous peoples and unite the diversity of immigrants through integration based on common values (e.g., “the American Dream”).

The Swiss Constitution has in fact tried to develop a special type of federal state - one that is developed and determined by its multicultural environment. This state is based on principles that have shaped the political culture of Switzerland, including the distribution of powers. The main aim of American and German federalism was to introduce vertical separation of powers in order to limit governmental power. In addition to this, through compromise Swiss federalism has had to accommodate the diversity of the union of sovereign Cantons. Taking cultural diversity seriously, the Constitution provides the Confederation with the general responsibility to promote cultural diversity within its delegated competences and, with regard to languages, to provide measures for the better mutual understanding of different language communities (Articles 2 and 70). Cultural sovereignty with regard to culture proper and to education (including university education) remains within traditional cantonal powers.

In the Swiss view a constitution that intends to take cultural diversity seriously cannot treat minorities as tolerated guests; rather, it must provide different cultural communities with proper constitutional status. Thus cultural communities have “state status,” at least in terms of the constitution-making procedure, with the result that they accept their state as their homeland. Consequently, in principle, Switzerland provides for four official languages<sup>viii</sup> -- German, French, and Italian are on equal footing. Romansh is an official language but not all legislation is translated into it. When a federal statute is implemented, each language is considered to be equal to the others. If there are different meanings or different interpretations, then each language



has to be considered as an original and authoritative text. Public officials at the federal level express themselves in their own language; however, as officials, they are supposed to at least understand German, French, and Italian. Italian-speaking members of Parliament have a saying that demonstrates this: “For beauty they speak Italian; if they want the members of Parliament to listen, they speak French; but if they want to be understood, they speak German!” The National Council (lower house of the Federal Assembly) now requires simultaneous translations for plenary discussions. Similar arrangements are not provided for in the Council of States.

The question of official languages falls within cantonal jurisdiction. Bilingual Cantons provide an equal footing for two official languages, while the trilingual Canton of Grison does so for three (German, Italian, and Romansch-Grison). For a long time Romansch had several idioms. Then, for financial reasons, the Canton of Grison began providing only one official translation per year: one year it would translate decisions into the Puter idiom and the following year into the Sursilvan idiom. Today the official language is Romansch-Grison, a “laboratory-made” idiom.

Cantonal competences to organize themselves according to their respective governmental systems, as well as according to their concept of local autonomy and their own judiciary, enabled the Cantons to continue their historic tradition as small democratic corporations. Their constitutions and their legal systems reflect their religions, their languages, and their international neighbourhoods as well as their rural, aristocratic, and commercial/corporate traditions.

The power of the Cantons to develop their own democratic vision has been essential in enabling their peoples to maintain their own “we”; that is, their own democratic communities (including their municipalities). Most democratic developments in Switzerland have been initiated in the Cantons. For example, the French-speaking Cantons began the trend of granting women the right to vote; this was followed by other Cantons and then by the Confederation. Only the last Canton (Appenzell Inner Rhodes) had to be forced by the federal court to recognize equal rights for women. In this case the court gave priority to the universality of equal rights over the collective right of a Canton to organize itself according to its own traditions. The Cantons, although integrated into a national-global market, differ to a great extent with regard to their democratic tools and with regard to their notions of how much power should be given to their municipalities.

From the Swiss perspective, a state that recognizes the political value of its different cultural communities (i.e., communities that are culturally but not politically united with their neighbour states) has to be based on a concept of multiple loyalties. The Swiss are politically loyal to the Confederation, the Canton, and the municipality, but they are culturally loyal to the cultural community of their kindred neighbour state. This multilevel loyalty is also reflected in the concept of citizenship. Swiss citizenship has a federal, a cantonal, and a municipal basis. On each level the political unit decides who will be accepted into the political community as a citizen. All three levels have to concur. Based on the principle of multiple loyalties, one must also consider the competences of the Cantons not only with regard to intergovernmental relationships within Switzerland but also with regard to relationships with other countries. The cultural cooperation of French-speaking Cantons with France and of Italian-speaking Cantons with Italy are essential for their development and, thus, for the development of the entire country.

The legitimacy of a state with cultural diversity can only be achieved if each cultural community considers the state as its own. This goal is attainable if the cultural community is

convinced that its own cultural heritage is best developed within that particular political community. The state must not simply tolerate but also aim to promote such diversity. In Article 2 of the 1999 Constitution, the Confederation is mandated to promote cultural diversity. This gives the different branches of the federal government additional responsibility with regard to cantonal competences in the fields of culture, education, and religion. Moreover, according to Article 70, Paragraph 3, of the Constitution, the Confederation and the Cantons shall encourage understanding and exchange among the linguistic communities. And Paragraph 4 holds that the Confederation shall in addition “support the multi-lingual Cantons in the fulfillment of their particular tasks.”

Swiss federalism is based on the principle of one person, one value; on the principle of one Canton, one sovereignty; and on the notion of equal Constitutional status. All Cantons enjoy the same rights notwithstanding their importance in terms of size, economy, and population. Switzerland is not an asymmetric federal state with regard to the Constitutional status of the Cantons; rather, it pointedly disrespects its actual asymmetry.

## THE SYSTEM OF DISTRIBUTION OF POWERS

### *General Aspects: Autonomy of the Cantons*

The Cantons must have the opportunity to make, finance, and implement those decisions that are relevant to their cultural development based on their cultural heritage. This includes decisions relating to education, the judiciary, administration, and the police. In fact, the legitimacy of a cantonal government is embedded in the historical, legal, constitutional, religious, and linguistic culture of its community; consequently, it can never depend on a centrally delegated legitimacy. Cantonal governments have the power to enforce law and order. The power of the police has its legal roots in the cantonal constitution and in the cantonal responsibility to guarantee the freedom and security of its people.

The most important power of Cantons and municipalities concerns their fiscal capacities. Cantons and municipalities decide on two-thirds of the state's income and expenditure. This fiscal capacity is based on the idea that the territorial units, which have the power and responsibility to perform and implement public justice, must also have the means to finance this public service through taxation. The federal government provides equalization payments in cases where some territorial units provide services for others; where, for specific geographical and demographical reasons, equal opportunities are not guaranteed; and where small units do not have the necessary resources to provide public services.

