# The constitutional position of the Swiss parliament in the context of the principle of separation of powers

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#### Abstract

This article considers the fundamental part of the Swiss constitution relating to the legal position of parliament and its powers. The regulatory provisions give the Federal Assembly significant predominance over other bodies of authority. The clearest example is the provision of the federal constitution that gives parliament oversight over the government, federal administration and federal courts. This provision, particularly given that the constitution makes no direct reference to the principle of separation of powers, may appear to indicate that state authority is unified in just one organ – contravening the model of democracy in which the principle of separation of powers is a fundamental element. It is shown here that it is unreasonable to read the constitutional provisions in a purely literal manner, and that they should be interpreted in the light of the functions that the provisions in question are intended to fulfil, particularly in the context of the rules of a democratic state.

**Keywords:** parliament, Swiss Confederation, separation of powers.

# Pozycja ustrojowa parlamentu szwajcarskiego w kontekście zasady podziału władz Streszczenie

Celem artykułu jest przybliżenie podstawowych rozwiązań ustroju Konfederacji Szwajcarskiej w części dotyczącej pozycji prawnej i kompetencji parlamentu. Przedstawione regulacje normatywne wskazują na wyraźną preponderancję szwajcarskiego Zgromadzenia Federalnego wobec wszystkich pozostałych organów władzy w państwie. Najbardziej dobitnym przykładem jest przepis konstytucji federalnej mówiący, że parlament sprawuje zwierzchni nadzór nad rządem, administracją federalną i sądami federalnymi. Przepis ten, zwłaszcza w sytuacji, kiedy w konstytucji federalnej w żadnym miejscu nie deklaruje się wprost zasady podziału władz, może wskazywać na fakt jedności władzy państwowej, skupionej w ręku tylko jednego organu. Takie rozwiązanie należałoby uznać za sprzeczne z wzorcem demokracji, którego immanentnym elementem jest zasada podziału władz. Tekst wskazuje na nieracjonalność wyłącznie literalnego odczytywania przepisów konstytucji. Przeciwnie, podkreśla się konieczność interpretacji jej postanowień zgodnie z uwzględnieniem funkcji, jakie dane przepisy mają spełniać, zwłaszcza w kontekście reguł państwa demokratycznego.

**Słowa kluczowe:** parlament, Konfederacja Szwajcarska, podział władz.

In times of heated debate concerning the shape of democracy, the rule of law and the understanding of the principle of separation of powers, it is helpful to look at the solutions applied in other legal systems, particularly in countries where it is generally perceived that the broadest democratic ideals are truly realised. An excellent example is the Swiss Confederation, sometimes described as a "pearl" of European and world democracy. It is a country in which, based on historically grounded traditions of parliamentarism and representative democracy, the constitutional position of the legislature is particularly strong. The supremacy of the Swiss parliament in the system of exercise of authority is limited by extensive and practised institutions of direct democracy and (importantly for the present analysis) by other mechanisms that prevent parliament from exercising sole power. Of particular interest here are the provisions in force at constitutional level and their implementation in practice. One element of the process of the application of law is its interpretation. The Swiss situation clearly confirms an elementary rule of legal doctrine: the interpretation of a legal text (including a constitutional provision) cannot be limited solely to linguistic interpretation. The proper reading (reconstruction, decoding) of a legal norm from a written provision must also take account of the systemic aspect and (particularly important for our present purposes) the functional aspect. In interpreting a given provision, regard must be had for the purpose that the regulation is intended to fulfil, and also its cultural context (which includes to some extent the historical context).

It is therefore necessary to refer to those provisions of the Swiss constitution which, read literally, might appear to place sole power in the hands of parliament, and thus give a special and dominant role to that representative body at the expense of other organs of authority, or even – more broadly speaking – other participants in public life. Such an interpretation is particularly tempting to members of parliament, irrespective of the place and time of their election and the party they represent.

