

## HISTORY OF CREATION AND GENERAL DESCRIPTION LEGAL ASPECTS OF THE CONSTITUTION OF SWITZERLAND 1874



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**Abstract.** The contemporary Ukrainian state has chosen a European development strategy, is carrying out all necessary measures and reforms to become a full member of the European community. Having signed an association agreement with the European Union in 2014, Ukraine's European choice is being implemented through a comprehensive reform of legislation, bringing it in line with European standards. One of the manifestations of this process is a meaningful study and analysis of

the constitutions of European countries. The article is devoted to the study of the Swiss Constitution of 1874, its individual articles, legal features. The provisions of the Basic Law affect the legislative system, its condition and further development. The optimal models of the state system, that will ensure its stability and sustainable development, can be found through the study of the history of constitutionalism.

**Keywords:** *Constitution, federal assembly, referendum, democracy, cantons, constitutional reforms.*

### Introduction

Switzerland is unlike any other European country in terms of its formation and development. Suffice it to look at the history of the formation of the Swiss state and compare it with similar processes that took place in neighboring countries such as France or Germany. In France or Germany, there has always been a dominant titular nation, a common language and culture, absent in Switzerland. The Swiss state arose as a result of a treaty or, more precisely, as a result of a kind of political compromise, which, in turn, led to the creation not of a nation united by a single culture, but 4 nations that united different cultures. In addition, there has been not only the creation but also the preservation of such a state for centuries, the improvement of its state and political forms, which could not have happened without building a solid foundation laid down in the constitution. Such a solid foundation was the state and political system, which allowed the newly formed Swiss state not to disintegrate throughout history, but, on the contrary, to find true unity.

Switzerland is not involved in major European politics and, on the one hand, does not attract the same general attention as many other European countries, but, on the other hand, attracts by virtue of its mystery and obscurity. While maintaining constant neutrality, being considered the oldest republican federation in Europe and decentralized, Switzerland is of considerable interest to lawyers.

The aim of the article is to carry out a historical and legal analysis of the formation and development of the Swiss Constitution of 1874 as a component of the continental legal system.

**Literature review.** In domestic jurisprudence, there was almost no comprehensive study of the constitutional foundations of the state system of the Swiss Confederation and its legal features. Some aspects of this topic were considered in the research and works of such domestic scientists as M. S. Gorshenyova, M. B. Onishchuk, V. F. Pogorilko, V. O. Riyak. General

problems of the constitutional law of the Swiss Confederation and the development of federalism, interaction between the Confederate authorities and the cantons, the implementation of the competence of the cantons were studied in the works of such jurists as T. D. Matveeva, S. L. Avramenko, I. P. Ilyinsky, N. V. Queen Borsodi, J. J. Blumer, Y. I. Leibo, W. W. Maklakov, T. D. Mat-

veeva, B. A. Strashun, K. Eichenberg, A. Auer, J. J. Blumer, A. Gabriel, R. Hermann, D. Farney. In view of this implementation, the study of the Swiss Constitution is relevant.

**Research methodology.** The author used general and special scientific methods of the historical and legal processes and phenomena cognition. The general scientific methods, namely: dialectical, historical, comparative-historical, method of general philosophical dialectics, comparative analysis, system-structural, from special-scientific – historical, historical-legal, comparative-legal, formal-legal and other methods, are also used in this research.

The empirical basis of the research consists of the scientific publications, archival documents and materials, as well as legislation, collections of documents on the period under the research, the results of the study of the Constitution of Switzerland 1874.

**Research results.** In the second half of the XIX century, in Switzerland, quite strong ties have been established between individual parts of the state. This was accompanied by a weakening of particularist aspirations, the expansion of the competence of federal bodies. Switzerland is a relatively small country, and this process was intense. Over time, it demanded adequate constitutional changes. By the mid-1870s vol. it became obvious that there were omissions in the Basic Law of 1848, and some of its provisions were noticeably outdated. The first attempt to reconsider at the request of the Radical Party was made by the Swiss Parliament in 1866. The Radicals demanded that the federal constitution, which existed at the time at the cantonal level, enshrine a legislative referendum.

