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The Constitution of Europe:
the European Union from a Federal Perspective

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This paper explores the nature of the multi-level political system of the European Union against a broad comparative background of federal and confederal systems, with particular focus on the Swiss experience. It analyses the extent to which the European Constitution moves the EU closer to a federal structure and what lessons the experience of key federal systems can teach us on the likely future development of the European Union. In particular, it focuses on the transition between a confederal and a federal constitutional order in Switzerland and it interprets the evolution of Swiss federalism since the foundation of the modern federal state. The paper argues that there are many lessons the EU can learn from the experience of federal systems and that the Swiss case, in particular, is most instructive. It further argues that the adoption of the Constitutional Treaty would not significantly move the EU in the direction of a federal system but that some of the dynamics it would be likely to generate can be analysed from the perspective of comparative federalism. It then concludes by calling for the further application of this theoretical framework to the study of the EU away from the overwhelmingly normative approach that has characterised the application of federal theory to the study of the EU for a long time.

Introduction

Switzerland as a federal state is a relatively recent creation, dating only from 1848, but it has a long confederal history stretching back to the 14th century and even, if one believes the official rhetoric, to 1291¹. It is thus seen as the country which more than any other embodies the spirit of the federal idea. Naturally, all those interested in the federal idea and how it can be put into practice look to Switzerland in search of inspiration. This is even truer in the case of those looking at Switzerland as an example of a successful federal state rooted in a pluricultural, if not pluri-national, society. Students and observers of the process of European integration and especially of its 'end-state, often debated in relation to the federal model, figure prominently among the latter². This paper³ takes a critical look at the nature of the European Union from the perspective of the Swiss experience of confederalism and federalism and insights from comparative federalism more generally. On the basis, it aims to elucidate some of the issues at the heart of the debate on the Constitutional treaty. The paper is organised as follows. Section One outlines the institutional evolution of the Swiss political system in the 19th and 20th centuries, with particular focus on the transition from confederation to federation. Section Two describes the essential features of today's Swiss federalism, in particular the division of competences and the relationship between the three levels of government. Section Three compares the Swiss experience with the evolution of the EU and discusses to extent to which the comparison between Switzerland and the EU sharpens our understanding of the dynamics at play in the latter. The concluding section draws some lessons for the debate on the adoption and the ratification of the Constitutional Treaty.

1 The institutional evolution of the Swiss system

From the 14th century until 1848 Switzerland became a progressively tighter confederation of small states or cantons.⁴ This slow evolution from looser to tighter confederation was interrupted between 1798 and 1815 when the country was invaded and *de facto* ruled by revolutionary France which imposed first a unitary state under the name of Helvetic Republic

¹ 1 August 1291 is the date on which the swearing of a solemn oath between the three initial cantons of the Swiss Confederation is traditionally believed to have taken place.

² See, among others, Muret (1950)

³ The paper draws heavily on Church and Dardanelli (2005).

⁴ The country may still officially call itself a 'confederation' in Latin, French and Italian – though, importantly, not in German in which it is referred to as *Eidgenossenschaft* (oath fellowship) – but it is undoubtedly a federal state.

and later a partial return to a confederal structure.⁵ Although this period is often overlooked in accounts of Swiss political history because it is seen as an alien imposition that was immediately rejected by the Swiss, it actually had a lasting effect on Switzerland's political system. The origins of two of Switzerland's peculiar features, the referendum and the 'directorial' form of executive bodies, can be traced back to this period.⁶ After the fall of Napoleon the Swiss cantons regained their sovereignty and, via the Federal Treaty of 7 August 1815, re-established a confederation among themselves, albeit on a tighter and more democratic basis than before 1798. This latter form of confederation lasted until 1847-48 when, following a brief civil war, it was replaced by the modern federal state. The institutional structure set up by the first federal constitution in 1848 has remained largely unaltered ever since, despite major constitutional revisions in 1874 and 1999. As discussed in the next section, however, the distribution of competences and power between the cantonal and federal levels has changed considerably.

Two periods in Swiss political history are particularly relevant for our purpose of comparing the European Union to the Swiss experience. The first one is the last confederal phase, between 1815-1847. In this period, the confederation reached institutional 'maturity' with a more sophisticated institutional structure and wider policy-making remit than had been the case before 1798. The second period is that of the modern federal state post-1848, especially the formative half-century after its establishment. The confederal phase lends itself to a comparison with the existing EU, on the basis of the assumption that the European Union of today is essentially a confederal political system subject to a number of pressures to become a federal state and, at the same time, facing very powerful resistances to moving down such a path⁷. The experience of Switzerland as a federal state is useful as a point of comparison when considering what might occur if the EU were to become a federal state. The remainder of this section outlines the institutional structure and the political dynamics in the two periods mentioned above.

⁵ The Helvetic Republic, imposed after the French invasion and based on the 1798 constitution, lasted until 1802. The 1803 Federal Constitution, better known as Act of Mediation, set up a half-way system between a confederation and a federation, with France retaining ultimate authority. This lasted until 1815; see Aubert (1974: 8-16). On the Swiss executive being modelled on that of the Directorial regime in France between 1795-7, see Kriesi (1998: 218-9).

⁶ There is some disagreement among scholars on whether direct democracy should be considered a modern or a long-standing feature of the Swiss political system. On the one hand, the contemporary instruments of direct democracy were introduced relatively recently (late 19th century as far as the federal level is concerned). On the other hand, many cantons do have very long traditions of popular decision-making symbolized by the institution of the *Landsgemeinde* (open-air popular assembly) and, in certain cases, of referring decisions back to communes *ad referendum*.

1.1 The last Confederation: 1815-1847

The last phase of the Swiss confederation was the most institutionally elaborate and mature form of confederation in Swiss history. Despite being an explicit attempt to 'restore' the pre-1798 order, the 1815 Treaty did accept a number of innovations brought about by the French hegemony, chief among them the equal status for all territories as cantons, including for those which had a semi-colonial status prior to 1798.

The confederation was thus a union of 21⁸ small sovereign states – cantons – coming together to, in the words of Article 1 of the 1815 Federal Treaty, “defend their freedom and independence from any foreign attack as well as preserving internal order and peace”.⁹ The cantons were independent and sovereign states *de jure* and, to a large extent, *de facto* although some encroachment on their sovereignty was already visible despite the essentially confederal nature of the system. This same Article 1 revealingly stipulated that cantonal constitutions were adopted by the supreme authority of each canton but also that they had to ‘conform to the principles of the federal treaty’, which implied that the relationship between the cantonal constitutions and the Federal Treaty was not dissimilar to the existing relationship in the EU between the state constitutions and the EU treaty¹⁰.

The institutional structure of the Confederation, which was centred on a Diet made up of representatives of each canton, was much less complex than that of either contemporary Switzerland or today’s EU. Cantons were on an equal footing with each other, each having one vote regardless of the size of their population or their contribution to the confederal treasury¹¹. Cantonal representatives to the Diet were delegates of their respective cantonal governments and voted upon the latter’s instructions. The Diet normally met annually, in July, in the capital of the so-called ‘managing canton’ (*Vorort*) whose own chief magistrate would be in the chair. When the Diet was not sitting, the general administration of the Confederation was entrusted, on a rotating biennial basis, to one of the ‘managing cantons’, whether Zurich, Berne or Lucerne. The managing canton would also host the skeletal confederal administration – the confederal chancellery – appointed by the Diet. The Diet normally voted on the basis of a simple majority, with the exception of very important decisions – such as military matters – for which a three-quarters ‘qualified majority’ was required.