A characteristic feature of Swiss doctrine is that in the description of a given institution, reference is made to its historical origins (*Entstehungsgeschichte*). Hence, in this article, the analysis will not merely refer to current regulations and political practice, but some attention will also be paid to historical determinants. Moreover, provisions of the Swiss constitution will be "confronted" with each other and with other regulations, along with established political practice related to the application of the law. The result of such an interpretation (from a functional standpoint, providing for dynamic response to the current needs of the democratic community) is a norm or norms that are not

identical semantically to the literal content of the provisions in question. The Swiss example that will be presented here is one of many that reflect situations of this type.

According to the Swiss federal constitution, the parliament or Federal Assembly (Bundesversammlung), subject to the rights of the people and the cantons, is the highest authority in the Confederation and exercises oversight (Oberaufsicht) over the government (the Federal Council or Bundesrat) and federal administration, federal courts and other bodies entrusted with the tasks of the Confederation (Constitution 1999/101: art. 148(1) and 169(1)). Moreover, the constitution indicates that federal acts (as well as international law) are authoritative (massgebend) for the Federal Court (Bundesgericht) and other judicial authorities (Constitution 1999/101: art. 190). In the Swiss system, this is understood to mean that courts may not question the constitutionality of the instruments in question in such a way – abstract or accessorial – that might lead to the direct overturning (Hangartner 2002: p. 1929) of a provision of the law (with effect erga omnes) or a legal norm (in casu). The text of the constitution makes no express reference to the principle of separation of powers.

A literal reading of the aforementioned provisions might lead to the conclusion that they concern measures appropriate to a state that realises the concept of parliamentary dictatorship, with a directorial model of government, which – due to the rejection of the principle of separation of powers<sup>1</sup> – cannot be admitted to the family of democratic systems.<sup>2</sup> It may be mentioned in passing that in the literature of the communist era, the Swiss system was assigned to the aforementioned directorial model, and that model was "generally adopted in European socialist countries" (in what was known as people's democracy) (Siemieński 1980: p. 233). At the same time, Switzerland was (and is) regarded in theory not merely as a democratic state, but as one whose constitutional principles are viewed as a pattern for other to follow. In this article we consider the following question: disregarding acts of direct democracy, which – though fairly frequent – are of an incidental nature and do not imply that authority is exercised by the people on an everyday basis, how do the Swiss uphold their state's democratic qualities while concentrating almost total power – according to a literal reading of the constitution – in a single body (namely parliament)?

<sup>&</sup>lt;sup>1</sup> The principle of separation of powers is considered almost universally in the literature as a condition *sine qua non* for democracy (Jamróz 1993: p. 99).

A different view is expressed by e.g. Andrzej Pułło, who, while not directly denying the democratic nature of the Swiss system, writes that "there should be no doubt that the organisational principle of the state apparatus [in Switzerland] is the principle of the supremacy of parliament, and thus we cannot speak of a principle of separation of powers" (Pułło 2007: p. 217).

# The constitutional position of the Federal Assembly

Switzerland, as a federal state, has had to date three different constitutions.

#### Historical determinants

Historically, in the first of the federal constitutions, it was stated explicitly that supreme authority in the Confederation rested with the dual-chamber<sup>3</sup> Federal Assembly (Constitution 1848: art. 60). There was also a provision giving parliament oversight over the federal administration and the judiciary (Constitution 1848: art. 74(14)). Realising the concept of a legislature-controlled state, the role of (in particular) the government was indeed reduced to that of an executor of parliament's instructions. The Federal Council operated as a committee that was controlled by, and indeed "chained" to, the Assembly (Sarnecki 1978: p. 46).

The next federal constitution, still based on the fundamental measures contained in the previous document, significantly reduced the role of parliament in the Swiss political system. While it was still stated that supreme power lay with the Federal Assembly (Constitution 1874: art. 71), the same provision reserved the sovereign rights of the people and the cantons, which were able to express their will in the process of the direct adoption (under specified conditions) of acts of parliament and the federal constitution.<sup>4</sup> This constitution remained in force for almost 126 years, until the end of 1999, and it was mainly in this period that Switzerland's contemporary political system was shaped. The constitution stated explicitly that competences were reserved by default to parliament (Constitution 1874: art. 84). Its specific powers (Constitution 1874: art. 85) included not only law-making competences (primarily the power to pass acts<sup>5</sup>), but also competences in management and in the making of rulings.<sup>6</sup> It was also to perform an elective function with respect to the other chief state authorities – the Federal Council, the Federal Court, and the Chancellor and General.<sup>7</sup> Not forgotten

The Federal Assembly consists of the National Council (*Nationalrat*), which represents all electors, and the Council of States (*Ständerat*), consisting of representatives of the cantons. This dual-chamber arrangement has persisted to the present day.

