THE SWISS AND THE EU CONSTITUTIONAL ORDERS COMPARED

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Bibliographic citation

Grin, Gilles. *The Swiss and the EU Constitutional Orders Compared*. Lausanne, Jean Monnet Foundation for Europe, Debates and Documents Collection, issue 32, January 2024.

The views and opinions expressed in this publication are those of the author and are not binding on the Foundation as an institution.

Gilles Grin has been the Director of the Jean Monnet Foundation for Europe in Lausanne since July 2012. He is also a lecturer at the University of Lausanne, where he teaches European integration. In November 2023, he joined the Royal Academy of Economic and Financial Sciences (RACEF), one of the ten Academies of the Institute of Spain, as Corresponding Academician for Switzerland. He is also a member of the board of the Swiss Foreign Policy Association (SGA/ASPE) and of the New Helvetic Society (NHG/NSH).

From 2006 to 2012, he was Deputy Director of the Jean Monnet Foundation for Europe, responsible for scientific activities, administration, and finance. From 2002 to 2006, he worked as a scientific adviser in the Swiss federal administration (Federal Office for Education and Science, then State Secretariat for Education and Research), after having worked as an administrative trainee and then as a consultant in the European Commission in Brussels.

From 2007 to 2017, he was a specialist officer, with the rank of captain, on the operational training staff of the Swiss Army.

Gilles Grin holds a Doctorate in International Relations from the Graduate Institute of International and Development Studies (The Geneva Graduate Institute). He also holds a Master of Science in Management from the Faculty of Business and Economics (HEC) at the University of Lausanne, a Master of Arts in History from Yale University and a Master of Science in European Studies from the London School of Economics and Political Science.

He is the author of around 80 publications devoted largely to European issues (books, book chapters, articles, and reviews). In 2022, he was awarded the "Mieux comprendre l'Europe" book prize for

his book entitled "Construction européenne: la révolution d'un continent", also translated into English under the title "European Integration: A Continent in Revolution".

THE SWISS AND THE EU CONSTITUTIONAL ORDERS COMPARED

Conference given at the University of Sofia 'St. Kliment Ohridski' on 4 December 2023

1. INTRODUCTION

It is a great joy to be here at the University of Sofia 'St. Kliment Ohridski' with you today and be able to intervene in the series of the Swiss-Bulgarian Constitutional Discourses co-organised by the Faculty of Law and the Embassy of Switzerland in Bulgaria. Thank you very much to Professor Martin Belov for his kind invitation and to Ambassador Meglena Plugtschieva for establishing the contact.

My intervention will aim at comparing the Swiss and the EU constitutional orders from a historical perspective. Indeed, I must clarify from the outset that I am a historian and not a legal scholar. My remarks do not commit my institutions of affiliations. I will firstly discuss Swiss main specificities. I will then consider the case of the European Union. This will allow me to analyse the main common points and differences before concluding my presentation. Of course, there are differences, and they may be well known. But it is no less interesting to be aware of the similarities that may be less discussed.

2. SWITZERLAND

In political terms, Switzerland was a true Confederation until 1848. The Cantons were sovereign. Their gathering, the Federal Diet, was involved in foreign policy and military issues. But it was too weak to deal effectively with the challenges of the time.

After a short civil war in 1847, called the Sonderbund war, and in the context of pan-European revolutions, Switzerland adopted a constitution and became a federal State.[1] It is interesting to note that this new text was adopted by 15 and a half Cantons whereas 6 and a half rejected it. It could still enter into force. The Swiss Constitution was influenced by the American Constitution of 1787. Article 3 of the 1848 Constitution read as follows: "The Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution and, as such, they exercise all the rights that are not delegated to the federal power." A similar clause is still present today in the Constitution.[2] A Canton cannot unilaterally leave the Confederation.

