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from

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on

“The elective function and checks on nominations to Parliament”

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'The first part of the duty of Parliament is the choice of the cabinet who are to administer the affairs of the country. It is upon the cabinet, as we all know, that everything which is important in our public business rests and must rest.'

Walter Bagehot, *The Economist*, 9 February 1861

1. The elective function of Parliament and overall architecture of its institutions

Normally a parliament is identified by its legislative role, or sometimes its budgetary or supervisory function. However, another of its roles, updated and popularised in the second half of the 19th century by the journalist Walter Bagehot (1826-1877), is perhaps even more important: its elective function.

The first time that Bagehot spoke of this function, he observed that it was an 'occasional act', so much so that commentators had failed to count the elective function among those of parliament. For this reason, he titled his article 'the unseen work of parliament'.

Since then, this function has gained a high profile and today it seems obvious that the manner in which our parliaments exercise it has a fundamental impact on the overall architecture and workings of our political systems. Moreover, this mechanism operates in two directions: if it has a major influence on the workings of our institutions, those institutions have had and continue to have a major influence on it.

This is particularly true in Switzerland, where the elective function of Parliament is highly sophisticated. This can be explained by the respective structures of the three branches of state: the legislature, the executive and the judiciary. The Federal Constitution¹ ranks Parliament (the Federal Assembly) first in the hierarchy of federal authorities, after the People and the cantons². This primacy is expressed most evidently in Parliament's power to elect the members of the two other branches of state, i.e. the members of the government (the Federal Council) and the judges of the Federal Supreme Court. Thus, Parliament has greater democratic legitimacy than the other federal authorities, because it is the only institution that has obtained its powers through being elected by the People.

This system has been chosen to allow Parliament to 'fashion' an executive and a judiciary in its own image that are representative of Switzerland's diversity, not only in political terms, but also in institutional, cultural and religious terms.

Switzerland is not a homogeneous country. It has four national languages, twenty-six cantons, jealous of their idiosyncrasies, and two dominant religions that form a group that knows no ethnic, linguistic, cultural or religious unity. This peculiarity has naturally shaped the national institutions, competing to create an extensive system of representation based on a common concept of political partnership: the principle of consociationalism³.

¹ Swiss Federal Constitution of 18.4.1999 (Federal Constitution).

² Art. 148, para. 1, Federal Constitution.

³ According to Arend Lijphart, who developed this concept, consociationalism helps us to understand how small European countries characterised by deep cultural divides have been able to maintain peace between their different cultural communities. In consociational democracies, decisions are taken by seeking amicable, compromise agreements that are generally accepted. All the major parties are

2. Elections by Parliament

2.1. Election of the members of the government and its president

In accordance to the Swiss Constitution⁴, the Federal Council has seven members who are elected every four years following the general elections to the National Council. The Swiss government is a college of equals; there is no prime minister. The number of members is fixed by the Constitution and has not changed since 1848. In contrast to other parliamentary systems, Parliament elects all the members of the government and not simply the head of government, as in Germany for example⁵. The government's mandate is limited to a period of four years, the same as the term of office of the members of parliament⁶. This means that the elections to Parliament are synchronised with elections to the Federal Council, which brings a government in harmony with the majority of the members of parliament and of the electorate. The Federal Council thus represents a compromise between a directorial system and an assembly system.

The term of office cannot be reduced, unless a minister resigns during their term or becomes incapable of carrying out their duties, e.g. due to serious health problems⁷.

The Federal Council cannot be dissolved during the legislature period. This feature gives the government a high degree of independence: once elected, the seven ministers in the government are no longer dependent on Parliament. There are no votes of confidence, no motions of censure, and no opportunities to unseat a member of the government. Equally, the government has no power to dissolve Parliament. On the other hand, Parliament exercises strict supervision over the work of the members of government throughout the legislature period. Due to its constancy, parliamentary control compensates for the intermittency of elections and maintains a certain grip on the Federal Council.

