

Ulrich Klöti †
Peter Knoepfel
Hanspeter Kriesi
Wolf Linder
Yannis Papadopoulos
Pascal Sciarini

Handbook of Swiss Politics

2nd, completely revised edition

Neue Zürcher Zeitung
Publishing

2.1 Federalism

Adrian Vatter,
Department of Politics and Management,
University of Konstanz

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1 The Foundations of Swiss Federalism¹

The foundations of the Swiss federal State

During the eventful first half of the 19th Century, the territory of present-day Switzerland passed through various forms of governance, from a loose-knit federation to a centralized, unitary State modelled after the French State (*Helvetische Republik*). The military defeat of the conservative cantons of the *Sonderbund* paved the way for the creation of a modern federal State. In contrast to the nation-States² that were created in the surrounding countries, the newly created federal State² did not adopt the vision of a Swiss nation, unified by language, ethnicity or culture, but pursued the idea of a multicultural State from the very beginning (Linder 1994, 2005). At the same time, the federal Constitution of 1848 was based on a compromise between a majority of liberal-Protestant centrists and a minority of conservative-Catholic federalists. Thus, the tasks of Government remained largely in the hands of the 25 (now 26) individual cantons. However, through the abolition of internal customs duties, and the harmonisation of external ones, the new Constitution created the conditions for a single economic area. It also assigned to the federal level several new responsibilities in the fields of foreign policy, customs policy, the postal and coinage systems, and parts of the military.

The Constitution of 1848 was characterized above all by a combination of two core elements which had different origins (Häfelin/Haller 2001):

- The basic principles of democracy and the rule of law (constitutionalism), which were embodied in the constitutions of the liberal cantons. These principles included a compulsory referendum on constitutional matters, representative democracy for ordinary legislation, division of powers, equality before the law, and basic constitutional rights.
- A federal structure along the lines of the US Constitution of 1787, with a two-chamber system.

The Swiss Constitution of 1848 also determined the relationship between the different political institutions, a relationship that is basically still valid today. The current organization of political institutions was established according to the principle of the division of powers (Federal Council as Government, Federal Assembly as Parliament, and the Supreme Federal Court). Following the American example, the Parliament was created as a bicameral system in which the two chambers, the National Council and the Council of States, have equal rights. As a consequence, every decision is subject to the democratic as well as the federal principle (equality of "member states"). Beyond the bicameral system of the Parliament, the close combination of federalism and democracy finds its

expression in the double majority (i.e., a majority of both the population and the cantons) required for a revision of the federal Constitution.

The federalist compromise embodied in the Constitution, with its non-centralization of political power and the granting of extensive autonomy at the cantonal and local levels, alleviated the tensions between Protestants and Catholics and between federalists and centrists during the first decades of the new federal State. It also allowed for diverging social and cultural developments within the different cantons. At the same time, the Federation furthered the creation of a Swiss multicultural society (Papadopoulos 1997: 37).

With the complete revision of the Constitution in 1874, further aspects of legal harmonization were transferred to the federal level. From that time on, the Federation had total responsibility not only for the military and legal systems, but also for legislation in the fields of social security and traffic and communications. With the introduction of the legislative referendum—and the introduction of the popular initiative for a constitutional amendment in 1891—the instruments of direct democracy were also significantly strengthened. The extension of basic constitutional rights (e.g., freedom of religion and conscience) and the expansion of the powers of the Federal Court were additional features of the Constitution of 1874. From a federalist perspective, the most important change in the completely revised Constitution of 1999 was the expansion of the cantons' rights of participation in the area of foreign policy (Hänni 2000).

In sum, the newly created federal State of 1848 was characterized by: a *multi-ethnic* federalism, which stood in contrast to the predominant nationalist integration strategy of other European States at the time; the strong autonomy and involvement of the cantons; and the principle of popular sovereignty, which was inspired by the American Constitution and was unique in the European context.

The basic principles of Swiss federalism

The far-reaching autonomy of and equality among the cantons, their rights to participate in the decision-making process of the Federation, and their duty to cooperate, are at the core of the Swiss federal State (Aubert 1991, Häfelin/Haller 2001). The guiding principle of cantonal autonomy is based on Article 3 of the Constitution. In line with the principle of cantonal sovereignty, this subsidiary general clause states that all powers that have not been explicitly attributed to the Federation are automatically vested in the cantons. The creation of new federal powers requires a constitutional amendment that must be approved by a double majority: a majority of all voters and a majority of the cantons. There are no universally valid precepts on how to divide the responsibilities between the Federation and the cantons. Any task can be attributed to

either the Federation or the cantons, or, as has become more common during the 20th Century, the Federation and the cantons can jointly assume responsibility for a particular task. However, the adoption of the reform of the system of financial perequation and task redistribution (*NFA*) in the popular vote of November 2004 was an important step in a move towards increased disentanglement of task allocation between the Federation and the cantons, and towards the financing of this disentanglement (Frey 2001, 2005).