Since 1848, Switzerland has established and developed a federal State even if it kept the name "Confederation". Over the decades, the federal State increasingly gained new powers. A new Constitution was voted in 1874. The federal State was financed exclusively through indirect taxes until 1936. The need to finance the country's rearmament then led to the creation of a direct federal tax. A major milestone in the establishment of a social State was taken in 1947 with the creation of an insurance for the elderly. Fields such as police, justice, transport, the environment, education, social policy, and health policy became increasingly shared competences of the Confederation and the Cantons.

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[1] The original Constitution of 1848 can be found at the page:
https://www.parlament.ch/centers/documents/de/constitution1848.pdf
See the Historical Dictionary of Switzerland:
https://hls-dhs-dss.ch/fr/articles/009811/2023-06-29/
[2] See article 3: https://www.fedlex.admin.ch/eli/cc/1999/404/fr

Since 1848, the Federal Assembly has exercised the legislative power. It is composed of two chambers equal in rights: the National Council, representing the people, and the Council of States, representing the Cantons. Switzerland has a collective head of state which is also the government of the country. It is the Federal Council composed of seven members. These seven members are individually elected by the Federal Assembly. Each oversees a federal department that is the equivalent of a ministry. One of them is elected President of the Confederation for one year by the Federal Assembly. The Parliament has no right of censorship towards the Federal Council. The latter cannot dissolve the Parliament. The constitutions of the Cantons must receive the guarantee of the Federal Assembly. Their laws must be compatible with federal law.

In short, Switzerland has been a political federation since 1848. The shape of its institutions has been the same for the last 175 years. To take a European vocabulary, the establishment of an internal market, of an economic and monetary union, and of a political union were simultaneously decided. This institutional and political continuity has no doubt been an enhancer of prosperity. At the same time, the federal system has been gaining increasingly new competences. Its history has been everything but static.

Popular rights have been progressively developed. The obligatory referendum was put in place in 1848. It basically means that the federal Parliament cannot change the Constitution without the approval of the Swiss people and the Cantons. We speak of a required double majority. The facultative referendum was established in 1874. It allows a share of the electorate, now 50,000 citizens, to provoke a popular vote on a law adopted by the Parliament. To be approved, the law needs to get a simple majority of the people's votes. The popular initiative was introduced in 1891. A share of the electorate, today 100,000 citizens, can make a proposal to amend the federal Constitution. As for the obligatory referendum, a change needs the double approval of the people and the Cantons.

3. EUROPEAN UNION

The characterisation of the EU is a complex question. It is partly supranational, partly intergovernmental. Stated in a different way, there are federal characteristics in the EU even if the EU is less than a federal State.

The Schuman Declaration of 9 May 1950, designed by Jean Monnet and the first step in the creation of the European Communities, mentioned the long-term objective of the creation of a European Federation.[3] The first European Community was that of Coal and Steel, established in 1952. Its first president was Jean Monnet. After the crisis leading to the failure of the European Defence Community in 1954, two new Communities were created in 1958: the European Economic Community and the European Atomic Energy Community.

In the 1950s and 1960s, Jean Monnet, who would become in 1976 the first Honorary Citizen of Europe, detailed his thoughts in this regard. Here are some quotes from him that help us understand the DNA of the European project:

- "The aim is peace for mankind, the continuous improvement of their standard of living and the preservation of freedom."[4]

- "Our countries have become too small for today's world, faced with the scale of modern technology, of the America and Russia of today and the China and India of tomorrow."[5]

- "Mere cooperation between governments is not enough. It is vital for States to delegate some of their powers to European federal institutions acting on behalf of all participating countries."[6]

- "It is impossible to achieve peace in Europe without establishing equality and eradicating domination as far as possible. And for this, it was necessary to make the French and the Germans understand each other. To understand one another, you have to talk, which is why these institutions were formed."[7]

- "People pass on, others will come along and replace us. What we can leave them is not our personal experience, which will disappear with us – what we can leave them are the institutions. Institutions live longer than people so, if they are well built, institutions can accumulate and transmit the wisdom of successive generations."[8]

