

Suitzako kantonamenduak “mikro-estatu”tzat jotzen dira, eta ahalorde handiak dituzte. Ez dago suitzar naziorik, baina bai “desiraren nazioa”, elkartzen dituzten loturak etengabe eguneratu nahi dituzten herritarren borondateak sortutakoa: “Elkarrekin, ezberdin izaten jarraitzeko eskubidea defendatuko dugu”<sup>1</sup>. Horren ondorioz, herrialdean ez da mugimendu sezesionistarik sortu.

Giltza-Hitzak: Suitza. Federalismoa. Kantonamenduak. Sezesioa (sezesionik eza). Eleaniztasuna. Desiraren nazioa. Subiranotasun partekatua. Aniztasuna.

Los cantones suizos se consideran “micro-estados” y disfrutan de amplios poderes. No existe una nación suiza, pero sí una “Nación por deseo”, forjada por la voluntad de los ciudadanos de renovar constantemente los vínculos que los unen: “Juntos, defendemos el derecho de permanecer diferentes”<sup>1</sup>. Como resultado, no se han dado movimientos secesionistas en el país.

Palabras Clave: Suiza. Federalismo. Cantones. (No) Secesión. Multilingüismo. Nación por deseo. Soberanía compartida. Diversidad.

Les cantons suisses sont considérés comme des «micro-États» et jouissent de larges pouvoirs. Il n’y a pas une nation suisse, mais une «nation par volonté» forgée par le désir des citoyens de renouveler constamment les liens qui les unissent: «Tous ensemble, nous défendons le droit de rester différents»<sup>1</sup>. En conséquence, il n’y a eu aucun mouvement séparatiste dans le pays.

Mots-Clés : Suisse. Fédéralisme. Cantons. (Non) Sécession. Multilinguisme. Nation par volonté. Souveraineté partagée. Diversité.

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1. De Rougemont Denis. *La Suisse ou l'histoire d'un peuple heureux*, L'âge d'homme, Lausanne 1990, p. 18.

# In the country of William Tell, the myth became reality

Some reflections about cantons'  
sovereignty

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## 1. Presentation of the chapter

The title of this paper sounds perhaps mysterious...

What is a myth? It is «A popular belief or story that has become associated with a person, institution, or occurrence, especially one considered to illustrate a cultural ideal»<sup>2</sup>.

In the mental construction of Switzerland, William Tell<sup>3</sup> plays an important role, representing the proud mountain dwellers fighting against the foreign oppressors in the time of the original foundation of the Old Swiss Confederacy in the early 14<sup>th</sup> century. Since then, and despite a popular veneration, the historicity of William Tell has been subject to debate. No matter that he existed or not. Even if it is a legend, he is perceived as an absolute reality in the collective unconscious of Swiss.

In our case, the myth is something else: the sovereignty of cantons according to art. 3 of the Federal Constitution. From a legal point of view, it seems impossible. Like William Tell, it cannot exist. But like for the hero, everything has been done by the Swiss authorities to give to this legend all appearances of reality.

Myth plays an important role in Switzerland, because there are very few elements able to keep together so different cantons. Therefore it has been necessary to find some elements beyond the classical unifying elements like language, culture or ethnicity. The basic myth is the unity within diversity, symbolized by the country's multilingualism<sup>4</sup>. Over the years, further embellishments were added to

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2. <<http://www.thefreedictionary.com/myth>>.

3. <[https://en.wikipedia.org/wiki/William\\_Tell#Hitoricity\\_debate](https://en.wikipedia.org/wiki/William_Tell#Hitoricity_debate)>.

4. The epitome of this mythical multilingualism has been reached in 1938; in order to strengthen the national unity in a troubled period, Switzerland recognized also Romansh ( a language spoken only by 0.5% of the population) as the fourth national language, in a popular vote with an almost stalinian majority of 91.6% yes (even 98.9% in Geneva); this unique process (insisting on diversity in order to reinforce unity) is the best proof that preservation and promotion of cultural and linguistic diversities were the basement of the national cohesion.

the national myth, such as William Tell, orderliness, hard-work, cleanliness, precision, the humanitarian calling symbolized by the Red Cross, etc. «The establishment of the Swiss national myth was a highly successful operation of social psychology, because the origins of the myth were, by and large, not just accepted, but actually forgotten.<sup>5</sup>». But authorities have always been clever enough to give a certain substance to the myth, in other words to try to make the reality correspond to the myth. This is precisely the goal of this article: to show how, with the time being, what started like a myth became an everyday reality.

After a short but essential historical introduction, whose goal is to remind that Swiss federation is in fact resulting from a centralizing process, we shall continue in exploring how the country has been able to deal with the necessity to centralize too small cantons while protecting their specificities.

