

SWITZERLAND

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I. OVERVIEW

The Swiss Confederation is a rather young state. Even though the foundation of Switzerland took place as far back as 1291,¹ the Swiss Confederation as such was only established much later. In 1648, following the treaty of Westphalia, Switzerland became independent from the Roman-German Empire. In 1803, the name “Swiss Confederation” was definitely adopted,² and the country was given full international status following the 1815 declaration of “perpetual neutrality of Switzerland”.³ From 1815 to 1848, however, the Swiss Confederation was not truly a sovereign state but rather only a community of Cantons, each of which had its own sovereignty. The legal basis for a federal state was created in 1848 with the adoption of the first federal Constitution (September 12th, 1848). This federal structure is maintained today under the 1999 Constitution⁴ and is reflected in three tiers of government: The *Confederation* or federal government, the *Cantons* and the *Communes*.

The highest governmental tier of the Swiss Confederation is the central, i.e., federal government. The term “Confederation” is misleading: a confederation, in modern political terms, is usually limited to a permanent union of sovereign states for common action in relation to other states.⁵ However, the denomination of “Confederation” has been maintained due to translation difficulties,⁶ even though Switzerland technically is a federal state.⁷ In German, the Confederation is called “*Schweizerische Eidgenossenschaft*” which does not relate to a similar word in French, Italian or even English. The term *Eidgenossenschaft* could be translated as a “*sworn brotherhood*” and describes the historical foundation of Switzerland as it was created in 1291 by the representatives of three Cantons swearing their allegiance to a common State.⁸

The 26 Swiss Cantons are the middle tier of government. They are the component states of the Confederation. The Cantons did not emerge out of a central state due to decentralisation; on the contrary, the Cantons were sovereign and independent states which decided in 1848 to create the Confederation.⁹

¹ Pacte fédéral (August 1st 1291) uniting the Cantons of Uri, Schwyz, Nidwald to be found at: Quellenwerk zur Entstehung der Schweizerischen Eidgenossenschaft Abt. 1, Urkunden Bd., 1 Aarau 1933 and <http://www.admin.ch/org/polit/00056/index.html?lang=fr> (last visited on 06.03.09).

² Mediationsakte 19 February 1803, “Act of Mediation “by Napoleon Bonaparte, see J. Biedermann, “Chartes, pactes et traités de la Suisse”, Lausanne 1915.

³ « Acte de reconnaissance et garantie de la neutralité perpétuelle de la Suisse et de l’inviolabilité de son territoire » drafted by Charles Pictet de Rochemont (November 20th, 1815), CPJI, série C, n. 17-1, vol. II, 1929, pp. 1190ss.

⁴ Federal Constitution of the Swiss Confederation of 18 April 1999 (RO 1999 2556, modified as of 16 December 2005 (FF 2005 6793).

⁵ The Oxford English Dictionary, vol. II-C, Oxford reprinted 1978. “A permanent union of sovereign States for common action in relation to externals”.

⁶ T. Fleiner, «Switzerland: Constitution of the Federal State and the Cantons», in Lidija R. Basta Fleiner/T. Fleiner (eds.), *Federalism and Multiethnic States, The Case of Switzerland*, 2^e ed., Bâle/Genève/Munich 2000, p. 103.

⁷ A confederation is most likely to feature three differences from a federation: There are no real direct powers of the Confederation in comparison to a federal government: many confederate decisions are only implemented by member-state legislation. Decisions are not taken by simple majority but by special majorities or even by consensus or unanimity (every member has a veto). Changes of the constitution, which usually takes the form of a treaty, require unanimity.

⁸ A citizen of each Canton swore on August, 1st 1291 on a small mountain called “Rütli”: “*we will be a one and only nation of brothers ...*” This leads to the term confederation (“*Eidgenossenschaft*”).

⁹ To be complete, the joining of Cantons came in stages: 1291: Uri/Schwyz/Uterwalden (split up into: Obwald/Nidwald); 1332: Luzern; 1351: Zurich; 1352: Zug/Glarus; 1481: Freiburg/Solothurn; 1501: Basel (1833 split up into: Basel Stadt/Basel Land)/Schaffenhäusen; 1513: Appenzell (1597 split up into: Appenzell Ausserrhoden/Appenzell Innerrhoden); 1803: Sankt-Gallen/Aargau/Thurgau/Ticino/Vaud; 1815: Valais/Neuchâtel/Genève; 1979: Jura.

The Cantons thus transferred their sovereignty to the Confederation in a bottom-up manner. Article 3 of the 1999 Constitution states that “[t]he Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution; they shall exercise all rights which are not transferred to the Confederation”. In this context, the meanings of the words “sovereignty” and “sovereign” are not the classical ones, e.g., Cantons do not have what German authors call the “*Kompetenz-Kompetenz*”,¹⁰ meaning the right to define in their constitutions the distribution of tasks between federal government and themselves. Cantons therefore only have a subsidiary or indirect competence.¹¹

The Cantons have kept their intrinsic nature of a sovereign state (*statehood*),¹² their own constitutions, and most of their political autonomy, yet only the federal state is a sovereign in respect to international law. As a result, the study of the Swiss federal system is different from the study of other federations throughout the world, the Cantons still exercising sovereign powers within the Confederation in relation to each other, whereas only the Confederation, as such, has full and direct international sovereignty.¹³

On the final and lowest tier of government, one finds the Municipalities (*Communes*) which compose the Cantons.

Like most modern states, Switzerland has enacted a strict separation of powers between the executive, the legislative, and the judicial branches of government. This separation exists within each tier of government, up from the Municipalities to the central level.

II. THE FEDERAL DISTRIBUTION AND EXERCISE OF LAW-MAKING POWER

The Swiss main legislative body is the Federal Assembly (*Assemblée Fédérale*) which is composed of two Chambers: the National Council (*Nationalrat* or *Conseil National*) and the Council of States (*Ständerat* or *Conseil des Etats*).¹⁴ When the two Chambers are united for a common session, they form the United Federal Assembly (*Assemblée Fédérale Unie*). However, many legislative acts are also enacted at the cantonal level.

The National Council has two hundred members. In this Council, the representation of the Cantons is proportionate to the size of their population. However, according to Article 149 al. 4 of the Constitution, each Canton has a right to at least one seat. Zurich with its large population has 34 seats, whereas Uri and Glarus, Obwalden, Nidwalden, Appenzell Outer Rhodes, and Appenzell Inner Rhodes are entitled to just one representative each.¹⁵

In this legislative organ, the election of the members is based on proportional representation in respect to the population of each Canton. This results in giving smaller parties a higher chance of being elected than they would have if the election system were a winner-take-all majority system.¹⁶

¹⁰ Schweizer in, St. Galler Kommentar zu Art. 3 BV, Rz. 7, Schulthess 2008.

¹¹ T. Fleiner-Gerster, «Problèmes de la souveraineté intérieure et extérieure», in T. Fleiner-Gerster/S. Hutter (eds.), *Federalism and Decentralization*, Fribourg 1987, p. 64; T. Fleiner/A. Mistic, “Föderalismus als Ordnungsprinzip der Verfassung”, in D. Thürer/J.-F. Aubert/J.-P. Müller (eds.), *Verfassungsrecht der Schweiz*, Zürich 2001, p. 436.