Each year, Parliament also elects the president of the Swiss Confederation and the vice-president from among the members of the Federal Council. The president thus changes each year based on a succession rule established by custom. The president of the Swiss Confederation is neither the head of state nor the head of government, and has no authority over his or her colleagues in the Federal Council whom he or she has not chosen and to whom he or she may not give orders or instructions. The president of the Swiss Confederation is thus the '*primus inter pares*' and carries out special duties that are primarily ceremonial, as well as chairing meetings of the government. Essentially the Federal Council exercises governmental authority and acts as head of state as a body. This lack of hierarchy probably makes Switzerland the only country in the world with no head of government⁸.

Parliament also elects, for a duration of four years, the Federal Council's chief of staff, who holds the title of Federal Chancellor.

involved in the process and are assigned political duties and responsible positions in the administration, the armed forces and the judiciary, in proportion to their electoral strengths. Consociationalism thus allows peace to be maintained among the various communities in Switzerland (see AREND LIJPHART, « Consociational Democracy », in : *World Politics*, volume 21, n° 2, January 1969, pp. 207-225).

⁴ Art. 175, para. 2, Federal Constitution.

⁵ Art. 63 of the Basic Law for the Federal Republic of Germany of 23.5.1949.

⁶ Art. 175, para. 3, Federal Constitution.

⁷ Art. 140a Parliament Act of 13.12.2002.

⁸ Strange though it may seem, Switzerland owes its collegial system to France, which imposed it on the Swiss during the Helvetian Republic in 1798. See JEAN-LUC PORTMANN, *Histoire du gouvernement fédéral suisse. Le Conseil fédéral des prémices de l'Ancien régime à 2009*, Edition Artesia, Lausanne/Zurich/Lugano, 2009.

Since 1959, the Federal Council has been a grand coalition of the four largest political parties sitting in Parliament. The coalition is broad and covers a wide political spectrum extending from the socialist left to the nationalist right, taking in the centre on the way. In contrast to other coalition governments, no political party takes precedence over the others and each party can have a maximum of two members in the Federal Council. These members are elected individually, one after the other: there is not an election, en bloc, of the seven members, but seven individual elections. The vote is a secret ballot, often comprising several rounds. To be elected, a candidate must receive more than half of the available votes (an absolute majority). To prevent the election process from taking too long, after the third round of voting, the candidate in last place is eliminated and may not stand again. Federal councillors who stand for a further four-year term – which is quite normal – are voted on in order of their seniority.

The Constitution requires the various regions and the language regions to be fairly represented in the Federal Council⁹. This means the parties should have candidates in their ranks who reflect the country's diversity. Currently, the Federal Council comprises three French-speaking and four German-speaking members. Until 1999, the Constitution forbade two federal councillors from the same canton. Even today, the Federal Assembly tries to adhere to this requirement.

The obligation that both the political parties and the different regions and languages of the country be fairly represented is a response to the concept of consociationalism, which is so fundamental to maintaining harmony among the cultural communities in Switzerland.

During their term of office, the federal councillors must work in a collegial manner¹⁰, which means that the ministers must work together to deal with government business and take strategic decisions. Although the Federal Council has seven members, it is regarded as a single body once constituted. Its members must present a united front in their external dealings. Each member must respect and support the decisions taken, and implement them dutifully, even if he or she originally took a different view.

The requirement of collegiality has certain very specific consequences: in 2007, a member of the government failed to secure re-election at the end of his term of office because he experienced some difficulty working in a collegial manner; this created a sensation. Thus, in order to be re-elected, a federal councillor may have to pursue a policy that does not accord with that of his or her own party, but which is likely to achieve consensus. This is all the more the case because the members of the college are elected individually: in a parliament where no single party has an absolute majority, each candidate must find a majority among the political groups that support them. The principle of collegiality thus requires majority parties to refrain from exploiting their dominance.

The principle of collegiality and the term of office have consequences for the way in which federal councillors work: rather than seeking the approval of those on the outside, they must find common ground with their colleagues; rather than giving priority to their own political views, they must learn to defend those of the Federal Council. This system encourages moderation and restraint, acting as a strong cohesive force within the government.

