



## A Well Regulated Militia Political and Military Organisation in Pre-Napoleonic Switzerland (1550-1799)

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**Abstract** – The period sees the transition of the ordinary fighter from feudal levy, yeoman or city burgher militia, to subject in an absolute polity, to today’s concept of the free citizen in a democratic state. In the period, the Swiss Confederacy was the only major polity that was not monarchical, but republican, and at the same time eschewed a standing army in favour of continued reliance on militia throughout.

A commonwealth’s military organisation is clearly one of fundamental importance to its own understanding of the nature of rule – its “constitution”. The article traces the transition and relates it to the concept of government under the different theories of the period.

**Keywords** – Militia, democracy, absolutism, gute Policy, military organisation, Switzerland, 2<sup>nd</sup> Amendment, constitution, city-state, war, Natural Law

*Da sprach der erste: »Kommandant! / Dort unten liegt mein Heimatland.  
Ich schütz es mit der Flinte mein. / Wie sollt ich da nicht lustig sein?«*

*Der zweite sprach: »Herr Pestaluzzi! / Seht ihr das Rathaus dort am Stutz?  
Dort wähl ich meine sieben Herrn. / Drum dien ich froh; drum leist ich gern.«*

*Der dritte sprach: »Ich halt als Norm: / ‘s ist eine Freud, die Uniform.  
‘s ist eine mutige Mannespflicht. / Da muß man jauchzen. Oder nicht?«  
From Carl Spitteler: Die jodelnden Schildwachen<sup>1</sup>*

### I. OBJECTIVE, INTRODUCTION AND PROPOSITION

Even to contemporary writers, it was remarkable that within a sea of princely states which disarmed their own populace and instead paid standing armies, Switzerland was not only a republic, but also relied exclusively on locally-raised militia.<sup>2</sup> And yet, while the story of

<sup>1</sup> Carl Spitteler (1845-1924) won the Nobel Prize for Literature 1919 (<<http://gutenberg.spiegel.de/buch/carl-spitteler-gedichte-1294/10>>; accessed 23 October 2015).

<sup>2</sup> Sigg, 17. *Jahrhundert*, p. 350.

Swiss mercenary service abroad has received intense scrutiny, the academic discussion, both at the time and currently, seems uninterested in going beyond that general statement – with some exceptions.

In this article, I propose to follow the methodology sketched out by Walter:<sup>3</sup> What was the relevant constitutional concept prevalent in Switzerland at the time? My approach is slightly different from Walter's: Walter's analysis was limited to the relationship between the Netherlands on one hand and Zurich and Berne on the other, but included topics other than the militia. I propose to focus on the issue of the militia, but widen the purview and pay more attention to the legal and constitutional dimension, to ask: What were the drivers for the concept of an armed populace organised in a militia, as the only armed force in the commonwealth?

## II. SWITZERLAND IN THE RELEVANT ERA

### II.1. Political Structure

Switzerland – after 1550 internally and externally roughly within the borders that exist today – was made up of three types of territories: First, a confederacy of Thirteen Cantons (*Orte*), full members, each of them sovereign within the Holy Roman Empire, bound together by a network of treaties and resolutions; the sole common institution was the *Tagsatzung*, a congress of ambassadors from the cantons. The Thirteen were selective, taking care to maintain a balance between city and rural, Catholic and Protestant cantons; after 1513 (Appenzell), no new full members were created until Napoleon re-arranged Switzerland.<sup>4</sup>

Secondly, the associate members, without vote in the *Tagsatzung* but allied with the Thirteen. Some of the associate members were sovereign republics in the HRE in their own right, others did not have the full panoply of privileges to rate as sovereign.<sup>5</sup>

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<sup>3</sup> Walter, *Niederländische Einflüsse*, pp. 11-15.

<sup>4</sup> Simler, *Regiment der Eydgenossenschaft*, pp. 1-2; Wyß, *Politisches Handbuch*, pp. 117-221; Maissen, *Geschichte*, p. 111-113; comprehensive overview: Oechsli, *Orte und Zugewandte*. The *Dreizehn Orte* were: Zurich, Berne, Lucerne, Uri, Schwyz, Unterwalden, Glarus, Zug, Fribourg, Solothurn, Basel Stadt, Schaffhausen and Appenzell (after the Reformation split into Inner- and Ausserrhoden).