¹² Comp. “République de Genève”, “Etat de Vaud”, «République de Neuchâtel»... A similar system can be found in Germany: «Freistaat Bayern», “Freistaat Sachsen-Anhalt”...

¹³ Even though the Cantons may, in certain fields, notably in taxation matters, conclude international treaties with neighboring states (Cst., art 56).

¹⁴ The National Council represents the overall population and the Council of States, the member states of the Confederation, i.e. the Cantons.

¹⁵ See the document “legislative power” on the website www.admin.ch (last visited on 06.03.09)

¹⁶ W. Linder, “Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies”, 2nd ed, London/NewYork 1998, p. 45

The Council of States (*Ständerat, Conseil des Etats*) has 46 members.¹⁷ Each Canton elects two representatives, except for Obwalden, Nidwalden, Appenzell Outer Rhodes, Appenzell Inner Rhodes, Basle-Land and Basle-City which only have one representative.¹⁸ The rules governing the election of the members of the Council of States is purely a cantonal matter (Cst., *Art. 150 al. 3*).

The process leading to the adoption of a new law is complex and often lengthy. This is a fundamental characteristic of the Swiss law making process which seeks, above all, *consensus* at all stages. It takes at least 12 months to enact legislation, but in extreme cases, the procedure has lasted as long as 12 years,¹⁹ typically if the case is contested. The law making procedure²⁰ can encompass up to 15 steps. Yet, this is only the case when the opinions of the two Chambers of Parliament differ.

The Constitution provides for the general law making powers of the Confederation but also for the powers of the Cantons. Title III of the Constitution deals with the structure of the Federation and the relationship between its components. About fifty very detailed articles of the Constitution relate to the distribution of power. This great number of articles can be explained by the complex system of direct democracy, which requires the consent of each Canton for each new federal competence.²¹

It is a basic principle of the relationship between the Confederation and the Cantons “to divide before to collaborate”.²² Yet often the distinction between Federal and cantonal matters cannot be clearly drawn.²³

As a general rule, the Confederation has authority in all areas in which it is empowered by the Federal Constitution. Article 42 provides that “*The Confederation shall accomplish the tasks which are attributed to it by the Constitution*”.

Numerous articles of the Constitution grant specific powers to the Confederation, yet the content and the scope of each of these powers can vary from one field to another, as in some fields the Cantons may also have competing powers. The division of powers is mandatory so that the Cantons and the Federation cannot agree to change it. There are four different kinds of powers in Switzerland: exclusive powers, competing powers, powers limited by principles, and parallel powers.

Exclusive powers are the competences which plainly exclude cantonal action whenever this competence is allocated to the Confederation, even before any laws are enacted in that field. This kind of competence is less important today because the domains in which it applies have already been legislated, e.g., money, customs, and postal services. The Confederation thus has competences in the fields of economy,²⁴ agriculture,²⁵ defence,²⁶ social and health issues,²⁷ supply of energy and other essential goods,²⁸ media

¹⁷ Cst., art. 150 al. 1.

¹⁸ Cst., art. 150 al. 2.

¹⁹ Typically, the law providing national and regional development was initiated in 1972 and entered into force in 1980 (LAT, RS 701). The law on civil liability has been under discussion since 1988.

²⁰ T. Fleiner/A. Mistic/N. Töpferwien, “Swiss Constitutional Law”, The Hague 2005, p. 101; see the figure 3.4 in W. Linder, *op. cit.*, p. 123.

²¹ T. Fleiner, “Swiss Confederation”, in R. Blindenbacher/A. Ostien (eds.), *Dialogues on Distribution of Powers and Responsibilities in Federal Countries*, Global Dialogue on Federalism Booklet Series # 2, Montreal 2005, p. 270.

²² J.F. Aubert/P. Mahon, « Petit Commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999 », Zurich, 2003, p. 382.

²³ B. Knapp, „Kompetenzverteilung und Zusammenwirken der Kantone“, in D. Thürer/J.-F. Aubert/J.-P. Müller (eds.), *Verfassungsrecht der Schweiz*, Zürich 2001, §29, pp. 457-472.

²⁴ Private economic activity (art. 95) ; Competition Policy (art. 96); Banking and Insurance (art. 98) ; Monetary Policy (art. 99) ; Policy on Economic Development (art. 100) ; Foreign Trade (art. 101); Gambling (art. 106).

²⁵ Agriculture (art. 104) ; Production, importation, refining and sale of Alcohol (art. 105).

²⁶ Weapons and Military Material (art. 107).

²⁷ Consumer Protection (art. 97) ; Promotion of Construction and Ownership of Housing (art. 108) ; Landlord and Tenant (art. 109) ; Labour (art. 110) ; Social Security (art. 111) ; Old age, Survivors’ and Disability Insurance (art. 112) ; Employee Pension Plans (art. 113) ; Unemployment Insurance (art. 114) ; Family Allocations and Maternity Insurance (art. 116) ; Health and Accident Insurance (art. 117) ; Protection of Health (art. 118) ; Medical Assistance to Procreation and Gene Technology in the

and communication,²⁹ immigration,³⁰ civil and criminal law³¹. Additionally, the organization of the federal courts is determined exclusively by federal legislation.³²

Competing competences between Cantons and the federal government are the rule in Switzerland. Cantonal competence, however, ends when the Federation enacts laws in a specific field.

Powers *limited by principles (or guidelines)* are a variety of competing competences where the Confederation provides for broad principles that the Cantons must respect. For example, the Federation establishes the principles for energy and the Cantons must comply with those principles even if they are competent in this matter.³³ Some principles enacted in the Constitution are thus directly imposed on the Cantons, e.g., the cantonal laws must respect the principle of proportionality, the principle of equality, and they must not restrict personal liberties such as the freedom of expression.³⁴

Competences are parallel when there is no exclusion of either the Confederation or the Cantons, e.g., in the matter of direct taxes.³⁵

Each article of Title III of the Constitution is used to regulate different fields of law and thus empowers the federal government to enact federal legislation. Important federal acts in the area of constitutional law include: the Federal Act on the Organization of the Federal Judiciary of 16 December 1943;³⁶ the Federal Swiss Citizenship Act of 29 September 1952;³⁷ the Federal Act on the Proceedings of Federal Parliament and the Form, Publication, and Entry into Force of Its Acts of 23 March 1962;³⁸ the Federal Administrative Procedure Act of 20 December 1968;³⁹ the Federal Political Rights Act of 17 December 1976;⁴⁰ and the Federal Act on the Organization of the Federal Council and the Federal Administration of 21 March 1997.⁴¹

Public law is the most important area of regulation for the central government. More specifically, important matters within its competence are the matters of public transportation, communications, and economic issues. In private law, intellectual property is an important matter of legislation. Yet, depending on the political objectives of the Federal Council, the fields of law-making can change drastically from one legislative period to another.

For example, in 2006 and 2007, many regulations concentrated on school and education, on telecommunications, on environmental law, and on the transfer of cultural property. The 2007-2008 legislative period, by contrast, focused on corporate governance, company law, and implementation of the

Human Field (art. 119) ; Medical Transplantation (art. 119 a); Gene Technology in the Non-Human Field (art. 120) ; Residence and Domicile of Foreigners (art. 121).