⁷ This point is elaborated below.

⁸ Twenty-two from 1833 when canton Basle split into two half-cantons, see below.

⁹ Kölz (1992-6: 193).

¹⁰ European law requires that state constitutions be in conformity with its principles – e.g. the right to vote in local and European elections for EU citizens – but it has no formal power over domestic constitutions as such and offers them no guarantees. See also footnote no. 18.

¹¹ The latter varied from 1,184 francs from canton Uri to 91,695 francs from canton Berne at the time of the signing of the Federal Treaty, see Kölz p.194.

In the tradition of previous confederations, this last one was also primarily concerned with defence and security, both external and internal. At the heart of the Confederation was a mutual defence guarantee set out in Article 4 of the Federal Treaty. There was no standing confederal army hence the defence of the confederation was provided by the cantonal contingents directed in time of war by a confederal commander as general. However, the Confederation was also concerned with economic matters. It notably had the significant responsibilities of conducting external trade policy and signing commercial treaties. The Confederation also set a common external tariff that was collected by the border cantons and paid into the confederal treasury annually. This external revenue was the only independent source of income for the Confederation which had for the rest to rely on cantonal contributions, though a 'national' debt accruing to the Confederation was recognized.

Even at this stage, the constitutional framework of the Confederation placed significant constraints on the autonomy, if not the sovereignty, of the cantons. In addition to the constitutional 'compatibility clause' already mentioned, the Treaty also prevented cantons from concluding alliances with each other or agreement with foreign states that were deemed to be in conflict with its norms or were detrimental to the rights of the other cantons. On the other hand, despite the emphasis on equality symbolized by the elevation of all territories to a cantonal status as declared in Art. 7, there were no provisions for confederal citizenship, with the result that citizens had rights only within their own canton and were considered 'foreigners' in all other cantons. Moreover, if the balance of power between the central level and the cantons might appear rather unfavourable to the latter for a confederal order, the lack of enforcement power on the part of the central level meant that the cantons often ignored the Diet's decisions.¹²

To conclude this briefest of outlines of the institutional structure of the last Swiss confederation, it is important to stress that cantons which signed the Federal Treaty in August 1815 could plausibly be described as sovereign states but not as nation states in the contemporary sense of the term. This is because, even if they were determined to defend their autonomy vis-à-vis encroachment from the centre, they accepted that a sense of Swiss national identity was already present, partly as a result of the impact of French revolutionary ideas and the experience of the Helvetic Republic. This sense of Swiss nationhood was explicitly mentioned in the last article of the Treaty, which made reference to the 'common fatherland' of the cantons and was also revealed by the proliferation of 'national' associations in the 1810s and 1820s.¹³

¹² See Aubert (1974: 18)

1.2 From Confederation to Federation

The confederation established by the 1815 Federal Treaty was an explicit attempt to go back in time, to the old ways of the Swiss tradition and to forget as much as possible of the revolutionary period. However, so many of the forces unleashed by the revolution could not be kept at bay and they put increased pressure on the institutional structure of the last confederation as it entered the 1830s and 1840s. Most of these forces were part of the broader 'liberal movement' sweeping Europe from which Switzerland could not isolate itself. Moreover, the Europe-wide battle between liberal and radical forces on one side and conservative and reactionary ones on the other, also led to Switzerland becoming an object of external pressure, particularly from Austria and France.

Politically, the rise of the liberal movement generated strong demands for greater equality, more citizen participation, clearer limits on government and, especially, more competences for the central level and a stronger institutional infrastructure to carry them out. From about 1830 onwards, this movement led to wide-ranging constitutional reforms in a number of 'progressive' cantons which adopted new constitutions, which they submitted to popular approval in a referendum.¹⁴ If in some cantons these reforms were achieved more or less peacefully, in others it was not so: in some extreme cases the confrontation between liberal and conservative forces led to bloodshed; in canton Basle it even led to the secession of the countryside to form a new half-canton in 1833.¹⁵ Moreover, this atmosphere of confrontation generated inter-cantonal defensive pacts on both sides which would spell trouble for later events.

Economically, the liberal movement manifested itself in growing demands for the creation of a unified economic space from which economic growth would greatly benefit. Under the 1815 treaty, there still existed a variety of weights, measures and currencies in Switzerland and cross-cantonal trade had to pay tariffs and duties. Bourgeois reformers in the rapidly industrialising cantons such as Zurich came to see this economic fragmentation as one of the greatest obstacles to the nation's progress. Hence they added their weight to the pressures for a centralisation of the system.¹⁶

The reform movement inevitably spilled over – or, more accurately, up – from the cantonal to the confederal level, with the liberal and radical members of the Diet exercising pressure on their conservative counterparts for a reform of the Federal Treaty in a more centralist direction. A project along those lines in 1832-3 failed to gather enough consensus, with the progressive cantons finding it too timid and the conservative ones too radical. The

¹³ See Kölz (1992-6: 202) and Aubert (1974: 19).

¹⁴ See Aubert (1974: 20). As far as the cantonal level is concerned the modern form of direct democracy dates from this period.

¹⁵ Called Basle-Country; on the circumstances of the secession see Church (1983: 57-69).

¹⁶ See Fahrni (2003: 63-76) and Lister (2001: 111).

failure of such moderate reforms had the effect of emboldening the radical wing of the liberal movement which intensified its campaigns for radical democratic and federal reforms and increasingly there was a social elements in the campaigns. The forces of liberalism and radicalism on the one hand and of Catholic conservatism on the other hand balanced each other out, with ten or so cantons on each side, and the delicate equilibrium at the confederal level could suddenly be altered by revolutions and counter-revolutions in some cantons, most notably that in Lucerne, which overthrew the liberal government there in 1841. These background trends were further exacerbated in the late 1840s by several disputes that touched on delicate issues such as the presence of religious orders in the Catholic cantons.

In this climate, the Catholic cantons felt threatened by the mounting radical tide and in December 1845, signed a pact of mutual support known as the *Sonderbund*. Under the terms of the Federal Treaty such pacts were illegal, hence the existence of the *Sonderbund* was initially kept secret. The pact became public, however, in June 1846, triggering an immediate demand by the liberal cantons for its annulment. At that time, however, the liberals and radicals did not constitute a majority in the Diet. They did achieve a majority a year later after the cantonal elections in Geneva and St Gallen, so the Diet, meeting in July 1847, decided to dissolve the *Sonderbund*, to expel the Jesuits and to revise the Treaty in a more centralist direction. These decisions triggered a month-long civil war which ended in the defeat of the conservative, Catholic cantons of central Switzerland and in the triumph of the radical forces¹⁷.

The latter set up a constitutional commission entrusted with a 'revision' of the Treaty but, as it turned out, it ended up drafting a constitution for a federal state thereby radically changing the nature of the Swiss political system. In June 1848 the new constitution was endorsed by the Diet, with 13 votes in favour and 9 against or abstentions. Subsequently, the new constitution was ratified by popular referendum in all but one of the cantons, with 13½ votes in favour and 6½ against. In September the last Diet gathered to promulgate the new constitution and establish the new federal state, although, strictly speaking, the procedures by which the new constitution was being adopted were illegal under the terms of the existing Federal Treaty. The cantons defeated in the civil war voted against the new constitution both at the Diet and in the ratification process but ultimately accepted the outcome and participated in the subsequent election for the new federal parliament. The new parliament gathered for the first time in November 1848 in Berne – which was made the permanent capital.