<sup>&</sup>lt;sup>4</sup> The earlier constitution provided only for the joint participation of the people in the procedure of amendment of the federal constitution (Constitution 1848: art. 113).

Regulatory instruments passed by the Swiss parliament may take the form of acts or ordinances (executive provisions to acts).

For example, the Federal Assembly was empowered to consider complaints about Federal Council decisions in administrative disputes (Constitution 1874: art. 85(12)).

The General is the commander-in-chief of the Swiss armed forces, elected at a time of general mobilisation.

either was the clause giving parliament oversight over the federal administration and the judiciary (Constitution 1874: art. 85(11)).

### The present-day system

Switzerland's current constitution (in force since 1 January 2000), like both previous federal constitutions, lays down that the legitimacy of parliament derives from general elections. Members of the National Council are elected for a four-year term in direct elections according to a system of proportional representation (Constitution 1999/101: art.149). The act on political rights describes the electoral process in detail; its characteristics include the right of a voter to delete candidates from a list or add candidates from other lists (*Panaschieren*) and to accumulate more than one vote<sup>8</sup> for a given candidate (*Kumulieren*) (Poledna 2001: p. 367). Seats are assigned according to the Hagenbach–Bischoff system (Act 1976/161.1: art. 40ff.). The procedure for election of members of the Council of States is traditionally (as in both nineteenth-century federal constitutions) subject to regulation by the individual cantons (Constitution 1999/101: art. 150(3)).9

The authority of the Federal Assembly (although with the reservation of the rights of the people and cantons) is described as the highest in the Confederation (Constitution 1999/101: art. 148). The National Council and Council of States are equal in law.<sup>10</sup> In principle, they sit separately.<sup>11</sup> For a resolution of parliament to be effective, it must be approved by both Councils (Constitution 1999/101: art. 156(1–2)).

The principal function of the Swiss parliament is the passing of laws. It plays a part in the process of approval and amendment of the federal constitution (Constitution 1999/101: art. 192ff.). It is the chief forum and the key decision-making body in the procedure for the passing of acts. It should be remembered, however, that parliament's legislative powers may be limited by the direct participation of the people (through a popular initiative, popular veto or referendum) or the cantons (cantonal initiative, cantonal veto, counting of cantonal votes in the case of a dual – *doppelte* – referendum).

<sup>&</sup>lt;sup>8</sup> However, one candidate may not receive more than two votes from a single elector.

In elections to the Council of States, all cantons currently use a majority system (except for Jura, which applies a proportional formula) (Häfelin, Haller 2001: p. 431).

The terms "lower" and "upper" house are not used in Swiss legal doctrine; the "first" house is that in which the legislative procedure is initiated.

Exceptions from this principle concern elections made by parliament, settlement of disputes over competence between the highest federal bodies, and exercise of the right of pardon, as well as joint sittings on special occasions and for the hearing of governmental declarations (Rhinow 2000: p. 272).

The Federal Assembly may also, based on statutory powers (or based directly on the federal constitution), issue regulatory instruments in the form of ordinances<sup>12</sup> (Constitution 1999/101: art. 163(1)).

It should be noted that the scope of the acts passed is extremely broad, given that "all significant provisions that establish binding legal rules" (Constitution 1999/101: Article 164(1)) must be enacted in the form of federal acts. They may concern in particular: the exercise of political rights, limitations on constitutional rights, the rights and duties of individuals, the parties obliged to pay taxes and the subject and amounts of taxes, tasks and performances of the Confederation, obligations of cantons to introduce and enforce federal law, and the organisation and conduct of proceedings before the federal authorities. The constitution also provides for the possibility of passing emergency federal acts, which come into effect without the need to wait for the time allotted for the exercise of a popular or cantonal veto (Häfelin, Haller 2001: p. 533), including emergency acts for which no constitutional basis is indicated. It should be noted that this last power potentially enables the Federal Assembly to amend the federal constitution for a period of one year without the participation of the people or the cantons (Müller 2001: p. 1108).