Based on their fiscal autonomy, the voters of the Canton and of the municipalities decide on the taxes that will provide the necessary income. Exceptionally, they fund public services through the raising of public debt or through federal grants. In addition, important new expenditures for projects such as roads, buildings, Olympic Games, and so on have to be submitted to a public referendum. Through these tools of direct democracy local accountability is safeguarded.

The development of Switzerland also depends to a great extent on the capacities of the Cantons to cooperate among themselves as well as with the federal government. For example, the new federal legislation on cooperation between cantonal and federal universities is based on a

federal statute that can only be implemented if it is supported by a treaty of the Cantons that includes themselves as well as the federal government. Based on this treaty a new “super” agency, with power over the cantonal universities as well as over the federal technical universities, has been given the mandate to coordinate university development.

Within the limitations established by federal law, each Canton has the right to self-organization according to what is set down in its Constitution. The Cantons can decide on the organization and political structure of their territory as well as on how their institutions will be set up and how they will operate. They can limit their own cantonal powers or they can delegate some of these powers to municipalities. While the actual organization of the Cantons shows that there are several similarities among them as well as between them and the Confederation, there are, nevertheless, important organizational nuances.

The possibilities of the Cantons determining to whom they want to confer political rights are limited to the principles set down in a democratic constitution. The Cantons have the option of giving non-Swiss persons the right to vote and to be elected. They also have the authority to deprive citizens under guardianship of their political rights. In this respect, cantonal citizens are more powerful than are federal citizens. For instance, in the Cantons the citizens elect the members of the cantonal parliament and the cantonal government - and, in some cases, civil servants, teachers, and even judges. In addition, Cantons provide more means of direct democracy than does the Confederation. In most Cantons elections are decided by secret ballot. Very few Cantons (e.g., Appenzell Inner Rhodes and the Canton of Glarus) are still governed by an assembly of the people (*Landsgemeinde*).

### *Intercantonal Treaties and Cooperation*<sup>ix</sup>

Cantonal responsibilities have become more and more complex and interconnected. This complexity creates pressure to unify cantonal law and requires Cantons to strengthen their intercantonal cooperation. In order to prevent the transfer of powers to the federal level, the Cantons try to unify their laws through intercantonal treaties. According to Article 48 (1) of the Constitution, the Cantons may conclude intercantonal treaties known as concordats. These concordats cannot be contrary to constitutional or federal law, including those relating to the distribution of powers between the Federation and the Cantons, the interests of the Confederation, and the rights of other Cantons. The Confederation must be notified of all such concordats (Article 48 [3]).

Intercantonal treaties can regulate such subjects as administrative agreements or unifying legislation, and they can create common institutions. Political (I use the term in a narrow sense) intercantonal treaties are prohibited because they endanger the political unity of Switzerland. Concordats can be concluded between two or more Cantons, and the Confederation can be party to the treaty and/or can participate in the common institutions (Article 48 [2]). This provision is of relevance in areas where the federal government and the Cantons have parallel powers. For instance, the Confederation is party to the concordat on the equivalence of scientific degrees. Based on this concordat, the criteria for the equivalence of high school diplomas were unified. The concordat may not transfer cantonal powers to the federal level, and the Confederation may only get involved in areas where the Constitution indicates that federal power is appropriate. One must realize that these instruments for creating intercantonal or cantonal-federal cooperation



have a tendency to restrict the scope of citizen intervention. This is because often they can only be handled by the executive branch of government.

A federation only exists on the basis of the solidarity of its partners. Along with constitutionally instituted cooperation, Swiss federalism looks for complementary balance in a network of informal cooperation at all levels of government and administration, including between labour unions and economic entities - the so-called “social partners.” Due to its informal character this network might not be apparent, but this comity of different partners is most effective in establishing cooperation. The complexity of state tasks and state obligations requires cooperation not only among magistrates and elected authorities but also among civil servants of federal and cantonal administrations. This is the underlying philosophy of Article 44 of the Constitution, according to which the Confederation and the Cantons shall cooperate and support each other in the fulfillment of their tasks.

According to Article 44 (2) the Cantons and the Confederation owe each other mutual consideration and support and shall grant each other administrative and judicial assistance. Article 47 requires the Confederation to respect cantonal autonomy. Moreover, disputes between the Cantons or between Cantons and the Confederation shall be resolved through negotiation. Thus, in contrast to the German and other federal systems, in the Swiss system disputes among Cantons and Confederation are seldom resolved by court decision but, rather, by negotiation or by legislative or constitutional amendments.

For example, ten years ago the people of the Canton of Basel Countryside decided that Canton authorities should use all legal means in order to prevent the construction of an atomic power plant in the neighbourhood of the Canton. Some federal authorities, including the federal court, would have considered such a legal mandate to be against the principle of *Bundestreue* (loyalty to the federal state). However, the federal Parliament, when asked to approve this amendment (as is always the case with changes in cantonal constitutions), accepted it out of respect for cantonal sovereignty and popular democracy.

Since 1874, as a result of more than 140 constitutional amendments,<sup>x</sup> the originally extensive powers of the Cantons have slowly shifted to the federal level. Gradual integration into the European Union, along with bilateral treaties, may also have a centralizing effect on Swiss federalism. Taking these developments into account, the 1999 Constitution now mentions expressly: (1) the right of Cantons to participate in the foreign policy decisions of the federal government; (2) the general right to participate in internal federal legislation; and (3) the possibility for Cantons to regulate matters of general concern through international or intercantonal treaties.