- "The United States of Europe that we are striving to create are not a centralised state – they are a federation that respects deep national realities – that gives everyone resources they could never have as individuals through the pooling of resources – that also enables a rapid improvement in the standard of living of the peoples of Europe – through the creation of viable common institutions, that can guide and stimulate human progress where existing national institutions prove too narrow to encourage it."[9]

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[3] Henri Rieben, Martin Nathusius, Françoise Nicod, Claire Camperio-Tixier, *Un changement d'espérance : La Déclaration du 9 mai 1950, Jean Monnet – Robert Schuman,* Lausanne, Fondation Jean Monnet pour l'Europe, Centre de recherches européennes, 2000, p. 150.

[4] Translation from French. Source: "– Le but, c'est la Paix […]", reflection note from Jean Monnet, 1955, Lausanne, Archives from the Jean Monnet Foundation for Europe (FJME), AMM 5/1/27.

[5] Translation from French. Source: "M. Jean Monnet quitte la direction du pool charbon-acier pour se consacrer à la réalisation d'une Europe fédérale", article from François Roussel, La Croix, 13 November 1954, FJME, AMH 61/8/83.

[6] Translation from French. Source: "Pour que ça change", from Jean Monnet, Demain, number 1, 15-21 December 1955, p. 7, FJME, AML 121/1.

[7] Translation from French. Source: Dialogue with Georges Suffert, interviews from 10-11 May 1970, FJME, AML 298/21, published in: Henri Rieben, Claire Camperio-Tixier, Françoise Nicod, *À l'écoute de Jean Monnet,* Lausanne, Fondation Jean Monnet pour l'Europe, 2004, p. 189.

[8] Translation from French. Source: "Discours, Strasbourg, 11 septembre 1952", text published in: Jean Monnet, *Repères pour une méthode: Propos sur l'Europe à faire,* Paris, Fayard, 1996, p. 98.

[9] Translation from French. Source: "Discours de Jean Monnet au Congrès européen du travail du 29 avril 1956", FJME, AMM 5/2/20.

- "We need to avoid doctrinal discussions about whether the political authority that we construct will be a confederation or a federation – the Swiss Confederation is a good example here: a Confederation when it was created, it became a federation with independent 'Cantons' in certain areas but kept the name of Confederation."[10]

Today, following the line of argument of Professor Olivier Beaud, we may say that the EU is an incomplete federation, or a federation without a federal State.[11] It is a sui generis construction. As such, the European Union, which replaced the Community in 2009 when the Treaty of Lisbon entered into force, has no formal constitution. It possesses a whole series of treaties forming primary law. These treaties can only be amended by the unanimity of member States. EU primary and secondary law has primacy over national law and the Union is a community of law. The Treaty of Lisbon formalized the fact that a member State of the Union can leave the latter by a unilateral decision.

The European Stability Mechanism and the Fiscal Compact that entered into force in 2012 and 2013 are based on intergovernmental treaties that follow a different logic. Unanimity was no more required for them to be adopted, but these treaties do not apply to countries that have not ratified them. The countries in favour of these treaties have not been blocked by the others.

Following the end of the work of the Conference on the Future of Europe in May 2022, the debate on the necessity and feasibility to amend the existing treaties has become more acute. It may seem doubtful that the margins offered by the current treaties will suffice in the context of future enlargements of the Union.

A crucial question is being debated: would it be possible to amend the treaties without the unanimous approval of the member States? If so, what should be the threshold and what would happen with countries refusing the changes? The idea of concentric circles of integration comes back to the forefront. But how to manage the possible change? And would it be practically feasible to have the same EU institutions in charge of managing future different circles of integration? The alternative, i.e. to have different institutions for different circles, might create institutional chaos.