The Federal Assembly plays an important role in foreign policy. It participates in the shaping of such policy, and oversees the state's foreign relations (Constitution 1999/101: Article 166). A particular competence is the granting or refusal of consent for the conclusion of significant<sup>14</sup> international agreements by the Confederation,<sup>15</sup> although it should be remembered that the authority of parliament here is limited by the requirement for an obligatory referendum in the case of agreements concerning membership of collective security organisations or supranational communities (Constitution 1999/101: art. 140(1)(b)).<sup>16</sup>

It may be noted that, apart from the rules of the two houses and the rules for joint sittings, parliament issues very few ordinances (Müller 2000: p. 254 and examples cited there). It should be added that other (non-regulatory) enactments are issued in the form of federal decrees (Constitution 1999/101: art. 163(2)).

This refers primarily to states of emergency (*Notstandsrecht*) declared in cases of danger to the state (Häfelin, Haller 2001: p. 523), for which the constitution contains provisions in relation to legislation (Constitution 1999/101: art. 165(3)). An interesting alternative view on parliament's power to pass acts without a basis in the constitution is that of Pierre Tschannen, who concludes that in case of serious and real danger to the state, a constitutional basis for law-making (including the passing of acts) is redundant (*entbehrlich*) (cf. Tschannen 2007: p. 182).

In contrast to agreements of lesser significance, referred to in the act on the organisation of government and administration (Act 1997: art. 7a).

When consent is given by the Federal Assembly, ratification is performed by the government (Häfelin, Haller 2001: p. 439).

Such a referendum takes place following the adoption of an appropriate resolution by parliament. It should be added that a parliamentary resolution consenting to the conclusion of an international

The Swiss parliament also has budgetary competences within a scope usually reserved to the executive. This provides a real possibility of influencing the state's finances, not limited merely to the passing of the state budget and acceptance of reports (accounts) relating to its implementation. The act on the federal budget provides for the participation of parliament in decisions relating to the taking of measures concerning a possible deficit, including actions to achieve savings, the making up of deficits and the management of additional savings, as well as in granting consent for the giving of federal credit guarantees and for the undertaking of emergency liabilities by the state (Act 2005/611.0: art. 15, 17d, 17c, 18, 23, 28).

Another significant competence of the Federal Assembly is the election of persons to positions of high authority. Investiture (understood broadly, as the approval and election of candidates and assignment of competences) of the Federal Council (including election of its chair, the President of the Confederation), the Federal Chancellor, the judges of the Federal Court and the General, is a parliamentary process. Moreover, federal acts empower parliament to elect further persons<sup>17</sup> performing the functions of federal bodies (Constitution 1999/101: art. 168). In relation to the government, the constitution explicitly grants competences to parliament in the assignment of functions to it (Constitution 1999/101: art. 171); hence it may be stated that parliament shapes not only the composition of the government, but also – though to a limited extent – its policy.

The aforementioned oversight over the government, federal courts and other bodies performing federal duties, according to the act on the Federal Assembly, is exercised based on the principle of legality (in relation to the performance of given actions), compliance of actions with the provisions of the law, and their purposefulness, effectiveness and economy (Act 2002/171.10: art. 26(3)). The act also gives parliament the power to take strategic planning decisions, including the determination of goals, principles, criteria for realisation and use of the state's assets (Act 2002/171.10: art. 28).

Parliament is also the recipient of reports of various types and degrees of importance – the most important being the budget report – from the government and organs of federal administration, but also from the Federal Court. Acceptance of such a report is

agreement may also be subject to an (optional) referendum, at the demand of 50,000 electors or eight cantons, provided the agreement is not limited in time and makes no provision for withdrawal, concerns membership of an international organisation, or contains provisions requiring the passing of an act for its application (Constitution 1999/101: art. 141(1)(d)).