The strengthening of the shared-rule principle has not led, as one might have expected, to a strengthening and widening of the powers of the second chamber; instead, this principle has been implemented by strengthening the possibilities for cantonal executive bodies to participate in federal decision-making processes. In order to participate in federal decision-making processes, cantonal executives have had to create a new body - one that represents all the cantonal governments. Thus, the widening of the shared-rule principle at the federal level has led directly to the establishment of the Council of Presidents (made up of the presidents of the Cantons), which in turn, has led to better cooperation between cantonal governments. The creativity of this cooperative (and executive) federalism is new, and may result in Switzerland having greater flexibility than it does now. For example, with regard to universities, the legislature has established a body - composed of representatives of cantonal governments and of

the Federal Council - who must plan and establish strategies for developing federal and cantonal universities. With this new “superstructure” combining shared-rule and self-rule in the field of higher education, Switzerland is trying to meet the new challenge of a “European Space of Higher Education,” as proclaimed in the Bologna-Declaration of 1999. There are also new tendencies, such as those in the field of professional education, that might lead to supracantonal cooperation on a regional basis.

It may well be that the new flexibility associated with intercantonal cooperation will lead to the establishment of real intercantonal bodies with specific democratic legitimacy - a legitimacy based on the citizenry and united by a specific functional focus (such as a school, hospital, or police region). Thus, Swiss federalism may produce new administrative bodies, new distinct regional parliaments and communities of voters, and new executive branches all united in order to efficiently fulfill specific tasks. Representative bodies with shared power could be supplemented by executive and administrative bodies with shared power. Still, the Federal Assembly has a tendency, when creating new responsibilities, to impose specific systems of judicial administration on the Cantons.

### *The Supremacy Clause*

According to the various systems of European continental law, the law forms a unity in which the Constitution, different treaties, and statutes, along with federal, cantonal, and municipal ordinances, are hierarchically classified. This is apparent in the German Basic Law as well as in the system adopted by the European Union. In Article 49 the Swiss Constitution determines that all levels of federal law take precedence over contrary cantonal law. According to this principle, even Federal Council ordinances take precedence over cantonal constitutional law. In addition, the Confederation has the duty to ensure that the Cantons respect federal law.

Article 49, Paragraph 1, of the Constitution, which provides for federal supremacy, also provides for the constitutionally guaranteed rights of citizen. In the case of a dispute between federal law and cantonal law, citizens may initiate public law action as a remedy in order to establish whether or not the latter contradicts the former. If there is a contradiction, then federal law prevails. However, federal authorities usually respect constitutionality - as the Constitution expects them to do.

### *Administrative Federalism and Enforcement*

Contrary to the American and other systems of dual federalism, the Cantons implement federal law (i.e., administrative [*Vollzugs-*] federalism). Consequently, the federal administration is rather small in size and would not be capable of executing federal law by itself. While federal law binds the Cantons in terms of how they implement it, the Confederation must leave them as much leeway as possible and must shoulder the financial burden as well as take into account the particularities of each Canton (Article 46). Depending on the federal regulation, the Cantons have varying degrees of discretion in the execution of federal norms. Due to the diversity among Cantons with respect to size, topography, demography, and other structural elements, it is nearly impossible for the Confederation to take the particularities of the Cantons into account without

granting them broad discretion.

Diversity and direct democracy at the cantonal level may be why the power of the federal government to enforce federal statutes within the Cantons is very limited. Historically, the Constitution was concerned mainly with conflict management rather than with enforcing federal laws within the Cantons. Swiss federalism has followed the European concept of administrative federalism. It is chiefly the responsibility of the Cantons to enforce federal law within cantonal territories. The Federal Council must control implementation; however, the tools with which it must work in order to do so are limited. Moreover, any particular federal competence to implement and enforce a law has to be determined by the appropriate statute. However, one potentially powerful tool remains: cantonal constitutions require the approval of the Federal Assembly. Thus, in the case of the emergence of the new Canton of Jura, the Federal Assembly did not approve a specific provision of the cantonal Constitution because it believed that it violated the principle of respect and tolerance, which is basic to any intergovernmental relationship. The offending provision in the proposed Jura Constitution mandated all cantonal authorities to influence the people of the Jura region in the neighbouring Canton of Bern to join the new Canton. One may note that, in the federal Constitution, this article has been deleted, but it remains in the cantonal Constitution!

### *Non-Promotion of Equal Living Conditions*

Article 72 (2) of the German Basic Law provides for general federal legislative power to promote the standard of law necessary to the establishment of equal living conditions throughout the country. A similar provision is to be found in Article 130 of the Spanish Constitution, which provides that the “public authorities shall attend to the modernization and development of all economic sectors, particularly of agriculture, livestock raising, fishing, and handicrafts, in order to equalize the standard of living of all Spaniards.” Modern constitutions generally require equal rights and equal opportunities, but not equal results.

The Swiss Constitution, however, guarantees neither equal opportunities nor equal results. Swiss federalism does *not* promote equality of living conditions among the Cantons. Diversity and autonomy can only be upheld if a certain degree of economic discrepancy among different Cantons - and even among different municipalities - is permitted. For the sake of the autonomy of the Cantons, Swiss federalism has always accepted this inequality. Equalization (of this sort) would mean centralization, and most Swiss people believe that this would imperil Switzerland’s diversity.

With possible integration into the European Union, which promotes an open market based on equal opportunities, Switzerland may have to face a new era of federalism. Thus the Federal Assembly has already put into force a law guaranteeing equal opportunities with regard to Switzerland’s internal market. According to this act, quite a number of cantonal legislative modifications would be required in order to ensure the eradication of intercantonal discrimination. However, according to evaluations based on Article 170 of the Constitution, most Cantons have not followed these federal requirements.

In a state with a fragmented society, the issue of equality pertains not only to individuals but also to the status of different cultural communities and religions. Equality of communities may often take priority over equality of individuals. This may be why the 1874 Constitution did

not - and why the 1999 Constitution still does not – contain any provision guaranteeing equal opportunities among individuals or equal living conditions for all. Only the proposed constitutional amendment on equalization of finances (discussed below) provides, in Article 43, Paragraph 4, that basic state services must be equally available to all.

### *Spending Power*

Unlike the United States, which accepts the general spending power of the federal executive, Switzerland can only give grants or subventions when explicitly empowered to do so by a federal statute. In addition, the federal legislature can only provide spending in a federal statute if this falls within the framework of federal government power. Unlike in Germany, in Switzerland the budget is not considered to be a statute. Thus the Federal Assembly cannot empower the Federal Council to make financial decisions through the budget. The budget is only considered to be a licence to spend if there is another general statute that provides a specific spending power with specific goals. Thus federal power cannot be indirectly enforced through general spending power, as it can in other federations.

