I. INTRODUCTION

Switzerland is a small country of 7 million inhabitants surrounded by Germany, France, Italy, Austria and the small principality of Liechtenstein. Although the first historical development of small local state units seeking independence from foreign kingdoms goes back to the 12th century, modern Switzerland has been constituted out of 25 sovereign (6 half cantons) cantons with the first Federal Constitution of 1848. The 26th Canton (Jura) has been constituted out of secession from the Canton of Berne in the end of the seventies. 17 Cantons are German speaking, four Cantons are French speaking, one Canton is Italian speaking, three Cantons are bilingual (German – French) and one Canton has three languages (German, Romansh and Italian). In 1874, the sovereign, that is, the majority of the voters and the majority of the Cantons adopted a new Constitution. This Constitution remained in force although it has been modified by several important amendments (approx. 140) through partial revision. On January 01, 2000, a new Constitution has been introduced. The new Federal Constitution did not radically change the political system. But in particular with regard to federalism it provides quite important new provisions, which might be the beginning of a new federal policy of Switzerland. This paper deals in particular with this new Constitution. The Constitution has been drafted after several failures to modify radically the old Constitution. Thus, the spirit of the founders of the new Constitution was just to modernize the old Constitution without major changes in the system.

Actually, Switzerland faces three important challenges: Globalization and European Integration, Privatization and growing public debts on all levels and finally migration. 20% of people living in Switzerland are foreigners. Switzerland has far the highest percentage of foreigners per capita and far the highest percentage of asylum seekers compared to all other European countries. All those challenges will have important effects on federalism. Will the new Constitution empower Switzerland to face those challenges with flexible, innovative and federalist policies?

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1 Zurich, Lucerne, Uri, Schwyz, Obwald and Nidwald, Glarus, Zug, Solothurn, Basel-City and Basel-Land, Schaffhausen, Appenzell Outer Rhodes and Inner Rhodes, St. Gall, Aargau, Thurgau.
2 Vaud, Neuchâtel, Geneva, Jura.
3 Ticino.
4 Berne, Fribourg, Valais.
5 Grisons.
II. FEDERALISM AS PRE-CONSTITUTIONAL PRINCIPLE

A. Diversity

Swiss federalism has developed out of several different, independent and very diverse communities, which have been structured as rural corporations, small democracies, aristocratic or economic oligarchies. These small corporations did loosen their ties and finally secede from their big neighborhood empires, kingdoms or nations. Thus, they have not been integrated into the nation building process of Europe in the 18th and 19th century. On the contrary, they were able to form their own governmental system and to constitute a state composed of different sovereign Cantons, that is, of politically very diverse political units, of different language communities and different religions. The main purpose of the Alliance (“Bund”), which later developed into a federal state, was to rule the political affairs of the Cantons and of the Alliance independently and according to their own values of democracy.

This policy was the reason, that at the edge of the three big language groups of Western Europe (German, French and Italian) some 25 democratic corporations could unite in an Alliance around the Alps. In 1848, this Alliance has been transformed after a short civil war (“Sonderbundskrieg”, 1847) into a federal state with a Federal Constitution. The Federation is still called Swiss Confederation for several reasons and in particular, because the German name (“Schweizerische Eidgenossenschaft”) can not be translated into French and Italian. The very legitimacy of this unit is based on the constitutional autonomy of the Cantons (self-rule) and their constitution making power on the federal level (shared-rule). The Swiss Confederation exists through and by the will of the Cantons.

Each of the cantonal democratic communities could thus live and develop according to its own culture, history, language and religion. It followed the legal culture of its neighbors and established its own perception of the State, Law, Democracy, and even state-church relationship. They kept their own perception of a cantonal nationhood and state legitimacy. In consequence, they maintained their own cantonal and even municipal citizenship. Thus, until today every Swiss has kept its three-fold citizenship: municipal, cantonal and federal (art. 37 par. 1).

The Alliance and later the federal state were able to maintain their independence from their big and powerful European neighbours, which among themselves were long-time enemies for the sake of their own interest to build up their nationhood. Nevertheless, the Cantons and in particular those at the border-line of Switzerland did maintain their cultural relationship with their big neighbours. Thus, the Swiss citizens had and still have a double loyalty. Politically they are loyal to their own state, but culturally they feel connected to the culture of the big neighbouring nations.

The Cantons and the Swiss Federation have thus adapted in a very diverse manner to the constitutionalism of the modernity and they maintained at the same time their way of corporativism in a rural environment and culture. According to the Preamble, they did not adopt the melting-pot solution of “We the people of...” (US Consti-

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6 Cp. K. W. DEUTSCH, Die Schweiz als ein paradigmatischer Fall politischer Integration, Bern 1976, pp. 21 et seq.
tution). On the contrary, they decided to remain a composed nation and adopted in Article 1 of the 1874 Constitution the following formula:

“Together, the peoples of the 23 sovereign Cantons of Switzerland united by the present alliance, to with: Zurich, Bern, Lucerne, Uri, Schwyz, Unterwalden (Upper and Lower), Glarus, Zug, Fribourg, Soleure, Basle (City and Rural), Schaffhausen, Appenzell (both Rhodes), St. Gall, Grisons, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchatel, Geneva and Jura, form the Swiss Confederation.”

Up to the end of 19th century the causes of conflict were much more religious between Protestants (55%) and Catholics (44%) than cultural between the different languages. This radically changed in the 20th century. Today, religion as a cause of conflict is fading away. Much more important is the language issue. Democratic decisions of the people by referendum show, that language groups have very different opinions on foreign policy, European integration, social security and environment. If in the next years the gap between language communities will become larger and deeper, one can foresee important conflicts between the different communities.

Taking into account these emerging new tensions among different linguistic communities the new Constitution emphasizes the obligation of the Federation to enhance peace and understanding among the different linguistic communities. As the previous Constitution, the actual Constitution declares all four languages namely German (63,7%), French (19,2%), Italian (7,6%) and Romansh (0,6%) as official languages of the country (art. 4). The three main languages (German, French and Italian) are on equal footing. With regard to the Romansh language article 70 of the Swiss Constitution provides only the guarantee for the Romansh speaking citizens to have their official contact with the federal administration in their own native language.

With regard to the other three official languages, they are legally respected with equal value a constitutional guarantee, which has far-reaching practical consequences. For instance, all official decisions in particular all legislations (bills, statutes and ordinances) have to be translated into the three languages. Bills, statutes, ordinances etc. are only valid, if they are published at the same time in the three official languages. Each text and wording has equal value with regard to interpretation. No language has priority, every language has the same original priority. In case of conflict, the judge has to decide according to the most reasonable interpretation, not according to the language, in which the statute has been drafted.