If we try to consider the status of Swiss cantons in order to measure their level of «sovereignty», we shall see that there are (at least) seven fields in which cantons enjoy a considerable amount of independence. Seven, like the seven Federal Councilors, the seven deadly sins, the seven Samurai or the Magnificent Seven mercenaries.

- Mythically (see. 3.);
- Legally (see. 4.);
- Practically (see. 5.);
- Financially (see. 6.);
- Democratically (see. 7.);
- Contractually (see. 8.);
- Participatorally (see. 9.).

And we shall discover that from several perspectives, cantons enjoy not only many powers, but also a lot of «consideration» in order to enhance their sense of «statehood», closely related to sovereignty. Some of them call themselves «Republic», like the «Republic and Canton of Geneva, of Jura, of Neuchâtel»; they all have constitutions, flags, coat of arms, etc., all symbols of sovereignty.

## 2. Historical Reminder

Usually, historical introductions are quite boring. But in this case, it is really necessary to understand in which context the cantonal sovereignty is enshrined. Contrarily to Spain, a country which was previously quite unitary, it is not useless to remind that in Switzerland federalism has been firstly used to unify the country. People considering that federalism is synonym of decentralization should keep in mind the Swiss example, because in this case federalism has been called for a completely different goal. Let's present this evolution very briefly.

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5. GRIN François. Language Policy in Multilingual Switzerland: Overview and Recent Developments.

Before 1798, Swiss cantons were independent and linked together by a very complicated network of unequal alliances forming the so called Swiss Confederation<sup>6</sup>.

In 1798, Napoleon invaded Switzerland to bring the enlightenment of the French Revolution to the cantons whose democratic dimension faded away with the time. Of course, he was also interested by the wealth of some rich cantons like Bern. After the conquest, Napoléon transformed the old Confederation into a central and unitary state like France: the Swiss Republic. But this style of governance was against all the traditions of the inhabitants. They rebelled and there were five years of riots. In 1803, Napoleon admitted that his system was not possible for Switzerland and that a more "federal" system would suit better.

In 1815 after Napoleon's fall, cantons returned to a full sovereignty. But meanwhile times had changed. Progresses of the Industrial Revolution created a first "globalization" and within this context 25 little cantons with 25 different currencies, armies, borders and taxes were completely out of time and out of place.

Tensions concerning the future of the State started to appear. On the one hand catholic cantons (which were conservative) wanted to preserve this old system. On the other hand protestant cantons (which were more progressive) preferred the creation of a federation like the United States. Tensions increased and reached their epitome with a civil war between catholic and protestant cantons, the so called "Sonderbund War". Fortunately, as the protestant cantons were much stronger than the catholic cantons, the war was very short and does not represent a trauma in Swiss history. But it means that protestant cantons could impose to the others the transformation of the old Confederation into a full fledged federal state.

It means also that the Swiss Federal state is the result of a centralizing process. Everything that we shall say about the respect given to the cantons should be replaced in this context: Switzerland is a country in which centralization has brought wealth and prosperity. From that point of view, Federalism should not be seen as uniquely a step towards decentralization – and then the collapse of the State.

In Switzerland, federalism meant the creation of a centralized because more efficient state, BUT in such a way that cantons can preserve their identities, specificities and differences. And we shall see that the country has been quite successful in managing this way of juggling with two conflicting concepts: centralization AND decentralization.

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6. For convenient and diplomatic reasons, this ancient name has been preserved, even if Switzerland is NOT a Confederation but a classic federation; the name «Confederation» designates also the central power in Bern.

### 3. The Mythical Dimension

The slogan of Switzerland is: «Unus pro omnibus, omnes pro uno» ; it is a Latin sentence that means «One for all, all for one» in English. It is known as also the famous motto of Alexandre Dumas' Three Musketeers.

The text of the 1848 Constitution illustrates quite well this will to manage at the same time centralization and decentralization (this is an English version of the original 1848 text)<sup>7</sup>:

**IN THE NAME OF ALMIGHTY GOD!**

The Swiss Confederation,

With a view to *strengthen the Union* of the Confederates, to maintain and to *promote the unity, power and honor of the Swiss nation*, has adopted the following Federal Constitution:

**CHAPTER FIRST**

**GENERAL PROVISIONS**

**Article I**

*The People of the twenty-two sovereign cantons of Switzerland, united through the present union, to wit Zurich, Berne, Lucerne, Uri, Schwyz, Unterwalden (upper and lower), Glarus, Zug, Freiburg, Soleure, Basel (City and Country), Schaffhausen, Appenzell (both Rhodes), St. Gallen, Grisons, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, Geneva constitute collectively the SWISS CONFEDERATION.*

**Article II**

The object of the union is: to insure the independence of the country against foreign powers; to maintain tranquility and order in the interior; to protect the liberty and rights of the Confederates, *and to promote the common welfare.*

**Article III**

*The Cantons are sovereign, so far as their sovereignty is not limited by the Federal Constitution, and accordingly they exercise all rights which are not delegated to the Federal power.*

We have to note that these first provisions insist on the two aspects.

