

# The Consultation Procedure in Switzerland

**Thomas Sägesser** | *Als der liebe Gott die Welt erschuf, schritt er voller Ungeduld zur Tat. In nur sechs Tagen war das Werk vollbracht – mit den bekannten Mängeln, unter denen wir noch heute zu leiden haben. Als er dann später die Schweiz erfand, ging der Schöpfer auf Nummer Sicher. Er schenkte dem Alpenvolk nicht nur Berge und Täler, sondern auch die Sensibilität, Risiken zu eliminieren. (...) Derart inspiriert vom göttlichen Geist, hat das helvetische Sicherheitsdenken darauf das Vernehmlassungsverfahren geboren.*

*(Furrer, Weltwoche vom 31. Dezember 1998, S. 21)*

## 1 Introduction

It is small wonder then that the media thankfully conceived the idea of eliminating the «Vernehmlassungsverfahren» – as proposed by a member of parliament. It was regarded as a funny spot of colour in the Swiss political scene, though. The National Council turned down the parliamentary initiative without even having opened the debate.

## 2 Subject of the Consultation

Evidently, Switzerland without the «Vernehmlassungsverfahren» is beyond this country's perception, just as the «Vernehmlassungsverfahren» is unthinkable beyond the boundaries of Switzerland.

The «Vernehmlassungsverfahren» enjoys a high standing abroad, yet the term is usually put between quotation marks and is hardly ever translated, for the simple reason that there is no adequate translation.

This term unique to Switzerland is defined in article 147 of the Federal Constitution:

*The Cantons, political parties and interested circles shall be heard in the course of the preparation of important legislation and other projects of substantial impact, and on important international treaties.*

In order to keep things simple, I'll be using the term «consultation» from now on.

It is essential that the consultation procedure is conducted in the *course of the preparation* of legislation and international treaties. The Constitution therefore contains a statement about the sequence of events. Consultation takes place as early as the stage at which positions are defined. The course has not yet been set, but there is already an idea of the direction that the proposed legislation is aiming to take.

The Constitution stipulates that the consultation procedure is mandatory in the case of important legislation, important international treaties or other projects of substantial impact.

This is the case when the people have a right to express their views at a later stage, such as:

- amendments to the Constitution
- amendments to a law
- international treaties subject to referendum.

Each individual and each association is entitled to participate in the consultation. In order to enable these people to participate, the Federal Chancellery announces the opening of each consultation. Certain groups of addressees such as the cantons, political parties represented in parliament and specific associations – the latter depending on the respective subject – receive the documents automatically.

When the Federal Department of Foreign Affairs raised the question of whether or not Switzerland should join the UN, for example, 61 private individuals voiced their opinion.

A further example can be seen in the following overview of participants in the consultation procedure on the revised Federal Constitution:

- all cantonal governments
- Conference of cantonal governments
- 20 cantonal agencies
- 57 local authorities and agencies
- 64 parties and sections
- 15 federal authorities (courts, commissions)
- 17 business associations
- 26 professional organisations
- 10 employee representatives
- 54 associations from education, science, culture and sports
- 25 clerical and religious associations
- 5 women's associations
- 211 miscellaneous associations
- 11,183 private individuals

In addition to the cases mentioned above, a consultation procedure is also carried out if the project has far-reaching political, financial, economic, environmental, social or cultural implications. [Example: Ordinance on the integration of foreign nationals (Verordnung über die Integration von Ausländern)].

On the other hand, consultation procedures are not held if the project does not fulfil the requirements of importance outlined above. Just what is considered «important» is of course open to interpretation, and the term was chosen deliberately to ensure that projects are assessed on a case-by-case basis. The Federal Chancellery's task here is to ensure a coherent practice.

These consultations are not simply some kind of people's discussion, but rather a tool specifically applied in the preparation of important projects. This tool has the advantage of creating transparency in a process that is otherwise conducted behind closed doors during the rest of the administrative stages. The documents relating to the consultation, namely the draft law and explanatory report can be obtained by all those with an interest. The statements of those taking part in the consultation and the ensuing evaluation by the administration are also public. The comprehensive transparency surrounding the procedure means that the consultation, which serves to gauge public opinion, is able to contribute to ensuring that the project is correct, applicable and accepted by the stakeholders.

### **3 Range of Problems**

Since the project's implications have already been tested during the pre-parliamentary phase the role of parliament is often the subject of debate. According to the critics, the decision-making process is being transferred to the pre-parliamentary phase. Parliament is no longer able to fulfil its legislative function. As an aside, a sample solution to an exam set by the University of Passau provides interesting evidence in this context. In response to the question as to why Switzerland experienced such low voter turnout, the answer offered was that parliament was deemed to be relatively insignificant due to the (widespread) practice of consultation.

In fact, it is useful to get a picture of how much opposition there is to a project as early as possible to streamline the procedure. The consultation then relieves parliament of the burden: It knows the prevailing opinions of the people instead of being forced to speculate. The importance of this point should not be underestimated, for the act passed by parliament may still be subject to a referendum or popular vote.

In order to answer the question whether the consultation procedure really levers out parliament, we first have to deal with a further, widely discussed topic: At regular intervals there is an outcry right across the cantons, the parties and the various associations, all of which are overwhelmed by the sheer mass of paper pouring from the Federal Palace. Of course it goes without saying that the outcry is just as loud should some of these documents not reach the very same cantons, parties and associations.

However, it cannot be denied that many addressees can no longer cope. In fact, only those equipped with sufficient human and financial resources can take part on a regular basis as the volume of documents from just a single consultation can be vast. This kind of lobbying of an institutionalised variety is highly problematic from a democratic point of view. Furthermore, it goes against the fundamental idea of incorporating civil society into the legislative process, an idea integral to the consultation procedure.

However, it should not be neglected that the torrent of consultations is a burden to the Federal Administration as well: Every single procedure requires a lot of administrative work, as can be seen from the example of the revised Constitution. During the consultation on the revised Federal Constitution, the number of documents distributed amounted to:

- 174,000 brochures
- 143,000 copies of the draft constitution
- 17,000 explanatory leaflets.

#### **4 Legal grounds/revision**

While it is inconceivable to think of Switzerland without the consultation, it could do with some *rethinking*.

As the settlement of the consultation in an ordinance is no longer in *conformity with the revised Federal Constitution*, consultation is going to be embodied in a federal act on which parliament is deliberating at present. At the same time, the revision offers the opportunity to *streamline* and to *condense* the procedure and in this way eliminate the problems mentioned above. This goal is going to be achieved by reducing the number of subject matters that qualify for the consultation procedure. This mainly involves the subject's level of importance: A consultation is only to be held if the subject matter is likely to have a significant impact, examples of which we have already seen. Furthermore, since consultation is a tool of the government, only the Federal Council would be entitled to initiate a consultation procedure. This is not the case at present, as administrative units can also open a

consultation procedure.

If the bill is passed by parliament, time will then show whether or not the measures outlined have an impact on the number of consultation procedures.

In Henry David *Thoreau's* opinion there are three ways to deal with unjust laws:

*Shall we be content to obey them, or*

*Shall we endeavour to amend them, and obey until we have succeeded, or*

*Shall we transgress them at once?*

The preferred option is clear; at least in Switzerland it is.