The basic principles of cantonal autonomy can be specified as follows (Aubert 1978, Kriesi 1998):

- *The existence of the cantons is guaranteed (Article 1, federal Constitution).* Legislation at the federal level cannot abolish or amalgamate the cantonal level. Changes to cantonal territories have to be approved by the majority of the people and of the cantons (e.g., the canton of Jura in 1978).
- *The cantons are free to choose their internal organization.* A main feature of the Swiss federal State is the cantonal freedom of organization. The cantons decide upon their own constitution, their internal organization, the political rights of their citizens and the organization of their municipalities.
- *The cantons choose their governments independently.* The Federation does not essentially have the power, for example, to dismiss a cantonal government or to appoint members of the Council of States. However, cantonal freedom of organization is not unlimited. The Federation has established several principles which cantons must respect in their internal organization. Among these are the principle of republicanism (i.e., a democratic form of governance), the autonomy of municipalities, a guarantee that the political will of the citizens will be made known accurately, the rule of law, and an appropriate structure for implementing laws (Häfelin/Haller 2001).
- *The cantons have far-reaching responsibilities.* This is expressed in particular in Article 3 of the Constitution. This general clause on the division of powers between the Federation and the cantons, which functions as an actual rule for the attribution of the burden of proof, is a concrete manifestation of the subsidiarity principle. The responsibility of the Federation for a particular task can be claimed only if it is proved that the cantons are not competent. However, the cantons are usually responsible for implementing federal policies.
- *The cantons have their own financial resources.* The cantons have the right to collect their own taxes (state taxes), and even the municipalities have the power to levy taxes.
- *The cantons are not subject to political control.* Without legal authority, the Federation cannot interfere in the political process of the cantons or

“correct” unwelcome political decisions. However, given increasing cooperative federalism, this principle has to be qualified.

- *The cantons participate with equal rights in the decision-making process of the Federation.* The principle of the *equality of the cantons*, that is, the rule that no canton should have an exceptional status, is a core element of the Swiss federal State. The principle of absolute equality particularly concerns the rights of the cantons to participate in federal decision-making. The existence of half-cantons, which constitutes an exception to this rule, is a historical peculiarity. Their status is relevant in the following two respects: first, in calculating the cantonal votes in federal referendums, their votes only count as half; second, they are represented by only one delegate each in the Council of States.

The *direct participation of the cantons in federal decision-making* is another central feature of the Swiss federal State. The various forms of cantonal participation are among the “pillars of traditional federalism” (Hangartner 1974: 401) and are described in detail in the next section.

Besides these structural principles, two other basic characteristics of Swiss federalism must be mentioned. First, on the *process level*, there is the evolution towards cooperative “executive federalism” for the implementation of federal tasks as the dominant mode of the division of labour between the two state levels (Vatter/Wälti 2003; Wälti 2001). Second, on the *political-cultural level*, there is the anti-statist ideology, the subsidiarity principle, and ideas about solidarity and about social and economic compensation between the cantons (Linder 1994, 2005).

2 The Institutions of Swiss Federalism

The practical implementation of the main federalist principles, such as partial autonomy, or cantonal participation and collaboration at the federal level, depends on certain institutional arrangements. The federal process of exchange flows *vertically* as well as *horizontally*. While the rights of the cantons to participate in federal decision-making are guaranteed by the vertical institutions of federalism, the horizontal institutions facilitate cooperation between the cantons (Neidhart 1975, 2001). This section illustrates the vertical and horizontal institutions of Swiss federalism and considers a number of problems and projects for reform (Vatter 2006).

The vertical institutions of Swiss federalism

The upper house of Parliament: the Council of States

The Parliament of the Swiss federal State consists of two chambers with equal rights, the National Council representing the people, and the Council of States representing the cantons. This bicameral system is seen as one of the core elements of cantonal influence in federal decision-making. The Council of States comprises 46 members: two members from each of the 20 full cantons and one member from each of the six half-cantons. The voting procedures and salaries of the Councillors of State are regulated by cantonal law. Until the 1970s, the Councillors of State of some cantons were elected by the cantonal parliaments, but now all elections are based on direct popular vote. With the exception of the canton of Jura, all cantons follow the majority rule. The term of office is four years in all cantons, and, with few exceptions, elections are held at the same time as the elections for the National Council.

In Germany, the upper house (*Bundesrat*) comprises delegates from the governments of the *länder*. These delegates have a binding mandate. By contrast, the Swiss Councillors of State are delegates of, and represent the population of, the cantons. They vote without instructions, just like US Senators (the so-called "Senate principle"). Accordingly, empirical studies (Heger 1990, Jaag 1976, Trivelli 1974, Wiesli/Linder 2000) emphasize that the interests of the cantons are hardly articulated any differently in the Council of States than they are in the National Council, and that the Council of States therefore fulfils its purpose as a representative of cantonal interests only to a limited extent. Critics also point to a doubling of conservative interests in the Council of States due to the equal representation of small and large cantons. The Council of States is indeed a stronghold of the conservative parties. However, not only the political Left, but also other social groups such as women, the young and the inhabitants of urban areas are seriously under-represented. In this context, Kriesi (1998) has pointed to the veto potential of a small minority of 20% of the population in the federal legislative process.

In practice, however, relations between the two chambers are not very conflictual, and the potential for blockage is limited. According to evaluations of the parliamentary reconciliation procedures (a special procedure, known in German as *Differenzbereinigungsverfahren*, through which the chambers try to eliminate their differences) between 1875 and 1989 (Trivelli 1974, Huber-Hotz 1991), in most cases, the National Council and the Council of States were able to reach an agreement after just one round of deliberations. Even though the number of bills over which the chambers have disagreed has diminished since 1972, the behaviour of the two chambers differs in various ways. The Council of States acts more like a "legal conscience" and adopts a more liberal stance on

economic questions than the National Council. From various studies (Grangé 1987; Jegher *et al.* 1996; Wiesli/Linder 2000), it can be concluded that, although its crucial task of representing the cantons has declined in importance, the Council of States has initiated most of the relevant changes that have had a federalist purpose. Moreover, in the majority of cases, the Council of States has adopted a less centralist position than the National Council.

