

## **The participation of the Citizens in the Legislative Process in Switzerland**

### **Introduction**

Switzerland is a country which practices original democracy, as per the scope of federalism on the one hand, so to the meaning of the referendum on the other<sup>1</sup>. The Swiss Federation is made up of the cantons and the citizens<sup>2</sup>. The direct participation of the cantons and the citizens in affairs which are in the competences of the Federation is accomplished through two key institutions: the Federal Assembly and the referendum.

The Federal Assembly is the supreme legislator at the federal level and the highest authority in Switzerland. The Swiss bicameral system was created after the model of the United States. What distinguishes this model from the model of the United States and its *differentia specifica* is the equal powers at the disposal of both houses of Federal Assembly. Thus, in the exercise of the legislative function, i.e. the adoption of federal laws, both houses are completely equal. Laws shall be deemed adopted only if they are adopted in both houses.

Following the American experience on one side and remaining consistent to its own tradition of practicing direct democracy on the other side, Switzerland creates a model of legislative procedure which today represents a successful cocktail of simple parliamentary procedure and possibility for direct participation of the citizens in the legislative process. Thus, Kelzen's postulate that "the creation of state will is not a function only of the state personality, but it should be marked as a social process which includes all factors that participate in the legislation"<sup>3</sup>, is deemed that relates best to the Swiss model of legislative procedure. It will not be a mistake to say that this model enables the highest possibility for direct participation of the citizens in the legislative process.

Today, the Federal Assembly as the highest legislative authority in the Swiss Confederation and the citizens and the cantons, through the facultative legislative referendum, represent equal partners in the initiation, forming and the passing of the federal laws.

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<sup>1</sup> Diamel. *Ustavno pravo-demokratiite*, Skopje 1993. page 139

<sup>2</sup> By creating the state, the citizens and cantons transfer to the Federation certain powers necessary for the unified functioning of the state. On the other hand, in order to secure part of its autonomy, certain mechanisms for direct citizen participation in the work of the federation have been developed. Novicic. *Ustavno ustrojstvo Švajcarske, iskustva i pouke*. 310

<sup>3</sup> Kelzen. *Glavni problem teorije državnog prava razvijeni iz učenja o pravnom propisu*. Sluzbeni list. Beograd 2001. pages 337, 376

## **1. Mechanisms for indirect initiation of the legislative procedure (right to petition and right of legislative initiative of the cantons)**

The initiative and the referendum represent direct forms of democracy. Switzerland is undoubtedly the most developed country with forms of direct democracy. It can rightfully be considered as their "homeland". These forms are numerous, they are provided at all levels of government organization and they are often applied in practice<sup>4</sup>.

The citizens of Switzerland however, have no right of legislative initiative. Namely, that means they have no formal legal right to file a bill in the Federal Assembly. Although they have no right of legislative initiative, referendum of the citizens for that federal law does a major legislative stakeholders..

The idea of introducing a citizens' initiative for the adoption or amendment of federal laws had been discussed several times. In 1958 a referendum was conducted to amend the constitution, which provided for the introduction of citizen initiatives in the legal matter, but even then, the request was rejected. There are two main reasons cited against citizen initiative. First, the preparation of the complete text of the bill is not simple (technical reasons), and second the introduction of a citizen initiative for matters of federal laws would be contrary to the federal principle. So on the federal level, citizens can propose a revision of the federal constitution, but they cannot propose amendment or adoption of federal laws.

However, although the Constitution of Switzerland does not regulate the issue of legislative initiative of the citizens, they have a possibility to submit a proposal for passing a law by using two main instruments. These mechanisms give the citizens the opportunity to indirectly initiate the passing of a specific federal law. These are first, the right of petition which is constitutionally guaranteed right of the citizens (Art.33) and second, to submit a proposal for passing a law indirectly through the legislative initiative of the cantons.