These also include high offices such as those of judges; see the examples in (Ehrenzeller 2002: p. 1661).

synonymous with approval of its content. Apart from such *ex officio* reports, members of parliament may (individually or collectively) demand responses to parliamentary questions, simple questions, motions and proposals. As a result, not only does parliament receive the desired information, but this may also form a basis for an undertaking of the government to prepare drafts of particular legal measures, especially federal acts (Häfelin, Haller 2001: p. 443). Another category of institution of state oversight is the parliamentary commission of enquiry, which is assigned a broad range of powers (Act 2002/171.10: art. 163–171).

In relation to the individual cantons that make up the Confederation, the Federal Assembly gives a guarantee for their constitutions and (in case of a preceding objection from the Federal Council or another canton) gives consent for the conclusion of agreements known as *Konkordate* between particular cantons or between cantons and foreign entities (Constitution 1999/101: art. 172).

The constitution assigns further specific powers to parliament (Constitution 1999/101: art. 173(1)). It is empowered to adopt resolutions concerning the protection of external security, Switzerland's independence and neutrality, the protection of internal security, the performance of active service, and the full or partial mobilisation of the armed forces. Parliament is also empowered to enact appropriate measures to ensure the effective enforcement of federal law. It decides on the validity of popular initiatives. It may also take decisions in matters of an individual nature (provided that this is allowed explicitly by a federal act). Parliament also settles conflicts relating to competences between the highest federal bodies, including in situations where it is itself a party to the dispute. The Federal Assembly is also empowered to grant consent for the criminal prosecution of its members (through the removal of parliamentary immunity). As has already been mentioned, parliament takes decisions on matters of pardons for individuals and amnesties (Häfelin, Haller 2001: p. 447–448).

The Federal Assembly also deals with matters that belong to the competence of the

The Federal Assembly is also required to evaluate federal measures with regard to their effectiveness (Constitution 1999/101: art. 170).

<sup>&</sup>lt;sup>19</sup> This is a form of control over the will of the people as expressed by the initiators of changes to the federal constitution. Such an initiative is deemed invalid if it fails to comply with the requirements of consistency of form and of subject matter, or if it infringes mandatory provisions of international law (Constitution 1999/101: art. 139(3)).

An example given by U. Häfelin and W. Haller is the parliamentary resolution of 1978 approving the peaceful use of atomic energy (Häfelin, Haller 2001: p. 447).

More precisely: removal of immunity requires due resolutions of the appropriate committees in the National Council and the Council of States (Act 2002/171.10: art. 17a).

Confederation and have not been assigned to other bodies. Additional duties and powers may be assigned to the Assembly by law (Constitution 1999/101: art. 173(2–3)).

# The separation of powers in present-day Switzerland

The present federal constitution makes no explicit declaration of the principle of separation of powers. The absence of such a direct regulation is justified by a feature characteristic of the Swiss system of organisation of power, "the diversity of mutual permeation of different state functions". This feature made it impossible for the writers of the constitution to lay down such a principle "in a single provision that would sufficiently differentiate notions while remaining comprehensible" (Address 1996/1997 I 1: p. 370). In this regard, it is sometimes pointed out that in the Swiss system the principle of separation of powers is merely (and as much as) an element of a broader understanding of the model of the functioning of state authority, where on the one hand parliament has superiority<sup>22</sup> over other bodies of authority, although this cannot have the nature of mere subordination (Zuordnung), while on the other hand there is mutual control and restriction of authorities performing varied functions that often interpenetrate. It is sometimes proposed that the system that connects the different segments of state authority be conceived as a model of coordinated (though separated) authority - what is called kooperierende Gewalten (Rhinow 2000: p. 261–262). Moreover, based on the literal provision of the constitution stating that the authority of the Federal Assembly (although subject to the rights of the people and the cantons) is the highest in the Confederation (Constitution 1999/101: art. 148), it is sometimes claimed that the classical understanding of the principle of the separation of powers is inadequate in relation to contemporary solutions.