Firstly, the *centralized* dimension: it is written that the Swiss Confederation wants to strengthen the alliance and that the goal of this Constitution is to increase the common prosperity (of the citizens).

Secondly, the *decentralized* dimension: it is written twice that the 22 cantons (19 full cantons and 6 half cantons; the distinction does not exist anymore, and currently we count 26 cantons with the new Jura) are «sovereign».

Moreover, let's note that between the Preamble and the three first provisions, the Constitution tries to sit on the fence and to make a subtle «mix» between the Swiss nation (a concept that will leave the constitution in its second 1874 version), the sovereign cantons, the «people of the cantons» and the «Confederates».

These provisions still exist in the 1999 Constitution (the third and until now last Federal Constitution of Switzerland after those of 1848 and 1874):

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7. <<https://archive.org/stream/federalconstitu00switgoog#page/n13/mode/2up>>; italics have been added by the author.

#### **Preamble**

The Swiss People and the Cantons,

[...]

resolved to *renew their alliance* so as to strengthen liberty, democracy, independence and peace in a spirit of solidarity and openness towards the world,

*determined to live together with mutual consideration and respect for their diversity,*

[...]

adopt the following Constitution:

#### **Title 1: General Provisions**

##### **Art. 1 The Swiss Confederation**

*The People and the Cantons of Zurich, Bern, Lucerne, Uri, Schwyz, Obwalden and Nidwalden, Glarus, Zug, Fribourg, Solothurn, Basel Stadt and Basel Landschaft, Schaffhausen, Appenzell Ausserrhoden and Appenzell Innerrhoden, St. Gallen, Graubünden, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, Geneva, and Jura form the Swiss Confederation.*

[...]

##### **Art. 3 Cantons**

*The Cantons are sovereign* except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation.

If you compare with the Preamble of the 1978 Spanish Constitution, it seems to a foreign reader that the «Spanish Nation» (= the «Central State») takes an almost exclusive lead.

*The Spanish Nation*, wishing to establish justice, liberty and security, and to promote the welfare of all who make part of it, *in use of her sovereignty*, proclaims its will to:

[...]

#### **Section 2.**

The Constitution is based on *the indissoluble unity of the Spanish Nation*, the common and *indivisible homeland of all Spaniards*; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.

## **4. Art. 3 of the Constitution from a legal perspective**

In 1848, all cantons were not enthusiastic to lose their independence and to merge into a federal state. They were entering into a new statute: it was finished to be independent, but they remained theoretically sovereign.

The scope of article 3 is quite wide and could be topic of a thesis. If we try to summarize, this provision is a legal program as well as a legal rule.

### **4.1. The first part of the Provision**

It concerns firstly the construction of the federal state. But this dimension is extremely theoretical. It was quite difficult in the 19<sup>th</sup> Century to conceive a system of shared sovereignty. Therefore theorists have tried to elaborate some complicated systems in order to justify the federal state from a legal point of view (theory of the state).

In the 21<sup>st</sup> Century (what could be a revealing element for Spain and Catalonia), this discussion has lost its interest, especially since the end of WW II. The trend towards always more and more international co-operation, with a lot of international organizations, and also taking into account the economic, cultural and social globalization, as well as the necessity to evolve from the «foreign policy of the states» towards a «world internal politics»<sup>8</sup>, all these elements make the attachment in the omnipotence of the State as dangerous and obsolete. No State (except perhaps Northern Korea) can pretend to be totally independent, and even less a small state like Switzerland. Moreover, the distinction between States and all other political entities is always more and more confusing, especially due to the evolution of international public law since the end of WW II. Nowadays, transitions and differences between federations, confederations and decentralized States are blurred.

It means that it is less difficult than previously to recognize the «sovereignty» of a member state. Therefore this important consequence: art. 3 is not a theoretical construction of the federal State, it is rather a program that the State has to follow in order to preserve the difficult<sup>9</sup> balance between the necessities of creating a new centralized state while preserving the cantons.

Of course, this necessity derives from the fact that the creation of Swiss federation is a «bottom-up» process. Historically, initial states are the cantons, and from that point of view article 3 has an essentially political reach and illustrates a principle: cantons have to remain States, as they were previously, it means «originating public powers».

We shall see hereafter that federal authorities have applied this principle with efficiency and a great respect for the cantons.