The latest document regarding a revision of the treaties is a European Parliament resolution of 22 November 2023 on proposals of the EP for the amendment of the Treaties.[12] An ambitious set of proposals would reform the Union, which would no longer need the unanimity of member States for treaty changes. A majority of 80% of the member States would be deemed to be sufficient. Below that level, a pan-European referendum would have to be organised. Here are other examples of proposed reforms: the European Parliament would gain important new powers; majority votes in the Council would become the standard; the European Commission would become the European Executive and its president would be the president of the Union; the Executive would have a maximum of 15 members.

The Treaty of Lisbon has introduced a clear repartition of competences between the Union and its member States. There are exclusive, shared and supporting competences.[13]

The Treaty on European Union states three fundamental principles: conferral, subsidiarity, and proportionality. "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States." "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot

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[10]   Translation from French. Source: Draft letter from Jean Monnet to the members of the Committee, Les Diablerets, 4 September 1971, FJME, AMK 26/6/17.

[11]   Olivier Beaud, *Théorie de la Fédération,* Paris, Presses Universitaires de France, 2007, 447 pp.

[12]   https://www.europarl.europa.eu/doceo/document/TA-9-2023-0427_EN.pdf

[13]   Treaty on the Functioning of the European Union, articles 2 to 6.

be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."[14]

According to the previously mentioned European Parliament's resolution containing proposals for the amendment of the Treaties, the Union would gain an exclusive competence for the environment and biodiversity as well as negotiations on climate change; shared competences would be strengthened in fields including public health, energy, foreign affairs, external security and defence, external border policy and cross-border infrastructure; and the rule of law would be strengthened.

Today, the EU possesses seven institutions: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice, the European Central Bank, and the Court of Auditors. Four of these institutions belong to the original institutional setting of the Communities and date back to the 1950s: the Council, the Commission (named High Authority in the Coal and Steel Community), the Assembly which became the Parliament, and the Court of Justice. The first three institutions are usually referred to as the institutional triangle that lays at the heart of the legislative process.

The increasingly bicameral system made of the Council and the Parliament is typical of a federation. The monopoly of legislative initiative in the hands of the Commission is a remnant of the need to defend the common interest at a time when the Parliament had no legislative power. It is frequently argued that this monopoly should disappear.

In a nutshell, the legislative and judicial functions in the EU are of a federal type. The main difference comes when the executive branch is concerned. Collectively, member States do not want the Commission to be as powerful as a government ought to be. The Council has hence kept important executive powers. And the European Council, established in 1974, and involving top national executive leaders, has strengthened the intergovernmental nature of the Union. The Treaty on European Union states that "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions."[15]

If the European Union were to follow a completely federal institutional architecture, the Commission would become the Government of the Union. In this regard, the fundamental aspect of a parliamentary democracy is already in place in the sense that the president of the Commission is elected by the European Parliament, that the whole college of commissioners is subject to a vote of consent by the EP, and that the EP can vote a motion of censure against the Commission. In a pure federal institutional architecture, the Council would leave its executive powers to the Commission and would become a Senate. The national right of veto would disappear. The European Council would become a sort of collective head of State of the Union.

Still, in today's reality, it seems impossible to imagine that the member States would transmit their most important competences in foreign policy and defence to the Union. Their motto may be expressed as: cooperation, yes; transfer and common exercise of sovereignty in such kingly fields, no. A complete federation with a European federal State is thus only a distant and hypothetical prospect.

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[14]   Treaty on European Union, article 5.

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[15]   Treaty on European Union, article 15, paragraph 1.

4. MAIN COMMON POINTS AND DIFFERENCES BETWEEN SWITZERLAND AND THE EUROPEAN UNION

Whereas Switzerland decided in 1848 to create simultaneously an internal market, an economic and monetary union, and a true political union, the process has been scaled at the level of the European Union because it was the only feasible option given the resilience of national sovereignty. This way to proceed has been sometimes referred to as the Monnet method.

In a stylised way, we may say that the three Communities established in the 1950s created an institutional setting that is still largely in place today, and that economic integration came before the establishment of a political union, which was a consequence of the failure of the European Defence Community and the European Political Community. Beware, there is no connection between this "old" EPC project and the current EPC which is a platform created in 2022 associating all the European countries except Russia and Belarus.

