THE SWISS POLITICAL SYSTEM: CHANGING CONCEPTIONS AND PATTERNS OF A NEUTRAL, MULTIETHNIC STATE, 1866-1973.

Gunter E. Klein

~~July 1974~~
February 1975

A thesis in the Department of Politics submitted to the faculty of the Graduate School of Arts and Science in partial fulfillment of the requirements for the degree of Doctor in Philosophy at New York University.

Approved:

ACKNOWLEDGEMENTS

The writer wishes to express his gratitude and indebtedness to Professor Gisbert H. Flanz at New York University for his helpful criticism and many kind suggestions, and for the time which he has so generously given in reading this work in all stages of its composition.

INTRODUCTION

Comparative political studies during the last decades have emphasized the "Big-Power" systems and those of the "Third World" to the neglect of older systems such as Switzerland in its important transformations during the twentieth century, and its consequent bearings on contemporary political problems. Although well documented during the nineteenth century when the Swiss manifested great interest in the American system of bicameralism, and the Americans keenly studied the Swiss methods of direct democracy (the referendum and the initiative), there have been few contemporary works concerning the evolution and present functioning of the Swiss political system.

This thesis endeavors to document the changing conceptions and patterns of the Swiss political system in the last one hundred years. As a result, the development of Swiss society is seen to reflect several possibly irreversible trends which pertain not only to Switzerland but also to any highly

developed Western, and particularly European, society.

In the perspective of Swiss constitutionalism, federalism, and democracy, three essential tendencies prevail: the growth of the central state, the decline of parliament, and the sacrifice of individual freedom to equality and comfort. As this has involved a great increase in state intervention, modern Swiss democracy, curiously enough, welcomes and insists upon the right of the state to intervene in almost all aspects of national life. Yet, whereas powerful organized interests can apparently prevent this development from being carried too far, the problem posed to the Swiss political system might well have become more acute because of its reliance upon referenda and initiatives. Since the "people's veto" has been supplanted by that of powerful pressure groups, the increasingly technical issues and complicated political decisions of our day appear to have become unsuitable to the ideals of Switzerland's direct or semi-direct democracy.

Chapter one provides a brief historical background of the developing Swiss nation-state from a Staatenbund into a

Bundesstaat as reflected in the first Federal Constitution of 1848 and in its subsequent total revision in 1874. Four major trends and objectives clearly emerged in the nascent Confederation. These comprised national centralization, the extension of democracy to its direct forms, the conflict between Church and state as mirrored in the Kulturkampf-articles, and the growth of etatism.

Chapter two traces the changing Swiss conceptions of constitutionalism and the transformation of the constitutional framework. The most noticeable change in the evolution of Swiss constitutionalism has been the increasing emphasis on the happiness of the greatest number in terms of which the federal government, within the ever-expanding limits of its constitutional competences, can take all "necessary" measures to safeguard the well-being of the country. The transformation of the constitutional framework from 1866 to 1973, accordingly, reflects a development through which the instruments of government have clearly become the means for the conscious introduction of social change. In that very process, however, the fundamental

law of the country appears to have become an almost unworkable agglomeration of constitutional provisions, transitory clauses, ordonnances, arretes, and laws. As a result, the idea of a total revision of the Constitution seems imminent.

Chapter three deals with the nature of Swiss federalism and some major centralizing tendencies involved in the changing equilibrium between the federal government and the cantons. With the growth of economic and social problems that appear to require national action for their solution, the question whether the member states and not the central state of the Swiss Confederation can survive as constitutionally autonomous entities might well characterize the evolution of Swiss federalism. Inasmuch as the transfer of many original cantonal functions to the central state has led to an unhealthy tension between a vague ideal and a reality in which federalism in Switzerland is revered as a monument of the past, the solution to the problem of reestablishing a healthier division of competences might also be dependent upon a total revision of the Federal

Constitution. This development, the result of centralizing tendencies, reflects a gradual shifting of individual loyalties from the cantons to the federal state. It is marked, essentially, by the acceptance of a new political philosophy in which the purpose of the state has been redefined from that of the "nightwatchman" to that of the "protector of the public welfare." As the traditional sphere of governmental operations has been suffused with a national interest which transcends cantonal lines and requires federal action and support, the inherent danger in reliance upon central solutions cannot be averted except through a politics which involves all the cantons, or through new solutions in practical federalism. The enlargement of federal competences, closely connected with the general economic, social, and technological development of the country, attests to the conflict between a liberal tradition and modern economic - and social policies.

Chapter four examines the evolution of Swiss democracy and the role of political parties. Through the introduction of the initiative and the referendum in both their optional and

compulsory forms, representative democracy became "pure" democracy and the people the real legislator. However, although direct popular action by means of referenda remains still an effective instrument for the rejection of some federal legislation, many important decisions escape the censorship of the will of the people either because of the "urgency clause" or because the Federal Council has been accorded extraordinary powers. Consequently, two major changes mark the development of democracy: first, the parliamentarian, formerly the actor on the political stage, has today been demoted to a front-seat spectator; and, second, enthusiasm for direct democracy has declined. Concomitantly, the problems resulting from the increasing influence of pressure groups which, by operating outside the sphere of public control, have deprived political parties of their influence in the determination of public policy, have called into question the whole workings of Swiss democracy because the "veto" of the people has been transformed into that of private associations thereby outweighing the impulsion which could be given to reform through use of the initiative, and because there is lacking

a political institution in which negotiations can be influenced by majority rule, by public opposition, sanction, and control.

Chapter five concerns the relationship between parliament and the executive which has undergone such fundamental changes in the last century that it has been almost reversed. Whereas formerly the policies of the executive government had been dictated by the Chambers, today the Federal Council is superior to parliament as it has successfully managed to ensure that the will of the Chambers remains in conformity with its own. However, despite the concentration of power in the executive, the Swiss system of government is characterized by a tradition of cooperation in terms of which both political bodies remain closely connected by a perpetual coalition. The pervading respect for law, in addition, might indeed remain the fixed point in the shifting relationships of social power and administrative practice in federal legislation; the law which makes the Assembly the "toothless watchdog" and sets the Federal Council at the center of the political process.

Chapter six outlines the problems entailed in the exercise of fundamental rights which in constitutional jurisdiction appear to remain, in Switzerland as elsewhere, linked to the difficulty in specifying the permissible freedoms of individuals. The trend to secure the happiness and security of the greatest number by making the state more indispensable to the individual's well-being has led to the restrictions of individual rights and freedoms and to the assumptions of ever more functions and social responsibilities by the state. The chapter also discusses the recent emancipation of Swiss women which granted to them the right to vote in federal matters for the first time in 1971.

In conclusion, chapter seven summarizes the evolutionary trends in Swiss society beginning at the industrial stage and proceeding to the tertiary (services) stage which, in the perspective of Swiss constitutionalism, federalism, and democracy, attest to both the increasing scope of the activities of the state always undertaken for the benefit of the individual but often only realized at the expense of his freedom, as well as to the recognition that with the progress

of science in all realms of human endeavor, the increasingly technical issues and complicated political decisions of our day have become unsuitable to the ideals of Switzerland's direct or semi-direct democracy.

TABLE OF CONTENTS

TRADITIONAL AND MODERN ELEMENTS IN THE SYSTEM OF 1866

The Swiss political system of 1866 is determined, like any other historical fact, by two distinct but convergent aspects: on the one hand, by recorded pictures of actual events which remain contingent upon our relative ignorance of fact, or of all that can be known; and, on the other, by the recognition that our conceptions of history are built upon our prejudices and purposes of the present. With these two limitations in mind, the Swiss Confederation of 1866 can be viewed (a) as reflecting the persevering elements of all preceding experiences, the slowly matured results of a particular political will and instinct for historical continuity as based upon the early Alliance of 1291, and (b) as revealing a series of pragmatic responses to the challenge of new circumstances, of adaptations of inherent principles to the advances of the time as mirrored in the necessary extensions of the constitutional law of this period.[1][2]

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[1] J.M. Vincent, Government in Switzerland (New York, 1913), p. 37.

[2] B. Moses, The Federal Government of Switzerland (Oakland, 1889), p. 55.

The Swiss Confederation

The old Swiss Confederation, which lasted for about five centuries from 1291 to 1798, linked a number of more or less independent cantons or states into a network of diverse legal relationships without providing for a fundamental compact or principle in terms of which the unequal member states could be bindingly united.[3] Against the background of Switzerland's geographical make-up in which several regions remain so disparate in their geography, scenery, climate, and vegetation, and, at the same time, so sharply separated from one another that they can be said to constitute the actual geographical units of the country, there occurred, prior to the thirteenth century, an event which was to have a lasting effect on Swiss social and political evolution. This was the invasion of Germanic tribes which sundered what Rome had forcibly united in the course of five centuries.

The resulting establishment of the Swiss linguistic divisions have remained almost unchanged to modern times; there

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3 J.F. Aubert, Traite de Droit Constitutionnel Suisse (Neuchatel, 1967), I, p.1.

persist four language groups each of which claims its proper right to tongue, creed, race, and culture. Inasmuch as these racial and linguistic patterns of modern Switzerland cannot well be understood without reference to the Roman occupation and its replacement by the German peoples,[4] so neither can the concept of Swiss liberty be comprehended without reference to the Germanic system of property relations which, based on the allmend, or rural parish, distinguished between personal freedom and sense for social solidarity.[5]

When three small forest communities joined in a "perpetual league" for common defense, the rudiments of Swiss identity and liberty had been established. In these very beginnings of conscious unity through diversity can be found some lasting values of Swiss political thought: readiness for local partnership and opposition to change. The controversial issue of the influence of geography on human social organization notwithstanding, the influence of the Swiss landscape on Swiss political thought and action has been

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4 E. Bonjour et al., A Short History of Switzerland (Oxford, 1952), p.40.

5 H. Tschani, Profil der Schweiz (Zurich, 1967), p.13.

affirmed with lasting national pride. Self-determination originated among a mountain people who, in their fight against the forces of nature, has stood enduringly for the virtues of the "small circle" with its emphasis upon limited association, differentiation, seclusion, and conservatism. Out of such thought springs the "no" of the Swiss citizen as against the central state: suspicion to innovation has remained a lasting characteristic of Swiss politics.[6]

The union of 1291, which gave Switzerland an identity, developed in the presence of rejected authority, and, "interpreted in a highly political sense, was the defiant organization of free men to resist the unbearable burden of Habsburg oppression."[7] Whether the alliance is interpreted as revolutionary in that an original form of old German democracy took root on Swiss soil, or whether it is viewed, alternatively, not as an insurrection against the established order by revolutionaries but as a work of people who preserved more of their own than they relied on innovations,[8] military success was followed by reinforcement of the alliance.

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6 Tschani, loc.cit., p.17.

7 Bonjour, loc.cit., p.80.

8 R. Carpentier et J.Lannoye, Suisse Nation Europeenne (Paris, 1949), p.96.

In the next two hundred years, the initial union of three communities grew to a Confederation of Thirteen, testing again and again the effectiveness of their defense pact against outside aggression. During the fifteenth century, or Switzerland's heroic age, the Myth of William Tell sanctified the tradition of intrepid resistance to the foreign oppressor; and, as the young Confederation passed from the allegedly defensive to the openly offensive, its most salient characteristic remained a warlike nature.[9]

With the disappearance of fear of an external enemy, the alliance lost its unifying influence. Separatist tendencies, reflecting the differences in language and culture as perpetuated by the natural divisions of the country, as well as fear of the cities' predominance over the countryside, prevented its growth into a higher level of statehood. This inability for concerted action was to result in a military defeat at French hands in 1515, in the end of further expansionist strivings, and in the beginning of the politics of neutrality. Added to this discord towards foreign affairs, the impact of the Reformation further devastated the already politically endangered union from within by straining the

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[9] Bonjour, loc.cit., p.105.

weakening ties which held the cantons together. Cooperation between Catholics and Protestants became increasingly difficult when politics could no longer be separated from religion.[10] The lasting legacy of the Reformation was a deplorable religious dualism. With the break-up of the Confederation into two hostile camps, wars of religion were soon to follow by casting their shadow over Swiss public affairs until very recent times.

Interference by foreign powers aggravated the situation. Zwingli's concept of a united Switzerland, allied with Venice and the German princes opposing Austria and the Catholics from Denmark to the Adriatic, died with him, and so proved a disaster to Protestant Europe. The consistent Catholicism of the old cantons was nourished by the coffers of the Pope as well as of the rulers of France and Spain. By the time of the Thirty Years War, consequently, the religious disunion of the country was such that it prevented the young Confederation from having any official policy at all.[11] However, at the Treaty of Westphalia in 1648 the Confederation was recognized as independent of the jurisdiction of

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[10] Bonjour, loc.cit., p.174.

[11] Ibid., p.184.

the German Empire. It took on a permanent political character in law as an independent state, and a period of relative peace and self-government was to ensue until 1798.

Apart from the dividing forces of the religious schism, the old Swiss Confederation had turned into an aristocracy of guilds and families. Although the cantons represented a variety of governments ranging from pure democracies to urban aristocracies to commercial oligarchies, a definite hierarchy based on political, military, or economic importance had supplanted the cherished sovereignty of free and equal citizens.[12] The vices of this hierarchy, such as the unjust system of bailiwicks, the subjugation of the countryside to the cities, and the suffocating realities of paternalism and corporatism, were to be revenged. Switzerland, left with no central government to make binding decisions, susceptible to the appeals of eighteenth century liberalism, and aided by some local revolutionaries who looked abroad for the realization of their own political ideals, succumbed to the French invasion of 1798.

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[12] G.A. Codding, The Federal Government of Switzerland (Boston, 1961), pp.24-5.

The Helvetic Republic

Under the regime of the Helvetic Republic, the most radical innovation in the Constitution of 1798 was the transformation of Switzerland from a loose Confederation into a centralized and nominally democratic state. In the new republic, "one and indivisible," emphasis was placed, as in all unitary states, on the central organs of government. The result was that the thirteen cantons were reduced to the ranks of administrative, jurisdictional, and electoral districts on the model of French departments. While neutrality and local autonomy were to be abolished, some new values of lasting validity made their appearance: representative democracy, separation of powers, equality before the law, and the guarantee of individual rights and freedoms. Yet if representative democracy, the creation of a single Swiss citizenship, common democratic suffrage, and the guarantee of the freedoms of residence, trade, speech, and press were meant to eliminate the previously existing hierarchy among citizens, then there remained a hard core of people not content to give up their hereditary rights and privileges. The ranks of this opposition grew with French

interference in Swiss politics.[13]

The new regime, unable to win the affection of the people, left its legacy in the form of a series of coups d'etat. Against this background, however, it must be remembered that the new territorial and constitutional form of Switzerland was totally adjusted to the requirements of France, that individual liberties as derived from the ideology of the French Revolution were based on the abstract notions of natural law, and that, consequently, the Helvetic Republic remained an artificial Rechtsstaat which, by ignoring the historical growth over five centuries, had no roots in the past to nourish it. Since the diversity of political orientation and local autonomy was replaced by a uniform administrative machinery, Switzerland, varying so widely in natural conditions, religions, customs, and languages could not for long endure an imposed bureaucratic uniformity.[14] In the final analysis, however, it remains equally important to remember that the Helvetic Republic exerted an educating influence in centralized government, and that its induced enthusiasm for greater unity

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[13] Codding, loc.cit., p.27.

[14] Bonjour, loc.cit., p.223.

pushed slowly but steadily toward "higher ideals of politics and social welfare."[15]

The ensuing years offered a distressing spectacle as democrats and republicans, later to be called centralists and federalists, fought each other in their respective narrow-mindedness by preferring the evils of internal insurrections to political compromises. The political abuses suffered under the regime of the Helvetic Republic were to lead very soon to a counter-attack by the federalists, the supporters of the old Confederation, or the partisans of cantonal sovereignty. This outbreak, surprisingly enough, appeared to meet with the approval of Bonaparte who was sufficiently astute to recognize that an imposed unity corresponded rather badly to the diverse conditions of Switzerland. On the basis of two successive drafts, known as the Projets de Malmaison, Napoleon propagated the ideas of a federal state, of a bicameral parliament, and of a dilatory referendum, all of which were inspired by the American Constitution of 1787. When the federalists went into action by re-establishing their old constitutions, Bonaparte

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15 Vincent, loc.cit., p.28.

responded with the Act of Mediation in 1803.[16]

If, according to Swiss legal opinion, the five years between 1798 and 1803 can be said to constitute the origin of Switzerland's entire future evolution, then the lasting merits of the Helvetic Republic would read as follows: Switzerland, through the successful union of the German and Latin genius, had established her composite linguistic and racial order. The taste for equality, demanded initially by cantons and later by individuals, would no longer be contested; and for the first time some people began to envisage new forms of the state as revealed by their constitutional gropings toward federalism. For the first time as well, the doctrine and political devices of the separation of powers, of bicameralism, and of the referendum made their appearance. The collegiate character of the central government was the offspring of the various Directories, or executive powers. The ideas of compulsory education and of a federal tax came to the fore; and, finally, there was ushered in the era of liberalism with its concomitant attributes.[17]

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[16] Aubert, loc.cit., pp.6-9.

[17] Ibid., pp.9-10.

The Act of Mediation

The Act of Mediation (1803-1813), by perfecting the Projets de Malmaison, remained fundamentally a compromise between the federalists and the centralists. Under its auspices, six new cantons were added to the Confederation, and, in seeking to substitute an as yet inchoate federalism for the previous unitary state, article 12 of the Act expressed for the first time the famous phrase that all powers not expressly conferred to the central government are reserved to the cantons. This formula was a conscious imitation of article 2 of the American Constitution of 1781. Even though the Act had met with widespread approval, Swiss self-consciousness and pride remained dependent upon the dictates of Napoleon who considered Switzerland to be only a protectorate of France. The laws of commerce and industry were geared to suit the financial policies of France, and inasmuch as the Act proved to be a further compromise to individual rights by prohibiting special privileges while maintaining property qualifications for voting, the defeat of Napoleon at Leipzig led understandably to the dissolution of

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[18] Codding, loc.cit., p.28.

his government in Switzerland. Shortly thereafter an extraordinary Diet, or Assembly, convened to deliberate on Swiss attitudes toward the victorious Allies, or the Holy Alliance, regarding Switzerland's internal and external policies.

As regards the Act of Mediation itself, some historians regard it as having inaugurated the first Swiss federal state, the intermediate form between the unitary state under the Helvetic Republic and the Confederation of states before 1798. Others have denied this historical development by the claim that the federal state is more than a contractual union in that the decisions of the federal government are obligatory for the member states, and in that the central powers can be increased against the will of any given minority among the constituent members. Since a contractual union between sovereign states prevailed which was based upon a system of concordats and precluded, therefore, any increase of central powers through the necessary consent of all its members, the system of 1803 kept its confederate

character.[19]

Called upon by the Allies to join the coalition against Napoleon, the extraordinary Diet, under the auspices of the Long Diet (1813-1815), wisely chose neutrality. In further declaring the Act of Mediation null and void, it acted without any constitutional basis, and, this fact notwithstanding, took on the name of "Federal Assembly." Its aim was not only to establish a new regime, but, more importantly, to substitute for the Act a truly Swiss Constitution. By declaring that the existence of the new cantons would remain inviolate, however, it drew the condemnation of those cantons upon itself which ever since the fall of Napoleon aimed at the restoration of the regime prior to 1798. The ensuing conflict which divided Switzerland into two camps of almost equal strength resulted in concessions which saved the new cantons at the expense of almost all the other achievements since 1798.

Still these concessions were not enough to calm the strife-rent political situation; it was left to the conservative forces of the Holy Alliance to impose the so-called

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[19] Aubert, loc.cit., pp.13-14.

Federal Pact of 1815 at the Congress of Vienna. Apart from a provision which called for the union of twenty-two equal members, the new Confederation remained from its very inception a "new ancient regime." It stood for return to the system of reigning families and privileged classes in which the central powers were almost non-existent,[20] and reflected a reactionary triumph which was to postpone for longer than a generation the development of the country. The only permanent organ of government which remained was the Federal Chancellery, and, the Swiss concept of perpetual neutrality was formally recognized by the Allies at the Congrēss of Vienna.

The Federal Pact

The history of the Pact (1815-1848) is generally divided into two periods of almost equal duration: Restoration and Regeneration. During the former period, from 1815 to about 1830, when a number of individual rights and freedoms were arbitrarily curtailed, the respective governments proved, curiously enough, to be tolerant to the freedom of association.

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20 Aubert, loc.cit., pp.16-18.

The result was the luxurious growth of all kinds of societies and organizations which, nourished by the subversive ideas of political refugees pouring into the country, remained very receptive to new ideas in seeking to create a truly national spirit. These associations were lastingly to contribute to Switzerland's history of liberalism.[21]

If the gropings for national unity were to leave a partially unified army as the most durable achievement of the Restoration, then beginning with the 1830's, or the period of the Regeneration, there was to be put into motion an accelerated process of national ambitions for a more perfect union. Under the influence of the expanding forces of Western liberalism, the Pact of 1815 proved insufficient to respond to the demands of the time. The Regeneration, therefore, called forth by liberal forces which now and then turned into radical ones when confronted with staunchly defended traditional values, reflected the ideals of popular sovereignty, direct election of parliament, separation of powers, creation of collegiate authorities, open legislative sessions, extension of education, unification of public

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[21] Aubert, loc.cit., pp.18-19.

services, as well as of legal guarantees and of individual rights.[22]

The need for security and national independence was matched by that for economic uniformity in relation to such matters as money, weights and measures, communications, customs and duties, etc., and all of these demands were translated, by both a new middle class and a social stratum comparable to a new "third estate," into a new political philosophy. Its ideological factors comprised the provisions of all the modern constitutions of that time, such as national sovereignty, separation of powers, popular consultation, and so on; respect for human dignity, faith in man's perfectibility, and belief in progress; and a defiant hostility to the irrationalities of tradition together with its corollaries, the demands for freedom and equality.[23]

To the history of the Pact, however, two reservations need to be made explicit. First, it is inadmissible to attach too great an importance to the historical dividing line

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22 H. Tschani, Profil der Schweiz (Zurich, 1967), p.30.

23 W.E. Rappard, La Constitution Federale de la Suisse (Neuchatel, 1948), p.103.

between Restoration and Regeneration. The latter had its beginnings in 1798, and the former was no more than a fight of the rear-guard. Second, although the July Revolution of 1830 in France is often credited with having initiated the Swiss reform movement, it really only accelerated it by bringing impetuously into the open all those liberal sentiments of 1798 which the Pact of 1815 was unable to suppress.[24]

To the Constitution of 1798, paradoxical as it might appear, Switzerland owed not only its accorded linguistic diversity but also its recognition of the principles of freedom and equality. These products of foreign rather than of national circumstances were to prove that their values were more premature than fundamentally contrary to the needs of the Swiss people.[25] The Regeneration, on the other hand, beginning in the cantons, was to be a work of Swiss national origins, the spontaneous expression of cantonal governments seeking to adapt their constitutions to newly realized ideals. This enthusiasm, though far from universal, expressed itself

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24 Aubert, loc.cit., p.18.

25 W.E. Rappard, The Government of Switzerland (New York, 1936), pp.27-28.

among several cantons as follows: a popular assembly would elect a constituent assembly which, in drafting a proposal for revision, would submit the proposal to a popular referendum. This was a radical technique employed in order to arrive at a liberal constitution.[26]

The reformist movement of the 1830's was composed of both liberal and radical elements which substantially agreed in their condemnation of the confederate regimes and therefore in their advocation of a federal structure of state while having widely varying conceptions on the subject of popular sovereignty. The reformers very soon encountered the opposition of the Alpine democracies and of a number of Catholic cantons. Opposed to all liberal reforms in fearing that their rights as sovereign states and as cantonal minorities would suffer invasion,[27] these cantons adamantly refused to conform their constitutions to the novel political aspirations. On the political balance sheet of the first wave of the Regeneration, therefore, Switzerland appeared again divided into two camps, between liberals-radicals and conservatives. This grouping,

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26 Aubert, loc.cit., p.23.

27 Rappard, loc.cit., p.20.

however, was not purely intellectual as it found in due time its legal expressions in the Concordat of Seven and in the League of Sarnen respectively. Fortunately for Switzerland at that time, neither the one nor the other proved of any effectiveness.[28]

Upon the initiative of the liberal and radical cantons, a revision of the Pact of 1815 was sought by a new Commission which submitted its draft, the Projet Rossi, to the Diet in 1832. With this event, the conflict took on a confessional aspect. As the decisive phase of the reform movement was henceforth to be determined by the forces of radicalism, this group of extreme liberals, in pressing for the creation of a unified state based on direct democracy as well as for the subordination of the Church to the state, encountered " in the midst of its triumphal progress the opposition of the extreme form of Catholicism... the militant order of the Jesuits."[29]

Whereas formerly the animosities between Protestants and Catholics had been of a political nature in that they opposed each other as social classes, henceforth religious

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28 Aubert, loc.cit., p.24.

29 Bonjour, loc.cit., p.260.

ideas entered into the conflict. For, if the Regeneration had stood at once for popular sovereignty and political freedom and equality, it had also advocated the subordination of historical tradition and authority to logical reason and even skepticism during its later phases. To the faithful sons of traditional orthodoxy, the liberals were iconoclasts, heretics, anarchists; to the partisans of freedom and equality, the conservatives were the enemies of popular emancipation.[30] Regrettably, the 1840's were to become a repetition of old religious strifes in which the forces of liberalism battled with those of respect for political and ecclesiastical authority, of attachments to historical and federative traditions, and of fidelity to cantonal sovereignty.[31]

When the Church found its influence undermined by liberalism, and when a number of Catholic cantons asked for papal assistance and demanded that Jesuits be put in charge of their educational affairs, a united front of Protestants and radicals rose to the challenge. For long the bete noire

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30 W.E. Rappard, La Constitution Federale de la Suisse (Neuchatel, 1948), p.104.

31 Ibid., p.64.

of the radicals, the Jesuits were charged with obeyance to Rome rather than to their civil authorities, and a number of monasteries were temporarily closed. The political-religious antitheses intensified to the point of hatred, and the more ruthless the action taken by the state against the Roman Catholic Church, the more stubborn their resistance and the popular support of it.[32] When subsequently a number of Catholic cantons formed a separate alliance, the Sonderbund, ranks in the opposing camp closed as well. Liberals and radicals, by exploiting their majority in the Diet, condemned the alliance and shortly after went to war against it. What neither persuasion nor political pressure could accomplish was thus solved by the sword in the Civil War of 1847 (which, it must be added, lasted for three weeks and involved 113 casualties). Without the cooperation of the defeated Sonderbund, the Swiss people by a constitutional referendum were to adopt a new Constitution.[33]

THE SWISS CONSTITUTION OF 1848

Favored by the triumph of the liberal-radical party and

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[32] Bonjour, loc.cit., p.298.

[33] W.E. Rappard, The Government of Switzerland (New York, 1936), p.20.

by the successful example of a federal republic in America, the Swiss Constitution of 1848 was to reflect, above all, the influences of its country's past as well as those of its future aspirations. As a child of its time, the document sought to reconcile the exegencies of Swiss history, geography, and psychology with the requirements of democratic argumentation and rationale.[34] Inasmuch as the victors of the Sonderbund War had drafted the new liberal constitution, there might be discovered a causal connection between the triumph of popular sovereignty and political and economic liberalism. Their creation can be considered the daughter of the cantonal Regeneration of 1830 and of those ideas which inspired it, if it is remembered that this very Regeneration was called forth by the Industrial Revolution and the involvement of Switzerland in the European system.[35]

The Constitution was accepted with enthusiasm by only a fraction of both cantons and people and reflected the compromises and adjustments of political relations between a

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34 W.E. Rappard, La Constitution Federale de la Suisse (Neuchatel, 1948), p.112.

35 Ibid., p.97.

strong central government and its constituent units. Because the motive for union remained anchored in the desire for local independence, it must be kept in mind that Switzerland's traditions were intimately interwoven in a Staatenbund in which the member states maintained an almost insulated independence. When the Bundesstaat of 1848 demanded solidarity, love for unity could hardly come out of it.[36]

As regards the political, economic, and cultural domination of city and country in Switzerland, until the French Revolution the rural areas dominated in economic terms, while the towns prevailed politically and culturally. Eighteen fortyeight inaugurated a

> period of political preponderance for the rural areas... (as) the overwhelming majority of the population then lived in communities with less than 2000 inhabitants.(37)

Consequently, the "founding fathers" sought to avoid all revolutionary appearance in bowing to historical necessities while introducing fundamental and revolutionary changes. At the same time the Constitution of 1848 was mainly the

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36 Vincent, loc.cit., p.39.

37 A. Gretler and P.E. Mandl, Values, Trends and Alternatives in Swiss Society (New York, 1973), p.188.

creation of the German sector of Switzerland in its Protestant, liberal, and economically-developed aspects, i.e., the work of the larger cantons whose demographic, political and military weight were indispensable for the creation of a federal union.[38] The partisans of the reform of 1848 were thus those cantons which were more attuned to the principles of liberal and radical democracy, more conscious of their solidarity with the confessional and linguistic majority, and more developed in relation to trade and industry.[39]

Concerning the revision of the Pact of 1815, almost all of the particular provisions in the document of 1848 date back to the Projet Rossi of 1832. As to the actual procedure of revision, however, the majority decision of 1848 remains of dubious legal validity. Generally speaking, in the absence of rules for a proper revision, a constitution becomes a truly political danger as it makes out of revolutionary action, in the absence of general agreement, the necessary

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38 Rappard, loc.cit., p.96.

39 Ibid., p.96.

instrument of progress.[40] And regarding 1815 in particular, the Pact provided for revision on the basis of unanimous agreement, a legal provision impossible to comply with given the circumstances in 1848. When consequently a majority opinion of thirteen cantons, being thus devoid of juridical value, decided on the legitimacy of the new Constitution which was to replace the Pact of 1815, the legality of this decision might well be questioned.[41]

The document itself is composed of a short preamble, of 114 articles which are divided into three chapters, and of seven transitory provisions. The first chapter, articles 1 to 59, sets up the federal structure of the country, establishes the division of powers between the central government and the states, and authorizes certain individual freedoms. The second chapter, articles 60 to 120, deals with the organization of the federal authorities in instituting a Federal Assembly, a Federal Council, and a Federal Tribunal, and in establishing their respective jurisdictions. The third

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40 Rappard, loc.cit., p.168.

41 Aubert, loc.cit., p.32.

chapter, articles 111 to 114, regulates the revision of the Constitution.[42]

Since a number of subjects according to the above synopsis will be dealt with in subsequent chapters, a few words remain to be said regarding the organization of the federal authorities. Generally considered to be a happy political result, the creation of a strong, stable federal government involved several compromises as mirrored in the only partially realized doctrine of the separation of powers and in the adoption of bicameralism.

Although the Constitution distinguishes between the legislative, executive, and judicial branches of government, these bodies are far from equilibrating or checking each other; the legislative branch dominates, at this point in time, both the executive government or the Federal Council, as well as the high court, or Federal Tribunal.[43]

To the extent that the constitutional framework sought to divide lawmaking powers for the entire nation between a

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[42] Aubert, loc.cit., p.34.

[43] Ibid., p.35.

central government and a number of constituent governments, the

> authors of the Swiss Constitution (faced) problems similar to those solved in the United States by the Constitution of 1789. ... Whereas, however, the Anglo-American traditions had all been in favor of a double chamber, the Swiss traditions were all opposed to it. (44)

The solution of the problem of reconciling local and national interests which finally prevailed was the structural adoption of bicameralism in conscious imitation of the American Constitution; as such it was to reflect the "exoticism of the majority" in adding a foreign political mechanism to the working of a system of purely helvetic inspiration.[45]

The creation of two houses on the American model (the bicameral legislature), which was composed of the National Council, the House of Representatives which would represent the people proportionately, and the Council of States, the Swiss senate which would represent the cantons equally, met with admiration ever since the discussions about and recommendations for bicameralism had been exposed during the

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44 W.E. Rappard, The Government of Switzerland (New York, 1936), p.21.

45 W.E. Rappard, La Constitution Federale de la Suisse (Neuchatel, 1948), p.269.

1830's. However, the organization of the executive power according to the American exemplar was outright rejected. Fearing that the American prototype of a popularly elected president would cut a path toward a monarchical, and thus unrepublican and dictatorial system of government, the federal executive was modeled after the cantonal governments in both the mode of its election by the Federal Assembly and in its corporate composition of seven members.[46]

Concerning the judicial branch, the model of the American Supreme Court was equally discarded. With no powers of judicial review, the high court, or Federal Tribunal, was hardly more than a committee of the Federal Assembly entrusted with certain limited duties.[47] And even though historical evolution was to add to its importance, the Federal Tribunal remained subordinate to the legislative and the executive powers, unable to emancipate itself completely from the political tutelage under which the authors

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46 W.E. Rappard, The Government of Switzerland (New York, 1936), p.23.

47 Ibid., p.23.

of the Constitution had wanted it to remain.[48]

If the political system of 1848 had provided the Bundesstaat with the formal and material means for a cohesive life of the nascent nation, then its conservative elements had certainly stood their own by opposing its centralizing tendencies in taking full account of old historical forces. Switzerland had become a federal state in which the cantons had lost their sovereignty, and in which a superior state could impose tasks upon the cantons which they had neither wanted nor foreseen. In addition, the twenty-five cantons had become one customs union by uniting in a common market. Nonetheless, the objections and obstacles raised to the centralizing thesis were based on the stubbornly defended diversity of the needs of the different parts of the country, on the relative incapacity of the federal bureaucracy compared to the superior competences of experienced cantonal administrators, and on the difficulties arising out of the system of public revenues.[49]

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48 W.E. Rappard, La Constitution Federale de la Suisse (Neuchatel, 1948), p.164.

49 Ibid., p.252.

Towards the Total Revision of 1874

In 1866 the young nation's growing pains and difficulties were to result in a crisis of lasting importance, prompted by a relatively minor political event. Switzerland was henceforth to embark upon a course of liberal radicalism in politics and economics. The Constitution of 1848 had proven so consonant with the needs and wishes of the people that in the course of 17 years neither its revision nor even its laws had seriously been questioned. However, the situation was to change suddenly when the repercussions of the Swiss-French treaty of 1864 made themselves felt.[50] According to this agreement, all French citizens, without distinction of religion, had the right to settle in Switzerland. French-Jewish subjects, consequently, enjoyed a privilege that had been denied to their Swiss co-religionists according to a constitutional provision which accorded the freedom of settlement to Swiss citizens of "one of the Christian confessions" only.[51] When upon inquiry by the

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50 Rappard, loc.cit., p.273.

51 Ibid., p.274.

Federal Council most of the cantons expressed themselves in favor of a constitutional revision, the executive government, under the leadership of Dubs, took the opportunity to propose, apart from the modification of the provision in question, a whole series of other amendments the necessities for which appeared to have become obvious in the course of Switzerland's historical evolution since 1848.[52]

The proposals of the Federal Council included, among others, the right to legislate on such matters as freedom of trade and industry, a standard of weights and measures, protection against the simultaneous claims of several cantonal legislatures, etc.[53] To these, the Federal Assembly answered with counter-proposals by rejecting some and adding others. In the end, nine proposals were submitted to the vote of both people and cantons in 1865.

Divergent answers have been given to the question why both the Federal Council and the Federal Assembly should have tried to take advantage of the occasion for a relatively

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52 Aubert, loc.cit., pp.42-43.

53 Rappard, loc.cit., p.276.

minor revision of a constitutional provision by adding a whole series of wide-ranging amendments. It can be granted that one of the reasons was the fact that the Constitution did not as yet distinguish between total-and partial revisions. To assert, however, that the situation in 1865 did not reveal unsuspected gaps in the fundamental law appears to remain controversial when viewed in the light of the following considerations.

First, a special revision was called for; was it not appropriate to take advantage of this occasion, which one did not intend to repeat often, in order to settle at one swoop a series of other questions whose very nature since 1848 had revealed their interest if not urgency?[54] Second, and as will be seen in greater detail in the next chapter of this essay, the first draft for a total revision was based, for the most part, on the proposals of this time to which a revision commission of the National Council added some articles of even more drastic import concerning unification, extension of popular rights, and secularization.[55]

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54 Rappard, loc.cit., p.277.