## SPECIFIC POWERS OF THE CONFEDERATION

### *Security*

Switzerland has no professional army: its “army” is organized as a militia. Its main functions, due to the principle of neutrality, are the prevention of war, the maintenance of peace, the defence of the country, and the protection of the population. Furthermore, the Swiss army supports civil authorities in their efforts to repel serious threats to internal security as well as in other exceptional circumstances (Article 58 [2]).<sup>xi</sup> According to Article 59, every Swiss man is required to perform military service. If a man refuses to comply with this fundamental obligation (*Dienstpflicht*), Article 81 of the Federal Military Penal Act allows for imprisonment of up to eighteen months. While alternative service is possible, it lasts longer than the military service. Military service is voluntary for Swiss women.

The use of the army is a federal matter. The Federal Council is entitled to take measures to secure the external security, independence, and neutrality of Switzerland (Article 185 [1]). According to Article 168 (1), during cases of external threat to national security, when a large contingent of troops may be assigned to combat, the Federal Assembly must elect the general and commander-in-chief of the Swiss army (Article 85 [1] of the Federal Military Act, SR 510.10). Until his/her election, however, the control of the military remains in the hands of the Federal Council, which is to use it on a provisional basis (Article 85 [2] of the Federal Military Act). Even after the general is elected, the Federal Council remains the supreme organ of the executive branch, giving the general his/her commission (Article 86 of the Federal Military Act). The general is elected only in case of, and only during the time of, major external threats to national security.

The federal Constitution does not provide a general police power for the Confederation. Article 57 conveys the responsibility for security jointly to the Cantons and the Confederation,

which, within the frameworks of their respective constitutional powers, are responsible for protecting the population. Until now the people and the Cantons have regularly refused to empower the federal government with a specific police force that would enable it to guarantee law and order throughout the country. Unlike the United States (with the Federal Bureau of Investigation) and Germany (with the *Bundesgrenzschutz*), Switzerland has no specific police force available. When it is asked to provide specific protection, the Federal Council usually provides the army with a specific police task, although the army is composed of militia soldiers who have only limited professional training for specific police responsibilities. As the Cantons are responsible for protecting their citizens and for guaranteeing law and order, they have installed cantonal police, which often share responsibilities with municipal police (the municipalities also being responsible for protecting their citizens and for upholding law and order at the municipal level).

According to Article 52 (1), the Confederation shall protect the constitutional order of the Cantons. While primary responsibility for ensuring constitutional order lies with the Cantons (Article 57), if a particular Canton cannot ensure its own order, then the Confederation and the other Cantons are called upon to support it (principle of comity). This duty of support is based on Article 44 (1)-(2), which states that the Confederation and the Cantons shall support each other in the fulfillment of their tasks.

A *federal intervention* is foreseen when the inner order of a Canton is disturbed or threatened and cannot be protected by the Canton alone or with the help of other Cantons (Article 52 [2]). The Confederation will only intervene when the general support given to the Canton is not sufficient to reestablish the constitutional order and when the disturbance of the constitutional order does not emanate from a cantonal institution or agency. As a last resort, the Confederation will intervene with military force.

The territory of the Cantons is defined neither in the Constitution nor in other legal documents. At the time of the formation of the federation in 1848 cantonal territory was not disputed, and only those areas that, later, were subject to disputes and agreements have been defined in treaties or in court opinions. Nonetheless, the Confederation has the duty to protect the existence and territory of the Cantons (Article 53 [1]). Changes in the number of Cantons or in the redistribution of territory are only permissible in accordance with the constitutional procedure set down in Article 53 (2)-(3).

The Constitutions of 1848 and 1874, respectively, did not foresee the need for a procedure for territorial modifications. The rules that were recently introduced in Article 53 were developed according to the experience of the secession of the Jura territory from the Canton of Bern.

The current procedure for territorial changes includes as its main element the consent of the concerned populations. Article 53 distinguishes three different cases of modifications that concern the existence and territory of the Cantons. The modification can concern the total number of Cantons or it can change their status (Article 53 [2]). The number of Cantons can be increased or decreased, and the status of a Canton can be changed (e.g., by elevating a so-called half Canton to the status of a full Canton). In these cases the modification must be based on the consent of the populations concerned, of the Cantons concerned, and of the whole Swiss population. This procedure foresees a cascade of popular votes at the district and/or municipal level, at the cantonal level, and at the federal level, with the result being the highest possible legitimacy for the new boundaries. The creation of a new Canton needs the consent of: (1) the



population inhabiting it, (2) the population inhabiting the Canton to which the territory formerly belonged, (3) the Swiss population as a whole, and (4) a majority of cantonal populations. Changes in the number and the status of the Cantons must fulfill the requirements of a constitutional revision because they entail amendments to the constitutional text (i.e., Article 1 in the case of enumeration of the Cantons, Articles 142 and 150 [2] in the case of a change of status).

Finally, Switzerland is one of the very few countries that has established a procedure for changing the structural composition of its federal units. If a part of the population were to want to secede from Switzerland, then this article might also become, by analogy, the legal ground for a secession procedure.

### *Foreign Affairs*

Switzerland's foreign policy aims at alleviating world poverty, promoting respect for human rights, democracy, the peaceful coexistence of nations, and the preservation of natural resources (Article 54 [2]). The preceding provision outlines the various pillars of Swiss foreign policy, which are: (1) the relationship between Switzerland and Europe, (2) peace and security, and (3) international development. Surprisingly, considering its importance to Switzerland, the Constitution does not expressly mention foreign trade policy (except for Article 101 [1], which grants to the Confederation the power to safeguard the interests of the Swiss economy abroad).

Foreign relations and treaty making are the prerogative of the sovereign state and are a federal matter (Article 54 [1]). However, the Cantons can participate in the preparation of foreign policy decisions that concern their powers or essential interests. In addition, the Confederation, in a timely manner, is to fully inform and consult with the Cantons. Furthermore, the position of the Cantons has particular weight whenever their powers are concerned. In these cases, the interested Canton will participate in international negotiations as appropriate (Article 55).