Very controversial is the principle of freedom of language. Two main principles are conflicting. Those who advocate the protection of minority languages feel threatened by the majority. They try to defend their language territory by invoking the collective right of the language group, which within its territory must have the protected right to impose the language of the territory even against the principle of individual right to language. In fact, the new Constitution provides a compromise to this issue. Article 18 guarantees the freedom of language as one of the fundamental individual liberties. Article 70 para. 2 stipulates that every Canton has to designate its official language. In doing so, the Cantons shall, in order to preserve harmony between linguistic communities, “respect the traditional territorial distribution of languages and take into account the indigenous linguistic minorities.” In a conflict between the individual right for language and the collective right of the community to defend its language territory, the collective right wins, if it is for the sake of harmony and peace.
Peace among language groups is also an issue of art. 70 para. 3, which requires from the federal and cantonal authorities to “encourage mutual understanding and exchange between the linguistic communities”.

Multiculturalism, diversity and complexity have often been shaped out of brutal religious wars and ideological controversies with the risk of breaking the country into pieces. Switzerland thus remains a composed nation with an important potential of conflicts. However, there is today certainly a large consensus that minority interests should not be pursued with violence but rather with peaceful political means. What are the reasons, which make all different communities to renounce violence and basically to accept peaceful decision making processes? The very reason is to be found in the legitimacy of the unity of the nation. But as the nation is not ethnically homogeneous, the only factor, which does unify the country is the conviction into the same political values and the internalised acceptance of the rule of the games of a corporate local and federal consensus democracy. Such general acceptance, however, can not only be based on specific shared rule principles; it depends just as much on the self rule principle, that is, on the autonomy of cantons and municipalities.

The characteristics of the new Constitution will put more emphasis on the shared rule principle than on the self rule principle, that is, on the autonomy of the cantons. It provides in particular more possibilities of cantonal governments to participate in executive decisions on the federal level.

The most provoking challenge of Swiss federalism is its multiculturality. This multiculturality is not the outcome of an immigration country like the US, Canada or Australia (all also federal countries). Multiculturality has its roots in ancient history of communities, which have always lived in Switzerland. The still almost not solved challenge of immigration countries with regard to their indigenous population can be compared to the multiculturality European countries have to cope with. The major and most challenging question thus is: How can so diverse a society as the Swiss community, which is not homogeneous like Germany find its unity and legitimacy in common political values? How can the exclusive political values of local democracy and federalism, which are not universal and inclusive enable a composed people to be united within a European environment, which today does base its political unity on universal values such as democracy, rule of law and human rights?

This challenge becomes even more worrying in our times. Both developments, that is, the European Integration and the globalization do trigger emotional counter reactions in form of nationalism and ethnic conflicts on the local level. Financial restrictions for local authorities require centralization by either “supracantonal” cooperation or merger of cantons or municipalities. Emotions of the citizens on the other hand postulate for more autonomy and in some cases even secessions. So we still have to ask ourselves whether the Swiss, belonging to different cultures, will be able in future united Europe or united world, to identify as a people united by the same political beliefs and political culture.

The State of Modernity has its legitimacy either by the state created Nation or by the pre-constitutional ethnically homogeneous people. The “nation” has been “consti-

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tuted” by the state that is by the citizens (citoyens) of the state territory accepting the universal values promoted by the constitution (French case). The state can also be created - as in the German case - by the ethnically homogeneous people. According to this understanding, the ethnically homogeneous people is united by nature that is by common history tradition, culture, language or religion. This unity by nature “produces” the right of self-determination. The Preamble of the German Constitution thus stipulates: “...the German People have adopted, by virtue of their constituent power, this Constitution”.5 Between these two poles of its neighbor countries, France and Germany, Switzerland was able to establish its own concept of a composed nation based on a social compact to establish cantonal authority and on a federal alliance to establish federal authority.

While the Constitution of 1874 explicitly mentioned that the different people of the sovereign cantons form the Federation, the new Constitution does base its legitimacy on the Swiss nation and on the peoples of the cantons.6 Here the question remains, whether the people of Switzerland is a unity and what is the bases of this unity? It can well be that the traditional political procedures and institutions such as direct democracy, federalism and local authority have been so strongly internalized that they turned a culturally diverse population into a politically homogeneous people. It may well be, that federalism in particular that is shared power of the different cultures and strong autonomy of cantons and municipalities has been and still is the most important integrative factor of the reality of the Swiss population. It is certainly thanks to these common political values that Switzerland has not been up to now been split up into language and/or religious communities.

Thus, the legitimacy of the Swiss Confederation is based on the peoples of the cantons as well as on a “Swiss nation” composed by a rich diversity of different cultures and religions. This nation is fragmented by the Cantons, which represent the political units of the federation. The peoples in the Cantons are politically committed to their Canton and the Federation, culturally they are linked to the strong culture of their related people of the neighbour country. The homogeneity of the state thus is based on the common understanding and on the common perception of the fundamentals of politics. This historical reality implements finally the federal structure of the federation. If the Constitution would not take this reality into account, the Confederation would finally split into the different ethnic communities.10

It is this reality of the fragmented Swiss society which has induced the drafters of the new Constitution to provide already in the Preamble a clear mandate of the Confederation to be “determined to live our diversity in unity respecting one another. And already art. 2 par. 2 of the Constitution does oblige the Confederation to foster the cultural diversity of the Federation. Such provision is certainly unique compared with other constitutions. The US-Constitution is based on the melting pot concept: “we, the people of the United States”. The South African Constitution also stipulates unity by diversity, but taking into account the wounds of history, it confesses to heal the divisions of the past.

10 P. SALADIN, Commentary (Constitution 1874), ad art. 3, N 9.
The paradoxical formula of “diversity in unity” (Preamble) describes the federal principle according to the Swiss understanding of its multiculturality. Diversity in unity is the starting point of different theories on federalism. It does not only emphasize that different cultural communities can be united by their firm will to be a political union, but it expresses also the dialectic tension between self-rule, shared rule and solidarity. Federalism as a structural principle depends on the constitutionally established and protected balance between self-rule and shared rule. All measures of the federal government and in particular the federal statutes have to respect this balance in order to accomplish the mandates of the constitution.

The constitutional powers of federal and cantonal authorities are separated and divided according to the Federal Constitution (art. 3) and in practice they are redefined in a complex network, which can only function on comity and federal-cantonal partnership. Swiss Federalism thus is not only a complementary instrument for an additional separation of power in order to limit state powers by vertical checks and balances. The multiculturality and the diversity of the Swiss society is the preconstitutional reality which is reflected in Swiss Federalism. Thus, federalism is a principle, which underlies the legitimacy of the constitution.