²⁸ Transportation of Energy (art. 91); Supply of Essential Goods and Services (art. 102); Weights and Measures (art. 125).

²⁹ Postal and Telecommunication services (art. 92); Radio and Television (art. 93).

³⁰ Residence and Domicile of Foreigners (art. 121).

³¹ Civil Law and Civil Procedure (art. 122); Criminal Law and Criminal Procedure (art. 123).

³² The most important legal sources are the Federal Supreme Court Act (LTF 17/06/2005, RS 173.110, RO 2006 1205.), the Federal Criminal Court Act (LTPF 04/10/2002, RS 173.71, RO 2003 2133) and the Federal Administrative Court Act (LTAF 17/06/2005, RS 173.32, RO 2006 2197).

³³ FF 1997 I 253.

³⁴ Cst., arts. 5, 8, 10 and 16.

³⁵ Cst., art. 128 and 129.

³⁶ RS 171.11.

³⁷ RS 141.0.

³⁸ RS 171.111.

³⁹ RS 172.021.

⁴⁰ RS 161.1.

⁴¹ RS 172.010.

Schengen-Dublin Agreement on the free movement of citizens into Switzerland. In 2009, due to the recession and the banking scandals involving banking major UBS (originally for Union Bank of Switzerland), the focus was on regulating financial services.

Despite the great number of powers of the federal state, the Cantons still have autonomous legislative power as well the right to self-organisation.⁴² According to Article 3 of the Constitution, the sovereignty of the Cantons is exercised to the extent it is not limited by the federal Constitution. This provision gives the residual powers to the Cantons, which in turn often confer these powers on the Municipalities (*Communes*).

Each Canton has its own constitution, but in order to ensure the democratic nature of these constitutions and their conformity with federal law, the Federal Assembly has to approve any amendments to cantonal constitutions.⁴³ Yet, there is no uniform model law of the Confederation in this respect.

The following matters are in the exclusive power of the Cantons: the implementation of federal law (Cst., art. 46); the drafting of cantonal constitutions (Cst., art. 51); determination of the power of Communes (Cst., art. 50); education at all levels (Cst., art. 62); culture (Cst., art. 69); languages (Cst., art. 70); and church and state relationship (Cst., art. 72). In many Cantons,⁴⁴ main regulations focus on public law, principally on the organisation of local authorities, schools, telecommunications, and land use planning. Cantons administer their finances, and make decisions regarding their development based on their specific cultural heritage.

The Cantons are allowed to act even within those areas that are in the competence of the central government as long as the latter has not made use of its power.⁴⁵ Nevertheless, when the federal government begins to legislate in such an area, the powers of the Cantons are totally or partially restricted retroactively.⁴⁶

As mentioned, in some areas, both cantonal and federal powers coexist. The most important areas of this nature include telecommunications and land use planning, schools, and culture in general. Moreover, the Confederation and the Cantons have competing powers in the areas of personal income tax, corporate income, and capital tax.

In the field of their competences, the Cantons are, in principle, free to accomplish their tasks however they wish.⁴⁷ They must, nevertheless, comply with all sorts of federal, constitutional or legislative mandates, e.g., Article 62 II on education or Article 72 II on maintaining public peace between religious communities.

A special feature of Swiss law pertains to the organisation of cantonal justice. As of now, cantonal courts are essentially organized in accordance with cantonal law. The Cantons regulate the appointment and remuneration of judges, the partitioning of the Canton into judicial districts, the rules on admittance to the bar and to any legal professions, etc. Nevertheless, the Cantons must observe the requirements of federal law on a variety of organizational issues.

⁴² Cst., art. 47.

⁴³ Cst. art. 51; see A. Auer/G. Malinverni/M. Hottelier, "Droit constitutionnel suisse", vol. 1 «l'Etat», 2^e ed., Berne 2006, pp. 63-66.

⁴⁴ According to the study of the different official cantonal registers, principally BE, FR, VD, NE, GE.

⁴⁵ U. Thalmann, "Die Verfassungsrechtliche Stellung der Kantone", in P. Hänni (éd.), *Schweizerischer Föderalismus und europäischer Integration : die Rolle der Kantone in einem sich wandelnden internationalen Kontext*", Zurich 2000, p. 85; M. Arefaine, "Federalism and Accommodation of Diversities: With Special Reference to Divided Societies, Fribourg 2005, p. 163.

⁴⁶ U. Thalmann, *ibid.*

⁴⁷ Cst. art. 43

A number of principles have been developed to avoid or solve conflicts between federal and cantonal authorities. Typically, Article 44 al. 1 of the Swiss Constitution provides that the Confederation and the Cantons “shall collaborate, and shall support each other in the fulfilment of their tasks”.

As a general rule, however, Article 49 states the supremacy of federal law⁴⁸: “federal law breaks the cantonal law”.⁴⁹ Thus, the Cantons cannot enact a rule contrary to the federal law.⁵⁰ Yet, this principle must be tempered, and the Federal Supreme Court (*Tribunal fédéral, Bundesgericht*) has decided that this supremacy only exists if the division of powers is respected. Thus when the Constitution gives a specific competence to the Cantons, the cantonal regulation is superior to the federal regulation on the same matter.⁵¹

In addition, Article 189 of the Constitution provides that the Federal Supreme Court “shall judge public law disputes between the Confederation and the Cantons”. However, the idea is that the Cantons and the Confederation should not view each other as rivals but as partners working toward common goals. Thus, Article 44 al. 3 of the Constitution holds that in case of conflict between the Confederation and the Cantons, such conflict shall be resolved as much as possible through negotiation or mediation. Yet, there is no federal mediator to resolve those kinds of conflicts, nor is there a special commission within the federal parliament that specializes in questions of distribution of powers. As a result, if there is a conflict, it is usually too late for mediation. To avoid such conflicts, a certain number of principles are laid down by the Constitution, and the Federal Supreme Court has jurisdiction to decide such conflicts (Cst., *Art. 189, Id*).⁵² As a result, the Federal Supreme Court can defend a constitutional cantonal provision that conflicts with a federal provision.⁵³

Another principle is subsidiarity⁵⁴ which is based on Articles 3, 42 and 46 of the Constitution. According to this principle, the powers should, as much as possible, be allocated to the lowest level of government that is able to properly fulfil the task in question.⁵⁵

Under Articles 3 and 42, the federal government only has those powers that are specifically allocated to it by the federal Constitution, and the federal government shall only assume those tasks which require uniform regulation. As a result, tasks that do not require uniform regulation throughout Switzerland are left to the Cantons.⁵⁶

Merely one article of the Constitution is dedicated to the Municipalities (*Cst., Art 50*). The Constitution doesn't grant them law making powers, as the *Communes* are an institution of cantonal law. Yet, some federal laws also enlist the help of the *Communes* to implement federal legislation, as in the case of the Federal Act on Military Organisation⁵⁷ or the Federal Act on Civil Protection.⁵⁸ Additionally, the

⁴⁸ Cst. art. 49

⁴⁹ „Bundesrecht bricht Kantonales Recht“.

⁵⁰ ATF 120 Ia 299.

⁵¹ FF 1997 I 218; ATF 128 II 112.

⁵² ATF 117 Ia 221.