As a rule, relations between the Cantons and foreign countries are conducted by the Confederation on behalf of the Cantons. However, according to Article 56 (1), the Cantons are entitled to conclude treaties with foreign nations. The Constitution requires that: (1) the matter be within the scope of the powers of the Cantons (Article 56 [1]); (2) the treaty between one or more Cantons and a foreign nation is not contrary to the law or the interests of the Confederation or to the laws of other Cantons (Article 56 [2]); and (3) the Cantons inform the Confederation before the conclusion of a treaty (Article 56 [2]). The Cantons are allowed to deal directly with lower ranking foreign authorities (Article 56 [3] of the Constitution). In all other cases, the Confederation will act on behalf of the Cantons.

In the 1999 Constitution the element of cooperation (which is included in the shared-rule principle) has, as a compensation for diminished cantonal autonomy, gained in importance. In the context of foreign affairs, as noted, the Constitution underlines the role of the Cantons in the decision-making process as well as the relations between the Cantons and foreign nations. In accord with the concept of cooperative federalism, Article 55 (1) integrates the Cantons into the foreign policy decision-making process when their powers and essential interests are at stake. Additionally, in order to avoid centralization through foreign policy, the Federal Participation Act reconfirms the role of the Cantons in the federal foreign policy process, albeit without

adding anything new to Article 55. Besides the right of the Canton to be timely and fully informed, and the obligation of the Confederation to consult with it (Article 55 [2]), the Constitution, as appropriate, grants the Cantons further participatory rights in international negotiations (Article 55 [3]).

As a result of the inadequate flow of information during the negotiations for entry into the European Economic Space in the 1990s, the Conference of the Cantonal Governments (*Konferenz der Kantonsregierungen*) was created by intercantonal agreement in 1993. The conference is not focused exclusively either on foreign policy or on European Union policy; rather, it aims to coordinate the decision-making process among Cantons so that they can exercise joint influence at the federal level. All twenty-six Cantons are members of the conference, and the vote of eighteen of them is sufficient to ratify a decision. Additionally, the conference sends a delegate to the European Union in Brussels. This delegate serves both to provide information to the conference and to augment its influence on the European Union.

### *Fiscal System*

All three levels of government (federal, cantonal, and municipal) may raise taxes. The citizens pay about one-third of their taxes to each level of government. According to Article 127 (1) the general principles of taxation - particularly the circle of taxpayers, the object of the tax, and its calculation - shall be established by a statute submitted to a referendum.

In the areas of personal and corporate income tax, and corporate capital tax, the Confederation and the Cantons have concurrent powers; but here the federal government is very much the junior partner. The Constitution explicitly limits the federal government's power to raise income tax to 11 percent of the income of individuals (Article 128), and it limits value-added tax to 6.5 percent (Article 130). This is the outcome of different compromises between the Christian Democratic Party and the French-speaking Cantons, who are concerned with defending their autonomy. The limited federal value-added tax is a compromise between labour and business interests. Economic groups (including business) were interested in promoting equal opportunities and thus promoting equality through a value-added tax; labour, on the other hand, was interested in equalizing social disparities, which can only be achieved through a progressive income tax. Finally, populist parties were interested in plain and explicit constitutional competences as any constitutional amendment needs to be submitted to popular referendum. The federal power to levy direct taxes and the value-added tax expires in 2006 (Articles 13 and 14 Transitory Provisions). The federal government is therefore only accorded a provisional power in this case. Mainly due to these constitutional limitations, in Switzerland there is a comparatively low level of fiscal centralization.

Direct taxes are the most important aspect of cantonal and municipal tax revenue. According to Article 127 (3) intercantonal double taxation is prohibited, and the Confederation is to take the necessary measures to prevent it. Cantonal income tax is levied at one's place of residence. In order to prevent intercantonal double taxation corporate taxes are levied at the branches where the income was generated. This tax splitting favours fiscal competition. Within the limits of the federal Constitution, the Cantons can decide on the type of taxes they levy, the tax base, the tax scale, the tax rate, and exemptions. Direct taxes, including federal taxes, are assessed and collected by the Cantons (Article 128 [4]). In some cases religious communities

also have the right to levy taxes, which are then equally assessed and collected by the Cantons.

The Swiss taxation system has, inter alia, consequences with regard to tax inequalities among Cantons and municipalities. The global tax burden of a representative taxpayer differs decisively from one Canton to the other (57 to 131 index points by a mean of 100). Depending on their domiciles, citizens in one Canton may pay up to 2.5 times more taxes than do citizens of another Canton. The Constitution provides only a limited federal competence to harmonize the cantonal taxation system (Article 129 [2]). The tax scales, tax rates, and tax exempt amounts are decided either by a cantonal parliament or by popular cantonal referendum (without the intervention of the federal government or legislature). Federal harmonization can only concern tax liability, tax object, taxation period, and procedural and criminal taxation law.

Not only does the tax burden differ decisively among Cantons, but so does the Canton's financial capacity. The yardstick for measuring the financial capacity of the Cantons is established by federal regulations. It is based on a balancing of different indices, such as GDP per inhabitant, fiscal burden, fiscal revenue, and cantonal financial need. The financially weakest Canton has a 7.27 times lower financial capacity than does the financially strongest Canton.

Due to these differences, fiscal equalization has gained in importance. In Switzerland, fiscal equalization aims at giving the Cantons enough revenue to assure that they can provide a minimal - not an equal - level of services. In Article 46 (3) the Confederation is mandated to ensure equitable fiscal equalization. The basis for some fiscal equalization is provided in Article 135, which states that the Confederation is to promote fiscal equalization among the Cantons. When granting subsidies the Confederation is to take the revenue capacities of the Cantons and the special situation of the mountainous regions into account. Article 128 (4) provides that at least one-sixth of the amount raised through federal direct taxes is to be used for fiscal equalization among Cantons.