- In fact, under the Constitution every citizen has the right to petition any state authority. That means that every citizen can ask the Federal Assembly to pass a specific law or to amend or repeal another. This request, consisted in the petition has the same treatment as any other complaint or petition to any other body and it must act. This means that the competent Board for petitions in the legislature is obliged to act upon it. The adoption of a petition in the Federal Assembly does not require the consent of both legislative houses. The accepted petition is forwarded to the Federal Council with the use of indirect instruments of parliamentary initiative (proposal or request).
- The cantons can be authorized proposers of a federal law. Therefore, the second way through which citizens can exercise the right to propose passing of a law is

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<sup>4</sup> Jovicic. *Ustavni i politicki sistemi*. Sluzbeni glasnik. Beograd 2006. page 227

through the right of legislative initiative of the cantons, in the framework of individual cantons.

These instruments for indirect initiation of the legislative procedure have not had a particular practical application. Therefore, in modern terms, it would not be wrong to conclude that in terms of entities- (holders of the legislative initiative), the legislative initiative in Switzerland is widely set out, but also it would not be wrong if we conclude that the Federal Council still has a dominant role authorized proposer.

## **2. Extra-parliamentary consultation – separate phase of the legislative procedure in Switzerland**

A separate phase of the legislative procedure is the extra-parliamentary consultation phase. Known as pre-parliamentary phase, it is realized after the proposing of the bill in the Federal Assembly, but before the activity of the parliamentary committee. This phase of consultation on the solutions of a specific bill is realized in the Federal Council. The procedure begins when the invitations to participate in the consultation are submitted to the cantons, political parties, business associations and other associations that may have an interest in the relevant law. In this "early stage" of the legislative process experts in the relevant matter which the law governs, can be called.<sup>5</sup> The advantage of consultation at this stage of the process is to enable the legislator to work on a bill which will be based on correct facts and accurate data and to enable the preparation of bills whose solutions will be applicable.

However, when the extra-parliamentary consultation stage of the legislative process is reviewed, it must be specified that this stage does not affect the activity and the role of the Federal Council in the lawmaking process. "The role and involvement of the Federal Council in the legislative process cannot be regarded as a form of an extra-parliamentary consultation because its role in this process is undoubtedly significant and exceeds the nature of the consultation"<sup>6</sup>. On the contrary, the so-called extra-parliamentary consultation relates to the activity and the role of governmental bodies out of the Federal Assembly as well as the economic organizations, political parties, NGOs, interested groups, experts, etc. The consultation of these entities may be oral or written. It is usually realized by an invitation to provide an opinion on certain legal solutions that future legislation would establish. For that reason, these entities should be provided with the materials for which they are to be consulted (draft provisions, possible variants of solutions, alternative solutions that can be taken into consideration). If the consultation is carried out in written form, it should be accomplished within a specified

<sup>5</sup> Unlike the consulting of state bodies, political parties, associations and interested associations through which the interests of citizens surface, the consulting of experts provide expertise in making of laws. Namely, "the legislation is at the same time, political and scientific work". Николић. *Законодавна процедура у Југославији са посебним освртом на Швајцарско право*. Институт за упоредно право. Београд.1997. page 72

<sup>6</sup> Nikolic. *Zakonodavna procedura u Jugoslaviji sa posebnim osvrtom na svajcarsko pravo*. Institut za uporedno pravo. Beograd.1997. page 71

period not exceeding 2 months. The fact that the overall phase of extra-parliamentary consultation is conducted by the Federal Council and that it is the one that performs analysis of the data and submits them to the Federal Assembly speaks about how much the Federal Council is involved in the legislative process.

1.1 The parliament and its working bodies are not professional in nature. Members of Parliament as members of various parliamentary committees may be legal experts or experts in another area, but it is not a sufficient guarantee for the quality of preparation of the laws. Therefore, the introduction of extra-parliamentary consultation is a good attempt to meet the needs for high quality technical, legal and professional preparation of laws. On the other hand, the realization of some of the forms of extra-parliamentary consultation allows to determine the pulse and opinions of citizens on specific legislative proposal and an opportunity to realize the so-called "new formula for direct democracy".