55 Aubert, loc.cit., p.47.

Of the nine proposals only one, the political equality of Jews, was accepted. This political verdict was to be often confirmed in Switzerland's subsequent evolution in that those very elements which, already in 1848, had shown their hostility to the Constitution were the same as those which again had voted against the amendments. It must also be recognized that the other amendments were rejected by varying majorities: the article on the standard of weights and measures, for example, was accepted by the people but rejected by the cantons. Furthermore, the general political situation must be kept in mind. The series of amendments were of liberal inspiration in that they sought to abolish certain inequalities and so to perfect the federal state without its becoming a unitary state in the process.[56]

There were three parties in existence at that time: to the left, the radicals, already facing displacement by the democrats; in the center, the liberals; and on the right, the conservatives, for the most part Catholics. In the resulting dialogue the opposing forces might best be revealed in the persons and programs of Simon Kaiser and the

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56 Aubert, loc.cit., p.47.

democrats on the left who stood for "galvanizing" the country in its entirety, for the popular election of the Federal Council, and for the rights of initiatives and referenda; and in de Segesser, on the right, who rejected all unhistorical, untraditional, and artificial constitutional provisions as being devoid of those roots which had grown organically out of Switzerland's soil. Against the threatening forces of unification and centralization he opposed the ideal of the independent growth and of the separate life of each state within the union.[57]

The idea of revision, however, had gathered enough momentum in its relentless march toward unification to drown the voices of tradition. Its thrust based itself on three separate but mutually reinforcing tendencies which, under the name of centralism, democratism, and anti-clericalism, were to determine the total revision of 1874.

Already very much alive in the 1860's, the centralizing current, cherished for long by the German radicals in their demands for administrative and legislative unification, was fed by two powerful supplementary forces. First, the German

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57 Bonjour, loc.cit., p.289.

victories over Austria and France seemed to have proven the value of centralization of political and military institutions, and, second, with the demands for unification of civil and penal law by the Society of Swiss jurists in 1868 and 1869 respectively,[58] the justifications for a stronger federal state seemed irrefutable.

As the Constitution of 1848 had inaugurated a representative democracy which in turn had engendered a species of oligarchy, the new democratic current expressed itself in the 1860's by the claims that it was the prerogative of the sovereign people to supervise the gentlement of parliament, to stimulate them by means of the initiative, to moderate them by means of the referendum, and to prevent them from doing harm by means of the recall. In addition, the democrats demanded the popular election of the government as well as of the judges and national councilors.[59] These claims were buttressed because the referendum had an ancestor in the veto, practiced since the Regeneration. Direct democracy in the cantons had found expression since 1844 in the compulsory

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58 Aubert, loc.cit., p.45.

59 Ibid, p.45.

referendum, since 1845 in the initiative and in the optional referendum, and since 1858 in a compulsory referendum pertaining to financial matters. Historians have seen the point of departure from representative democracy in a cantonal constitutional revision of 1863.[60]

The anti-clerical current had lost much of its strength since the war of the Sonderbund. It was to rise again to frightening heights in the politically agitated atmosphere of the 1870's. Despite the banning of the Jesuit order and the withdrawal of the cantons of the Sonderbund into virtual isolation in their minority status, old wounds had begun to heal. However, with the papal encyclical Quanta Cura of 1864 and its Annex, the Syllabus Errorum, as well as the proclamation of Papal Infallibility of 1870, a veritable Kulturkampf[61] ensued. Along with these currents, a growing reaction against economic liberalism had been nourished from abroad in the writings of Marx, Engels, and LaSalle. The motives to restrict individual freedom were to express themselves very soon in the actions taken by the more industrial-

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60 Aubert, loc.cit., pp.45-46.

61 Ibid., p.46.

ized cantons in the social and economic order. It seemed only natural that the federal state should follow the more progressive cantons.

Against the background of these developments, there remains to be examined the influence of the nationalist revolution of the mid-century upon Switzerland. The feeling of nationalism, confined to the cantons, had not so far become part of the Swiss consciousness; however in later years it threatened potentially to partition Swtizerland among her neighbors.[62]

The original pact among the three Alpine communities has remained the symbol of union in diversity. As different as these groups might have been, the necessities to adapt themselves to the same natural elements aroused identical needs and prompted them to parallel actions. Communal and cantonal autonomies remained the schools for voluntary forms of patriotism and pride in liberties both on the local and national levels; for these reasons Switzerland has subsequently not unjustly been called a miracle of good will.[63]

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62 Bonjour, loc.cit., p.283.

63 Carpentier et Lannoye, loc.cit., p.159.

Concerning linguistic diversity, in Switzerland three of the most important language families of Europe come together: German, French, and Italian. This convergence in so relatively small a country made for tensions not only in the political realm but also in the cultural sphere, as each national character and concomitant traditions were so distinct that their meeting precluded any mutual penetration for centuries. These three families, living side by side in mutual sympathy and antipathy, reflect a decisive problem in Swiss history. It was always deemed wiser to decide in favor of the independence of a given locality for a respected part in a small state, than to opt for the splendor of a powerful state and so to become a less significant province in a vaster cultural domain.

As in the course of time mere toleration made for tolerance, a cultural phenomenon of Switzerland became manifest. Over centuries language divisions and their cultural regions have remained unchanged, but perhaps mutual respect devoid of any ethnic delusion of grandeur allowed these diverse peoples to reach satisfactory solutions without compromising their native traditions. At the same time,

however, it must also be recognized that the

> Swiss "miracle" of unity in diversity rests upon a peculiar equilibrium of cross-cutting cultural divisions which is historically unique and cannot be duplicated under different conditions.(64)

Of the four national languages only Romanche, derived from Latin and showing similarities with Provencal,[65] remains without support of a wider cultural circle. At given times of cultural-political upheavals abroad the other ethnic groups have known their crises of allegiance. However, when it became a question of maintaining their native home and of conserving their own version of democracy, all have found their support in the tradition of the Alpine valleys preferring compromises to principled and therefore unalterable decisions. It is in this context that the following assertion must be understood: Switzerland like no other nation is as foreign to nationalism as it is national.[66]

From a historical point of view, the foundation of Swiss

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64 Kurt B. Mayer, "The Jura Problem: Ethnic Conflict in Switzerland," Social Research, vol 35, no.4, 1968,p.707

65 G. Sauser-Hall, The Political Institutions of Switzerland (Lucerne, 1946), p.13.

66 Carpentier et Lannoye, loc.cit., p.67.

nationality was dramatized in Tell by the call for a single nation of brothers, echoed in subsequent centuries by the demand for a new brotherhood irrespective of existing sovereignties and class barriers.[67] If nationalism, however, presupposes the existence of a centralized form of government for a new re-ordering of society, then the foundations of modern nationhood were not laid in Switzerland until the inauguration of the Helvetic Republic under Napoleon in 1798. This nascent nationalism was to fuse ancient and modern liberties. Although the source and inspiration of modern liberty have generally been attributed to the French Revolution, Switzerland's example provides a major modification to this thesis. Where liberty was molded by feudal mentality and absolutist monarchy, the French Revolution increased the desire for liberty but allowed despotism and force to further national aims; where the Revolution met with a non-absolutist and non-dogmatic approach, however, its influence was compatible with the conscious growth of a liberal tradition from historical roots in which individual liberty, local self-government, and tolerance of diversity

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67 H. Kohn, The Idea of Nationalism (New York, 1967), p. 383.

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could be lastingly maintained.

When in the nineteenth century the struggle for national independence of race, language, and religion presented insurmountable obstacles to a fraternal association of neighboring peoples, Switzerland's constitutional framework made possible not only a peaceful development of liberty among diverse populations but also

> withstood well the twin pressures exercised by growing mass mobilization and the increasing scope of governmental tasks upon the capabilities of the government of a modern, multilingual state and upon the political consensus of its citizens. (69)

The character of Swiss nationalism, therefore, confirms the assertion that although nature, language, and blood separate the Swiss from one another, what keeps them together is a consciousness of forming a nationality far above blood and racial ties. Alternatively, and beyond their patriotism which proved strong enough to

> overcome the attachment of every citizen to his canton, the conflict between cantons, and the difference of

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68 H. Kelsen, Nationalism and Liberty: The Swiss Example (New York, 1956), p.13-14.

69 K.W. Deutsch, Nationalism and Social Communication (Cambridge, 1966), p.3-4.

> languages and culture ... what kept the Swiss together was a sense of social and political responsibility, a sense of citizenship born out of life in small communities. (70)

If, as in America, the consciousness of solidarity was a matter of slow development even after the forms of constitutional unity had been accepted, then

> Switzerland most strikingly illustrates the weight of a common tradition as the basis of that real constitution which transforms a written charter into a political force of lasting importance. (71)

In conclusion, the political system of 1866 reveals four major trends and objectives which were to find their concrete embodiment in the constitutional revision of 1874. The first concerned national centralization, testing whether Switzerland could in fact be a nation, and if so, whether the federal authorities could be flexible enough to meet national crises and could be capable of development according to evolving needs. These challenges were answered in that Swiss national unity required a Civil War to solve the constitutional ambiguities and the economic and social

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70 Jacques Freymond, "Switzerland's Position in the World Peace Structure," Political Science Quarterly, Vol.67, No.4, Dec.1952, p.526.

71 C.J. Friedrich, Constitutional Government and Democracy (Boston, 1950), p.168.

cleavages involved, and in that the growing sentiment of national unity had endowed the central government with those measures for unification and centralization through which the expanded activities of the state could be effectively discharged.

The second trend dealt with the extension of democracy, raising the issue whether the new social conscience could find adequate humanitarian expression in the formal organization of government. This question was answered through the growth of direct democracy, and particularly by the movement in favor of the initiative and referendum which swept over most of the Protestant cantons after 1860; it reflected a trend which naturally led to similar demands on the federal state.[72]

The third trend encompassed the conflict between Church and state, resulting in re-inforced anti-clericalism. Nourished by the internal opposition of the Catholic minority to all liberal reforms since 1848 as well as by external interferences of Rome through the Papal Encyclical of 1864 and the proclamation of Papal Infallibility of 1870 respectively,

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72 W.E. Rappard, The Government of Switzerland (New York, 1936), p.26.

these events were to irritate the majority against the clergy to such an extent that the legacy of this period was to be enshrined in the Kulturkampf articles in the revised Constitution of 1874.

The first three trends had proceeded along the same lines since 1798, interrupted by the reactions of 1803 and 1815, and resumed by the cantonal Regeneration of the 1830's. Finally they were generalized for the whole country in 1848.[73] The fourth objective, state intervention in social and economic fields, was new and different. The Constitution of 1848 had stood for a purely liberal and individualist philosophy by freeing the individual from the state. Once freed, however,

> the individual had soon wished to make the state subservient to the satisfaction of his wants and needs. This natural evolution, coupled with the development of industrial and commercial capitalism, led to the growth of state socialism or "etatism"... (a) factor which has since been responsible for most of the subsequent amendments.(74)

The contention that Switzerland "is a welfare society rather

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73 W.E. Rappard, The Government of Switzerland (new York, 1936), p.25.

74 Ibid., p.27.

than a welfare state" notwithstanding, the main characteristics of the reform of 1874 may justly be considered as a result of the encroachments upon cantonal competences, of the progress of science in all realms of human endeavors, and of the increase of the scope of the activities of the state always undertaken for the benefit of the individual but often only realized at the expense of his freedoms.[75][76]

If the modern elements in the political system of 1866 can thus be reduced, particularly since 1798, to the essential contributions of each successive regime, then the traditional elements in the system, or -

> the only important features which present day Switzerland has in common with the medieval communities out of which it has emerged, are republicanism, unicameral legislatures in the cantons, and the corporate form of the executive authorities. (77)

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75 Ioan Bowen Rees, "Local Government in Switzerland," Public Administration, Vol.47, Winter 1969, p.445.

76 W.E. Rappard, La Constitution Federale de la Suisse (Neuchatel, 1948), p.287.

77 W.E. Rappard, The Government of Switzerland (New York, 1936), p.27.

CHANGING SWISS CONCEPTIONS OF CONSTITUTIONALISM, AND THE TRANSFORMATION OF THE CONSTITUTIONAL FRAMEWORK

Swiss Constitutionalism

Like all comprehensive terms, "constitutionalism" represents an evolution in meaning. On a most abstract level, constitutional theory deals with relationships among the legislative, executive, and judicial branches of government. More specifically, it may include, on the one hand, comparative questions about the structure and functioning of government in emphasizing such concepts as "constitution," "sovereignty," "separation of powers," or "judicial review;" it may address itself, on the other hand, to critical questions regarding the objectives of government in stressing such concepts as "freedom," "equality," "public order," or "the protection of civil rights."[78] These relative and crucial concepts notwithstanding, constitutionalism is said to embody one essential quality: it is a legal limitation on government, or the antithesis of arbitrary rule such that constitutional government is, by definition, limited government.[79]

In exemplification of the foregoing, Swiss constitutionalism reflected its early and most revealing characteristics

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[78] G. Marshall, Constitutional Theory (Oxford, 1966), p.1.

[79] C.H. McIlwain, Constitutionalism (Ithaca, 1966), p.21.

in the political philosophy of the Regeneration. Examination of the liberal-radical program of the 1830's, however, must always be linked to the recognition that inasmuch as the ideals of Swiss constitutional liberty had to be fought for in a Civil War, so, too, remain the subsequent interpretations of the Constitution and the broadening of individual rights and civil liberties a reflection of the struggle between the demands for cantonal autonomy on the one hand, and the obligations of the federal government for the security and the prosperity of the country on the other.

Swiss liberalism stood, first of all, for the separation of powers and the creation of courts of justice with an independent judiciary. In addition, it sought to establish a barrier between government and parliament such that the same person could not be a member of the two bodies at the same time. Second, it upheld the extension of the representative character of parliament. By calling for the abolition of property qualifications for voting it preserved, in return, certain compromise procedures, such as indirect election. As regards the structuring of electoral districts, it intended to attenuate the inequality between town and country. Third,

Swiss liberalism supported the elimination of fixety of tenure, reduction of the duration of the legislature, and publicity of debates, and, finally, it desired the restoration of liberty, the realm from which it derived its name, through greater protection of individual rights and freedoms.

These programs did not remain unchallenged. Swiss radicalism went back to the ideas of liberalism and pushed these to their logical conclusions. Thus the only true democracy was to be direct democracy, and the sovereign people would not limit itself to the election of representatives only; their work was at least to be supervised by means of the referendum.[80] In a mixture of these agenda, a more detailed analysis of Swiss constitutionalism will emphasize the concepts and principles of the separation of powers, of the constitution itself, and of judicial review.

Separation of Powers

The political device of the separation of powers can be said to constitute the essence of constitutionalism, yet the

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[80] Aubert, loc.cit., p.22.

phrase "separation of powers" remains one of the most confusing in the vocabulary of political and constitutional thought. Just as the mixing of political functions can reflect a fundamental conception about the nature of democracy since

> the difference between a legal system in which the ordinary legislature is free from legal limitations, and one where the legislature is subject to them, appears merely as a difference between the manner in which the sovereign electorate chooses to exercise its sovereign powers (81),

so, too, was the same doctrine of the separation of powers (which in the United States was thought to require judicial review of legislative acts in order to protect written constitutions as well as minority rights[82]) to find a different interpretation in Switzerland. Here, the constitutional separation of powers accorded greater importance to the legislature and less to the judicial branch of the government.

As one of the main articles of the liberal faith, the doctrine, in its "classical" formulation, sought to divide governmental powers according to function, or according to the bodies which exercise them, as distinguished from its spatial-territorial aspect in federalism. In entrusting

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81 H.L.A. Hart, The Concept of Law (Oxford, 1961), p.72.

82 C.G. Haines, The American Doctrine of Judicial Review (New York, 1959), p.13.

different functions to different bodies, the doctrine sought to prevent that political power be concentrated in a single person or office, thus aiming at the creation of anequilibrium of powers through which fundamental rights and civil liberties would be better assured.

Resting on three presuppositions, the doctrine held:(a) that the activities of the state are clearly divisible into a certain number of functions; (b) that these functions must be vested in different persons or bodies; and (c) that these bodies must be, as much as possible, independent of one another, or at least interdependent.[83]

Like all constitutional principles, the doctrine provided for general propositions which do not cover all concrete facts; and in the evolution of political thought, the classical definitions were soon proved insufficient. Inasmuch as the executive, legislative, andjudicial functions were said to be exercised by three separate bodies, deemed both constitutionally equal and mutually independent, the doctrine remains doubtful in its application to the political arrangements of any working constitution, past or present. As it

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83 Aubert, loc.cit., II, p.451.

embodies a cluster of overlapping ideas which, in some of their implications, are mutually inconsistent, the doctrine in even its more modern versions is still said to be

> infected with so much imprecision and inconsistency that it may be counted little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds(84).

Since it has become unclear what precisely is to be separated, and of what legislation, administration, and jurisdiction consist, these categories, ambiguous in themselves and certainly not at all applicable to all sorts of intermediate operations, would by their very definition attribute, for example, executive functions to isolated bodies and in so doing prevent the administration from taking the initiative in the preparation of laws.[85] It is thus absurd to partition governmental functions or bodies into water-tight compartments when, in actual practice, they are to cooperate with one another.

Concerning "interdependence" of functions, most governmental systems which profess this dogma refer to some form

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84 Marshall, loc.cit., p.124.

85 Aubert, loc.cit., II, p.455.

of equilibrium which exists, for the most part, in text-books only. As a mixture of ideas about isolating, balancing, and checking, brought into a sort of balance by a necessary interaction to preserve a "paper" separation, the divided bodies are, in reality, never in a state of equilibrium as the formulae for independence or inter-dependence cannot prevent one body from dominating the others.[86][87]

Yet despite these criticisms, the following enduring qualities of the doctrine are said to remain: (a) the necessity of several functions sufficiently different from one another; (b) several bodies, as a concomitant prerequisite, with a corresponding attribution of a principal, but not exclusive, function to each, and (c) as regards the relationships between these divided bodies, the aim must be such an arrangement of forces whereby no single body of the system is condemned to servitude.[88]

In its application to Swiss federal law, neither the

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86 Marshall, loc.cit., p.103.

87 Aubert, loc.cit., II, p.455.

88 Ibid., p.455.

Constitution of 1848 nor that of 1874 expressly referred to the doctrine of the separation of powers. Whilst the three branches of government are, of course, distinguished, their authorities of competences are rather badly defined, and their relationships are organized in such a way that the Federal Assembly appears to prevail over both the Federal Council and the Federal Tribunal.

With respect to the relationship between the Federal Council and the Federal Assembly, however, the ambiguity of several constitutional provisions has given rise to two fundamentally opposing interpretations: (1) the "democratic" version, which upholds the preponderance of the Federal Assembly, and (2) the "liberal" version, which would curb the supremacy of the Federal Assembly by strengthening the other two branches of government.[89] Finally, to the extent that certain additional provisions and laws modify the partitioning of operations with the result that the Federal Assembly performs administrative or judicial functions, that the Federal Council acts in a legislative or judicial capacity, and that the Federal Tribunal deals with legislative

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89 Aubert, loc.cit., II, p.456.

or administrative matters, the "governmental" tasks, comprising a fourth or intermediate category of functions, remain subject to a very complicated division between the Federal Assembly and the Federal Council.[90]

The Constitution

To the extent that the concept "constitution" refers to the whole of legal rules and regulations relative to the state, in both foreign and Swiss commentaries the Swiss Constitution is not regarded as either inviolable or even sacred. As there exists, furthermore, no such reverence for the "founding fathers" as, for example, in the United States, the ensuing slight respect for the fundamental law is said to be due to the facility with which the Constitution can be amended. As a result of laws being thus easily changed, the essential difference between constitutional and statutory law disappears, since "the Swiss people as a whole place democracy, the observance of the will of the pople, above constitutionality, the observance of the will of the constitution."[91]

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90 Aubert, loc.cit., II, p.456.

91 H. Huber, How Switzerland is Governed (Zurich, 1946) p.10.

This very will of the people, however, as expressed through the political devices of the constitutional initiative together with the referendum, has subsequently not only been deemed responsible for the blurring of the difference between constitutional and statutory law, but also, through the casualness with which constitutional provisions were often disregarded, and through the ease and frequency with which they were amended and multiplied, been held accountable for having deprived the Constitution of an essential element of its authority which should be a major attribute of any supreme norm.[92] In this context, however, it must be recognized that the Constitution provides for both legislative and popular methods of amendment, whilst making the final approval of both the people and the cantons an indispensable requirement for the adoption of proposed constitutional amendments.

In particular reference to Anglo-American political institutions, it has also been maintained that the Swiss Constitution is more democratic and progressive than that of the United States in that the latter was framed, purpor-

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92 W.E.Rappard, La Constitution Federale de la Suisse (Neuchatel, 1948), p.381.

tedly, by a secret assemblage of propertied men to more adequately safeguard private property,[93] whereas the former stressed the rights of the people. Finally, and whereas the difference between the lawmaking and the constitutional amending process has maintained the distinction between ordinary laws and the Constitution in the United States, or that English parliamentary supremacy is said to be modified by the "rule of law," traditions of Swiss history are deemed unfavorable to the "supremacy" of the law.[94]

The foregoing explanations, however, remain open to several objections. Most generally, there is the problem of comparison which implies inclusion of differing elements within the same class. Thus although resemblance expresses a relation to a shared property, it remains nonetheless imperative to recognize that a chosen quality for comparison depends not only on the purpose of inquiry, but also, and perhaps more importantly, on the selection of the criteria

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93 M.L. Tripp, The Swiss and the United States Constitunal Systems (Paris, 1940), p.65.

94 Moses, loc.cit., p.163.

by reference to which classes are defined.[95] More particularly, and in contrasting the results of judicial control over legislation with the effects of legislative control over written constitutions, the following comment is paramount:

> we do not admit that our tribunals legislate... and yet we maintain that the rules of the English common law... are coextensive with the complicated interests of modern society. (96)

Further, that although the law does not command the same respect, and is not so marked a foundation of the state and element of national character, and although the administration of justice is not in the same way a model for the other activities of the state, Switzerland is a Rechtssaat governed by the rule of law.[97]

Finally, another authority of Swiss legal opinion offers the following interpretations.[98] Beginning with the assertion

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95 J. Hall, Comparative Law and Social Theory (Binghampton, 1963), pp.47-48.

96 H.S. Maine, Ancient Law (London, 1959), p.27.

97 Huber, loc.cit., p.39.

98 J.F. Aubert, Traite de Droit Constitutionnel Suisse (Neuchatel, 1967), I, p.105.

that some constitutional provisions are basic and unalterable by ordinary legal processes, the claim that from a theoretical point of view the Swiss Constitution appears as if it were only an ordinary law is denied by an alleged superiority of the Constitution over statutory law. This contention is based on two facts: (1) the Constitution can only be revised according to a more difficult mode of procedure, and (2) a constitutional provision can therefore annul ordinary law whereas the reverse does not apply. To exemplify: in Switzerland laws are only submitted to a referendum when thirty thousand citizens demand it; a procedure in which the cantons are not consulted. Constitutional provisions, on the other hand, must be submitted for consultation to both the electorate and the cantons. The resulting superiority of the Constitution, however, is therefore not of greater legitimacy than statutory law since it remains simply the difference of procedure which places the Constitution above the law.[99]

As a corollary of the foregoing, the distinction between flexible and rigid constitutions is untenable. If "flexible"

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[99] Aubert, loc.cit., p.105.

refers to the smoothness with which a constitution can be adapted to new situations, or to a constitution which can be revised without special procedure, i.e., according to ordinary legislation, then a flexible constitution is not a constitution in the formal sense since the latter must be distinguished from other documents by its form, i.e., procedure, and not by its content. A flexible constitution, therefore, is simply "law", a series of rules and regulations which constitute the material aspect of a constitution. The Constitution of 1874, consequently, is a constitution in the formal sense: by providing for its mode of revision, it is distinguished from ordinary legislative procedure by the compulsory referendum and the prerequisite consultation of both cantons and people.[100]

In much the same way as the superiority of the Constitution over statutory law was said to be derived from a difference in procedure only, so the claim that there is in every constitution a "hierarchy" of rules is equally questioned. Accordingly, the distinction between "fundamental" and "circumstantial" constitutional provisions can therefore mean

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100 Aubert, loc.cit., pp.107-108.

only two things: either that the constitution provides for two different procedures one of which is more difficult than the other, or that the advocates of this distinction believe that the fundamental rules escape from all revision.[101] As the latter possibility leads up to the delicate question of the so-called material limits of constitutional revision, Aubert is inclined to view these - whilst not denying, in principle, the existence of intangible constitutional rules - as an appeal to mysterious regulations in view of the fact that article 118 of the Federal Constitution says very simply: the Federal Constitution can be revised at any time, totally or partially.[102]

Arguments over the legal value of the procedure of constitutional revision have resulted in equally perplexing, and staunchly defended, opposing schools of thought. At the basis of this controversy lies a dictum ascribed to Sieyes: if the original constituent body which adopted the constitution is superior to the derived constituent body which is to revise the constitution, then the procedure of revision which

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101 Aubert, loc.cit., pp.109-110.

102 Ibid., p. 132.

the first imposed upon the second constitutes a valid, legal regulation.[103] On the other hand, when the two bodies are identical, it is maintained that the rules for revision are, properly speaking, not legal ones since a supreme power cannot legally bind itself, or since no statute can establish obedience to statute, for that "would be to assume and act on the very power to be conferred."[104]

In reference to Swiss history, the original constituent body in 1848 was not superior as only some cantons pronounced themselves in favor of the Constitution; the entire electorate was not yet organized. In 1874, the two bodies were identical in that the Constitution had been accepted by both the people at large and the cantons, and both were thus entitled to revise the Constitution. On the basis of the suggested argument, however, Chapter Three of the Federal Constitution would be devoid of juridical validity, or, more generally, all constitutional revisions, from 1848 to the

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103 Aubert, loc.cit. p.113.

104 G. Marshall, Constitutional Theory (Oxford, 1971), p.49.

present, would constitute some sort of "revolution."[105]

Agreeing in principle, Giacometti believed to have found a way out of this dilemma through his concept of the plurality of constituent bodies: contrary to one supreme body which cannot bind itself, two or more can do so conjointly in some reciprocal manner.[106] Yet it would follow that constitutions without at least two constituent bodies could not be revised without revolutions. Viewed in the perspective of 1848, the adoption of the Constitution, as mentioned in chapter one of this essay, was accomplished without legal basis, and, to the extent that the Federal Pact was silent on its proper revision and yet served as the basis for each constitutional addition, a "revolution," if one were intent to invent one, would have to be sought at that point in time.[107]

Aubert admits that a supreme authority cannot legally

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105 Aubert, loc.cit., p.113.

106 Z. Giacometti, Schweizerisches Bundesstaatsrecht (Zurich, 1949), pp.700-702.

107 Aubert, loc.cit., p.115.

bind itself. This means, however, that if the body which adopts the constitution is the same as that which revises it, it cannot place any material limits on its power of revision. It cannot say, for example, I oblige myself never to change this law, but it can well say, and in so doing bind itself, I oblige myself not to change any rule without following such and such a procedure.[108]

In the final analysis, the foregoing explanation derives its justification from a dictum ascribed to Rousseau which, in its more modern version, would read as follows: it is neither against reason nor against nature that the constituent authority can revoke its actions in observing a procedure which it has stipulated for itself.[109] This interpretation has found corroboration in examination of the English doctrine of the sovereignty of parliament. For even if it is conceded that parliament cannot by statute circumscribe the scope of future legislation by parliament, an enactment aimed at altering the "manner and form of legislation," while consistent with the rule that parliament cannot bind

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108 Aubert, loc.cit., p.114.

109 Ibid., p.114.

its successors, may "redefine" parliament and what must be done to legislate.[110]

Judicial Review

Among the many different devices for protecting the provisions of a constitution from the operations of the legislature, the controversial practice of review of legislation is said to be "affected by the control which legislatures exercise over the courts and the constitution."[111] Correspondingly, and according to variations in legal traditions and political habits, political systems have been divided into those in which the courts interpret the constitutionality of laws, and into those, as in the case of Switzerland, where the federal legislature has final authority to interpret the fundamental law with the result that the judicial power is obliged to give effect to the enactment of federal laws

> even though (this) may be in plain conflict with the provisions of the constitution as to the proper scope of the legislature's operations. (112)

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110 H.L.A. Hart, The Concept of Law (Oxford, 1961), p.147.

111 Haines, loc.cit., p.4.

112 Hart, loc.cit., p.71.

Many reasons have been given to explain these differences. Thus it is maintained, for example, that in continental European systems, under the traditions of the Roman Law, the courts reflect a traditional non-contentious habit of mind which leads to acceptance of authority rather than to contesting it, or that European courts regard a conflict of competences among coordinate branches of government over any issue on the constitutionality of a law as a political question outside the jurisdiction of a court of justice.[113]

The merits of these explanations notwithstanding, the relationship between the legislature and the judiciary, perhaps the most crucial relationship in a constitutional system, has been interpreted, alternatively, as follows: To the question of who can right a breach of the law, neither parliament (it cannot control its own constitutionality since control presupposes that the controller is not identical with the controlled), nor the electorate (since neither elections nor referenda would meet the issue of constitutionality as such), nor any other individual agency which could possibly

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[113] C.G. Haines, The American Doctrine of Judicial Supremacy (New York, 1959), p.476.

claim that authority,[114] is entitled to do so. The care for the interpretation of the Federal Constitution falls to all the organs of the state, or, alternatively, to the "legislator" who remains the sole judge over the scope and validity of all constitutional provisions.[115]

The assertion that tribunals are the organs best qualified to verify the constitutionality of the law is, accordingly, denied on the basis of a triple distinction between competent courts of justice, their mode of procedures, and the consequences of their judgments.[116] Whereas characteristic judicial virtues have been derived from the presupposition that an understanding of constitutional matters pertains to courts and lawyers as the mass of the population, however law abiding, is said to be too ignorant, and whereas impartiality and neutrality in surveying alternatives, combined with concern to deploy some acceptable general

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114 J.F. Aubert, Traite de Droit Constitutionnel Suisse (Neuchatel, 1967), p.164.

115 Ibid., p.116.

116 Ibid., p.167.

principle as a reasoned basis for decision,[117] have been held to constitute the hallmark of judicial wisdom, it does not follow, therefore, that judges are better qualified, both in terms of training and lack of political bias, to determine the meaning of the constitution. This is only one part of the "lawyers vs the people" controversy; the other part places greater reliance on the voice of the people since "the lack of preciseness and technical terminology in the constitution indicate that it is more of a political than a legal document."[118]

As the doctrine of the separation of powers did not expressly indicate whether judges ought to review legislative and administrative operations, the assertion that the people are the better judges, and that courts should not be allowed to reverse their political philosophy, has been corroborated in various ways. Inspired by Roman Constitutionlism according to which the whole people remained the ultimate source of legal authority, judicial control of the constitutionality of legislation is said to constitute an

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117 Hart, loc.cit., p.200.

118 R.K. Carr, The Supreme Court and Judicial Review (New York, 1942), pp.279-280.

infringement of democratic principles in being incompatible with direct democracy.[119] Further, and inasmuch as the difference of opinion about the judicial role may be affected by different assumptions about the relation of the judicial process to social justice, judicial interference with social and economic reforms, by involving the judiciary in the politics of the people, would also result in allowing one branch of the government to modify the terms of the federal arrangement. Hence, as only the entire nation can decide, judicial control, by sanctioning increased national authority for "progress", would be a means whereby the widening of governmental power is approved and glorified.[120]

In addition, by preferring the will of the judges to that of the people, the judiciary itself would remain the final judge of its authority; while unconstitutional exercise of power by the other branches of government would be subject to judicial restraint, the only check upon the exercise of judicial power could only be self-restraint. Finally, to the

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119 W.E. Rappard, La Constitution Federale de la Suisse (Neuchatel, 1948), p.382.

120 Carr, loc.cit., p.56.

extent that canons of interpretation cannot provide for their own interpretation, any conclusion, therefore, remains a choice: when courts assume the power to settle the ultimate criteria which confer upon them that power, the question of how a constitution can confer authority to say what the constitution is, is still left unanswered. All that can be said is that

> when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they get their authority to decide them accepted after the questions have arisen and the decisions have been given. Here all that succeeds is success. (121)

To the extent that constitutions emanate from the people, and as they and their representatives are therefore said to be their best interpretors, control over the constitutionality of laws is held to be precluded from jurisdiction by the courts because of the political character of the controversies involved. For even if courts refuse to decide issues of constitutionality in cases involving "political" questions, the answer to what is a political question would in turn be decided by the courts; hence, since "political" questions suggest an improper dealing in political matters, until it

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121 Hart, loc.cit., p.149.

clear which political activities are subject to judicial control, "political questions" are question-begging.[122]

As the entire nation, or the "legislator," are deemed to act in conformity with the constitution, and, in so doing, interpret it, judges must therefore not be superior to parliament; since judges, too, have political opinions which influence their manner of judgment, why should interpretation by a tribunal be preferred to that of parliament, lest justice itself were to be politicized?[123] For even if a court of justice is more apt to make the exegesis of a legal text, its superiority vanishes when it becomes a question of how to interpret the constitution itself, since that interpretation depends almost as much on the art of politics as on the science of law. Conversely, the collaboration of non-jurists in Swiss courts is based on the view that jurisdiction requires not only knowledge of all relevant law but also a capacity of "common sense."[124]

There also remains the assertion that the power of

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122 Marshall, loc.cit., p.111.

123 Aubert, loc.cit., p.171.

124 Huber, loc.cit., p.57.

judicial control would weaken the position of both the legislature and the executive. This suggestion, however, remains directly opposed to the view which sees in the

> potential value of judicial review...a possible instrument for use against legislative bodies too much inclined to favor the demands of dangerous factions within the body politic.(125)

In an attempt to straddle these positions, the power of control in the hands of the Federal Court is deemed superfluous as the electorate in Switzerland has a direct means of expressing its sovereign will. Conversely, even in Switzerland a partial substitute for judicial review of the laws of the central government is said to exist in the popular referendum as a method of challenging national laws.[126] This explanation, however, remains very tenuous in that judicial control would enable the Federal Tribunal to invalidate even those laws which received the sovereign electorate's approval in a referendum vote,[127] apart from the

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125 Carr, loc.cit., p.44.

126 A.W. Macmahon, Administering Federalism in a Democracy (New York, 1972), p.22.

127 Tripp, loc.cit., p.52.

fact that the legislature, in seeking to free itself from popular tutelage, can withdraw national laws from the referendum challenge by declaring them "urgent" or "not universally binding"; a subject matter which will be dealt with in subsequent chapters.

By refuting the necessity of judicial control over the acts of government in a constitutional democracy, the following arguments are equally denied: popular rights are better served if interpretation of the law is left to a tribunal accustomed to weigh the intent of words and to decide whether the people had kept within general principles;[128] or that with all their facilities for revision of the constitution and for popular expression of the law, final interpretation should be left to a calmer authority than a national congress;[129] or that the unhealthy omnipotence of the Federal Assembly needs to be modified by judicial control in order to fully guarantee fundamental rights under the constitution.[130] The implications of all these claims, however, are held to lead to only one result: to politicize

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128 Vincent, loc.cit., p.107.

129 Ibid., p.208.

130 Tschani, loc.cit., p.50.

the judges in relation to their independence of spirit and to their modes of nomination. For, so it is asked, has not the example of the United States made clear that the members of the Supreme Court, carefully selected by the president, inflame public sentiments through their verdicts?[131]

By the same token, the claim that the safeguarding of legal limits to governmental power by an independent court is not to advocate the enfeebling of that government itself, or that the subjection of the legislature to the law does not make it an inferior branch of the government,[132] is met by the objection that only the "constituent" is entitled to pronounce itself on the constitutionality of laws; for, so it is asked again, why should there be a constituent if one were to allow the judge to supplant him?[133]

Alternatively, if the power of decision is left to the courts, and if democracy requires that such power be vested only in elected officers of the government, then the case against judicial control is strong indeed. Only if the court's

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131 Aubert, loc.cit., p.171.

132 Marshall, loc.cit., p.109.

133 Aubert, loc.cit., p.119.

selective action is part of an evolving policy, since otherwise the judiciary's decisive power would be inconsistent with democracy itself, and only if constitutionalism is defined as the application of the judicial method to basic problems of government,[134] could the controversy between judicial review and democracy be solved by the claim that only an unrestrained democracy and an arbitrary judiciary conflict with each other.