B. Peace and Liberty

1. Balance between individual and collective Rights

Primary aim of the state of “Modernity” is individual liberty, that is protection and promotion of fundamental rights and values. A multicultural state as Switzerland, which is confronted with a high potential of internal conflicts has not only to worry about individual liberty but also to safeguard peace and harmony among the different communities. In fact, it has to manage and enhance peace not only between individuals, but just as much between the different communities. One of the most important aims of Swiss Federalism thus is to guarantee apart from individual liberty to sustain the multiculturality of the rich and diverse cultural communities.

In order to respond to these necessities the Federal Constitution did establish political institutions and procedures, which enable a peaceful settlement or management of internal conflicts. In this sense, the Preamble of the new Constitution explicitly stipulates to “strengthen liberty, democracy, independence and peace (not only international) in solidarity and in openness to the world.” So not only liberty but also peace among the cultural communities are the declared aims of the Constitution. In fact, during our history individual liberty has often been restricted for the sake of peace between the cultural and/or language communities. Religious and language communities did always claim their rights under the title of collective rights, whenever they felt threatened by other more numerous or more powerful communities.

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2. Liberty of Religion and Peace among Religious Communities

With regard to the liberty of religion (art. 15) the Federal Court did not only take into account the individual freedom as fundamental right of the individual, it respected just as much also religious peace as one of the main purposes of the Federation. So the Court based its decision not explicitly but implicitly on the collective right of religious communities in order to pursue among the communities and their traditional territories the interest of the majority religion. Today, religion as a potential cause of conflict in Switzerland is fading away. The worry for religious peace has no priority anymore. Nonetheless art. 72 par. 2 empowers the federal and cantonal authorities explicitly to take the necessary measures in order to maintain public peace among the different religious communities.

3. Liberty of Language and Principle of Territoriality

Although the peril of religious peace is not anymore at stake within Switzerland, religious and language conflicts did raise all over the globe and turned into the most dangerous conflicts threatening world peace today. As far as Switzerland is concerned the tensions among different language groups remained. Thus, the Constitution (art. 70) conveys the explicit burden and responsibility on the federal and cantonal authorities to seek harmony among the different language communities. This is a particular burden for bilingual or even multilingual Cantons. Three cantons are bilingual (French/German: Valais, Fribourg, Bern) and one canton is even trilingual (German, Italian, Romansh: Grison/Graubünden). The canton of the Tessin is only Italian speaking, but it has a small German speaking municipality (Bosco Gurin). Harmony and peace between different language communities is not only an issue between Cantons, it is also an issue of intercantonal harmony.

The contradictory wording of the Constitution between the individual right to language (art. 18) and the collective right of minority territories to protect their language (art. 70) have already been mentioned. They will need quite innovative interpretation by the Federal Court.


The Constitutions of 1848 and of 1874 have been drafted under the influence of the civil war between the catholic conservative cantons. The Catholics were linked to the Catholic Monarchies and the Protestant liberal Cantons where under the influence of the French Revolution and did promote a liberal constitution reflecting the universal values of the declaration of human rights. The Catholic Cantons established a specific alliance (Sonderbund) in order either to defeat the liberal Protestants or to secede from a liberal democratic Switzerland. Catholics wanted to restore Switzerland according to the ancient aristocratic times of the 18th century. Liberals wanted to constitute a new unitary state of modernity and have governmental branches with separated and limited powers in order to protect individual rights. In the so-called war of the “Sonderbund”, the Catholics were defeated and the liberals could establish a constitution according to their liberal perception of Switzerland.

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However the sense of compromise established through centuries of conflicts and the preparedness for partnership prevailed. It enabled the founding Fathers of the new federal state they wanted to constitute to respect the interests of the conservatives by providing strong autonomy and shared rule possibilities based on the concept of equal sovereign rights of the Cantons. This respect of equal sovereign rights of the Cantons as federal units did have and still has far reaching consequences as the size in population and territory of the Cantons is very different. The factual “asymmetry” between the big and the small Cantons is unusually big. This has as an effect, that for instance in a constitutional referendum the vote of a citizen of the half Canton of Appenzell (which counts only as half cantonal vote) has a value 37 times higher than the vote of a citizen of the most populous Canton of Zurich.

The conservative Cantons accepted on their hand some liberal constitutional rights and the prohibition of any particular political alliance among Cantons. As some particular borderlines between some Cantons have often been disputed with the risk of open conflict, the Constitution considered the territories of the Cantons as “sacred” and thus did not foresee any territorial change among the territories of the Cantons. On the contrary, for the sake of peace among the Cantons the Constitution obliged the federal authorities to protect and to guarantee the territory of the Cantons.

Nevertheless, the most important dispute on territory concerning the Jura region of the Canton of Berne could not be settled by such explicit lack of regulation. It did not find a final solution with such rigorous freezing of cantonal territories. Thus, this policy did not prevent the people of the French speaking part of the Canton of Berne living in its northern part, which was the historic unity and region of the Jura to require secession from this Canton. The dispute lasted more than a century.

Finally, without any specific provision in the federal Constitution, the Canton of Berne decided, empowered by its own residual power, to grant the right of self-determination to the people living in this area. However, this right was provided for the region as a whole, but at the same time the right of self-determination was given to every district and in certain cases even to the municipalities. If the region was favorable for secession, the smaller districts and in some instances even the municipalities could decide whether they would prefer to remain in the Canton of Berne or to join the new secessionist Canton of Jura. This cascade of different votes allowed both Cantons to reshape the borderlines not along the language border but also along the religious division between French speaking Protestants and French speaking Catholics living in the Jura region of the Canton of Berne.

If the right to self-determination would have been given only to the entire territory of the region as a whole, the conflict could not have been settled democratically. A vote based on a simple majority principle with consequence for the entire region would have been a major cause for unsolvable conflicts.

Thus, the pragmatic (although sometimes very painful) procedure of the secession of the Canton of Jura from Berne has respected the following principles:

1. All parties accepted a procedure based on a common consensus. Never the idea of a unilateral secession has been realistically invoked. The final decision of a new canton required 1st the constitutional amendment of the Canton of Berne accepted in a popular referendum, 2nd a vote of the people living in the area of the Jura region, 3rd the acceptance of the districts, 4th the decisions of the municipalities and 5th the acceptance of the majority of the
Cantons and the people of Switzerland to integrate the Canton of Jura as new federal and constitutional unit within the Confederation.

2. Decisions did not follow the simple majority principle ("the winner takes all"). They took into account even majorities of small municipalities, which were de facto granted the status of a state unit, as they had the power to decide which state they wanted to belong to.

3. It was considered to be part of the constitutional autonomy of the Canton of Berne, to provide in its own cantonal constitution a democratic procedure which could implement a peaceful settlement of the right to self-determination for a region within the territorial sovereignty of the Canton.

4. The entire procedure has been influenced by the necessity, that in such crucial decisions even small minorities belonging to a municipality must be part of the consensus making process.

