

Zeitschrift: The Swiss observer : the journal of the Federation of Swiss Societies in the UK

Herausgeber: Federation of Swiss Societies in the United Kingdom

Band: - (1961)

Heft: 1389

Artikel: British and Swiss constitutions and their histories

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DOI: <https://doi.org/10.5169/seals-690504>

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What you should know about BRITISH AND SWISS CONSTITUTIONS AND THEIR HISTORIES

by
JO. HENRI BÜCHI

(Continuation from the last issue.)

Charles II used to discuss matters of state with his confidants in his cabinet. On the advice of Sir William Temple he was persuaded to seek advice from a properly established commission of the Privy Council. This, then, was the early Cabinet, with a capital "C". The name stuck, and the Cabinet Committee by and by developed into more than the sovereign's advisory body. But it was not until after the accession of George I, who did not speak English and who was still too much concerned with his Hanoverian Electorate, and who in consequence left day-to-day administration to the members of his Cabinet, that parliamentary government through a ministry composed of members of parliament, representing the will of the majority in the House of Commons, became the rule.

And Sir Robert Walpole, who served under the two first Georges, held such a position within the Cabinet that he can be described fairly as the first Prime Minister; though strictly speaking that title belongs to Pitt, when a Cabinet whose members were willing to serve under a "prime" or head-minister became both a necessity and an established fact.

The Constitutions To-day

First of all what is a constitution? The Swiss federal constitution and the individual Cantonal ones are laid down in writing. Each is a formal act or law circumscribing the authority, the scope of its legislative and administrative actions, and the general organisation of the Federation and the Cantons. The British constitution is scattered over a few dozen statutes, but also is partly embodied in a number of very important conventions. The notion that there should be a Prime Minister or political parties has had no statutory sanction until they were accepted by implication in the Ministers of the Crown Act of 1937.

There is also the old red herring that the British constitution is unwritten; this, of course, is merely a colossal misuse of language. In his "Constitutional Law" Mr. Hood-Phillips correctly states:— "the British constitution is said to be unwritten, because it is not embodied in any enactment or formally related series of enactments", bits of it were haphazardly added to ordinary legislation.

Nor is there much in the point of the unwritten constitution being more flexible. Experience shows rather that it seems more difficult to change a mere convention than an Act of Parliament. That also applies to Switzerland, where the male convention that women should stay out of politics dies hard. One might also add that, on the other hand, it is more difficult to convert a million or more voters than, as the suffragettes have done here, to frighten into action a government which has constantly to think of the next election.

Great Britain is, of course, a constitutional monarchy with the Queen as sovereign. Though restricted as compared with the medieval monarchies, the Crown's prerogatives are still many. Though, again, conventions as much as or more than actual legislation come into action. One would not expect, for example, the Queen

ever to contemplate selling the navy, lock, stock and barrel, as she would be entitled to do — by implication.

Switzerland, on the other hand, is a republic where sovereignty is embodied in the body of rightful citizens. She also forms a confederation, a Bundesstaat.

In both countries we have separation of powers; and in neither is that separation anything like complete. As Professor Fleiner says: "*Nicht die Trennung, sondern die Vermischung der staatlichen Funktionen ist bis heute das Kennzeichen unseres Bundesstaates*". And in translating this we can say for Britain that not the separation but the mixing of functions is equally a characteristic of the British constitution.

Great Britain is a parliamentary democracy with representative character. The fundamental law of the British constitution, it is asserted by all the constitutional lawyers, is the legislative supremacy of parliament.

The Queen is, of course, the head of her parliament. She does not now — not since medieval times — take part in parliamentary deliberations. But her assent is still required to every Act of Parliament. However, not since Queen Anne's time has the sovereign made use of the veto, though, on the other hand, twice has the king used his influence to bring the House of Lords to heel — namely by threatening to create, or actually by creating, new Peers to swamp the ruling party in the House with newcomers of the opposing side. (This happened in 1911 and in the reign of William IV.)

Since the Privy Council is the Queen's "private" council, we may as well mention it here. It has mostly purely prerogative functions except for a Commission of the Council to which lie juristical appeals from those Dominions who have not contracted out, and from the Crown Colonies. The Privy Council is composed of past and present members of the Cabinet and other praiseworthy persons. Membership is by appointment.

"*Die Schweiz ist das am meisten demokratische, aber am weitesten vom Parlamentarismus entfernte Land Europas*", says Fleiner, She is a true democracy — *eine reine Demokratie, une démocratie propre*. The difference between the two systems seems difficult to grasp even to some of the constitutional writers. Dicey says somewhere that only those who had lived or were living in Switzerland could really understand the spirit of the Swiss political institutions. Now that is true of any country, at least to some extent.