Paweł Sarnecki noted almost a quarter of a century ago that the assumption of deconcentration of power should be regarded as obsolete in relation to modern democratic states. He developed the thinking of the Swiss political scientist Richard Bäumlin, who claimed that the separation of powers as a basic constitutional assumption is not currently negative in character and does not lie merely in the establishment of mutual restrictions. The subject of such separation is the establishment of a structure of human cooperation, involving the constitution of particular authorities, definition and limitation of their competences, regulation of cooperation, and thus the creation of a (limited)

In the literature on political systems and constitutional law, this term refers to legal and actual dominance of one body over another (cf. e.g. Witkowski, Bień-Kacała 2015: p. 74).

unity of state authority. Consequently, it is more and more frequently understood that, in the light of the existence of varied and complex interests felt by various social groups, strata and classes, and reflected in particular segments of the organisation of the state, it is necessary that a certain political unity must develop<sup>23</sup> (Sarnecki 1995: p. 21 and citations therein).

In Swiss legal theory<sup>24</sup> it is generally maintained consistently that the principle of separation of powers is realised in that country's constitutional practice. It is underlined that the principle is among the fundamental elements of a democratic model of government, which at least for decades, and certainly since the enactment of the present federal constitution, has been realised – although possibly in a unique way – in the Swiss reality. The presence of that principle is treated as something obvious, although the uniqueness is manifested in the supplementation of the constitutional measures with numerous and varied instances of direct democracy, which most importantly are reflected in frequent political and legal practice.

Nonetheless, in view of the subject matter of the present article, it is necessary here, taking account of the applicable regulatory provisions, to consider the understanding of the principle of separation of powers in contemporary Switzerland.

In the Swiss system, that principle may be presented from three standpoints: organisational, personal, and in terms of the mutual limitation of authorities' actions (Tschannen 2007: p. 377ff.).

Considering the aforementioned constitutional regulations concerning law-making, it may be stated that, in accordance with the organisational separation of powers, legislative competence – subject to the institutions of popular initiative and referendum – lies with the Federal Assembly. According to the constitution, the highest governing and executive authority lies with the Federal Council (Constitution 1999/101: art. 174), while the dispensing of justice is ascribed to the Federal Court (Constitution 1999/101: art. 188(1)).

The principle of organisational separation of powers is not realised without exception, and in this regard emphasis may be placed on the superiority of parliament over the other bodies of authority. The Federal Assembly participates along with the Federal

The claim of the "democratic unity of state authority" in the Swiss political system is also made by Waldemar Żebrowski (Żebrowski 2007: p. 109). Bogusław Banaszak writes that "it has become customary for us [in Poland] to assert that the supremacy of parliament adopted [in Switzerland] excludes the principle of separation of powers" (Banaszak 2012: p. 302).

For example: (Häfelin, Haller 2001: p. 403 and citations therein).

Council in the government and administration of the country, and even holds financial powers. Parliament also exercises supervisory competences, to some extent may issue rulings, and has elective powers in relation to the other chief bodies of authority in the Confederation.

In personal terms, the principle of separation of powers is expressed through the strict incompatibility of membership of the National Council, Council of States, Federal Council and Federal Court. Moreover, government members and full-time Federal Court judges are not permitted to hold other offices in the Confederation or in the cantons (Constitution 1999/101: art. 144).

The aspect of mutual limitation of action is of particular importance. Here again, the constitutional principle of the superiority of parliament applies (this seems to be most clearly expressed by the aforementioned oversight formula). It might appear that we have to deal here with the unilateral influence of the Assembly on the other high federal authorities. This impression is especially reinforced by the elective functions of parliament, which elects all (seven) members of the government (for a period of four years), including the President and Vice-President of the Confederation (each for a one-year term of office). In making their choices, members of parliament must ensure appropriate representation in terms of the cantonal and linguistic ties of each federal government member<sup>25</sup> (until 2000 it was not permitted to elect more than one government member from the same canton).