Both in its composition and in its operation, the Swiss government must therefore meet two requirements: that of representing the diversity of the country, while at the same time presenting a united front. The Federal Council is thus a precise reflection of what the Swiss Constitution demands that Switzerland be: united in its diversity¹¹.

⁹ Art. 175, para. 4, Federal Constitution.

¹⁰ Art. 177, para. 1, Federal Constitution.

¹¹ Art. 2 para. 2, Federal Constitution.

2.2 Election of the judges of the Federal Courts

The Federal Assembly is also responsible for electing the judges of the federal courts¹². These elections take place every six years¹³ with a few exceptions. Each judge is elected by an absolute majority of members of parliament.

Since 2003, the Judiciary Committee, comprising twelve members from the National Council and five members from the Council of States, has been responsible for inviting applications for vacant positions and preparing for the elections. The committee ensures that the various political forces are equally represented within the federal courts. Generally, it only submits candidacies to the vote if they have the full support of at least one political group. This recruitment method results in a close correlation between the relative strengths of the parties in Parliament and the composition of the supreme judicial authority – although there is a certain misalignment due to the judges having a longer term of office.

Under the Federal Constitution, any citizen who is eligible to vote may become a judge in the Federal Supreme Court¹⁴. In practice, however, only candidates with complete legal qualifications and broad experience are elected. In addition, the candidates' first language and the regions that they come from are also taken into consideration.

In the election of judges, the requirements of consociationalism also dominate the process, and it is exceptional for judges once elected not to be reappointed to their positions. Indeed, there have been only three cases of judges not being re-elected; in two of these cases, the age of the candidates was the issue, while the third case was due to an error – the judge in question was re-elected the following week through the replacement procedure.

In practice, the choices that Parliament makes aim to bring continuity. Although a desire for party representation plays a key role in the election of judges, once elected, they remain in place. For the Federal Assembly, this is a way of maintaining stability throughout the structure. A decision not to re-elect a judge or a federal councillor would be liable to upset this balance. In the courts as in government, there is therefore a high level of stability and, generally speaking, persons elected to office tend to serve for longer than they might personally wish.

2.3. Other elections: the Attorney General and the Commander in Chief of the Armed Forces

Since 2011, the Attorney General of the Confederation and his two deputies have also been elected by the Federal Assembly, together with the Attorney General's supervisory body. The Federal Assembly regarded this procedure as the best way of preventing any form of political or governmental influence over the work of the federal prosecution service. Once again, the Judiciary Committee prepares these elections.

Parliament is also responsible for electing a general to act as the supreme military commander. This is not a permanent position and an election is only held when a major mobilisation of troops is expected. Since 1848, Parliament has elected a general on five occasions, the last time in 1939.

¹² The federal courts are composed of the Federal Supreme Court, the Federal Administrative Court, the Federal Criminal Court, the Federal Patent Court and the Military Court of Cassation.

¹³ Art. 145, Federal Constitution.

¹⁴ Art. 143 Federal Constitution.

3. Confirmation of nominations

The Federal Assembly is not only responsible for the election of the members of the government and Federal Supreme Court judges. In certain cases, it is also required to confirm nominations proposed by the government¹⁵. These include the Federal Data Protection and Information Commissioner and for the Director of the Swiss Federal Audit Office. The first named has the task of applying the legislation on data protection and ensuring that citizens can access public documents. The Swiss Federal Audit Office is the supreme financial supervision body in the Confederation and has a function similar to a court of auditors.

The heads of these two offices are chosen by the Federal Council, but they cannot begin their work until Parliament has confirmed their nomination by a vote. Parliament can accept or refuse the government's proposal, but it cannot propose its own candidate. This derogation from the principle of the separation of powers requires an explanation: the appointment of these two senior officials by Parliament gives them a high degree of legitimacy and independence, which is reinforced by distancing them from the hierarchical powers: they do not receive instructions from the government and cannot be removed from office unless it is proven that they are unable to carry out their duties.

Here again it is the Judiciary Committee that interviews the proposed candidates, gathers the information required and makes recommendations to the Federal Assembly before a confirmation vote is held.