Based on this democratic procedure, Switzerland finally amended its Federal Constitution by providing that the Canton of Jura should be constituted as a Canton within the Confederation and that it would be the 26th constituent Canton of the Confederation (art. 1 in fine).

This democratic and finally peaceful secessionist procedure was the model for a new provision in the new Constitution regarding territorial changes. Art. 53 provides that any modification with regard to the number of the Cantons, or with regard to their status are subject to the assent of the population concerned, of the Cantons concerned, and of the People and the Cantons. Thus the new Constitution regulates explicitly the democratic procedure for secession or re-union.

In neither case, it can be a unilateral decision. Secession or re-union require the consensus first of the seceding or uniting population and second of the entire population of the country and the majority of the Cantons. The procedure seems to take at best as well minority interests as majority interests into account. So one can say, that since the year 2000, the Ethiopian Constitution and the Swiss Constitution are the only constitutions in the world, which explicitly regulate secessionist procedures.

Paragraph 3 of article 53 does even provide a procedure for changes of territory without modification of the number of the Cantons. In case of such territorial modifications, the proposals are subject to the assent of the population concerned, of the Cantons concerned and the assent of the Federal Parliament. As there is still dispute within the Canton of Berne with regard to its Protestant French speaking region of the Jura, which did not want to join primarily the new French speaking, but Catholic Canton, the region in a certain future might still decide according to this procedure whether it prefers to join the new Canton of Jura.

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17 BASTA (note 3), pp. 56 et seq.
Switzerland of the last century was internally very fragile and externally under the threat of neighbouring monarchies. This potential instability was the reason the Constitution of 1874 did prohibit the Cantons to constitute political alliances, which could endanger the unity of Switzerland. The new Constitution has renounced such prohibition, because there is no real threat to the unity of the country. This may be a case to prove, that democratic constitutions can very well provide institutions and procedures to integrate and strengthen the legitimacy of the state.

C. Federalism and Democracy

1. The Tyranny of the Majority

Is democracy limited by federalism; does federalism violate the democratic principle of majority? Does it even replace democracy by granting minorities rights which they would never get in a system based on a “winner takes all” democracy? Democracy is based on the principle of one person, one vote, one value. Such equal rights principles can only be achieved and implemented in a democracy of a unitary state. In such a centralized state minorities have no possibility for autonomous rulings, opting out from majority decisions or to participate (shared rule) in the central decision making process with any chance to defend their legitimate interests with regard to the majority. Equality in the sense of equal rights is the main target of a democracy, which has developed out of the French Revolution and of the “Westminster-model”.

This understanding of democracy as a pure and efficient majority-producing instrument does not correspond to the Swiss perception of democracy. In Switzerland, democracy is perceived as a tool of individual and collective self-determination and thus of individual and collective freedom. If self-determination can not be achieved individually, it has to be achieved democratically within a community. In smaller communities, chances for every participant to pursue its interests as much as possible are higher than in bigger communities. The smaller the democratic unit, the higher are possibilities of self-determination for each group-member. If democracy is understood as an aim to guarantee individual and/or collective self-determination, it can only be optimized in a decentralized and federal way. As only federalism, conceived as state organizational principle, can allow the decentralization of decision making to small collectivities, which can also participate through the shared power principle on the decision making process on the central level, federalism and democracy have to be seen complementary to ensure freedom and self-determination. Federalism, understood from this point of view, is even the necessary condition for the establishment of a consensus driven democracy. Without federalism, democracy will fade away concurrently and vice versa. Thus, the consensus driven democracy in Switzerland is essentially linked to Swiss federalism.

2. Consensus-Driven Democracy

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20 Cp. art. 7 Constitution 1874.
22 Cp. A. DE TOCQUEVILLE, De la Démocratie en Amérique, Oeuvres complètes II (Pléiade), Paris 1992, 2. part, chapter 7: De l’omnipotence de la majorité aux Etats-Unis et de ses effets, and chapter 8: De ce qui tempère aux Etats-Unis la tyrannie de la majorité.
Democracy is not only a procedure to establish a legitimate government but also a procedure to ensure peaceful settlements of conflicts in particular the conflicts of a state fragmented by different ethnic communities. It has high legitimacy based on rational arguments and pragmatic compromises between conflicting interests. The real motor for this consensus driven democracy is based on the Swiss system of direct democracy. In case of popular referendums decisions taken by the legislature are ratified by the simple majority of voters. Constitutional amendments need additionally to the majority of the voters the majority of the cantons. This seems to exclude any consensus, as every simple majority can decide.

However, reality is different. Government proposals are usually rejected in a referendum, when they lack fundamental consensus among the political elite and the big parties. Thus, the political elite is doomed to find compromises if it needs the approval of the majority of the voters. On the other side, no party has a veto power. If one party misuses its position in the process to find consensus, its position will certainly be rejected in the referendum.

This consensus driven democracy is one of the basic pillars of a state with a composed nation. The Westminster type democracy would condemn any minority as a permanent loser. Only in a system, which has as target of the decision making process to achieve the highest majority possible and not only 51%, minorities have a chance not only to be protected as folklore minority but to get its legitimate interests to be accepted by the majority. Thus, a consensus driven democracy enables to legitimize the policy with regard to minorities.

Permanent losers will never identify with the state they live in. They will always feel to be second class citizens. Thus a multicultural state can only survive, if it introduces a democratic system which has as target consensus and not simple majority.

In a multicultural state, in which existing cultures should flourish and develop and in which they should not be assimilated and "equalized" in a melting pot, each cultural community must have the possibility to identify with the state. Such result is only possible, if decisions, which will have essential and fundamental consequences for the state are supported by a large consensus and the great bulk of the different communities.

Apart from the system of direct democracy the principle of shared powers established by the Constitution does already by itself limit the simple majority principle. Shared power principles are provided through the second chamber, which has been constituted according to the American Senate with 46 members (23 full cantons) of the state council: two per canton and one per half canton (of 6 half-Cantons) (art. 150). Shared-rule is not only implemented through the second chamber. Just as important is the power of the cantons to participate with the majority of their voters in all constitutional referendums. According to the constitution any constitutional amendment needs to be ratified by the majority of the voting citizens and the majority of the cantons (art. 140 par. 1 lit. a), which - as already mentioned - differ to a large extent in size and population. An indirect effect on the shared power system in Switzerland has to be seen in the electorate system. As the cantons are the constituencies for the members of the first chamber, the cantonal parties decide on the candidates in the federal parliament. This system including the principle of a fixed term collegial executive does avoid too much political influence of federal (central) politics within cantonal votes (as in Germany). On the contrary, it gives Cantons through their parties an additional possibility to influence federal policies. These
constitutionally provided rules of shared power did not change with the new Constitution.