⁵³ G. Zaccaria, “Das Staatsrecht der Schweizerischen Kantone”, Zurich 1979, p. 57.

⁵⁴ On the principle of subsidiarity see : U. Thalmann, “Subsidiaritätsprinzip und Kompetenz-Verteilung, in T. Fleiner/P. Forster/A. Mistic/U. Thalmann (eds.), *La nouvelle Constitution suisse. Fédéralisme, droits fondamentaux, droit économique et structure de l'Etat*, Bâle/Genève/Munich 2000, pp. 149-170; A. Epiney, Subsidiarität als verfassungsrechtlicher Grundsatz, in *Rapports suisses présentés au XIV^e Congrès international de droit comparé* (Athènes), Zurich 1994, pp. 9-33.

⁵⁵ M. Arefaine, «Federalism and Accommodation of Diversities: With Special Reference to Divided Societies», Fribourg, 2005, p. 163. See also Cst., Art. 5a

⁵⁶ U. Thalmann, «Die Verfassungsrechtliche Stellung der Kantone», op. cit. pp. 73-74.

⁵⁷ Art. 11, 131 ss. Laam.

⁵⁸ Art. 46 al. 2 LPPCi.

Constitution provides that the Confederation shall pay attention, in its activities, to the special situations of the cities, urban conglomerations, and mountainous regions.⁵⁹ The degree of autonomy granted to the *Communes* is thus determined by the individual Cantons⁶⁰ and therefore varies considerably between them.⁶¹

As a rule, the Cantons control the Municipalities. This control is more extensive than the one applied by the Confederation over the Cantons.⁶² However, in general, Municipalities have the right to self-administration. They also have the legislative and administrative powers in areas that directly concern the local level, such as municipal citizenship, primary education, and municipal police.⁶³ Moreover, they have the right to raise their own taxes.

The federal courts have held that Municipalities are autonomous in areas where they have a relatively important decision making power.⁶⁴ It has also been decided that the Municipalities are competent to interpret their own regulations. In other words, the Cantons cannot arbitrarily impose a specific understanding of a municipal legal act,⁶⁵ and the Confederation must remedy any violation of municipal autonomy committed by Cantons.

III. THE MEANS AND METHODS OF LEGAL UNIFICATION

The unification of law has been, and still is, a long process in Switzerland. Even if federal law appears to be predominant, because of its territorial scope, cantonal law still remains voluminous. Typically, when the Confederation legislates, the Cantons generally still have the right to fill in the details, thus creating legal diversity.

These rules are set down in the Constitution, but the Constitution can be revised by a majority of the votes of Swiss citizens and the Cantons.⁶⁶ This has occurred many times to ensure the unity of the law within the Confederation.

Unification of private law is a main political topic in Switzerland. The central unification of law by the Confederation is balanced by increasing opportunities for the Cantons to participate in the decision-making process at the central level. Abolishing the Cantons' differing regulations in favor of nationwide legislation has improved the equality of laws as well as legal certainty.⁶⁷

The most recent project of unification of the law relates to the unification of criminal procedure. The draft bills for a Swiss Code of Criminal Procedure and for a Swiss Code of Juvenile Criminal Procedure, of 21 December 2005, replace Switzerland's 26 cantonal codes of criminal procedure, as well as the corresponding regulations at federal level. As a result, since January 1 2011, criminal offenses are defined in a standard way in the Swiss Penal Code and they will be prosecuted and judged according to the same procedural rules. This unique procedural code helps defense counsel and makes it easier for prosecuting authorities to deploy staff across cantonal borders. It will also facilitate international cooperation.⁶⁸

⁵⁹ Cst. art. 50 al. 2 et 3.

⁶⁰ Cst. art. 50 al. 1.

⁶¹ T. Fleiner/A. Misic/N. Töpferwien, op. cit. p. 137: "It can be said that the more important the Municipalities have been in history of the Canton the more powers they are attributed".

⁶² A. Auer/G. Malinverni/M. Hottelier, op. cit., p. 84.

⁶³ A. Auer/G. Malinverni/M. Hottelier, op. cit., pp. 83-84.

⁶⁴ ATF 101 Ia 259.

⁶⁵ ATF 108 Ia 74; ATF 103 Ia 468.

⁶⁶ Cst. art. 140 al. 1 let. A; Cst. art. 142 al. 2; Cst. art. 195.

⁶⁷ See the Explanatory Report "*Message*" 21/12/2005, FF 2006 1057.

⁶⁸ Ibid.

In addition, the erstwhile multitude of civil procedure codes has now been overcome: as of January 1, 2011, Switzerland has a federal, and thus uniform, Code of Civil Procedure, although, again, in some matters Cantons still fill in the details.

There are no directly applicable constitutional norms which unify a field of law. However, the unification of law is mainly based on the Articles 122 and 123 of the Swiss Constitution. Additionally, Article 42 al. 2 provides that the Confederation shall assume the tasks which require uniform regulation. This entails a top-down approach. Yet according to the interpretation of the principle,⁶⁹ and to the statements of commissioners and representatives of the government, the Article doesn't mean that the Confederation may legislate with no other constitutional basis than this Article. In other words, the Confederation may not use Article 42 in a circular fashion every time it considers that one task shall be regulated uniformly.⁷⁰

Most of the unification of law is achieved by a directly applicable norm: that is to say, by a federal act. Important examples include the Federal Act on the Organization of the Federal Judiciary; the Federal Act on the Proceedings of Federal Parliament and the Form; the Federal Administrative Procedure Act; the Federal Act on the Organization of the Federal Council and the Federal Administration of 21 March 1997; the Civil Code; the Code of Obligations; the Federal Act on Private International Law; the Federal Act on Cartels and Other Restrictions of Competition, and, as of recently, the federal Codes of Criminal and Civil Procedure.

The powers of the Confederation and of the Cantons to legislate and to implement the law do not necessarily overlap. Sometimes the central government is empowered to implement unified law, i.e., concerning taxes, postal service, and customs. But more often, the task to apply federal acts is allocated to the Cantons, and the Confederation only supervises such implementation. In some cases, the Constitution explicitly provides for the cantonal enforcement of federal law, e.g., in the fields of environmental protection,⁷¹ the protection of animals,⁷² and of national highways.⁷³

As a result, most federal laws are implemented by the Cantons and even by local and municipal authorities. Executing a federal law thus usually requires a cantonal law or at least an ordinance. The adverse consequence is that federal laws are not always implemented uniformly.

The distribution of the federal budget sometimes induces the Cantons to regulate certain matters. For example, in the field of social protection, the fact that the Confederation pays part of the allowance for poor retired citizens will have an influence on the Cantons' decisions to run complementary social programmes in order to obtain a share of the federal funds.

The spending power under the federal budget is granted to the Federal Council according to Article 183 of the Constitution: "The Federal Government shall prepare the financing plan, draft the budget and establish the federal accounts. It shall ensure correct financial management". Also, according to Article 167 of the Constitution, "the Federal Parliament shall decide on federal spending, shall adopt the budget, and shall approve the federal accounts".

Federal financial influence on cantonal legislation is also found in the field of education, particularly in respect to universities.

⁶⁹ U. Thalmann, "Subsidiaritätsprinzip und Kompetenzverteilung", op. cit. pp. 165-166; R. J. Schweizer, «Die neue Bundesverfassung: die revidierte bundesstaatliche Verfassungsordnung», PJA 1999, p. 672.