In the final analysis, all of the foregoing arguments can be reduced to two opposing schools of thought. There are those who would ask, with John Marshall, "to what purpose are powers limited ... if these limits may, at any time, be passed by those intended to be restrained?"[135] And there are others who would reply that such interpretation seeks to circumscribe the legislature, and that the constitution is not directed against the legislator any more than it is against the judge; that it simply imposes regulations which

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134 C.J. Friedrich, Constitutional Government and Democracy (Boston, 1950), p.117.

135 R.E. Cushman, Leading Constitutional Decisions (New York, 1966), pp.327-8.

limit all governmental authorities, and, inasmuch as these regulations must be interpreted, why should a small number of judges be entitled to impose their interpretation upon a large number of representatives?[136]

The question who is to decide when the fundamental law has been violated cannot simply be answered by asserting that since constitutional provisions are equivalent to laws, and since it is the duty of the courts to interpret and to apply the laws, the courts must therefore interpret the laws of the constitution. Conversely,

> assertions that judicial duty is to apply the law are not to the point if what is in issue is whether the law of the constitution implicitly allots judgment in particular cases to the legislative body rather than to the judiciary.(137)

As a decisive critique of Marshall made clear, arguments in favor of judicial review take for granted the very thing to be proved, and, as the construction of the constitution belongs to the legislature, are therefore not the people and their representatives entitled to judge the constitu-

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136 Aubert, loc.cit., p.172.

137 Marshall, loc.cit., p.106.

tionality of their own acts? To the question, consequently,[138] "I beg to know upon what principle it can be contended that any one department draws from the constitution greater powers than another?,"[139] the answer must perforce remain a choice.

The Swiss solution to the problem might most succinctly be expressed in the assertion that

> the notion that the executive could negative the decisions of the legislature by veto is as foreign to Swiss constitutional law as the idea that a tribunal could refuse to apply them on grounds of unconstitutionality.(140)

As the absence of judicial review was a deliberate choice in 1848, so, too, had that decision been upheld in 1874. Although inspired by American institutions, Switzerland never followed that example of the United States as the political traditions of the two countries were too different. Men like Hamilton and Marshall were in love more with liberalism than with democracy; their counterparts in Swtizerland were democrats before being liberals.[141]

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138 Cushman, loc.cit., p.335.

139 Haines, loc.cit., p.235.

140 Rappard, loc.cit., p.50.

141 Aubert, loc.cit, p.123.

Despite several demands for an extension of judicial control during the 1920's and 1930's, and despite various deliberations by the Society of Swiss Jurists according to which the absence of judicial control has been repeatedly condemned, judicial control in the present state of Swiss law has remained circumscribed by article 113 of the Federal Constitution. Read in conjunction with article 84 of the Law on Judicial Organization of 1943, the result is that judicial control does not extend to federal regulations, that no federal act can be attacked on grounds of its constitutionality, that judicial review of federal legislation is generally excluded.[142]

In order to complete the synopsis of Swiss constitutionalism, several brief commentaries on the Federal Tribunal and the Swiss concept of Public Law pertain. As the Federal Tribunal was to be, from its very beginning, a subordinate branch of the government, all subsequent enlargements of its competences continued to preclude the power of judicial control over federal acts. Even though the Constitution of 1874 enhanced its dignity in that the Federal Tribunal was

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142 Aubert, loc.cit., p.177.

no longer to be controlled by any political organ and in that the enlargement of its competences included cases between cantons,[143] it remained subordinate to the legislature. With a further broadening of its functions in relation to procedural guarantees of individual rights and freedoms, as well as through the increasing scope of the operations by the central government (which, by superseding cantonal laws and thereby adding to the body of federal laws, are seen to come under the cognizance of the Federal Tribunal), the Federal Tribunal is regarded as being in a period of transition. To the extent that the settlement of its functions remains part of the struggle for and against centralization, it may thereby become more independent of the legislature.[144] However, political traditions stand opposed to this interpretation as a brief consideration of the Federal Tribunal's administrative jurisdiction will show.

The Administrative Court, as a section of the Federal Tribunal, was accorded greater authorities in that certain classes of appeals in administrative law which formerly were

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143 W.G. Rice, Law Among Nations in Federacy (Appleton, 1959), p.108.

144 Vincent, loc.cit., p. 208.

taken up by the Federal Council were successively transferred to the Federal Tribunal. On the basis of this development, administrative jurisdiction, by extending the judicial method to problems of government, could well be said to be an extension of constitutionalism itself,[145] were it not for the frequently voiced opinion that the possibilities for the citizen to resist the arbitrary actions of the Federal Administration remain almost non-existent.[146]

In an explanation of this apparent contradiction lies the Swiss concept of administrative law itself. Inspired by the tradition of the Roman Law, Swiss lawyers make a qualitative distinction between "public" and "private" law whereby the former deals with the subordinate relationships of citizens to the state and the latter with those of legal persons of the same kind.[147] This distinction, although reinforced by three theories (one of which, for example, stipulates that all mandatory rules are public law, while rules

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145 Friedrich, loc.cit., p.117.

146 Tschani, loc.cit., p.210.

147 Rice, loc.cit., p.204.

that may be varied by agreement are private), has been disparaged for reasons of obscurity and ambiguity.[148]

Concurringly, and to the extent that this boundary has steadily restricted the private law area, and to the extent that the "moving frontier of the law, between the legal land of rights and the political land of interests" is said to elude any precise definition, so, too, is the line between private law and public law held to defy any sharp differentiation.[149]

The arguments for or against the distinction notwithstanding, public law, in Switzerland, is in turn divided into two parts: state-law, and administrative law. Whereas the former includes the organization of the state, voting rights, as well as some constitutionally guaranteed freedoms, administrative law comprises the relations and fields of Church and state, citizenship, health, education, etc.[150]

As a general rule, cases of administrative law come under the cognizance of a political tribunal rather than of

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148 Rice, loc.cit., p.204.

149 Ibid., p.211.

150 C. Hughes, The Federal Constitution of Switzerland (Oxford, 1954), p.127.

a judicial one, with the result that "much of what in Great Britain would go to a court of law goes to a political - or civil-service tribunal in Switzerland."[151]

Conversely, administrative jurisdiction may include extra-legal factors as

> the Federal Council insures a different appraisal of public policy than the Federal Tribunal particularly because administrative disputes are entrusted to the Federal Council by statute. (152)

In the matter of civil liberties, a subject to be pursued in subsequent chapters, the Constitution of 1874 guaranteed a certain number of fundamental rights and freedoms which, although scrupulously maintained for the most part, need equally to be evaluated in that context in wich they are not protected by the Federal Tribunal from possible diminution by the Federal Assembly or by the Federal Council both of which, in determining the constitutionality of their own acts, remain, in certain situations, the ultimate guarantors of civil liberties.

By way of conclusion, the Constitution of 1874 has been

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151 Hughes, loc.cit., p.127.

152 Rice, loc.cit., p.309.

said to reflect three obvious shortcomings: that its provisions are not arranged in any systematic order, that it remains silent on some subjects whilst being excessively detailed on others, and that some articles, more properly pertaining to statutory law, continue to be included in it in an ever more complicated conglomeration of constitutional provisions.[153]

If some written constitutions are indeed "to liberty what a grammar is o language,"[154] then, perhaps, a fourth shortcoming might be added: the Constitution's systemless construction is complicated by a non-unified use of language. Thus in the realm of the Federal Administration, for example, the German word "Wesen" (essence, or substance), can be deployed to augment the competence of the federal government by absorbing into its vortex all that might fall under "Postwesen," i.e., comprising all matters which pertain to post and/or mail.[155] Alternatively, the same

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153 Aubert, loc.cit., p.111.

154 C.H. McIlwain, Constitutionalism(Ithaca,1966), p.2.

155 H. Strauli, Die Kompetenzausscheidung zwischen Bund und Kantonen aof dem Gebiete der Gesetzgebung (Aarau,1933), p.19.

> expression (e.g. Federal supervision) is occasionally used to describe different things, while the same thing(e.g. within the Federal competence alone) is rendered by a number of different expressions (steht dem Bund zu, ist Sache des Bundes, ist Bundessache) without plan, and without consistency between the French and the German texts. (156)

Summary

In any tentative evaluation of Swiss constitutionalism, two initial propositions need to be made explicit. First, constitutional provisions suffer from the same weakness of all that can be expressed in human language; they are likely to be obscure, ambiguous, or fallacious.[157] Second, there remains the enduring problem of giving meaning in the twentieth century to constitutional provisions which were drafted long ago; the burden of these provisions, inherited from some "horse and buggy era"[158] in the past, reflects the present insufficiency of constitutional law.

Furthermore, as constitutional principles are general

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156 Hughes, loc.cit. p.1.

157 Aubert, loc.cit., p.116.

158 MacIlwain, loc.cit., p.31.

ideas which do not decide concrete cases, any attempt at defining the "literal" meaning of the constitution, a synonym for "true intention," suffers not only from its "ambiguous status of being associated historically with narrow methods of adjudication,"[159] but must also come to terms with the apparent contradiction that whereas in formal terms constitutional provisions are changed only by formal amendment, in actual practice they have been modified by ordinary laws. Thus whereas the wording of constitutional provisions may have remained constant, their contents have drastically changed.

To the extent that constitutional questions are answered on the bases of the predilections of those who interpret them as well as of the constitution itself, some major aspects of modern constitutional history have been determined by the broadening of the implied power of the Federal Council, by the rise of the central government at the expense of the cantons, by the uneven course of the legislative-executive relations, and by the relationship of fundamental rights to the notion of the public interest. As each modern crisis has

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159 Marshall, loc.cit., p.86.

accelerated the trend toward interventions by the central government, and as the concentration of power in the executive has been accompanied by a corresponding encroachment of civil liberties, the most noticeable change in the evolution of Swiss constitutionalism might well be the emphasis on the well-being of the greatest number in terms of which the federal government, within the limits of its constitutional attributions, can take all necessary measures to safeguard the well-being of the country.[160]

There remain two final propositions, both of which might well speak for themselves. First, the suggestion that the Federal Constitution should be entirely redrafted to create a basic instrument more adapted to the times[161] has found a loud and clear echo in a recent call for a recasting of the fundamental law through which Switzerland is to regain her lost self-confidence.[162] Second, the conviction

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160 Aubert, loc.cit., p.97.

161 Codding, loc.cit., p.61.

162 Tschani, loc.cit., p.51.

that all power of the government must be kept within limits by law needs to be reconciled with the assertion that

> there is a tendency in Switzerland for the constitution to follow in the wake of unconstitutional practice, declaring the stable door open long after the horse has escaped. (163)

The Transformation of the Constitutional Framework

Important changes were to characterize the political system of Switzerland during the period between 1866 and 1874, although no further amendments were added to the text of the Constitution of 1848. As indicated in chapter one, the objectives of liberal radicalism in politics and economics had been defined as "the springs from which have since flown the centralizing, the democratic, and anti-clerical tendencies which characterize the subsequent constitutional evolution."[164] The push for a constitutional revision, therefore, which existed already in 1866, was to become imperative in the course of the following years.

On March 5, 1872, consequently, a draft constitution of the Chambers was published which proposed a triple

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163 Hughes, loc.cit., p.33.

164 Rappard, loc.cit., p.28.

program of national unification, extension of popular rights, and secularization. Returning for the most part to the rejected amendments of 1866, it added to these several articles relating to the centralization of the army, unification of civil and penal law, regulation of banknotes, creation of a national minimum public school program, abolition of indemnities hitherto paid to the cantons for their loss of customs duties and postal services, acknowledgement of a federal competence pertaining to railways, initiative and optional referendum in the realm of legislation, and the interdiction of school and church activities to Jesuits.[165]

This draft constitution, however, was rejected in a popular referendum on May 12. If, on the one hand, the vast competences attributed to the central government had alienated the sympathies of all federalists, then the partisans of further centralization, on the other hand, would have been wrong to feel too greatly discouraged. The margin of both popular votes as well as that of the cantons, relative to their setback, was not overwhelming; the people, it appeared, evidently were in favor of a revision, if only of a more

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165 Aubert, loc.cit., p.47.

acceptable one.

On January 31, 1874, a totally revised Federal Constitution was adopted by the two Chambers, and, submitted to a popular referendum, it was accepted on May 29, 1874. In its composition, the new Constitution had not changed. There were still the same preamble, three chapters, and several temporary provisions. Although the chapters had retained their titles, there were now, instead of 114 articles, 121 which were divided into: Chapter I, articles 1-70; Chapter II, articles 71-117; Chapter III, articles 118-121. (Toady, the Constitution consists of 123 articles and 11 temporary provisions).

Compared with the text of 1848, the new federal structure reflected the following characteristics: Switzerland remained a federal state. Bicameralism did not undergo any change, nor did the Federal Council, except that in gaining certain governmental competences, it lost some jurisdictional ones. The Federal Assembly lost some of its competences to the profit of the Federal Council and the Federal Tribunal which became permanent, more independent, and more powerful. In addition to the exclusive powers which the Federation had been accorded in 1848 (in the field of international

relations, public works, as well as the monopolies of post and telegraph, coinage, and gunpowder), the competences of the central government were further increased. It had gained new powers in relation to: the military (articles 18-22); railways (article 26); private law (articles 53, 54, and 64); hunting and fishing (article 25); water regulations and forests (article 24); protection of factory workers (article 34); issuing of banknotes, but without monopoly (article 39); weights and measures (article 40); human and animal epidemics, etc. In the field of finances, the indemnities for custom duties and postal services hitherto paid to the cantons were abolished; the federal treasury received these incomes in their entirety and obtained, furthermore, half of the revenues of a special tax collected by the cantons for exemption of the military service (articles 18,42).

In the field of political and fundamental rights, the freedom of settlement was further enlarged (articles 43 and 45), as was the right to vote (articles 66, 25); and the catalogue of constitutional rights which, in 1848, had been confined to the freedom of the press, association, petition

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166 Aubert, loc.cit., p.48.

and religious ceremonies, was enriched by two new articles: freedom of conscience and belief (article 49), and freedom of trade and industry (article 31). In addition, procedural safeguards for individual rights and freedoms were improved to the extent that Appeal in Public Law to the Federal Tribunal (article 113) was now open to individuals against the actions of cantonal governments. On the other hand, the "confessional articles" (articles 50-52), remained a blow to the freedom of worship. Finally, the procedure for constitutional revision remained unchanged, and Switzerland became a partially direct democracy inasmuch as the legislative initiative and the popular election of the Federal Council had been rejected.[167]

By way of review, of the 114 articles of 1848 the total revision of 1874 left 60 intact; it modified 40, abrogated 14, and it added 21 new articles. Just as the revision multiplied the functions of the central government and reinforced individual rights, so it restricted at once the functions and rights of the cantons.[168] Alternatively, the revision

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167 Aubert, loc.cit., p.50-52.

168 Rappard, Constitution, loc.cit., p.285.

of 1874 supplemented rather than changed the work of 1848, and although innovations in structure were few, the revision did introduce the federal legislative referendum; the constitutional initiative was not introduced until 1891, nor the optional referendum on treaties until 1921.[169]

Numerous amendments were to modify the Swiss Federal Constitution during the next 40 years until the outbreak of the First World War, and although some of the changes were minute, they did have a significant effect.

By a law of May 18, 1879, article 65 was amended. In 1874 the central government had succeeded to abolish the death penalty with the exception of the qualifying phrase "for political crimes." In the wake of a series of particularly odious murders, however, a popular demand for the reintroduction of the death penalty in 1879 led the Assembly, against the advice of the Federal Council, to submit an amendment to popular vote. The amendment was accepted, resulting in restored cantonal competence, and the Catholic cantons reintroduced the death penalty. The Swiss Penal Code, however, abolishes it, and it can now only be imposed

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[169] Codding, loc.cit., p.34.

by military courts in "war-time" for political crimes against the Confederation.[170]

On October 25, 1885, article 31 was amended, and another paragraph was added to article 32. As article 31 of 1874 had the effect of abolishing the last vestiges of mercantilism and corporatism, so article 32 voided cantonal laws controlling the trade in alcohol; the amendment of article 31 and a new article 32(bis) of 1885 created the federal monopoly in alcohol. The law of its application dates from 1886.

On July 10, 1887, article 64 was amended. In the field of "civil capacity of persons," the federal competence for the protection of inventions was not included in the revision of 1874. In 1887, and upon the initiative of the Federal Council, the amendment was accepted in a popular referendum.

Another paragraph was added to article 34 on October 26, 1890. Pursuing its social policies as inaugurated through the adoption of article 34 in 1874 in relation to protection of employees in factories, the central government introduced

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170 Hughes, loc.cit., p.77.

insurance against accident and illness through article 34 (bis) which was accepted at a popular votation. The relevant law of this insurance of 1911 makes insurance obligatory for certain classes of workers, and "delegates to the Cantons the authority to make sickness insurance compulsory."[171]

On July 5, 1891, changes were made in section III of the Constitution. The articles which were amended at that time were 118, 119, 120, and 121. The total revision of 1874 did not speak of "total" and "partial" revision. The Federal Council, by calling attention to the fact that partial revision through popular initiative had beenpart of most cantonal constitutions, proposed the abrogation of Chapter III of the Constitution. The whole of articles 121 and 122 date from 1891, and the expressions "partial" and total" in articles 118,119, 120, and 123.[172]

A few weeks later, on October 18, article 39 was amended. The revision of 1874 had given the central government the power to legislate in the matter of banknotes, pro-

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171 Hughes, loc.cit., p.39.

172 Ibid., p.132.

vided it neither created a monopoly nor made notes legal tender. In 1891,

> the Federal Assembly submitted with success a cunningly worded amendment to the people and the Cantons, drafted so as to leave the question open whether the bank was to be a private or a State bank, but establishing clearly a federal monopoly.(173)

On August 20, 1893, another paragraph was added to article 25. The rights of hunting and fishing, article 25, were understood to remain cantonal competences subject, however, to extensive federal restrictions. The popular initiative article 25(bis), accepted in a subsequent popular referendum, was the first in a series of deplorable usages of the constitutional right of initiative according to the newly revised Chapter III of the Constitution. It demanded that animals no longer be killed according to Jewish tradition. Since cantonal legislation in this matter had been voided as a violation of article 50, it was necessary to pass the prohibition in the form of a federal constitutional amendment.[174]

On July 11, 1897, article 24 was amended, and another paragraph was added to article 69 on the same day. Federal

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173 Hughes, loc.cit., p.46.

174 Aubert, loc.cit., p.728.

supervision over water power, article 24(bis), is interpreted to mean a concurrent power shared by the central government and the cantons. The amendment of article 24 was only an improvement of the text of 1974, aiming henceforth at all water regulations and forests. On the basis of this amendment, a Law of 1912 regulates all matters pertaining to the forestry of the country. With regard to concessions for water works, the article was again amended in 1956. Article 69 (infectious diseases), was enlarged by another paragraph empowering the central government to regulate upon trade in food products and household goods insofar as these might endanger life or health. The relevant law dates from 1905, and is detailed in a subsequent ordonnance of 1936.

Article 64 was amended on November 13, 1898. The federal competence for the unification of civil law, article 64, was accepted at the same time as article 64(bis); the Confederation was authorized to legislate upon penal law. This dual unification which had been foreshadowed in 1872 enabled the central government to enact a Civil-and Penal Code in 1907 and 1937 respectively.[175]

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[175] Aubert, loc.cit., p.54.

On November 23, 1902, another paragraph was added to article 27. In order to assure the effective application of article 27 (education), the central government, by seeking to live up to its newly assumed responsibilities, embarked upon a politics of subsidies. The last paragraph of article 27, calling for "necessary measures" in relation to cantonal obligations

> appears to mean that the Confederation has some duty to see that the provisions of the Article are enforced, that public primary education is in fact available, adequate, obligatory, free, and secular.(176)

The additional paragraph, article 27(bis), was accepted to help the cantons "fulfill their obligations." Since organization of primary schools remains a cantonal matter, however, and since it is not clear what is to be understood by such terms as "adequate", article 27 is to be read in conjunction with a relevant Law of 1903 and of 1940, as well as with a further amendment of the article in 1965, in order to determine the given cantonal competence from federal regulations with respect to the matter of education.

On March 19, 1905, article 64 was again amended. The federal competence for the protection of inventions included

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176 Hughes, loc.cit., p.28.

in the amendment of 1887 had become inconsistent with the international obligations Switzerland had meanwhile assumed. In 1905 the present wording was accepted which provided for the protection of inventions applicable to inudustry, including designs and models, such that patent rights could henceforth be protected like copy rights.

On July 5, 1908, article 31 was amended, and another paragraph was added to articles 32 and 34. When the evils of alcoholism reached alarming proportions, there followed a growing public demand for an initiative to amend article 31 prohibiting the manufacture and sale of distilled drinks in conformity with article 32 (bis, ter, and quater), the "Schnapps"-articles, which called for the prohibition of manufacture, import, transport, sale, or holding for sale, of absinth throughout the country. Article 34(ter), by establishing uniform provisions for arts and crafts, enabled the Confederation to extend the protection of factory workers to employees in commerce and handicrafts. On the basis of a further amendment of this article in 1947, professional organizations and all labor contracts were subsequently regulated by the pertinent Laws of 1963 and 1964 (the Swiss

Labor Act)[177], respectively.

A few weeks later, on October 25, 1908, another paragraph was added to article 24. In conjunction with a so-called "conservative patriotism" in the early years of this century, article 24 is an example of a protectionist movement. In order to prevent exportation of energy, the movement for public ownership of water power, initiated in 1891, found in article 24 its present wording; water power is under the protection of the Confederation[178]. Legislation under this article was not passed until the enactment of its relevant Law in 1916.

Articles 31 and 69 were again amended on May4, 1913. Both amendments concerned sanitary regulations. The revision of 1874 had accorded to the central government the competence to take measures against human and animal epidemics; the text of 1913 speaks of infectious diseases, very widespread, or particularly dangerous. A further extension of federal powers in this field was reflected in a pertinent

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177 Aubert, loc.cit., p.53.

178 Hughes, loc.cit., p.24.

Law of 1928 dealing with tuberculosis and cretinism.

To review the period prior to the outbreak of the First World War, the following were the most significant changes: There was a distinct tendency from indirect to direct democracy. The federal legislative referendum was introduced in 1874. In 1891 the institution of the constitutional popular initiative was firmly entrenched. Equally decisive were the clauses which continued the trend toward state intervention in the entire life of the nation. Apart from popular participation in federal legislation, the unification of both weights and measures, and of civil and penal law, the creation of a national school system in primary education, the provisions for security and welfare of the working population, and the desire to increase national production and prosperity had all led to the establishment of several federal monopolies. The result of this was that when the central government took over the transport system, a considerable part of the economy was nationalized, and the rights of state ownership had been greatly advanced.[179]

1914-1918. Although the neutrality of Switzerland was

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[179] Bonjour, loc.cit., p.

strictly maintained throughout the First World War, the effects were nevertheless clearly revealed in its constitutional and political system. Two characteristic tendencies were the increase of the powers of the federal government at the expense of the cantons, and the growth of executive power at the expense of the legislature. The specific constitutional changes were the following.

On October 25, 1914, article 103 was amended, and a new paragraph was added to article 114. Since administrative jurisdiction had not been accorded a special status in 1874, recourse against the federal administration had been possible only through the government. In order to fill this gap, article 114(bis) was inserted into the Constitution which foresaw the creation of an independent Administrative Court, as part of the Federal Tribunal. The law which gave effect to the amendment was that of 1928; this in turn was repealed by the present Law on Judicial Organization, passed in 1943. At the same time the Federal Council recommended a revision of article 103 which established the departmental system, as well as the right to delegate authority to subordinate branches of the departments; regulations pertaining to this matter are contained in a Law of 1914.

On October 13, 1918, article 73 was amended. Concerning the election of national councilors, it dealt with the transition from majority voting to that of Proportional Representation which, since 1888, had taken root in several cantons. As the end of the First World War had been characterized by a strong thrust of Socialism as well as by a division in the radical ranks, the success of the initiative for Proportional Representation was foreseeable. Elections for the National Council follow the principle of proportionality according to the constitutional revisions of article 37 of October 13, 1918, and August 10, 1919.

1919-1939. Still another paragraph was added to article 24 on May 4, 1919. The revision of article 24(ter), "legislation upon navigation is a federal matter", settles the doubt as to the competence in this field. This innovation appeared justified in view of the progress and prospects of navigation on rivers and lakes, as well as by the possible problems, inter-cantonal and international, which this progress might entail.

Article 35 was amended on March 21, 1920. Originally intended to favor a distinctively Protestant morality, the

article on gaming houses has since been amended twice in 1920 and 1928. The revision of 1920 proved unsatisfactory to both the opponents of gambling, who thought it not sufficiently rigorous, as well as to those who considered it indispensable to tourism. The result of the second amendment was that the cantons could forbid, in the name of "public order and decency," games which the federal government tolerates.

On May 16, 1920, a law was enacted which established Switzerland's membership in the League of Nations. When the question arose of seeking admission to the League, a cautiously worded arrete was submitted for popular approval. The double

> precaution of entering the League while expressly reserving neutrality and of submitting the project to a constitutional referendum on the grounds that neutrality was being imperiled, was nearly, but not quite, insufficient to reassure the voters. (180)

This constitutional clause was voided in 1946.

Article 89 was amended on January 30, 1921. Concerning ratification by the Federal Council of international treaties which "for an undetermined period or for more than 15 years

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180 Hughes, loc.cit., p.94.

shall be submitted to the people," this amendment has remained such indeterminate a criterion of duration that the most important political and economic decisions are removed from the referendum challenge by the people. Nevertheless, the amendment reflected the will of the people to extend to foreign affairs their rights of direct participation in the legislative process which the total revisionof 1874 had already accorded to them in internal matters.

Two more paragraphs were added to article 37 on May 22, 1921. The federal government's supervision over roads and bridges was extended to regulations concerning cars and cycles, article 37 (bis), as well as to legislation of aerial navigation, article 37(ter). Both amendments reflected previously existing demands; the motives were prompted by internal necessities as well as by growing international travel. In contrast to articles 37 and 37(bis, article 37(ter) is an exclusively federal matter; the powers of legislation may not be delegated to the cantons, nor may federal legislation be executed by them.

A third paragraph was added to article 69 on October 25, 1925. Considered to be another example of the "new

patriotism," article 69(ter) reflected one of the after - effects of the First World War: the enactment of urgent regulations during the war to control the entry of foreigners. Legislation concerning entry, exit, temporary residence, and conduct of foreigners was revised by relevant Laws in 1931 and 1948 respectively.

A fourth paragraph was added to article 34 and a third amendment to article 41 on December 6, 1925. Social legislation had made its entry with a series of innovative measures in 1890: article 34(bis) had given the central government the power to legislate insurance against accidents and illness. In the revision of 1925, the central government was charged with the introduction of insurance against old age and widowhood, article 34(quater). The federal law introducing the insurance was challenged to a referendum and rejected in 1931; another project was accepted on July 6, 1947, on the same day of voting for the "economic articles."[181] Article 41 (bis), income from stamp duties, had given the central government a new source of income permanently; in 1925 the Confederation got two

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[181] Hughes, loc.cit., p.41.

new taxes: articles 34(quater) and 41(ter), to tax tobacco.

On May 15, 1927, article 30 was amended. After 1848 federal income from customs was used to compensate the cantons for the sources of income they had lost. The present article represents the decision of 1874 to abolish this compensation, with the exception of payments to four cantons charged with the upkeep of international mountain passes.[182]

Article 44 was amended on May 20, 1928. Improved communications had led to such an influx of foreigners that their increasing number after the census of 1910 appeared to be a national danger. Of the possible remedies, that of curbing immigration, or of facilitating naturalization, the latter was chosen. Since 1874 the Confederation had already received some powers in this matter, as reflected in the Laws of 1876 and 1903. But with the revision of 1928, combined with that of 1898 relating to civil law, the central government gained the capacity to regulate absolutely all that concerned the acquisition or the loss of Swiss nationality.

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[182] Hughes, loc.cit., p.30.

This vast competence was put into effect through a pertinent Law of 1952.[183]

Another paragraph was added to article 23 on March 3, 1929. In 1915 a federal monopoly of corn was introduced by an arrete of the Federal Council under war-time Full Powers which was replaced by a subsequent arrete guaranteeing government purchase at a fixed price. The arrete was declared "urgent" to withdraw it from challenge to a referendum by the people. In 1926 the Federal Assembly submitted a constitutional amendment making a cereal monopoly legal; the amendment was rejected. Notwithstanding this, the central government continued its subsidy of corn growing by urgent arretes until acceptance of the present revised article in 1929. The arrete prescribes control and subsidy, but not monopoly. In 1939 a monopoly was reintroduced, "provisionally,"[184] which remained in effect until the late 1950's. Article 23 was one in a series of constitutional provisions which were an infringement by federal authorities against article 31,

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183 Aubert, loc.cit., p.54.

184 Hughes, loc.cit., p.22.

freedom of trade and industry.[185]

On April 6, 1930, articles 31 and 32 were amended. A revision of the regulations of alcohol was effected through the amendment of articles 31 and 32(bis), as well as through the introduction of the new article 32(quater). All deal with measures designed to protect public health against abuse of spirituous liquors, distilled or undistilled.

Article 12 was amended on February 8, 1931. The position of this article in the Constitution immediately after the prohibition of "military capitulations," article 11, reveals its historic origin. The receipt of pensions and bribes from foreign sovereigns was one of the important industries of the primitive Alpine communities. The severity of this article, increased in 1931, encompasses all authorities and servants, civil and military, of both the Confederation and the cantons. Honorary and "other doctorates are not included in this prohibition, since they are not conferred by a foreign sovereign or state."[186]

On March 15, 1931, articles 72, 76, 96, and 105 were

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185 Aubert, loc.cit., p.104.

186 Hughes, loc.cit., p.14.

amended. Concerning article 72, the composition of the National Council, the number of its members has varied. In 1848 it was 111 (one per 20000 inhabitants), 196 after the census of 1950 (one per 24000). Today, the number is fixed at 200 in accordance with the subsequent revision of the article in 1962 and the law of its application of March 8, 1963. Articles 76, 96, and 105 pertain to the term of office for the National Council, the Federal Council, and the Federal Chancellor. Until 1931 the period of election was three years; since then all are elected for four years.

Articles 41 and 116 were amended on February 20,1938. Article 41, the federal monopoly of gunpowder, dates from 1848; it is one of the exceptions to the freedom of trade and industry. The article in its present form dates from the votation of 1938, "the motive being public security and the control of an industry potentially anti-social."[187] Article 116 concerns the national languages of Switzerland. Its amendment in 1938 raised Romanche to a national language; however, German, French, and Italian remain the official languages of the Confederation. The only other reference to

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[187] Hughes, loc.cit., p.47.

Swiss language federalism occurs in article 107, elections to the Federal Tribunal. Here, according to the amendment of 1938, the Federal Assembly "shall see that the three official languages of the Confederation are represented upon it."

On November 27, 1938, transitional provisions were enacted which pertained to financial management. In 1933 the Federal Assembly passed an arrete levying a federal direct tax, the "crisis offering," and granting the Federal Council certain other taxing powers. The arrete of the Assembly was declared urgent; a movement for adopting the Constitution to the fait accompli resulted in acceptance of the transitory provisions of 1938.[188]

Article 89 was amended on January 22, 1939. Together with article 92, it establishes the two Chamber system for laws and arretes, and hence for constitutional revision (articles 119 and 121). The words "universally binding" have given rise to much dispute. The legislative Councils themselves determine whether an arrete is to be furnished with the "referendum clause," and thus submitted to challenge

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[188] Hughes, loc.cit., p.50.

by the people, or whether it is to be withdrawn by being labelled "urgent" or "not universally binding." The former paragraph three of this article was replaced by article 89 (bis) on September 11, 1949, called the "Initiative for the Return to Direct Democracy", which was directed against the practice of withdrawing federal arretes from the referendum. The immediate effect of this article has been to add to the Constitution a shifting group of "transitory" provisions. Even though the effect of the urgency clause had been profoundly modified through the constitutional provision of 1949, article 89 accords the parliament an exceptional legislative competence. For one year the Chambers can do practically anything without recourse to the people; i.e., according to article 89(bis III), federal arretes enacted under the urgency procedure which in fact infringe upon the Constitution must be sanctioned by the people during the year following their promulgation.[189]

On June 4, 1939, defense legislation was enacted. Also enacted on the same day were legislative measures to combat unemployment. On June 7, 1938, the Federal Council, in

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189 Aubert, loc.cit., p.422.

its message on the "strengthening of national defense and the fighting against unemployment" expressed the anguish of a government at bay; to cope with these vast projects entailed expenses for which the federal government had neither the financial resources nor the constitutional means to procure them. Under the pressure of circumstances the problem of a jurisdictional basis was resolved in favor of a constitutional revision. Through the vote on June 4, 1939, the federal government was granted, among other sources of income, further direct taxation.

1939-1945. As during the First World War, Switzerland maintained its neutrality. Nonetheless, the war strongly influenced the country's constitutional and political system.

On July 6, 1947, the "economic articles" were accepted: 31(bis, ter, quater, quinquies); 32; and 34(ter). Since 1874 the various constitutional provisions had aimed at the increased well-being of the individual accompanied by an inevitable loss of his freedom. In the course of the First World War, national security considerations joined forces with those of social security which brought with them new restrictions to the freedom of trade and industry. At the end

of the war, new interventions were called for. On the one hand, interest groups demanded protection against the vicissitudes of economic life; on the other hand, belief in the economic and social virtues of competition was shaken. Faith in a new mission of the state took root: it was no longer to limit itself only to the maintenance of the public order, but, henceforth, to the protection of certain particular interests threatened by internal competition or by international circumstances. Interventions multiplied in the period up to the Second World War when the government, conscious of a conflict between emergency legislation and the Constitution, faced the necessity of a constitutional revision.[190]

The revision of the "economic articles" consisted of slightly modifying articles 31 and 32(quater), profoundly altering articles 32 and 34, abrogating article six of the transitory provisions, and of introducing the new articles 31 bis, ter, quater, and quinquies. Article 34 conferred upon the federal government an extended legislative competence in relation to the freedom of work; by its letter C, paragraph

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190 Rappard, Constitution, loc. cit., p. 372

II, it declared legal the extension of collective labor agreements, and thereby permitted later adoption of the Swiss Labor Act. The economic articles largely extended federal powers; by controlling the country's economic circumstances, it curtailed the liberties involved in local freedom and constitutional rights.[191] In addition, during the first half of this century, the Constitution was enriched by a certain number of transitory provisions. These laws and arretes were adopted according to the formal constitutional procedure, but because of their limited objectives, they were not incorporated into the Constitution.[192] Most of these regulations pertaining to direct taxes, unemployment, price controls, etc., became void after their stipulated duration. Some, however, continued in existence. Thus the provision for the protection of the family (article34, quinquies) of 1945 served as a basis for family allocations and for subsidies for housing construction in a Law of 1965. With respect to taxes, those on tobacco, beer, and sales, for example, had been created by means of urgent arretes. They

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191 Hughes, loc.cit., p.33.

192 Aubert, loc.cit., p.104.

were continued by means of additional constitutional clauses, and were finally incorporated into article 41 of today.

In the field of federal finances, where the steady increases in the costs of government entail the concomitant problems of finding additional revenues, "unconstitutionality and living from hand to mouth have become an institution of Swiss public life."[193] Just as the lack of co-ordination has resulted in a practice of promulgating "temporary" ordinnances which frequently are sanctioned for further use, so in 1963 the presently existing financial arrangements were accepted;[194] they are to remain in effect until 1975.

To the extent that article 34(bis, ter, quater, and quinquies) provided the foundation upon which the ever-growing realm of social insurance and the Swiss Labor Act were based, a new freedom, the right to work, has so far been rejected. Although incorporated into several other European constitutions and deemed essential to all free citizens to maintain their self-respect, the proposition that

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193 Hughes, loc.cit., p.50.

194 Tschani, loc.cit., p.362.

"everybody has the duty to work and the right to obtain employment" has been interpreted as being tantamount to the socialization of the economy.[195] On the assumption that the state must provide for employment, if would have to dispose of all available sources for employment and hence direct the economy of the country. Equally as controversial as the right to obtain employment is the "duty" to work; on the assumption that everyone has an obligation to work, the possibility of forced labor cannot be ruled out.