<sup>5</sup> Generally Maissen, *Geschichte*, pp. 113-115. Sovereign *Zugewandte* were the Grisons, the Valais, Geneva, Neuchatel, St Gallen city and some cities now integrated into the cantons (like Gersau or Biel). The Prince-Abbey of St Gallen and the Prince-Bishop of Basel (now the demicanton Basel-Landschaft), as ecclesiastical estates, could not have the full set of privileges. The Prince-Abbey was a significant estate, and in the *Defensionale* of Wil 1647 the fifth-largest contributor of forces, after Berne, Zurich, Lucerne and Fribourg – Menolfi, *Solddienst*, p. 205.

Finally, there were the subject territories; each was administered by one or more of the full members, and the chief function of the *Tagsatzung* was to share out among the full members the lucrative offices and the income derived from their exploitation.<sup>6</sup>

All cantons had republican forms of government; the city cantons<sup>7</sup> had essentially oligarchical structures, where leading patrician families or guilds populated privy councils that largely selected themselves and which were no less absolutist than the princely states.<sup>8</sup> Alongside the city cantons were the rural cantons, where a *Landsgemeinde* – a popular assembly of all citizens – elected magistrates and passed laws; though here, too, leading families emerged, the “oligarchisation” was more limited.<sup>9</sup> In these *Landsgemeinde* cantons, a clear link traditionally existed between citizenship (the right to vote), bearing arms, and military service, and in Appenzell Innerrhoden, male voters still today carry a side-arm to show their eligibility to vote in the *Landsgemeinde*.<sup>10</sup>

## II.2. International Relations

Thanks to the comprehensive mercenary hiring treaties of 1516 and 1521, the undeniably closest external relationship was to France, with the Swiss sometimes seen as a protectorate of France. Especially after the revocation of the Edict of Nantes, France was clearly Catholic, and pre-1712 often intervened to preserve the Catholic preponderance

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<sup>6</sup> Today the cantons of St. Gallen, Aargau, Thurgau, Vaud, Basel-Land, Ticino, and Jura; Maissen, *Geschichte*, pp. 111-113; Fehr, *Absolutismus*, pp. 197-200.

<sup>7</sup> Zurich, Berne, Lucerne, Fribourg, Solothurn, Schaffhausen, Basel; Neuchâtel, an associate member, was a hereditary principality – the only non-republican entity in the confederation, until 1707 part of the house of Orléans-Longueville, and then of Prussia.

<sup>8</sup> Peyer, *Verfassungsgeschichte*, pp. 110-116; Fehr, *Absolutismus*; Gmür, *Städte als Landesherren*, p. 191; Schläpfer, *Ausserrhoden*, pp. 57-65; Maissen, *Geschichte*, pp. 109-111 and pp. 129-130; Jeker, *Rechtsgeschichte Solothurn*, pp. 38-45. Josias Simler, *De republica*, ff. 121r-121v, recites the Aristotelian definition of forms of government: By the one (*rex*), the few (*optimates*), and the people (*totus populus*), and their lapsed forms *tyrannis* (a monarch ruling without the consent of the people), *oligarchia* and *populare imperiu[m] tumultus et anarchiae plenum* (a popular rule full of tumult and anarchy); he finds that Switzerland has a mixed form of government, some cantons governed by *optimates*, other by the *totus populus*. An instructive – though slanted to the point of propaganda – read is David Wyß exposition of the Zurich constitution, written 1796 (*Politisches Handbuch*, pp. 51-54).

<sup>9</sup> Brändle, *Revitalisierung*. Uri, Schwyz, Unterwalden (both Ob and Nid dem Wald), Glarus and (both) Appenzell; Zug was technically a city canton, but organised like a *Landsgemeinde* canton.

<sup>10</sup> <[www.ai.ch/de/politik/sitzung/](http://www.ai.ch/de/politik/sitzung/)>; Bischofberger, *Rechtsarchäologie Innerrhoden*, pp. 79-83; Schläpfer, *Ausserrhoden*, p. 42; Tlusty, *Martial Ethic*, p. 275; Brändle, *Revitalisierung*, pp. 605-606. In the city cantons, the authorities avoided a link since their rural subjects had no voting rights but still a service obligation; still, in Zurich, a man needed the proper equipment to join a guild (i.e. vote): Wyß, *Politisches Handbuch*, p. 225.

in the Confederacy.<sup>11</sup> Generally, the Catholic cantons maintained their own friendly relations with the Holy See and Catholic princes.