The overall assessment of the Council of States provides an uncertain picture. On the one hand, it is increasingly losing its legitimacy due to its one-sided party-political and socio-economic composition and, in practice, contributes only modestly to the direct promotion of cantonal interests. It tends to favour the well-organized interests that already dominate the National Council, a tendency that also manifests itself in the minor disagreements between the two chambers. On the other hand, observers acknowledge that the Council of States is quite capable of fulfilling other traditional tasks of an upper house, such as the strengthening of political consensus, and that it contributes to the stability of political decisions through double deliberations (Grangé 1987; Huber-Hotz 1991). The basic problem of the Council of States therefore lies not so much in its underpinning of the political *status quo* as in the one-sided protection of minorities and in the growing importance of the democratic principle in comparison with 1848. Today, it is the small, rural cantons that benefit most, while other regional interests, particularly urban regions and larger cities, are increasingly under-represented.

Consequently, the various reform projects for the Council of States call for a better recognition of the population ratios of the cantons and for a more direct representation of the cantons in the upper house. However, not all proposals are equally far-reaching (Vatter 2006). Whereas Neidhart (1975) suggests creating a federal assembly with only one chamber, in which every cantonal government would be represented by one member, Jaag (1976) recommends a double mandate for the Cantonal Council (the government of the cantons) and the Council of States. Huber-Hotz (1991) proposes that the committees of the Council of States should be composed according to regional, as opposed to party-political criteria, and that the two half-cantons of Basle be upgraded. Linder (1991) sees a possibility of strengthening the democratic principle by redistributing the tasks and functions between the two chambers, by enhancing the representation of the most populous cantons in the Council of States, and by strengthening the role of the lower chamber in the reconciliation procedure. Finally, there is a proposal which has its origin in a fundamental critique of traditional policy-making processes and which calls for the establishment of a "Council for the future" as a third parliamentary chamber that would represent the interests of future generations (Unteregger 1998).

The cantonal vote on constitutional amendments: the need for majority support from the cantons

Since 1874, constitutional amendments have had to be approved by a majority of the voters as well as by a majority of the cantons. While this rule remained uncontested for about 100 years and had almost no practical consequences, it has come under strong attack from various sides in the last 20 years. The most important arguments that have been advanced in favouring of revising the relevant provision (Article 123 of the Constitution) can be summarized as follows.

The first argument points to the unequal demographic development in the different cantons as a result of industrialization and subsequent migration into urban agglomerations. This can be illustrated with the oft-quoted example that, in votes that require a double majority, the vote of a citizen of Appenzell Inner-rhoden counts about forty times more than the vote of citizen of Zurich. A direct consequence of this growing population imbalance between small and large cantons is that an ever declining number of voters can block a double-majority bill. Today, this so-called "smallest possible blocking minority" (Germann 1991: 262f; Vatter/Sager 1996) lies at about 9% of the voting population, if the "no" votes are distributed optimally among the small cantons. The effective blocking minority lies between 20% and 25%. Hence, the Swiss political system reveals a tendency that is typical of modern federal States. This is referred to as the "homogeneity problem" (Kilper/Lhotta 1996: 69) in research on federalism. If the member states of a federation, in addition to differences in territory, show increasing disparities in population as well as in economic and financial resources, these asymmetries make the maintenance of the federal balance increasingly problematic. A second reason for the increased potential for conflict between the popular voice and the voice of the cantons lies in the steady increase of double-majority votes. In this context, Germann (1991: 263 *et seq.*) speaks of an "inflation of double-majority referenda". While there were only 46 double-majority votes between 1951 and 1969, that number rose to 113 for the period between 1970 and 1990. This trend has continued in recent years. Between 1991 and 2000 alone, a further 70 double-majority votes were submitted to the population.

Extensions to the cantonal majority requirement are directly linked to this increase in double-majority votes. Wili (1988: 157) points out that, "in the course of recent Swiss history, the cantonal majority requirement has witnessed a gradual but wide-ranging expansion in three ways". First, the introduction of the (specifically worded) initiative for a partial revision (amendment) of the Constitution in 1891 enabled the cantons to take part directly in votes on popular initiatives. Second, the revision of the "emergency procedure" after the Second World War provided that "urgent ordinances" (*dringliche Bundes-*

beschlüsse) that are incompatible with the Constitution must be submitted to the people and the cantons within a year. Finally, in 1977, the cantons obtained the right of co-decision for the ratification of international treaties on the accession to supranational communities or to organizations of collective security.

Since 1848, a total of eight bills have been rejected as a result of the cantonal majority requirement; six of them within the last 35 years. These bills covered issues such as the protection of tenants, public finance, education, economic policy, energy policy, cultural policy and immigration policy, or in other words, key controversial issues in post-War Swiss politics. In particular, the more recent cases addressed important provisions of the Constitution. In the late 1980s, Wili (1988: 240) was still able to maintain that, as a rule, an exclusively cantonal veto could have only a delaying effect since, in most cases, a rejected bill would be re-submitted to the people and the cantons relatively quickly and often successfully. However, in the light of voting results in recent years, this assessment seems too optimistic (European policy, naturalization).