Namely, for a "system of stacking"<sup>7</sup> as the one of Switzerland, the use of additional forms by which citizens can exercise their influence in the process of adoption is not surprising<sup>8</sup>. If we take into account the true nature of democracy in Switzerland, as Nikolic says "search for compromise and consensus"<sup>9</sup>, the acceptance of extra-parliamentary consultation in the legislative process is understandable because it allows detection of possible compromises and opportunities for achieving consensus. It is said that this form not only provides a practical realization of citizens' influence in the legislative process through reviews of proposed solutions or proposals for their amendment, but also provides quality legislative drafting, it reduces the possibility of adopted laws adopted to be suspended on a referendum, resulting in an increase in the interest of citizens and their greater political activity. Therefore, the phase of consultation in the legislative process is an institution sui generis of the Swiss system of consensus.

### 3. Legislative Referendum

The forms of direct and semi-direct democracy and their application in Switzerland, make this country a true "laboratory" of the direct democracy. The developed and deep awareness of Swiss citizens for these forms of direct democracy and the rich practice of their application undoubtedly left their marks on the procedure for making laws. Namely, "the semi-direct democracy has incorporated itself in the legislative procedure in this country as a referendum"<sup>10</sup>.

<sup>7</sup> Diamel. *Ustavno pravo-demokratiite*, Skopje 1993.page 145

<sup>8</sup> The basic means by which citizens participate in the legislative process is the legislative referendum. Through it citizens can suspend the adopted bill or approve its entry into force. The extra-parliamentary forms of consultation, provide the participation of citizens in the shaping of the text, through the ability to propose different solutions or to propose solutions for its amendment.

<sup>9</sup> Nikolic. *Zakonodavna procedura u Jugoslaviji sa posebnim osvrtom na svajcarsko pravo*. Institut za uporedno pravo. Beograd.1997.page 65

<sup>10</sup> Nikolic. *Zakonodavna procedura u Jugoslaviji sa posebnim osvrtom na svajcarsko pravo*. Institut za uporedno pravo. Beograd.1997.page 149

Today, the referendum *latu sensu* makes Swiss citizens an equal partner in the process of making laws. It is an instrument through which the citizens can directly influence the work of the legislature. Namely, the influence of citizens in the legislative process through referendum is double. On the one hand, the risk of referendum pressures the Federal Assembly, so in the process of adoption, it will always strive to avoid differences with the views and needs of citizens, to circumvent the adoption of the "unpopular" measures, to keep an eye on the mood of the citizens in order to reduce the possibility of initiating a referendum. Therefore the phase of consultation in the preparation of "generally acceptable" legal text is very important and has a quality of an "anticipated referendum that makes the second redundant"<sup>11</sup>. On the other hand, the pressure that the citizens may make on the work of the Federal Assembly through this form of semi-direct democracy is not negligible if we take into consideration that the referendum i.e. the citizens' opinion for a specific legislative proposal, has the character of the People's sanction.

The legislative referendum in Switzerland is an integral part of the legislative procedure and last, final stage of legislative procedure. Nikolic said the "The law passed in the houses of the Federal Assembly becomes legally perfect only when it wins the popular sanction and when it can be published in the Official compilation of federal laws."<sup>12</sup> Considered from this aspect, the referendum is now an active player in the exercise of legislative power in Switzerland.

The legislative referendum in Switzerland is optional. Under the Constitutional provision of Art. 141, at least 50,000 citizens of voting age or 8 cantons may require a referendum in relation with a federal law. When it comes to a referendum on legal matter, it must be emphasized that under the Constitution, the initiative for putting a specific federal law on referendum may only come from these subjects, excluding this opportunity from central government bodies. Thus, after the federal law is passed in both legislative houses of the Federal Assembly and once it is published in the Official Gazette, it does not enter into force before the expiry of a period of 90 days from the date of publication. If in this term, a request is filed to the Federal Assembly for carrying out of a referendum on the actual law, it is necessary to accede to his organization. If the law is adopted on a referendum by a majority vote of those who have voted, it is published in the official compilation of federal laws and then it enters into force. Otherwise, the law is considered rejected and cannot be applied.