In October 2003 the Swiss Federal Assembly approved a fundamental new concept of fiscal equalization entailing important changes to the system. This concept was submitted to popular referendum in autumn 2004 and was accepted by the people (i.e., all Swiss voters, as a single constituency) and the Cantons (i.e., voters from each Canton, with the Canton as the constituency). The new equalization scheme is part of a broader reform to disentangle federal and cantonal responsibilities and, in the process, to provide a renewed basis for ensuring that fiscally weaker cantons can handle additional tasks. Basically, this proposal provides that the Confederation should only be responsible for tasks that Cantons can not fulfill themselves or that require uniform regulation. The objective is to ensure that the level of government (Confederation/Canton) that provides the service also pays the costs. In order to achieve these goals the federal government can decide that some intercantonal treaties of cooperation are mandatory for all Cantons. And, as part of the overall bargain, there would be an enhanced equalization fund.

### *Other Powers*

As there is no general list for the distribution of powers it is only possible, through the appended table, to give a general idea of the distribution of powers in Switzerland. As already noted, each power delegated to the federal government requires a specific provision in the Constitution. The

Constitution is divided into different titles. Title III deals with the relationship between the Confederation, the Cantons, and the municipalities. Chapter 3 of this title deals explicitly with the powers of the Confederation. It is divided into nine sections (Foreign Relations, Security, Culture, Environment, Transport, Energy and Communication, Economy, Social Security, and Foreigners). As noted above, the Constitution often delegates to the federal government not only a specific power but also the goals towards which this power should be directed. The system of distribution of powers follows the traditional concept, which distinguishes between exclusively federal, exclusively cantonal, and concurrent powers.

## CONCLUSION

Swiss federalism is the result of a long historical process that has been shaped by different actors, institutions and interests. Three major factors can be identified:

1. The presence of territorial units differing in terms of culture, language, religion, and democratic perception but forced to cooperate for economic and political reasons;
2. A constitution establishing the general principles of democracy and, through a bottom-up approach, dividing powers between the different levels of government; and
3. The extensive use of direct democratic (i.e., popular vote-based) tools as a way of conveying legitimacy to the constitutional and institutional expression of federal principles.

It is also important to stress that Switzerland must constantly seek the right equilibrium between its federalist commitment and the functional requirements of a modern state. This equilibrium cannot be fixed once and for all but, rather, must be the result of political contest.

A full understanding of federalism must therefore take into account how federal principles are put into practice and how they are lived every day. From time to time, such principles have to be adapted or even changed. In Switzerland the main works in progress are the reform of fiscal equalization and the allocation of tasks between the Confederation and the Cantons; intercantonal and transborder cooperation; and, in some Cantons, the drafting of new constitutions.

Will Switzerland be able to cope with globalization? Is Switzerland able to change? Federalism is a political formula that is flexible and that, consequently, is always changing and adapting. Thanks to the system of direct democracy and flexible federalism, Switzerland's capacity for adaptation is greater than many would expect. Direct democracy prevents extreme solutions, provides a high degree of legitimacy for changes, and guarantees that legal provisions will be implemented. If the challenge of European integration does not question these basic principles, which I do not think it will, then Switzerland should be able to adapt its system without losing its identity.

Finally, there is the unsolved problem of modern migration. Today, 20 percent of the people living in Switzerland are foreigners who do not have the right to participate in the democratic process. Can we still claim to be a democracy if we exclude one-fifth of the population? What, given our concepts of diversity and democracy, are our options for becoming more inclusive? Up until now, no acceptable answers have been found.

## ANNEX

Table of the distribution of powers according to different fields of state activity<sup>xii</sup>

### Basic features and financial system

Field	Power	CO	SP	EF	Federal and cantonal							P	E	C
					Legisl.		Implement.			FC				
					EF	SH	EF	SH	EC					
Basic Features														
	Residual Power	Art.3	CA	N	N	N	N	N	N	N	N	N	Y	
	Subsidiarity	Art.42	FR	N	N	Y	N	Y	N	N	N	N	N	
	Implementation of Federal Law	Art.46	CA	N	N	Y	N	N	Y	Y	N	Y	Y	
	Supremacy of Federal Law	Art.49	FR	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
	Cantonal Constitutions	Art.51	DE	N	N	N	N	Y	N	Y	N	Y	Y	
	Communes	Art.50	AU	N	N	N	N	N	Y	N	N	Y	Y	
	Cantonal Existence	Art.52	PO	N	N	Y	N	Y	N	N	Y	N	N	
Financial System		CH3												



	Financial Management	Art.12 6	BA	N	Y	N	N	N	N	N	Y	N
	Taxing Principles	Art.12 7	N	N	Y	N	N	N	N	N	N	N
	Direct Taxes	Art.12 8	N	Y	YL	N	N	Y	N	Y	Y	N
	Harmonization of Taxes	Art.12 9	N	N	N	YP	N	Y	N	N	N	N
	Value Added Tax	Art.13 0	N	Y	YL	N	Y	N	N	N	N	N
	Consumption Tax	Art.13 1	N	N	yc	N	Y	N	N	N	N	N
	Stamp and Withholding Taxes	Art.13 2	N	Y	Y	N	Y	N	N	N	N	N
	Customs	Art.13 3	FR	Y	Y	N	Y	N	N	N	N	N
	Financial Equalization	Art.13 4	FR	Y	Y	N	N	Y	N	N	N	N

Foreign affairs, security, education, and culture

Field	Power	CO	SP	EF	Federal and cantonal							P	EC
					Legisl.		Implement.			FC			
					EF	SH	EF	SH	EC				
Relations with Foreign Countries		S1											
	Foreign Affairs	Art.54	A	Y	N	N	N	Y	N	N	n	n	
	Cantonal Relations with Foreign Countries	Art.56	N	N	N	N	N	Y	N	Y	Y	N	

Securi ty Natio nal and Civil Defen ce		S2										
	Security	Art.57	CR	N	N	Y	N	Y	N	Y	Y	N
	Army	Art.60	N	N	Y	N	N	Y	N	Y	N	N
	Civil Defence	Art.61	FR		Y	N	N	Y	N	Y	N	N
Educa tion Re- search Cultur e		S3										
	Education	Art.62	CA	N	YG	N	N	N	Y	N	N	Y
	Universities	Art.63	CR	N	YG	N	N	Y	N	Y	P	N
	Professional Education	Art.63	N	N	N	Y	N	Y	N	N	N	N
	Research	Art.64	N	N	N	Y	N	Y	N	Y	Y	N