In general terms, we can even observe, that the new Constitution has enlarged the shared power possibilities and diminished the self-rule, that is the autonomy of the cantons. As international co-operation, in particular the integration into the European Union, will have great impact on Swiss Federalism, the new Constitution contains much more provisions, which take into account international co-operation. This co-operation shall not be limited to the federal government. Article 53 provides that Cantons have to participate in all decision making processes with regard to international co-operation. A specific statute already regulates the participation of the cantonal governments in matters of foreign policy.

In addition, art. 45 provides that Cantons shall participate in all federal matters and in particular in legislation, where it is so provided in the Constitution. This provision does also oblige the federal government to inform Cantons of important policies the federal government is planning.

The new Constitution thus contains important provisions to enlarge the shared power rule. Historically, the founding Fathers of the Constitution did defend the equal sovereign rights of the Cantons sharing federal power on the bases of the quality of sovereignty they are conveying to the federal government by the Federal Constitution. In quantity those sovereign rights may be different but they do not differ in quality. Thus, the Constitution did implement two principles of representation: Representation of the people based on one person, one vote, one value in the first chamber and representation of the people’s of the Cantons based on two representatives for one sovereign Canton, one representative for one sovereign half Canton.

The new provisions of the Constitution do not follow the liberal principle of people’s representation by parliament. It enlarges the shared power rule by empowering cantonal governments. Thus, one can say in general that the new Constitution opens a new concept of federalism of the executive branches of government. In future, Cantons will have the right to the shared power rule based on the principle of representation through their citizens as voters and through their executive branches of government.

3. Democracy of municipalities

Diversity and multiculturality are not limited or identical with the territories of the Cantons but in several cases with the territories of the municipalities. Multiculturality with regard to religion and with regard to language is often determined by municipal boundaries. This is the very reason, why federalism in Switzerland can not be reduced to the relationship between Cantons and federal government. It has to incorporate also the local democracies of the municipalities. The small democracy on the municipal local level is the essential element of Swiss federalism. Contrary to most actual nation states, which by the historic tradition of the monarchies have been developed “top – down”, Switzerland is one of the very few countries, which has been developed “bottom – up”. The municipal democracies are the units at the bottom of the state, which guarantee and foster the diversity of Switzerland.

This corporate democracy is an essential element of the perception of democracy and federalism. The Swiss citizen is citizen of its municipality, of the Canton and of the Confederation. Each taxpayer pays taxes to the municipality, to the Canton and
to the federal government. The municipality takes care of daily necessities of citizens and through the system of direct democracy they control financial expenditures, elect local parliaments as well as the members of the executive council, decide on taxes, local planning etc. The municipality is the area where self-determination is directly implemented. According to the Swiss understanding of federalism, the federal structure of the country has to ensure in particular the local democracy as part of self-determination and conflict settlement.

According to the self rule principle, the structure, organization and autonomy of municipalities are subject to cantonal law. This was the reason why the autonomy of municipalities has not even been mentioned in the old Constitution. The new Constitution provides a special section with art. 50 for the protection of municipalities. It guarantees their autonomy according to cantonal law and obliges the federal government to evaluate all measures, which might have consequences for the municipalities. The economic development and in particular the side effects of globalization, the complexity of the welfare state and the principle of the executive federalism which overburdens in particular small (less than 500 inhabitants) municipalities with tasks they can not any more cope with. So Cantons are confronted with the necessity to provide or even to enforce the merger of small municipalities, which do not dispose of the necessary means with regard to their human and financial capital in order to fulfill their basic obligations. Such merger of municipalities is regulated by cantonal law, which in most cases requires a referendum of the population concerned. As in any merger at least one part of the population will lose the name and therefore the identity with the commune, the citizens often prefer to pay a higher price in taxes than to give up its own home community and merge with another municipality.

D. Equal Living Conditions

Article 72 par. 2 of the German Constitution provides federal legislative competence if it is necessary for the establishment of equal living conditions throughout the country. A similar provision is to be found in art. 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.”

Constitutionalism of the state of modernity requires equal rights with regard to equal opportunities, not equal results. Neither equal opportunities nor equal results are guaranteed according to the Swiss Constitution. Swiss federalism does not promote equality of living conditions among the different Cantons. Diversity is only possible if human beings pay the price of economic discrimination among different Cantons and even different municipalities. Swiss federalism has always paid this price for the sake of fiscal autonomy of the Cantons. Equalization would mean centralization and this would destroy diversity. With the European Union, which promotes an open market based on equal opportunities, Switzerland has to face a new period of federalism. Thus, the federal parliament has already put into force a law guaranteeing

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23 This article has originally been drafted to limit the legislative competencies of the federation, in practice it became the very provision for the creation of unitary law cp. the German Supreme Court case law: BVerfGE 18, 415; 26, 383; BVerfGE 4, 127; 26, 383; 78, 270.
equal opportunities with regard to the internal market in Switzerland. This law needs quite a few cantonal legislative modifications in order to give up internal cantonal discrimination. However, according to evaluations of the federal parliament most Cantons did not follow the federal obligations. This example shows how difficult it will be even within Switzerland to establish in reality equal opportunities.

In a state with fragmented society, solidarity is not only an issue between individuals but just as much also between the respect of different cultural communities and religions. Thus, solidarity as a basic element holding the potential conflicting society in Switzerland together has to provide equal opportunities not only for individuals, but also for communities. Equality of community may often have even priority with regard to equality of individuals. This may be the very reason, why the old and the new Constitution did (and still do) not have any provision guaranteeing equal opportunities among individuals or guaranteeing equal living conditions for the whole population. It gives equal rights and the “right to be equal” as part of a minority the same value.

The understanding of equal rights has accordingly two different meanings: The right to “be equal” and the right to “equal rights”. If persons belonging to the Romansh minority have only equal rights, they will always be considered or they will consider themselves as second class citizens. In a totally equal society, they remain a tiny minority, which feels de facto discriminated in a state, which reduces the citizen to an only political person naked of any culture. If they have on the other hand the right to be equal, they must be accepted on equal terms as being part of their cultural community. A Romansh speaking citizen needs to have the same value as part of his community just in the same in the same way as persons belonging to the majority of the German speaking community. It is obvious that Switzerland is seeking a balance between equal individual rights and the right to be respected as equal although belonging to a minority.

This has also consequences with regard to inequalities of taxes between Cantons and municipalities. Thus, also the new Constitution provides only a federal competence to harmonize the cantonal legislative systems of taxes and the procedure of taxing among the different Cantons (art. 129 par. 2). The amount of taxes, that is the income per year, on the other hand is decided either by cantonal parliament or by popular referendum. As a consequence, individuals with the same income have to pay considerably different taxes depending the municipality and Canton they have their domicile and therefore obliged to pay taxes. Article 135 of the Constitution does provide for some equalization.