Just about how much the referendum has influenced the work of the legislature and how often it has appeared as an instrument of reactionary or progressive character, speaks the fact that the referendum has long excluded women from politics, but also, this instrument in 1971 allowed the expansion of suffrage of the women. It is interesting that the Swiss citizens have rejected the proposal to introduce 40-hour workweek, believing that it is not in the interest of the community, including a proposal for the age pension be reduced, arguing that it is too expensive for the state, but contrary to this was the acceptance of the

<sup>11</sup> Diamel. *Ustavno pravo-demokratiite*, Skopje 1993.page 143

<sup>12</sup> Nikolic. *Zakonodavna procedura u Jugoslaviji sa posebnim osvrtom na svajcarsko pravo*. Institut za uporedno pravo. Beograd.1997.page 150

proposal to raise the price of bread when the government had elaborated the need for such a step<sup>13</sup>. A newer data is the information that 58% of citizens voted and responded positively for increasing the rights of registered same-sex couples, which would allow identical tax and pension like the married couples, but a referendum on the possibility of adoption of children by these couples or the possibility for in-fertilization treatment was rejected.

The rich Swiss experience in implementing this form of semi-direct democracy leaves room for evaluation of this instrument. Although the legislative referendum can be given equal pro and contra arguments<sup>14</sup>, the fact remains that it, as a separate phase of legislative process, remains to be the "most effective mortar of national unity and an instrument that removed all doubts about the true mood of the electorate."<sup>15</sup> Today, the referendum in Switzerland, as well as the Swiss chocolate, remains the sweet temptation to which the Swiss citizens often give in.

## Conclusion

The model of the legislative process in Switzerland is a model sui generis. Today the procedure for adopting laws represents a successful cocktail of procedural activities undertaken in the Federal Assembly on one side and the forms of direct citizen participation in the legislative process (extra-parliamentary consultation and legislative referendum) on the other. The previous presentation points that the extra-parliamentary consultation and legislative referendum are completely incorporated in the model of legislative procedure in Switzerland.

1. Although the institution public discussion, as a form of extra-parliamentary consultation, does not exist in Switzerland, it is more than compensated by the legislative referendum as incomparably stronger and more effective means to mobilize citizens in the legislative procedure. The consultation of political parties leaves room for a certain influence in the creation

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<sup>13</sup> Maleski. *Sovremeni politicki sistemi*. NIO. Studentski zbor. Skopje. 1986. page 133

<sup>14</sup> Most often the following are cited as deficiencies of the legislative referendum: 1. decisions passed on a referendum are often challenged by the fact that the participation (turnout) of the citizens in a referendum is small (very often the turnout of citizens is less than 60%) 2. laws can be rejected because of the ignorance of the citizens; 3. voters may also be subject to manipulation by organized political or economic forces, 4. referendum often had a conservative character. The same number of arguments can be given in favor of the use of referendum in the legislative procedure. Thus, 1. the decisions by the citizens on a referendum testify about their political maturity, 2. through this instrument the role of the political parties is neutralized on account of the possibility for direct participation of citizens in political decision-making 3. the hesitations about the mood of the electorate are removed.

<sup>15</sup> Jovicic. *Ustavni i politicki sistemi*. Sluzbeni glasnik. Beograd 2006. page 235

of the law and even to political parties that are not in power.

2. The dimension of engaging experts in the legislative process goes beyond the usual framework of extra-parliamentary consultation. Namely, the possibility of their participation in the making of laws makes them an active entity of the legislative process.
3. The Constitution establishes the legislative referendum as one of the key stages of the legislative process. Accordingly, the legislative sanction given either way by the citizens enables the making of legally perfect law. The specified constitutional solution turns citizens into an active entity in the process of making laws. The role of the citizen does not consist solely in initiation of the application for conducting a referendum or in the act of voting, but primarily in the performance of confederate legislative power, even when the referendum is not realized. Namely, the non realization of the referendum also reflects the will of the citizens, because in that way the citizens accept the law and the solutions it offers. In other words, they give their tacit consent to the law..

Therefore, it is said that the specifics of the Swiss model of legislative procedure do not consist in the way the lawmaking procedure is realized in the legislature, but in the forms through which the direct participation of citizens in the process is enabled.

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