1.3 The 1848 settlement

The 1848 constitution represented a compromise settlement between the vision of the radicals and the need to keep the old *Sonderbund* cantons on board. It set up a federal state in which the cantons retained ample autonomy in many areas of policy-making under the 'residual powers' clause of Art. 3. In formal constitutional terms, the shift from a confederation of states to a federal state was far from unambiguous. On the one hand, the first article of the constitution cited as the constituting body of the new state 'the peoples of the twenty-two sovereign cantons', with no mention of a single Swiss *demos*. Moreover, no explicit supremacy clause of federal law over cantonal law was written into the constitution.¹⁸ On the other hand, the preamble made explicit reference to the 'unity, force and honour of the Swiss nation' and Art. 3 clearly stated that cantons were sovereign only insofar as their sovereignty was not specifically limited by the federal constitution which, of course, really meant that they had lost their sovereignty.¹⁹ As had been the case in the past, however, political practice was different from the letter of the constitution and pointed to a clear shift of power towards the central level. Despite an initial challenge to the legality of the new constitution by three members of the defeated *Sonderbund* – Uri and the two half-cantons²⁰ of Nidwald and Obwald – direct defiance of the principle of federal sovereignty in the formative period of the new state was very rare and there is substantial evidence that the principle was widely accepted by cantonal authorities, despite their insistence on describing their cantons as 'sovereign states'.²¹

The change between the pre- and post-1848 constitutional order was not much more dramatic in terms of policy-making competences conferred to the federal level although, as explained below, these were explicitly spelt out in the constitution and made subject to the procedure for constitutional revision. There was still no single, standing federal army, no direct federal taxation and no unified civil and criminal legal codes²². The clearest innovations were in the field of the management of the economy and citizenship rights. In the former, the constitution established a single economic and monetary space with the federal authorities in charge of its enforcement. All discrimination in inter-cantonal trade was

¹⁷ See Remak (1993). The country also narrowly escaped intervention by Austria and France, in support of the *Sonderbund* alliance and the liberal cantons, respectively; see Lister (2001: 114-6)

¹⁸ This only appeared in the revised constitution of 1874.

¹⁹ There is a tendency in political science scholarship to use the term sovereignty in a loose way to mean policy-making autonomy rather than in its legal sense of ultimate, supreme power. On the cantons being no longer sovereign, see Aubert (1974: 29-30; 81). Incidentally, the supremacy of the federal constitution over the cantonal constitutions also meant that the latter had to have, under Art. 6b, a republican nature. This could have been a problem for canton Neuchâtel, long a Prussian principality, had it not had its own republican revolution in 1848, see Aubert (1974: 33-4) and Luck (1985: 309-4). See also art. 28 of the German constitution and art. IV, section 4 of the US constitution for similar provisions.

²⁰ On the status of half-cantons, see Hughes (1970 [1954]: 3-4).

²¹ See Friedman Goldstein (2001: 99-140).

abolished, the federal competence in external trade confirmed and a single currency established. The constitution also created a Swiss citizenship giving citizens the ability to exercise their rights throughout the federation regardless of their canton of residence.²³

The crucial difference from the previous constitutional order was arguably in the institutional framework of the system. Whereas under the 1815 Federal Treaty the only real confederal institution was the non-permanent Diet, the 1848 Constitution set up an elaborated set of federal institutions – partially modelled on the US system – with a bi-cameral Federal Assembly, a seven-member executive called Federal Council and a Federal Tribunal. The Federal Assembly was made up of a directly elected lower chamber, the National Council, and an upper chamber of cantonal representatives, the Council of States, in which each canton was represented by two members, irrespective of its population²⁴. Each chamber had exactly the same power, thus giving cantons a strong influence in federal decision-making. Even more importantly, from the cantons' point of view, was the fact that the granting of new policy-making competences to the federal level would only be possible on the basis of a constitutional revision and the latter was made dependent on an endorsement in a referendum by a majority of the people *and* of the cantons.

Wide cantonal autonomy in policy-making, equal representation at the federal level, perfect bicameralism and a cantonal majority for constitutional revisions thus represented a formidable set of guarantees to the cantons – especially, it goes without saying, to those on the losing side of the 1847-8 confrontation – that the minority would not be trampled on in the new federal state. Their position was later consolidated by the growing use of direct democracy and proportional representation. This probably goes a long way towards explaining the acceptance of the new order and the remarkable stability of the modern Swiss political system. Despite two constitutional revisions, in 1874 and 1999, today's institutional framework is still essentially the one set up in 1848.

1.4 The evolution of Swiss federalism since 1848

If the 1848 settlement represented a delicate compromise between the desires of the liberal and radical majority and the fears of the conservative minority, it could not for long resist new pressures both the liberal-radical movement and from economic necessity. As we have already seen, the new federal state was still extraordinarily decentralized, with limited

²² Which are, of course, crucially important in a civil law system such as Switzerland.

²³ Interestingly, Swiss citizenship remained dependent on cantonal citizenship in a very similar manner to the way in which EU citizenship is dependent on state citizenship. Art. 42 stated 'Everyone who is a citizen of a canton is a Swiss citizen.' Incidentally, the same article also forbade the exercise of political rights in more than one canton, unlike in today's EU where this is sometimes possible [e.g. an Italian citizen resident in the UK can vote for all elections and referendums in Italy as well as for local and European elections in the UK].

competences exercised at the central level. The pressures that had led to the transformation of the confederation into a federal state were now pushing in the direction of a greater centralization of the latter. The main drive was the desire to harmonize regulations across cantons, especially of weights and measures and of the legal codes, in order to facilitate economic activity on a country-wide basis. After a failed attempt in 1872, a wide-ranging constitutional revision was approved in 1874 giving more power to the central level, notably on matters of defence, private law, transport and the environment.

As noted above, the 1874 revision left the institutional structure largely unchanged, with the significant exception of a strengthening of the powers and independence of the Federal Tribunal. In fact, the most significant innovation of the new constitution was the introduction of an optional referendum for ordinary legislation, whereby 30,000 citizens could challenge any law passed by the Federal Assembly, adding to the mandatory referendum for constitutional revisions. Even more important in this respect was the introduction, in 1891, of the popular initiative for partial constitutional amendments²⁵. These instruments became the pillars of the system of direct democracy that has profoundly shaped the Swiss political system. In particular, as discussed in more detail below, direct democracy has played a crucial role in constraining the centralizing tendency of the political dynamics and thus preserved some of the peculiar features of Swiss federalism.

This slow but persistent centralizing tendency was clearly displayed where the harmonization of legal codes was concerned. An 1898 constitutional revision paved the way for the adoption of a single civil code in 1907 and a single penal code in 1937. After the First World War, and even more so after the Second World War, the same centralizing dynamic was on display in the progressive creation of a welfare state, with more and more power conferred to the central level. This trend was reflected in the fact that the 1874 constitution was amended more than one hundred times over the course of the following century.²⁶ Some of the most conservative cantons, such as Uri, have consistently voted against all full, and most partial, revisions of the constitution since 1848 but have nonetheless never questioned – after the very initial challenge – the legitimacy of the system. Interestingly, and probably not unrelated, official nation-building after 1848 was centred on the 'myths' (such as the 1291 oath and the William Tell legend) of the 'primitive' Switzerland of the so-called

²⁴ These representatives, however, were no longer delegates of cantonal governments but were selected by cantonal parliaments. They are now directly elected.