The system of fiscal equalization has been under general discussion and will be fundamentally modified. It will have basic influence on Swiss federalism. The main

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26 Art. 46 par. 3; 83 par. 3; 86 par. 3 lit. e; 128 par.4 and in particular art. 135 Constitution.
target is to give cantonal policy more autonomy by global grants, to support inter-
cantonal co-operation, to give economically weak cantons more federal resources
and to finance cantonal tasks, which for the very reason of the specific environment
are very costly.

III. INSTITUTIONS AND STRUCTURE OF SWITZERLAND WITH REGARD TO ITS
“FEDERALIST PHILOSOPHY”

A. Cantonal Autonomy (self rule)

1. Cantonal Sovereignty

The state according to the continental law perception is the Leviathan according to
the social contract theory of Thomas HOBBS. Sovereignty is perceived as a “Big
Bang”, out of which the legal system, the state, the constitution making power, le-
gitimacy, court jurisdiction did emerge. The supreme power and jurisdiction can not
be divided. Either the competence belongs to the Federation or to the Cantons. If it
belongs to the Federation, the Cantons can not be states. A state without sovereignty
can not exist; States and sovereignty are indivisible. Those, who still advocate this
theory of absolute sovereignty, can not accept the idea of a division of sovereign
powers. Although in theory sovereignty is not divisible, the old as well as the new
constitutions claim the Cantons to be sovereign as far as their sovereignty is not lim-
ited by the Federal Constitution (Art. 3). The residual power remains with the Can-
tons, which as sovereign units, handed over partial sovereignty to the Confederation.

This sovereignty is limited, but Cantons dispose of all traditional state powers, as
they hold all three branches of Government: Legislative, executive and judicial
power. They also have a limited constitution and even treaty-making power (art. 56).
They decide on their democratic system and determine the power of their sovereign
in their system of direct democracy and they decide on their own structure of decen-
tralization including the powers of local authority. Much more important is the le-
gitimacy of state government. This legitimacy does not depend on the federal le-
gitimacy but on the peoples of the Canton legitimacy. Cantons do not derive their
legitimacy from the federal government; their power structure are and have to be le-
gitimized by their own people. Thus, the legitimacy of the federal and cantonal
powers in Switzerland do depend on different constituencies. Sovereign are the peo-
ple (art. 148 par. 1), which give legitimacy to the state power. In Switzerland, de-
pending on its factual diversity, the constituencies, which provide legitimacy are di-
vided by the federal and cantonal sovereign.

2. Are cantons „States“?


28 SALADIN, (note 5), N 41
29 For a thorough analysis cp. M. IMBODEN, „Die staatsrechtliche Problematik des
schweizerischen Föderalismus“, in: DERS., Staat und Recht, Ausgewählte Schriften
und Vorträge, Basel/Stuttgart 1971, pp. 175 et seq.
30 HAMILTON, Federalist Papers, Nr. 33
31 Cp. also SALADIN, (note 5), N 47.
This question is related to the European understanding of the “state” as a collective unit conceived as the fountain of justice and law. It is related to the European perception of the theory of the state, which has been developed parallel to the building of the European nation state in the 19th century. The question, whether Cantons have to be considered as states, has concrete consequences in particular with regard to international law. International law still considers states as units and only subject to international law. However, in strongly decentralized federal states the subjects of the federation are also participating in international decisions and specially in the international treaty making. International law neglects this fact and denies subjects of federal state to be parties before international courts. Thus, if Switzerland would join the European Union, Cantons could never sue or be sued before the European Court, although there might be cases, in which the responsibility to apply European law is up to the Cantons and not to the Federation.

As states, the Cantons decide their own constitution. They have the limited but still undisputed constitution making power. The Preamble of the Constitution of the Canton of Jura, for instance, invokes the French Declaration of Human Rights, the Universal Declaration of Human Rights and the European Convention on Human Rights. Power of the governmental branches are not derived from the Federal Constitution or federal law, they depend on the legitimacy of the people of the Canton. If federalism can be a response to multiculturality, the Cantons as basic holders of cultural communities have a legitimacy which is not derived from any other unit than from their own people, the very constituency of the Canton.

3. Autonomy and Division of Powers

According to art. 3 of the Constitution, all powers of the federal government have to be worded out in the Federal Constitution. As Cantons have residual and original power, their competencies are not mentioned in the Constitution. According to several cantonal Constitutions the residual power did even remain on the municipal level. According to the Constitution of 1874, the federal Government could only claim competencies by interpreting the relevant articles of the Constitution. This has changed with the new Constitution. According to article 42 par. 2, the Confederation shall assume tasks which require uniform regulation. This article can be given a very broad interpretation. If this would be the case, the federal legislature would factually decide which competencies are needed for the necessary uniform regulations. All these articles have been drafted with the idea, that the new Constitution will, contrary to the old Constitution, provide a constitutional review of statutes. This “revolutionary” proposal did not get the approval of Parliament. Thus, it will be in the only jurisdiction of the federal legislature to decide, to what extent article 42 par. 2 can be used for federal competencies without explicit constitutional provision. Will it have the same impact as the American commerce clause of the US Constitution?

With regard to the actual distribution of powers between the Confederation and Cantons, the new Constitution did not provide any important changes. One of the main ideas of the Constitution was, to give the actual system a new wording, but not to provide any important amendments, which would dramatically change the balance of powers in Switzerland.

32 Cp. also art. 42 par. 1 Constitution.
4. Federal Standards and Principles

Swiss Federalism has followed the tradition of all federal states in Europe including the “executive federalism” of the European Union. These federal states provide as major policy the implementation of federal law by the agencies of the federal subjects. There are usually no federal agencies dealing directly with the implementation of federal law into reality. This is the responsibility of the Cantons. Thus all federal statutes and ordinances are in general first interpreted and applied by cantonal administration and controlled by cantonal administrative courts depending on cantonal administrative procedure. This type of federalism is called “executive federalism” (Vollzugsföderalismus). This very principle of executive federalism is for the first time now explicitly provided in art. 46 of the new Constitution. Executive federalism is based on a hierarchical relationship between Cantons and federal government in all matters of federal competencies. There is no competition provided between federal and cantonal governmental branches as in the American federalism, where federal agencies implement federal statutes and state agencies implement state bills.

Taking this context into account, federal authorities try to establish a new policy with regard to cantonal administration. They want to leave detailed regulations to the cantonal legislature and to restrict themselves to policy making, to issuing federal standards and principles and to empower the Cantons to implement those principles within their own legislation. So the competencies given to the Confederation in the Constitution are usually restricted to the legislative powers. Implementation of the statutes is part of the residual power of the Cantons. This policy has not changed with regard to the new Constitution. In fact, the Cantons have the experience to deal directly with their citizens. If federal agents would implement federal law within the Cantons, resistance of the population towards unknown federal agents coming from different ethnic communities would be very provocative.