Table 1: *Popular votes with conflicting popular and cantonal majorities*

Bills	Year	% yes population	cantons
Weights and measures	1866	50.5	9.5: 12.5
Proportionality rule for National Council	1910	47.5	12:10
Protection of tenants and consumers	1955	50.2	7:15
Civil protection	1957	48.1	14:8
Fiscal policy of the Federation	1970	55.4	9:13
Federal responsibilities for education	1973	52.8	10.5: 11.5
Articles on economic policy	1975	52.8	11:11
Article on energy policy	1983	50.9	11:12(1)
Cultural policy	1994	51.0	11:12
Facilitation of naturalisation	1994	52.8	10:13

^a From 1978, the canton of Jura is counted as the 23rd canton.

Sources: Germann (1991: 266) and Vatter/Sager (1996: 175).

An analysis by canton of the voting results for the eight bills that failed due to the cantonal majority requirement identifies the "winners" and "losers" of the double-majority clause (Vatter/Sager 1996).³ Among the "winners" were, first of all, the cantons of the former *Sonderbund*, in particular the rather small and, in comparison with the rest of Switzerland, conservative, rural cantons such as Uri, Schwyz, Obwalden and Nidwalden, Glarus, Zug, and the two half-cantons of Appenzell. In this sense, the cantonal majority requirement remains a very efficient protection of the Catholic cantons of central and eastern Switzerland which were part of the defeated *Sonderbund*. However, the exclusively French-speaking cantons of western Switzerland, as well as Ticino, are definitely among

the losers under the double-majority rule. For instance, in relation to the bills on energy policy, cultural policy and naturalization policy, the four French-speaking cantons, which have almost ten times as many voters as the mountainous cantons of central Switzerland, were on the losing side. This same pattern is also valid for the various "quasi-conflicts" in recent years. Apart from the French-speaking and Italian-speaking minorities, the urban cantons stand out as another group of losers. The people of cities such as Zurich, Berne, Basle and Geneva, who tend to be more receptive to reforms and who have a more progressive outlook than the rural population, are in a particularly weak position. In double-majority votes at the federal level, they are often outvoted not only by the smaller cantons but in many cases also by the rural populations of their own cantons.

In recent years, a number of proposals for reform of the cantonal majority requirement have been made. One set of proposals would modify the majority rule and diminish the voting power of the small cantons (e.g., by requiring a two-thirds majority to reject a bill). A second set of ideas calls for the distribution of the cantonal votes proportionally based on population figures. Finally, according to a third set of proposals, specific, local minority interests such as those in the French and Italian parts of the country or in the large urban centres would be given more weight.

An application of these models to the double-majority votes which were held between 1970 and 1995 shows that even a small modification of the voting power of the cantons would have major consequences (Vatter/Sager 1996). However, most of the models violate a crucial criterion of Swiss federalism, namely the basic equality of the cantons. This raises the question of whether it is possible to find other models that do not violate this core principle. Reforms are particularly urgent in relation to those contested decisions that suffer from an evident lack of democratic legitimacy, that is, decisions in which a clear majority of the voters disagreed with the majority of the cantons. In such cases, one possible solution would be the principle of a "qualified majority of the people". According to this model, the democratic principle would prevail if, and only if, a clear and qualified majority of voters (e.g., 55% of the voters) were in favour of a double-majority bill (Vatter/Sager 1996). In contrast to the other proposals, the "qualified majority of the people" would apply only to those votes in which the results are particularly questionable from a democratic point of view. Another possible approach would be Linder's model of the "stronger majority" (Linder 2005). In cases where the two majorities are unequal, the proportionally stronger majority would prevail. This proposal would be easy to manage and would not necessarily weaken the federalist principle.

The cantonal initiative

The cantonal initiative, which was introduced in 1848 to compensate for the fact that the cantons did not have the right to impose mandates on their delegates in the Council of States, gives every canton the right to submit an initiative demanding an amendment of the Constitution. In all cantons, the Parliament or, alternatively, the Government, can exercise this right. In ten cantons, a cantonal initiative can also be launched by the electorate (Lutz/Strohmann 1998: 99). In contrast to the popular initiative, the cantonal initiative is not an actual initiative but only a petition. Thus, whereas a successful popular initiative must necessarily be submitted to the people and the cantons, the cantonal initiative represents only a request to the Federal Assembly. If one of the two chambers dismisses the request, or if no common decision is reached by the two chambers, the cantonal initiative has no further direct effects. If both chambers accept the cantonal initiative, a commission is appointed to draft a bill in the same way as for a parliamentary initiative (Baumgartner 1980; Wili 1988).

Until the 1970s, the cantonal initiative was used only rarely, but it has steadily gained importance since then. On average, scarcely a dozen cantonal initiatives were submitted per decade prior to the 1970s. In the 1970s and 1980s, the total rose to more than twenty; and between 1987 and 1991 alone, 36 cantonal initiatives were presented. A total of 189 cantonal initiatives were submitted between 1978 and 2001. By far the most cantonal initiatives are launched by the canton Geneva, followed by the cantons Jura and Basle City, while the central Swiss cantons (UR, NW, OW, ZG) make use of this instrument only rarely (Neuenschwander 2006). Roughly every fourth cantonal initiative deals with health, labour, and social security issues. Institutional questions, traffic and communications policy, and energy policy are also common themes. As with other types of initiatives, the direct rate of success is relatively low, although substantial indirect effects can be discerned. For recent times, Neuenschwander (2006) concludes that only one third of all cantonal initiatives achieve a certain effect, for instance by triggering a postulate or a motion in the federal Parliament. Neuenschwander (2006) particularly highlights three functions of the cantonal initiative: the function of protesting against unwelcome federal laws (e.g., health insurance law); the "advertising" function for concerns in one's own canton; and the possibility for cantonal parliaments to participate in and influence ongoing federal legislative processes.