²⁵ This allowed citizens to propose changes to individual articles of the constitution.

²⁶ See Church (2004: 35-47).

Forest Cantons, in other words the small, rural, conservative, Catholic cantons who fought and lost a civil war to prevent a unified state from seeing the light of day.²⁷

From before the establishment of the federal state until the 1970s, a slow but unambiguous process of centralization thus took place in the Swiss federal system. It was, moreover, a process that gathered momentum over time, with a decline in the number of defeats to constitutional amendments from the end of the 19th century onwards.²⁸ However, it is important to nuance this statement. First, the Swiss federal state started from a situation of extreme decentralization more commonly associated with confederations than with federations. The power shift that has occurred over time can then partially be explained by the very low initial level of centralization. Secondly, centralization has largely been confined to legislation while policy implementation has been left to the cantons and the communes. Hence, for example, while legal codes have been harmonized, the organization of the judicial system is still in the hands of the cantons. Thirdly, centralization in the Swiss system, though significant, has not gone as far as it has done in other federal states with the result that Switzerland is still the most decentralized of the main federations.²⁹

As already mentioned, the process of centralization over time has been driven by three main forces: the desire to facilitate economic activity by creating a single economic space governed by harmonized regulation, the desire to grant citizens equality of rights in the political and social spheres, which has translated into the strengthening of Swiss citizenship and the building of a welfare state, and a strong nationalist ethos in the Radical Party. In political terms, the forces driving this process forward were thus what could be broadly defined as the 'left', which meant in the 19th century the liberal-democratic movement embodied by the Radical Party and in the 20th century the latter allied, to a certain extent, with the socialist movement. The forces resisting it were essentially the conservative, Catholic party primarily rooted in German-speaking, central Switzerland and the liberal-free market forces of French-speaking Switzerland.

Beyond this fairly conventional positioning of the political forces on the issue of relative distribution of power between the federal and the cantonal level, however, centralization has also been constrained in Switzerland by a number of factors more peculiar to the Swiss political system and culture. The first and most obvious one is the presence of strong cantonal identities rooted in history and normally associated with linguistic and religious traits. Although these identities are subordinate to an overall sense of Swiss nationhood, they make cantonal governments and, importantly, their populations – who have

²⁷ The Swiss national day, 1 August commemorates the 1291 pact rather than any date related to the foundation of the federal state. It was first celebrated in 1891; the William Tell monument in Altdorf, Uri was erected in 1895.

²⁸ See Aubert (1974: 86).

²⁹ See McKay (2001: 142).

the final say on constitutional amendments – wary of seeing policy-making competences drift away to the federal institutions in Berne. Secondly, centralization has been restrained by the quintessentially Swiss belief that ‘local’ is always preferable in principle to ‘distant’ and thus that policy-making should be conducted, as much as practical, at the lowest possible level. It is in essence the spirit of the much-debated principle of subsidiarity, even though the principle is not explicitly spelled out in the federal constitution.³⁰ The lowest possible decision-making level in Switzerland is, of course, that of the people as embodied in the modern institutions of direct democracy and in the tradition of the *Landsgemeinde* or popular citizen assemblies.³¹

This leads us to the last, but by no means least, factor that has constrained centralization in the Swiss federal system: the constitutional framework. Federal competences must have an explicit constitutional basis, hence each new transfer of competence requires an amendment to the constitution. Furthermore, any such amendment must pass the ultimate test of the mandatory referendum with double popular and cantonal majorities. Many constitutional amendments have foundered in the face of popular opposition. Taken together, these factors peculiar to the Swiss system have posed a formidable obstacle to the process of centralization and yet centralization has still been significant. Relative centralization of legislation and regulation over time and the maintenance of decentralized policy implementation has brought about a wholesale blurring of the division of competences between the two levels of government, thus undermining the original vision of the founding fathers of the federal state.

2 Contemporary Swiss federalism

Two general points should be made about Swiss federalism. First, it is not a fixed entity but an evolving affair marked by constitutional change and driven by political dynamics. Secondly, its contemporary form and its functioning are not just a matter of institutional mechanics and of formal division of powers. They are also intimately linked to political culture in a much more organic and behavioural way. More generally, federalism is still very vigorous both in its ‘institutional’ and ‘cultural’ forms and is still very much at the heart of the Swiss political systems. If anything, the 1999 constitution has reinforced it by, for example,

³⁰ It is often stated that ‘residual powers’ clauses such as those of art. 3 of the Swiss constitution, art. 30 of the German constitution, the 10th amendment to the US constitution etc. represent a formulation of the principle of subsidiarity. However, this is incorrect as they only state a presumption in favour of the cantons, *Länder* and states vis-à-vis the federal level but not a *general* presumption in favour of the lowest level of government which, in all these cases, would be the commune or municipality; see Art. 1 of the EU Treaty.

making for the first time an explicit reference to the role of the communes in Art. 50. It is also worth emphasizing that in Swiss political discourse, federalism implies decentralization so that if someone says s/he is a federalist, s/he means being pro-cantons and anti-Berne. This understanding of federalism contrasts sharply with that prevailing in the British discourse on the EU, especially in Eurosceptical quarters.

At heart, Swiss federalism is concerned with giving as much autonomy as possible to local communities and letting the differences between them coexist peacefully and harmoniously. Moreover, beyond the formal institutional arrangements, it is a way of working and thinking, rooted in an organic, bottom-up conception of the state and shaped by history. In such a context, informal institutions and procedures are as or more prominent than formal ones. Swiss federalism has grown into a form of co-operative federalism where there is a functional division of competences between the federation and the cantons rather than a dualistic separation: legislation is largely produced centrally while implementation is largely done regionally or locally. The principle of loyal co-operation between levels of government – the so-called *Bundestreue* obligation – is central to its working and is reflected in the tax system which is also divided both vertically and horizontally. Finally, it is important to point out that because of its depth and width in Swiss society, federalism has become a key component of Swiss national identity, which is based on ‘constitutional patriotism’ rather than, of course, on shared ethnicity or culture³².

This ‘mythical’ role probably accounts for a certain anachronism in the official terminology applied to Swiss federalism too, with the state still officially called a confederation and many cantons still describing themselves as independent, sovereign states. The rest of this section explores these aspects by looking at actors, constitutional provisions, formal and informal rules and procedures, and, finally, the problems and wider applicability of Swiss federalism. It will conclude that Swiss federalism is more complex and behaviourally determined than is commonly realized, partly because of direct democracy, and that this raises questions about the extent to which the Swiss experience is transferable.

2.1 Actors

There are three institutional actors in Swiss federalism: the federation, the cantons and the communes. All three levels of government have specific constitutional tasks though their nature and extent naturally vary – and it is essential to include the communes because they play a very crucial role in Switzerland

³¹ For an enthusiastic, journalistic account of the Swiss belief in the wisdom of the people, see Fossedal (2002). After having been abolished in a number of cantons, only two cantonal *Landsgemeinden* survive (in Appenzell-Inner-Rhoden and Glarus).