Finally, in 1971 several trade unions submitted an initiative by calling for yet another amendment to article 34 with respect to the "co-determination of workers" (consultation at plant level), as a "counter-balance to the concentration of corporate power resulting from the continuous process of mergers."[196] As of today, however, employers have opposed the co-determination initiative.

By way of review of the constitutional evolution since 1945, from 1874 to 1967 forty partial revisions have enlarged federal competences, particularly in the social and economic

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195 Aubert, loc.cit., p.92.

196 Gretler and Mandl, loc.cit., p.174-175.

fields.[197] By another count, partial revisions in the period from 1874 to 1966 took place every fourteen months, whereby three-quarters of them resulted in enlargements of federal competences; and the trend to burden the federal government with ever more tasks continues.[198]

Consequently, and just as cinemas (article 27, ter, of 1958 and its pertinent Law of 1962) as well as radio and television (based on article 36, and their laws of application of 1952 and 1965) are operated according to guidelines "within the interest of the state," so their growing importance enhances and strengthens the "cultural politics of the state."[199] Furthermore, and inasmuch as new or extended federal competences comprised new amendments in the fields of pipelines (article 26, bis, and its pertinent Laws of 1961 and 1963), water pollution (article 24, quater, of 1953 and its Law of 1955), traffic and roads (article 36, bis, of 1958 and its Law of 1960), protection of monuments, fauna and flora (article 24, sexies, of 1957, Law of 1966), atomic energy (article 24, quinquies, of 1957, Law of 1959), the instruments of government have clearly become the means

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197 Bischofberger, loc.cit., p.40.

198 Tschani, loc.cit., p.50.

199 Ibid., p.336.

for the conscious introduction of social change, conform to the spirit of the twin victories of democracy and technology.

In that very process, the fundamental law of the country appears to have become an almost unworkable agglomeration of constitutional provisions, transitory clauses, ordonnances, arretes, and laws. As a result, the idea of a total revision of the Constitution seems imminent. As reflected in the "motions" of Obrecht and Durrenmatt of 1965 and 1966, the feasibility of such a revision is under consideration.[200] At the very least, a revision of all constitutional provisions pertaining to the organization of the federal administration as proposed in 1967 appears imperative.[201]

Although the few remaining thistles (women suffrage and the "confessional articles") have been removed from the bouquet of constitutional rights in 1971 and 1973 respectively, the demand to cast the Constitution into a new mold through which alone Switzerland is to regain her self-respect appears to find ever more general acceptance.[202]

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200 Aubert, loc.cit., p.146.

201 Bischofberger, loc.cit., p.15.

202 Tschani, loc.cit., p.51.

CENTRALIZING TENDENCIES: SWISS FEDERALISM AND THE CHANGING EQUILIBRIUM BETWEEN THE FEDERAL GOVERNMENT AND THE CANTONS

Swiss Federalism: An Overview

With the growth of economic and social problems that appear to require national actions for their solutions, the question whether the member states, and not the central state, of a federal government, can survive as constitutionally autonomous entities might well characterize a decisive problem in any commentary on modern constitutional development. For inasmuch as federation can be said to unite without destroying the selves that are uniting, or that the federalizing process is meant to organize cooperation which, on its higher levels, is linked to constitutionalism because it presupposes the rule of law and the sanctity of contracts, the ever-widening sphere of the central government's activities and interventions in the entire life of nations has determined the evolution of federalism in such a way that the federated units have been reduced to mere shadows of their former selves.[203]

In its relation to constitutionalism, a federal govern-

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203 C.J. Friedrich, Man and his Government (New York, 1963), p.587.

mental structure seeks to establish a spatial or territorial, as distinguished from a functional, division of powers. As a restraint upon any undue concentration of powers, this geographical partitioning is deemed more effective than a functional division as the latter can be more easily rendered ineffective by extra-constitutional operations such as the activities of political parties or organized interest groups.[204] The claim, therefore, that the only true federalism is geographical, appears to be confirmed by the following example. To the extent that the Swiss central government relies on the power of certain private groups and economic associations by either seeking their advice or by delegating certain responsibilities to them, a new form of decentralization has come into existence through which the "one and the many" are combined in such a way as to better preserve the autonomy of the separate parts.

This new "functional" or "professional" federalism, however, is a dangerously vague concept. As exemplified in several recent studies, it shows similarities with corporatism and syndicalism in that the public activities of these

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204 C.J. Friedrich, Constitutional Government and Democracy (Boston, 1950), p.220.

interest groups have actually accentuated the trend toward centralization: the most important decisions which are taken in Zurich exclude the French-speaking minority which is concentrated in Bern; the latter, as regards the federal administration of the country, is therefore hardly represented at the apex of the political-economic hierarchy.[205]

Federalism, furthermore, is said to be best suited for those countries in which values, interests, and beliefs lead to stable patterns of commonly shared objectives such that people have enough interests to act through a central government while the constituent units remain self-governing for certain purposes. From this point of view, federalism constitutes a political attitude which, on the one hand, reflects a desire for mutual aid between member states that are sufficiently similar to make association possible, and which mirrors, on the other hand, sufficient fear of uniformity such that the federated units will stubbornly strive to preserve their distinctive character. It follows that a federal union is condemned to fail when it wants to embrace too heterogeneous a given number of parts; to develop harmon-

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205 J.F. Aubert, Traite de Droit Constitutionnel Suisse (Neuchatel, 1967), p.64.

iously, the member states must be of comparable dimensions and must exhibit similar ideas on a certain number of fundamental points, such as the form of government and the role of the state in the economy as well as in the lives of individuals.[206] Consequently, and inasmuch as a certain diversity is said to justify the existence of internal frontiers, the essence of federalism appears to lie in the economic, social, political, and cultural forces of society itself. As these considerations reflect historical traditions without which all division would remain artificial, and as these traditions are, simultaneously, causes for fellowship and singularity, they constitute a loyalty to a federalism of two native lands, to both the inclusive and exclusive community.[207]

The foregoing observations, however, remain subject to a number of objections. First, the founders of the Constitution might well have been aware that a certain homogeneity of the cantons was indispensable for the functioning of the Swiss Confederation. At that time, emphasis was placed on constitutional law: the Constitution demanded only

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206 Aubert, loc.cit. p.203.

207 Ibid., p.204.

that the cantons, as stipulated in article 6, were to be organized in accordance with republican-democratic principles. Today, however, the serious student of federalism must demand, apart from its constitutional aspects, a certain socio-economic and administrative homogeneity of the cantons lest he betray the basic federal idea that no single member state be powerful enough to dominate the others.[208]

Second, and in reference to the alleged justification of internal frontiers as based upon the proposition that where diversities are pronounced, decentralization is inevitable, it must be recognized that

> the boundaries of the constituent units within a federal system become fixed usually before the future patterns of life are fully revealed; the long-run outcome is likely to be uncertain always. (209)

As a result, and in view of recent developments, there have been attempts to infuse traditional concepts of federalism with new life in demands for radical re-partitionings of

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208 P. Bischofberger et al. Verwaltung im Umbruch (Bern, 1972), p.42.

209 A.W. Macmahon, Administering Federalism in a Democracy (New York, 1972), p.12.

federal-state relationships and their concomitant competences on an intercantonal level through the creation of regions or provinces.

Though consistent with the spirit of federalism, any recasting of state areas, however, still confronts the dilemma that whereas a given number of regions could each be more varied and consequently more independent of support from the central government than existing states with their uneven needs and financial resources, the resultant mixture of prevailing elements might be even less suited for a coherent kind of self-expression.[210] Moreover, cantonal fusions remain, theoretically, unacceptable: if one were allowed to take place, so would have to be all possible others, with the result that one day there might be only one canton and hence the end of federalism.[211]

From the perspective of a political contrivance, the federal state aims at a reconciliation of national unity and power with the preservation of "states' rights," and, in its

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210 Macmahon, loc.cit., p.15.

211 Aubert, loc.cit., p,132.

developed form, is said to be marked by three characteristics: the supremacy of the constitution, the division of powers between levels of government, and a supreme arbiter to settle disputes between the latter.[212]

Accordingly, the distribution of functions which, theoretically, can be changed only through a revision of the constitution, reflects an intimate interlacing of relationships and competences which involve a definition of rights and duties as part of a cooperative whole. This relationship of mutual responsibility, however, remains determined by two decisive facts. First, it must be recognized that from the standpoint of survival the need is to protect the supremacy of the central government, and, second, that the safeguarding of the constituent governments involves a distribution of functions which is not delimited in advance but remains, rather, dependent upon cycles of centralizing currents.[213]

The claim, consequently, that the only guarantee for

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212 C.F. Strong, Modern Political Constitutions (New York, 1964), p.64.

213 H. Strauli, Die Kompetenzausscheidung zwischen Bund und Kantonen auf dem Gebiete der Gesetzgebung (Aarau, 1933), p.2.

whatever distribution of functions there is remains the constitution which determines the political structure as a whole,[214] entails examination of the so-called delegated, residual, or implied powers through which the central government can in reality influence its constituent governments without touching the formal structure of the constitution.

To the extent that constitutional provisions delimit the competences of the different levels of government, article 3 of the Swiss Constitution is one of the most difficult to interpret. While delimiting, with certain restrictions, the delegated powers of the federal government, the cantons retain all others, i.e., "residual" competences. This wording has proved an unreliable guide to the actual powers of the cantons. Since a federal competence does not supersede a cantonal one until it is actually made use of by the central government,[215] emphasis on constitutional provisions which seek to buttress the states' rights ideology remains

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214 Friedrich, loc.cit., p.264.

215 C. Hughes, The Federal Constitution of Switzerland (Oxford, 1954), p.6.

ineffective in view of the so-called elastic clause which, in an analogy with the tenth amendment of the American Constitution, is interpreted in such a way that all powers are retained by the states which have not yet been surrendered. Since article 3 of the Federal Constitution has led not only to an extension of national legislative but also of judicial and administrative powers over those of the cantons, the doctrine of implied powers as derived from a broad interpretation of the constitution is also a feature of Swiss constitutional law, contary commentaries notwithstanding.[216]

As based on the so-called "ends-means" classification of reasoning, the doctrine, by seeking to expand the limits of national authority, proposes that those powers which are "proper", "necessary," or "conducive" to the exercise of any express power are equally consistent with the scope of the Constitution in the execution of laws by federal authorities. Thus apart from the fact that the powers granted to either one of the two levels of government are not necessarily exclusively enjoyed by either since the concept of "concurrent powers" blurs the line between the two levels

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216 Aubert, loc.cit., p.238.

of competences, the doctrine of implied powers remains a subsidiary constitutional principle not always consistent with federalism:

> the ideas of federalism and implied powers constitute a pair of rival constitutional principles which are in more or less opposition to each other. (217)

On the basis of the foregoing considerations, the concept of "sovereign" federated units has equally been called into question. As Swiss opinion in general does not consider the Constitution to be a contract but a law, it is maintained that the claim that the cantons are sovereign stands or falls with the claim that the Constitution is a contract.[218] Alternatively, it has also been asserted that no sovereign can be discovered in the federal system since instead of being directed by a sovereign power, a constitutional system rests upon the constituent power.[219]

Apart from the fact that "sovereignty" remains a relational concept which does not say very much about the scope and content of given competences without examination in

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217 Carr, loc.cit., p.85.

218 Hughes, loc.cit., p.3.

219 Friedrich, Man and his Government, loc.cit., p.597.

fact, increasing cantonal dependence upon the central government which through successive constitutional revisions has progressively diminished the power of its constituent units, can hardly be contested.

The question whether the cantons are "sovereign" as expressed in articles 3 and 5 of the Federal Constitution has been answered by the claim that the words "sovereignty" and "sovereign" have become irrelevant in being no longer appropriate to the realities of our time and that, therefore, the words should read "competence" and "competent" if these terms are understood to express the right to judge a given cause.[220] The word "sovereignty" consequently, remains at best either a verbal concession to cantonal sensitiveness or a concession to those who formerly might have opposed the establishment of the federal union.

In much the same way as the concept of sovereignty is held to have become irrelevant

> in the face of three phenomena of the modern world - political democracy, federalism, and public law as represented in welfare legislation (221),

so it is also held to be presumptuous to emphasize the

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220 Aubert, loc.cit., p.223.

221 Marshall, loc.cit., p.37.

sovereign role which the cantons allegedly play in the revision of the Federal Constitution. As it can be revised by majority vote, one can say that some cantons together participate in the sovereign character of the Confederation, but not that one canton alone is sovereign.[222]

These considerations notwithstanding, endeavors to "raise" the status of the cantons have been based on the following, and rather ingeneous, construction. There is, accordingly, a central state with certain delegated powers on the one hand, and there are, and on the same level, a given number of member states with certain other competences. As sovereignty belongs to a "total" state alone, composed of both the central state and the member states, the latter, without being, properly speaking, sovereign, can yet partake in the sovereign essence of the total state. However, as the total state would appear to manifest its existence at the occasion of a constitutional revision only, whilst in all other instances no distinction could be drawn between it and the central state, the differentiation remains at best very tenuous.[223]

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222 Aubert, loc.cit. p.224.

223 Ibid., p.225.

The status of Swiss cantons, consequently, remains one of competent, i.e., relatively autonomous, political communities. Yet because their competences are determined by constitutional provisions, it must not be inferred that they are therefore a creation of the Federal Constitution as such interpretation would go against historical reality; the cantons were in existence long before the establishment of the present federal state. Furthermore, if the cantons were merely the product of the federal legal order, the federal constituent could abolish them. However, not one canton can be suppressed against the will of its population.[224]

From a comparative point of view, the essence of Swiss federalism with its century-old cantonal loyalties has been contrasted to that of the United States which is said to be based on the undesirability of a unitary form of government.[225] This interpretation allegedly explains the emphasis in America on decentralization, while the Swiss state, built up from below, emphasized cantonal independence. Swiss federalism, therefore, is seen as the product of historical tradition which

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224 Aubert, loc.cit., p.225.

225 Tripp, loc.cit., p.74.

triumphed over racial, linguistic, religious, and political differences on the one hand, and which preserved, on the other, these differences in that they coincided with cantonal frontiers and an absence of a feeling of need for assimilation into a more inclusive sphere.[226]

However, Swiss moderation and common sense have equally been accredited with restoring the balance between local tradition and federal unity. This attitude of deep-rooted respect for autonomy and diversity, as based on the educational and political philosophy of Pestalozzi, aimed not at the ideal of cantonal self-sufficiency; rather, the people knew that their small country required a compensation for the breadth of its supranational culture.[227]

As the use of the word "federal" in its legal sense of the term has been associated with an old tradition, modern political developments and their concomitant administrative relations, both vertical and horizontal, have rendered the formalistic criteria of old largely insufficient for present-day realities. If part of the traditional virtue has been the

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226 Hans Huber, How Switzerland is Governed (Zurich, 1946), p.12-13.

227 E. Bonjour, loc.cit., p.370.

endeavor to combine the one and the many, its structural arrangements, while legal in essence, have become administrative in actual operations.[228] Thus, whereas federalism is not a fixed and static pattern but a process, preoccupation with the pattern of power as separate, rather than intertwined, had led the most authoritative exponents on federalism to the conclusion that the system of the division of powers between levels of government is such that each government remains, within its own sphere, coordinate and independent.[229]

As previously discussed, however, "coordinated," in the sense of "sovereign," and therefore by implication equal in rank or importance, is hardly applicable to the constituent governments in a federal state. Furthermore, the essence or intensity of federalism has been said to vary according to the following phenomena: constitutional revision through various voting procedures; examination of the constitutionality of laws by tribunals and their recognition of implied powers of the central government; independent

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228 Macmahon, loc.cit., p.3.

229 K.C. Wheare, Federal Government (London, 1947), p.11.

financial bases of constituent governments; the number and internal organization of political parties and pressure groups, and, finally, according to the way in which the relationship between the government and the parliament, between the two houses of parliament, and between national and local representatives, are established.[230]

From the foregoing it is apparent that there are no two federal states which are alike, or that a single definition applicable to all so-called federal states can be given. Swiss federalism, therefore, remains one type among others in which a certain degree of union coexists with a certain degree of decentralization; and, as the two frontiers cannot be precisely established, it remains, if a definition be necessary, at a point somewhere between total independence and total unity.[231]

To the extent that administrative relationships have become the real cutting edge of federalism, the Swiss example is said to be characterized by a highly pronounced participation of the member states in the organs of the

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230 Aubert, loc.cit., p.203.

231 Ibid., p.188.

federal government, as well as by the practice of cantonal execution of federal laws which, as based upon a deep-rooted propensity for decentralization and self-government, has also been regarded as the only remedy for the perils of undue centralization.[232]

These claims have been confirmed in various interpretations such that the federal state is characterized by the participation of the member states in the formation of the will of the central state,[233] or that the most significant trait of Swiss federalism is the cantons's intimate association with the execution of federal laws.[234] This association, or the so-called great affair of Swiss federalism, by entailing a redivision of legislative, administrative, judicial, as well as of financial functions, was to lead to one of the most lively debates in Swiss constitutional history. The "great affair," which centered essentially around the reform of federal finances, might most succinctly be summarized by the following aphorism:"tell me the arrangement of

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232 Tripp, loc.cit., p.99.

233 G. Sauser-Hall, Guide Politique Suisse (Lausanne, 1947), p.24.

234 Aubert, loc.cit., p.228.

your financial system, and I will tell you the nature of your federalism."[235]

Since the redistribution of wealth had become the urgent problem of federalism, cantonal participation in the central will and in the execution of federal laws appeared to have given an answer to the question of how to halt a continuous erosion of a structural arrangement in which neatly parceled-out functions proved no longer a bulwark against possible unconstitutional activities of the Confederation. In the final analysis, however, this "executory" federalism, which was meant to calm the disturbing considerations of growing, centralizing tendencies, was unable to prevent that the cantons were increasingly reduced to administrative subdivisions of the central government.[236]

Reexamination of old concepts in the light of new realities were therefore to give rise in Switzerland to two new formulations of federalism: cooperative and administrative.

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235 Aubert, loc.cit., p.283.

236 Ulrich Hafelin, "Die Fortbildung des Schweizerischen Bundesrechts in den Jahren 1954-1971," Jahrbuch des Offentlichen Rechts der Gegenwart, Neue Folge, Band 22, 1973.

As the Confederation and the cantons seemed to have understood that in treating each other as natural enemies they hardly advanced matters of public concern, the tradition of competitive federalism was to be replaced by that of a more cooperative outlook.[237] This new spirit, in seeking to restore the by now "antiquated" federal school of thought, expressed itself in such efforts as that of the New Helvetic Society which, in 1965, launched a program aimed at the creation of an institutional mechanism of coordination through which newly envisaged possibilities of cooperation on the horizontal as well as on the vertical level could be translated into a more realistic division of competences.[238]

A comprehensive presentation of this program is still missing today, and the notion of cooperative federalism has not as yet been translated into a doctrinal body, let alone a precise legal mechanism. As a state of mind, however, and in virtue of this new spirit, the transfer of a competence to the central government is said to be often not any longer

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237 Aubert, loc.cit., p.61.

238 H. Tschani, Profil der Schweiz (Zurich, 1967), p.60.

resented as an impoverishment of the cantons, but viewed as a better distribution of forces since the cantons remain associated with the federal enterprise in both preparing and executing it.[239]

This optimistic interpretation, however, appears to stand in need of reconciliation with the growing recognition that the trend to burden the central government with ever more tasks remains a danger to the structure of the federal state as prescribed in the Constitution, or that cantonal competences remain intact as long as they are not superseded by federal ones.

As regards the concept of administrative federalism (another variation of the constitutional theme by leading exponents of the federal state), it has similarly been defined as the use of member states as agents for carrying out national laws, and, in particular reference to Switzerland, has been called "indirect federal administration."[240] This indirect process, furthermore, is said to be helped by a highly developed personal union between the Federal

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239 Aubert, loc.cit., p.65.

240 Macmahon, loc.cit., p.22.

Assembly and the local administrations, a phenomenon which, plainly visible in the National Council, is even more pronounced in the Council of States. Conversely, as similar educational backgrounds of the officials at both levels contribute to the cantons sharing in the framing of the laws given them to administer, the "agency role" of the cantons has been accredited with much influence in determining what the federal laws shall be.[241]

The concept of administrative federalism, however, has met the following objections. Insofar as the delegation of federal competences to the cantons, or the tasks which the Confederation leaves to the execution of the cantons, can be said to constitute administrative federalism, it is held possible that through this process the economic and administrative disparity among the cantons will be furthered rather than reduced. Since the wealthy cantons are better equipped to make use of, and derive optimal results from, the "blessings" of the central government, it is to be feared that with ever more complex tasks the weakest cantons will simply be unable to meet the challenges demanded of them

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241 Macmahon, loc.cit., p.24.

with the result that under the cloak of a lush verbal federalism a cultural and economic colonization of the larger cantons over the backward ones cannot be ruled out.[242]

Reforms rather than continued application of the existing practice of federalism in its "indirect" administrative aspects have consequently been advocated in demanding not only a reexamination of federal fiscal arrangements aimed at equalizing cantonal disparities, but also that the central government should increasingly take the execution of its laws into its own hand, by following the example of the United States, or by gaining greater influence over recruiting and training of cantonal officers, and thereby over the cantonal apparatus, by following the example of Germany.[243]

The controversial reference to the United States notwithstanding, the foregoing reflections have found their echo in the platform of the Free Democratic Party of the late 1960's which, among other things, deplores that

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242 Bischofberger, loc.cit., p.45.

243 Ibid.,p.45.

because of the demands of expediency, and following in the wake of technology and industrialization, the limits of communities and cantons are transgressed in many areas of public activity. It advocates, therefore, that the division of competences should be reappraised in order to eliminate the overlapping of functions, and that, for the sake of Swiss liberalism, a new concept of federalism be created which includes the promotion of intercantonal and regional cooperation.[244]

In conclusion, a number of propositions are offered with the intent to corroborate the development of constitutionalism. Above all, federalism cannot be successfully defended on the grounds that the tendency of a unitary form of government points inevitably in the direction toward political repression, nor that a division of constitutional powers remains the best guarantee of political rights and freedoms. Since increased economic interdependence as well the modern media of communication appear to lessen the desirability of a federal form of government, by implication,[245]

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244 A. Gretler and P.E. Mandl, Values, Trends, and Alternatives in Swiss Society (New York, 1973), p.212-213.

245 Tripp, loc.cit., p.80.

therefore, a greater feeling of national community would appear to point in the direction of a unitary state. Second, as the redistribution of wealth has become one of the most characteristic phenomena of modern constitutional history, federal finances, though channeled to cantons and communities by means of revenue sharing and subsidies, are not conducive to the sentiment of autonomy.[246] Third, and to the extent that a federal structure of government confronts the problem of adjusting to the shifting requirements of an industrial society, the mixing of populations, accelerated through a greater freedom of settlement, has contributed to the declining spirit of particularism.[247] Fourth, as the federal structure can no longer be said to exhibit a constitutionally fixed division of powers with no overlaps, the essence of federalism, as determined by centralizing currents, appears to have become less a matter of legality and more so a matter of national policy. Finally, inasmuch as the transfer of many original cantonal functions to the central

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246 Aubert, loc.cit., p.61.

247 Ibid., p.63.

government has led to an unhealthy tension between a dull ideal and a reality in terms of which federalism in Switzerland is revered as a monument of the past, the solution to the problem of reestablishing a healthier division of competences might well be dependent upon a total revision of the Federal Constitution.[248]

Centralizing tendencies in Historical Perspective

In the course of the past century, the political institutions of Switzerland underwent a fundamental change. Of the three families occupying the federal building, the central government, the people, and the cantons, the apartments of the first two were modernized and enlarged at the expense of the chambers of the third.[249] This development, which reflected a gradual shifting of individual loyalties from the canton to the federal state was marked, essentially, by the acceptance of a new political philosophy in which the purpose of the state was redefined from that of the

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248 Tschani, loc.cit., p.60.

249 W.E. Rappard, La Constitution Federale de la Suisse (Neuchatel, 1948), p.285.

"nightwatchman" to that of the "protector of the public welfare." Although this change took place faster on the federal level, its influences, by mirroring those modern problems which arise from a gap between democracy and efficiency,[250] remained inescapable on the cantonal level as well.

Concomitantly, the essential shift in the territorial distribution of the population

> over the last hundred years has therefore been the substantial increase in the degree of urbanization, together with its corollary, the dramatic decline in the proportion of the population living in communities with less than 2000 inhabitants.(251)

In conjunction with the trend toward state intervention in social and economic matters of local units, the result was both a loss of importance of the cantons in relation to the central government as well as a weakening of the federal principle.

As late as the first half of the nineteenth century, proud and independent cantons determined the political

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250 P.Bischofberger et al., Verwaltung im Umbruch (Bern, 1972), p.127.

251 A.Gretler and P.E. Mandl, Values, Trends and Alternatives in Swiss Society (New York, 1973), p.182.

life of Switzerland. As almost each of them possessed its own currency as well as a small army, the setting up of trade barriers, reinforced by the cantons' individual regulation of dues and customs, had not only confined them to an almost insulated existence but had also hindered the movement of goods and persons throughout the country at both the cost of a national economy and the extension of individual rights and freedoms.

Just as guilds and cantonal governments regulated all social services, so also in foreign affairs each canton reflected a world of its own in which sentiments of local autonomy, of traditional diversity, and of attachment to historical liberties not only remained a safeguard against any imposed uniformity, but also proved a real obstacle in the conduct of international relations because of a tenacious localism, if not selfish provincialism, with its roots in racial and religious prejudice. As nothing united them but the will to defend their individual liberties, the cantons' unwillingness to sacrifice their independence for the sake of unification was reflected in a network of alliances which had kept them in a state of competition and rivalry.

Swiss public life and spirit, the proverbial narrowness of which is said to reflect at once the topography and the history of the country, appears always to have revolted against the requirements of an all-embracing common existence.[252]

In the endeavor to reconcile a central political allegiance with the divergent racial and religious elements, therefore, it was only natural that what had grown for centuries within a "small circle" should not make for easy subordination towards a greater whole; it was the almost revolutionary achievement of the forces of liberalism to have awakened an expanded consciousness for a higher, federal, level.[253] Although the political will to unify was in most essentials to prevail over fidelity to local habits, Switzerland's sense of history is said to have remained that of the cantons; it is localized, not national history.[254]

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252 Rappard, Constitution, loc.cit., p.206.

253 H. Tschani, Profil der Schweiz, (Zurich, 1967), p.17.

254 C. Hughes, The Parliament of Switzerland (London, 1962), p.1.

Accordingly, the sentiments in the original struggle for freedom in the secluded valleys of the high Alps are still held to pervade the whole of Swiss political life. As these communities, which really were once sovereign, had emphasized such virtues as self-reliance, devotion to locality, as well as opposition to all innovation which might disturb the traditional, these very characteristics continue to remain resistant to absorption or to curtailment by modern, national legislation.[255] Conversely,

> in spite of pressures toward a national investment policy, a more comprehensive national road network, nationally imposed sanctions against river pollution ... (and) in spite of substantial federal subsidies, the typical Swiss still considers himself a citizen, first of a commune, then of a canton and only by virtue of this, of Switzerland. (256)

Alternatively, and in the same valleys where the original ideas of government are best preserved, and where the different sections of the country were fortified by artificial partitions made of jealosy and mistrust, modern methods of

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255 H. Weilenmann, Pax Helvetica (Zurich, 1951), p.233.

256 Ioan Bowen Rees, "Local Government in Switzerland," Public Administration, Vol. 47, Winter 1969, p.428-9.

communication and transportation are said to have caused these idiosyncracies largely to disappear with the result that the still existing diversities in political institutions remain worthy to be studied for their problems in political psychology.[257] These observations notwithstanding, the freedom for which the cantons had fought was their own cantonal independence, and the ensuing sense of history was strengthened and perpetuated by the traditions, or fictions, of republicanism.[258]

In a state ethnologically as heterogeneous as Switzerland, political harmony was predicated on cantonal autonomy. Its curtailment through the necessary limitations in the interests of security and prosperity for the whole country, therefore, made the problem of national unity not simply a question of abstract states' rights against a growing central power, but also involved such burning issues as ideological prejudices and economic fears. Fortunately for the national unity of the country, the boundaries between the

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257 J.M.Vincent, Government in Switzerland (New York, 1913), p.53.

258 Hughes, Parliament, loc.cit., p.2.

confessional and linguistic groups cut across each other. Thus although

> modern Switzerland is characterized by great diversity of economic, political, and cultural conditions, with few exceptions these divisions overlap in such a complex fashion that the cleavages are constantly neutralized. They are attenuated by overlapping loyalties. (259)

Yet while the two major religions are fairly equally divided both on a national and on a cantonal basis, the large cities are predominantly Protestant.

From a traditional point of view, it might well be maintained that "although in a minority, Catholic Switzerland is the real Switzerland(as) the rest wandered from the folkways of their ancestors into worldly bypaths."[260] However, in the conflict between progress and reaction, tradition, if not to perpetuate an odious routine of privileges, must also be modified to make for a healthy development of political and social institutions better adapted to the needs

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259 Kurt B. Mayer, "The Jura Problem: Ethnic Conflict in Switzerland," Social Research, Vol.35, Winter 1968, p.714.

260 R.C. Brooks, Civic Training in Switzerland (Chicago, 1930), p.23.

of the time. Conversely, one of the main purposes of

> the Federal Constitution of 1848 and amended in 1874 was to break down these barriers... to create a truly Swiss citizenship and to guarantee certain fundamental rights to all Swiss of all creeds throughout the whole country. (261)

Where communities do remain relatively independent today, each attempt at centralization is of course viewed as undemocratic or as an intervention into local self-administration. Or, where local governmental patterns do remain rooted in ancient traditions, the obstinate determination of the cantons to maintain their peculiarities, although inefficient from the point of view of an industrial society, might well attest to the old ideal that the variety of their ways of living was for the Swiss the guarantee of the supreme values of personality.[262]

Just as Swiss cantonal history has been described as the battle between the love for local alliances and the desire

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261 W.E. Rappard, The Government of Switzerland (New York, 1936), p.12.

262 E. Bonjour et al., A Short History of Switzerland (Oxford, 1952), p.370

for large-scale interest associations,[263] so the observation that material interests had not supplanted the ideal social interests developed through centuries of common life was soon to be modified by the recognition that economics as a motive in politics had meant the obliteration of every cherished national trait by an all-engulfing materialism.[264] The conflict between devotion to home rule and democracy with economic interests, consequently, might best be summarized by the observation that the

> profound changes effected in 1848 were the constitutional reaction to modified economic and political conditions... to a broadening of both the market and of the national consciousness. (265)

Against this background, and in the transition from a loose confederacy to a federal union, Switzerland's history revealed a republican tradition of half a millenary. If this evolution, which was accomplished in little more than five years in America, took more than five centuries in Switzer-

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263 R. Carpentier et J. Lannoye, Suisse Nation Europeenne (Paris, 1949), p.103.

264 Brooks, loc.cit., p.28.

265 Rappard, Government, loc.cit., p.12.

land, then it must equally be recognized that although Switzerland obtained its federal government sixty years later than the United States, it had five centuries of prejudice to overcome.[266]

Inasmuch as liberalism was the prevailing political doctrine as well as the dominant social and economic creed in 1848, the Constitution reflected a compromise between a centralized state and sovereign cantons as clearly to be witnessed in the composition of the Council of States, the true guardian of cantonal traditions.[267] Since the central government compensated for cantonal inequalities by giving each the same number of seats in the Council, this political institution, in conjunction with the requirement that constitutional amendments be submitted to the vote of the people at large as well as to the majority of the cantons, was deemed an effective safeguard against undue unification. Yet if the cantons were therefore well equipped to defend themselves against premature centralization in that the

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266 Vincent, loc.cit., p.37.

267 Bonjour, loc.cit., p.269.

" Council of States remained their citadel and the referendum their buckler,"[268] then it can today also be admitted that the constitutional referendum has never played the role assigned to it; it has not protected the cantons against the extension of the central powers.[269]

Although the cantons had not been reduced to mere administrative districts of the central government as they remained their own masters in such fields as public education, administration of justice, and of taxation, the freedom of the cantons had nevertheless been curtailed through the establishment of federal monopolies:

> after 1848, the pressure of economic and industrial necessities soon led to the establishment of... large-scale economic services (and) bureaucracy was born when the Federation undertook these activities.(270)

While the political minority of the Catholic conservatives, which had fought the growth of the detested bureaucratic state, was now joined by the linguistic minority of the

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268 Brooks, loc.cit., p.10.

269 Aubert, loc.cit., p.200.

270 C.J. Friedrich and T. Cole, Responsible Bureaucracy (Cambridge, 1932), p.29.

radical democratic French cantons which were roused by the threat of Germanization, already the Swiss Civil War had given the military as well as the constitutional verdict over the autonomy of the cantons. It had left a heritage of expanded federal powers never subsequently to be surrendered. Just as in the American Civil War the Swiss government made no secret of its sympathies for the northern states (with only a few conservatives supporting publicly the cause of the South which recalled their own fight for traditional, local, and rural democracy)[271], so the exigencies of a nascent Swiss industrial system called forth adequate institutions and machinery in spite of ideological objections.

To the extent that amendments to the Constitution in 1874 multiplied the functions of the federal state and the individual rights of citizens, it suppressed at the same time those of the cantons. Furthermore,

> the growing sentiment of national unity promoted by internal migration and by the rapid development of intercantonal trade led to the demand for the unification of commercial, civil, and penal law. (272)

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271 Bonjour, loc.cit., p.284.

272 Rappard, Government, loc.cit., p.25-26.

Federal administrative powers had been growing rapidly, especially through the creation of monopolies and institutions for social insurance. As new working relationships called for new regulations by the state, the working class relied on state support against the demands of industry. The provisions for security and welfare in factory work, as reflected in the revised Constitution of 1874, had the effect, like most of the measures for centralization and unification, to transfer to the federal government competences hitherto reserved to the cantons. Concomitantly, the lower- and middle-classes set the tone in public life by creating a new form of Swiss life and intellectual outlook. Although nationalization of certain industries was a clear rejection of the liberal principle of freedom in economic life,

> with its measures of unification of the customs, weights and measures, and the coinage, and with the statutory freedom of settlement and occupation, the federal state had provided industry with the elbow room it had so long desired. (273)

Freedom of trade and industry was not guaranteed in 1848; its introduction in 1874 had the effect of voiding a number of cantonal laws. It remains "guaranteed in so far as it is

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273 Bonjour, loc.cit., p.324.

restricted by the Constitution itself."[274]

A further weakening of the forces of localism was tied to the statutory freedom of settlement (article 45) and its concomitant residence system. Through the increasing migratory movements of Swiss into cantons other than those of origin, people remained less willing to defend cantonal prerogatives against the encroachments of the central government, and, in fact, accentuated the centralizing current by demanding measures for unification of school curricula.[275] Also, and inasmuch as the federal government does not as yet administer or finance poor relief, public assistance to the needy has so far remained a responsibility of the cantons, a liability they would prefer to escape.

Just as even today the citizenship of a commune remains the necessary preliminary of the citizenship of a canton and hence of Switzerland, so a citizen's residence determines his right to public assistance; poor relief is paid by the canton of settlement when residence is temporary; when permanent,

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274 C. Hughes, The Federal Constitution of Switzerland (Oxford, 1954), p.31.

275 Aubert, loc.cit., p.63.

the canton of origin assumes the liability.[276]

To the extent that membership in a canton depends on membership in a community, these peculiarities are due largely to methods employed in the sixteenth century in order to eradicate vagrancy.[277] Today, when one of the most common type of inter-cantonal litigation concerns assistance to the destitute, the needs of a mobile population make uniformity a necessity. The pressures for unified national legislation become particularly inescapable when viewed in the light of different cantonal legislations over the freedom of settlement and its attendant problems of taxation as well as of the exercise of political rights.[278]

The diversity of existing cantonal constitutions has frequently been advanced as the most telling proof for a certain independence of the cantons. The Swiss Constitution, in its article 6, requires three conditions according to which cantonal constitutions must (a) contain nothing contrary to

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276 Aubert, loc.cit., p.315.