Given the cumbersome nature and relative lack of success of cantonal initiatives, in the 1980s Baumgartner (1980: 148 *et seq.*) and Wili (1988) put forward three reform proposals, varying in scope, whose aim was to improve the efficiency and effectiveness of the cantonal initiative. Since then, these proposals have in fact partially been implemented. The first proposal would provide that

cantonal initiatives would only be considered permissible if they contain a detailed draft. A further proposal calls for the introduction of the principle of “discontinuity”, according to which cantonal initiatives not yet dealt with at the end of a legislative period would become invalid. The third and most fundamental reform proposal puts the cantonal initiative on an equal footing with the popular initiative.

The cantonal referendum

According to the federal Constitution, 50,000 voters or, alternatively, a minimum of eight cantons can demand a popular vote on a federal law, on a federal ordinance (*allgemeinverbindlicher Bundesbeschluss*) or on certain international treaties. Under federal law, the cantons can decide which authority is responsible for a decision; accordingly, differing regulations apply in the cantons. Given the required quorum of eight cantons, the cantonal right to launch an optional legislative or treaty referendum had never been successfully exercised by the end of the 20th Century (Wili 1998: 341). This changed at the beginning of the 21st Century with the dispute over the tax laws proposed by the Federation. After an amendment of the federal proposals by the National Council and Council of States, as a result of which the cantons would have suffered substantially increased tax losses, 11 cantons under the leadership of the Conference of Cantonal Governments (*KdK*) launched a successful cantonal referendum for the first time. Together with left-wing, green circles, the cantons won a majority of votes in the popular vote of 16 May 2004, rejecting the tax laws proposed by the Federation. According to Fischer’s (2006) case study, the reasons for the successful use of the cantonal referendum were the cantons’ institutional reforms, which made it easier to launch referendums, the organizational improvement of the cantons’ position *vis-à-vis* the Federation which resulted from the expansion of the Conference of Cantonal Governments, and the dominance of party political interests over cantonal interests in the Council of States.

The right to demand an extraordinary meeting of the Federal Assembly

Based on the Confederate Pact of 1815, the federal Constitution contains a provision by which a minimum of five cantons can demand an extraordinary meeting of the Federal Assembly (Wili 1988: 145). However, this instrument has been of no practical use to date, since the constitutional quorum of five cantons has never been achieved since 1848 (Wili 1988: 354). The increase in regular sessions of the Federal Assembly, new communications technologies and the differences between the procedural rules of the cantons have made this instrument irrelevant (Wili 1988: 368).

The cantons in the pre-parliamentary decision-making process

During the 20th Century, as a consequence of the developing democratic welfare State, the pre-parliamentary consultation procedure (*Vernehmlassungsverfahren*) has become an important channel through which organized interests influence the legislative process of the Federation. The 1947 revisions of the constitutional provisions on economic policy made consultations with the cantons and with economic interest groups compulsory. The complete constitutional revision of 1999 strengthened this consultation procedure, and since 1991 it has been regulated by decree. The purpose of this procedure is to reduce the frequency of referendums and to ensure, at an early stage of policy formulation, that federal bills are sensibly drafted and easy to implement.

The official position of the cantons – i.e., their position as “member states” and as agencies that implement a significant part of federal legislation – is of great importance in the Swiss federal system. The main reason is that, in the consultation process, in contrast to the Council of States, the cantons can express their will in a direct and undistorted manner. Because of this, Schenk (1997) views the pre-parliamentary consultation procedure as the most important instrument of participation at the federal level. Today, the basic problem from the point of view of the cantons is, on the one hand, that they are overwhelmed by the huge number of consultations conducted by the Federation and, on the other hand, that their opinions are insufficiently taken into account in comparison with the views of economic and other interest groups. Furthermore, in recent decades the cantons have accepted more and more responsibilities for the implementation of federal policies.

New evaluations show that, since the decree took effect in 1991, the number of pre-parliamentary consultation procedures has not increased significantly, although the highest number of consultations in any one year (41) occurred in 2004 (Sager/Steffen 2006). Moreover, the cantons participate in 9 out of every 10 consultations, which nevertheless does not allow us to draw any conclusions about their actual influence (Germann 1986: 350). Opinions are divided over the importance and quality of the pre-parliamentary procedure. Klöti (1987) argues that its importance has increased quantitatively but is declining in qualitative terms, and that it is being transformed from a mechanism of expert consultation into an anticipated, plebiscitary process. Fleiner, in contrast, views the consultation procedure as a “valuable, even indispensable instrument of efficient legislation”¹ (Fleiner 1991: 60). However, he does acknowledge several shortcomings, such as the privileging of particular interests and the impairment of the legal status of the Parliament.