Especially for the Protestant cantons, the connection to the Netherlands was a particularly strong one, thanks to Calvinism. Initially, Geneva was a centre for Protestant studies by Dutch students, but as the Dutch founded their own universities, a veritable stream of Swiss students flocked to Leiden, Franeker, Groningen and Utrecht, not just to study theology, but also law and other subjects.<sup>12</sup> The Dutch also hired large numbers of Swiss mercenaries, especially in the Protestant cantons.<sup>13</sup>

The military reforms put in place by Maurice of Orange in the late 16<sup>th</sup> C, which enabled the Dutch to defeat Spanish Habsburg in the Eighty Years' War, were a model for all of Europe, and were copied in Switzerland as well.<sup>14</sup>

### II.3. The Militia Principle

All of the cantons for their military relied on a militia, none had a standing army.<sup>15</sup> While in the 16<sup>th</sup> C recruitment was specific to a venture, by the early 18<sup>th</sup> C the militia were raised by a system of annual or at least regular musters, where military-age men were allocated to the units they would train with and their kit was regularly inspected.<sup>16</sup> The

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<sup>11</sup> Peyer, *Verfassungsgeschichte*, pp. 81-84. Grosjean, *Kriegsgenügen*, pp. 162-163; Ulrich, *18. Jahrhundert*, p. 372: It is no accident that Villmergen II happened while the European powers' attention was focussed on the War of Spanish Succession peace negotiations.

<sup>12</sup> Walter, *Niederländische Einflüsse*, pp. 7-8, 87-97; at the time, the only Swiss university was Basel, founded 1460. Geneva, Zurich and Lausanne had religious (Protestant) colleges.

<sup>13</sup> Walter, *Niederländische Einflüsse*, pp. 82-87; Sigg, *17. Jahrhundert*, p. 359; despite Zurich's prohibition, Zurich was not able to stop – or chose to turn a blind eye to – Zurchers signing up for Dutch service.

<sup>14</sup> Walter, *Niederländische Einflüsse*, pp. 18-54; Jeker, *Rechtsgeschichte Solothurn*, p. 78. Conversely, the Netherlands looked to Switzerland for inspiration on the constitutional organisation of the Seven Provinces; Walter, *Niederländische Einflüsse*, p. 7-8.

<sup>15</sup> Though purchasing mercenaries had been contemplated: during the Thirty Years' War, there were attempts to give the Confederacy the authority to hire a standing mercenary force and allocate the cost among the members, in accordance with the Dutch model, but the costs were daunting and the plan politically unpalatable – Peyer, *Verfassungsgeschichte*, pp. 94-96; Walter, *Niederländische Einflüsse*, pp. 55-81. Zurich had contingency plans to raise mercenaries if it had been drawn into the Thirty Years' War (Sigg, *17. Jahrhundert*, p. 352), and Berne actually did purchase some troops (Rodt, *Berner Kriegswesen*, II, p. 200-202; Grosjean, *Kriegsgenügen*, p. 155). Maissen, *Geschichte*, p. 120 points out that in 1732, Berne spent 4% of its budget on the military, France in 1700 75%, and a fair portion of that went to pay Swiss mercenaries.

<sup>16</sup> Simler, *Regiment der Eydgenossenschaft*, p. 406; Simler, *De republica*, p. 123v-124r: *Nam cum apud multos gentes plebi armorum usus interdicitur, contra in Helvetia etiam mercenarii & capite censi arma pro facultatum ratione sibi comparare & domi conservare coguntur* (For as with many peoples the common people are forbidden the use of arms, but in Switzerland even peddlers and labourers are obliged to buy and

change was forced by the transition from the *Gewalthaufen*, consisting of pike and halberd, where comparatively little training in weaponry or manœuvring was required, to the predominance of pike-and-shot and later flintlock units, where both the handling of the weapon and the evolutions of the battlefield formations required intensive training.<sup>17</sup> Authority mandates required regular compulsory meetings for drill and musket practice, and the authorities subsidised prizes for marksmanship competitions.<sup>18</sup>