	Statistics	Art.65	N	N	N	Y	N	Y	N	Y	Y	N
	Educational Needs of Adults and Young People	Art.67	SU	N	N	YC	N	y	Y	Y	N	(Y)
	Sport	Art.68	PR	N	N	Y	N	Y	N	N	N	N
	Culture	Art.69	CA	N	N	PR	N	(y)	N	Y	N	Y
	Languages	Art.70	RU	N		N	YO	N	N	N	YO	Y
	Cinema	Art.71	EN	N	N	Y	N	Y	N	Y	N	N
	Church and State	Art.72	CA	N	N	RU	N	N	Y	N	N	Y

Environment and public transport

Field	Power	CO	SP	EF	Federal and cantonal							P	EC
					Legisl.		Implement.			FC			
					EF	SH	EF	SH	EC				
Environment and Land Use Planning		S4											
	Sustainable Deve- lopment	Art.7 3	CP	N	N	Y	N	Y	N	Y	N	N	N
	Environment Pro- tection	Art.7 4	RP	N	N	Y	N	Y	N	Y	N	N	N
	Land Use Planning	Art.7 5	CR	N	N	YP	N	N	Y	Y	N	N	N
	Water	Art.7 6	RP	N	N	Y	N	Y	N	Y	N	N	N
	Forests	Art.7 7	RP	N	N	Y	N	Y	N	Y	N	N	N
	Nature and Cultural Heritage	Art.7 8	CA	N	N	YP	N	Y	N	Y	N	N	N
	Hunting and Fishing	Art.7 9	N	N	N	YP	N	Y	N	Y	N	N	N





	Protection of Animals	Art.8 0	RP	N	N	YP	N	Y	N	Y	N	N
Public Works and Transport		S5										
	Public Works	Art.8 1	CI	N	N	Y	N	Y	N	Y	Y	N
	Road Traffic	Art.8 1	N	N	Y	N	N	Y	N	Y	N	N
	National Highways	Art.8 3	CP	ne	N	Y	N	Y	N	Y	N	BU
	Alpine Transit	Art.8 4	RP	N	Y	N	N	Y	N	N	N	N
	Transport	Art.8 7	N	FR	Y	N	N	Y	N	N	N	N
	Foot Paths and Hiking Trails	Art.8 8	N	N	N	YP	N	Y	N	N	N	N

Energy, communication, and the economy

Field	Power	CO	SP	EF	Federal and cantonal	P	EC
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				Legisl.		Implement.			FC			
				EF	SH	EF	SH	EC				
Energy and Communications		S6										
	Energy Policy	Art.89	CP	N	YP	Y	N	Y	N	Y	N	N
	Nuclear Energy	Art.90	N	N	Y	N	N	Y	N	Y	N	N
	Energy Transport	Art.91	N	N	Y	N	N	Y	N	Y	N	N
	Postal and Tele-communication Services	Art.92	FR	Y	Y	N	Y	N	N	N	N	N
	Radio, Television	Art.93	CR	Y	Y	N	Y	N	N	N	N	N
Economy		S7										
	Gainful Private Economic Activity	Art.95	N	N	N	Y	N	Y	N	N	N	N
	Competition Policy	Art.96	N	Y	Y	N	Y	N	N	N	N	N
	Consumer Protection	Art.97	CR	N	N	Y	N	Y	N	N	N	N
	Banking Insurance	Art.98	N	Y	Y	N	N	Y	N	N	N	N

	Monetary Policy	Art.99	N	Y	Y	N	N	Y	N	N	N	N
	Cyclical	Art.10	FR	N	Y	N	N	Y	N	N	N	N
	Economic Policy	0										
	Foreign Trade	Art.10	FR	Y	Y	N	N	Y	N	Y	N	N
		1										
	Maintaining	Art.10	FR	Y	Y	N	N	Y	N	Y	N	N
	Stocks of	2										
	Essential Goods											
	and Services											
	Structural Policy	Art.10	FR	N	N	Y	N	Y	N	N	N	N
		3										
	Agriculture	Art.10	FR	N	N	Y	N	Y	N	N	N	N
		4										
	Alcohol	Art.10	FR	Y	Y	N	N	Y	N	N	N	N
		5										
	Games of	Art.10	FR	Y	Y	N	N	Y	N	Y	N	N
	Chance	6										
	Weapons and	Art.10	N	Y	Y	N	N	Y	N	Y	N	N
	Military Material	7										

Social security, health, foreigners, and civil and criminal law

Field	Power	CO	SP	EF	Federal and cantonal							P	E C
					Legisl.		Implement.			FC			
					EF	SH	EF	SH	EC				
Housing, Work, Social Security and Health		S8											
	Promotion: Con- struction, Access to Ownership	Art.108	FR	N	Y	N	N	Y	N	Y	N	N	
	Leasehold	Art.109	N	N	N	Y	N	Y	N	Y	N	N	
	Labour	Art-110	N	N	N	Y	N	Y	N	Y	N	N	
	Old Age Survivors Di- sability Responsibility	Art.111	EN	FR	Y	N	N	Y	N	Y	N	N	
	Old Age Survivors, Disability Insu- rance	Art.112	mi	FR	Y	N	N	Y	N	Y	N	N	
	Pension Plans	Art.113	PE	FR	Y	N	N	Y	N	Y	N	N	

Unemployment Insurance	Art.114	EN	FR	Y	N	N	Y	N	Y	N	N
Assistance to those in Need	Art.115	CA	N	N	SU	N	Y	N	Y	N	Y
Family Allowance and Maternity Insurance	Art.116	RP	N	N	RP	N	Y	N	Y	N	Y
Health and Accident Insurance	Art.117	CR	Y	Y	N	N	Y	N	N	N	N
Protection of Health	Art.118	CA	N	N	YT	N	Y	N	N	N	N
Procreation, Genetic Engineering involving humans	Art.119	AP	N	N	Y	N	Y	N	Y	N	N
Medical Transplants	Art.119a	N	N	N	Y	N	Y	N	Y	N	N
Genetic Engineering (Non-Humans)	Art.120	AP	N	N	Y	N	Y	N	Y	N	N