## 4.2. The second part of the provision

There is a second part of article 3, giving an immediate concretization to the political necessity to consider cantons as states. It is foreseen in the Constitution that any amendment of the allocation of powers between the Confederation and the cantons, in other words any transfer of power from the cantons to the Confederation, requires the double majority of voters and of cantons.

It means that cantons cannot be deprived of a power without their consent, at least without the consent of a majority of cantons, according to the rule of the mandatory referendum.

### Art. 140 Mandatory referendum

- <sup>1</sup> The following must be put to *the vote of the People and the Cantons*:
- amendments to the Federal Constitution;

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8. «*Der Weltfriede ist nicht das goldene Zeitalter, sondern sein Herannahen drückt sich in der allmählichen Verwandlung der bisherigen Außenpolitik in Welt-Innenpolitik aus*»; VON WEIZSÄCKER Carl Friedrich, Bedingungen des Friedens, in *Physikalische Blätter*, 19. Jahrgang, 1963, Heft 11, Nr. 2 p. 489.

9. Some authors use more admiring terms to describe this unique work of preserving cantonal sovereignty while creating a unitary State.



- b. accession to organizations for collective security or to supranational communities;
- c. emergency federal acts that are not based on a provision of the Constitution and whose term of validity exceeds one year; such federal acts must be put to the vote within one year of being passed by the Federal Assembly.

This is the best possible guarantee of the subsidiarity principle, an important principle for all federations, which is also enshrined in the Swiss Constitution:

**Art. 5a Subsidiarity**

The principle of subsidiarity must be observed in the allocation and performance of state tasks.

The Confederation cannot deprive cantons of their powers without the consent of – at least – a majority of cantons. Neither the government nor the Supreme Court can deprive cantons of their original powers: only cantons themselves can commit such a «power suicide», meaning that they accept to give up some of their powers.

Why did it happen that cantons have accepted this restriction of their sovereignty? With the globalization, undoubtedly it becomes sometimes too heavy, too complicated or too expensive for the cantons to exercise a certain power. Consider for instance the civil and criminal procedures. They have been cantonal for a long time, but with the globalization of crime it became too unproductive to have 27 different criminal procedures and 27 different civil procedures. Therefore cantons accepted quite easily to transfer this power to the Confederation.

## **5. The Practical Dimension**

There are – at least<sup>10</sup> – two institutions which take into account in a very practical way the necessity to give great consideration to the cantons: the Federal Council and the procedure of consultation.

### **5.1. The Federal Council**

How is it practically possible to take into account different cantons into State institutions? The *Founding Fathers* of the Swiss Constitution have found a practical and unique form of government. Instead of having one single Head of state, one prince, one president or something like this, the supreme executive authority of the country is a collegial body comprising seven persons representing seven cantons. With the time being, this representativeness has been extended to the necessity to take also into account different political parties, different genders and different languages. But at the beginning in 1848, as there was only one political party and when only men could be elected, the goal was really to represent the cantons. As such, cantons are directly involved into the representation of the government.

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10. I would never pretend that these are the only two examples; it is just a personal opinion.

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## II.-FEDERAL COUNCIL

### ARTICLE LXXXIV

The members of the Federal Council are elected by the Federal Assembly for the term of three years among any citizens of Switzerland who are eligible as members of the National Council. *Only one member, however, is allowed to be chosen from the same Canton.*

On November 16<sup>th</sup>, 1848, the Federal Assembly (Parliament) has elected the first Federal Council. Please note that 168 years later it has never been replaced as a whole, but only partially, which makes of it probably the most stable government in the world.

– Jonas Furrer from Winterthur	Canton Zurich
– Henri Druey from Moudon	Canton Vaud
– Ulrich Ochsenbein from Nidau	Canton Bern
– Martin Josef Munzinger from Olten	Canton Solothurn
– Stefano Franscini from Bodio	Canton Tessin
– William Matthias Naeff from Altstätten	Canton St-Gall
– Friedrich Frey-Herosé from Lindau	Canton Aargau <sup>11</sup>

From the early beginning, the composition of the Federal Council took care of the cantons, as its seven members should represent seven different cantons. Typically, the Federal Councilors were representing mostly big cantons, but were coming from small cities... Also according to the tradition (because none of this rule was enshrined in the Constitution) two members were catholic (but at the beginning they did not come from the losers of the war) and two did not speak German. The respect of diversity has always been the core of the Swiss politics.

## 5.2. The Consultation procedure

This is another quite remarkable achievement for the cantons: the right to be consulted *before* the adoption of any legislation. Of course, they are not the only ones to be consulted (experts, political parties, interested groups and organizations), but it means that the Federal State will never adopt any legislation without a due opinion of the cantons. And of course if cantons are completely reluctant to a draft, the draft is amended, or it is abandoned before its adoption... and not like in France where sometimes new laws are contested by riots on the street and are abandoned after endless political disputes.