277 Vincent, loc.cit., p.135.

278 Hughes, Constitution, loc.cit., p.56.

the provisions of the Federal Constitution, (b) assure the exercise of political rights according to Republican (representative or democratic) forms, and, (c) have been accepted by the people and be susceptible to amendment whenever the absolute majority of the citizens demand it. Within these limitations, cantons are said to regulate their internal affairs as freely and as stubbornly as they wish to. Also, by enumerating the two forms of "republican" government the Swiss are held to have effectively prevented any disputes over the compatibility of direct democracy with a republican form of government, as occurred in the United States.[279]

In religious matters, just as with respect to political institutions, there is said to prevail a wide variety in the form of church government and in the actual amount of personal liberty. Since the majority of the cantons support their own "national" churches by means of subsidies and confer on them certain privileges that other churches do not enjoy, religious worship, although regulated by uniform[280]

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279 Codding, loc.cit., p.41.

280 Sauer-Hall, Institutions, loc.cit., p.92.

federal laws, pertains in its actual practical application to the cantons, as each state, under given different systems, gives expression to the particular needs of communities and individuals.

With respect to cantonal types, today there remain five "pure" democracies which represent less than 3% of the total population; the other twenty cantonal constitutions all possess representative institutions, supplemented by the direct democratic devices of the referendum and the initiative. These pure democracies or Landsgemeinden have been acclaimed as an extraordinary form of direct democracy in that they remain, for some observers, an unequalled and inspiring lesson in civic freedom and of devotion to the common country.[281] For others, they remain a fetish with which to conjure up original Germanic institutions.[282]

Since the people, theoretically, were to enact and to administer all laws and regulations themselves, it was only natural that with the increasing complexity of political life representative councils and other corps of officials should

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281 Rappard, Government, loc.cit., p.36.

282 Vincent, loc.cit., p.55.

have supplemented the vaunted ideals of the "open air" democracies. Since the Landsgemeinde is simply not a twentieth century institution, its uncertain future might well depend on the question of how far democratic simplicity, under the impacts of modernity, will retire into the recesses of the Alps;[283] its survival, consequently, might indeed only be guaranteed as a cherished reminder of the days gone by.[284]

Inasmuch as the luxury of direct democracy had given rise to Switzerland's political diversity, today there are twenty-five federated member states, composed of nineteen cantons and six half-cantons. (The latters' position does not differ from a whole canton as they have their own constitutions and citizenships, although while each canton is represented in the Council of States by two representatives, each half canton is represented by only one).

Each canton entered into ever more tenuous relationships with the central government as the federal powers increased, especially in economic matters. This development paralleled

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283 Vincent, loc.cit., p.165.

284 Rappard, Government, loc.cit., p.37.

the country's growing dependence on international trade and slowly but steadily induced a change in concept of the duty of the state from that of protector of liberty to that of guarantor of the minimum conditions necessary to the good life.[285] Thus, just as the logic of democracy had led the people to increase their demands on the state by calling for the relief of poverty, the encouragement of production, and the creation of prosperity, so

> the causal relation between technical progress and administrative centralization was indirect, but obvious; technical progress engendered changed economic conditions, which in turn called for federal intervention. (286)

The result was centralization, despite Switzerland's hesitancy in openly recognizing the trend of a fully organized bureaucracy upon which any industrial system depends.

This development, from the point of view of the constitutional division of powers, is best characterized by some brief observations of the more pertinent provisions in question. According to article three of the Federal Constitution, "cantons exercise all rights which are not trans-

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285 Codding, loc.cit., p.133.

286 Rappard, Government, loc.cit., p.115.

ferred to the Federal Government." The underlying principle is that the cantons exercise all residual powers and that, in the case of conflicting competences, the presumption is in favor of the cantons. Thus the constitutional lawyer may well emphasize that cantonal competence is the rule and that each federal competence, and thus each exception to the rule, requires a constitutional justification.[287] However, and inasmuch as article three must be read in conjunction with article two of the Transitory Provisions ("federal law breaks cantonal law"), the Federal Constitution proves

> an unreliable guide to what is in the competence of the cantons, for a federal competence does not supersede a cantonal one until it is actually made use of. (288)

In this respect, diminution of cantonal competences is particularly striking in cases where the cantons themselves had already legislated, for example, when cantonal civil codes became null and void with the introduction of the Swiss Civil Code in 1912. But the restricting effect is equally real,

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287 Bischofberger, loc.cit., p.40.

288 Hughes, Constitution, loc.cit., p.6.

although less visible and therefore politically more easily acceptable, when the cantons have not yet legislated, as, for example, in relation to novel realms such as the field of atomic energy. Although here federal competences did not supersede cantonal laws, nevertheless, cantonal competences were thereby diminished.[289]

Furthermore, as article three is one of the most difficult to interpret, the federal government enjoys implicit powers or those competences which are necessary and proper for the exercise of a given federal power.[290] With respect to "concurrent" powers, consequently, cantons retain provisional competences which reflect, as it were, stages of transition to the central government. Concurrent powers, in the final analysis, are understood to mean that the federal government can preempt them, whenever, and to whichever extent, it wishes to do so.[291]

As the foregoing explicit and implicit deductions and rules apply not only to cantonal legislative but to executive

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289 Aubert, loc.cit., p.58.

290 Ibid., p.242.

291 Ibid., p.263.

and administrative ones as well, it is obvious that no cantonal activity can escape the influence of article three. Thus although the cantons have been given "primary" responsibility in certain areas, and although the courts for criminal as for civil law are cantonal in both their organization and procedure, the courts, like all cantonal acts, remain subject to the overriding principle of the supremacy of federal law.[292] Contrary to the observation, therefore, that in the foreground of the division of powers stands the execution of federal laws by legislative and administrative bodies of the cantons, reflecting a deep-rooted trend for decentralization and self-administration,[293] the Federal Constitution, in fact,

> provides ample remedies for the central government if the cantons infringe federal law, but none for the cantons if the federation infringes cantonal competences. (294)

According to article seven of the Federal Constitution,

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292 Hughes, Constitution, loc.cit., p.76.

293 H.Strauli, Die Kompetenzausscheidung zwischen Bund und Kantonen auf dem Gebiete der Gesetzgebung (Aarau, 1933), p.235.

294 Hughes, loc.cit., p.6.

cantons have the right to conclude conventions among themselves upon matters of legislation, administration, and justice. This provision which meets the need for federating adjacent communities for effective joint action when the constituent units are too small for handling needed social services, was to give rise to a horizontal partitioning of competences, or to the system of concordats in wich concordat law prevails over cantonal law.[295] However, as these "treaties" between cantons must be in accordance with federal law, here, too, federal censorship, analogous to that under article six, pertains. Furthermore, control over water courses as well as water pollution, for example, involve interpretation of modern federal legislation. Thus, as the central government increased its competences also in the sphere of civil and criminal law, the formerly numerous inter-cantonal treaties disappeared to the extent that federal legislation replaced them.[296]

Further diminutions of cantonal competences were effected

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295 W.G. Rice, Law Among States in Federacy (Appleton, 1959), p.806.

296 G. Sauser-Hall, Guide Politique Suisse (Lausanne, 1947), p.97.

through limitation of cantonal freedom in foreign policy according to article 12 of the Federal Constitution, as well as through interpretation of such constitutional provisions as articles sixteen and eighty-five, which call for "federal intervention" in cantonal affairs if these endanger the security of the country, and for "federal execution" if a canton deliberately fails to obey federal laws, respectively.

In the evolution of federalism, consequently, the division of powers had apparently the result that no appreciable area of national life remains outside the sphere of federal interferences, or that the federal government has at least a supervisory function in all aspects of life.[297] Federal supervision, however, is a rather vague conception, and, as the expression is used in at least five different senses, its connection with the two levels of government is characterized by the following situations and relationships: where the central government is alone competent (federal monopolies); where the cantons are alone competent (direct local taxes); where matters are legally controlled by the federation, but

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297 Codding, loc.cit., p.44.

administered jointly; and where matters are ruled by federal laws, but the administration and execution of which is left to the cantons.[298]

It is with respect to the last relationship that federalism, in spite of the transfer of cantonal competences to the central government, is still held to be flourishing, although it must be realized that the idea of leaving legislation as a whole to the federation and the execution thereof to the cantons, is nowhere expressly stated in the fundamental law of the country.[299]

Prior to examination of the proposition that the cantons to enjoy the important powers of execution and adjudication of both cantonal and national laws, however, some brief historical comments are in order as besides the political, economic, and social factors which have promoted centralization, the issue of public finance has remained one of the overwhelming problems in the constitutional history of the country.

To the extent that the financial relationship between the

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298 G. Sauser-Hall, Institutions, loc.cit., p.56.

299 Hughes, Constitution, loc.cit., p.91.

federation and the cantons had been reversed in 1874 in that the central government now had revenues of its own (the yield of customs duties), the separation of finances between the two levels of government (the cantons retained Steuerhoheit or the power to levy direct local taxes) was soon to make for confusion and to endanger the independence of the cantons without satisfying the needs of the federation.[300] As a result, and as late as the 1960's, the Swiss system of taxation, the outgrowth of a long historical tradition, was still deemed incapable of meeting the urgent demands for a more efficient and rational arrangement.[301]

With the increasing scope of federal operations in the life of the whole nation, new tasks called for new expenditures which in turn had to be matched by new revenues. While the principle, according to which direct taxes are reserved to the cantons, may count as a political principle although it is nowhere established in the Constitution, the

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300 H.Huber, How Switzerland is Governed (Zurich, 1946), p.15.

301 Walter Wittmann, "Die Frage eines rationalen Steuersystems fur die Schweiz," Schweizerische Zeitschrift fur Volkwirtschaft und Statistik, 99 Jahrgang, No 4, Dez. 1953, p.481.

the First World War was to prove the weakness of the financial arrangement. Heavily indebted because of defense expenditures, the federation, for the first time, levied a direct tax in 1915.

The imposition of taxes by the Federal Council through urgent arretes (thereby withdrawing them from challenge to the referendum), was deemed temporary; after the crises of wars and economic depressions the return to the historic principle that the federation levy no direct taxes appeared self understood. However, reliance by the federal authorities on grants of Full Powers for the levying of further taxation was to continue; in 1963 the people accepted as valid the existing financial regulations which are to remain in effect until 1975.[302] As the cantons today have become public charges on the federal revenue, their growing financial dependence "remains exclusive of a true moral and political independence."[303] The central government, therefore, through its fiscal policies (and thus by promoting programs which it could not legally require short of a

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302 Tschani, loc.cit., p.362.

303 Rappard, Government, loc.cit., p.119.

constitutional amendment), might well end up by superseding the competences of the cantons in this matter as much as it has succeeded to do so through legislation in other fields.[304]

In the existing fiscal arrangement, cantons receive shares (parts, Anteile) according to a stipulated partitioning of the receipts from certain taxes and assessments, subsidies (subventions, Beitrage), as well as reimbursements (remboursements, Vergutungen).[305] If the proposition that the central government actually buys the agreement of lower levels of government appears to dratic, the viability of present day Swiss federalism, nevertheless, is surely dependent on the flexibility of certain fiscal relationships. The flow of money to the cantons and communities, particularly with respect to subsidies, has certainly not been conducive to the sentiment of local autonomy.

Tied to certain purposes, and deemed to be transitional means to induce positive action through self reliance, subsidies have instead been regarded as pensions which by their

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304 Aubert, loc.cit., p.233.

305 Ibid., p.289.

very nature have made for an even greater dependence upon the state.[306] Since there are very great differences in resources, and hence in the taxable capacity of the various cantons, adaptiveness to the central government's policy of conditional grants has been characterized by two subsequent developments. First, cantonal authorities, sensitive to electoral consequences, have been spared the ungrateful tasks of introducing new or increased taxes, as well as of risking a referendum challenge. Second, in view of the differences in wealth among the cantons, the desired level of economic welfare for all necessitated the introduction of the principle of "equalization" whereby the central government collects more revenues from the richer cantons and distributes more to the poorer ones.

In the redistribution of wealth, however, the concept of equalization, though a generous idea, is fraught with danger in that like any notion of equality carried to the extreme,[307] it tends to endanger the essence of federalism. Inasmuch as the formulae for fiscal efficiency with respect

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306 Tschani, loc.cit., p.325.

307 Aubert, loc.cit., p.63.

to equalization of minimal standards for public services are based on population and per-capita income, as well as on national tax collections within a canton,[308] lack of agreement on any "best" formula must not cloud the recognition that the ideal to provide for an allocation of resources which will correspond to anticipated functions, might never be attained. Also, the central government's role in influencing the operations of the lower governments raises the issue that what might be most efficient for solving problems, is likely to be least conducive to federalism - and vice versa.

Against this background, the notion of "shared administration" needs briefly to be reexamined. As based on the proposition that the federation has wide powers, but not always the administrative apparatus necessary to apply its laws, collaboration with cantonal authorities is deemed indispensable.[309] As a result, because the cantons have retained much of the administration of these laws in their own

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308 Aubert, loc.cit., p.295.

309 Sauser-Hall, Institutions, loc.cit., p.55.

hands, they have thereby limited the centralizing trend of social measures.[310] Further, while the central government passes laws as to basic principles, but leaves "enabling" legislation to the cantons,[311] federal dictation of policy remains qualified and conditional as control over intended measures, through collaboration, is weakened by a concomitant dividing of responsibility.

However, because national participation at all levels has become a central feature of federalism in an urbanized society, the foregoing contentions need to be qualified by the following considerations. First, although the cantons are entitled to supplement federal laws through cantonal regulations, federal supervision to ensure conformity remains nevertheless a dominant factor on account of such devices as Oberaufsicht, high supervision, and direktive Leitsatze, directive guidelines, through which federal norms not only affect directly existing cantonal rights and privileges, but

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310 D.de Rougemont and C. Muret, The Heart of Europe (New York, 1941), p.89.

311 F.O. Adams and C.D. Cunningham, The Swiss Confederation (New York, 1889), p.35.

also any future cantonal legislation.[312] Second, lower levels of government remain handicapped by the complexity and scope of demanded governmental services, by a lacking infrastructure in general, and by the inadequacy of administrative arrangements in particular. This has meant the shift of many social services, traditionally thought of as state and local responsibilities, to the central powers.

Compounded by the more recent public law cases concerning apportionment of costs for roads, means of transportation, water-power works, and support of indigent citizens, as well as by the increasing mandatory controls of the central government regarding the problems of an endangered environment, the growing direct actions of the central government assure, as it were, that the overarching power is national.[313]

Third, the inter-regional movements of populations have contributed to the general centralizing current in that the difficulties involved in a change of governmental boundaries, the source of inefficiency and inequality, has partially been

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312 Strauli, loc.cit., p.221.

313 Tschani, loc.cit., p.89.

offset by personal mobility, or the choice of community by the individual. This development is brought into sharp focus through examination of the "homogeneity" of the cantons: in relation to population, it ranges from 2% to 17.6% between two given cantons, and the disparity is increasing through concentration in large centers. As the cantons of Basel, Genf, and Zurich cover only 6% of the territory, but include 30% of the total population,[314] the increasing concentration of power in one city and in one canton alone, such as Zurich, which has become the most important industrial, commercial, and financial center, is clearly a threat to the decentralized cantonal structure and to Swiss national strength.[315]

In addition to the discrepancy in population, economic disparity is equally as overwhelming, and, what is more, the gap between the rich and the poor cantons is increasing. As similar considerations hold true at the administrative level, "shared administration," therefore, by presupposing that central control will not replace the operations of the

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314 Bischofberger, loc.cit., p.42.

315 Codding, loc.cit., p.17.

lower levels of government, might well increase, rather than attenuate, the existing disparities between the cantons,[316] and thereby weaken the federal principle in general.

Alternatively, national restraint in curtailing the lower governments' discretions, inter-cantonal cooperation, and modernized cantonal governments might well restore the traditional advantages of federalism. However, as the striving for coordination is directly determined by the demand for rationalization, most cantons simply have not yet entered the realm of public administration and thereby undertaken the necessary modernization of their governments as a prerequisite[317] to a coordination of competences. Attempts to adapt existing conditions to the requirements of the present have remained frustrated by the insistence that besides the requirements for a rational organization, there remain political considerations; the democratic organization of the nation is held to preclude the organization

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316 Bischofberger, loc.cit., p.45.

317 Ibid., p.124.

of cantonal administrations in accordance with scientific principles.[318]

From the point of view of centralizing efforts, the general tendency toward bureaucratization is a "natural" concomitant of the development toward an industrial society, and inasmuch as urbanization is said to be one of the essential conditions of the growth of democracy, bureaucracy and democracy would appear to "belong to each other as structural aspects of a fully organized community."[319] In this respect, increasing centralization might indicate that not only federal expenditures, but also federal personnel, will grow more rapidly than those of the cantons, yet both have increased more rapidly on the cantonal level. Moreover, as public administration is often associated with bureaucracy, formalism, and waste, the growth of the public sector has been thwarted by a yet unfulfilled wish to shift functions to larger governmental units in order to remedy the inadequacy of administrative arrangements on the lower levels of government. This requirement would appear to involve not only the

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318 Bischofberger, loc.cit., p.26.

319 Friedrich and Cole, loc.cit., p.88.

problem of a redistribution of competences, but also the creation of a higher caliber of public service.[320]

While some of the cantonal goals remain those of the past, the means employed to preserve them belong more and more to the present, and in such a confrontation rational instrumentalities most frequently conquer traditional ends. When the right to regulate navigation, aviation, and motor traffic was transferred from the cantons to the federal state in the early 1920's, a great shift in economic responsibility from private to public shoulders was soon to follow in the wake of subsequent economic and military upheavals. As the freedom of trade and industry needed to be curtailed by the concentration of powers that any crisis government entails, and as no constitutional government under emergency powers is left behind without permanent alteration always toward enlarging the central powers, so it is inconceivable today[321] that the economy can dispense with "less state" without the most damaging disturbances in the economic structure. Whether

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320 Bischofberger, loc.cit., p.30.

321 C. Rossiter, Constitutional Dictatorship (New York, 1963), p.295.

subsequent measures to achieve greater "social justice" were legitimate or not, it became a question of adapting the Constitution to novel situations. Inasmuch as the "economic articles" of 1945-1947 paved the road to the welfare state, Switzerland's system of social insurances is today well qualified to meet the demands of "social security" as exemplified in article 102 of the International Labor Organization.[322]

Today, because Switzerland has approached the welfare state, the federal government's increasing rights oblige it to ensure an all-encompassing protection. Just as with respect to such laws as those of 1966 which dealt most comprehensively with working relationships as well as with housing and through which political liberalism appears finally to have been sacrificed to economic socialism,[323] so the even more recent federal regulations on the use of land appear to eclipse progressively the individuality of the cantons through a program of "land rationing."

Whether or not centralization has succeeded in Switzer-

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322 Tschani, loc.cit., p.303.

323 Rappard, Government, loc.cit., p.129.

land by "adroitly throwing a sop to the states' rights element,"[324] or whether the increasing desire for material goods and a growing dependence of the Swiss economy on foreign labor[325] have proven the greatest threat to tradition, it can hardly be ignored that there are functions in the modern state which cannot be mastered federally any longer. The question, therefore, whether Switzerland, constitutionally speaking, can still properly be classified as a federation, entails the following concluding considerations since there remain, apparently, no longer any barriers to national legislation to determine cantonal competences.

In the conflict between modern legislation and tradition, such influences as the French Revolution, German radicalism and socialism, the restricting influences of national defense and economic crises, as well as the inter-regional movements of populations, have all been held to be principal causes of Switzerland's descending path toward etatism - which is centralizing, totalitarian, and levelling, and therefore

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324 Brooks, Government, loc.cit., p.60.

325 Codding, loc.cit., p.18.

incompatible with federalism, democracy, and fundamental rights.[326] On the other hand, federal intervention in domestic affairs has also been deemed essential for the protection of the individual from his most dire needs. Inasmuch as modern life appears to call for central solutions because given tasks go beyond the capacity of the cantons or presuppose international cooperation, it has therefore been held that "interventionism" as Switzerland knows it, is the corrective to free enterprise, whereas socialism is its abolition.[327] Further, as national programs are a necessary precondition to a viable federal system which demands that local responsibility be replaced by central responsibility when cantonal action proves inefficient, the esteem of the central government has actually grown among the people.[328]

Finally, there remain the assertions that federalism is still an important principle in that each canton remains

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326 Carpentier et Lannoye, loc.cit., p.15.

327 Aubert, loc.cit., p.91.

328 Tschani, loc.cit., p.46.

a center of a very active political life of its own, in that cantons have as defensive measures the initiative and the referendum, equal representation in the upper House, and the cantonal basis of party organization, and in that cantons may rely for protection upon the soberness and moderation of the Swiss political character.[329]

These observations remain of particular relevance to the relationship between democracy and federalism when viewed from the perspective of the equal part that all cantons, although of unequal populations, take in the formation of the central will. In order to appreciate the resulting contradiction between the federal system and the demands for equality of "pure" democracy, two examples are offered. First, in 1955, a majority of the small cantons, i.e., a minority of all Swiss citizens, was able to impose its will on the majority of all Swiss voters by defeating proposed legislation for a temporary control of prices.[330] Second, the Socialist party constituted more than one fourth of the members of the National Council in 1963, but gained only

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329 Codding, loc.cit., p.46.

330 Aubert, loc.cit., p.448.

three seats in the Council of States, or less than one tenth. Without doubt, this deviation can be explained in good part by the difference in electoral procedures for both Houses, and it would probably be less strong if all electoral districts were of the same demographic magnitude. Justification of this contradiction, however, is of a more fundamental nature. If cantonal barriers were artificially carved-out electoral districts, the contradiction would be inadmissible. Yet the cantons existed before the Socialist party, and their boundaries, consequently, are not the results of gerrymandering nor the fruits of any other political conspiracy.

In the final analysis, in 1848 several cantons accepted the new federal state only after being promised that the smallest cantons would have a voice equal to that of the greatest ones in certain political bodies. Although the Constitution can be revised in all its parts at any time, the belief that the federal system results from these promises persists; and, as expressed in one leading opinion, "legally we are not bound, but we are so morally, and the desire to push a principle to its final consequences must not make us forget our moral commitment." Alternatively, as the [331]

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331 Aubert, loc.cit., p.402.

traditional sphere of governmental operations has been suffused with a national interest which transcends cantonal lines and requires federal action and support, the inherent danger in reliance upon central solutions cannot be averted except through a politics which involves all the cantons, or through new solutions in practical federalism[332], as the enlargement of federal competences, which is closely connected with the general economic, social, and technological development of the country, attests to the conflicts between a liberal tradition and modern economic- and social policies.[333]

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332 Tschani, loc.cit., p.402.

333 Karlheinz Nicklauss, "Strukturprobleme der Schweizerischen Demokratie," Politische Vierteljahresschrift, 8 Hahrgang, Heft 1, Marz 1967, p.127.

THE EVOLUTION OF SWISS DEMOCRACY AND THE ROLE OF POLITICAL PARTIES

The evolution of Swiss democracy, being equally as bewildering and disconcerting as the development of constitutionalism and federalism, is characterized by the fact that of the three partners of the Confederation, people, parliament, and government, parliament has declined in importance to the benefit of the other two. However, both government and people have followed trends which remain, in a sense, opposed to each other.[334]

During half a century of democratic expansion, the people freed themselves from parliamentary tutelage as manifested in the rejection of numerous laws during the latter quarter of the nineteenth century, in the popular initiative for partial revision of the Constitution in 1891, in the institution of Proportional Representation in 1919, and in the extension of the referendum to certain treaties in 1921. Since the First World War, however, another trend

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334 J.F. Aubert, Traite de Droit Constitutionnel Suisse (Neuchatel, 1967), I., p.65.

predominates. The government itself has taken the decisive lead in the management of federal affairs, a development which has been accentuated through subsequent military- and economic crises.

Although direct popular action by means of referenda remains still an effective instrument for the rejection of a certain category and amount of proposed federal legislation, many important decisions escape the censorship of the "will of the people" either because of the "urgency clause" attached to certain federal laws, or because the Federal Council has been accorded extraordinary powers.

As a result, two major changes mark the development of democracy: first, the parliamentarian, formerly the actor on the political stage, has today been demoted to a front-seat spectator; and, second, enthusiasm for direct democracy has, oddly enough, declined as the people, theoretically, are spared the abuses of the urgency clause today because of its revision in 1949, and as they are not subject, for the moment at least, to a system of governmental police powers.[335]

Since the decline of parliament in relation to other

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335 Aubert, loc.cit., p.66.

centers of power will be dealt with later on, the remainder of this chapter will seek to elucidate the concept of Swiss democracy in relation to its representative - and direct constitutional forms.

Historically, and as indicated in chapter one, the growth of capitalism and individualism had accelerated the rise of the masses in their struggle against aristocracy and officials harnessed to political-economic power. As the political trend of the time aimed at bringing the people closer to the actual operations of the government, so the democratic movement placed its reliance upon direct popular actions which, according to old cantonal forms and traditions, sought now to restrain the newly created governmental bodies.

With the introduction of the initiative and the referendum in both their optional and compulsory forms, the people succeeded to remove the remaining barriers which tradition had opposed to their triumphant advance, and, as based on the belief that the people has as much common sense as the legislature, the result was that representative democracy

became pure democracy, and the people the real legislator.[336] Conversely, and on a comparative level, the democratic revolt against corrupt legislatures had led to increased jurisdiction in the United States, whereas in Switzerland it took the form of extending direct legislation.[337]

Direct democracy, however, did not seek to destroy constitutional restraints in the nameof the "will of the people;" rather, it offered another system for the division of powers by seeking to preserve civil liberties and to strengthen the democratic elements of the country. Direct popular action, therefore, reflected a number of very distinct characteristics as derived from Swiss history and tradition.

As the farmer had gained political equality in the course of the nineteenth century, and thereby dominated the state by his large voting power, he had left his mark on Swiss culture as a whole: democracy with a conservative tinge.[338]

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336 Bonjour, loc.cit., p.300.

337 Rappard, Government, loc.cit., p.51.

338 Bonjour, loc.cit., p.209.

Combined with an emphasis on particularism and decentralization which stood for the freeing of the diverse energies of the people, as well as for the ideal of personal responsibility, the democracy of the "small circle," embedded in the democracy of the cantons, and safeguarded by the democracy of the Confederation, was therefore to reflect the inalienable characteristics of the country.[339] Adverse to regimentation, the dominating loyalty to democracy, as based on both a communal and a personal concept of freedom, expressed itself, perhaps most succinctly, in the following dictum "we, the people, are the state."[340]

Accompanied by reliance upon the rule of laws and constitutions according to which Switzerland's democracy has been said to be more truly democratic,[341] the Swiss attach great importance to the formal cooperation of the individual in the formation of the national will, and, as Switzerland's history is that of the people rather than of its leaders,

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339 H. Weilenmann, Pax Helvetica (Zurich, 1951), p.253.

340 R.C. Brooks, Civic Training in Switzerland (Chicago, 1930), p.1.

341 Ibid, p.12.

the result has been a bias to mediocrity. The ensuing ill-will towards those who are outstanding thus made for a climate of opinion in which there is less feeling for abstract ideas and fine phrases as compared to the French, and through which the Swiss are less pedantic and less in love with power than the Germans.[342]

Swiss democracy, accordingly, is said to reflect a sort of

> man to man democraticness... and egalitarianism which rises out of a profound respect for the dignity of the citizen as a Swiss. (343)

The tendency to reject brilliant and forceful leaders, furthermore, is reinforced by two pillars of Swiss democracy: the schools and the army. As Switzerland mingles its military with its private life, military institutions create among citizens social bonds in terms of which all are equal. The general military service includes also non-military service duties as based upon a militia system with its

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342 Hans Huber, How Switzerland is Governed (Zurich, 1946), p.33.

343 C. Hughes, The Parliament of Switzerland (London, 1962), p.14.

" good will by command" (befohlene Freiwilligkeit)[344]. Finally, the slow penetration of the town by the country, by mixing urban and rural populations, has made for a social leveling in terms of which " the worst aspects of the age of big business took on less ugly forms than in neighboring countries."[345]

Consequently, Swiss democracy today is said to manifest the following characteristics. First, because Switzerland stands still for the preservation of the "small circle," the decay of naturally grown communities has been successfully prevented despite acceptance of a modern economy and technology. Conversely, although the forms of democracy have undergone a change, its spirit remained the same.[346] Second, the "pure" citizen, stripped of all his private ties and associations which stood between him and the state, has condemned himself to a new servitude; by making the state more indispensable to his well-being, the result was that

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344 H. Tschani, Profil der Schweiz (Zurich,1967), p.78.

345 Bonjour, loc.cit., p.316-317.

346 Rappard, loc.cit., p.111.

political liberalism was sacrificed to economic socialism.[347] Reconciliation of these two positions calls for a more detailed examination of the doctrinal bases in the evolution of Swiss democracy and its institutions.

The controversial claim that the Swiss are in love with the word "democracy" rather than with the word "freedom"[348] notwithstanding, the legitimacy of democracy is held to be assured when power can be said to derive from the people although there is no certainty that the people, despite electoral procedures, do in fact exercise effective influence over decisions taken in their behalf.[349] The requirements of modern technology appear to necessitate that decisions be made by a small number. The justification of democracy rests on a procedural device: although democracy assures neither the best of all possible choices nor undiminished freedom for all, a given majority, by imposing its

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347 Rappard, loc.cit., p.129.

348 C. Hughes, The Federal Constitution of Switzerland (Oxford, 1954), p.107.

349 Aubert, loc.cit., p.394.

will upon all, can be succeeded by a given minority to impose its will in turn; democracy, therefore, makes a given choice more easily acceptable. Furthermore, justification of democracy entails that constraint be, as much as possible, acceptable to all those who are subject to it; coercion, in order to be just, must be applied equally to all, and, conversely, democracy based on equal rights is the least arbitrary of inequalities.[350]

From the perspective of a constitutional formula, democracy consists of legal procedures through which the people enter into partnership with the state in the exercise of its power; or, which make of the people an organ of the state. In this respect, a major distinction, which touches upon the nature of popular participation, is made between representative - and direct democracy. Under the former, also called the republican form of government, people limit themselves to the periodic elections of their representatives who perform most governmental tasks on behalf of the people. Under the latter, the people themselves assume more of the governmental

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350 Aubert, loc.cit., p.395.

chores by, for example, electing the government, or by expressing themselves upon proposed legislation by means of the referendum, or by initiating such proposals by means of the initiative.[351]

In a different manner, the same distinction is made by opposing the procedure of election (for a vote of a person) to that of votation (for a vote upon a project by the public) even though the difference is not always easily defined. These features might best be expressed in the "classical" parallel between Montesquieu and Rousseau. Whereas the former held that the people must entrust to their representatives some part of its authority, the latter maintained that representatives cannot conclude anything, as sovereignty, by resting upon the general will, cannot be represented for the same reason for which it cannot be surrendered.[352] The merits of these distinctions notwithstanding, it would be wrong to infer that a representative system of government entails a moderate form of democracy, or that direct democracy is, therefore, by definition, radical; it is the dis-

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351 Aubert, loc.cit., p.396.

352 Ibid., p.396.

position of the people, and not the constitutional system, which determines the degree and extent of political agitation.[353]

The fundamental notion of direct democracy is perhaps most clearly revealed in the popular demand for a revision of the Constitution as it touches upon the prerogative to decide the issue of substantive constitutional limitations, or to negate or affirm superior constitutional norms. As the electorate is deemed the more promising source to determine an answer to the question, any arguments based upon the possible excesses of popular furor are countered by the contention that intemperance pertains equally to the bodies of parliament. Furthermore, since agreement on the scope of constitutional limitations does not exist, non-established limits can hardly be opposed to popular rights. Finally, since limits, once fixed, are liable to engender other limits, arguments in favor of the federal authorities' prerogative remains suspicious; there is the disquieting feeling that under the cover of hidden political motives these limits will be used as instruments designed to preserve

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353 Aubert, loc.cit., p.397.

the established order.[354]

Since the Swiss electorate is today at least as conservative as parliament, the answer to the question to which extent the Constitution can be revised belongs therefore more properly and convincingly to the people. Furthermore, superior constitutional limits as derived from the Constitution itself are inadmissible, despite the immense talent which has been employed to prove their existence. According to one Swiss legal authority,[355] the conclusions arrived at in this matter by Burckhardt, Fleiner, and Max Huber are to be preferred to those of Nef, Haug, and Giacometti. Although this position does not rest on the belief that the majority is always right, it upholds, nevertheless, that the judgment of the people and the cantons is to be preferred to that of the Federal Assembly. As corroborated in a message by the Federal Council, in matters of constitutional legislation, there are limits of form but not of content; the initiative is not only one of the more important popular rights but appertains, equally, to those rights which remain without

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354 Aubert, loc.cit., p.132.

355 Ibid., p.133-135.

any restriction of a material nature. The initiative, therefore, cannot achieve its aim if its promoters are not absolutely free to determine its contents as they understand it, and secure its ultimate justification through the vote of both the people and the cantons.

Among the devices of popular checks upon government, both the referendum and the initiative are said to be indispensable instruments for the functioning of Swiss democracy. By means of the referendum, a given legislative proposal by parliament may be referred to the people for approval or rejection, and such reference may apply to simple legislative measures as well as to proposed amendments to the Constitution. Also, these proposals *may* be optional or compulsory. The initiative, on the other hand, empowers the electorate to propose legislative measures as well as to suggest constitutional amendments. The initiative is used in both the Confederation and the cantons, and for both ordinary legislation and constitutional amendments; the Constitution, however, does not recognize a corresponding right to initiate legislation on the federal level.

The actual procedure of constitutional revision as

described in Chapter III of the Constitution as well as in a relevant Law of 1962 has not unjustly been called an obstacle course.[356] By providing for two alternative procedures, either "popular" or "assembly", for a total revision of the fundamental law, a popular initiative entails such cumbersome a procedural arrangement that one possible outcome can consist of two different votations on a given proposal as well as one re-election of the Federal Assembly.

With the introduction of the provision for partial revision of the Constitution, the procedure was hardly simplified. The only relief was that in case of agreement the Chambers could continue their work without being renewed. In addition to the alternative procedures by the people or the Assembly, however, two new forms were added to the popular procedure: the formulated and the unformulated initiative. The rationale for the former was that it could be directly submitted to the vote of both the people and the cantons without passing through the Chambers. In this way, parliament would be prevented from possibly betraying the

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356 Tschani, loc.cit., p.48-49.

intentions of the initiative's signatories. In the latter case, parliament had the authority to reply to a popular proposal by means of a counter-proposal.[357]

The counter-proposal to an unformulated initiative entails the following aspects. Since the proposal itself does not provide for amendments, the alleged purpose of the counter-proposal was to endow the former with an improved version by parliament. However, it soon became customary to use the counter-proposal not only as a means to correct a badly formulated text, but also to oppose its original idea by a more acceptable one to parliament. As the only limitation for editing remains "germaneness," it was only natural that the counter-proposal should be able to provoke a different response from that asked for in the original proposal.[358]

If it is recognized that an initiative, furthermore, originates with a minority party which confronts a hostile parliament, and that only the formulated proposal can

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357 Aubert, loc.cit., p.67.

358 Ibid., p.155.

guarantee greater efficacy, then it appears that the electorate, indeed, did not grasp the quasi-revolutionary character of the regulations for constitutional revisions. Politically, the revision was a victory of the conservatives over the radicals.[359]

Conversely, and in reference to the legislative referendum, it was introduced into the Constitution by the Left; it was the Right which made the greatest use of it. The delays involved in the procedural arrangements for partial-total revisions are delays of foreclosure. Thus their inherent danger is not imaginary; certain initiatives have been dragged out for a dozen of years and were finally withdrawn because they had lost much of their actuality. It is, consequently, rather doubtful whether this method of "liquidating" initiatives was foreseen by the authors of Chapter III of the Federal Constitution.

The referendum, as described in articles 89 and 32 of the Federal Constitution, as well as by several other pertinent Laws, applies to federal laws and universally binding federal arretes only. The distinction between laws and

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359 Aubert, loc.cit., p.67.

arretes is one of form, and not of content:

> Federal Arretes have the procedural advantage over Laws that they can be declared "urgent" or "not universally binding," and thus be removed from the possibility of challenge by the people. (360)

As the Constitution remains silent on the definition of the distinction, the importance of the question is obvious: any answer will bear upon the extent to which direct democracy operates on the federal level. Despite heated doctrinal controversies, the

> legislative Councils themselves determine whether an arrete is to be furnished with the "referendum clause" and thus submitted to the possibility of challenge... or whether it is to be expressly withdrawn by being labeled "urgent" or "not universally binding."-(361)

In seeking to free itself from popular tutelage, the Federal Assembly withdrew from the referendum a good number of unpopular measures in declaring them "urgent." Thus from 1930 to 1933, for example, parliament enacted 91 urgent arretes; a particularly reprehensible method was to prolong an urgent arrete, theoretically limited in time, by a new one of its kind.[362]

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360 Hughes, Constitution, loc.cit., p.100.