⁷⁰ See on www.admin.ch (last visited 6.3.09): the statements of commissioners and representative of the government, PV 4687-4688 (commission of the Council of States) and 1386-1388 (commission of the National Council).

⁷¹ Cst. article 74 al. 3.

⁷² Cst. art. 80 al. 3.

⁷³ Cst. art. 83.

The Confederation cannot force Cantons to regulate by threatening to take over the field in case of cantonal inaction or if cantonal action does not conform to centrally specified standards. However, according to Article 186 al. 2 of the Constitution, the Confederation shall approve cantonal legislation where the implementation of federal law requires it.

The Confederation cannot influence legislation through the judicial creation of uniform norms by the Federal Supreme Court (*Tribunal fédéral*). Swiss law belongs to the civil law family, which, in contrast to the common law tradition, is based on abstract rules, which judges must then apply to the cases coming before them. In other words, laws are first enacted by the legislature and then applied by the judges. Yet, there is frequently a consistent line of court decisions. Judicial «precedents» thus play a very significant role in Switzerland despite their non-binding nature. The uniform interpretation of law is given by the Federal Supreme Court when the provisions of law or of the Constitution have a very general meaning. Courts also deduce new rules from existing legislation by way of analogy or legal analysis (Art. 1 of the Swiss Civil Code).

There is no centrally managed coordination and information exchange system among the Cantons, but there are mechanisms to coordinate action and to prevent conflicts. For example, the procedure required for the adoption of every federal law leaves much room for coordination and information exchange between the Cantons. The Constitution states that the adoption of federal legislation is preceded by a consultation procedure and by political debate.⁷⁴ Moreover, Switzerland is a small country which means that people in important positions often know each other; thus they try to resolve problems by informal talks.

In addition, a Conference of the Cantonal Executives has been established. This institution meets at regular intervals and allows direct influence by the Cantons on the Confederation. It is also a good tool for the collective and coordinated resolution of problems. This institution is seen today as a successful and strong lobby group for the Cantons, and as an important partner for discussions with the Confederation.⁷⁵

Yet, legal unification is not accomplished through formal or informal voluntary coordination among the Cantons. Typically, cantonal legislatures differ and there is little harmonisation. Nor is there any unification of case law between the Cantons as legislation is often different from one Canton to the next.

There are nevertheless a number of horizontal instruments of cooperative federalism that enable the Cantons to take collective action without the involvement of the Confederation.

There are inter-cantonal organizations and agencies, and the traditional legal instrument of cooperation is the so-called *concordat*.⁷⁶ *Concordats* are inter-cantonal treaties functioning as a form of regional cooperation.⁷⁷ These treaties can regulate the unification of legislation and even create common institutions.

A major example can be found in the field of education that is within the jurisdiction of Cantons. A special institution called the Swiss Conference of Cantonal Ministers of Education⁷⁸ was established in order to help to coordinate action. The *Conference* is a joint endeavour of the 26 cantonal government ministers, who are responsible for education, training, culture, and sport. It shapes the cooperation among

⁷⁴ Cst., art. 147.

⁷⁵ N. Schmitt, "Swiss Confederation", in J. Kincaid/G. A. Tarr (eds), *Constitutional Origins, Structure, and Change in Federal Countries*, Global Dialogue on Federalism, Series number 1, Montreal 2005, p. 358.

⁷⁶ See Auer/G. Malinverni/M. Hottelier, op cit. pp. 565-580.

⁷⁷ Cst., art. 48.

⁷⁸ See the website of the Conference: <http://www.edk.ch> (last visited 6.3.09).

the Cantons through a series of inter-cantonal agreements: e.g., the Agreement on Education Coordination, various Agreements on Financing and on Freedom of Access to Education. A new inter-cantonal agreement to harmonise compulsory education is currently under consideration.

In respect to higher education at the universities, the Swiss University Conference (*Conférence Universitaire Suisse*)⁷⁹ established the Inter-cantonal Convention on Coordinating University Policies. The main goal of this Convention is to strengthen the cooperation between the Cantons and the federal government.

Legal unification can also be accomplished, or at least promoted, by non-state actors. In Switzerland, the work of legal scholars helps to provide uniform interpretation of laws. Swiss judges often base their decisions on the works of legal scholars, both Swiss and foreign. Article 1 al. 3 of the Civil Code provides specifically that the judge “shall be inspired by the solutions (...) contained in the writing of legal scholars”. Legal scholars can also draft model laws which contribute to the unification of law at a later stage. Standards and practices of industry, trade organizations or other or private entities can create rights and obligations. This is particularly true in the banking and financial industry.

Legal education and training is diverse in Switzerland, as it is a matter of cantonal competence, but the Swiss University Conference aims to ensure a better cooperation between the universities. Additionally, law schools draw students from throughout the federal system, yet the linguistic differences (especially between German and French speaking parts) limit student mobility. There is no law school in the Italian-speaking part of the country. Italian-speaking students thus often study in Italy and their diploma is recognized in Switzerland. Some federal institutions play a unifying role in legal education, e.g. by offering internships to graduates at central courts or in the federal administration, such as the Federal Office of Justice. Still, the linguistic diversity of Switzerland remains an important differentiating factor among lawyers.

Swiss legal education focuses on federal law. Yet, bar admission is organised by the Cantons, and each maintains a register of lawyers who have a business address within the Canton and who fulfil the professional requirements⁸⁰ and personal qualifications.⁸¹ In practice, graduates tend to set up their offices or take jobs in the Cantons in which they qualified.

According to Article 4 of the Federal Act on the Freedom of Movement for Lawyers, “all lawyers who are listed in a cantonal register of lawyers can represent parties before judicial authorities in Switzerland without additional authorisation”.⁸²

⁷⁹ <http://www.cus.ch/wFranzoesisch/index.php> (last visited 6.3.09).

⁸⁰ Art.7 LCCA 23/06/2003 Professional requirements: 1 To be inscribed in the register, the lawyer must be in possession of a lawyer's license that has been granted on the basis of the following conditions: a. course of studies in law leading to a graduate degree awarded by a Swiss university or to an equivalent diploma awarded by a university from one of the States that has concluded an agreement of reciprocal recognition with Switzerland; b. at least one year of practical experience in Switzerland that has been concluded with an examination of juridical knowledge in theory and in practice. 2 Cantons in which Italian is the official language may recognise a foreign diploma, acquired in the Italian language that is equivalent to a graduate degree.

⁸¹ Art 8 LCAA 23/06/2003 Personal qualifications : 1 To be inscribed in the register, lawyers must fulfil the following personal qualifications: a. they must have the capacity to act; b. there can be no criminal conviction against them for acts that are incompatible with the legal profession and that have not yet been deleted from the register of convictions; c. there can be no deeds of loss; d. they must be capable of practising law independently; they may be employed only by persons who themselves are inscribed in one of the cantonal registers of lawyers. 2 Lawyers who are employed by recognised charitable organisations can be registered as long as conditions, according to paragraph 1, letters a-c, have been fulfilled and their representation of parties is strictly limited to mandates within the context of the purpose as defined by the organisation concerned.