³² Although it could be argued that such belief in the political values of Switzerland and pride in its institutions constitute a *cultural* element shared by all Swiss, see Church (2004).

The cantons still appear to be the central actors. Not only are they the crucial middle level between the federation and the communes, they are also the building blocks of the state. Constitutionally, they are the only actors free to determine their own policy-making role within the limits of the federal constitution although, *de facto*, this freedom has been progressively reduced by the process of centralization discussed above. Moreover, as already mentioned, they are the main agencies of public policy implementation in the country and thus the principal 'face' of the political system vis-à-vis the citizens.

The 26 cantons and half-cantons vary greatly in size, both geographically and demographically, in their political influence and in the length of time they have been in the Swiss (con-)federation but all have the same rights under the federal constitution.³³ So called half-cantons, the result of splits of whole cantons at critical historical junctures, are almost *de facto* full cantons and have the same rights save for having just one seat in the Council of States and half the weight in calculating the cantonal majority in constitutional referendums; the 1999 constitution plays down the distinction between full and half cantons further. Cantons, as already observed, still tend to perceive themselves, at least in their official discourse, as independent and sovereign. Indeed, they do retain vestigial elements of statehood including a concept of cantonal *demos* and citizenship, full taxation power and a 'residual powers' clause. They are probably more autonomous, more organic and more 'self-conscious' than regional units in other federal systems.³⁴ Partly because of their historical independence and 'precedence' vis-à-vis the federal state, cantons are also more inclined to act as individual units rather than as a collective 'cantonal lobby'. Historically, the cantons have preferred to retain their policy-making autonomy rather than ceding it to the central level in exchange for a significant stake in federal decision-making, although, in some areas, they have inevitably been forced to do so. Cantons are now very fully integrated into federal decision-making. Not only are they represented in one chamber of the perfectly bi-cameral Federal Assembly, they are also fully involved in pre-parliamentary consultations on draft legislation, a crucial agenda-setting phase in the Swiss law-making process.³⁵

The federation is nonetheless a very important actor, although, strictly speaking, its status is ambiguous. On the one hand, the federal constitution implies that the 'Confederation' – i.e. the federation – is synonymous with the whole Swiss political system, including cantons and communes. Elsewhere, on the other hand, it refers to the

³³ In the official Swiss usage, cantons are listed in descending order by the date they joined the confederation/federation, save for the three 'managing cantons' under the 1815-1848 Confederation, which are listed first.

³⁴ We prefer the term 'region' to that of 'state' when referring to sub-central units of a federal system – which take different names in different countries e.g. cantons, *Länder*, provinces, states and indeed regions – as it avoids the conceptual confusion generated by the fact that the federal state itself is a 'state'. As Aubert (1974: 81) put it: "L'Etat fédéral ou fédératif (*Bundesstaat*) est un Etat souverain, composé d'Etats qui ont cessé de l'être".

'Confederation' as the federal level of government – essentially the federal institutions – as distinct from, if not sometimes opposed to, the cantons and the communes. While bearing in mind the tension between the two conceptualizations, we use the latter conceptualization not least because one key component of the 'Confederation', in the language of the constitution and, in a very real sense, through direct democracy is the Swiss people who cannot be neatly subsumed into the federal institutions³⁶. The only significant change in the federal institutions since the 1874 constitutional revision is that members of the Council of States are now directly elected rather than being chosen by the cantonal parliaments³⁷.

As already emphasized, communes are very important actors in the system. There are several types of commune, but the one we are concerned with here is the so-called 'political commune' which is comparable to its namesake in Germany, France and Italy but it does not have an exact equivalent in English local government.³⁸ The nearly 3000 communes carry out a great deal of policy implementation, directly raise a significant amount of taxation to finance it and, importantly, are the agencies granting citizenship. Uniquely among federal states, Swiss citizenship depends on cantonal citizenship which in turn depends on citizenship of a commune³⁹. It is tempting to see communes as miniature cantons and there are certainly many similarities between the two. However, it is worth pointing out that cantons are not themselves 'federal' so do not accord communes the status the federation accords to them. Nonetheless, many cantons make explicit reference to the communes in their constitutions and treat them with a great deal of respect, unlike the cavalier way with which local government is treated in some other political systems. The 1999 constitution also gives formal recognition to communes and requires the federal institutions to take them into account when formulating public policy.

2.2 Division of competences

The division of competences between the three levels of government is primarily regulated through constitutional norms, federal for federation/cantons relationship – and cantonal, for the relationship between canton and communes. The new constitution adopted in 1999 ushered in some slight changes. As these new rules have been in operation for such a short time, it is not possible to evaluate their impact fully. The presence of constitutional rules at

³⁵ See Church (2004: 173-86).

³⁶ There is arguably a similar tension in the European discourse between the conceptualisation of the EU as the whole political system including states, regions etc. and identifying it with 'Brussels'.

³⁷ Note that the electoral rules for the Council of States are, according to Art. 150 of the Constitution, a cantonal rather than a federal competence.

³⁸ See Church (2004: 92-102).

³⁹ The ruling by the Federal Tribunal in mid-2003 that communes could not use direct democracy to decide on individual applications for naturalisation caused anger in conservative circles.

both federal and cantonal level means that each of the three levels operates within legal constraints and has to respect the autonomy and prerogatives of the other levels and to co-operate with them. This said, there is a clear hierarchy of levels. Cantonal constitutions and legislation constrain the communes' margin of manoeuvre while the federal constitution and laws prevail over cantonal laws. Importantly, cantonal acts are subject to judicial review by the Federal Tribunal while federal acts are not and can only be challenged through referendum.

The formal division of competences is less clear-cut than might be expected. It is not fully specified and it operates through several categories – fully cantonal, joint and fully federal – which are not straightforward. The complexity arises from the fact that the joint competences are shared between the two levels in a variety of different ways and that even within fully federal competences policy implementation is typically left to cantons and communes. In other words, the division of competences relates essentially the legislative sphere while policy implementation is overwhelmingly carried out at lower levels.

By and large, this pattern is mirrored in the fiscal sphere. All three levels have revenue-raising powers and broadly speaking aim to be self-financing, although there is a considerable degree of revenue sharing. Reflecting the distribution of policy implementation, cantons and communes spend more than the federation; indeed, the federation has been granted tax income on a limited temporal basis only and cannot extend it unilaterally. Although not dependent on income from the centre, cantons do get help from the federation through sharing in federal taxes plus receiving grants, refunds and subsidies in compensation for their implementation role and/or investment. This is done through an equalization fund intended to smooth the imbalances in revenues among cantons. However, very significant differences persist and the overall financial impact of equalization is much weaker than in other federal systems such as Germany. It is, however, comparable to the EU structural funds in relation to GDP.⁴⁰ A recently approved reform will streamline the system by increasing the purely horizontal dimension of the system – between 'rich' and 'poor' cantons – and reducing the amount of ear-marked federal grants.