It is nonetheless useful to consider long-term political practice in the filling of places on the Federal Council in terms of the party membership of particular government members – the "magic formula" (*Zauberformel*). Although this was not introduced by way of regulation (Branecki 2014: p. 125), it is in fact treated as a kind of constitutional convention. In the years 1959–2003 the government (irrespective of the results of parliamentary elections) always consisted of representatives of the same parties, and in the same numbers. There were always two members of the Christian Democrat People's Party (CVP), two of the Liberal Democrat Party (FDP), two of the Social Democratic Party of Switzerland (SPS), and one of the Swiss People's Party (SVP). In this way there was implemented the idea of a "grand coalition" as a measure characteristic of

The religious affiliation of federal councillors was taken into fairly strict account in the electoral process until the mid-twentieth century. Over time (with the development of the magic formula, mentioned later in the text) party affiliation came to the fore. The religious factor as a condition for election to the Swiss government was finally discarded with the election of a Jewish member, Ruth Dreifuss, to the Federal Council in 1993.

consensual democracy, where the importance of electoral rivalry is diminished, and a greater role is played by interparty agreements. This was a result of, on the one hand, the specific nature of the Swiss political system, and on the other the country's political culture – these being factors that require parties to seek a consensus in spite of policy differences (Mader 2001: p. 1048ff.). From 2003 onwards certain changes took place<sup>26</sup> in the composition of the government, and since 2016 the operational formula has been as follows: 2 SPS + 2 FDP + 2 SVP + 1 CVP.

In spite of the clearly outlined superiority of parliament over the executive, it must be remembered that its influence on the government that it has elected is purely political in nature. The governmental acts of the Federal Council cannot be overturned or amended by way of parliamentary oversight (Zimmerli 2001: p. 1041). Parliament's ability to influence the composition of the government ends with the election of the federal councillors. The latter independently (by way of consensus) assign themselves departments.<sup>27</sup> It should be made clear that the supervisory powers of the Federal Assembly do not enable it, and have never done so, to dismiss the government or its individual members for political reasons. No provision is made for votes of no confidence in the government or any of its members. It is also impermissible to dismiss the President of the Confederation or to degrade him or her to a mere head of department. Once elected by parliament, members of the Federal Council are guaranteed to last until the end of their term of office, regardless of any evaluation of their actions.<sup>28</sup> They may be made politically answerable only by way of a process of review carried out after the end of their term of office (Aleksandrowicz 2016: p. 231).

It may be mentioned in passing that the government has very little influence on the Federal Assembly. Such influence may occur only through the execution of a government legislative initiative, including through the drafting of proposed acts, together with rationales, which is called a "preliminary legislative procedure" (*Vorverfahren der Gesetzgebung*). In specific situations, actions of the government lead to the calling

On changes to the composition of the Federal Council and their political determinants, see (Kosowska-Gastoł 2012: p. 89ff.).

The Federal Council has seven departments: foreign affairs, internal affairs, justice and police, defence and sport, finance, economy, and transport, energy and communications. When new areas of federal administration arise, no new departments are created, but lower-level administrative units are established within the existing departments.

Like all members of the highest federal authorities, they may nonetheless be called to account for illegal actions through civil or criminal proceedings or disciplinary procedures, as laid down in the act on liability of 1958 (Häfelin, Haller 2001: p. 412–413).

of an extraordinary parliamentary session.<sup>29</sup> It should be noted that neither the Federal Council or its head, the President of the Confederation, has the power to veto parliament's actions or to dissolve parliament before the expiry of its term (Häfelin, Haller 2001: p. 480).

Under the constitution, the influence of parliament on the Federal Court is manifested in the election of its judges and the exercise of oversight over them. By law, parliament is also empowered to elect (for two-year terms of office) the chair and vice-chair of that court (Act 2005/173.110: art. 14(1–2)). The law also lays down that there are to be from 35 to 45 full-time Federal Court judges, as well as an appropriate number of additional judges<sup>30</sup> (Act 2005/173.110: art. 1(3)). The current number of judges is determined by way of a parliamentary ordinance.<sup>31</sup> A judge's term of office lasts for six years, but terminates at the end of the calendar year in which the judge reaches 68 years of age (Act 2005/173.110: art. 9(1–2)).

Parliamentary oversight over the Federal Court is limited to organisational matters. Each year, the court presents its preliminary budget to parliament for approval, and later a report on the implementation of the budget and a general report on its activities (Act 2005/173.110: art. 3). Parliament is not permitted to examine the content of the court's judgments. Exceptionally, checks may be made relating to the legality of judicial actions (Zimmerli 2001: p. 1042). Rulings of the Federal Court may be overturned or amended only by that court<sup>32</sup> and exclusively on the basis of statutory provisions.