⁸² Loi fédérale sur la libre circulation des avocats (Loi sur les avocats, LLCA) of 23rd June 2000.

External factors, such as international law, exercise considerable influence on legal unification in Switzerland. Typically, as Switzerland has a monistic approach, compliance with international legal obligations plays a major role. In other words, international treaties that are self-executing have to be applied directly by the competent authorities, i.e., without need to transform them into domestic statutes.⁸³ Treaties are thus part of the Swiss legal system. Switzerland is also member of various institutions pursuing international legal unification, such as the Hague Conference on Private International Law, and it has signed a number of international conventions in the field of private international law. These conventions are also reflected in the Federal Act on Private International Law (LDIP) of 18th December 1987, a federal act unifying the field. Thus, Article 49 LDIP directly refers to the Hague “Maintenance” Convention. It provides that “Maintenance obligations between spouses shall be governed by the Hague Convention of October 2, 1973 on the Law Applicable to Maintenance Obligations”. Similar reference is made in chapter 9a of the LDIP to The Hague Convention on the Law Applicable to Trusts and on Their Recognition of 1st July 1985.

Further international influence can be found in the field of arbitration where, in order to promote institutional arbitration in Switzerland and to harmonise the existing rules of arbitration, the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud and Zurich have adopted the “Swiss Rules of International Arbitration”, in force since January 1st 2004.⁸⁴ These provisions are based on the UNCITRAL Arbitration Rules and replace the former rules of the six chambers.

IV. INSTITUTIONAL AND SOCIAL BACKGROUND

1. *The Judicial Branch*

In Switzerland, the Federal Supreme Court (Federal Tribunal) is the highest court.⁸⁵ It covers a wide spectrum of litigation as it rules on disputes concerning private law, criminal law, public and administrative law. At the same time, the Federal Tribunal is also a constitutional court. It decides on the constitutionality of acts and laws within the country.

The Federal Supreme Court thus has a variety of tasks such as providing those seeking justice with legal redress in specific cases, ensuring the uniform application of federal law, and contributing to the further development of the law. On appeal, it reviews the decisions of the highest cantonal courts and other authorities of the Confederation to ensure they are in compliance with the law. It is also responsible for ensuring that the rules governing the making, application and interpretation of law are adhered to.

The Federal Tribunal has its seat in Lausanne.⁸⁶ This geographically demonstrates the independence of the judiciary from the federal government and parliament in Berne, and it also expresses an accommodative spirit and federal solidarity with regions of linguistic minorities by allocating to the French-speaking part of the country an important element in the constitutional system.⁸⁷

Even though the Federal Tribunal acts as constitutional court, its power to overturn federal laws is considerably restricted. Article 190 of the Constitution requires the Court, as well as all other cantonal and federal authorities, to apply federal laws and ratify international law. The Federal Tribunal can interpret federal laws and define their meaning. Furthermore, the Federal Tribunal can identify gaps in the legislation and will, on occasion, criticise certain regulations. The interpretation of Article 190 in legal

⁸³ ATF 127 II 177; ATF 120 Ib 360.

⁸⁴ YCA 2004 pp. 447ss; ASA, spec. Series, n°22, pp. 131 ss; www.swissarbitration.ch (visited 6.3.09)

⁸⁵ Cst., art. 189 al. 4.

⁸⁶ Except the social division which is in Lucerne, but this division is integrated to the Federal Supreme Court.

⁸⁷ O. SIGG, “Switzerland’s Political Institutions”, English translation F. M. Blackwell/D. N. Roscoe/M. Mettler, Zurich 1991, p. 34.

scholarship is somewhat contradictory: the Article is interpreted as not forbidding the Federal Supreme Court from stating its opinion on the constitutionality of federal laws, but at the same time it obliges the Federal Supreme Court and other bodies to apply federal laws, even if they are considered unconstitutional.⁸⁸

In recent years (1996 and 2000), the Federal Council tried to introduce concrete review under the Constitution. Two arguments were put forward: first, that the lack of constitutional review of federal laws creates a gap in the system of legal protection; and second, that the Federal Tribunal has changed its jurisprudence to comply with the European Convention of Human Rights.⁸⁹ These arguments for introducing concrete review failed to find a majority in parliament. Thus, the proposal to expand the jurisdiction of the Court to include concrete review of federal laws and acts having general effect on the federal assembly was defeated. As a result, there is presently no control of the constitutionality of federal law whereas there *is* control on the constitutional competence of the Cantons.

Surprisingly, Article 95 of the Federal Supreme Court Act (LTF),⁹⁰ which defines the types of actions brought before the Federal Supreme Court, does not mention cantonal legislation. As a result, the application and judicial control of cantonal law are cantonal competences. This competence follows from Articles 3 and 47 of the Constitution, which obliges the Confederation to respect cantonal autonomy. In exceptional cases, however, the Federal Supreme Court may examine the application and the interpretation of cantonal law. Such is the case, for example, when there are serious restrictions of liberty. The Federal Supreme Court also judges the compatibility of cantonal acts with superior federal norms.

The Swiss system of justice is complex. There are administrative, civil and criminal courts at both the cantonal and federal levels. The judicial system is constructed as a pyramid. At the base, there are the courts of first instance, i.e., the trial courts, which are followed by the courts of appeal. Both first and second instances are cantonal. Trial courts and courts of appeal apply federal and cantonal civil and criminal law.

At the top of pyramid is the Federal Tribunal. It has power to decide appeals from cantonal courts. It also rules on appeals lodged against decisions by federal agencies. The Federal Tribunal decides conflicts between the Confederation and the Cantons as well as conflicts among the Cantons. It is empowered to review legislative and executive acts of the Cantons and thus to guarantee the (cantonal) constitutional rights of the citizens.

2. Relations between the Federal and Cantonal Governments

The Central government has no (constitutional) power to force the Cantons to legislate in the field of their exclusive powers. Yet, under the interpretation of Articles 173, 182, and 187 of the Constitution, the Confederation has such power indirectly. The Confederation must ensure the implementation of federal law and thus can oblige the Cantons to act.

In spite of this rule, there is no sanction if the Cantons do not respect their obligation to legislate. Legal scholarship has frequently discussed this matter, but no solution has been found. In practice, however, there are no cases in which the Cantons did not respect their obligation.

⁸⁸ A. Auer/G. Malinverni/M. Hottelier, op. cit. pp. 685-791.

⁸⁹ The Federal Supreme Court is willing to verify the harmony of federal law with the European Convention of Human Rights (ECHR). Moreover, in the case of a conflict between federal law and the ECHR, the Federal Supreme Court has refused to apply federal laws that violate the ECHR in some recent cases, on the condition that the parliament did not wilfully legislate against international law.

⁹⁰ Federal Tribunal Act of 17 June 2005, RS 173.110.

As mentioned, the implementation of federal law is largely performed by the Cantons.⁹¹ Federal law binds the Cantons with regard to how they implement federal legislation. However, as a general principle, the Confederation must leave the Cantons as much freedom of action as possible. It must also take the financial burden of the Cantons created by the execution of federal law into account.⁹²

The relationship between the Cantons and Confederation is very close as the composition of the central government is decided by the parliament, where cantonal representatives play a major part. Both chambers of the Parliament are directly elected by the people: the National Council (representing the Swiss People) is elected in accordance with federal rules, and the Council of States (representing Cantons) according to provisions varying from one Canton to another. In both cases, the Cantons form the constituencies.