The main point which foreign commentators have difficulty in placing in perspective is the fact that true democracy must, ipso facto, lead to supra party government. And that a supra party government is not dependent on a party coalition for its hold on office. It does not, therefore, matter how many parties are represented in parliament, or whether any one party or coalition of parties can rely on a majority. But the contra point also is true, that only a supra party government system can afford to have extensive proportional representation in parliament, since such a modus of election tends, inevitably, to a plurality of parliamentary parties.

Parliamentary life

The parliaments of both our countries consist of two chambers — the House of Lords and the House of Commons in this country, the State Council and the National Council in Switzerland. But while the House of Commons and the National Council have — some peculiarities apart — more or less the same function, those of the second chambers are rather different.

The House of Lords was the successor to the barons council and as such really the original parliament, if that term can still be used. Until only a few decades ago it represented, in effect, the landed gentry and the nobility. Until comparatively recently it remained the House of the Nobility, though latterly a fair number of new creations has much changed the character of the chamber. Membership is, of course, by creation and inheritance. The creation of life-peers is a novelty.

The House of Lords is a revising body; they have power to initiate legislation and to amend bills coming from the other House; but if they are unable to agree with the other House they are no longer able to prevent such legislation. They can hold it up for one year, but after that, if the Commons so decide, it will go to the Queen for her assent. Bills certified by the Speaker of the House of Commons as Money-Bills they cannot hold up for more than one month. Their amendments on other bills have, however, often led to improved legislation.

The other special function of the House of Lords is that of the supreme appellate court. Only Lords with legal training sit on judicial committees, but there is no written legal bar on other Lords to sit on these committees — though it would no doubt be looked upon with disfavour.

Besides the House of Lords judicial Committees there is the array of high court chambers and the lesser courts below.

Now the State Council of the Swiss Federal Assembly is an elected Council of equal standing with the National Council. But its members are elected by the cantons, either by direct election or by election through the cantonal parliament. Each canton has two members, and members are expected to represent the interests of their particular cantons. In all legislative and administrative decisions they have to find agreement with the National Council.

The authors of the 1848 constitution were faced with the fear of the smaller cantons that they would always be overruled by the masses of voters of the larger — and particularly the town — cantons. They found in the constitution of the United States of America a model from which to work. Dicey and others have noted that none the less the Swiss State Council did not develop into the powerful chamber of its American forerunner. But the special, some semi-juristical, powers which the Senate arrogated to itself would have been entirely against the spirit of the compromise achieved in the Swiss constitution.

* * *

The House of Commons and the Swiss National Council are legislative chambers who also, naturally, control the administration. But there is more freedom for the individual member of the National Council than in the House of Commons. Perhaps we had better turn the argument round. The British Cabinet has much more power in and over the House of Commons than has the Federal Council over either council, though the latter is left all the initiative it wants. The two councils can by agreed motion *instruct* the Federal Council to prepare legislation. By postulates the councils do often *invite* the Federal Council to do this or that,

The great and fundamental difference between the two chambers of the Swiss Parliament and the House of Commons is that every federal law is subject to the facultative referendum. It means that 30,000 voters can demand that the *Lex* or Decision (Bundesbeschluss) be referred to the plebiscite of the people. In matters of amendment or revision of the constitution the referendum is obligatory.

In addition, 30,000 voters can launch an "Initiative" for the amendment of the constitution and if the plebiscite is in their favour the government and the parliament have to amend the constitution accordingly.

The House of Commons is elected by popular vote in single seat constituencies. The relative majority elects the member even if it is, in fact, a minority vote; in other words, even if it has less than half the votes cast. The result is that a minority of the voters gains the majority in the House of Commons and thereby the control of government. There are 630 members. The visitor to the House of Commons may be puzzled if he happens to be in the gallery when the House changes into "*a committee of the whole house*". He will see the Speaker leave the chair and depart from the chamber. Then his deputy, who is also chairman of the committee, will take over. The origin goes back to the beginning of the seventeenth century, when parliament, and particularly the House of Commons began to realise its strength. In those days the Speaker was still suspect of being the King's man. Thus, when they wished to discuss matters "off the record" so to say, they sent the Speaker home and voted themselves into a committee.

* * *

The British Government consists of a Prime Minister and a Cabinet of about twenty persons plus another fifty or so Ministers of the Crown and their deputies. The Queen, on the advice of a former Prime Minister or other prominent politician, asks the leader or prospective leader of the majority party in the House of Commons to form a government. He then collects his cadre and hands a list of their names to the Queen, who, in due course, will formally appoint the selected persons to the offices suggested by the Prime Minister appointee. A major vote of censure will be the end of the Government and may mean a new general election. All members of the government must be or become members of the House of Commons or be members of the House of Lords. By convention it is now established that the Prime Minister must be in the House of Commons.