Analyses of the federal decision-making process show that the drafting of legislation and ordinances on the federal level is dominated by a limited number

of actors (Blaser 2003; Fleiner 1991; Gerheuser *et al.* 1997; Kriesi 1980; Papadopoulos 1997; Pfisterer 1995; Sager/Steffen 2006). In this context, Linder (1987: 203f.) emphasizes the selectivity and the limited political openness of the pre-parliamentary procedure. While the responsible federal authorities, consulted experts and interest groups that are capable of launching a referendum are all usually accorded a strong position, other actors, such as the cantons or the parties, find themselves in a comparatively weak situation. However, the larger cantons that have sufficient administrative resources at their disposal can play an important role (Germann 1986). The limited influence of the cantons in comparison with interest groups is mainly a consequence of the latter's greater organizational capacity and ability to put forward powerful arguments. In contrast to interest groups, the cantons often find they have to represent heterogeneous interests and are thus obliged to adopt contradictory positions (Sager/Steffen 2006). In addition, the small and economically weak cantons lack the necessary expertise to evaluate complex federal projects. These cantons therefore tend to adopt the position of certain professional associations – a tendency that favours the creation of so-called “consultation cartels”. In general, the larger cantons are better represented both in the pre-parliamentary consultation procedure and in extra-parliamentary expert committees, and they maintain better contacts with experts and representatives of interest groups (Germann 1986).

Opportunities for the cantons to influence the pre-parliamentary consultation procedure also depend heavily on the communication and evaluation strategies of the Federation (Fleiner 1991; Pfisterer 1995; Gerheuser *et al.* 1997). Because of political pressure, the cantons are often compelled to respond quickly to the proposed bills, and this has consequences for the quality of their statements and limits their capacity to clarify questions concerning implementation. In many cases, the Federation fails to inform the cantons within a reasonable period of time about prospective implementation regulations. Moreover, the Federation does not evaluate the statements it receives according to commonly agreed criteria. Finally, most of the consultations are conducted in a conventional manner, that is, in writing and in a linear fashion, without the possibility of feedback or iteration.

Various proposals for the improvement of the pre-parliamentary consultation procedure have been advanced in recent years. While National Councillor Dunki, in his parliamentary initiative of 1996, called for the abolition of this instrument, Schenk (1997) has proposed confining it to legislative bills. By shifting increasingly from formal to informal consultation and by restricting the number of participants, the essential purpose of the consultation procedure could be enhanced (Fleiner 1991). Finally, in recent times, a combination of

written statements and interactive forms of direct oral consultation, such as hearings, preliminary meetings, joint information activities and the creation of implementation agencies in the form of working groups and conferences at which the Federation and the cantons are equally represented, have proved to be successful. However, this development could increase the danger of selective, opaque and redundant decisions (Papadopoulos 1997; Sager/Steffen 2006).

The implementation of federal policies by the cantons

While the Federation holds the legislative power in many areas, responsibility for implementing federal policies resides to a large extent with the cantons. For the Federation, this has the advantage of reducing its workload; for the cantons, the advantage lies in controlling their own programme priorities and in adapting policy implementation to the local context (Linder 1987, 2005). Cantonal implementation of policies is supervised by the Federation. However, given the necessity – in the strongly federal Swiss context – of maintaining cooperation over the long term, implementation control is limited in scope and politically difficult to execute. The Federation therefore prefers cooperative to conflictual strategies and rarely makes use of its powers.

Federal implementation is based on cooperation between programming and implementing agencies and resembles implementation processes in general, which are characterized by divergent interests, low predictability, and the need to mobilize sufficient political will (Linder 1987; Bussmann *et al.* 1997; Wälti 2001). By implementing ordinances, the cantons are able to adapt the political programmes of the Federation. Federal legislation provides for the ensuing diversity of fulfilment of federalist tasks. Thus, in carrying out federal policies, the cantons act not only as *implementing*, but also as *programming* agencies (Linder 1987, Sager/Rüefli 2005).

As a consequence of increasing policy integration between the Federation and the cantons and of the sustained delegation of federal tasks to the cantons, the problems that are specific to this form of federal implementation have today become the main topic of the debate on federalism in Switzerland. The factors that inhibit better cooperation between the Federation and the cantons, and which thus lead to implementation deficits, are very complex (Balthasar *et al.* 1995; Bussmann 1986; Faganini 1991; Linder 1987; Vatter/Wälti 2003; Wälti 2001). To begin with, the inadequate level of cooperation between the Federation and the cantons in implementing federal policies can be explained by reference to the less than precise delineation of tasks between the two levels of the federal system. As a consequence of this unclear delineation, new tasks are passed back and forth between the cantons and the Federation (referred to as the “*föderalistisches Schwarz-Peter-Spiel*” – see Bussmann 1986). New tasks are first

first assigned to the cantons, but when the strain on the cantons increases, they turn to the Federation, which has to assist even though the responsibility lies with the cantons. The Federation then enacts a federal law but continues to delegate the responsibility for its implementation to the cantons, while providing financial assistance in return. Whereas active cantons benefit from these federal subsidies, others fall into arrears and call for more help from the Federation. This, in turn, makes it necessary for the Federation to provide further support and sanctions. The end result is an increasing normalization of the implementation process, stricter criteria for federal subsidies, and ever-stronger policy integration between the Federation and the cantons (Bussmann 1986; Faganini 1991). Other factors that lie at the root of implementation problems include inadequate horizontal coordination, overly complex procedures, large disparities among the cantonal administrations in terms of financial, legal and human resources, the limited financial capacity of the Federation, excessively detailed federal legislation, and insufficient regard for the specific regional context (Balthasar *et al.* 1995; Faganini 1991; Vatter 2002).