Military service was compulsory for all able-bodied male inhabitants, usually from age 15 or 16 to 60, and a soldier had to purchase his uniform and weaponry – as defined by the authorities – himself.<sup>19</sup> The units were officered by the scions of the politically powerful families of the canton.<sup>20</sup>

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keep at home arms in accordance with their means); in detail Wyß for Zurich 1796, *Politisches Handbuch*, pp. 224-227 and 231-236; Rodt, *Berner Kriegswesen*, II, pp. 282-300; Ziegler, *Milizen der Stadt St. Gallen*, for St Gallen city. Menolfi, *Solddienst*, pp. 213-216; Sonderegger, *Altappenzellisches Wehrwesen*, p. 30-32; Schläpfer, *Ausserrhoden*, pp. 128-129; Sigg, *17. Jahrhundert*, p. 358; Jeker, *Rechtsgeschichte Solothurn*, pp. 48-49 and 66-71; Nussbaumer, *Zuger Militär*, pp. 204-205 and 215-235.

<sup>17</sup> Walter, *Niederländische Einflüsse*, pp. 20-54; Maissen, *Geschichte*, p. 122; Sigg, *17. Jahrhundert*, pp. 352-353 and 358-359; Menolfi, *Solddienst*, p. 213; Sigg, *Promenade Militaire*, p. 26-34; Jeker, *Rechtsgeschichte Solothurn*, pp. 62-64; Grosjean, *Kriegsgenügen*, pp. 149-151; Ziegler, *Milizen der Stadt St. Gallen*, pp. 157-186. Drill was introduced and regulations written, initially on the Dutch pattern, later increasingly following French models – e.g. Hans Conrad Lavater, *Kriegsbüchlein* (Zurich, 1667 – particularly pp. 109-134); the *Reglement für die Herren Officiers Löbl. Grenadier-Compagnie zu Fuß* (St. Gallen, 1796) or the *Reglement vor die Land-Miliz löbl. Stands Zug* (1757).

<sup>18</sup> Schläpfer, *Ausserrhoden*, p. 130; Sonderegger, *Altappenzellisches Wehrwesen*, pp. 35-38; Menolfi, *Solddienst*, p. 214; Ulrich, *18. Jahrhundert*, p. 385; Nussbaumer, *Zuger Militär*, pp. 230-235; Jeker, *Rechtsgeschichte Solothurn*, pp. 75-76; Tlusty, *Martial Ethic*, pp. 191-196 and 204-206. Wyß, *Politisches Handbuch*, p. 246 – Zurich still has an annual *Knabenschieszen* (<<http://www.knabenschieszen.ch>>).

<sup>19</sup> Lavater, *Kriegsbüchlein*, pp. 65-68. Jeker, *Rechtsgeschichte Solothurn*, pp. 64-66 and 72-77; Ziegler, *Milizen der Stadt St. Gallen*, pp. 139-153; in Berne, the authorities initially tried to encourage uniforms through “*gute und freundliche Persuasion*” (“good and friendly persuasion”), but soon mandated them, while at the same time ensuring affordable cloth – Rodt, *Berner Kriegswesen*, II, pp. 242-247; Schläpfer, *Ausserrhoden*, pp. 128-129 (in Appenzell Ausserrhoden the required equipment was scaled by census); Nussbaumer, *Zuger Militär*, pp. 193-205; Schmidt, *Handfeuerwaffen*, pp. 121-128. A key concern was to ensure that all long arms had the same bore (Ahasverus Frötsch, *De iure Iustrationis* p. 71), to rationalise the casting of shot; in Zug, this was not mandated until the 1750s (Nussbaumer, *Zuger Militär*, p. 79). In places, a man could not marry unless he produced the required kit and weapons: Rodt, *Berner Kriegswesen*, II, p. 233; Schläpfer, *Ausserrhoden*, pp. 128-129; Menolfi, *Solddienst*, p. 215; Nussbaumer, *Zuger Militär*, p. 204. In the 18<sup>th</sup> C, Zurich instituted that uniforms could be commissioned from franchised tailors, and arms and kit had to be purchased from the arsenal, both at regulated low prices: Wyß, *Politisches Handbuch*, pp. 238-239; Ulrich, *18. Jahrhundert*, p. 386.