The importance of this process increased with the time. It was not formerly mentioned in the two first constitutions (even if traditionally respected), but now it is enshrined in the new 1999 Constitution:

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11. In fact, Lindau is not in the canton of Aargau, but the main criteria was the canton of residence; many years later, some candidates to the Federal Council had to move hastily to another canton in order to fulfil the requirement.

**Art. 147 Consultation procedure**

*The Cantons, the political parties and interested groups shall be invited to express their views when preparing important legislation or other projects of substantial impact as well as in relation to significant international treaties.*

## **6. The Financial Dimension**

### **6.1. Fiscal Federalism (in a nutshell)**

As we have seen previously, cantons enjoy many powers. In order to implement these powers, they also have the right to levy taxes.

Cantons, but also municipalities, collect direct taxes. They can tax the income and wealth of citizens and firms. They can also collect usage charges for all their activities.

On the contrary, the Confederation is more responsible for the indirect taxes, the value added tax, tax on mineral oil, custom excises etc. It collects also a federal direct tax.

But cantons and municipalities levy the important direct tax on the revenue and fortune of natural and moral persons.

As a result of this generosity the global budget of the Federal state can be roughly divided in three equal parts between the Confederation, the cantons and the municipalities:

«In 2010, public incomes of Confederation, cantons and communes have reached 153 billion francs, split in three parts with 34 percent to the Confederation, 42 percent for cantons and 23 percent for municipalities, a division which reflect quite well the congruence between revenue and expenditure.»<sup>12</sup>

Another division is worth noticing concerns the Swiss National Bank. According to art. 31 para. 2 of the law concerning the Bank<sup>13</sup>, «The part of the profit which exceeds the dividend returns for a third to the Confederation and for two thirds to cantons.» This calculation method has been reasserted in a new convention signed on November 11<sup>th</sup>, 2016, between the National Bank and the cantons concerning the allocation of its benefit<sup>14</sup>. It means that cantons generously receive two thirds of at least one billion Swiss francs a year, which allow them to live high on the hog.

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12. DAFFLON, Bernard, 'Le fédéralisme financier suisse : état des lieux et réformes récentes', in LEROY, Marc, et ORSONI, Gilbert (éds), *Le financement des politiques publiques*, Bruylant, Bruxelles 2014, chapitre 22 pages 605-654.

13. Loi fédérale sur la Banque nationale suisse (Loi sur la Banque nationale, LBN), du 3 octobre 2003 (RS 951.11) ; <<https://www.admin.ch/opc/fr/classified-compilation/20021117/index.html>>.

14. <[http://www.snb.ch/fr/mmr/reference/pre\\_20161110/source/pre\\_20161110.fr.pdf](http://www.snb.ch/fr/mmr/reference/pre_20161110/source/pre_20161110.fr.pdf)>.

## 6.2. Its Signification

This allocation of finance has two significations.

Firstly, it means that money follows power (or vice-versa). Even if the reality is not as simple (because there is also a financial equalization), in Switzerland cantons enjoy the necessary financing of the powers and tasks which are delegated to them. They do not have to beg for a financial support, or even for their whole budget as in many decentralized states. They are not held by the golden leash of the central state. It is the so called principle of fiscal equivalence, which is widely respected in Switzerland.

Secondly, it means that the central state loses the control of a large amount of public money. Looking at the Swiss example, the Confederation (= the central state) controls only 34 percent of public finance, meaning one third of it. A centralized state which would consider a decentralization process having the same size than those of Switzerland should give up two thirds of its resources. It is therefore not surprising if no single government in the world would accept such a loss of control.

## 6.3. Illustration with two anecdotes

In France, the president François Hollande has decided to redesign the French regions in order to make of them more powerful entities. The idea was to make them able to compete with quite identical European regions. But French authorities who cannot forget that France is a centralized country, have limited the transfer of powers to the new regions. As a result, the budget of all 15 regions of metropolitan France represents *less* than the budget of Catalonia<sup>15</sup>... Moreover, this new regional law called NOTRe<sup>16</sup> has erased the general clause establishing the regions' capacity to act beyond the powers which have been attributed to them. From now on, regions are strictly limited to their specific tasks.

Another example come from Africa, where local collectivities are in bad shape. I was participating to a conference about decentralization in Senegal, and when trying to make a comparison between the finances of decentralized entities in Senegal and in Switzerland, I realized that the budget of the canton of Vaud was much higher than the budget of Senegal as a country... Moreover, all decentralized entities in Senegal draw only very limited resources (a few percent) from the regular budget of the country.

In such a context (France or Senegal), the limited resources of the regions contribute also to their limited importance and recognition, and consequently upon their identity.