There are several common points and several differences between the constitutional orders of Switzerland and the EU. We shall endeavour to present the key points allowing a comparison to be made.

Firstly, let us consider rules and principles for attributing powers to the federation. In Switzerland, the model is fully federal. In the EU, it is intergovernmental or confederal. In addition, we may say that the three fundamental EU principles of conferral, subsidiarity, and proportionality seem perfectly in line with Swiss federalism.

Secondly, there is the institutional design allowing the legislative, executive and judiciary powers to be exercised. In Switzerland, there is a clear separation of powers. The fact that the EU is an incomplete federation can be mostly seen in the way the executive power is exercised. An EU equivalent for Switzerland would

mean that the Federal Council would be composed of 26 members, one per Canton, that its president would be elected for five years and would be its real leader, that the Federal Councillors would be appointed together as a team and that they could be dismissed at any time by the National Council. Then, the function of head of State of the country would belong to the Conference of Cantonal Directors. Of course, this is very different from the Swiss system we know. A key difference is that Switzerland has a (collective) presidential system whereas there is a parliamentary system in the EU.

Thirdly, another key difference between Switzerland and the EU is the existence of semi-direct democracy in the former. Of course, individual citizens might have reasons to consider that the Swiss model represents an enhanced form of democracy, but I do not feel it pertinent to enter the debate to know which form of democracy, representative or semi-direct, is intrinsically superior for there is a key difference in size: Switzerland has 9 million people whereas the EU has 448 million. It is not possible to manage in the same way a small to middle-sized country and a continental federation.

Fourthly, when we consider political parties and political culture, we find important similarities between Switzerland and the EU. In both cases, there is political culture of entente with no clear majority and opposition. This represents a factor of stability and continuity. There is however a clear difference since Switzerland has a completed federal system, without a unilateral right of withdrawal for federated entities, which is not the case in the EU. Populist movements can more easily be absorbed in Switzerland and become part of the exercise of power. Populist demands will have an impact on public policies and may shift them to some extent without changing the institutional framework in place. For populists in the EU, the European level is often assimilated to the international level and the focus is on national sovereignty. The will is often strong to change the European institutional framework in the direction of weakening the supranational dimension.

In a nutshell, Switzerland, despite its linguistic and cultural differences, is a nation, a Willensnation in German, that is to say

a nation based on common will. Europe is further away from this because it has had less time to unite. Still, what Europe has achieved since the launch of the first European Community in 1950, 73 years ago, is remarkable on a historical scale. If the political will is collectively present, constitutional patriotism can be a uniting factor and a European demos can develop.

The EU has been hit by continuous waves of different crises since 2005. To name them with a few keywords: institutional crisis following the demise of the Constitutional Treaty; economic and financial crisis; sovereign debts crisis; monetary crisis; social crisis; migration crisis; political crisis; Brexit; crisis of multilateralism; Covid-19 pandemic; war in Ukraine. Even if the future is not written beforehand, its resilience has been very impressive. Through crises, it could develop its economic union that is a necessary complement to monetary union, issue common debt, and increase solidarity mechanisms. So far, the way to handle the war in Ukraine has also been aligned between the 27. Of course, this does not mean that future challenges will be easy to overcome. The U.S. elections in November 2024 may be a decisive moment for the West and the rest.

5. CONCLUSIONS

In summary, Switzerland possesses an elaborate federal system. The federal Parliament is bicameral. It has a collective presidential system. Federal law has primacy over the law of the Cantons. It has a set of very developed popular rights for the citizens. It is based on a political cultural of understanding and compromise.

The EU has an incomplete federal system maintaining key powers for the member States. The legislative structure goes towards bicameralism. It has strong attributes of a parliamentary system, but always cohabiting with intergovernmentalism. EU law has primacy over national law. This fundamental attribute has however regularly been contested by nationalist leaders. The EU possesses no system of popular rights comparable to Switzerland, while still wishing to better involve European citizens. Finally, there is also a political culture of understanding and compromise.