As regards the ability of the Federal Court to influence parliament, it should be borne in mind that a characteristic feature of the Swiss governmental system is that the Federal Court has no jurisdiction to examine federal acts and international law. This means that no constitutional complaint may be made to the Federal Court concerning federal legislation (which, for the court, has the status of authoritative law). Thus, since the authoritative nature of federal acts means that the Federal Court cannot examine their constitutionality, respect must be given to parliament for the fact that it has not seized for itself absolute authority (including the right to dismiss the government or the Federal Court). It must be noted, however, that such legislation may be reviewed ac-

An example is the giving of consent for the undertaking by the state of liabilities valued in excess of 500 million francs (Act 2005/611.0: art. 28(3)).

<sup>&</sup>lt;sup>30</sup> This number must not exceed two-thirds of the number of full-time judges (Act 2005/173.110: art. 1(4)).

<sup>31</sup> At present there are 38 full-time and 19 additional judges (Ordinance 2011/173.110.1: art. 1).

<sup>&</sup>lt;sup>32</sup> An exception is the case, already mentioned, where the Federal Assembly may exercise the right of pardon.

cording to a criterion other than the federal constitution, when it is examined in the light of the norms of international law (Häfelin, Haller 2001: p. 564–565). Such examination can be only of an accessorial nature, effective *in casu* (in a given case of application of the law).<sup>33</sup>

#### **Conclusions**

The foregoing analysis indicates without doubt that the Swiss political system realises the principle of separation of powers, one of the basic democratic requirements. For clarity of argument it must be stated, in answer to the question posed at the outset, that although highest authority rests in the hands of the country's parliament (as is expressly laid down in the constitution), the concentration in that organ of a wide range of powers with respect to other bodies of authority, its actual and legal supremacy, is not absolute in nature. There cannot be said to be democracy if the whole spectrum of authority is concentrated in a single body. Therefore, the democratic legitimacy of the members of parliament does not justify the granting of absolute authority to the legislature. The Swiss parliament's power of oversight does not mean that state authority at the federal level is unified, either in terms of regulatory provisions or in constitutional practice. The dominance, justified by direct legitimacy (coming directly from the electors), of the legislature over the other federal authorities, as the highest authority, exercising oversight over them, cannot and does not mean the "democratic dictatorship" of parliament – which, as has been indicated, was ascribed in the past to countries adopting a directorial model. The oversight of the Federal Assembly over the Federal Council, in spite of the many possibilities of exerting political influence on the latter's actions, does not entail the right to dismiss its members. Federal judges are similarly irremovable during their term of office. The obligation to present various types of report to parliament does not mean automatic removal from office if such a report is not approved by its recipient body. Only a comprehensive reading of the text of the federal constitution, supplemented by the provisions - consistent with it – of lower-level regulatory instruments, enables one to make a proper interpretation of the principle of separation of powers that is contained within it (although not articulated explicitly). By the same token, the Swiss exhibit a rational moderation with regard to the functioning of the national political system, do not succumb to the temptation

Of particular importance for the examination of internal law in Switzerland are the provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

to make only a literal interpretation of the provisions of their constitution, and do not adopt laws which, though declared automatically "authoritative", might contravene that principle.

A separate issue in relation to the realisation of the principle of separation of powers, particularly in terms of the limitation of authority (especially that of parliament), is citizens' direct participation in the processes of exercise of authority. This does not refer, however, to an organisational division between particular segments of authority (such as the classical legislature, executive and judiciary). Institutions such as the referendum or popular veto<sup>34</sup> (only briefly referred to in this article) are excellent solutions which can thwart attempts to gain excessive dominance on the part not only of particular segments of authority (primarily the Federal Assembly), but also of particular (let us say victorious) political groupings. This, however, is a topic for another article.

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<sup>34</sup> It is nonetheless worth recalling the aforementioned power to pass emergency acts without constitutional basis (which may remain in force for one year without popular approval). In the literature, however, there is no indication that these powers are abused (in general) (Tschannen 2007: p. 572). This remark also concerns potential legislative action in the case of acts which do not have a constitutional basis.

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