<sup>20</sup> Nussbaumer, *Zuger Militär*, pp. 42-67; Sigg, *Promenade Militaire*, pp. 29-31; Sigg, *17. Jahrhundert*, pp. 359-361; Jeker, *Rechtsgeschichte Solothurn*, pp. 41-44 and 87-88; Ulrich, *18. Jahrhundert*, p. 387. For the practice in Zurich 1796, Wyß, *Politisches Handbuch*, pp. 228-231. There is a clear interdependency between political office, militia command and mercenary officer (which could result in a considerable

Berne had the institution of the *äussere Stand* or “outer estate”. The structure of the *äussere Stand* mirrored the structure of the *innere Stand* (the Grand and Privy Council), but without executive or legislative power; it served two functions: to familiarise the next generation of *Burger* with the processes and mechanics of wielding power, and to organise manoeuvres for the militia, for which the *innere Stand* would allocate a budget.<sup>21</sup>

A Dutch-inspired novelty was the introduction by Zurich of military mustering and mobilisation districts (*Quartiere*). Not only did these new districts cut across the traditional feudal boundaries, discomfiting the subjects, but they also involved a military administration and command structure separate from the civilian general, fiscal and judicial administration, upsetting the formerly all-powerful bailiffs (*Vögte*).<sup>22</sup> Generally, in the 18<sup>th</sup> C both Berne and Zurich managed to thoroughly modernise both their militia and the administrative structure required to support it.

The forces consisted of infantry, artillery, cavalry, and specialised troops (pontooniers, sappers, supplies, etc.), to various degrees of sophistication and competence. A network of beacons assured prompt alarm.<sup>23</sup> Berne – far and away the largest and most powerful canton – could in the 18<sup>th</sup> C, fully mobilised, field an army of 78-80,000, all of them

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wealth); on one hand, the ruling class could thus consolidate its political grip and keep its military know-how up-to-date, but it on the other hand preserved the civilian control of the military and prevented the emergence of a distinct “officer caste”. In Berne, the institution of the *äussere Stand* (Fn 21) formalised the link between higher militia officer charges and political leadership; competent rural subjects had the opportunity to rise to officer rank – Rodt, *Berner Kriegswesen*, II, pp. 403-408.

<sup>21</sup> Mülinen, *Vom Aeusseren Stand*, pp. 5-8; Hidber, *Der äussere Stand*, pp. 5-8; Rodt, *Berner Kriegswesen*, II pp. 93-94; Adams, *A Defence*, p. 39.

<sup>22</sup> Ulrich, *18. Jahrhundert*, pp. 384-389. St Gallen city too reformed its military in the mid-18<sup>th</sup> c: Ziegler, *Milizen der Stadt St. Gallen*, pp. 108-109. Berne’s reforms were no less intrusive and are elaborated in great detail by Rodt, *Berner Kriegswesen* (also Grosjean, *Kriegsgenügen*, pp. 159-161). Walter shows that Berne and Zurich were conscious that their reforms went beyond what the authorities could traditionally expect of their subjects, and carefully prepared their introduction in the early 17<sup>th</sup> C (*Niederländische Einflüsse*, pp. 35-37). Still, the separation of functions was a key step in the modernisation, by rationalisation and specialisation, of the cantonal administration.

<sup>23</sup> Sigg, *17. Jahrhundert*, pp. 351-352; Sigg, *Promenade Militaire*, p. 27; Wyß, *Politisches Handbuch*, pp. 237-238; Schläpfer, *Ausserrhoden*, pp. 127-128 (maintaining the beacons was the only military measure Appenzell Ausserrhoden took seriously, it comprehensively neglected mustering, equipment and training – *Ibid.*, pp. 236-239); Sonderegger, *Altappenzellisches Wehrwesen*, pp. 21-29; in Zug, the beacons were so neglected that by 1733, no more trace of them could be found: Nussbaumer, *Zuger Militär*, p. 142; Jeker, *Rechtsgeschichte Solothurn*, p. 49.

uniformed and kitted out with standardised equipment supplied through a system of arsenals.<sup>24</sup> The rural and poorer estates might be able to field only infantry, with only a cockade or armband for identification instead of a uniform and without standardised kit.<sup>25</sup>