A similar procedure applies for the Secretary General of the Federal Assembly whose election is also confirmed by a vote in Parliament. In contrast to the Data Protection Commissioner and the Director of the Swiss Federal Audit Office, the Secretary General is appointed by the Conference for Coordination, which is formed from the two offices of the chambers, and thus comprises in which the presidents and vice presidents from the two chambers and heads of all the political groups represented in Parliament. The Secretary General is the sole parliamentary official elected by the Federal Assembly by secret ballot. This method of selection is justified by the fact that the person exercises the highest office in parliamentary administration. It gives the Secretary General a large degree of legitimacy in the eyes of the parliamentary bodies and Council members and thus a broad scope for action within the administration. The Secretary General cannot be removed during the four-year legislature period. Unless he or she stands down, the Secretary General is reappointed automatically¹⁶. This has always been the case so far.

4. Conclusion

As we have seen, the elective powers granted to the Federal Assembly are very important. It appoints the members of the executive and the judiciary at federal level; since 2011, it has also appointed the Attorney General of the Confederation and the related supervisory body. The Federal Assembly also elects the Commander in Chief of the Armed Forces in times of war. Finally, it is responsible for confirming certain nominations.

The representation of the main political parties in Parliament, the government and the Federal Supreme Court and the effort made to ensure representation for Switzerland's regions and linguistic communities is a response to the concept of proportionality and fair representation contained in our democratic principles. The elective function of Parliament thus plays an essential balancing role by supporting or restraining certain trends.

¹⁵ Art. 168, para. 2, Federal Constitution.

¹⁶ Art. 26 Parliamentary Administration Ordinance of 3.10.2003.

Consociationalism is not simply an obligation. It is also a tool and a means of expression for the Federal Assembly. It allows all the forces in the country to have a voice, and if used properly it is the key to maintaining Switzerland's national unity.

| | FUNCTIONS | Role of the Parliament | Period | Preliminary discussion / recommendation |
|--------------------|---|-------------------------------|--|--|
| LEGISLATURE | President of the National Council and President of the Council of States | Election | 1 year | Parliamentary groups |
| | Vice-Presidents of the National Council and Vice-Presidents of the Council of States | Election | 1 year | Parliamentary groups |
| | Tellers/substitute tellers of the National Council and of the Council of States | Election | 4 years (National Council) 1 an (Council of States) | Parliamentary groups |
| | Secretary General of the Federal Assembly | Confirmation | 4 years | Conference for coordination (Offices of both Chambers) |
| EXECUTIVE | Seven members of the Federal Council | Election | 4 years | Parliamentary groups |
| | - President of the Confederation | Election | 1 year | Parliamentary groups |
| | - Vice-President of the Federal Council | Election | 1 year | Parliamentary groups |
| | Federal Chancellor | Election | 4 years | Parliamentary groups |
| JUDICIARY | Federal Supreme Court - Judges - President/Vice-President (renewable 1x) | Election Election | 6 years 2 years | Judiciary Committee Judiciary Committee |
| | Federal Administrative Court - Judges - President/Vice-President (renewable 1x) | Election Election | 6 years 2 years | Judiciary Committee Judiciary Committee |
| | Federal Criminal Court - Judges - President/Vice-President (renewable 1x) | Election Election | 6 years 2 years | Judiciary Committee Judiciary Committee |
| | Federal Patent Court - Judges - President (renewable) | Election Election | 6 years 6 years | Judiciary Committee Judiciary Committee |
| | Military Court of Cassation - Judges - President (renewable) | Election Election | 4 years 4 years | Judiciary Committee Judiciary Committee |
| | Attorney General's supervisory body | Election | 4 years | Judiciary Committee |
| | Attorney General of the Confederation/Deputy Attorneys General | Election | 4 years | Judiciary Committee |
| OTHERS | Commander-in-Chief of the armed forces | Election | Open | Open |
| | Federal Data Protection and Information Commissioner | Confirmation | 4 years | Judiciary Committee (as a general rule) |
| | Director of the Federal Audit Office | Confirmation | 6 years | Judiciary Committee (as a general rule) |