On the one hand, the current forms of federal implementation have highly integrative effects. On the other hand, they usually allow for only incremental adaptation to new circumstances and thus limit the innovation and decision-making potential of the federal political system (Vatter/Wälti 2003). However, this limited capacity for innovation is not a feature of the federalist system of implementation as such. Rather, it depends to a great extent on the various constellations of political conflict and consensus at the different levels of the State (Linder 1987, 2005). A broad political consensus at the federal and cantonal levels furthers innovation in both programming and implementing activities. Under such circumstances, even modest stimuli can generate the development of a programme and lead to innovative implementation at the cantonal level. However, if there is disagreement at the cantonal level, low effectiveness can be expected. The Federation in turn might attempt to overcome a low degree of consensus at the cantonal level through financial incentives. Situations in which there is political dissent at the federal level but consensus at the cantonal level are rare, since, as a rule, the cantons cannot impose a programme on the Federation. However, this constellation often leads the cantons to adopt instrumentalizing strategies, whereby they make use of other federal programmes in order to further their own goals. Finally, if there is political disagreement at the federal as well as the cantonal level, innovations within individual cantons are likely to remain isolated.

The effectiveness of federal implementation is most likely to be enhanced by incorporating the results of scientific evaluations of implementation and effects into revisions of federal policy; by identifying potential implementation prob-

lems at an early stage of policy formulation; and by including the cantons from the very beginning as future implementation agencies in the debate about federal policies (Balthasar *et al.* 1995; Bussmann *et al.* 1997; Vatter/Wälti 2003; Wälti 2001). Moreover, new studies indicate that differences in cantonal policy implementation can be minimized by means of secondary harmonization processes (Balthasar 2003; Sager 2003).

Finally, vertical forms of Swiss federalism include *the federally organized party system*, in which the cantonal parties have a strong position, *the representation of linguistic minorities in the Federal Council, the Federal Court and the federal administration*, and *the constitutional guarantee protecting the different official and national languages*.

The horizontal institutions of Swiss federalism

Because of their cumbersome nature and their technocratic character, the institutions of horizontal federalism play only a minor role in comparison with the vertical forms of cooperation (Bochsler *et al.* 2004; Frenkel 1986; Kriesi 1998; Linder/Vatter 2001; Vatter 2005; Wälti 1996). The main purpose of the horizontal institutions is to further coordination and cooperation among the cantons without including the Federation. However, as a general precondition, the cantons have the power to act in the domain in question.

Inter-cantonal treaties (Konkordate)

Inter-cantonal treaties (*Konkordate*) represent the most important aspect of horizontal cooperative federalism. The revision of the federal Constitution in 1999, which replaced the general “prohibition rule” by a rule of qualified consent and replaced the Federation’s duty to consent by an obligation to provide information (Abderhalten 1999, Brunner 2000), has led to an increase in inter-cantonal cooperation. Today, there are more than 700 inter-cantonal treaties in Switzerland, of which 30% are less than 10 years and 71% are less than 35 years old (Bochsler *et al.* 2004: 94). The main purpose of the inter-cantonal treaty is to function as an instrument of bilateral (regional) cooperation. Thus, three quarters of the approximately 740 inter-cantonal treaties concluded since 1848 are bilateral agreements between two cantons, while a mere dozen treaties are signed by all cantons. Whereas to date, the German Swiss cantons of St. Gall, Basle Country, Basle City and Berne have concluded the most inter-cantonal treaties, some of the western Swiss cantons (GE, VS) and Ticino are the least horizontally integrated. An analysis of the structure of inter-cantonal treaties identifies four groups of particularly strongly interlinked cantons: the cantons of eastern Switzerland (including ZH), the French-speaking and Italian-speaking cantons, and the cantons of northwestern and central Switzerland (Bochsler *et*

al. 2004: 97). Thematically, most of the treaties deal with finance and tax issues, but many also concern education, scientific and cultural issues (Bochsler *et al.* 2004: 95).

The cantons have the right to conclude treaties on all issues that fall within their sphere of responsibility. However, the Constitution imposes certain limits on these treaties. The cantons do not have the right to conclude political agreements that would alter the political balance of power between the cantons. Moreover, such treaties must not be inconsistent with federal law, federal interests, or the rights of other cantons (Häfelin/Haller 2001).

Inter-cantonal treaties are concluded for various reasons. Besides geographic and economic motivations, inter-cantonal treaties in the past often served to prepare regulations at the federal level, e.g., the various inter-cantonal treaties on traffic and communications. In recent years, such treaties have also been used increasingly to defend cantonal powers and thus to prevent the enactment of federal bills establishing federal responsibilities in a given area (e.g., the inter-cantonal agreement on the exclusion of tax conventions) (Häfelin/Haller 2001).

Inter-cantonal conferences

The inter-cantonal conferences of directors (*Interkantonale Direktorenkonferenzen*), which bring together the heads of the cantonal governments and to which the head of the relevant federal ministry may be invited as well, are also important instruments of horizontal federalism (Bochsler *et al.* 2004; Frenkel 1986; Vatter 2005). As consultative organs, the inter-cantonal conferences of directors – 16 in total – mainly serve to facilitate the sharing of experience, to divide and coordinate tasks, and to enable the State Councillors of all cantons who are responsible for a particular area to discuss current problems. Well-known examples include the conference of the cantonal ministers of finance and the conference of the cantonal ministers of education.