The infantry were by and large of reasonable to high standard. But there were huge differences in quality in both equipment and training among the cantons, which the authorities often lacked the political will or financial wherewithal to correct.<sup>26</sup> Both the cost of the personal equipment and the time required for drills fell on the individual, and with the generally tight economic situation in most of Switzerland from the mid-17<sup>th</sup> C onwards, individuals simply could not afford either.<sup>27</sup> Some estates – e.g. the City of St

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<sup>24</sup> For a comprehensive overview over Berne's military: Rodt (the number of effectives – about 20% of the population! – *Berner Kriegswesen*, II, pp. 188-189). Berne understood the military cost of substandard kit and provided arms and uniforms to its draftees, though even there, the intent was that the individual should eventually purchase these: Grosjean, *Kriegsgenügen*, p. 162; Rodt, *Berner Kriegswesen*, II, pp. 231-232 (with prices). Zurich's service-age population 1679 was 21, 450, of which about 15,000 musketeers: Sigg, *17. Jahrhundert*, p. 356. The arsenals provided powder, lead, heavy weapons etc., and also a certain number of flintlocks or rifles to equip at least a rapid-reaction force – Wyß, *Politisches Handbuch*, pp. 239-241; Sigg, *Promenade Militaire*, pp. 32-33; Sigg, *17. Jahrhundert*, p. 357; Nussbaumer, *Zuger Militär*, p. 194. Peyer, *Verfassungsgeschichte*, pp. 129-130; Schläpfer, *Ausserrhoden*, p. 129; Sonderegger, *Altappenzellisches Wehrwesen*, pp. 33-34.

<sup>25</sup> Simler, *Regiment der Eydgenossenschaft*, p. 407. Peyer, *Verfassungsgeschichte*, pp. 128-130; Nussbaumer, *Zuger Militär*, pp. 209-214; Sigg, *Promenade Militaire*, pp. 29 and 35-36. For the weaponry and uniforms of the time: Schneider, *Vom Brustharnisch zum Waffenrock*.

<sup>26</sup> Mantel (*Zürcher Wehranstalten*, pp. 194-195) finds that in Zurich, efforts were made when trouble was on the horizon, but abandoned as soon as the crisis passed – in the 18<sup>th</sup> C, this changed with the *Quartier* system and concomitant measures: Ulrich, *18. Jahrhundert*, pp. 384-389. For Prince-Abbatial St. Gallen, Menolfi, *Solddienst*, pp. 213-216; Jeker, *Rechtsgeschichte Solothurn*, p. 40. Organisationally, too, there were deficits – centralisation would have benefited the military, but many cantons (e.g. Zug – Nussbaumer, *Zuger Militär*, pp. 33-42) left the matter to local authorities. Partly, the cantonal authorities couldn't be bothered, but the local communities also jealously guarded their role – in the case of Berne, after the disastrous campaign against Savoy 1589/90, the city asked the communities whether they'd be willing to contribute the cash to hire mercenaries, but the communities refused to allow the city that much power: Grosjean, *Kriegsgenügen*, pp. 154-155.

<sup>27</sup> Menolfi, *Solddienst*, pp. 215-218 – in Prince-Abbatial St. Gallen, draftees were instructed to show up with at least a hatchet. In Zug, a substantial number of draftees showed up with halberds right up the French Invasion in 1798: Nussbaumer, *Zuger Militär*, pp. 193-194. Complaints about defective, non-regulation or substandard equipment were perennial: Sigg, *Promenade Militaire*, pp. 32-33. In an annex to his book on the law of muster and levy, Fritsch deals with the deficiencies in equipment and the cost of fixing them (*De iure lustrationis*, pp. 71-73). Pay was only due for active service; in Zug, the amount was dependent on the soldier's community's capability (Nussbaumer, *Zuger Militär*, p. 244-256). Berne had detailed regulation on pay (Rodb, *Berner Kriegswesen*, II, pp. 409-429). In any event, keeping militia in the field for a prolonged period was politically impossible, especially during harvest season, Sigg, *Promenade Militaire*, p. 37; therefore, preferably volunteers