The democratic opposition demanded constitutional reforms, namely, "expanding the rights of the people in the country's political life and improving the system of representative democracy by enshrining in the Constitution the instruments of direct democracy." Slogans were raised about free secondary education, tax cuts, the creation of a child protection program and the restriction of working hours, i.e, giving the state a social function to maintain balance in society. In the cantons there was talk of expanding the rights of residents. In 1869, the first reforms at the cantonal level were implemented in Zurich: the local government was elected by the people, and all laws passed by parliament had

to be approved by popular vote. A similar wave of democratic reforms swept across other cantons.

The changes and additions adopted by the Federal Assembly were submitted to a referendum on January 14, 1866. Of the nine articles put to the vote, only one was adopted, which spoke of the legal equality of all Swiss citizens, including Jews. Other provisions enshrining the right of settlers to vote in public and cantonal voting and the obligation to pay taxes by settlers, freedom of religion and worship, expansion of the Federation, abolition of corporal punishment, protection of copyright in industrial and artistic works and industrial products, unity of measure and weights, as well as the ban on lotteries and gambling, were rejected.

In 1869, after the regular elections to the National Council, the majority in it were representatives of the Radical Party, who advocated a revision of the Constitution and the further strengthening of the central government. In the early 1870's, they initiated a new attempt to revise the Basic Law. The country has long had a need to create common commercial and civil codes to all of Switzerland, and this could not be done without significant changes to the current Constitution. The intensification of the religious struggle also pointed to the need for centralized protection of the spiritual freedom of the population. In addition, the unification processes taking place in the nearby German Empire could not but affect Switzerland.

In 1872, the radicals submitted to parliament a draft Basic Law, which significantly expanded the list of subjects of the Federation by giving it the right to issue laws on railways, banks, insurance companies and factories, as well as laws governing marital and family relations. Military affairs were transferred to the Federation, primary school education was declared compulsory and free, executions and corporal punishment were abolished, and complete freedom of conscience and religion was guaranteed. In addition, an optional referendum was introduced not only at the cantonal but also at the federal level. Most parties in parliament opposed the bill. On May 12, 1872, it was rejected in a referendum: 261,096 votes to 255,585 and 13 cantons to 9. The federal government had to draft a new, "more careful" draft Constitution, changing the original text to less centralization.

By the end of January 1874, the Federal Assembly drafted a new Basic Law, which was put to a referendum on April 19 of that year. 340,199 citizens and 14 cantons voted for it. The new Constitution came into force on May 29, 1874. It was in force for 125 years, until the adoption of the Basic Law in 1999, and was considered, along with the American, one of the "oldest" written constitutions.

The changes to the original draft were that some areas of military construction were placed under the jurisdiction of the cantonal governments, and federal legislatures were given the right to issue laws only on clearly defined issues. At the same time, in ecclesiastical matters, the new Basic Law significantly expanded the rights of the Federal authorities. According to T. Kurta, "the fact that this Constitution was adopted by such an overwhelming majority, gave it more respect and strength than is usually achieved by constitutions introduced against the will of the people" (Kurti, 1906).

As D. Farn notes, "this Constitution had a dual character: on the one hand, in the economic sphere it became the top of the liberal system, because within it a single economic space was created, on the other hand, it marks the end of the era of radical democrats" (Fahrni, 1982). It was the Constitution of 1874 that introduced the institution of a referendum of petitions into the country's political life. According to D. Farn, "the transition to a modern democracy of referendums, in which the population, having collected a certain number of signatures, could demand a vote on any law passed by parliament, was the most important step towards a new political system" (Fahrni, 1982).

The structure of the Constitution of 1874 was completely copied from the Constitution of 1848. It consisted of 123 articles, 3 sections and transitional provisions. In terms of volume, the original text of the Constitution turned out to be only 9 articles larger than the previous Constitution.

The Constitution of 1874 was based on the same principles as the Constitution of 1848: people's sovereignty (Article 1), recognition of rights and freedoms (Article 2.5), equality before the law (Article 4), separation of powers (Article 71), the federal state system (Article 1), the republican form of government (Article 6), the democratic political regime (Article 6).