Another type of inter-cantonal conference is the conference of cantonal governments, which was established in 1993 in the aftermath of the rejected EEA Agreement. Through this conference, the cantons attempt to increase their direct influence on the Federation, in particular in the field of foreign policy, and to coordinate the formulation of their political demands. In recent times, the conference of cantonal governments has played a particularly important role in the reform of the system of financial perequation and in the cantonal referendum against the tax laws proposed by the Federation (Bochsler *et al.* 2004; Fischer 2006). Conferences that unite the cantonal governments of a particular region have been organized on a regular basis for many years. Finally, there are also the inter-cantonal conferences of experts which are organized at the various levels of the administration and which are highly technocratic in nature (Tamm

1982). Overall, there are well over 500 such bodies in very diverse fields of the administration (Frenkel 1986).

Besides the inter-cantonal treaties and conferences, the cantons also run joint institutions, such as specialized colleges and prisons. The forms of inter-cantonal collaboration are many and diverse and allow for flexible cooperation adapted to the local context. They can also be seen as decentralized alternatives to standardization at the federal level. However, these collaborative mechanisms have proved to be cumbersome, especially in cases of politically controversial issues (Frenkel 1986). Moreover, experiences in recent years have shown that inter-cantonal treaties are not very effective in preventing the creation of new spheres of federal responsibility. At the same time, they make collaboration with the Federation more difficult. Nevertheless, newly created organs such as the conference of the cantonal governments have, under the pressures of European integration, given rise to *alternative and enhanced forms of horizontal cooperation which can exert informal, but direct vertical influence* (Vatter 2005; Wälti 1996). Although inter-cantonal institutions in Switzerland favour coordination from below as well as negative horizontal coordination and a pronounced decentralized executive, the degree of institutionalized policy integration remains much lower than in Germany due to the absence of co-decision rights for so-called “common tasks” (Armingeon 2000; Braun 2003; Scharpf 1994; Kilper/Lhotta 1996).

3 Challenges to Swiss Federalism

Federalism is still one of the core elements of Switzerland’s political culture and its political system. However, 150 years after the creation of the modern federal State, Swiss federalism is confronted with many challenges and appears to be in need of reform (Vatter 2006). In the coming years, issues such as the successful implementation of the reform of the system of financial perequation and task redistribution, the redistribution of tasks and responsibilities between the Federation and the cantons, an increased right of cantonal co-determination in federal bills, and closer cooperation among the cantons themselves will increasingly become focuses of discussion.⁴ In addition to these specific problems, there are more basic challenges that call for a debate of principle on the meaning and purpose of federalism today. The self-evident demographic shifts between the cantons, the one-sided composition of the upper chamber, the increasingly frequent conflicts between the popular and cantonal majorities in constitutional votes as well as fundamental transformations in the understanding of the notion of democracy have aggravated the tension between the two basic political principles of democracy and federalism, and have underscored the urgent need for

reform. Further problems with which Swiss federalism will be faced in future are: the increasing loss of solidarity among the cantons, and respectively among the cantonal governments (cf., for instance, the debate regarding the tax privileges for high earners in the canton Obwalden); the replacement of this solidarity with competitive patterns (and hence the danger of ruinous competition); and the increasing irrelevance of cantonal legislatures. The latter is becoming increasingly limited to mere political implementation in the course of European integration and globalization, which clearly contradicts the cantons' claims to sovereignty. Finally, the increasing importance of non-territorial minorities and the complexity of socio-economic and cultural conflicts that escape the traditional territorial logic of federal conflict resolution are putting the existing federal institutions under still greater pressure. There is also an increasing tension between the current problems of urban areas and the existing mechanisms for federal minority protection. The invigoration of federalism by adapting federalist structures to the new realities of large urban settlements and regions, and by strengthening pluralist decision-making and democratic legitimization processes which are more sensitive to the needs of increasingly significant non-territorial minorities, will therefore constitute the fundamental, long-term challenge to Swiss federalism.

Notes

- 1 The main focus of this contribution is on the foundations and institutions of Swiss federalism. For commentaries on the lower levels of the State (cantons, municipalities) and on relationships with the federal level, see the other chapters in this Volume. Current overviews of Swiss federalism can be found in Armingeon (2000), Blöchliger (2005), Fleiner (2002), Freiburghaus (2002), Frey (2005), Linder (2005), Linder/Vatter (2001), Neidhart (2001), Papadopoulos (2002), Vatter/Wälti (2003), Vatter (2005), (2006) and Wagschal/Rentsch (2002).
- 2 The official designation of the newly created federal State, "Confoederatio Helvetica", is somewhat misleading, since a confederation usually refers to an association of separate States, while a federation refers to a single federal State. In this context it is worth noting that federalists in Switzerland, as opposed to those in the US, are understood to be advocates of a maximum degree of autonomy at the "member state" level.
- 3 In two of the ten cases with conflicting majorities (introduction of the proportionality rule in 1910, referendum on civil service in 1957), the bills were rejected by the population.
- 4 Overall, three main directions can be identified in the movement to reform federalism as it exists in Switzerland today, disregarding the centralization of tasks and competences which can often be found in practice: the strategy of disentanglement through decentralization, as expressed in the reform of the system of financial perequation and task redistribution; the (vertical and horizontal) strategy of cooperation, particularly the new forms of inter-cantonal cooperation; and the fundamental reform of territorial structures through the creation of new politico-territorial units (Klöti 2000: 18 et seq.; Vatter 2002: 461 et seq.).

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