B. Participation of Cantons in the Decision Making Process of Federal Authorities (shared rule)

1. Self rule and shared rule

According to the Constitutions of 1848 and 1874, autonomy of Cantons had clear priority. However, since 1874, based on approximately 140 constitutional amendments, the originally large powers of the Cantons shifted slowly to the central Government. This process of centralization diminished cantonal autonomy gradually. As already mentioned, the new Constitution provides now a general provision, which can be interpreted as a general clause similar to the principle of subsidiarity and thus diminish cantonal autonomy by legislative majority not only in a more difficult procedure for constitutional amendments. A new constitutional amendment provides now for federal competencies in the field of court procedural rules. This will have important centralizing impact on the entire judiciary.

The challenge of the European Union on Swiss Federalism will also undoubtedly have important centralizing effects. This may have been the most important reason, why the new Constitution does much more focus on the shared-rule than on the self-rule principle. In this sense, Swiss Federalism is more and more influenced by the German tradition. Three major changes have to be mentioned in this context: The first two are obvious: The right of Cantons to participate in foreign policy decisions of the federal government and the general right to participate in internal legislation. Indirectly also their general possibility to regulate matters of general concern through international or intercantonal treaties has to be mentioned. Partnership between cantons and partnership between cantons and federal government as well as partnership with European regions are probably the most interesting.

2. Council of States and Executive Federalism

The strengthening of the shared rule principle does not lead, as one could expect, to a strengthening and widening of the powers of the second chamber. It is implemented by strengthening the possibilities of cantonal executive bodies in the decision making process of the federal government. In order to participate on the federal decision making process, cantonal executives had to create a new body, which did represent all cantonal governments. Thus, the widening of the shared rule principle on the federal level had as direct consequence the establishment of the council of presidents of cantonal governments. This did lead to better co-operation between cantonal governments as such. This development did also enable the cantons to use new ways and tools of cantonal and intercantonal partnership co-operation. The creativity of this new way of cooperative federalism is new and may lead Switzerland to new flexibility.

In the field of Universities, the legislature did establish a body composed of representatives of cantonal governments and of the federal council, which has to plan and establish the strategies for the development of federal and cantonal universities. Such development would not have been possible a couple of years before. There are also new tendencies, which might even lead to new supracantonal co-operation on regional bases. This is already at least a partial reality in the field of professional education. Discussion is open not only for direct partnership of executive bodies but also of cantonal parliaments. It may well be, that this new flexibility of intercantonal co-operation will lead to the establishment of real intercantonal bodies with specific democratic legitimacy based on the citizens and united by a functional unity such as a school, hospital or police region.

Thus, Swiss Federalism will face new administrative bodies, new specific regional parliaments and new executive branches all united to fulfill specific tasks in order to have more efficiency. Federalism or shared power of representative bodies will be concurred with a shared power system of executive and administrative bodies. As far as the new Constitution is concerned it seems clear, that this Constitution does not want to restrict federalism only to the legislative branch and to representative bodies, but that it enlarges federalism to the executive branches.

35 Cp. also P. HANNI, Schweizerischer Föderalismus und europäische Integration, Zürich 2000, pp. 388-89.
C. Partnership between Confederation and Cantons

1. Solidarity

A couple of years ago, the Canton of Basle introduced in its Constitution a provision, which imposed the cantonal authorities to fight with all legal means against any atomic power plant, which threatened to endanger the population of the Canton. As cantonal constitutions have to be approved by the federal parliament, the question was, whether such constitutional provision, which may be contrary to the general interest of the Swiss population depending on atomic energy, would be acceptable. Parliament did approve the amendment with the argument, that authorities are only obliged to use legal and not with illegal means in their struggle against atomic power plant.

At almost the same time, Parliament had to approve the Constitution of the Canton of Jura. This new Canton, which has been established out of the catholic and French speaking part of the Canton of Berne, provided in its Constitution a provision, which enabled the cantonal government to foster political tendencies of the remaining Protestant but French speaking neighboring minority of the Canton of Berne to secede from the Canton and to join the new Canton of Jura. This article has been considered as a provision, which would stir up secessionist conflicts within the Canton of Berne. The federal parliament did not approve the article although it did not empower the new cantonal authorities of the Jura to use illegal means.

The issue in both cases is solidarity. In the Basle case, it has been considered, that solidarity is not violated. In the Jura case, the federal parliament was of the opinion, that the constitutional obligation to foster secession of a neighboring region violates the principle of solidarity. The very issue with regard to solidarity is: What solidarity the majority can reasonably and legitimately expect from the minorities, what solidarity is necessary from the majority in order to have legitimacy with regard to the minorities?

A federation (foedus, alliance) can only exist on the bases of the solidarity of its partners. Partnership is indispensable between the Cantons but also between the federal branches of government and cantonal branches of government. Without such solidarity, the Confederation can not exist. This is the philosophy behind article 44 of the Constitution which reads as follows:

“1 The Confederation and the Cantons shall collaborate, and shall support each other in the fulfillment of their tasks.

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

3 Disputes between Cantons, or between Cantons, and the Confederation shall, to the extent possible, be resolved through negotiation or mediation.”

In fact, federalism in such a small country as Switzerland is only possible if the separation of powers finds its complementary system in a network of informal co-operation on all levels of government and administration including also labour unions and economy, the so-called “social partners”. This network might often not been very transparent, as it is informal. But it is this comity of different partners, which does finally hold Switzerland together. The complexity of state tasks and state obligations need such kind of co-operation not only among magistrates and elected
authorities, but just as much among civil servants of federal and cantonal administration. This is the content of Art. 44 par.137.

Although this provision was not part of the old tradition, its content was living reality. Without this reality such provision would remain on paper. But because it has been written out of long lasting political experience, it is only the formal and legal ratification of an attitude which is a historic reality.

The explicit obligation to solidarity is to be found in par. 2 of this article. This is not limited to an obligation of loyalty as it is the case according to the German constitution for the German Länder. It is an obligation to solidarity which goes beyond loyalty in the sense that it is less hierarchical and more driven to partnership. If partners, in particular those representing the majority are not prepared to sacrifice some of their interests for the sake of the whole unity, federalism will sooner or later break into pieces. 38

2. Supremacy of Federal Law

Not all federal states have clear provisions to guarantee the supremacy of federal law. 39 The Swiss Constitution has already since the beginning of the Confederation followed the American model of the supremacy clause.40 As according to the Continental law systems, the “law” must be a unity in which different bills, statutes, ordinances of federal, cantonal and municipal governments are integrated into a clear hierarchy. This is today self evident for the German constitution41 as well as for the European Union.42 Security of law and in particular equal protection can only be guaranteed on the bases of the principle of the supremacy clause.

In the old Constitution, the supremacy clause has been hidden in the provisions regulating the transition. The new Constitution determines clearly in art. 49: “Federal law takes precedence over contrary cantonal law. The Confederation shall ensure that the Cantons respect federal law.”