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15. <<http://www.20min.ch/ro/news/monde/story/La-France-va-passer-a-13-regions-en-metropole-14336541>>.

16. Loi sur la Nouvelle Organisation Territoriale de la République (NOTRe), promulguée le 7 août 2015.

## 7. The Democratic Dimension<sup>17</sup>

Switzerland is one of the few countries in the world where citizens enjoy so many possibilities to take part in the decision making process of the country through direct democracy.

Is there an influence of direct democracy upon the sense of sovereignty of the cantons? There are again two dimensions in the reinforcement of the cantonal identity, because direct democracy takes place at the federal but also at the cantonal level.

### 7.1. Direct Democracy at Federal Level

At the federal level, direct democracy implies rather to reinforce the role of citizens; it is the reason why we speak in Switzerland of «the sovereign people», because people can decide about almost everything. Nevertheless, constitutional amendments require the double majority of people and cantons, what gives of course an important weight to the cantons, and even a strategic position<sup>18</sup>.

But the direct democracy consists of two main instruments: the popular referendum (compulsory in the case of Constitutional amendment, optional for the laws) and the popular initiative. It is a possibility given to 100'000 Swiss citizens to ask for a constitutional amendment concerning almost any possible topic. In these cases, the double majority is also required. Most of the time, initiatives are rejected (because they are not consensual enough), but they represent the engine (or the pepper) of Swiss political life, because they bring to the political agenda some tricky topics politicians would prefer not to deal with. In the history of direct democracy, 163 initiatives have been rejected and 19 have been accepted<sup>19</sup>.

As the double majority is required, cantons sometimes have a great weight in an initiative. As a matter of fact, there have been some cases (more in the recent years) where it has not been possible to reach one of the two majorities, meaning that there is a real difference of approach between the citizens and the cantons.

Let me illustrate this with a recent example. The Christian Democratic Party has launched an initiative aiming at an improvement of the fiscal situation of married couples<sup>20</sup>. In Switzerland, for the Federal tax, the revenues of men and women by the married couples add themselves, which drives to an artificial increase of their taxes (the so called «cold progression») for some 80'000 wealthy couples.

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17. This has also to do with the compulsory referendum, see D.2.: The second part of article 3.

18. We have already spoken of this double majority in the case of compulsory referendum whose goal is the power transfer from the cantons to the central State (see. 4.2.).

19. <<http://www.bfs.admin.ch/bfs/portal/fr/index/themen/17/01/key.html>>.

20. Initiative populaire du 5 novembre 2012 «Pour le couple et la famille - Non à la pénalisation du mariage» (FF 2015 4403).

The Catholic Party presented its initiative as a fiscal one, but it tried to insert in the Constitution a provision specifying (without obvious necessity) that the marriage is the union between a man and a woman, closing the door to the «same sex marriage». Why? The answer underlines the strategic importance of cantons. An acceptance of the fiscal initiative would have put in the Constitution the strict definition of marriage. It would then have been very difficult to create any legal means introducing the same sex marriage, because it would have required not only a legal amendment, but also an amendment of the Constitution. As a majority of cantons are rather small, catholic and conservative, it would have become impossible (or at least extremely difficult) to amend the Civil Code in such a way to accept same-sex marriage. On 28 February 2016, if a majority of cantons have accepted the Catholic initiative, a little majority of citizens living primarily in the most populated urban (and therefore more progressive) areas has rejected the text. This reflects very well the difference between citizens and cantons... They play a different role in the direct democracy at the federal level.

The necessity of a double majority (citizens and cantons) means that sometime only one of the majority is reached. This case is quite seldom, but it happens.

In the history of direct democracy in Switzerland, there have been 13 cases where the majority of cantons and citizens did not coincide. Four times, citizens have rejected a draft that a majority of cantons has accepted, but *nine times* a majority of cantons torpedoed a draft approved by a majority of citizens.

Among the four times where citizens have rejected an amendment that cantons would have approved, the initiative of PDC on married couples taxation is the fourth case. The last one goes back 13 years ago.

On November 24<sup>th</sup>, 2002, the UDC initiative against abuses in the asylum has been accepted by 10 cantons and 5 half cantons, but rejected by 50.1 percent of citizens.

On March 3<sup>rd</sup>, 1957, the Constitutional provision about emergency preparedness has been rejected by 51.9% of citizens, despite its approval by 12 cantons and 4 half cantons.

On October 23<sup>rd</sup>, 1910, an initiative aiming at the election of the National Council (the lower Chamber of the parliament) according to the proportional representation, has been approved by 10 cantons and 4 half cantons, but rejected by 52.5 percent of voters.

But the reverse is more frequent. There are *nine cases* where the majority of cantons has torpedoed constitutional drafts accepted by the people. A double case goes back to June 12<sup>th</sup>, 1994, where a provision about culture and another one on the easier citizenship for young foreigners, has been rejected by a majority of Cantons.