The Constitution of 1874 has a religious color, as the preamble begins with the words "In the name of Almighty God", which reflects the role of the church, which played a significant role in political life. Now this formula is in tune with the religious sentiments of the majority of the country's population. Actually, the text of the constitution includes 1% of the article in numerical order. Throughout its history, it has undergone numerous changes and by 1985, 54 new articles were included in this act, and 52 of them were left under existing numbers, but with the addition of the Latin words "bis", "ter", etc., and 54 articles were canceled or changed (39 of them – once, 9 – twice, 3 – three times and 3 – five times). Two articles (51 and 52) have only numerical designations without text. Of the actual 173 articles (number 121), only 84 reflect the original text of the 1874 Basic Law. As a result of frequent changes, the constitution has largely lost its unity and internal coherence. In comparison with the new and latest constitutions of other Western European countries, Swiss law loses both in form and content. The current Constitution lacks, for example, a special section on rights and freedoms, does not enshrine many of them, does not name the principles of internal organization of the Swiss state. Although the preamble mentions the chains of the Swiss Union - the maintenance and strengthening of the unity, strength and honor of the Swiss nation - this act does not say anything about the goals of the state, the tasks assigned to the confederation and cantons. Moreover, there is no section in the Constitution on the division of competence between the federation and the cantons. The first chapter contains various rules – on the preemptive rights of the federation, on the rights and freedoms of Swiss citizens, citizenship, financial and tax provisions, etc. The second section focuses on the structure of central government and the third – the revision of the federal constitution.

The text of the Constitution of 1874 was formed in different historical epochs, so it reflects different political events, conditions, needs. "Different-caliber", "diverse", the inequality of different parts and provisions of the constitution was greatly facilitated by the change in the procedure for amending it, made on July 5, 1891, when the basic law introduced the possibility of changing it by popular initiative. You can, for example,

specify a number of articles of this act, reflecting the struggle in the country on various issues, conflicts of interest of different groups and organizations. Among such norms were: Article 25 bis, introduced in 1893 and in force for more than 80 years, prohibiting the slaughter of cattle without prior stunning before the release of blood (in December 1973, the content of this rule was changed, it now speaks of animal protection); current regulations on grain harvesting (Article 23 bis); on water management (Article 24 bis); on the protection of swamps and wetlands of special beauty (paragraph 5 of Article 24 of the Sixth); on the right of the confederation to issue legislation on hunting and fishing, especially in order to preserve large game in the mountains (Article 25); about alcoholic beverages (Articles 32 bis, 32 ter, 32 boats); about gambling establishments (item 35); on taxes on fuel (Article 36 ter) and more.

The Constitution of 1874 established in Switzerland a federal form of territorial organization, which during its existence has undergone significant evolution. About half of all changes to the constitution are related to the strengthening of the central government in the country.

According to the form of government, Switzerland is a parliamentary republic, which has some features in comparison with the classical model. There is no head of state in the country – a specially elected president; nominally, the head of the confederation is recognized as the head of the government, who receives his powers for a term of one year. The head of the confederation has only representative and technical functions, and as the head of government, this person does not have any special rights; he is only the "first among equals" of ministers. One of the defining features for establishing the form of government is, as is well known, the question of government responsibility. There is no answer to this question in the constitutions, laws and regulations of the chambers of the Federal Assembly, although deputies have some traditional forms of control. They can ask questions, make interpellations that are actually questions with debate. Nowhere is there any mention of the possibility of the government's resignation and the conditions for such resignation. The constitution does not provide for the most important rights of parliament in relation to the government - a

vote of no confidence and a resolution of condemnation.

In parliamentary republics, and it is generally accepted, the question of government partisanship is always quite clear - the right to form a government is given to the political party or parties that have a majority in parliament (usually in the lower house). The constitution of 1874 and the rules of procedure of the chambers of the Federal Assembly, which sit together (namely, they form the government) do not say anything about the influence of parties in this process, although they certainly participate in the formation and chambers are party factions. If in the classical model of a parliamentary republic received by the investiture, the head of government represents its members to parliament, in Switzerland, these members are elected by secret ballot and separately for each position. Given that Switzerland does not currently have a monopoly party, the government may be multi-party (although consultations between faction leaders are held), and second, the personal moment in the vote may probably be of greater value than in classical parliamentary countries.