361 Ibid., p.100.

362 Aubert, loc.cit., p.420.

The abuse of the urgency clause which amounted, obviously, to a negation of direct democracy, called forth three popular initiatives for reform, all of which were defeated. A fourth initiative of 1949, called the "Return to Popular Democracy," was partially successful. Accordingly, a time limit of one year was attached to its operation after which a given "urgently" enacted measure continued to be effective, or was declared void, depending upon the positive or negative outcome of the referendum challenge. However, for a period of one year the Chambers can practically do as they please, and even unconstitutional arretes, through a corresponding affirmative vote, can be maintained in existence for an indefinite period of time.[363] A further reform of the urgency clause was sought in a Law of 1962, concerning the Relations Between the Councils. Yet even this attempt remains subject to several objections, in that the legislator still defines constitutional regulations, and in that certain articles of the Law are simply unconstitutional.[364]

The technique of getting legislation passed unchallenged

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363 Aubert, loc.cit., p.422.

364 Ibid., p.419.

by making arretes either too important or too trivial so that the proposals can take effect with the tacit consent of the people, continues to cast a shadow over the vaunted ideal of direct popular action - although it must also be recognized that the use of the urgency clause is frequently prompted by emergencies which were not anticipated, or which had been dealt with too late. If not abused, the clause constitutes a safety valve without which democracy could not possibly function today.[365]

In the working of Switzerland's "referendum democracy," a further extension of the system involved, in 1921, the application of the referendum to treaties concluded with foreign powers "for an undetermined period or for more than fifteen years." The vagueness of this constitutional provision, however, is such that an interpretation least favorable to the people is chosen with the result that in the period between 1921 and 1966 only two conventions with foreign powers were submitted to the vote of the people.[366]

Finally, and among other direct popular procedures,

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365 Tschani, loc.cit., p.14.

366 Aubert, loc.cit., p.69.

the financial referendum, the legislative initiative, and the direct election of the government by the people have been practiced, for a long time, by all the cantons. The Confederation, however, remains closed to them. This divergence might well remain a warning against easy analogies, for what is conducive to a canton is not necessarily so for the Confederation. Not only is the canton smaller, but it is also a unitary state.[367] However, and as determined in a votation of 1956, it must equally be recognized that the financial referendum, for example, as a means to protect the taxpayer from the consequences of certain public expenditures, is not applicable on the federal level for political rather than legal reasons, if only because the people refused to make use of the referendum challenge.[368]

As a last device of direct popular checks, there is the right of recall in its possible application to the unsatisfactory activities of a representative. This right, introduced into the cantonal constitutions during the 1850's and 1880's, was rarely put into effect; it soon became obsolete

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367 Aubert, loc.cit., p.73-74.

368 Ibid., p.429.

as the referendum was deemed sufficient for the purpose in question.[369]

In any comparison between the referendum and the initiative, the claim that the referendum corrects sins of commission, while the initiative corrects those of omission, remains too formal a point of view. It is too simple to attribute both the relative success of the referendum and the relative ineffectiveness of the initiative, to the conservative instinct of the people, or to see in the referendum a "brake" and in the initiative a "motor." A given "progressive" proposal might well be defeated by means of the initiative, and a referendum could work for the latter's abolition in turn. The initiative, consequently, would be a means of deceleration, and the referendum one of acceleration.[370]

Despite the complaints about the actual system that it renders the success of a revision more difficult, that it favors the preservation of the status quo, and that the purpose of the counter-proposal is simply to "torpedo" the

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369 Aubert, loc.cit., p.442.

370 Ibid., p.161.

initiative, it must also be admitted that from 1848 to 1966 the electorate participated in 146 referendum votes on the Constitution, and that the Constitution itself underwent 72 revisions,[371] one of which was total.

Yet it remains equally true that the initial ardor for the referendum, by which the will of the people was deemed to prevail, has lost much of its strength in the course of the twentieth century. The people refused to express themselves on a number of regulations and matters concerning, for example, customs duties, inter-cantonal and international water ways, financial referenda, and nuclear weapons, and these results of the optional referendum might well corroborate the claims that it accelerated, paradoxically enough, the shift of the decision-making process from the people to parliament. For if the alleged preventive effect of the referendum is to force parliament to temper its impulses, then Swiss governmental practices, such as the consultation of private corporate bodies, also act like an anticipated referendum which renders the other futile, as the purpose of knowing the opinions of the more influential

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371 Aubert, loc.cit., p.161.

milieux of the country entails the creation of generally acceptable proposals such as to prevent the possibility of a referendum challenge, or at least to assure a favorable outcome.[372]

In any interpretation of Switzerland's referendum democracy, therefore, a variety of different conclusions need to be considered. Arguments against the value of the referendum have been based, for the most part, on the following claims. If used too frequently, it will cause delay in the enactment of legislation; as the road to action is often long and cumbersome, legislation will lag behind practical needs.[373] Also, the increasing influence of pressure groups on legislation leads to compromise and thereby to a complete nullification of all progressive legislation.[374] Further, the referendum accumulates power without responsibility, and as the complexity of modern legislation has become such that not even a well-informed citizen can pass

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372 Aubert, loc.cit., p.425.

373 Tschani, loc.cit., p.186.

374 Strong, loc.cit., p.230.

final judgment on it, abstention from voting and its concomitant danger, the victory of a small minority vote, will be its results.[375] Finally, as a method of wresting concessions from opponents, it weakens responsibility in assemblies, and in so doing shifts the weight from the Federal Assembly to the Federal Council.[376]

On its positive side, the following assertions are offered. By means of the referendum, a correcting influence by the people over the legislature is assured, and, by leaving to parliaments no more than the preparation of laws, it compels the legislator to conform to the aspirations of the people resulting in the end of conflicts between people and governments and thereby provides one of the safest barriers against revolutionary action.[377] Also, fear of the referendum challenge is often said to be

> a more potent factor in preventing the adoption by parliament of certain legislative measures than the actual repudiation itself. (378)

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375 Huber, loc.cit., p.25.

376 Hughes, Constitution, loc.cit., p.101.

377 F. Bonjour, Real Democracy in Operation (New York, 1920), p.113.

378 Rappard, loc.cit., p.72.

Finally, the referendum is also a bond of union and civic training in that it helps in the process of popular education and thereby

> gives the institution an educational quality unparalleled by any other political device, and which gives it a moral value. (379)

As the same arguments in favor of the referendum can equally be applied to the initiative, the objections to the former apply even more strongly to the latter when used in connection with constitutional law; for the initiative as a means of direct popular action entails the risk that through the growing influence of pressure groups in the formulation of the central will the abuse of democratic freedoms will become greater. As the cost of setting the initiative in motion appears to confine its use to corporate bodies, the voice of the people grows dimmer.[380]

As these considerations stand in a curious relationship to the assertion that "by the operation of the initiative and the referendum Rousseau's dream is more than fulfilled, since

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379 Hughes, Constitution, loc.cit., p.102.

380 Tschani, loc.cit., p.107.

every citizen may participate in the making of laws,"[381] all that can be maintained is that direct legislation in Switzerland has not

> realized all the extravagant anticipations of its friends. But it has not fulfilled the dismal prophecies of chaos and revolution uttered by the conservatives of an earlier period. (382)

Consequently, some of the explanations for the relative ineffectiveness of Switzerland's referendum democracy must be sought in the complexity of legislation as called for by modern conditions, in necessities which, grasped too late, have sanctified the use and abuse of the urgency clause, and in the weight exerted by private associations in the formulation of political decisions. If the most important laws, prepared behind the scenes, and, before becoming public, are indeed so neatly tailored by private corporate bodies that at the occasion of a referendum "all are for the proposal," then it is not surprising that politics should not any longer be regarded as a "matter for the people, but an

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381 Vincent, loc.cit., p.89.

382 R.C.Brooks, Government and Politics in Switzerland (New York, 1921), p.164.

occupation for experts, who are mostly identical with those directly concerned or are guided by them."[383]

In order to complete the synopsis of the evolution of Swiss democracy, brief mention of the distinction between the electoral methods of majority voting and Proportional Representation is in order. Although these devices are, above all, mere techniques for securing responsibility in governments, a choice among them entails not only a very definite composition of the organs of the state, but also determines the electorate's associational ties and divisions as well as the voter's political morality.[384]

Accordingly, where voters are adverse to simplifying their political preferences, accomodation of their opinions as favored by the proportional ballot, are said to give rise to many, and therefore smaller, parties. The majority system, on the other hand, by favoring the existence of only two parties, is by that definition the result of political traditions according to which people are willing to compromise the expression of individual choices and therefore unite

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383 Gretler and Mandl, loc.cit., p.211.

384 Aubert, loc.cit., p.397.

their political preferences to create fewer, and, consequently, larger parties.

Considerable controversy exists as to the justification and effects of the different electoral methods. In the perspective of Swiss history, the method of majority voting prevailed as long as electoral districts were honestly divided, and thereby guaranteed equitable representation to national minorities. However, as party politics under the regime of the radicals led to gerrymandering, the search for an alternative electoral method by certain minority parties resulted in the adoption of Proportional Representation on a cantonal basis in the 1880's. The small Catholic cantons which had clamored for decentralization were again those who supported the introduction of Proportional Representation in order to combat the domination of the radicals who aimed at centralization.[385]

The subsequent adoption of Proportional Representation on the federal level in 1918 for the election of National Councilors represented a victory of Catholics and socialists over the radical majority in the National Council. This

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385 Aubert, loc.cit., p.70.

development was favored, as a result of the First World War, in that the growing influence of economic factors was splitting up the existing parties, and, as Proportional Representation encouraged further secessions, parties based on religion also made their appearance.[336] Thus, if in 1918 the political problems had remained the same, then what had changed was the structure of the electorate. The majority of the liberal-radical party which had ruled Switzerland since 1848 was now menaced by a rapid growth of the socialists on the Left, and by a movement of artisans and farmers, born within their own ranks, on the Right. Also, if the radicals had remained the most numerous party, they represented hardly more than one fourth of the electorate. The multiplication of parties, if not determined by Proportional Representation, was at least favored by it; an electoral system which allows each appreciable minority a particular representation makes for the weakening of large parties by emancipating numerous small groups from their tutelage.[337]

Since electoral laws determine the process by which

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336 E.Bonjour, loc.cit., p.326.

337 Rappard, Constitution, loc.cit., p.260.

political preferences, in the form of votes, are translated into distributions of parliamentary seats among competing political parties, so the system of Proportional Representation, in its numerous variations, seeks to accomplish this purpose on the basis of the multi-member constituency.

Accordingly, the aim of a candidate is not to obtain a "majority" but, rather, a so-called quota which is defined as a "number of votes equal to the total of votes cast divided by the number of seats to be filled."[338] By this method, an almost mathematical representation of the existing views of the electorate is said to be mirrored in the National Council as the faithful photograph of the people. This result, allegedly, is accomplished by being more respectful to the "conscience" of the citizens. It follows, that a better representation of minorities is assured, that the evils of gerrymandering are avoided, and the tendency of traditional etiquettes which unite, under a false solidarity, groups of voters who are fundamentally opposed to each other as exemplified in the United States,[339] is precluded.

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338 Strong, loc.cit., p.183.

339 Aubert, loc.cit., p.398.

In addition, Proportional Representation is said to compensate for the drawbacks of the referendum through representation of as many groups as possible in the National Council which can provide for legislation without provoking the referendum. Also, through representation of as many political trends as possible, a feeling of greater justice at the occasion of electoral decision prevails.[390]

These observations notwithstanding, the effects of Proportional Representation in Switzerland have also been held to lead to electoral scrambles such that no single party can obtain a majority with the result that through the necessary formation of coalitions, parliament has become weakened with a corresponding shift of the center of gravity from the Chambers to a coalition Federal Council with no opposition in a multi-party Assembly. However, it must be added that in the Swiss rules of the democratic game an institutionalized opposition party, as compared with a two-party system where government alternates with opposition, is unknown.[391]

Further, numerous Swiss observers of the system have

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390 Huber, loc.cit., p.46.

391 Hughes, Constitution, loc.cit., p.84.

imputed its workings to lower the level of performance of the National Council by eliminating personality factors in electoral choice.[392] Above all, Proportional Representation has been said to be analogous to the representation of "estates" of the late Medieval Ages. Accordingly, the actual system substitutes for the old hereditary social classes those of modern professions and private interests. The result, if not apathy among the voters, is the opposite of what the electoral system purportedly sought to achieve: the elimination of oligarchic trends by means of a multi-party system.

As a check upon the ascendancy of a numerical majority, the alleged purpose for which "exact representation" is demanded, simply does not exist; or, at best, remains a Platonic form in its demand that the "share of seats awarded to any party should be equal to the share of the vote which it has won."[393] Preoccupation with "representation" in proportion to numbers of every division among the voters would

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392 Tschani, loc.cit., p.282.

393 D.W. Rae, The Political Consequences of Electoral Laws (New Haven, 1967), p.28-29.

entail that every opinion, however absurd, must have its representatives in proportion to its strength in the electorate.[394] Arguments in favor of Proportional Representation might in this sense indeed constitute a kind of reasoning "subject to the reductio ad absurdem which Rousseau's denial of the possibility of representation foreshadowed."[395]

Whether Proportional Representation is the "Trojan Horse" of democracy or whether it compels democracy to be true to itself, in the end, the problem of how to avoid legislative deadlocks, or how

> to produce an effective flow of public policy without abandoning the elective principle in the face of many social and attendant political cleavages (396)

will remain dependent, the diversity of electoral methods notwithstanding, upon the recognition that democracy cannot function if it does not create in the people an almost unanimous accord on certain fundamental questions.

In conclusion, Swiss democracy is today characterized

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394 F.A. Hermens, Democracy or Anarchy?(Notre Dame,1941) p.3.

395 Friedrich, loc.cit., p.282.

396 Rae, loc.cit., p.136.

by (1) several instruments of direct popular action, particularly in the cantons; (2) an extensive resort to the proportional ballot, except for the elections to the Council of States and most cantonal governments, at least in theory; (3) a plurality of political parties; and (4) a curious equilibrium between parliamentary and governmental bodies such that the federal government is legally subordinate to parliament while remaining, politically, its superior; and, on the cantonal level, where the two authorities are coordinate, legally as well as in fact.[397]

The Role of Political Parties

The extent to which political parties and interest groups have been integrated into the formulation of public policy reflects the affirmation or denial of answers given to the question of how the readjustment of group relations in a multi-group society contributes to the realization of the ideals of equality and opportunity. It centers around a problem of statecraft; how to adjust intergroup conflicts

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397 Aubert, loc.cit. p.401.

into an over-all program of common interests without destroying the spontaneity of group activities in an attempted reconciliation of liberty and order.

In the mechanics of government, political parties are said to be the important channels of policy formation, the organizers of administrations and legislatures, the lubricating oils in the wheels of democratic machinery; as agents of integration, therefore, modern democracy is not conceivable without them.[398] In the "country of coalition," the Swiss political party system appears well adapted to a feeling for collaboration which is said to pervade the social life of its citizens, and, inasmuch as extreme differences in the philosophy and social composition of the parties is practically non-existent, the Swiss' love for order and compromise as channeled through their political associations might justly be held to contribute to the political stability of the country.[399] As the actual political process, however, reflects not only interaction, but also

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398 Aubert, loc.cit., p.77.

399 Codding, loc.cit., p.113.

struggle, over social policy, private associations, by remaining outside the sphere of public control, are also said to have deprived political parties of their influence in the determination of public policy. The result is that politics has become more materialistic, obscure, and conservative, thereby calling into question the whole working of Swiss democracy.[400] If interest groups are indeed the living forces behind the political parties, brief examination of the origin and development of both associations is in order.

Related to the "democratization" of social life, political parties represent a modern type of association, and the distinctive characteristic of the modern political order is the constitutional status of parties, the recognition of their governing function in the modern state. Yet, the Swiss Constitution is silent on the subject; compelled to adjust to federalism and to the separation of powers, political parties filled in gaps in the constitutional structure by means of extra-legal organizations as derived from the right of association (article 56), and, since 1919, from article 73

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400 C. Hughes, The Parliament of Switzerland (London, 1962), p. 34.

pertaining to Proportional Representation. Without being expressly mentioned in these constitutional provisions, however, Swiss political parties have existed since the beginning of the federal state.

There were three major political groups in 1848. On the right of the political spectrum, the Conservatives who, although militarily and politically defeated in the Sonderbund War, began a slow but uninterrupted recovery. In the center and on the left, the Liberals and Radicals who, at once hostile to Roman Catholicism and to cantonal autonomy, were to impose their control upon the country for over half a century. During the 1860's, a democratic branch detached itself from the radical wing, and, about twenty years later, the Socialist party made its debut. At the beginning of the twentieth century, both Liberals and Democrats, by now occupying intermediary positions, began to lose strength; due to Proportional Representation and as a result of two World Wars, new parties were formed which ranged from the party of artisans and farmers to that of the Communist party and to a rather original movement, composed of an alliance

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401 Tschani, loc.cit., p.130.

of Independents, which attempted to combine economic liberalism with some sort of social progressivism.[402] Today, about a dozen parties confront each other on the national level. In terms of voting strength, there are three large parties composed of Conservatives, Radicals, and Socialists,[403] the pillars of Swiss political party life. There is one intermediate party, composed of Agrarians, and there are several smaller ones, composed of Independents, Liberals, Democrats, Communists, etc.

To the extent that the Constitution of 1848 was the expression of the ideals of the Liberal party, the foundations of the modern party system as well as the main features of the cantonal constitutions of today derive from the period of the Regeneration; and "just as the events of 1848 still determine the nature of the two great historic parties, the Catholic Conservatives and the Liberal Radicals,"[404] so their

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402 Aubert, loc.cit., p.78.

403 Tschani, loc.cit., p.136.

404 Hughes, Parliament, loc.cit., p.8-10.

history might well be described in the rise and fall of the Radical party. As the

> spiritual heir of the Liberals of the 1830's, the Radical party carried through the cantonal Regeneration ... won the Sonderbund War ... created the Confederation of 1848 ... carried through the revision of 1874, and, until Proportional Representation in 1919, had a majority in the National Council. Its story of bitter feuds between its right and left wing, the story of the modern Confederation itself (405),

is subsequently told by the loss of its plurality in the Council of States in 1935 and that in the Federal Council by 1945. Since 1959, a certain parity of representation in both the Federal Assembly and in the Federal Council pertains.

Because of the absence of extreme differences in the social composition of the parties, the following curious situations arise: the Socialist party, by accepting more responsibility in the governing process and thereby eliminating most of its radical Marxian tenets, appears to lose strength and effectiveness with an ever-growing middle class orientation[406]; the Independents, on the other hand, appear to provide an outlet for the discontent with the historical

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405 Hughes, Parliament, loc.cit., p.22.

406 Codding, loc.cit., p.123.

parties in attempting to break up "too complacent an electoral compact between party bureaucracies."[407] Also, because the possibilities of alliance are so many, a given party may vote in social and cultural policy with one of its opponents, and, in economic policy, with that of another.

In any examination of Swiss political parties, however, it must be recognized that political life is a cantonal much more than a federal phenomenon; parties remain, above all, cantonal political associations, and the party system, consequently, consists of a loose federation of local party organizations. Although the lessening of religious tensions, the blurring of differences in party philosophies, changes in the social structure, and migration from one canton to another, have given political parties a wide geographical distribution,[408] individual cantonal parties manifest remarkable differences in both structure and policy. Further, and although national party organizations have been created on these diverse cantonal foundations as a result of the increasing scope of federal activities, national party decisions

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407 Hughes, Parliament, loc.cit., p.30.

408 Codding, loc.cit., p.124.

remain mere recommendations for cantonal authorities; as no nation-wide elections necessitate a national organization (the Federal Council is chosen by the Federal Assembly which in turn is elected on a cantonal basis), the road to political office remains a cantonal one.[409]

With particular reference to cantonal party systems, however, these organizational forms of political life as well as those of community assemblies appear to lose their importance with a rising degree of urbanization. On the basis of a distinction as drawn by one observer between four different cantonal systems, ranging from one- to multi-party systems, it has been shown that the complexity of cantonal political associations grows with a rising degree of urbanization, accompanied by a simultaneous weakening of political participation in the relevant geographical and political units.[410] This development, attended by the greater role of private associations in the formulation of political decisions, has not surprisingly led to questioning whether political parties are indeed still relevant today since

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409 Codding, loc.cit., p.124.

410 Gretler and Mandl, loc.cit., p.209.

> campaigns are no longer planned and executed by the parties alone, but entrusted to special organizations and agencies which carry no permanent political responsibility. (411)

In addition to variety in numbers and voting strength, the role of political parties has equally undergone a transformation. Whereas formerly the party represented the effort of those who composed it, today it exists almost independently of its members as it has been raised to the level of an institution. This development in Swiss constitutional life is manifest in three ways: in the consultation of parties on proposed legislation, in the parties' preparation of electoral lists, and in the representation of parties in parliamentary groups.

The consultative function pertains to the drafting stage of legislation which remains, however, essentially an affair of the Federal Council and its administrative agencies. This process in its several phases of "parliamentary procedure" calls for the introduction of a legislative proposal to the most influential milieux of the country which include, by definition, also the parties. Theoretically given a first

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411 Ernst Bieri, " A Government Crisis in Switzerland?," Swiss Review of World Affairs, Neue Zurcher Zeitung, Vol III, no. 11, Feb. 1954, p.18.

hand opportunity to voice their official opinions, consultation of political parties is in actual practice, and in more recent times, not any longer accorded to them on a regular basis.[412]

Concerning the parties' electoral function, it is more specific and indispensable inasmuch as Proportional Representation presupposes clearly differentiated parties and their concomitant lists of candidates. However, in the electoral mechanics the parties are not exclusive masters of their lists; the voters can modify them by means of latoisage (the crossing out of candidates) or of panachage (the adding of candidates from other parties) by using "the officially provided blank ballot to make up (their) own lists."[413] Furthermore, under Proportional Representation and in a system of coalitions, the voter is frequently obliged to renounce the basis of his choice in that he does not support, in the final analysis, the policies of his party but that of a coalition of which his party becomes a part. Also,

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412 Aubert, loc.cit., p.79.

413 U.W. Kitzinger, "Swiss Electoral Democracy," Parliamentary Affairs, Vol XIII, No.3, Winter 1960, p.341.

the possible coalition intentions of his party remain dependent upon the votes of all other parties.

The deliberative function, finally, is manifested in the organization of parties into commissions as represented in the bureaux of the National Council. However, and with particular reference to parliamentary debates, issues in question are not absolutely determined by prior party considerations; representatives do not always follow the instructions of their parties as "party discipline" remains only imperfectly enforceable.[414] The observations, consequently, that Swiss parties, unlike American ones, are held together by principles rather than be patronage,[415] or that in Switzerland political parties are more interested in principles than in individuals, and that, due to Proportional Representation, their discipline is greater,[416] need to be evaluated in the light of the following assertions.

Above all, party loyalties appear to be determined by

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414 Aubert, loc.cit., p.80.

415 M.L. Tripp, The Swiss and United States Constitutional Systems (Paris, 1940), p.43-44.

416 G. Sauser-Hall, The Political Institutions of Switzerland (Lucerne, 1946), p.208.

concrete interests. As parties are, accordingly, mere instrumentalities for the integration of interests into a generally acceptable public policy rather than the individual embodiments of metaphysical beliefs with which the rank and file of voters is inextricably tied up, a corresponding subsiding of ideological battles in the shift from elections to votations has given rise to a growing "unpolitical" attitude of the people which is at once more practical and not without a certain danger in Switzerland's "votation democracy".[417] Conversely, if people are somewhat tired of parties, one reason is that parties still pursue a defense of ideas; yet as it is difficult to defend what in actual practice is not any longer challenged, the defense of ideas has become a rather thankless task.[418] Further, and to the extent that the foundations of parties have become more organizational than ideological, lack of party discipline and decline in party loyalty are said to have made feasible individual integrity and intelligence; as parties do not dominate the life of the nation, each individual seeks to

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417 Tschani, loc.cit., p.143.

418 Aubert, loc.cit., p.81.

arrive at his own personal opinion, and, by maintaining respect for the other person, thereby safeguards the national climate of opinion.[419]

Finally, and the constitutional provision for "voting without instructions" notwithstanding, a traditional abhorrence of the Swiss voter for the professional politician results in the drafting of men for political office whose backgrounds reflect success in their private lives.[420] Furthermore, it must also be recognized that it is

> quite inadmissible to draw a hard and fast line between agents with definite instructions or mandates and representatives empowered to attend to a general task. An elected body ... usually will be both a set of agents from different interests, and a representative group determining the common interest. (421)

Just as some of the foregoing considerations testify to the declining influence of political parties, so their actual weaknesses are also manifest in their relationships with the government, and with the electorate at the occasion of a referendum vote. Federal Councilors are generally elected

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419 Carpentier et Lannoye, loc.cit., p.134.

420 Codding, loc.cit., p.131.

421 Hermens, loc.cit., p.XXIII.

in proportion to party strength; once elected, however, they escape their parties' influence through an almost indefinite period of tenure. As to the referendum, when voters express themselves upon numerous constitutional or legislative proposals at frequent intervals, the materials' inherent complexity is often so confusing and disconcerting that the people are apt to reject a certain proposal which has been recommended for acceptance by the parties.[422]

The vaunted ideal, moreover, that the emperor of Switzerland is the people whose voting decisions are his decisive verdicts,[423] requires reexamination in the light of present realities as well. As based on one of the few extant voting behavior studies in Switzerland, the increasing complexities of modern life have made it more and more difficult for the average citizen to form a clear judgment of public affairs. Unable to give any longer account of who makes the decisive political decisions, feelings of helplessness and fear to be deceived have been imputed to purely

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422 Aubert, loc.cit., p.80.

423 Tschani, loc.cit., p.118.

formal functional and anonymous relationships between representatives and their constituents in the milieux of the cities, resulting in such attitudes of resignation as expressed in "those on top do as they please."[424] Accordingly, the ideals of civic duties have been supplanted by apathy and alienation. The prevailing attitude towards politics, "we do not want any part of it," although not fundamentally different in the older generation, is especially effective in the younger generation, and, as economic and social mobility appears to go hand in hand with withdrawal from political life,[425] the mass of voters not only chooses not to participate in the life of the parties, but, what is more, for those non-voters for whom the life of politics has become utterly unfamiliar, politics itself has become a sordid business.

To the extent that these non-voters are considered a menace to the workings of a healthy democracy, a solution for the problem of "abstentionism" is held to lie in a more

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424 J. Steiner, Die Beziehung zwischen den Stimmberechtigten und den Gewahlten in Landlichen und Stadtischen Milieu (Bern, 1959), p.48.

425 J. Steiner, "Uber die politische Aktivitat der einzelnen Stimmburger in Kanton und Gemeinde," Schweizerische Zeitschrift fur Volkswirtschaft und Statistik, 98 Jahrgang, No.1, Marz 1962, p.36.

personal relationship between representatives and their constituents.[426] Yet, as the prospects for sound public policies have also been held to improve with the distance between them, the question to which extent social reality can be improved through laws and regulations, or which other factors will contribute to the formation of an effective public opinion, remains largely unanswered. What appears to be certain, nonetheless, is that the

> educational solution to the problem of declining popular participation in democratic life cannot be sought merely in a greater degree of civic instruction... What is needed is to enable the citizen by means of his initial and lifelong education to visualize and understand complex social and economic processes. (427)

As viewed from the perspective of the political parties themselves, the hypothesis that they express the values to which Swiss society subscribes is called into question by the parties' position on some major aspects of urbanization. In the interplay of concentration and depopulation, the "natural" development of increased concentration of the

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426 J. Steiner, Die Beziehung, loc.cit., p.85.

427 A. Gretler and P.E. Mandl, Values, Trends and Alternatives in Swiss Society (New York, 1973), p.55.

population in large centers which coincides with the aim of maximization of economic growth, is contrary to the avowed aims of the parties.[428] In the evolution of Swiss society, therefore, changes brought about by the imminent tertiary or services stage have proven parties to simplify too greatly those very activities which characterize a modern industrial society. The representation of these complex interests had to be assumed by other associations, and the gap was to be filled in by interest groups.[429] Yet it must also be recognized that in the wave of dissatisfaction with excessive foreign infiltration into Switzerland, criticisms of unbounded economic growth have become an essential component of some party policies with the result that although economic growth is one of the declared aims of Swiss economic policy, it is

> nevertheless clear from the relative success in the early 1970's of the new political groups, the National Action and the Republican Movement, that large numbers of people are beginning to regard the rate of growth as a menace. (430)

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428 Gretler and Mandl, loc.cit. p.188-189.

429 Aubert, loc.cit., p.81.

430 Gretler and Mandl, loc.cit., p.46.

To the extent that the evaluation of political parties needs to be supplemented by consideration of pressure groups, interest group activity in the Swiss system is integrated into the normal political process by means of Proportional Representation and the concomitant multi-party executive and multi-party majority in the Assembly which invite an intensive activity of pressure groups. In the evolution of economic associations, however, it must also be realized that they are as old as the economic problems of the federal state itself, and that they have entered into almost official relationships with the public powers of the state. Their role of recipients in the form of subsidies, for example, in return for all sorts of information and advice, testified to the fact that economic problems have led the Confederation from its early beginnings to favor the development of these powerful intermediary bodies.[431] As the distinction between governmental and private sectors of policy making have thus become blurred a long time ago, the idea that policy determinations should now be initiated by a complex arrangement of committees, commissions, corporations, and associations

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431 Aubert, loc.cit., p.81.

can hardly be surprising. A danger involved is equally apparent: as many of these associations are only loosely connected with the government, they are yet intimately involved in the shaping of events that concern society at large.

It was, above all, in the process of consultation that the influence of political parties began to be supplanted by that of economic associations, with the result that the latters' consultative -and even electoral- functions make them play roles today which are far greater than those of the parties themselves.[432] As the parties' activities remain concentrated in the cantons, certain interest groups exert a decisive influence on the choice of national candidates, although the greater part of the higher eschalons is not engaged in party politics.[433]

Like parties, the associations are consulted in the preparatory stages of legislation. However, whereas for the parties consultation is the first occasion to make themselves heard, the associations had their mouthpieces already in the commissions of experts which presided over the

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432 Aubert, loc.cit., p.81.

433 Bischofberger, loc.cit., p.78.

drafting of given proposals. As even parliament is open to them (although through the intermediaries of parties), leading officials of these associations comprised, for example, one fifth of the composition of the National Council in 1963.[434] Not content with mere participation in the drafting of legislation, their actual legislative function is revealed in determining the contents of some laws themselves. By asking for certain regulations of prices and wages, for example, the associations obtain, under certain conditions, a subsequent approval from the Federal Council through a "decision by extension" which endows the regulation in question with binding authority.[435]

In addition to their legislative functions, the associations' administrative and even judicial functions have equally become an accepted feature of the political process. Although it must be admitted that the associations, in contrast to the parties, are mentioned in the Constitution in several places, these short and rather vague allusions according to articles 27, 32, and 34 entail an inherent danger to both federalism and democracy: to federalism, in that they are structurally centralized and geographically concentrated; to democracy

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435 Aubert, loc.cit., p.82.

Ibid., p.82.

through an alleged prerogative that legislation is a matter for those who know, and that in economics special interests should be given a free hand.

The speciousness of the latter argument is rather obvious. Above all, the observation that political negotiators, including the functionaries of organized interests, look upon their demands as being automatically conducive to the general welfare is deceiving; it can hardly be supposed that in furthering particular interests the general welfare is equally respected if it is not even possible to give relevant criteria for the difference between the general welfare and particular interests.[436] Further, the interests involved include those of consumers as well, and if the associations could reach workable agreements among themselves, their apparent need of special concessions from the state would be superfluous. Conversely, and as they demand special favors, their particular need of the state entails acceptance of the state with all its impediments, democracy included.[437]

Finally, a further weakening of the role of political parties has been due to the growing influence of experts

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436 B.A. Jenny, Interessenpolitik und Demokratie in der Schweiz (Zurich, 1966), p.79

437 Aubert, loc.cit., p.83.

through which Switzerland's traditional democratic institutions have become tainted with "expertocracy." Although it can readily be admitted that modern legislation has become complex enough to escape understanding of the average citizen, the timidity of political authorities, however, who apparently cannot take one step without the assistance of experts, remains open to severe criticism. For unless it is to be concluded that the federal administration is devoid of creative minds, the composition of a commission of experts, by including representatives from the most diverse disciplines, must also be recognized for what it is: a representation of expertise which is certainly not absolutely free from subjectivity either.[433]

If it can be admitted that while socio-economic forces are important, they must act through the medium of a certain type of political form which modifies their action, and often these forces themselves, in that very process, then this subject deserves brief examination with particular reference to the referendum in its forms of both the initiative and the challenge. These political devices have been said to call

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433 Aubert, loc.cit., p.84.

pressure groups into existence even if there were none already, and in two ways: because of the prerequisites of a large organization and because of the concomitant and implicit formulation of the "will of the people" by opinion makers.[439] Thus, the referendum's practical application is linked to such financial and other organizational costs that the lead in the referendum fight is predetermined by organized interests with corresponding resources. As the formation of opinion is "expensive and a matter too important to be left to luck," the control by given communication centers has become a dangerous influence over public opinion through the mixing of information and propaganda.[440]

Theoretically, the referendum makes it possible to negate the power of legislation by representatives, and because a referendum might be demanded, it can force the decision-makers to include the possibility of a challenge in proposed legislation. As the threat of a referendum is therefore often calculated in advance, the result of this pre-parliamentary procedure often means escaping the risk

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439 Hughes, Parliament, loc.cit., p.34.

440 Tschani, loc.cit., p.146

of a rejected proposal through flight into compromise.

Alternatively, as a favorite technique is to threaten an initiative, and then to negotiate under the influence of that threat, the question of the legitimacy of an expressed threat remains of crucial importance for the federal authorities. In the politics of the referendum, consequently, two types of negotiations are possible: those which reflect the results of an integration of certain interests through the threat of a referendum, and those, which by circumventing the danger of the referendum, have simply been transferred into the closed political realm of the federal administration.[441] The implicit fear of a referendum calls the effectiveness of this institution of direct popular action into question by testifying to the lack of confidence on the part of public officials in the competent judgment of the people, as well as to the latter's growing lack of interest in proposed legislation.[442] Conversely,

> the influence given to interest groups by direct democracy would seem to be enhanced by the low levels

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441 B.A. Jenny, Interessenpolitik und Demokratie in der Schweiz (Zurich, 1965), p.96.

442 Tschani, loc.cit., p.113.

of voting participation common in referenda.[443] Inasmuch as the Swiss political system provides more opportunities for the open and direct participation of pressure groups in the political process, a rebuttal of the contention that politics has been subjected to economic interests has been based on the following arguments. As new organizations seek and will find political expression, the division of the electorate into a variety of interest groups not only challenged the old established bureaucracy, but also proved, with the emergence of professionals in legislative bodies, the adaptability of the Constitution to changing social forces. This development, through which paid representatives of the most powerful associations can sit openly in parliament where their activities are subject to criticism,[444] is thus held to constitute the actual and justifiable center of public interest.

Undoubtedly, the existence of associations testifies to effective politicization and to the recognition of the right

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443 Kenneth R. Libbey, "Initiatives, Referenda, and Socialism in Switzerland," Government and Opposition, Vol 5, No.3, Summer 1970, p.324.

444 Brooks, Civic Training, loc.cit., p.40.

to contest public policy. A healthy democracy, accordingly, provides for the institutionalization of conflicts; for example, among the conditions for civil rights, parties and organized interests are able to find a place in the formation of the political will since the foundation of democracy is based on the principle of equality. Alternatively, governmental decisions do not necessarily spell equality for all organizations of society; in order to maximize goals there must also be hierarchical organizations which are equally necessary for the preservation of freedom.[445] Yet the disquieting fact remains that

> if the trend to economic concentration is pursued without any change in the existing structure of economic control, there is danger of growing alienation and apathy in national life. (446)

As actual power in the Swiss economy is largely concentrated in a "bourgeoisie d'affaires," Switzerland appears to approach an oligopolistic or even monopolistic economic structure. Although views regarding this trend

> range from unreserved approval of what is held to be an economically and socially indispensable concentration

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445 Jenny, loc.cit., p.72.