2.3 Institutions and formal procedures

The three levels – and especially the cantons and the federation – are woven together in a co-operative way by a variety of means including:

§ *Constitutional amendments*: cantons have collective veto power over any shift of competences to the federal level because all amendments to the federal constitution are

⁴⁰ See McKay (2001: 115).

subject to approval by a majority of cantons, as well as of the people, in a mandatory referendum. It does happen that popular and cantonal majorities do not coincide and thus that amendments are not passed: eight such occasions have occurred since 1848.⁴¹

§ *Political representation*: theoretically this takes place via the Council of States, which, as mentioned above, has equal power with the National Council. With the shift to direct elections, members are now elected on party lines and owe greater loyalty to their party than to their canton. However, cantons also serve as constituencies for elections to the National Council so the cantonal basis of representation is very strong⁴². The role of representation of the cantons is to a certain extent performed by the inter-governmental conferences of cantonal ministers and cantonal presidents, which are the collective voice of the cantons. There is no cantonal representation as such in the seven-member federal executive – the Federal Council – although unwritten proportionality rules stipulate that not more than one councillor should come from the same canton and that the college should contain at least two non-German speakers and both Protestants and Catholics⁴³.

§ *Decision and policy-making*: cantons share in this via the Council of States, their constitutionally guaranteed role in the process of pre-parliamentary consultation, by representation in federal bodies such as the Integration Bureau⁴⁴ and via federal-cantonal conferences. Under Art. 141 of the federal constitution a request by eight cantons can also trigger a referendum challenge to any federal law⁴⁵. Cantons are thus fully involved in the three key phases of federal law-making in Switzerland: pre-parliamentary, parliamentary and post-parliamentary.

§ *Implementation*: as already mentioned, cantons and communes undertake most of the financing and implementation of federal laws and policies: there is no local federal administration such as exists in the US. There is also a great deal of inter-cantonal co-operation, through conferences of ministers and signing of 'treaties' known as concordats on a range of matters that cantons want to retain as their exclusive competence but on

⁴¹ See Church (2004: 143-53).

⁴² It could be argued that the only real difference between the National Council and the Council of States is in the lower 'district magnitude' of the latter which favours the centrist parties and under-represents the left and right wings.

⁴³ Before 1999, art. 96 of the 1874 constitution formally prevented any two councillors coming from the same canton from being elected, see Hughes (1970 [1954]: 107-8). The rule was broken in the 2003 elections, when two councillors from Zurich, the largest and most powerful canton, were elected.

⁴⁴ A federal body charged with coordination of European integration policy.

⁴⁵ This happened for the first time in 2003-4 when a large group of cantons decided to challenge the Federal Council's proposed financial reforms. Other interests are also separately challenging the package which will be voted on in May 2004.

which some degree of harmonization is also deemed desirable. A prominent example of this is horizontal co-operation in education among the francophone cantons.⁴⁶

§ *Judicial*: cantonal courts provide the lower level of the judicial system. Legal codes have now been harmonized at the federal level although the organization of the judicial system is still left to the cantons, with significant differences existing between them. Apart from the Federal Tribunal and its specialist sections, there is no overall federal judicial system. The Federal Tribunal ensures uniform application of federal law and compliance of cantonal acts with it. However, as it is not a constitutional court, it does not have the power to strike down federal acts on grounds of unconstitutionality. Moreover, the 'guaranteeing' of cantonal constitutions for conformity with the federal constitution is performed by the Federal Parliament not by the Tribunal.

3 Lessons for the EU

What can the EU learn from the Swiss experience? Three areas of the debate on the European Union are relevant here. First, how to conceptualize the nature of the EU system and what role states and citizens play within it, especially in relation to states' desire to retain their sovereignty and the fragility of popular identification with Europe. Secondly, how to divide policy competences between the Union and the states so as to maximise the policy-making capacity of the system. Thirdly, how to improve its democratic quality, i.e. its responsiveness to the citizens both in terms of inputs and of accountability.

But which Switzerland should we look to as a model? To the contemporary system or to the last confederation? Given the nature of today's EU and the pattern of collective identities in Europe, we should probably look at the 1815-48 confederation is probably a closer model than today's federal state but it is worth bearing in mind the factors that led to the end of the confederation and those that shaped the evolution of the post-1848 federal state.

3.1 The nature of the EU political system

Analysis of the Swiss political system before and after 1848 compared to that of the EU, provides strong support for conceptualising the EU as a confederation. Yet, although such conceptualisation has long been discussed, it is not still not widely used, with many scholars

⁴⁶ See Hega (2000). Inter-cantonal co-operation in Switzerland can be seen as the functional equivalent of what in the EU is now called the 'open method of co-ordination'.

preferring formulas such as 'quasi-federal' and *sui generis*.⁴⁷ Conceptualising the EU as a confederation, opens up the possibility of analysing the EU in a comparative way, rather than treating it as an entirely unprecedented form of political system. There is one problem however: all the main historical examples of confederation existed in the distant past; no confederation truly comparable to the EU exists today. We thus propose an analytical 'double act' of comparing a contemporary confederation of states – the EU – both with a historical *confederations* of states – in this case Switzerland from 1815-1848 – and with a *contemporary* federal state – such as today's Switzerland. When comparing the EU to historical confederations, we have to assess the incentives and constraints the system faced in the first half of the 19th century with the incentives and constraints generated by the modern world, although it does appear that the key element of the member states' desire to retain their sovereignty is relatively constant. When comparing the Union with contemporary federal states, we need to take into account that in today's EU ultimate sovereignty – both in terms of its popular locus and of the institutions entrusted with exercising it in the name of the people – rests with the states rather with the Union as does citizens' primary collective identification.

A powerful centralising trend – from confederation to federation and from a less to a more centralized federation – can be detected in the evolution of the Swiss system. This can probably be explained by the fact that federal states are unquestionably more coherent frameworks for economic activity and more efficient decision-makers than confederations of states as well as being, potentially, more democratic⁴⁸. The EU has faced and is still facing similar pressures towards more efficiency and more democracy so we should also expect pressure for greater centralisation to continue.

However, the Swiss experience also indicates that the transition from a confederal to a federal order may take a very long period of time and nevertheless still have to go through a phase of conflict to be finally accomplished. Despite the fact that the Swiss confederation became progressively tighter over time, the final transition to a federal state took place only after a civil war.⁴⁹ Like in 19th century Switzerland, turning the EU into a federal state would imply the explicit voluntary renunciation of sovereignty going beyond the current arrangement of whereby sovereignty is 'pooled' in the areas of EU competences but is ultimately retained by the 25 states⁵⁰. This appears highly unlikely for the foreseeable future

⁴⁷ See, among others, Taylor (1975), Wallace (1982) and, especially, Forsyth (1981). See also Warleigh (1998) for a recent plea in favour of the same approach.

⁴⁸ Provided, of course, the existence of a sufficient sense of being a *demos* in the population. So-called 'sovereignists' would, of course, contest this.

⁴⁹ It could be argued that the US too became a real federal state only after the 1861-5 civil war. See, among others, Friedman Goldstein (2001: esp. 22-33).

⁵⁰ Incidentally, in light of the Swiss, German and US constitutions mentioned above, an EU federal state with a republican order – say, a Federal Republic of Europe – would probably imply the

and suggests that the EU is likely to continue to integrate along incremental lines avoiding a 'big-bang' transition to a federal state, which could only be achieved through conflict. The way the Constitutional Treaty was negotiated and was to be ratified – increasingly dropping the federal elements and emphasising the confederal ones – appears to confirm this interpretation.