As already mentioned, the Constitution of 1874 is a very heterogeneous document that regulates not only state and legal relations, but also issues of administrative, financial, environmental and other branches of law. However, we can call a defining trend in the development of the constitution – the constant, continuous strengthening of central, i.e. federal power, which is expressed in the growth of areas of federal and mixed (competing, parallel and other) regulation.

Another notable result of more than a century of development of the Constitution of 1874 was some expansion of the rights and freedoms of citizens. As early as 1879, an amendment was introduced banning the death penalty for political offenses, in 1880 – on sickness insurance, in 1891 – on the inclusion of popular initiative in the procedure for amending the Basic Law, in 1945 – on family protection, in 1971 – on granting women the right to vote, in 1981 – on equality in the rights of men and women and some others.

It is safe to say that Switzerland, during the Constitution of 1874, had a "clearly established system of rights of direct democracy" (Schaffhauser, 1994), at all levels: federal, cantonal and communal. Apparently, there was no other country where

citizens were so active in the legislative process and where so many popular votes were held on specific issues. The humorous literature states that the country holds the world record for holding all sorts of referendums, "which force the state not to sleep all twenty-four hours a day and three hundred and sixty-five days a year" (Schaffhauser, 1994).

According to the method of change, the Constitution of 1874 is considered to be "rigid". There are two types of viewing – full and partial. One or both chambers of the Federal Assembly or 100,000 voters may initiate a full review; after the initiative is introduced, a national referendum is held. If a majority of voters support such a revision, both houses of parliament will be re-elected to draft a new constitution. The draft is then submitted to a referendum, which requires a double majority to be approved – a majority of

voters and a majority of cantons. During the current constitution, a full revision was repeatedly proposed (for example, in 1917 and 1945), but only once was a referendum held on the need for such a revision. On September 8, 1935, such an initiative was rejected by 511,578 voters against 196,135 with 60.9% of the electorate participating in the vote. In 1965, a procedure of full revision was initiated in both chambers of the Federal Assembly, which continues to this day and is characterized by detail and thorough preparation. The new version of the draft constitution, drafted by the Department of Justice and Police on October 30, 1985, has a completely modern look.

The result of the development of the Constitution of 1874 was the constant strengthening of central government, which was reflected in the growing number of areas of federal and mixed regulation.

## Conclusions

Thus, the Swiss state was and remains one of the most developed and successful in all respects, states of the planet. Switzerland has stayed away from many events that shook Europe in previous centuries. In many respects it is a merit of the state system put in the constitution and its creators – Swiss.

The Swiss Constitution of 1874 completely replaced the previous Constitution of 1848. The new Constitution entered into force on May 29, 1874.

The legal features of the Constitutions of 1848 and 1874 are largely the same, which allows us to conclude the formation of the Swiss constitutional succession. The structure of the Basic Law of 1874 was also clear and logical. The same use of terms was observed throughout the text. This Constitution can also be called incomplete, as many issues were allowed to be regulated by current legislation. Among the techniques used by the Swiss legislator, the inclusion in the Basic Law of both articles containing detailed regulations and shorter declarative articles is still noteworthy. In addition, some long wordings, difficult not only to understand but also to perceive, were not removed from the Constitution, which significantly complicated the work with the text.

The Constitution of 1874 was in force for 125 years, before the adoption of the Basic Law of 1999, and was considered, along with the American, one of the "oldest" written constitutions.

Future studies of the Swiss Constitutions will focus on a comprehensive review of the Swiss experience of scientific and practical interest in terms of building a modern multinational state, consideration of the peculiarities of the central authorities and the authorities of the Swiss Confederation.

For some, Switzerland remains a dream, for some an ideal, and for others an example to follow. Of course, the Swiss constitutional experience is invaluable in many ways. This small nation, which lives in a rather small area, has such a rich history, and we can learn a lot and adopt a lot from it.

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