446 Gretler and Mandl, loc.cit., p.172.

> of the means of production, to the resignation in the face of material constraints, and to the demand for a stiffer anticoncentration policy (447),

the possibility that the very foundations of Switzerland's pluralistic democracy are endangered can hardly be denied.

As exemplified in a detailed study of interest politics in Switzerland, the operations of this strong and unofficial political force have indeed called into question those allegedly democratic institutions through which social groups can interact with a reasonable measure of harmony for the public welfare. If Meynaud's observation with particular reference to Switzerland has been confirmed in that the organization of oligopolistic capitalism exerts such a strong influence in a closed realm of politics that it is no longer clear how organized pluralism can be harmonized with a political system in which political equality and majority rule are counted as principles of equality, then it remains indeed questionable whether the consultation of organized private interests can count as an extension of a general democratic control.[448] For as long as inequalities

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447 Gretler and Mandl, loc.cit., p.173.

448 Jenny, loc.cit., p.92.

in the distribution of information in society cannot be reduced, and as long as success in the process of pluralistic negotiations is primarily a function of resources and lack of public control, there is the risk that the road to political equality and thereby to democracy remains blocked.

Although it can be admitted that the extension of control and thereby of the approximation of the democratic goal is intimately tied up with the subtle inequalities inherent in the essence of politics, the shift of influence in the process of decision making from parliament into a realm which is inaccessible to the public raises the question to which extent the individual citizen is still prepared to use his right of participation in the organization and goals of his associational ties. Since "abstentionism" constitutes one of the most striking trends in Swiss political life,[449] in the absence of general participation, given oligarchic tendencies will remain unchecked with the result that organized interests become a complex of oligarchies in which a given elite determines public policies without public control.[450]

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449 Jacques Ballaloud, "Suisse: Les Elections du 31 Octobre 1971 et le Regime politique," Revue du Droit Publique et de la Science Politique, 83 Annee, 1972, p.349.

450 Jenny, loc.cit., p.78

Conversely,

> the impact of the referendum and the premium awarded to groups of substantial financial means may outweigh the impulsion which can be given to reform through the use of the initiative. (451)

If the solution to the democratic problem lies in the limitation of the oligarchic trend, then the system of negotiations of organized private interests with the central administration, which offers opportunities for modification of expressed preferences in general elections and votations, is hardly conducive to it. As the advantages of organized pluralism (political opposition can find expression in the system) must be evaluated in relation to its disadvantages (the supervision of negotiations by powerful interest groups in a realm of closed politics), the lack of public control and publicity reflects several unsolved problems in a system of negotiations as it relates to the goals of democracy. To the extent that resources for negotiations remain unequally distributed and that parliament is excluded from the process of decision-making, and that therefore general elections have only limited control over political officials, there is

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451 Libbey, loc.cit., p.326.

lacking a political institution in which the negotiations can be influenced by majority rule, by public opposition, and by public sanction.[452]

The thesis that private associations rule the country through the instrumentalities of party, parliament, and the referendum has been discredited by the observation that final decisions result to the civil servants who thereby retain ultimate responsibility.[453] Yet it has also been claimed that it is in the very nature of Swiss "agreement democracy" to depoliticize as many controversial points as possible, and thus to remove them from the responsibility of politicians to that of experts. The result of this "silent constitutional change," consequently, is said to be a governmental crisis which itself manifests a crisis of the entire political system.[454] As the political leaders remain captives of a social structure in which they are comdemned to settle conflicts upon whose origins and developments they have little in-

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452 Jenny, loc.cit., p.77.

453 Hughes, Parliament, loc.cit., p.163.

454 Bischofberger, loc.cit., p.92.

fluence, the full dimensions of this crisis between democracy and efficiency has subsequently been held to reflect a widespread desire for a new collective ethic, inasmuch as any criticism of a consumer society in an economy of abundance entails a radical reexamination of the ethical values of democracy itself.[455]

In conclusion, a critique of present societal conditions might well prove the demise of pluralism as a variable in political analysis in the modern Swiss democratic process. As the institutions of the liberal state have apparently failed to cope with the social revolution in that alienation and conflict have upset the cherished pluralists' equlibrium, the "displacement of self-regulating small groups" has led to an inverse relation between the need and the availability of informal and automatic social controls, because interest-group liberalism sought to justify power by avoiding law and by parceling out to private parties the power to make public policy.[456] By dispensing with a stable regime of legitimacy and effective administration, the process of policy formula-

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455 Bischofberger, loc.cit., p.178.

456 T.J. Lowi, The End of Liberalism (New York, 1969), p.58.

tion has become formulation itself, so that government has become an epiphenomenon of politics; as a variant of corporatism and syndicalism, interest group liberalism, by replacing the requirement of law with that of contingency, has led to the maintenance of old, and the creation of new, structures of privilege, and to conservatism.[457]

The foregoing critique, however, presupposes that the very nature of pluralism can no longer prevent the transformation of a liberal democratic society to its possible totalitarian form. Yet if the rule of law and the ideals of civic responsibility cannot be upheld in the long run by the disciplinary agencies of the state, but can only be fostered and maintained by the citizens' passion for liberty, then the ironic problem of present day critics and would-be reformers is only reintroduced. In the attempt to restore their cherished values of individualism they again approach the very techniques of organization which they themselves might fundamentally abhor, for the alternative to a

> generous faith in man is a craven faith in authority, freed, it is true, from responsibility of our fickle

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457 Lowi, loc.cit., p.58.

selves, but still wielded by fallible men.

As long as successful participation in organized interest groups remains an effective road toward participation in government, the unsolved problem appears to center around the question of how to impart to those groups a measure of responsibility in the conduct of modern administration. The denial of government by consensus, which encourages united action on matters on which agreement can be reached, but which also allows for diversity in other matters, can only be substantiated by the spurious contention that in pluralist government, with its antagonism to law, there is no substance, no legitimate procedure, only process.[459]

Since the problem of the political order, however, is not solved by simply elaborating a hierarchy of authorities, the final compromise among a plurality of organized interest groups should reflect the reasonable decision of a free electorate. If this be denied, then, of course, pluralism cannot have any meaning in the absence of a stable regime of "legitimate" authority.

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458 J.A. Corry, The Changing Conditions of Politics (Toronto, 1963), p.59.

459 Lowi, loc.cit., p.97.

On the other hand,

> it is difficult not to feel that the complicated fiscal or other technical issues of our day are increasingly unsuitable to the direct or demi-direct democracy of Switzerland. (460)

Accordingly, in the enduring problem of distilling the general public interest out of the often conflicting special interests which constitute parts of the whole, the ideals of "participatory" democracy and "responsible" party government might, at best, be affirmed by the observation that Switzerland

> is undoubtedly the country in which the possibilities for the direct intervention of the people in the political process are the most extensive. (461)

At worst, the ideals appear to be negated in that the formulation of governmental proposals in consultation with private corporate bodies has diminished the role of the parties and thereby enhanced a decision-making process in which private interests determine public policies while remaining outside the sphere of public opposition, sanction, and control.

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460 E. Wiskemann, "The State of Switzerland in 1956," International Affairs, Vol 32, No 4, 1956, p.444.

461 Libbey, loc.cit., p.303.

LEGISLATIVE-EXECUTIVE RELATIONS: THE COLLEGIATE EXECUTIVE; FROM DIFFUSION TO CONCENTRATION OF POWER

In much the same way in which social change and the increasing accumulation of administrative relations have modified the very nature of the federal principle by curtailing the competences of the cantons in relation to the central government, so, too, the relationship between parliament and the executive was to undergo fundamental alterations with the result that in the course of the last century the relationship has been almost reversed. Whereas formerly the policies of the executive government had been dictated by the Chambers, today the Federal Council is less dependent upon, if not in fact superior to, parliament, and although the former would never directly oppose the express will of the latter, the executive has successfully managed to ensure that the will of the Chambers remains attuned to its own.[462]

In the election of the federal executive by the legislature, the constituent body of 1848 acted in harmony with

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462 J.F. Aubert, Traite de Droit Constitutinnel Suisse (Neuchatel, 1967), I, p.75.

a prevailing tendency of the time in that the Swiss Constitution, by creating one of the first popularly elected governments during the period of the early democratic revolutions, sought to protect the individual against the powers of the state by subordinating government to parliament.[463]

Since the Federal Assembly, considered to be the true body of popular sovereignty, elected the Federal Council which was to remain dependent upon it, the constitutional life of young Switzerland might indeed have been characteristic of parliamentary government, particularly so since[464]

> the notion that the executive could negative the decisions of the legislature by veto remained as foreign to Swiss constitutional law as the idea that a tribunal could refuse to apply them on grounds of unconstitutionality. (465)

However, the Swiss system of government represents, as it were, a third variety besides the presidential and parliamentary regimes in that the government is subordinate, at least in theory, to parliament. The fundamental idea of this

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463 W.E. Rappard, La Constitution Federale de la Suisse (Neuchatel, 1948), p.153.

464 E. Bonjour et al., A Short History of Switzerland (Oxford, 1952), p.285.

465 W.E. Rappard, The Government of Switzerland (New York, 1936), p.50.

system is that only parliament is dependent upon popular election, and inasmuch as the executive is chosen by parliament, the former cannot demand the latter's dissolution. In return, and in order to assure some duration in office, parliament cannot force the government's resignation, but has to await the end of the administrative period for a given reelection. In case of disagreement, consequently, when for example parliament, or the people by means of the referendum challenge, repudiate a governmental proposal, the executive government does not resign but merely yields; the ordinary parliamentary result does not take place. The Swiss system, therefore, partakes of both the parliamentary regime in that the government derives from parliament, and of the presidential regime in that it is free from forced resignation. It would follow, theoretically, that the Federal Council is legally the servant of the legislature; in actual fact, however, as well as in contradistinction to the constitutional fiction, the Federal Council is preeminent.[466]

In order to exemplify the development whereby the

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466 Aubert, loc.cit., p.400.

executive government stays in office irrespective of the changes in the composition of parliament, and is, thereby, deemed to combine the best qualities of the democratic presidential and cabinet system by making for stability, anonymity,[467] and efficiency, several considerations, beginning with the nature of the Federal Council itself, are in order.

Equally as natural to the constituent body of 1848 as the supremacy of the legislature appeared the transfer of a national tradition, the institution of the collegiate executive from the cantonal to the federal level. In keeping with the intention to make the executive the administrative executor of the decisions of the Federal Assembly, the composition of the executive government, a corporate form of executive power inherited from medieval times,[468] aimed simultaneously at preserving those traditional values which were deemed conducive to preventing the predominance of any single individual, and thereby to safeguard against the danger of dictatorship. Since the Federal Council was

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467 G.A. Codding, The Federal Government of Switzerland (Boston, 1961), p.87.

468 G. Sauser-Hall, The Political Institutions of Switzerland (Lucerne, 1946), p.40.

modeled after cantonal governments in which one-man executives had been virtually unknown, it appeared indeed natural that contrary to the acceptance of bicameralism in conscious imitation of the American Constitution, adoption of the office of the presidency should have been flatly rejected; in Swiss experience this exemplar appeared to invite the evils of monarchy and dictatorship.[469] Furthermore, just as state cabinets acted as a unit and not by the divided authority of its members, so, too, the unitary control of the Federal Council was to be exercised only within the boundaries established by all its members. United in almost all expressions of opinion, the Federal Council is said to compromise its differences before any public appearance.[470]

The actual Swiss executive, or Federal Council, is a body composed of seven ministers who, in presiding over seven departments, are elected jointly by the two Houses of the legislature, formally for four years. Based on the principle of rotation, one of the seven is chosen by the Federal Assembly to act as president, for one year only.

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469 Rappard, Government, loc.cit., p.135.

470 H. Huber, How Switzerland is Governed (Zurich, 1946), p.55.

The functions of the president, however, reflect, as it were, a final "anti-monarchical" device; as his precedence over the other members is of a purely formal nature, the Swiss president, or, rather, Chairman of the Federal Council, embodies a concession to the un-Swiss conception of a "chief executive."[471]

Alternatively, an American equivalent of Switzerland's Federal Council is the commission form of government in American municipalities in which the mayor, like the president of the Swiss federation, remains merely the " first among equals."[472]

Since according to a Law of 1849 the presidency was to be held by different members each year, this arrangement engendered certain disadvantages such as the difficutly in providing for continuity in the department of foreign affairs. As solutions have ranged from dissociating the presidency from the political department to current practices whereby a federal Councilor does not change his department unless he so desires, or accedes to the presidency whilst retaining his department, the composition of the Federal Council

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471 Strong, loc.cit., p.267.

472 Tripp, loc.cit., p.185.

indicates that it is regulated not only by laws but also by unwritten practices analogous to English "constitutional conventions."[473]

In this respect, the election of federal Councilors is of particular importance. Although formally elected for four years, tenure usually depends upon their own will; since capable administrators are kept in office almost indefinitely, the ensuing tradition of reelection has not unjustly led to the observation that Swiss ministerial seats are the most secure in Europe.[474]

In addition to their longevity, the separate election of the seven members has also led to the result that government never changes completely. From the point of view of subordination to the legislature, therefore, the degree of dependence remains actually inversely proportionate to the chances of reelection; the tradition of reelection and the superior caliber of the federal Councilors have more than offset the apparent check by the Federal Assembly.

Professionalized through long service, the progressive

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473 Aubert, loc.cit., p.526.

474 Ibid., p.529.

strengthening of the Federal Council remained, as it were, in the natural order of things. Because of its prestige and small size, it can act swiftly and efficiently; for whereas parliaments are debating societies, governments are organs of decision,[475] particularly so when the Federal Council, a small body of professionals, can lean on the support of an entire administrative infrastructure. Because of its expertise, ensured through reelection, it provides continuity in governmental affairs and thereby makes for the most outstanding quality of the federal executive, stability of government. Because of its anonymity (as it is contrary to the spirit of the collegiate executive that divergences in opinion should be publicly exposed), it strengthened its neutral position between the people, the Federal Assembly, and the service bureaucracy.[476]

Yet in spite of these qualities, the legal inability to remove any or all members during their term of office, and the absence of any procedure for expressing lack of confidence, as well as repeated criticisms of under-representation

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475 H. Tschani, Profil der Schweiz (Zurich, 1967), p.173.

476 Friedrich and Cole, loc.cit., p.85.

in the executive government, all these factors have periodically led to demands for popular election or enlargement of the Federal Council. Whether or not these demands would still maintain the desired characteristics of collegiate responsibility, answers to the proposed changes in question have been derived, for the most part, from the "magic formula": 2:2:2:1. This is based upon two sets of factors in the election of federal Councilors: personalities and "constellations," i.e., language, party, region, and religion.[477]

Since the number seven is fixed in the Constitution, it has been defended, above all, as being low enough not to be prejudicial to governmental cohesion, and high enough to assure a balanced representation of political parties, regions, and languages. It has also been justified, even as late as 1968 (i.e., shortly before the successful struggle for women suffrage), as a "beautiful" number which, by already having been pleasing to antiquity, has remained a virile number and is therefore appropriate to a masculine

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477 C. Hughes, The Parliament of Switzerland (London, 1952), p.77-79.

democracy.[478]

These observations notwithstanding, direct election of the Federal Council is considered difficult to realize from a purely technical point of view because of the nature of Swiss federalism and because of the plural character of the executive government. Accordingly, direct election would eliminate all influence of the cantonal elements upon the election of the Federal Council, undermine the respect for the proportional principle, and represent a step in the direction of a unitary form of government.[479] In addition, it would increase even more so the powers of the Federal Council, accentuate liguistic divisions, and introduce foreign practices into Swiss political morals.[480] Nonetheless, it must equally be recognized that

> the point of the proposal for direct election has each time been to secure representation on the Council for an excluded political party or section of the country. (481)

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478 Aubert, loc.cit., p.528.

479 F. Bonjour, Real Democracy in Operation (New York, 1920), p.153.

480 Aubert, loc.cit., p.73.

481 Hughes, Constitution, loc.cit., p.108.

With respect to demands for enlargement of the Federal Council, arguments to increase the number of its members or departments were based, until the 1950's, on grounds of equitable representations for political parties; thereafter on those for the rationalization of organizational structures in the federal administration. Despite a frank recognition of overburdened personnel and organizational channels, enlargement of the Federal Council is deemed less urgent than the creation of more efficient working methods.[482]

Counterarguments, quite naturally, abound. Thus it is maintained, for example, that because of respect for the "magic formula" compromises have to be reached which exclude the most able of men; by first considering political parties, then regions, then language groups, and finally aptitude, confidence in the executive government has consequently been lost.[483] Further, that although the four large parties as well as the existing language groups are fairly evenly represented, religious denominations in the higher

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482 Aubert, loc.cit., p.529.

483 Tschani, loc.cit., p.194.

eschalons of the administration are not; and even less represented than Catholics remain the Social Democrats.[484] Since denominations remain of importance in that the political system is still largely confessionalized, the "magic formula" is thus held to be a facade which hides the real power relationships in the federal executive.[485] Alternatively, and in corroboration of the foregoing, it has been maintained that the "trouble with Swiss political life (is) too cosy an acceptance of urban, Protestant, middle-class values."[486]

Just as the election of the Federal Council by the Federal Assembly has been shown to result in virtuat independence by the former of the latter, so in the constitutional separation of powers the lead in governmental affairs was clearly to pass to the federal executive, despite the fact that both political bodies remain in principle

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484 P. Bischofberger et al., Verwaltung im Umbruch (Bern, 1972), p.50.

485 Ibid., p.50.

486 Hughes, Parliament, loc.cit., p.98.

coordinate.

According to the pertinent constitutional provisions, the Federal Council exercises "supreme directing and executive power" (article 95), in conjunction with a Federal Tribunal for the administration of justice "in so far as this is within the Federal competence" (article 106, 1). Yet it is also said that the Federal Assembly is invested with "supreme power" (article 71), and that it shall "handle all business within the competence of the Constitution, and which is not allotted to another Federal authority", (article 84).

These texts have given rise to two fundamentally different interpretations. The "democratic" version, as based upon articles 71 and 84, seeks to uphold the preponderance of the Federal Assembly (as the only political body which is almost entirely elected by the people), by leaning on the parliamentary practice of the last century. The "liberal" version, which seeks to combat the "tyranny" of the Federal Assembly by fortifying the other two governmental bodies, is given preference today, at least in the opinion of Aubert, and his interpretation of such authors as Burckhardt, His,

Giacometti, Oswald, von Orelli, and Eichenberger.[487]

Its justification is as follows. The "supreme" power according to article 71 is sufficiently respected when it is acknowledged that the Federal Assembly elects the Federal Council as well as the Federal Tribunal. As to article 84, it does not specify what the "subject matters allotted to another authority" are, nor does it say that they must be "expressly" shared. Consequently, and before granting the Federal Assembly an implicit competence, there is room for a rather broad exegesis of articles 95 and 106(I). The Federal Assembly, therefore, retains only residual competences which, by their very nature, are neither administrative nor judicial, and this manner of argumentation appears confirmed by articles 85 and 102, which enumerate the express competences of the Federal Assembly and of the Federal Council respectively.

From the foregoing it would appear that legislative functions pertain to the Assembly, administrative ones to the Federal Council, and judicial ones to the Federal Tribunal. However, and with respect to judicial functions,

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487 Aubert, loc.cit., p.456.

a number of reservations need to be added.

Just as interpretation of modern federal legislation impinges upon the border between political and judicial settlement (an area where courts act with reluctance), so many cases involving public policies fall under the competence of the Federal Council whereby "executive discretion, rather than law, could be directly applied in the making of the decision."[488]

As with many other constitutional provisions, specific judicial competences need to be evaluated in conjunction with other pertinent laws. Thus article 113, together with several laws regarding the Federal Administration, attribute judicial powers to the Federal Council in cases involving "administrative disputes," and thereby remove these decisions from the competence of the Federal Tribunal by leaving the "power of judgment" (pouvoir d'appreciation, Ermessen) to the Federal Council.[489] Since the decisions of the Federal Council are not subject to review by the Federal Admin-

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488 W.G. Rice, Law Among States in Federacy (Appleton, 1959), p.309.

489 Aubert, loc.cit., p.562.

istrative Court, the check upon the Federal Council by the Federal Tribunal is negligible. At best, recourse in administrative law is such that only individual departments or their subdivisions can be censored; at worst, the constitutional and administrative judicial competences of the Federal Council leave the boundary between the Council and the Tribunal not clearly drawn.[490]

With respect to legislative functions, federal councilors clearly dominate the legislature today, for it is the Federal Council or its subordinates who initiate almost all the decisions taken by parliament; or, conversely, the legislature does not adopt any measures which have not been elaborated by the executive government.[491]

Several factors have entered into this development, all of which contributed to a progressive weakening of parliament. To begin with, the Federal Assembly had lost some of its competences to the benefit of the Federal Council and the Federal Tribunal already in 1874. Also, "federal intervention" in cantonal affairs, which theoretically

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490 Aubert, loc.cit., p.561.

491 Ibid., p.75.

pertains to the Federal Assembly, is in reality initiated by the Federal Council which obtains sanction for its action from the Assembly after the fact.[492]

The introduction of Proportional Representation on the federal level in 1918 further strengthened the executive government. This electoral procedure encouraged a multiplication of political parties, and in the absence of any party with a clear majority, the ensuing coalition politics weakened responsible leadership. The net effect shifted the center of gravity from the Assembly to the civil-service side of the Federal Council.

Through the instruments of direct democracy, vetoes by the electorate of unpopular measures lessened the standard and esteem of the legislators. This resulted in an additional strengthening of the executive government because the Federal Assembly now prefers to delegate legislative powers to the Federal Council to avoid a referendum challenge, and because in times of emergency the Council does all the legislating.

The most important factor to account for the ineffective-

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492 Hughes, Constitution, loc.cit., p.113.

ness of parliament, however, has been legislation as called for by present-day circumstances through which representatives have been reduced to mere tools in the hand of experts, or, alternatively, have been forced to play the role of messengers between the real power holders and the people.[493] Inasmuch as the "real" power holders appear to be a combination of the Federal Council and its administration, of the directing bodies of political parties and pressure groups, and finally of experts, the resulting oligarchic tendency might well substantiate the assertion that the Federal Council has

> an even more complete monopoly over the rights of legislative initiative than the British Cabinet, albeit the Federal Council may be compelled to prepare legislation on a certain subject. (494)

In corroboration of the foregoing, a certain independence of the federal administration appears assured through consultation of private interests, since extra-parliamentary forces are integrated into the decision-making process in the pre-parliamentary stages. Instead of public debate, therefore,

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493 Aubert, loc.cit., p.74.

494 Tripp, loc.cit., p.171.

acceptance of a point of view by the executive is the rule. Parliamentary forces, accordingly, remain without effective opposition against the proposals by the Federal Council with the result that parliament merely amends. Analogously, although

> the typical Swiss commune is a going concern in which it is in the citizen's interest to participate...it has a strong enough executive to command respect and prevent affairs from going round and round in ever widening democratic circles. (495)

Since initiative in federal legislation accords to the Federal Council a fundamentally predominant role in that it is constitutionally enabled to prepare legislation with the help and consultation of experts and private interests, to direct debates, and to defend the proposals before the Chambers, it should not be surprising that in the absence of any effective opposition the Federal Council does use the dispersion of parliamentary forces according to the rules of the game of "divide et impera," thereby reinforcing its commanding position.[496]

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495 Ioan Bowen Rees, "Local Government in Swtizerland," Public Administration, Vol.47, Winter 69, p.439.

496 Karlheinz Nicklauss, "Strukturporbleme der Schweizerischen Demokratie," Politische Vierteljahresschrift, 8 Jahrgang, Heft 1, Marz 1967, p.135.

Yet despite these prerogatives, the Federal Council is said not to be free from accountability to the legislature as the latter, by means of certain procedures, can issue binding instructions to the Council. These procedures, consisting of "Motions", "Postulates", "Interpellations," and "Questions," are requests to the Federal Council to submit a report, or to take action on a certain subject. Although some of these are mandatory, in actual practice the Federal Council does not always comply as it treats the procedural forms of a demand as mere suggestions.[497] Furthermore, the very proposition that the Federal Assembly can give binding instructions to the executive within the latter's proper sphere of competences remains questionable, and whereas veritable injunctions by means of "motions" had been successful parliamentary practice during the nineteenth century, in the course of the twentieth century the Federal Council has freed itself progressively from too narrow a tutelage.[498]

In the expedition of governmental tasks, recourse to

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497 Hughes, Parliament, loc.cit., p.122.

498 Aubert, loc.cit., p.497.

committees has frequently been deemed an effective means of control over the executive and of protection of representatives. However, with respect to the latter, the development of parliamentary committees has been at the expense of the individual representative and thereby at the expense of parliament as a whole. As to the former, Swiss committees, standing or ad hoc, have no investigatory powers over the Federal Council and its administration, and, also, bills prepared by the Federal Council with the assistance of key committee members in the pre-parliamentary stages are rarely rejected by one of the Chambers. Further, although the composition of committees should provide for an equitable representation of political parties and language groups, the smaller parties are simply not represented on the smaller committees at all.[499] Finally, in the absence of any institutionalized procedure for opposition, the

> effective organs of control of the Executive -or, rather, of collaboration with the Executive- are the commissions; they are the operative part of Swiss parliamentary government. (500)

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499 Hughes, Parliament, loc.cit., p.157.

500 Hughes, Constitution, loc.cit., p.151.

In the field of public finance, the "unpreparedness and indecisiveness of the Federal Assembly, capable neither of obtaining power nor of exercising it, nor of responsibility,"[501] have accelerated, along with purely technical reasons, the removal of control from the hands of parliament. Control over executive expenditures has been supposedly insured by the Finance Committee of both Houses which, in addition to having broad powers of recommendation, approves the annual budget prepared by the Federal Council, and all requests for federal loans according to article 85(10). However, the members of the "controle des finances" are appointed by the Federal Council, and the constitutional provision in question is simply not used as a method of controlling the Executive.[502]

As the Federal Council assumes the responsibility for introducing fiscal measures, it bases its revenues for the most part on ordonnances which, be escaping from the referendum challenge, and thereby remaining of doubtful constitutional value, are submitted for approval to the Federal

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501 Hughes, Constitution, loc.cit., p.50.

502 Ibid., p.96.

Assembly.[503] These ordonnances have always been accepted. Although the Federal Assembly insures some degree of accountability through two available means of verification of finances, and although the two Houses can modify the figures of the budget to some extent, the Federal Assembly cannot annul decisions already taken. Any "injunction" remains valid for future actions only. Whilst the Federal Assembly cannot decisively influence the operations of the Federal Council, it is yet allegedly empowered to examine the past activities of the executive branch. In its Annual Report, the Federal Council submits a summary of its activities of the preceding year to the Federal Assembly in what has become known as the "state of the Union Botschaft."[504] The Chambers almost always accept it, and acceptance frees the Federal Council from responsibility for all actions therein.

The actual consolidation of powers in the Federal Council during the last hundred years was accentuated by two major developments around the turn of the century. First,

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503 Aubert, loc.cit., p.498.

504 Tschani, loc.cit., p.200.

on the basis of being the permanent body which could take all necessary actions demanded by circumstances, the Federal Council succeeded to monopolize foreign affairs through a broad interpretation of articles 85 and 102, thereby establishing its continuing predominance over the Federal Assembly.[505] Second, as a corollary, the Federal Council has been delegated such large competences in all other fields that during the two World Wars the executive literally became the master of Switzerland. Under its regime of wartime "Full Powers" not even the Constitution remained any longer a limiting factor to its all-engulfing actitivies.

To the extent that interventions by the central state in the entire life of the nation are changes characteristic of all modern democracies, even in normal times, the growth of powers in the executive government was nourished by the contributions of each successive crisis government. Under the pressure of circumstances, emergency regulations, purported to be correctives to the inefficiencies arising from the separation of powers, were considered convenient and

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505 Aubert, loc.cit., p.485.

efficient means to bridge a difficult political passage. Far removed from the original conception of the authors of the Constitution, dictated constitutional provisions were accepted in a spirit of resignation rather than of national enthusiasm.[506] Yet just as interventions and emergency regulations multiplied, so, too, grew the belief in a new mission of the state which, through its "positive" actions, was nevertheless to leave some unfavorable alterations in that each crisis administration left the government " a little less democratic than before, at least by traditional standards."[507]

If it can be admitted that one type of emergency or another has prevailed in Switzerland since 1914, then it must also be recognized that a voluntary transfer of legislative authority from the Federal Assembly to the Federal Council was based on a frank admission that in times of crises the legislature proved unequal to the tasks at hand. Therefore, although the Federal Council's emergency regu -

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506 Rappard, Constitution, loc.cit., p.369.

507 Clinton Rossiter, Constitutional Dictatorship (New York, 1963), p.313.

lations were deemed to constitute an interlude in the normal workings of government whilst becoming, instead, a substitute for normal procedures, so, too, were most of the government's emergency powers over commerce and industry sanctioned for regular future use.[503]

Abdication by the Federal Assembly of its constitutional powers, or delegation of its powers to the Federal Council, have been said to be unconstitutional because they preclude any recourse to a referendum challenge, and because they are contrary to the general principle of constitutional law in that "delegated powers cannot be delegated further." These assertions, however, entail several rejoinders. Without doubt, during the two World Wars the Federal Assembly conferred extraordinary economic powers upon the Federal Council which also took further political powers upon itself. Inasmuch as not only competences belonging to the Chambers were discharged by the executive government, but also constitutional rights were temporarily suspended, the "Full Powers" regime might well be considered unconstitutional

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503 G.A. Codding, The Federal Government of Switzerland (Boston, 1961), p.137.

since any suspension of legal norms is unconstitutional.[509] This, however, leaves the question unanswered of how to get timely, necessary, and effective action, particularly so when it is maintained that

> a temporary regime, alternating with periods when the Executive acts illegally (and thereby takes full responsibility), is by no means a bad solution of the problem of how to get certain things done by the central government while keeping a firm check on its powers. (510)

Arguments against delegation of powers (since the legislative power is delegated by the constituent power or the people to the legislature, the latter cannot delegate it further), can hardly detract any longer from the obvious and progressive breakdown of the principle of the separation of legislative and executive powers. Furthermore, despite some ingeneous counterarguments, such as a "delegating statute lays down principles whilst leaving to selected instrumentalities the making of subordinate rules within prescribed limits," the difficulty of distinguishing between illegitimate discretion and legitimate execution

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509 Hughes, Constitution, loc.cit., p.169.

510 Ibid., p.51.

is thereby hardly resolved.[511]

Also, the mere fact that power has been delegated leaves open the question of the manner in which the recipient should deal with it. Finally, just as in the case of England where no legal difficulty for unlimited delegation of rule-making power to the executive appears to obtain,[512] so, too, delegation of powers in Switzerland, deemed to be urgency techniques which answer a true necessity, has a customary constitutional basis through which it is considered normal that the care to adapt legislation to changing circumstances should be left to the executive government.[513]

Inasmuch as "ordonnance power" replaces normal legislation in times of emergency, there are five types of ordonnances through which the Federal Council can suspend the Constitution itself. As based upon articles 89(bis,III), 29(II), 102(IX-X), 35(III), and 41(IV) respectively, these

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511 G. Marshall, Constitutional Theory (Oxford,1971),p.115.

512 Ibid., p.113.

513 Aubert, loc.cit., p.549.

emergency regulations have been interpreted in favor of the Federal Council, and this constitutional verdict has since been followed by the Federal Tribunal.[514]

On the basis of these extra ordinary powers, it is consequently not surprising that the Federal Assembly should be said to have served too often as a rubber stamp for the Federal Council, nor that the emergency ordonnance should have become a pacemaker for a fully organized bureaucracy in that it remains an illustration of the "all-engulfing technicality of the conditions of modern industrial civilization."[515] As this, however, is not to deny the urgent need for institutional patterns which provide for effective action but which also prevent those called upon to act from abusing their authority and responsibility, a number of criticisms directed against the Federal Council remain to be considered.

To the extent that the Swiss system of government manifests a relatively weak parliament with only modest

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514 Aubert, loc.cit., p.545.

515 C.J. Friedrich and T. Cole, Responsible Bureaucracy (Cambridge, 1932), p.32.

control over the federal administration which is the real power under the guidance and supervision of the Federal Council, it must be recognized that what is subsumed under the "Federal Council" is a dependent, variable factor in the process of legislation. The Swiss "executive" can stand for the federal administration divided into departments, for the head of a department and its bureaux, as well as for the formal, collegiate, federal executive.[516] With respect to the latter, it is enjoined by the Constitution to act collectively in that each departmental decision shall be under the name and by the authority of the Federal Council (article 103). The inherent difficulties of this provision, through which the executive is corporately responsible while each member himself is at the same time the head of a department, were compounded because all Swiss public officials (with the exception of a few chosen by the Federal Assembly or by the Federal Tribunal), are appointed by the Federal Council or by other higher officials in the subdivisions of the departments, since the Federal Council can delegate its right of appointment.

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516 B.A. Jenny, Interessenpolitik und Demokratie in der Schweiz (Zurich, 1933), p.85.

The result was a weakening of collective responsibility due to the growing complexity of governmental functions and its concomitant delegation of authority to subordinate bodies. Because of the growth of ever more independent departments and their subsections, this development has not only been held to constitute an infringement of the collegiate system, but, in conjunction with the extension of the Swiss civil service or bureaucracy, has also been accredited with the re-opening of the case of the "bu - reaucratic v. the people's state."[517]

In any evaluation of these assertions, however, it must be recognized that with the rise of the "positive state" and its concomitant scientific revolution, public supervision and control increased, and with it, administrative authority and discretion. This development upset popular ideas about the way in which policies are initiated and adopted, and in which politicians can control them and be held responsible for them. Fear that public policy might become the captive of a scientific elite led on the one hand to nostalgic escapes into the past, and, on the other, to

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517 Huber, loc.cit., p.55.

a more realistic questioning whether the scientific revolution had not indeed made obsolete the institutions of democracy as presently organized and managed.[518]

Furthermore, the complexity of governmental tasks necessitated reliance of politicians on experts who in their most far reaching activities remain without direct responsibility to political control. It also led to the establishment and proliferation of executive agencies with such strength of initiative and autonomy that not only the old boundaries between the legislative and executive realms became blurred, but also that government itself suffered in comparison with mere administration.

In this perspective, the most frequently voiced criticism of the Federal Council centers around the absence of any collective responsibility, for as only the actions of individual departments can be censured, there is no way of criticizing federal policy as a whole, nor any power to hold the entire collegiate body responsible. Reform efforts, consequently, have aimed at introducing a "bipolar political system," based on effectively governing and criti-

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[518] Bischofberger, loc.cit., p.15.

cizing majorities and minorities respectively.[519] This unlikely development, however, which would entail such fundamental institutional reforms as the re-introduction of the majority principle for the National Council, the re-organization of the Council of States, as well as a limitation on the use of the optional referendum, appears to stand in a curious contrast to a national climate of opinion in which the conviction that responsibility in government is insured by respect for law, continues to prevail.

Responsibility, according to article 117 of the Federal Constitution, remains difficult to enforce inasmuch as it constitutes a procedure which is a "sort of romantic reminiscence of impeachment;" it has never been used, or, if it were used against the higher officials, would remain a device to secure them special privileges before the courts.[520]

Nevertheless, some concept of ministerial responsibility is said to pertain as ministers do resign, although the procedure is not openly directed to this point. In Swiss

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519 Bischofberger, loc.cit., p.92.

520 Hughes, Constitution, loc.cit., p.131.

parliamentary procedure a victory does not mean the resignation of the cabinet, but the resignation or non-election of an individual federal councilor.[521]

Moreover, the relationship of the Federal Council to the Federal Assembly is characterized by a tradition of cooperation in terms of which both political bodies remain closely connected by a perpetual coalition. It is not accurate to say, therefore, that during the administrative period the government is not responsible to the Federal Assembly; rather, the Chambers surrender all claims to enforce political responsibility, and this self-denial alone assures the stability of the Federal Council.[522] As the Swiss system of government depends more upon a habit of cooperation than upon enforceable legal texts, the respect or feeling for law might indeed be the

> fixed point in the ... shifting relationships of social powers and administrative practice in federal legislation; the law which makes the Assembly the "toothless watchdog" and sets the Federal Council at the center of the political process. (523)

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521 Hughes, Parliament, loc.cit., p.70.