Foreigners	Establishment and Residence	Art.121	N	FR	Y	N	N	Y	N	Y	N	N
Civil, Criminal Law		S10										
	Civil Law	Art.122	N	FR	N	Y	N	Y	N	Y	N	N
	Criminal Law	Art.123	N	FR	N	Y	N	Y	N	N	N	N
	Aid to Victims of Criminal Acts	Art.124	RC	N	N	Y	N	Y	N	N	N	N
	Weights, Measures	Art.125	N	FR	Y	N	N	Y	N	N	N	N

<sup>i</sup> For statistical information about language and religion in Switzerland, please see : [http://www.bfs.admin.ch/bfs/portal/fr/index/themen/bevoelkerung/sprachen\\_religionen.html](http://www.bfs.admin.ch/bfs/portal/fr/index/themen/bevoelkerung/sprachen_religionen.html) (accessed 29 June 2005).

<sup>ii</sup> For the text of the Swiss Constitution, see: <http://www.admin.ch/ch/itl/rs/1/c101ENG.pdf> (accessed 29 June 2005).

<sup>iii</sup> See table annexed to this chapter.

<sup>iv</sup> For further discussion on this theme, see Thomas Fleiner and Lidija Basta Fleiner, *Allgemeine Staatslehre*, 3rd ed. (Heidelberg: Springer, 2004); and Thomas Fleiner, Nicole Toepperwien, and Alexander Mistic, "Switzerland," *International Encyclopedia of Laws: Constitutional Law*, ed. André Alen (Deventer: Kluwer, 2004).

<sup>v</sup> Officially Switzerland is still called a "Confederation" in French and Italian; the German word is "Eidgenossenschaft," which cannot be translated. In this chapter I always use the official term - "Confederation" even though I'm speaking of what, technically, is a "federation." The phrase "the Confederation" refers to the federal (or central) government.

<sup>vi</sup> Reverdin Olivier, *Introducing Switzerland* (Lausanne: Development of Trade, 1967).

vii Jonathan Steinberg, *Why Switzerland?* (Cambridge: Cambridge University Press, 1976).

viii Kenneth D. McRae, "Precepts for Linguistic Peace: The Case of Switzerland," *Language and the State: The Law and Politics of Identity*, ed. David Schneiderman (Cowansville: Editions Y. Blais, 1991), p. 167; Grin François, "Language Policy Developments in Switzerland: Needs, Opportunities and Priorities for the Next Few Years," *Revue Suisse de Science Politique* 3: 108-113.

ix Nicolas Schmitt, *The Foreign Relations of Swiss Cantons within the Frame of the New 1999 Swiss Constitution* (Fribourg: PIFF, 2000), p. 165.

x <<http://www.admin.ch/ch/d/pore/va/index.html>> (accessed 28 June 2005).

xi Unless otherwise indicated, references to articles in this section are from the 1999 Constitution.

xii Explanations and abbreviations for the distribution of powers table:

Column 1 indicates the different fields of powers according to Chapter 2 of the Constitution; Column 2 labels the power and Column 3 indicates the article in the Constitution. Column 4 gives the abbreviations for specific goals and obligations that the Confederation has to observe when using the specific power. Column 5 indicates whether the federal power is exclusive, and it also indicates where the federal government does not have an exclusive power but does have a primary responsibility to legislate. The next six columns indicate the distribution of legislative, executive, and judicial power between the Confederation and the Cantons. In some cases the federal government has the exclusive legislative power, but implementation may be shared between it and the Cantons. In some cases the Confederation and the Cantons share legislative power. The last column indicates the power of the courts. In most cases federal laws are implemented by the Cantons. Although cantonal administrative courts control implementation, in the final instance the federal court can control cantonal administrative decisions. The possibility of the federal court controlling cantonal jurisdiction is indicated by the penultimate column.

## Abbreviations

A Aims of Foreign Policy: Independence, prosperity, welfare, alleviation of poverty, human rights, democracy, peace, natural resources

AP Abuse Protection

AU Guarantee of Autonomy

BA Financial Balance

BU Build and Construct

CA Primary Cantonal Responsibility

CC Civil and Criminal Law, Weights and Measures

CI Common Interest

CI PR Civil Law and Civil Procedure

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CO	Constitution
CP	Cooperation Responsibility of Confederation and Cantons
CR	Coordination Responsibility
CR LA	Criminal Law and Procedure
CH	Chapter
CP	Federal Power only based on a Constitutional provision
DE	Guarantee of Democratic System
EC	Exclusive Cantonal
EF	Exclusive Federal
EN	Ensure an adequate social security provision
FC	Implementing Administrative Decisions is controlled by cantonal administrative courts but, finally, is under the jurisdiction of federal administrative courts
FR	Primary Confederal Responsibility
MI	Pension must be sufficient to cover basic living expenses
NE	National Network
N	No
n	no, with exceptions
P	Parallel Powers of Confederation and Cantons
PE	Company Pensions Plans together with the old age insurance should permit to maintain previous standard of living
PO	Protection
PR	Responsibility to promote
PROF	Professional Education
RC	Common Responsibility of Cantons and Confederation
RP	Responsibility to protect
RU	Responsibility for common understanding

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S	Section
SECU	Social Security (Age, Disability)
SH	Shared Power
SU	Supplement Cantonal Measures
SP	Special Obligation
SU DE	Sustainable Development
STA	Statistics
VI	Aid to Victims of Criminal Acts
Y	Yes
y	yes, with exceptions
YC	Limited to specific products
YL	Limited to exact value
YP	Limited to principles
YO	Restricted to the use of official languages
YT	Limit to its powers for food, drugs, organic material etc; fighting contagious diseases, protection against ionising radiation
yc	May only complement Cantonal measures
YG	Limited to federal grant