The government of Switzerland in the sense of the executive power consists of the seven members of the Federal Council, as well as the Federal Chancellor, and is elected by the United Federal Assembly for a four-year term. The President of the Swiss Confederation is elected each year and is considered *Primus inter pares* (first among equals) during that time.⁹³

Competing power of the Confederation and Cantons is exercised over taxes on income of individuals and on income of corporations. The Swiss tax system is not centralized and is therefore particularly complicated. The three levels of government may raise taxes, i.e., the citizens pay taxes to each level. The consequence of this system is that the total tax burden differs considerably among the Cantons.

Article 127 al. 1 of the Constitution provides that “[t]he general principles of taxation, particularly the population of taxpayers, and the object of the tax and its calculation, shall be established by statute”; that is to say, submitted to a referendum. The Federal Constitution⁹⁴ provides for the various taxes that are the Confederation’s competence. The Confederation has exclusive power to levy a withholding tax on income from capital investment and certain insurance payments (federal anticipatory tax), a compensatory tax for the exemption of civil and military service, customs duties, federal stamp duties, a tax on commodities such as alcohol, beer and tobacco, a value-added tax, and a special tax on gambling houses.

The power of the Confederation to tax is limited to 11.5% on the income of natural persons by Article 128 of the Constitution (direct taxes) and to 6.5% on the supply of goods and services by Article 130 of the Constitution (value added taxes).

According to Article 46 al. 3 of the Constitution, the Confederation shall take into account the financial burden that is associated with implementing federal law by leaving sufficient funds to the Cantons, and by ensuring an equitable financial equalization. Article 135 of the Constitution states that that the Confederation shall promote fiscal equalization among the Cantons. When granting subsidies, it shall take into account the financial capacity of the Cantons and the special situation of the mountainous regions. Article 128 al. 4 provides that, concerning the direct taxes, at least one sixth of this amount shall be used for financial equalization among Cantons.

The harmonization of direct taxes is provided by Article 129 of the Constitution which states: “The Confederation shall establish principles on the harmonization of direct taxes of the Confederation, the Cantons and the Municipalities; it shall take into account the efforts of the Cantons to harmonize their

⁹¹ Cst., Art. 46 al. 1: “The Cantons shall implement federal law in conformity with the Constitution and the statute”.

⁹² Cst., Art. 46 al. 2.

⁹³ For details on the executive power, see the document of executive power on www.admin.ch (last visited 6.03.09); Auer/G. Malinverni/M. Hottelier, op cit. pp. 49-56.

⁹⁴ Cst., art. 134.

taxes. Harmonization applies to tax liability, tax object, taxation period, and procedural and criminal law on taxation. Harmonization shall not cover tax scales, tax rates, and tax-exempt amounts.”

3. *The Bureaucracy*

The civil service of the central government is separate from the civil services of the Cantons. The Post and Telephone Service (*La Poste Suisse*) and the Federal Railways (CFF) belong to the main federal services which deal directly with the general public. Most federal programs are implemented by the Cantons and the Municipalities, and there is no parallel federal administration.

There is no organized lateral mobility or career advancement between the civil services of the Cantons and of federal government. Still, it is not unusual for civil servants to move between central and federal civil service positions. Experience in cantonal administration is considered an asset when applying for leading positions in the federal administration.

4. *Social Factors*

Switzerland is a multi-ethnic, multilingual and multi-confessional nation shaped by the will of its people. Switzerland is said to be an “artificial aggregate of pieces of Eastern France, Southern Germany, Western Austria and Northern Italy”.⁹⁵ There is no “nationalism” based on ethnic, religious or linguistic factors. Instead, nationalism comes from a sense of common political values.⁹⁶ The elements of national identification are the legendary and symbolic tales of William Tell and *Helvetia* (the mother of the nation), and the Alps. The picture of a nation, basically composed of farmers and shepherds living in isolated mountain chalets or small villages (like the well-known figure of Heidi), distinguishes Switzerland from other countries despite the large-scale industrialisation since the nineteenth century.⁹⁷

From the beginning, Swiss identity has relied not only on what its people shared together but on Swiss specificities,⁹⁸ such as a tradition of hard work, cleanliness, humanitarian organizations (the Red Cross being a mirror of the Swiss flag), a sense of peace (neutral state) and plurilingualism.⁹⁹

In Switzerland, language and religion are the major causes of diversity. The country has four national languages: German, French, Italian and Romansch,¹⁰⁰ of which only the first three are official. According to the report of the Federal Statistical Office, 63,7% of the population speak German as their main language, 20,4% speak French, 6,4% speak Italian, 0,5 % speak Romansch, and 9% speak other languages.¹⁰¹

Cantons determine their official language.¹⁰² German is the official language of 19 Cantons,¹⁰³ French of six,¹⁰⁴ and Italian is the language of merely one.¹⁰⁵ Some Cantons are bilingual (e.g., Freiburg) and one of

⁹⁵ N. Schmitt, «Switzerland», in J. Kramer/H.-P. Schneider (Eds.), *Federalism and Civil Societies: An International Symposium*, Föderalismus-Studien, vol.14, Baden-Baden 1999, p. 335.

⁹⁶ N. Schmitt, *ibid.*

⁹⁷ U. Im Hof, «Die historische Dimension der nationalen Identität», National Forschungsprogramm 21, Kulturelle Vielfalt und nationale Identität, Bâle 1991, p. 14.

⁹⁸ B. Ruckstuhl, «Die Schweiz, ein Land der Bauern und Hirten», in S. Ferrari/ D. Siegrist, *Aus wen schoss Wilhelm Tell? Beiträge zu einer Ideologieggeschichte der Schweiz*, Tagung vom 13.-19. Januar 1991 in Saiecina/Maloja, Zurich 1991, p. 136.

⁹⁹ F. Grin, «Gestion “à la suisse” de la diversité linguistique : un succès menacé par l’économie?», in H. Guillorel et G. Koubi (dir.), *Langues et droits – Langues du droit, droit des langues*, Bruxelles, Bruylant, 1999, p. 251 (253 et 254), D. Froidevaux, «Construction de la nation et pluralisme suisses : idéologies et pratiques», *Revue suisse de Science politique*, 1997, n. 3, p. 29-58.

¹⁰⁰ Cst., art. 4.

¹⁰¹ Statistical Yearbook 2008 by the Federal Statistical Office, see www.statistique.admin.ch (last visited 6.03.09).

¹⁰² Cst., art. 70 al. 2.

them (Grison) is trilingual. Article 2 of the Constitution states that the Confederation shall “promote the common welfare, the sustainable development, the inner cohesion, and the cultural diversity of the country” and the Cantons have the requisite competences in the fields of culture, education, and religion in order to maintain the diversity of culture between Swiss citizens. According to Article 70 al. 3 of the Constitution, the Confederation and the Cantons shall encourage understanding and exchange among the linguistic communities.

Linguistic differences remain, however, very important throughout Switzerland, even within the same linguistic region. A special feature of the German part of Switzerland is the diversity of the dialects spoken: the Basel, Berne, or Zurich dialects are so diverse that understanding, even between the inhabitants of the German part of Switzerland, may be difficult.