Gallen – allowed a draftee to provide a replacement, resulting in the spectacle of aged men who had made a career of serving as replacements for others.<sup>28</sup>

Where artillery existed, it was also often of high standard, thanks to the pride the officers took in their art.<sup>29</sup> The weak point was generally the cavalry – many would-be troopers lacked the funds to equip themselves, and some could not even ride, having chosen the cavalry only to escape from the regular drills and practice demanded of the infantrymen and gunners.<sup>30</sup>

The authorities tended to rely on returning mercenaries, both officers and other ranks, to bring their training and experience with them and stiffen the inexperienced militia.<sup>31</sup> However, to keep the veteran other ranks friendly, they were often exempted from regular drill, somewhat defeating the purpose. Officers on the other hand tended to make a career of foreign service, reducing the number of returnees. Those that did return might inflict on their troops the latest uniform fashions, imposing further costs and causing resentment among their hapless recruits.<sup>32</sup>

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were sought for campaigns: Schläpfer, *Ausserrhoden*, pp. 240-241; Schmidt, *Handfeuerwaffen*, pp. 60-61.

<sup>28</sup> Menolfi, *Solddienst*, p. 218; Jeker, *Rechtsgeschichte Solothurn*, pp. 64-65. In Zug, certain service-exempt persons had to provide stand-ins: Nussbaumer, *Zuger Militär*, pp. 164-165.

<sup>29</sup> Zurich: Sigg, *Promenade Militaire*, pp. 34-34; Sigg, *17. Jahrhundert*, pp. 355-356; Wyß, *Politisches Handbuch*, p. 245; Ulrich, *18. Jahrhundert*, pp. 386-387; St Gallen city: Ziegler, *Milizen der Stadt St. Gallen*, pp. 116-120; Berne: Rodt, *Berner Kriegswesen*, II., pp. 82-135; Berne paid stipends for artillery training abroad: Rodt, *Berner Kriegswesen*, II, pp. 322-331; Schmidt, *Handfeuerwaffen*, p. 87; Nussbaumer, *Zuger Militär*, pp. 205-209; Solothurn's artillery on the other hand was in a sorry state: Jeker, *Rechtsgeschichte Solothurn*, p. 86.

<sup>30</sup> Sigg, *Promenade Militaire*, pp. 27-28, Sigg, *17. Jahrhundert*, pp. 358 – and this in Zurich! Jeker, *Rechtsgeschichte Solothurn*, pp. 85-86. Representational needs created a converse problem – in Ausserrhoden, e.g. the *Landgemeinde*-town of Trogen regularly required guards of honour, and for this, the local worthies organised snappily uniformed mounted and grenadier units. The military value of these formations was dubious – Schläpfer, *Ausserrhoden*, pp. 239-240; St Gallen city also entertained a mounted grenadier unit: Ziegler, *Milizen der Stadt St. Gallen*, pp. 100-104. Jeker, *Rechtsgeschichte Solothurn*, p. 86-87: the treaties allowing France to raise troops also called for France to send cavalry and artillery in case Switzerland was attacked. Rodt, *Berner Kriegswesen*, II, pp. 62-82 – since it proved difficult to raise proper cavalry and even dragoons, Berne through the 17<sup>th</sup> C toyed with re-activating the feudal-law obligations regarding mounted troops, which proved less than satisfactory.

<sup>31</sup> Jeker, *Rechtsgeschichte Solothurn*, p. 79-80; Sigg, *17. Jahrhundert*, pp. 359; Menolfi, *Solddienst*, p. 215; Grosjean, *Kriegsgenügen*, pp. 162-163; Wyß, *Politisches Handbuch*, pp. 224; as Switzerland itself no longer offered opportunity to gain experience, Berne judiciously franchised out mercenary units – to Sardinia with the express purpose to train mountain warfare: Rodt, *Berner Kriegswesen*, II, pp. 300-303. Zurich too encouraged officers to gain experience abroad: Ulrich, *18. Jahrhundert*, pp. 384 and 390-391.