The Constitution thus implements Kelsen’s philosophy of hierarchy of law. 43

3. Constitutional Review and Rule of Law

Switzerland belongs to those states, which introduced already in the 19th century constitutional review. But this constitutional review was limited to the review of cantonal statutes by the Federal Court. It is true that at that time the federal system could only function, when citizens were able to defend their constitutional rights

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39 This constitutional right is now explicitly provided in Art. 49 par.1 Constitution.
40 Cp. art. VI par. 2 of the US-Constitution.
41 Art. 31 German Fundamental Law.
against the cantonal legislature before a federal court. Thus, the Constitution of 1848 provided already a very limited possibility of the citizens to sue their Cantons before the Federal Court and to defend their constitutional rights against violations by cantonal authorities. This constitutional protection was indispensable. The power to defend constitutional rights against cantonal authorities is also provided in the new constitution.

However, although there have been many initiatives in our history to introduce also the possibility of constitutional review of federal statutes, Parliament did finally reject all those proposals. The majority of the Swiss is still too much committed to the idea of Rousseau and his “volonté générale”, that bills and statutes are not only written law but the very implementation of justice, which can not be abolished by a court decision. The legislature is the highest representative of the nation and therefore issues the volonté générale, which can not be questioned for what any constitutional reasons ever. As all statutes, which passed Parliament are subject to an optional referendum (art. 141), they are considered to be ratified either silently by the people, which did not use the right of referendum or explicitly because they have been approved by the majority of the people.

There is no judicial body, which would have the legitimacy to put into question, what has been tacitly or explicitly ratified by the sovereign. This argument proved even today to be more convincing against all traditional common law argumentation, that men should be governed by law and not by men.46 As consequence, the Cantons have no possibility to defend their autonomy against infringement of the federal legislature. Constitutional review thus has remained to be a one way road against cantonal violations but not against violations of the federal legislature.


Diversity and autonomy have been guaranteed up to now by the clear constitutional restriction of the federal powers. Direct democracy, the guarantee of cantonal autonomy in the Constitution and a political climate defending federalism have been the real guarantees of the Swiss multiculturality. These instruments have been developed for the settlement of conflicts and for the defense of minority interests. The new Constitution conveys from now on specific obligations to care, to support and sustain federalism, diversity, solidarity and comity.47 The federal government has to foster languages, to care for the mutual understanding, to guarantee peace among religious communities and to support poor regions, big cities and mountain areas. The Confederation has with regard to its legislation and administration to take cantonal particularities into account and at the same time to provide largest possible autonomy to the Cantons (art. 46 par. 2). The Confederation has to respect cantonal independence and self-rule (art. 47), but it also has to decide in which moment some regulations on the federal level need to be issued for the sake of necessary uniformity. (art. 42 par. 2).

45 Art. 189 par. 1 letter a Constitution
47 Cp. Preamble, art. 2, 69 par. 3 and 71 par. 2 Constitution.
Thus, the federal branches of Government will have to assume new responsibilities. They will need new tools for information in order to provide, plan and react according to their obligations. When they plan and decide new legislation of administrative measures, they are obliged to make assessment on the impact of federalism. On the other hand, they will determine, which federalism is good for Switzerland, a responsibility they did not have to assume according to the old Constitution.

IV. CONCLUSION

Switzerland does not only face globalization, at the same time, that markets become global, emotions seem to become more local. The local nationalism, which one can not calculate and foresee, is a challenge of even greater importance for a federal country composed of multiple diversity. Big and homogeneous nation-states are confronted with globalization. Multicultural federal states face “localization”. Thus, they are confronted with a double challenge. Globalization diminishes political capacities and in particular the power of the state to react politically and to develop an independent political strategy within their territory. Emotional localization on the other hand can only be coped with, if the political units dispose of high flexibility and the political capacity to find innovative answers to the requirements of national communities.

Internationalization on the other hand offers to federal units an incredible chance to enlarge their political capacities and flexibility through regional international partnership. In particular, one has to admit for Switzerland that through the European Union the co-operation of cultural communities with their neighbor states will broaden and strengthen their self-consciousness towards the central government. The growing international network between small communities will open new chances for partnership, cultural development and co-operation.

The central government on the other hand is much less confronted with emotional localization, if the fragments of the state through their international co-operation feel more self-confident with regard to their cultural partnership possibilities.

As far as the shared rule principle is concerned, a federal order can only exist, if there is a minimal consensus with regard to the basic values, which the great bulk of society accepts throughout all different cultural diversities. Therefore, cantonal constitutions must contain some basic values, which are generally accepted and thus approved by the federal parliament. (art. 51 par 1).

If those values are not cultural, which in a multicultural society can not be the case, they must be political. If they are political, they ought to be universal and therefore acceptable for every human being. The Swiss values are certainly political, but one can not claim, that values such as direct democracy are universal. Thus, the basis of the Swiss unity has to be found in political values, which are generally accepted by the citizens of the Swiss society. For any human being integrated in the Swiss tradition, they are generally acceptable and inclusive; for people not familiar with the democratic tradition of the Cantons and the Confederation they are exclusive. Thus, based on political values such as federalism and direct democracy a specific political culture was established, which seems to hold the fragmented nation together.

Those who consider federalism as basic value for a state order, have to be aware, that federalism in history has been one of the most dynamic, flexible but also fragile structure for state order. Contrary to the unitary system, federalism can be formed
and developed in great diversity. Shared rule and self rule can be strengthened, broadened, weakened or restricted. Even the principle of equal rights of federal subjects is no taboo. There are important examples of asymmetric federal states. It is the existing diversity of the society, its tradition, culture and language, the political values (consumer democracy or citizen democracy) which determine the concrete shape of a federal state. Those pre-constitutional realities are the decisive factors, which influence the federal system and create or destroy legitimacy of a federal system. This openness and dynamism should enable federal systems much better than inflexible unitary states to join international organization and to delegate part of their already limited and divided sovereignty. Thus, federal systems should easier adapt to the modern trends of Internationalization, European integration and globalization.

For Switzerland the very challenge will be, whether it can transcend its philosophy and its system of a multicultural society composed of traditional communities into a system which is open not only to global capital but also to global labor. Can federalism become a tool to integrate different cultures immigrating to our country? Like most European states, Switzerland is also threatened by racism, which discriminates against foreigners. Will it be able to face this challenge based on the tradition of diversity and federalism?

Further Reading:


* This paper has been translated and adapted by Thomas FLEINER for the international audience from a common paper of Thomas FLEINER and Alexander MISIC, Föderalismus als Ordnungsprinzip der Verfassung, in:

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AUBERT/MÜLLER/THÜRER, Handbuch des schweizerischen Verfassungsrechts, Zürich 2000, §27.