In March 2013, a majority of Germans-speaking and rural cantons torpedoed a reform of family policy. A constitutional provision should have guaranteed enough places in crèches and day-care centers, but a majority of conservative cantons (which defend a more traditional vision of the family) could block a draft which has been widely accepted by 54.3% of voters and all urban and French-speaking cantons.

## 7.2. Direct Democracy and Disruption of Democratic principle?

The weight given to the cantons by direct democracy is sometimes considered as a violation of the basic principle of democracy «One man one vote», because a voter in a small canton has more political weight and more influence than a voter in a big canton.

In Switzerland, the small rural canton of Appenzell Inner-Rhoden (which has half a voice in these constitutional votes) has less than 16'000 inhabitants, and the canton of Zurich has more than 1'400'000 inhabitants (with one voice). It means that the inhabitant of Appenzell weights as much as 44 citizens of Zurich. This is by the way a classical feature of federations. In USA it is the same between a voter from Rhode Island and a voter from California; or in Germany between Bremen or Hamburg and Bade-Württemberg or Bavaria.

But for the supporters of federalism, this small and quite arithmetical disruption of the democratic is nothing compared to the fact that federalism brings democracy closer to the citizens, allowing them to choose their authorities and to exercise direct democracy at two levels instead of one only.

## 7.3. Direct Democracy at Cantonal Level

But direct democracy plays an important role at the cantonal level, because citizens of the cantons vote regularly about topics concerning exclusively their canton itself. There are popular votes at the federal and cantonal (and even local) level in Switzerland about every three months<sup>21</sup>. The Institute of Federalism publishes a Newsletter enumerating and describing all topics submitted to the cantons' citizens. Every year, there are more than one hundred votes in the Swiss cantons, and undoubtedly this possibility for citizens to vote upon cantonal topics reflects and reinforces the cantonal statehood<sup>22</sup>.

## 8. The Contractual Dimension

An important feature of the states is their treaty-making power. Swiss cantons enjoy the right to conclude agreements at the national level but also at the international level.

### Art. 48 Intercantonal agreements

<sup>1</sup> The Cantons may enter into agreements with each other and establish common organisations and institutions. In particular, they may jointly undertake tasks of regional importance together.

[...]

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21. This period is not official, but taking into account the great number of initiatives and referendum, it is necessary to organize popular votes almost every three months.

22. This Newsletter which illustrate the extreme richness of direct democracy at the cantonal level can be found under: <[http://www.unifr.ch/ius/federalism\\_fr/prestations/newsletter/votations\\_cantonales](http://www.unifr.ch/ius/federalism_fr/prestations/newsletter/votations_cantonales)>.

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<sup>3</sup> Agreements between Cantons must not be contrary to the law, to the interests of the Confederation or to the rights of other Cantons. The Confederation must be notified of such agreements.

[...]

According to art. 48, cantons are free to conclude agreements with each other. This «treaty-making power» has of course a great importance for the «statehood» of cantons.

Cantons make a large use of this possibility and have concluded hundreds of agreements, which are traditionally called «Concordates» in Switzerland. The latter can link 2 or 3 cantons, cantons at a regional level or even all cantons.

A good but quite controversial example of this possibility is the concordate called *HarmoS*, by which cantons try to harmonize the school cursus and programs in order to avoid too many differences between cantons for parents and children if they have to change cantons in their life. Some cantons and political parties are quite unhappy because of this obligation to harmonize. Of course, life in the past centuries, without mobility and globalization, was more simple and local.

This possibility has recently been reinforced by the Federal Government. It has been improved by the RPT<sup>23</sup> because agreements between cantons could be considered as a good way of avoiding a centralization of powers through a constitutional amendment.

**Art. 48a Declaration of general application and requirement of participation**

<sup>1</sup> At the request of interested Cantons, the Confederation may declare intercantonal agreements to be generally binding or require Cantons to participate in intercantonal agreements in the following fields:

[...]

There has never been made use of this provision (since 2008), because cantons have always been able to discuss all problems between themselves without requiring the necessity to declare a binding agreement. Nevertheless, the fact that the Federal State has instituted a process in which intercantonal agreements should replace in a certain sense the traditional transfer of powers to the central government (although we have seen that in Switzerland this transfer respects as much as possible the cantonal sovereignty) is another proof of the basic importance of cantons in the institutional building of the country.

Moreover, cantons even enjoy the right to conclude relations with foreign states.

**Art. 56 Relations between the Cantons and foreign states**

<sup>1</sup> A Canton may conclude treaties with foreign states on matters that lie within the scope of its powers.