The Federal Council, on the other hand, is an elected council of at present seven members, all of equal status. One of them is elected President for the year; he cannot be in the chair for more than a year and cannot be re-elected until a further year has passed. But it has become the custom for the members to get into the chair in rotation. The elections to the Federal Council take place after each election (these take place in the autumn of every fourth year) in the united Federal Assembly, i.e., State Council and National Council combined.

The Federal Council is part of the Federal Assembly but its members are not members of either the State Council or the National Council, but they are *ex officio* entitled (and in duty bound) to attend both Councils and have advisory voice in both.

Federal Council and the Federal Assembly have some juristical functions reserved for them. For the rest there is a Federal Court as supreme Court for the country,

The British have no official language problem. In Switzerland, however, there are three main languages and a fourth mostly used on ceremonial occasions as far as parliament is concerned. In the courts of the Bund all three, German, French and Italian, are of equal status. In the bilingual cantons the rule is that the one language is called the main language and the other the ancillary one. This means that the law is written in and interpreted by means of the main language, a text in the other being considered as being a translation.

The National Council is elected by direct vote in cantonal constituencies, each canton a constituency, by proportional representation. For every 24,000 inhabitants, or a rest of 12,001, one member is elected. Some cantons have as many as twenty members while the smallest may only have one member. In the latter case the election is by straight absolute majority (if there has to be a second ballot, then a relative majority will decide). This system is the logical consequence of the whole of our political development. Indeed, a quarter of a century before the first — almost successful — attempt in 1911, to introduce this system, the so-called voluntary *Proporz*, voluntary proportional representation, in the cantonal and national councils made its way, slowly at first; but by 1910 it had almost completely conquered the country. Indeed, in some of the cantonal constitutions of last century the idea that the cantonal governments should more or less mirror the political parties, had actually been incorporated in the text.

In the cantons and down to the communes (boroughs in this country) the same sort of system governs government and legislature.

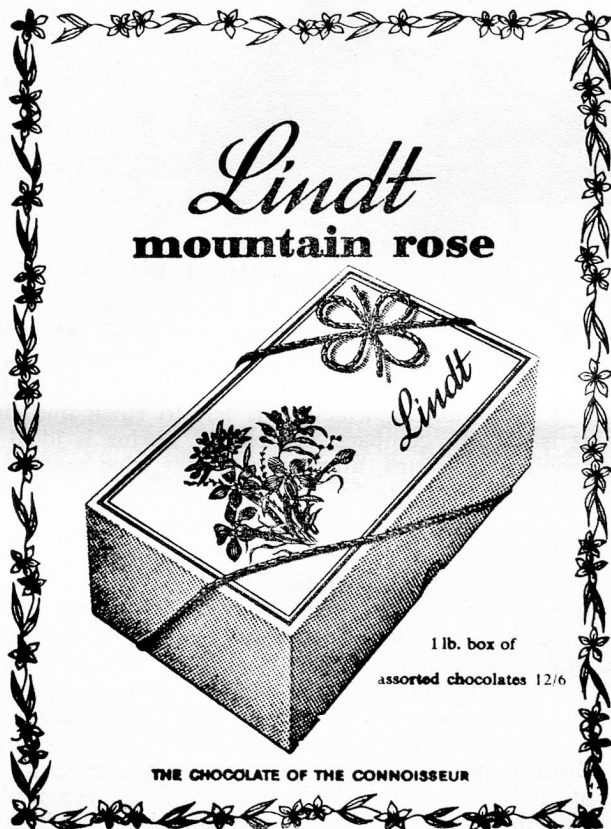
Now one last word on the difference between a system of proportional representation and the majority system.

There are, of course, people about with "majority-itis" on their brains. They consider that majority decision is the highest principle of democracy. That, of course, is nonsense. The majority principle has to be accepted as the ultimate arbiter when everything else has failed.

However, a two-party government system, as we have it in this country, must stick to majority elections. If there were even a system of second preference, or alternative vote, the danger of the electorate returning more than two parties, and therefore none of them likely to gain a large enough majority, or even a majority at all, is patent. When that happens party coalitions become essential and coalitions are subject to all sorts of disturbances. The government dependent on a coalition in parliament is an insecure government. That was one of the reasons why the House of Commons refused to accept the proposal of the Speaker's Conference of 1918 to introduce the alternative vote.

In a parliament with proportional representation and a supra party system of government there will be no sense in a majority "against" the government in the ordinary way of business. Because any vote against the government must, *ipso facto*, be a vote against all the parties represented in the government. Therefore there can be any number of ad hoc coalitions between the parliamentary parties — Liberals with the Social Democrats to-day, say, on taxation matters; yes, even between the Social Democrats, the Liberals and the Katholik Konservatives to-morrow — as happened in 1911 in the campaign for proportional system. THE END.

We wish to mention that our compatriot and friend, Monsieur William Roch, has written an extremely interesting book on the feudal system of England and its history. Its title is "La Féodalité en Angleterre".



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