We shall conclude on the fact that the Swiss and EU systems both suffer from difficulties linked to a broader political crisis in Europe and beyond. But Switzerland seems better equipped to face it for structural reasons.

The next elections to the European Parliament in June 2024 will be a very important democratic moment for the 27 member States, for their people, and for the future of the continent. They will tell us more about the resilience of the Union. European law and institutions should absolutely be preserved and strengthened to face mounting external challenges and the pressure of future enlargements. Young European citizens, in particular, ought to be committed to voting as their future is at stake.

The Jean Monnet Foundation for Europe was created in 1978 by Jean Monnet, the designer and first president of the first European Community (Coal and Steel) and the first honorary citizen of Europe. He donated all his archives to the Foundation. As an independent institution serving the public interest, the Foundation is non-partisan and does not engage in lobbying. It receives support from the Canton of Vaud, the Swiss Confederation, and the City of Lausanne. It operates out of the Dorigny Farm, which is located on the campus of the University of Lausanne, its main partner.

The Foundation also keeps and provides access to numerous other private archives, including those of Robert Marjolin and the European papers of Robert Schuman and Jacques Delors, as well as images and audio-visual documents. In addition, it houses a specialised library and a European documentation centre, and it collects first-hand accounts from participants and observers through a filmed interview programme.

It thus provides users, and especially researchers, with a coherent corpus of documentary resources on the origins and development of European integration and on Swiss-European relations. Its archives portal was opened in 2022 on the Internet; it can be found at: https://archives.jean-monnet.ch. Each year, the Foundation awards its Henri Rieben Scholarship to several advanced doctoral students.

Thanks to the internationally recognised importance of these collections and to the collaboration between Jean Monnet and Professor Henri Rieben, who chaired the Foundation until 2005, the Foundation is a focal point for European studies and an essential venue for meetings, debates and analyses about major issues facing Europe. It regularly organises conferences, European dialogues, and international symposia, forming partnerships with renowned institutions. It periodically awards its Gold Medal to prominent political figures who have worked for the common interest of Europeans; past laureates include José Manuel Barroso, Emilio Colombo, Mario Draghi, Valéry Giscard d'Estaing, Jean-Claude Juncker, Helmut Kohl, Romano Prodi, Helmut Schmidt, Martin Schulz, Javier Solana, and Herman Van Rompuy. The Foundation receives many visitors, regularly provides assistance to researchers, and is involved in training university students. With support from the Canton of Vaud, in 2016 the Foundation created a think tank whose experts are currently working on the challenges of Society 4.0.

Finally, the Foundation also produces several publications. The Red Books Collection, which was created by Henri Rieben in 1957, now comprises 219 titles, while the Debates and Documents Collection, a series of shorter publications in open access, was launched in 2014. Taken together, these publications highlight the Foundation's documentary collections and public events, as well as its members' and partners' expertise.

Both the Foundation Board, with more than 600 members from all over the world, and the Scientific Committee meet annually. Pat Cox, former president of the European Parliament and the European Movement International, has been president of the Foundation and its Executive Board since 1 January 2015. This role was held in the past by José María Gil-Robles (2009–2014), former president of the European Parliament and the European Movement International; Bronisław Geremek (2006–2008), member of the European Parliament and former minister of foreign affairs of Poland; and Henri Rieben (1978–2005), professor at the University of Lausanne. Since 2012, the Foundation has been led by Gilles Grin, who holds a PhD in international relations and is a lecturer at the University of Lausanne.

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This is the conference delivered by Dr Gilles Grin at the University of Sofia 'St. Kliment Ohridski' on 4 December 2023 in the series of the Swiss-Bulgarian Constitutional Discourses co-organised by the Faculty of Law and the Embassy of Switzerland in Bulgaria.

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