A final point worth emphasising in relation to the nature of the EU political system is that institutional evolution in 19th century Switzerland went hand in hand with change in collective identities. A federal state was eventually accepted only because a sense of Swiss nationhood was already there. However, once in place the federal state, in turn, embarked on official nation building. It is difficult to ascertain the direction of causality between institution-building and collective identities – for example the Helvetic Republic failed institutionally but probably had a deep impact on identities – but it seems clear that the institutional evolution of the EU system should also be matched by identity-building or it will risk losing legitimacy further, even if it remains within the confines of a confederal order. *A fortiori*, of course, the emergence of a 'thicker' identification with Europe at mass public level could be the *conditio sine qua non* for a legitimate transformation of the EU into a federal state⁵¹. So far there has been little sign of this happening.

A comparison between Switzerland and the European Union is also instructive where the nature of the executive and its relationship with the legislature are concerned. Here there are a number of similarities between the Federal Council and the European Commission. Both bodies are collegial multi-party institutions where members are equal in status and the president is more a *primus inter pares* than a true political leader. However, the president of the European Commission has progressively acquired significant power over his⁵² colleagues whereas the Swiss president is a purely ceremonial post rotating on an annual basis. Both institutions integrate a political level made up of ministers or commissioners and an administrative level organized in departments staffed by civil servants. Each minister or commissioner is responsible for one or more department or directorate-general. Both the Swiss Federal Council and the European Commission are elected/appointed by parliament but do not rely on parliamentary confidence to remain in office⁵³ hence their relationship with parliament can be described as semi-presidential within a context of separation of powers, although such separation is more clear-cut in Switzerland than in the EU. Two main features

abandonment of the monarchical order by its component states, such as the UK, as the latter would conflict with the republican principles set in the federal constitution.

⁵¹ See Zimmer (2003: 85-118) and Lister (2001: 116-7) for a discussion of this point in relation to Switzerland and Forsyth (1981: 187) and McKay (2001: 145-50) in relation to the EU.

⁵² There has never been a female president.

⁵³ The power of the European Parliament to dismiss the Commission through a motion of censure is more akin to an impeachment process in presidential systems than to the confidence mechanism in parliamentary systems.

set the two systems apart, however. The first is that the European Commission also performs a role of independent regulator - chiefly in competition policy - that federal political executives, such as the Swiss Federal Council, do not normally perform. The second, and more important, is that the European Council and the Council of Ministers - confederal institutions *par excellence* - perform a crucial role in the EU that does not have an equivalent in modern Switzerland. The Swiss experience offers three lessons here. First, representation in the Federal Council has historically been an important channel of minority inclusion - first with the Catholics, later with the Socialists - that has contributed to the stability and the legitimacy of the system. It could be argued that membership in the European Commission has performed a similar role and that plans for a two-tier or a rotating membership may undermine this function. The other side of that coin is, secondly, that a multi-party collegial body is bound to be less able to provide coherent leadership than a partisan cabinet organized along hierarchical lines. The European Commission has taken some steps in this direction but to what extent it can be fully transformed into a partisan cabinet is a delicate question. Lastly, a semi-presidential and separation of powers system deprives parliamentary elections of the *pathos* they enjoy in parliamentary systems - as they do not directly lead to a change in the executive - and is thus likely to contribute to voter apathy and low turnout⁵⁴. This has been countered in Switzerland by the use of direct democracy, which, as discussed below, is not available in the EU. Against this background, the Constitutional Treaty would not have introduced dramatic changes but would have reinforced the semi-presidential and dual nature of the EU's executive by strengthening the link between the Commission and the Parliament, on the one hand, and by creating a president of the European Council, on the other hand.

3.2 The allocation of competences

On the issue of the division of competences, there are more differences than similarities in the way policy-making responsibilities are allocated. These differences are of two kinds: legal-constitutional and substantive. As regards the former, the EU competences rest on a principle of explicit conferral by the states while in Switzerland the federal and cantonal competences are defined by the same federal constitution. In this, as in many other respects, the contrast between the EU's confederal nature and the 'organic', federal nature of Switzerland is sharply visible. On the other hand, the principle of the supremacy of Union law over state law mirrors that of federal law over cantonal law and is formally recognized in art. 10 of the Constitutional Treaty as it is in art. 49 of the Swiss constitution. Much the same goes for the principle of subsidiarity which informs the distribution of power in both systems

⁵⁴ Turnout in the last two parliamentary elections in Switzerland was around 44 per cent.

although whereas it is written in art. 9(3) of the Constitutional Treaty – as it is in the existing treaty – it was not explicitly mentioned in the Swiss constitution until 2003.

Substantively, there are a number of similarities in the allocation of competences in the two systems but crucial differences between them are also evident⁵⁵. The systems are closest in the area of monetary and fiscal policies whereby the former is dealt with at the central level and the latter is largely in the hands of the states and the cantons. As already observed, the degree of territorial re-distribution is also broadly similar. Greater divergence is present in the broad areas of transport and communication which are by and large run at the federal level in Switzerland while are primarily in the hands of the states in the EU. The largest discrepancy is, not surprisingly, in the area of foreign policy and defence. These are exclusive competences of the federal authorities in Switzerland whereas remain overwhelmingly controlled by the states in the EU, despite the provisions of the Common Foreign and Security Policy. The reforms contained in the Constitutional Treaty, including the provision of a ‘double-hatted’ Foreign Minister would not have significantly altered the current situation. Once again, the nature of the EU as a primarily economic confederation contrasts sharply with that of today’s Switzerland as a sovereign federal state. As regards the vexed question of the ‘ideal’ distribution of competences in the EU, the Swiss experience indicates that this is a politically charged question and that it is virtually impossible to identify a ‘perfect’ distribution of competences in a neutral, ‘technocratic’ way. The ongoing debate in the EU on issues such as tax harmonization, as reflected in the deliberations of the Convention and elsewhere, confirms this interpretation.

Recalling the observation made above on the trend towards centralization in both Switzerland and the EU, the last point worth emphasising is that the single most important check on centralization in the Swiss system has been the constitutional framework, in particular, the provision for mandatory referendums requiring both popular and cantonal majorities. Nonetheless, policy competences are significantly more centralized under the 1999 constitution than they were under the 1874 constitution, let alone that of 1848. This suggests that mechanisms for transferring competences are more important than the initial distribution, for curbing centralization. Constitutions are adopted at specific points in time and have to adapt to change. How they do this is crucial. In light of the above, the EU should pay as much as – if not more – attention to such mechanisms than to the starting point, although ratification rules for constitutional amendments are primarily beyond the remit of EU law. In that respect the increasingly widespread practice of subjecting ratification of EU treaties to referendums means that constitutional safeguards against centralisation are

⁵⁵ See Dubey (2002) for a very detailed comparative analysis of the allocation of competences in Switzerland and in the EU (prior to the Nice Treaty).

stronger now in the EU than in Switzerland, while in the past this was not so.⁵⁶ The rejection of the Constitutional treaty at the hands of the French and the Dutch electorates provided a clear illustration of this.

3.3 Quality of democracy

As already observed, a federal constitutional order is potentially more democratic than a confederal one and Swiss history provides ample evidence for this assertion. However, Swiss history also provides evidence that a federal order is hardly sustainable in the absence of sufficiently strong citizen identification with the federal polity as a whole rather than primarily with one of its component. Moreover, the Swiss experience, especially between 1798 and 1848, also casts serious doubts over whether the 'constitutional patriotism' hypothesis – i.e. that identification follows institutions, rather than the other way round – can work in practice, however appealing it may sound in theory.