In respect to linguistic differences, the French-speaking people are mainly in the west of Switzerland, the Italian- and Romansch-speaking in the east and southeast and the German-speaking people prevail in all other parts of Switzerland.

Switzerland is also diverse in terms of religions. The country has been marked by the civil war between Catholics and Protestants and then by a strong “*Kulturkampf*”.¹⁰⁶ This situation explains the important constitutional provisions on religion. Articles 8 and 15 of the Constitution prohibit religious discrimination among the various denominations: there are Protestants, Roman Catholics, Orthodox Christians, Muslims, and Jews. Article 72 of the Constitution provides that “The regulation of the relationship between Church and State is a cantonal matter”. That is to say that each Canton develops its relationship with religious institutions in different ways. Cantons may have any one of these three kinds of relations: union of church and state,¹⁰⁷ separation of church and state,¹⁰⁸ or autonomy of churches within a public law status.

In the process of interpretation of law by courts, the difference of religion can have an influence. For example, the decisions concerning divorce or abortion prevailing in Catholic Cantons differ from those in Protestant ones.

Religious divisions throughout Switzerland are now, however, not necessarily cantonal any more. At present, only the Roman-Catholic group can pride itself on being a majority in some Cantons.

There are also differences between cities and rural areas. Some of the Cantons are generally urban, such as Basel-City, Geneva, or Zurich, and most of them are located to the west and north of Switzerland. The smaller Cantons of central Switzerland and Appenzell are rural. But most of the Cantons do not belong to either group because industry, handicrafts, and small businesses are widespread throughout the Country. Nevertheless, tensions between rural states and cities persist. “[I]t is a problem of mentality, a feeling that the cities may acquire too much influence and democratic power. (...) The Swiss especially fear that Zurich will become too big and have too much weight”.¹⁰⁹

¹⁰³ Aargau, Appenzell Outer Rhodes, Appenzell Inner Rhodes, Basle-Land, Basle-City, Bern, Grisons, Glarus, Lucerne, Nidwalden, Obwalden, Saint-Gallen, Schaffhausen, Schwyz, Solothurn, Thurgau, Uri, Zug, Zurich.

¹⁰⁴ Fribourg, Geneva, Jura, Neuchâtel, Valais, Vaud.

¹⁰⁵ Ticino.

¹⁰⁶ *Kulturkampf* describes the strong reaction of the Protestants against the Catholics and the Church in general.

¹⁰⁷ None of the Swiss Cantons has this sort of relation with the church. However, the Canton of Vaud experiences a certain form of union: Its Cantonal Constitution at Article 13 provides that the Protestant Church is a “national institution” which is organised by the Canton itself. By contrast, the Catholic churches are not corporations of public law but constitute a private law organisation.

¹⁰⁸ Geneva, Neuchâtel.

¹⁰⁹ O. K. Kaufmann, “Swiss Federalism”, in R.A. Goldwin/A. Kaufman/W.A. Schambra (eds), *Forging Unity out of Diversity*, Washington D.C. 1989, p. 214.

To conclude, “The Swiss case is clearly one of cross-cutting cleavages, a society in which alignments on values, party alignments, religious alignments, linguistic alignments, and territorial alignments of the Cantons all cut across each other”.¹¹⁰

Political consensus and political commitment by the citizens are key elements of the Swiss political system. Strong federalist principles highly influence the legal and administrative environments for regulatory reform. The composition of the federal government reflects the principles of accommodation of linguistic, religious, or topographic diversity,¹¹¹ although minorities have a strong voice in the country. That is the reason why differences of culture are an important factor in the law making process: For example, the popular initiative is an original weapon for minorities to introduce new ideas into the political debate.¹¹² Yet, the unity of the country is maintained while at the same time the diverse identities of the Cantons are preserved.

In addition, the equitable representation of minorities is also perceptible in the composition of the country's supreme judicial body: the Federal Court. Article 107 of the Constitution provides that in electing the Federal Court judges and their substitutes, the Federal Assembly shall ensure that the three official languages of the Confederation are represented. In practice, the composition of the Federal Court also reflects the various political tendencies in Switzerland, and judges are elected in such a way that all regions of the country are represented.

An interesting example of coordination and cooperation between federal and cantonal authorities, and thus of the virtue of federalism, can be found in the field of education. This is a main element of national cohesion, and also an essential feature that measures the success of federalism.

The Cantons have the basic responsibility for education.¹¹³ Yet, the federal government can run technical universities and grant subsidies to the Cantons for scholarships, and it can also take measures to encourage education.¹¹⁴

There is a variety of compulsory educational systems. At present, “there are two, three or four different types of lower secondary schools to match performance requirements, and teaching hours for the nine compulsory years of schooling vary between 7100 and 8900 per child”.¹¹⁵ Teachers at primary schools are nominated and paid by the *Communes* and they receive an almost equal salary throughout each Canton. Less affluent *Communes* receive subsidies for the salaries of their teachers and for the building of schools. However, the differences between schools have not all been eliminated. The Curricula are inadequately coordinated and that creates difficulties for children when they move and change schools between Cantons.

V. CONCLUSION

The Swiss Federal system is an original design. Its peculiarities result in a complex legislative system. The unification of law has been a long process, which is still ongoing.

¹¹⁰ J. Linz, Discussion on the Swiss Federalism, in R.A. Goldwin/A. Kaufman/W.A. Schambra (ed.s), *Forging Unity out of Diversity*, Washington D.C. 1989, p. 256.

¹¹¹ M. Arefaine, *op. cit.* p. 166. The composition of the Federal Council is a compromise of all parties enabling the representation of all political tendencies, religions, genders, and all linguistic parts of Switzerland.

¹¹² Auer/G. Malinverni/M. Hottelier, *op. cit.* pp. 258-261.

¹¹³ Cst., art. 62.

¹¹⁴ J.-F. Aubert/P. Mahon, *op. cit.*, pp. 512-515.

¹¹⁵ Statistical Yearbook 2008 p. 519.

It is not appropriate to speak of centralization with respect to Switzerland because of the relatively strong autonomy of the Cantons. Even under modern conditions, one must not forget that the Cantons, and before them the Municipalities, created the Confederation.

Certain fields of law, such as successions and real rights are strongly harmonized thanks to the Civil Code. But Cantons still have adjunct competences which are expressed in different provisions, e.g., Article 499 of the Constitution which states that the Cantons must determine the authorities competent for establishing a public will (testament). Moreover, some provisions of the Constitution, such as Article 56 al. 1, which states that within their scope of powers, the Cantons may conclude treaties with foreign countries, lend credibility to the view that the Cantons are still sovereign, even if their power is concurrent and described as “subsidiary” to the federal treaty-making power.

Nevertheless, only few areas of law show a low level of unification. At present, only police law, inheritance taxes, education and some kinds of procedures are not unified. As mentioned, unification in these fields is on-going, and differences between the laws of the Cantons are less important than first impressions would lead one to conclude. In addition, the internationalisation of law, globalisation, and a growing influence of institutions such as UNCITRAL, UNIDROIT, and the Hague Conference on Private International Law promote harmonization as well. As a result, therefore, law in Switzerland is fairly uniform, in spite of the intrinsic diversity of the Swiss population and of the strong federalism which marks the political systems.