522 Aubert, loc.cit., p.539.

523 Hughes, Parliament, loc.cit., p.164.

FUNDAMENTAL RIGHTS: THE STRUGGLE FOR WOMENS' SUFFRAGE

In the relationships between the individual and the state, fundamental rights constitute, as it were, a separation of powers between the two in that given constitutional provisions impose certain limitations upon the state which accord, ideally, to the individual those guarantees that remain essential to his freedoms.

In the form of limitations upon political power, however, these rights reflect two different aspects. As political devices which aim at a partitioning of authority among several bodies (such as bicameralism, multi-partism, and federalism), they constitute procedural restraints; as fundamental precepts which are to be respected by the state (such as moral standards, customs, and public opinions), they are substantive restraints which can, however, be converted into procedural restraints by the right of appeal to certain tribunals.

To the extent that limitations upon political power are

to further the interests of individuals by better protecting their freedoms, the availability of a procedural channel which seeks to enforce these limitations is said to accord to them "individual rights." To the extent that these limitations are based upon the Constitution, or upon implicit principles derived from the same level, individuals are said to enjoy "constitutional rights."[524]

With respect to the Swiss Federal Constitution, there are, in the absence of a separate Bill of Rights, a dozen or so articles scattered throughout the general constitutional provisions which deal with the rights of individuals. Observance of these rights and freedoms is assured through Appeal in Public Law to the Federal Tribunal, and exceptionally through appeal to the Federal Council according to articles 113 and 84 of the Federal Constitution, as well as according to article 125 of the Law on the Organization of the Federal Judiciary.

In view of the foregoing, it is apparent that there is in all modern states a variety of procedures for determining rights and duties which range from procedures of courts and

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524 J.F. Aubert, Traite de Droit Constitutionnel Suisse (Neuchatel, 1967), p.623.

tribunals to those which constitute exercises of administrative discretion or policy and which are not procedures of judicial power as such. Consequently, the following important question remains:

> what issues or controversies ought to be resolved by .. adjudicative methods rather than by .. executive policy, if constitutional rights are to be maintained? (525)

The Swiss solution to the problem appears to lie midway along a continuum of governmental systems which, at one end, remain reluctant

> to see the judiciary saddled or entrusted with wide issues of policy such as are involved in concepts of "due process," "equal treatment," or the abstract freedoms enunciated in the traditional Bills of Rights (526),

and which, at the other end, are characterized by legislative and executive bodies which remain subject only to the restraints of public opinion and political opposition.

In the Swiss system of procedures for determining rights and duties, constitutional jurisdiction pertains, in general, to the Federal Tribunal inasmuch as the procedural guarantees of individual rights and freedoms were enlarged such

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525 Marshall, loc.cit., p.120.

526 Ibid., p.127.

that certain appeals which were formerly taken up by the Federal Council, today fall into the province of the legal authorities. Accordingly, constitutional rights remain a question of interpretation in that the Federal Tribunal extricates from the whole of constitutional provisions those in which it is disposed to see a "right" of individuals. The drawing-up of such a catalogue is complicated, in addition, because some rights have been inferred from cantonal constitutions, from implicit constitutional principles, as well as from statutory laws.[527] The Federal Tribunal recognizes the following categories of constitutional rights:

1. The principle of equality before the law, in accordance with article four of the Federal Constitution.

2. "Individual rights and freedoms," as enunciated in either the Federal - or in cantonal constitutions. The most important freedoms in the Federal Constitution are those of trade and industry (article 31), of settlement (article 45), of conscience and belief (article 49), of worship and religious ceremonies (article 50), of the press (article 55), of association (article 56), and of "expression" and "habeas

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527 Aubert, loc.cit., p.591.

corpus" which are principles of unwritten federal law.[528] From cantonal constitutions the Federal Tribunal has drawn the freedom of "public meetings" and the "invio - lability of the home", although the continued existence of cantonal freedoms, apart from federally guaranteed ones, has become very doubtful today. To the extent that all cantonal freedoms have been prempted by federal law, expressly or implicitly, cantonal declarations of individual rights, though still contained in their constitutions, remain nothing more than monuments of historical value, with the exception of the freedom of instruction in public schools in accordance with article 27 of the Federal Constitution.[529]

3. Certain "institutional guarantees," such as the right to marriage (article 54), the right to private property (a principle of unwritten federal law), and the right to a lawful judge.

4. Certain "political guarantees," such as the exercise of political cantonal rights as well as unwritten constitutional principles concerning communal autonomy.

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528 Aubert, loc.cit., p.593.

529 Ibid., p.632.

5. Certain guarantees against the inconveniences of federalism such as those pertaining to intercantonal relationships in accordance with articles 60, 61, 59 of the Federal Constitution.[530]

The foregoing list, however, is not complete to the extent that the "catalogue" of individual rights and freedoms is in perpetual evolution either because the Federal Tribunal discovers in the constitutional texts new guarantees (such as article 37, II, in its version of 1958 assuring the free use of roads), or because it recognizes, and more frequently, the existence of new and implicit federal principles.[531]

With respect to the latter, a brief examination of article four of the Federal Constitution is in order. As the most active rule of law of all the constitutional provisions, article four has been said to enunciate so elastic a principle (all Swiss are equal before the law), that the Appeal in Public Law by the individual against alleged violation of his constitutional rights to the Federal Tribunal or to the

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530 Aubert, loc.cit., p.592.

531 Ibid., p.592.

Federal Council (upon exhaustion of all cantonal remedies only), has rendered every cantonal act open to challenge on grounds of "arbitrariness." The Federal Tribunal has interpreted article four as conferring nothing less than a jurisdiction in equity over all cantonal decisions, legislative, administrative, or judicial, and not only with respect to constitutional rights, but to political rights (voting, for example), as well.[532] Since the appeal, however, is only open to cantonal acts because federal legislation remains exempt, it must also be recognized that the Federal Tribunal has not always stood up to the Federal Council when the latter acted contrary to individual statutory and constitutional rights.[533] This matter led to questioning whether the Swiss are indeed so secure in their constitutional rights as they would be under the control of an independent judicial body, particularly so since in individual cases

> the federal authorities may lend an interpretation to the principle of equality as guaranteed by the Constitution which differs from the interpretation given it by the

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532 Hughes, Constitution, loc.cit., p.123.

533 Codding, loc.cit., p.112.

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Federal Court.

These reservations notwithstanding, the Federal Tribunal has given to article four an unforseeable dimension by piling on top of it a legal construction which even the most careful reading of the provision would appear to leave undiscovered. By not limiting itself any longer to "proving" the existence of express provisions in the Constitution, it has built something new apart from it: unwritten principles which the Federal Tribunal grafts on the Constitution without reference to any enumerated article, to the preamble, or to the transitory provisions. Thus it declared in 1960 that "the guarantee of private property belongs to the unwritten constitutional law of the Confederation"; in 1961, that "the freedom of expression constitutes a fundamental principle of federal and cantonal law, written or not, as well as an extension of the protection guaranteed by the freedom of the press"; and, in 1963, that "personal freedom, in the sense of physical (corporeal) freedom, is an indispensable element in the legal order of a Rechtsstaat such

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Gerhard Leibholz, "Equality as a Principle in German and Swiss Constitutional Law," Journal of Public Law, Vol.3, No. 1, Spring 1954, p.157.

as the Confederation. According to prevailing opinion it belongs, like the guarantee of property, to unwritten principles of federal constitutional law".[535]

What must be understood is that in raising a principle to the dignity of unwritten, federal law, the Federal Tribunal does not limit itself to declaring that the principle is of a constitutional nature; what is important is that it accords to the principle the value of a formal constitutional rule which is of superior legal value to statutory law and which is, theoretically, amendable only in accordance with the formal procedure of constitutional revision.[536] The Federal Tribunal, therefore, performs essential functions not only in guaranteeing existing, but also in expanding, constitutional rights of citizens, although it must also be kept in mind that there remain "directive principles" of federal policy alongside judicially enforceable guarantees of individual rights and freedoms.

From a historical perspective, the "official" inspiration for fundamental rights was derived from the Declaration of

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535 Aubert, loc.cit. p.125.

536 Ibid., p.125.

the Rights of Man. Its first offshoots in Swiss liberalism found expression in the Helvetic Constitution which incorporated, in its articles six to nine, the freedoms of conscience, press, equality, and the guarantee of property. These freedoms were to reappear in the programs of the 1830's and in the cantonal constitutions during the period of the Regeneration; they were to be inserted into the Federal Constitution of 1848 in its articles 4, 41, 44, and 45 to 55, to be improved in 1866 (articles 41 and 48), and finally to be completed in 1874 (articles 4, 27, 31, 45, and 49-65).[537]

As most fundamental rights are of a negative nature in that they seek to delimit a zone free of fear from encroachments by the state, their purpose is to obtain national protection by independent and impartial judicial authorities. Yet it is frequently maintained that men enter society armed with "natural" or "inalienable" rights in relation to public authorities. To endow fundamental rights with a "natural" aspect as a protection against any political interference, however, would indicate that certain freedoms have an

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537 Aubert, loc.cit., p.626

existence apart from any government. In reality, all rights presuppose a government for their enforcement.

Furthermore, a legal provision, even when its formal application remains irreproachable, does not always apply to all, and is thus liable to remain for many merely a promise as long as their economic situations remain unchanged, thereby confronting society with the perpetual problem of how to reconcile constitutional rights and freedoms more equitably with actual social and economic freedom.[538]

Finally, all rights have known their dark hours due to the political and economic upheavals in the course of the twentieth century. Whilst the freedom of settlement was suspended during the two World Wars, and the freedom of the press remained, at times, under strict surveillance, and whilst clashes between extremists on both the Left and the Right necessitated the interdiction of political meetings as well as of certain associations, all these restrictions were lifted when the calm returned.

Two fundamental rights and freedoms, however, those of private property in land, and of trade and industry, were

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538 Aubert, loc.cit., p.625.

permanently to be curtailed. With respect to private property, relevant restrictions can be explained as a result of the growth of population which entails growing needs for available space, in conjunction with the requirements for public services, etc. As available land is limited, there remains the possibility of the socialization of land, or, if this be rejected, the alternative in the form of strict laws on its use.[539] According to an often repeated formula by the Federal Tribunal, restrictions to be imposed upon private property in the public interest are compatible with the Constitution "provided they rest on a legal basis, are conform to the public interest, and, when equivalent to an appropriation, must provide for an indemnity."[540] It must be understood, however, that "public interest" includes cases involving "public utility" which justify, by implication, indeterminate formal appropriations by the state.

With respect to the freedom of trade and industry, relevant restrictions can be explained as a result of the evolution of economic freedom wich in its classical inter-

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539 Aubert, loc.cit., p.185.

540 Ibid., p.760.

pretation had stood for the freedom of competition, but which was to be perverted through use of its concomitant freedom of contracts into the creation of trusts and cartels. As this development was to entail an irrepressible demand for a more equitable sharing of national revenues, the state embarked upon a policy of re-distribution of wealth in the service of which it was to employ the use of taxes, subsidies, controls, as well as of social insurances.[541] Prior to a more detailed examination of the restrictions on the freedom of trade and industry as well as on other fundamental rights, several explanatory observations on "curtailments" are in order.

Inasmuch as there is no absolute freedom, and all freedoms are liable to be restricted within variable limits by the regulations of the state, limitations are deemed necessary in order to protect the public from the excesses of individual freedoms. All limitations derive their justification from the notion of the "public order" which has been defined by the Federal Tribunal as "security, tran-

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541 Aubert, loc.cit., p.85.

quility, health, morality, and good public faith."[542]

Further, as all freedoms are curtailed to preserve a threatened public order by means of state regulations (restrictions policieres), the state becomes complementary to liberalism. The defense of the public order, however, must remain fundamentally negative, i.e., "to prevent future evils (Gefahrenabwehr), since it does not pertain to the state to "promote the public welfare" (Wohlfahrtspflege) through positive measures. As the liberal state, according to the latter possibility, would soon become totalitarian, it must nevertheless be recognized that the notion of the "police" has been progressively enlarged so that the regulations of the state, as based upon article 31 for example, comprise measures which aim more at the procurement of goods and services than at the prevention of future evils.[543] The state, accordingly, has become a veritable instrument of social policies, a means to modify the distribution of wealth. It can thus be asserted, without exaggeration, that in the domain of economic freedom the

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542 Aubert, loc.cit., p.633.

543 Ibid., p.634.

state has lost its traditional meaning of protection which itself has become absorbed by another nebulous concept, that of the "public interest," in terms of which the state might soon be allowed to acquire or to conserve anything as long as it is not prejudicial to the general welfare.[544]

Whilst endeavoring to adhere to the precept that state regulations which delimit the exercise of a freedom must not suppress the freedom itself, two additional observations pertain. First, and with respect to the menace of centralization, it has been remarked, as early as 1918, that in the attempt of making freedom secure, freedom itself has been lost.[545] Second, the avowed principle of the legality of state regulations suffers from a considerable exception. The Federal Council has the authority to issue "independent ordonnances" which, without basis in law, are to safeguard a threatened public order - or interest. This faculty to adopt necessary measures required for the maintenance or re-establishment of the public order is called the "general state power" (pouvoir generale de police) and

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544 Aubert, loc.cit., p.97.

545 Brooks, Civic Training, loc.cit., p.14.

is based on article 102 (IX,X) of the Federal Constitution or on an unwritten constitutional principle called the "general state clause" (allgemeine Polizeiklausel).[546]

Whereas the notion of the public order is said to remain the source of the curtailment of all freedoms, the regulations based on independent ordonnances as justified by the "general interest", however, indicate that the notion of public interest is even more extended that that of the public order. It covers all restrictions commanded by the public order, but justifies still others. Public interest, consequently, is public order augmented by all the political, economic, and social aspirations which the state may consider to be in conformity with the well-being of the population.[547]

In addition to the foregoing observations relative to the curtailment of economic freedom, article 31 was to be restricted as a classical freedom-right beginning in 1848 by the creation of the first federal monopoly over posts - and telegraphs. Successively added were the monopolies of

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546 Aubert, loc.cit., p.638.

547 Ibid., p.761.

telephones and the technical installations of radio and television networks, customs duties (article 24,ter), aerial navigation (article 37, ter), railways (article 26), navigation (article 24,ter), coinage and banking (articles 38 and 39), alcohol (article 32,bis), and gunpowder (article 41).

In addition, the Confederation does exercise a partial monopoly in several fields pertaining to social insurances (article 34, bis, ss.). Finally, the "economic articles" passed in 1947 made the control over economic freedom virtually absolute. As article 31 remained guaranteed from its very beginning in 1874 "except in so far as it is restricted" by federal legislation, so now, and on the basis of the so-called welfare state clause (article 31,bis), the most extraordinary measures were justified to infringe, if necessary, the freedom of trade and industry in order to increase the general welfare and to ensure the economic security of the country. Although the presumption remained that in the sphere of commerce all is lawful which is not against the public order, the economic articles discarded

the type of liberty involved in local freedom and constitutional rights.[548]

Among the remaining more important fundamental rights are those which the Federal Constitution subsumes under the notion of "freedom of opinion": freedom of conscience and belief (article 49), of public worship (article 50), of the press (article 55), and freedom of association (article 56). Freedom of opinion covers, in its Swiss version, all opinions except those which are expressed in the exercise of a trade or an industry, i.e., commercial advertising does not derive from the freedom of opinion, but from article 31.[549]

With respect to article 49, several reservations need to be made explicit. Despite the "inviolability" of its wording, public proselytism is forbidden to children under the age of sixteen. According to paragraph three, the father determines the religious education of the child, due to which the Salvation Army, for example, "got into trouble over

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548 Hughes, Constitution, loc.cit., p.33.

549 Aubert, loc.cit., p.711.

street meetings at which children under sixteen were present without their parents' consent."[550]

Further, a sectarian such as a Quaker or Jehovah's Witness may be punished for refusing military service, since according to paragraph 5 "no one is released from perfor - mance of his civil duties by reason of his religious beliefs." Also, in the case of all conscientious objectors, a proposed "civil service" in place of the military one raises the delicate question whether such a service can legally be admitted in the name of article 49 without revision of article 18: " every Swiss is liable to military service."[551]

Finally, article 49 must be read in conjuction with article 50 in order to distinguish freedom of conscience

> which is guaranteed (in appearance), absolutely, and Freedom of Public Worship, guaranteed subject to two potentially limitless restrictions, "public order" and "decency". (552)

It follows, for example, that not only distribution of religious literature from door to door is subject to regulations

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550 Hughes, Constitution, loc.cit., p.62.

551 Aubert, loc.cit., p.719.

552 Hughes, Constitution, loc.cit., p.64.

against peddling, but that both articles can supersede article 56 (freedom of association) in the interest of religious peace, such that religious meetings can be forbidden if they are not covered by article 56 which itself can curtail the freedom of association to political, social, and economic groups whose means employed are "in any way illegal or dangerous to the state."[553] It has, consequently, not unjustly been observed that article 56 eludes a direct guarantee, and that like the "freedom of the individual" or "freedom of opinion", it stands for an end-state rather than a rule of law, subject to restrictions by all sorts of different laws.[554]

As concerns the freedom of the press, the wording of the article gives the cantons the competence to restrain its exercise by "appropriate provisions against its abuse", subject, however, to the approval of the Federal Council. As the press is controlled in general by the Penal Code, the wording of the present text, dating back to 1898, has given rise to a suggested constitutional revision of the

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553 Aubert, loc.cit., p.722.

554 Hughes, Constitution, loc.cit., p.70.

entire article which in either its old or possibly new version is unlikely to trammel the Executive.[555]

To the extent that individual rights and freedoms are a necessary condition of democracy, physical and intellectual freedoms have been said to constitute its minimal requirements. In this respect, two constitutional provisions remain finally to be examined. The first one pertains to article 45, freedom of settlement. This freedom to reside, however, is not absolute in that cantons set standards and thereby restrictions which, by dating from an antique idea of "settlement", simply no longer conform to the spirit of the times and therefore appear to necessitate a constitutional revision of the entire article.[556] The second one, personal freedom in the sense of physical (corporeal) freedom, has been declared, as indicated above, to be an indispensable element in the legal order of the Swiss federal state. Despite the declared ideals, however, it must also be recognized that existing exceptions to the freedom

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555 Hughes, Constitution, loc.cit., p.69.

556 Aubert, loc.cit., p.699.

of habeas corpus have left its exercise less developed than in other nations up to this point.[557]

In conclusion, and from a legal point of view, problems in constitutional adjudication appear to remain, in Switzerland as elsewhere, linked to the difficulty in specifying the permissible rights and freedoms of individuals. As a result,

> the boundary line between entering the political thicket and dutifully applying constitutional guarantees of citizens' rights to equality and freedom (remains) a misty one. (558)

From the point of view of the evolution of ideas, the trend to secure the happiness of the greatest number, by constitutionally guaranteeing that all necessary measures will be taken to increase the general welfare and to ensure the economic security of the country, appears irreversible. In this respect, constitutionalism has followed two divergent evolutionary paths. Whereas the freedom of expression (physical and intellectual) is today as great as ever (and although not absolute, it probably never has been), economic freedom

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557 Tschani, loc.cit., p.97.

558 Marshall, loc.cit., p.111.

is certainly less from what it was in the last century as it had to compete with two equally forceful sentiments: the taste for equality and the need for security.[559]

Accordingly, the glorification of individual rights has been held to have pitched men against one another. By creating individualism, they have undermined the communal spirit of Swiss federalism. Political freedom, therefore, has in reality become a suppression; for by creating the "pure citizen", plucked of all his individual attributes, it has made all men equal to one another, and this suppression of individual autonomy has led to etatism.[560] In corroboration, it has been maintained that the various constitutional revisions since 1874 have aimed at increasing the well-being of the individual at the inevitable expense of his liberties. Due to the emphasis on material interests rather than on preoccupations of a spiritual nature, the desire to be well-off replaced the will to do good, and by making the state more indispensable to his own well-being

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559 Aubert, loc.cit., p.86.

560 Carpentier et Lannoye, loc.cit., p.99.

through demands for comfort and security, the individual condemned himself to a new bondage. Just as the main features explaining the constitutional evolution have been held to reside in the dual progress of technology and democracy, so these phenomena have therefore been said to lead to the restriction of individual rights and freedoms and to the assumption of all functions and social responsibilities by the state. This has preempted all rights of the individual under the pretext of better to protect him, and in so doing has stripped the individual of his proper autonomy.[561] As a result of this "politics of convenience", and to the extent that the protection by the state takes the form of prohibitions, the freedom of the individual has been sacrificed to his welfare. In Switzerland, therefore, not individualism and political liberalism but etatism, or "this economic anti-liberalism",[562] triumphed over socialism.

In reply to the foregoing observations which might easily lead to the cynical contention that rights are declared inviolable except when laws provide otherwise, it

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561 Rappard, Constitution, loc.cit., p.383.

562 Rappard, Government, loc.cit., p.123.

must be recognized, above all, that all freedoms are not equally or identically guaranteed, if for no other reason than to ask

> to what extent can a constitutional democracy afford to grant the protection of its civil liberties to those who employ them for the purpose of undermining and eventually destroying the constitutional order? (563)

Furthermore, and as the necessary curtailment of certain freedoms during times of acute crises have shown, a democratic, constitutional government confronted with a national emergency can be strong enough to maintain its existence without being too strong so as to subvert the liberties of the people it was called upon to defend.[564] Also, and as regards the alleged loss of individual autonomy, it can readily be admitted that conformism is not a necessary threat to the freedom of opinion as the latter also includes the freedom to think like one's neighbor. Finally, and with respect to etatism or state interventions in almost all aspects of national life, "interventionnisme", as known in Switzerland, is held by some to be a corrective of free enterprise,

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563 Friedrich, loc.cit., p.161.

564 Rossiter, loc.cit., p.3.

whereas socialism is deemed to be its abolition.[565]

To view in retrospect Switzerland's constitutional development, it has become apparent that the Federal Tribunal has drawn a line between fundamental personal liberties and the regulation of the country's economy. Inasmuch as planning is probably not incompatible with free political expression, the liberties of the individual must consequently not be considered as a detached, separate code of rights which would make coexistence with other rights for the maintenance of the common welfare difficult. Rather, in answering the question how far individual liberty can coexist with the liberties and rights of others, the human community and its welfare must be postulated as the ultimate criterion.

As the greatest welfare, however, implies that not all desires can equally be justified, it follows that a hierarchy of values is to be established when needs conflict. Thus, solution of conflicts for the common good demands a choice after examination of possible alternatives, and this choice cannot be defined in terms of proce-

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565 Aubert, loc.cit., p.91.

dure. As a moral evaluation of the common good in which commitment to the public welfare can thus not be identified with the support of a "particular", public welfare remains an objective of reasonable procedure ; freedom, therefore, might well remain a plant "that grows in its interstices."[566]

The Struggle for Womens' Suffrage

Although equality of rights between the sexes is guaranteed as a fundamental provision in most modern constitutions as well as in international human rights conventions, all women in Switzerland were excluded from the right to vote in federal elections and votations until 1971. This restriction, however, did not apply to all cantonal constitutions as several cantons maintained a more generous franchise with respect to their own internal affairs. In some, women had gained the political right to vote in cantonal elections and to sit in courts of arbitration; indeed, their vote had been deemed essential in relation to school and church matters.

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566 Hughes, Parliament, loc.cit., p.147.

Since neither the Constitution of 1848 nor its revision in 1874 had specified sex with respect to suffrage (article 74 of the Federal Constitution stated that "every Swiss" with the exception of certain categories of citizens has the right to vote), the exclusion of women had remained a matter of prevailing practice, of tradition, or of "common" law. Thus although the women suffrage movement had been very active between 1919 and 1954, on numerous occasions initiatives to allow women to vote were defeated by subsequent referenda.

Upon approval by the Chambers in the late 1950's, a proposal to modify article 74 by inserting "all male and female Swiss" without, however, referring the revised text to the consultation of the people, was rejected by the Federal Council which stood opposed to this manner of by-passing a stipulated constitutional procedure.[567]

As late as 1959, when in a referendum on the question of the federal enfranchisement of women, another initiative was defeated by a ratio of approximately two to one, the popular verdict appeared to remain true to tradition. Despite

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567 Aubert, loc.cit., p.72.

this, the three French-speaking cantons of Geneve, Neuchatel, and Vaud, which were soon joined by the first German-speaking canton of Basel, had a majority in favor of political emancipation. In these cantons women suffrage was consequently introduced during the early 1960's.[568]

Opposition to female suffrage, mostly of a sentimental kind, was based on a number of disputable arguments. Why, so it was asked, should women be given the right to vote when they themselves do not want it? Notwithstanding that the opinions of all Swiss women could hardly be known if for no other reason than that cantonal authorities had opposed a general inquiry into this matter as suggested by the federal department of justice in 1950, it can also be maintained that the suffrage is not so much a personal right as a civic duty, a social function which is to be fulfilled even by those who have not asked for it, and in terms of which compulsory voting as practiced by several cantons, is justified. For, after all, many Swiss citizens do not participate in public affairs whilst yet remaining, almost

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568 Gretler and Mandl, loc.cit., p.59.

despite themselves, qualified voters.[569]

Furthermore, since the problem of the division of labor between men and women was said to be more satisfactorily solved by the restriction of civic duties to men, it was assumed to follow that women simply do not understand politics and that their true place in life, therefore, remained the home. This contention was buttressed by the so-called primary duties of women, arising from the " three K's" of an old European tradition: Kuche, Kinder, Kirche (kitchen, children, church). As the first part of the argument would be relevant if democracy could be said to aim at the most "intelligent" decisions only,[570] the second part seems to ignore that all women are not the "queens of their foyers" as the traditional "model" is simply no longer in keeping with present trends. Since the 1970's, for example, publicity campaigns by private employment bureaux show young and elegant mothers who, whilst keeping impeccable homes, still find time to do part-time work.[571]

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569 Aubert, loc.cit., p.406.

570 Ibid., p.406.

571 Gretler and Mandl, loc.cit., p.72.

Apart from numerous other arguments against political emancipation which remain at best unconvincing, a more "rational" argumentation has been based on the principle of equality before the law. Accordingly, equality is assured "when like things are treated alike, and is violated when unlike things are treated alike"; since men and women are deemed to be unlike in all their qualities and works (though not necessarily superior one to the other), "there is therefore no case at all, in the Swiss view, from the argument of equality against the exclusion of women from all political rights."[572]

This point of view, however, remains highly controversial. For when we say that given departures from identical treatment do not detract from the principle of equality, the criteria upon which these departures from the principle take place are obviously crucial. It follows that the concept of "difference" implies a certain ambiguity in that the classification for discrimination should not be arbitrary but just, and that the foregoing interpretation of the difference of treatment reflects a deliberate rejection of the claim of

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572 Hughes, Constitution, loc.cit., p.8.

of equality out of respect for some other debatable value.[573]

As political life, however, appears to be less determined by logic than by experience, so, too, female suffrage in Switzerland followed an often repeated pattern. Introduced as a novel political institution into the cantons, it was later to be accepted on the federal level. Sooner than many observers had expected, women were granted political rights in federal matters on February 7, 1971. This "meant a complete change of attitude on the question in a lapse of 12 years: the two-thirds majority against was replaced by a two-thirds majority in favor."[574]

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573 Marshall, loc.cit., p.153.

574 Gretler and Mandl, loc.cit., p.59.

CONCLUSIONS: SWISS CONSTITUTIONALISM, FEDERALISM, AND DEMOCRACY IN PERSPECTIVE

As a result of the twin victories of democracy and technology, or in the evolution of the social processes of secularization, urbanization, industrialization, and popular participation, the development of Swiss society reflects several possibly irreversible trends which appear to pertain not only to Switzerland but also to any highly developed Western, and particularly European, society.[575]

Among these evolutionary trends, beginning at the industrial stage and proceeding to the tertiary (services) stage, are the following: continued concentration of populations in large urban centers, further decrease in working time granting to leisure time much greater importance, further emancipation of women, rapid technological changes in many fields associated with an increasing complexity in all areas of social life including political structures, and, finally, the growing effect of external

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575 A. Gretler and P.E. Mandl, Values, Trends and Alternatives in Swiss Society (New York, 1973), p.9.

pressures on Swiss society, thereby increasing "universal interdependence."[576]

With respect to increasing universal interdependence, Switzerland had succeeded for a long time to remain relatively immune to external influences because of its traditional principle of neutrality through which it was able to shape the structure of its society according to its own pace and volition. Furthermore, neutrality has been one of the ultimate foundations upon which the Confederation rests, and Switzerland's traditional political isolation was to give internal cohesion to the country's multiplicity of ethnic, linguistic, and religious groups, as well as to ensure its lasting peace among warring nations.

In the rapidly changing world of the twentieth century, however, Switzerland's continued insulated position is being questioned today for a number of reasons. Above all, as interdependence between states has been the result of international organizations pursuing simultaneously economic and political goals, this interdependence has been institutionalized and given a legal framework, a development

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576 Gretler and Mandl, loc.cit., p.9.

which fundamentally modifies political and economic relationships both on a bilateral and unilateral basis.[577]

Further, because one function of Swiss neutrality was to secure economic independence from political restrictions, the interrelatedness of political and economic factors raises questions not only with respect to the soundness of the assumption that economic decisions do not entail political consequences, but also, and perhaps more importantly, whether any small country dependent on international trade and commerce, can retain its national structural preferences under the economic and political pressures of the major powers.[578]

Finally, the growing significance of legal networks among international organizations for all nations beginsto undermine Switzerland's traditional policy of neutrality, particularly so when it is confronted with the questions of membership in the United Nations and the European Economic Community.

Upon joining the League of Nations in 1920, Switzer-

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577 Gretler and Mandl, loc.cit., p.215.

578 Ibid., p.216.

land already had to modify its view on neutrality through the concept of "differential neutrality" (neutralite differenciee), a status which had been accorded to it with the Declaration of London of the same year,[579] and in terms of which Switzerland was obliged to adopt economic sanctions (as opposed to military ones) against possible aggressor states. The resulting implications from the application of this doctrine in the Italian-Ethiopian war during the early 1920's, however, prompted Swtizerland to withdraw from the League; the request to be henceforth released from its "differential" obligations took effect in 1938.[580]

With respect to the United Nations, Switzerland has not yet joined the World Organization, even though it is a member of all its specialized agencies. Its peculiar status to the rest of the world as based on the new concept of "neutrality and solidarity", however, soon led to a growing feeling of uneasiness as regards the notion of "solidarity." A frequently voiced reproach is that Switzer-

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579 H. Tschani, Profil der Schweiz (Zurich, 1967), p.423.

580 Ibid., p.424.

land's position of neutrality is more egoistic rather than solidaristic.[581]

Although opposition to membership in the United Nations had for long been based upon insistence on the concept of "integral neutrality" (it could harly be expected that the United Nations in its early years was to accord to Swtizerland a special status), and although an opinion poll conducted in 1969 concerning the possible entry into the World Organization had indicated that only one third of those questioned were in favor of it (with 47% against and 23% undecided),[582] in 1972 most political parties were in full agreement with membership in the United Nations, or resigned to it. The result, according to some observers, is that there is no longer any question whether Switzerland will join the World Organization.[583]

As a similar evolution of ideas is said to have taken

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581 Tschani, loc.cit., p.428.

582 Daniel Frei, "Aktivere Aussenpolitik der Schweiz?", Europa Archiv, Jahrgang 24, No.18, Sept.1969,p.656.

583 Gretler and Mandl, loc.cit., p.217

place concerning Switzerland's relationship with the European Economic Community, several more cautious observations, however, are in order. The implications of the political aims of the European Economic Community impose a number of special problems, in addition to the formal amendment required for Switzerland's entry into the United Nations.[584]

As exemplified by the European Convention of 1950 on the Rights of Man, states which subscribe to its declarations in conformity with articles 25 and 46 (recognition of competence and of jurisdiction of its Commission and Court, respectively), would henceforth not only be involved in a legal international system but also remain subject to a superior jurisdiction. Although eight nations had accepted the jurisdiction of the European Court by 1966, in the case of Switzerland (and in view of article 13 of the Convention which stipulates that each signatory state must provide for a means of appeal against its own actions in violation of the Convention), this eventuality would entail unprecedented modifications of its political

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584 Aubert, loc.cit., p.427.

system such that the entire organization of its constitutional jurisdiction would have to be revised because there remain today certain acts of the federal government which escape from all censorship.[585]

With respect to the increasing tertiarization of the economy, numerous changes characterize the development of Swiss society during the latter half of this century. To the extent that aspirations for rising productivity necessitate a changeover from expansive to intensive economic growth, this trend entails accelerated technological innovations and a concomitant greater demand for an increase in the skill levels of the resident population.

Accompanied by the promotion of universities and technical schools, such a development is leading in the following directions: administrative planning and maintenance staffs have partially replaced production personnel, and policies to stabilize the number of incoming foreign workers have been adopted. Also, as the delivery of many tertiary services utilize skilled women, their demand for

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585 Aubert, loc.cit., p.641.

better working conditions and equal opportunities will increase. Further, because society has changed from an agrarian and artisanal pattern to an industrial and service-oriented one with the concomitant loss of the extended family structure to a nuclear one, the protective and welfare functions of the family have been subsumed under the extensive system of social insurances.[586] In addition, the factors of growing prosperity, economic independence, and urbanization continue to concentrate population around major centers such that the suburbs grow most rapidly, and, as the present process of urbanization is characterized by the political, economic, and cultural domination of the cities, this process is held to lead eventually to the virtually complete urbanization of the Swiss population.[587] As regards private property, there is a decline in the number of landowners and a relative decline in the number of home owners. The result is that the rising degree of prosperity is not correspondingly reflected in greater private property:

> rather than tending toward a society with broad distribution of property, the line of direction would thus be

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586 Gretler and Mandl, loc.cit., p.96.

587 Ibid., p.188.

> an opulent consumer society paying high rents for high standards of comfort but not establishing any roots through ownership. (588)

Finally, with a view towards predicting the future, the economy is seen to move toward a structure in which 10% of the working population will be engaged in the primary sector, 10% in the secondary, and 80% in the tertiary. This would imply a great decline in the importance of industrial capitalism and its related problems as jobs in the tertiary and quaternary sectors would henceforth be performed largely by various state institutions, resulting in a shift away from the present-day private economy to them.[589]

In view of the foregoing changes and predictions, however, two cautionary observations pertain. First, each nation individually responds to modernization through expression of its own culture and idiosyncracies, and because progress continues to occur even in the most advanced countries, those trends which are characteristic of all modern societies and those which reflect individual peculiarities

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588 Gretler and Mandl, loc.cit., p.166.

589 Ibid., p.176.

can be conjectured with imagination, but not predicted with assurance. Second, to agree that something is possible is not the same thing as to say that it is probable. For the time being, therefore, we can set aside all questions about the probable future of industrial society,[590] if for no other reason than if there is such a thing a growing human knowledge, we cannot predict today what we shall only know tomorrow.

What remains less debatable, however, is that in the perspective of Swiss constitutionalism, federalism, and democracy, three fundamental tendencies of our time prevail: the growth of the central state, the decline of parliament, and the sacrifice of individual freedom to equality and comfort.[591] As this has involved unforeseen dimensions of state intervention due to the more pressing, comprehensive, and diverse tasks which arose in the development of modern Swiss society, Swiss democracy, curiously enough, appears to insist upon the right of the state to intervene in the entire life of the nation. Yet whereas the powerful

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590 B. Moore, Jr., Political Power and Social Theory (New York, 1965), p.181.

591 Aubert, loc.cit., p.53.

industrial, financial, and commercial corporations can apparently prevent this development from being carried too far, the problems posed to modern Swiss democracy by the increasingly technical nature of political decisions and the need for efficiency might well be more acute because of its system of referenda and initiatives. Since low levels of voting participation have become common in referenda, the influence accorded to orgnized interest groups is enhanced to such an extent that it appears to check the impulse which could be given to reform through the use of the initiative. Conversely, and inasmuch as the people's "veto" has been supplanted by that of powerful pressure groups, the ideals of Switzerland's direct or semi-direct democracy have become largely irrelevant to the increasingly technical issues and complicated political decisions of our day.

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