<sup>2</sup> Such treaties must not conflict with the law or the interests of the Confederation, or with the law of any other Cantons. The Canton must inform the Confederation before concluding such a treaty.

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23. The reform of the financial equalization and the allocation of tasks between Confederation and cantons, RPT in French or NFA in German; it entered into force on January 1st, 2008.



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<sup>3</sup> A Canton may deal directly with lower ranking foreign authorities; in other cases, the Confederation shall conduct relations with foreign states on behalf of a Canton.

As an example among many others, France and Switzerland, but also the cantons of Geneva, Vaud, with their French counterparts, are working for an expensive public transportation network crossing the border and called CEVA<sup>24</sup>.

## 9. The Participatory Dimension

Increasing globalization makes cantons always smaller. European law can short-circuit cantonal law. The risk exists that cantons lose a part of their sovereignty. Therefore, the Conference of cantonal Governments, created in 1993, has made a lobbying work during the drafting phase of the new 1999 Constitution. It has been successful, as the new Constitution contains at least two specific provisions which reinforce the position of the cantons.

The new 1999 Constitution has integrated two possibilities for the cantons to participate both at the federal decision making *and* at the foreign policy decision making, in order to avoid that the cantonal sovereignty could be reduced by foreign means.

### **Art. 45 Participation in federal decision-making**

<sup>1</sup> In the cases specified by the Federal Constitution, the Cantons shall participate in the federal decision making process, and in particular in the legislative process.

<sup>2</sup> The Confederation shall inform the Cantons of its intentions fully and in good time. It shall consult the Cantons where their interests are affected.

[...]

### **Art. 55 Participation of the Cantons in foreign policy decisions**

<sup>1</sup> The Cantons shall be consulted on foreign policy decisions that affect their powers or their essential interests.

<sup>2</sup> The Confederation shall inform the Cantons fully and in good time and shall consult with them.

<sup>3</sup> The views of the Cantons are of particular importance if their powers are affected. In such cases, the Cantons shall participate in international negotiations in an appropriate manner.

These provisions have been implemented by federal laws<sup>25</sup>, and of course it makes the federal legislation work more complicated. Moreover, it is not so easy to make 26 cantons participate and ready to agree on any draft. Nevertheless, the fact to let cantons participate in the federal decision-making process both at

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24. Everything about CEVA under : <<http://www.annemasse.fr/Annemasse/Les-grands-projets/LEMAN-EXPRESS-CEVA>>.

25. For the first it is among others the participation of cantons to all instruments of direct democracy, but also the *Loi fédérale sur la procédure de consultation (Loi sur la consultation, LCo)*, du 18 mars 2005 (RS 172.061) < <https://www.admin.ch/opc/fr/classified-compilation/20032737/index.html#fn1>>; for the second, it is the *Loi fédérale sur la participation des cantons à la politique extérieure de la Confédération (LFPC)*, du 22 décembre 1999 (RS 138.1) <<https://www.admin.ch/opc/fr/classified-compilation/19996351/index.html>>.

the national and international level shows that cantons are considered as very important state entities.

## 10. Conclusion

In the 19<sup>th</sup> Century, it was the role of highly specialized lawyers, of even specialist of the theory of the state, to try to explain that it was possible in fact to speak of a shared sovereignty, based among others upon the seminal work of Johannes Althusius. Of course, at a time where most of the states in the world were highly centralized kingdoms, the notion of shared sovereignty sounded quite strange. Therefore at that time, art. 3 of the Swiss Constitution explaining that *cantons are sovereign* was something like a revolution. But besides the purely theoretical dimension of this provision, Swiss authorities have been clever enough to recognize that in fact article 3 was rather a political program obliging federal authorities to take great care of the cantons and to continue to consider them – as they were previously – like little states.

At that time, this program was not only revolutionary, but also quite mythical, because it was necessary to find some unifying elements for the new Swiss State. As rational elements were almost impossible to find in one of the world's most fragmented society, it was necessary to find a mythical dimension, insisting on the (Swiss) uniqueness of this shared sovereignty.

In order to implement this program, Swiss authorities have used all the means which were at their disposal to testimony their respect to the cantons: to invite them in the government, to share money with them, to give them generous sources of taxation, to let them vote, participate, to ask for their opinion and to take their remarks and suggestions into account.

168 years later, things have changed, and it is less remarkable to speak of shared sovereignty, in Switzerland as everywhere in the world. But at a time where there are some tensions in certain regions (Scotland, Flanders, Catalonia...), the Swiss example shows to the central authorities that a lot of consideration and respect given to «sovereign» sub-entities has allowed for avoiding any trouble, and any tendency towards secession or increasing autonomy, while preserving the unity of the country which has also driven to its prosperity.



Federalism is easy : if something goes wrong, it's Bern's fault!

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