Closely linked to the issues of democracy and accountability, is the precise form of co-operation between the central level and the state/cantonal level in the two systems. Here it should be pointed out that Swiss federalism largely conforms to the model of co-operative federalism, whereby legislation is enacted at the central level and implementation is carried out by regional or local levels and that the EU also displays many features of co-operative federalism. This form of federalism has led in Switzerland to a blurring of the responsibilities and accountability of the political system vis-à-vis citizens. Responsibilities and accountability are already opaque in the EU so a deepening of the co-operative nature of the system is unlikely to improve things. A more 'dualistic' form of (con)federalism would be better adapted to the EU system and to European-wide political culture but would likely clash with the states' desire to keep the Union level to a minimum⁵⁷.

Finally, we cannot fully understand Swiss federalism, or indeed the system as a whole, without taking into account the role of direct democracy, for without direct democracy the system would operate in a very different way. The question of whether instruments of direct democracy could be used on a EU-wide basis is an extremely delicate and difficult one which goes well beyond the scope of this article⁵⁸. A rather general point to be made is that direct democracy, in various forms, has very deep roots in Swiss political culture and had operated for a significant length of time at cantonal level before being adopted at the federal level; neither of these elements apply in the EU context. The Constitutional Treaty made a step in the direction of direct democracy by providing for a 'citizens' initiative' – as detailed in

⁵⁶ On the grounds that ratification by referendum with a double majority was probably a higher hurdle than ratification by parliamentary votes in all the states.

⁵⁷ See Abromeit (2002).

⁵⁸ For recent attempts to tackle this question, see Abromeit (1998), Hug (2002) and Papadopoulos (2002).

art. 46, paragraph 4 – but this would have not been an instrument of, strictly speaking, direct democracy because it would have not led to a EU-wide popular vote.

Conclusions

Switzerland is an extremely interesting example of a con/federal system in both its historical and contemporary dimensions. There are striking similarities between Switzerland – as a confederation and as a federation – and the European Union, both at the societal level and at the institutional level. As regards the former, Switzerland is in many respects a microcosm of Europe though, of course, the degree of ‘diversity’ is far greater in the latter than in the former. As far as institutions are concerned, today’s EU can be conceptualized as a still predominantly economic confederation facing strong pressures to become both more ‘political’ and more ‘federal’ and, at the same time, powerful opposition to such developments. As Switzerland has experienced a long confederal history and undergone a transition to a federal state, its experience could be of deep relevance for the contemporary debate on the EU.

This paper has sought to outline to what extent we can learn from one experience in order to understand the other. In conclusion, it could be argued that the ratification of the Constitutional Treaty would have constituted more a consolidation and simplification of the existing EU’s confederal order than the starting point of a federal state. The division of competences between the Union and the states would have been clarified but not radically altered and many key policy areas normally dealt with at the central level in federal states such as Switzerland would have – and would – remain under states’ control. On the other hand, the likely demise of the Constitutional treaty in its present form does not signal the end of European integration nor of the pressures on the Union to acquire more federal characteristics. In that respect, the EU is likely to continue facing issues similar to that experienced but confederal systems in the past, *in primis* Switzerland.

For this reason, analysing the European Union from the perspective of comparative federalism can be distinctly fruitful and add to our understanding of the dynamics at play. Although federal ideas have played a prominent role where normative approaches to the EU are concerned, political science tools derived from the study of confederal and federal systems have been under-utilised in positive studies. This paper is intended as a contribution towards this re-balancing of the literature on the EU.

References

- Abromeit, Heidrun (2002), Contours of a European Federation. *Regional and Federal Studies* 12/1: 1-20
- Abromeit, Heidrun (1998), *Democracy in Europe: Legitimising Politics in a Non-State Polity*. New York, Ny, Usa: Berghahn Books
- Aubert, Jean-François (1974), *Petite histoire constitutionnelle de la Suisse*. Berne: Francke
- Church, Clive (2004), *The Politics and Government of Switzerland*. Basingstoke: Palgrave
- Church, Clive (1983), *Europe in 1830: Revolution and Political Change*. London: Allen and Unwin
- Church, Clive and Paolo Dardanelli (2005), The Dynamics of Confederalism and Federalism: Comparing Switzerland and the EU. *Regional and Federal Studies* 15/2: 163-85
- Dubey, Bernard (2002), *La répartition des compétences au sein de l'Union européenne à la lumière du fédéralisme suisse*. Basle: Helbing & Lichtenhahn
- Fahrni, Dieter (2003), *An Outline History of Switzerland – From the Origins to the Present Day*. Zurich: Pro Helvetia
- Forsyth, Murray. 1981. *Unions of States – The Theory and Practice of Confederation*. Leicester: Leicester University Press
- Fossedal, Gregory (2002), *Direct Democracy in Switzerland*. New Brunswick, Nj, USA: Transaction Publishers
- Friedman Goldstein, Leslie (2001), *Constituting Federal Sovereignty – The European Union in Comparative Context*. Baltimore, Md, USA: Johns Hopkins University Press
- Hega, Gunther (2000), Federalism, Subsidiarity and Education Policy in Switzerland. *Regional and Federal Studies* 10/1: 1-35
- Hug, Simon (2002), *Voices of Europe – Citizens, Referendums and European Integration*. Lanham, Md, Usa: Rowman & Littlefield
- Hughes, Christopher (1970 [1954]), *The Federal Constitution of Switzerland*. Westport, Ct, USA: Greenwood Press
- Kölz, Alfred (1992-6), *Quellenbuch zur neueren Schweizerisches Verfassungsgeschichte*. Berne: Stämpfli, 2 vols
- Kriesi, Hanspeter (2001), The Federal Parliament: The Limits of Institutional Reform. *West European Politics* 24/2: 59-76
- Kriesi, Hanspeter (1998), *Le système politique suisse*. Paris: Economica
- Lister, Frederick (2001), The 'New' Swiss Confederation. In Idem, *The Later Security Confederations*. Westport, Ct, Usa: Greenwood Press

Luck, James Murray (1985), *History of Switzerland*. Palo Alto, Ca, Usa: The Society for the Promotion of Science and Scholarship

McKay, David (2001), *Designing Europe – Comparative Lessons from the Federal Experience*. Oxford: Oxford University Press

Muret, Charlotte (1950), The Swiss Pattern for a Federated Europe. In Edward Earle (ed.), *Nationalism and Internationalism*. New York, Ny, Usa: Columbia University Press

Papadopoulos, Yannis (2002), *Peut-on imaginer d'organiser des referendums a l'échelle européenne et à quelles conditions?* Policy paper No. 2. Paris: Notre Europe [http://www.notre-europe.asso.fr/fichiers/papadopoulos.pdf]

Remak, Joachim (1993), *A Very Civil War: the Swiss Sonderbund War of 1847*. Boulder, Co, USA: Westview Press

Taylor, Paul (1975), The Politics of the European Communities: the Confederal Phase. *World Politics* 27/3: 346-7

Wallace, William (1982), Europe as a Confederation: the Community and the Nation-State. *Journal of Common Market Studies* 21/1-2: 57-68

Warleigh, Alex (1998), Better the Devil you Know? Synthetic and Confederal Understandings of European Unification. *West European Politics* 21/3: 1-18

Zimmer, Oliver (2003), *A Contested Nation: History, Memory and Nationalism in Switzerland*. Cambridge: Cambridge University Press