<sup>32</sup> Schmidt, *Handfeuerwaffen*, pp. 104-105; Grosjean, *Kriegsgenügen*, p. 165; Menolfi, *Solddienst*, p. 215; Maissen, *Geschichte*, p. 122; Appenzell Ausserrhoden did not have a significant mercenary business,



## II.4. External Threat: The *Defensionalia*

After the defeat at Marignano 1515, the Confederacy itself was spared external attacks until Napoleon invaded in 1798.<sup>33</sup> The reasons for this were manifold and cannot be discussed here, but at the same time, the cohesion between the members of the Confederacy was weakening, due to the confessional divide, the disagreements over the mercenary business, diverging economic development and an increased focus of each canton on internal consolidation. Regional compacts on mutual defence (*defensionale*) were quite common, but the first comprehensive agreement, the *Defensionale* of Wil, was not achieved until 1647, by which time the Thirty Years' War was in its 29<sup>th</sup> and the peace negotiations in Münster and Osnabrück were in their second year.<sup>34</sup>

The *Defensionale* was renewed in Baden 1668, and this time, there was an embryonic effort at preparatory organisation, unified command and member obligations – which, however, did not go very far due to internal conflicts.<sup>35</sup> In 1702, under the impression of the War of Spanish Succession, a renewed effort to coordinate and integrate common defence was made, but the internal differences were too great.<sup>36</sup>

## II.5. Internal Threat: The First and Second Villmergen Wars

If the Swiss avoided foreign wars, they still warred amongst each other – the two “hottest” contests were two Villmergen Wars. The First Villmergen War 1656 resulted from the Protestant cantons, principally Berne and Zurich, attempting to win predominance for the Protestant cause within the Confederacy. Bernese troops occupied the village of Villmergen without much resistance, proceeded to loot and carouse, and awaited the

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so there was no infusion of up-to-date military knowledge from this side – Schläpfer, *Ausserrhoden*, pp. 241-243.

<sup>33</sup> Though there was danger enough – Oechli, *Orte und Zugewandte*, pp. 118-143; for an overview of Switzerland's challenges during the Thirty Years' War: Jeker, *Rechtsgeschichte Solothurn*, pp. 12-27; Peyer, *Verfassungsgeschichte*, pp. 80-84; Kurz, *Schweizer Heer*, pp. 164-168 and 180; Ziegler, *Milizen der Stadt St. Gallen*, pp. 54-59.

<sup>34</sup> It merely set out the troop contingents the members had to contribute, but was silent on preparatory organisation, financing, and command: Peyer, *Verfassungsgeschichte*, p. 94-96; Oechli, *Orte und Zugewandte*, pp. 127-131; Ziegler, *Milizen der Stadt St. Gallen*, p. 61. Wil was the administrative capital of the Prince-Abbey of St Gallen. Menolfi, *Solddienst*, p. 205; Nussbaumer, *Zuger Militär*, pp. 26-27. For a contemporary if rosy view of the *Defensionale* Wyß, *Politisches Handbuch*, pp. 222-224.

<sup>35</sup> Peyer, *Verfassungsgeschichte*, pp. 96-97; Oechli, *Orte und Zugewandte*, pp. 133-139; Kurz, *Schweizer Heer*, p. 179; Ziegler, *Milizen der Stadt St. Gallen*, pp. 61-62. Baden was a Catholic-controlled fortress in the subject territory of the Aargau – within a few years, especially Catholic cantons exited the 1668 *Defensionale*; Nussbaumer, *Zuger Militär*, pp. 27-29. The 1668 *Defensionale* was activated in 1792 when the border near Basel was threatened; the called-upon cantons found excuses not to send any or not the required number of troops, (Schläpfer, *Ausserrhoden*, pp. 240-241; Nussbaumer, *Zuger Militär*, pp. 148-152); St Gallen city complied: Ziegler, *Milizen der Stadt St. Gallen*, pp. 64, 222-236.

<sup>36</sup> Nussbaumer, *Zuger Militär*, pp. 27-29; Oechli, *Orte und Zugewandte*, pp. 138-143.

Zurich troops to join them. The Catholic forces, hastily assembled by Lucerne and Schwyz, saw this as an opportunity for a surprise attack during the night, and chased away the Bernese.<sup>37</sup>

The fact that the Catholic troops still relied on pike and halberd, and had routed the musket-equipped Bernese, at first led to a reversal of the movement toward firearms in the cantonal militias. But by the beginning of the 18<sup>th</sup> C, with the advent of the improved flintlock, especially Berne and Zurich replaced the ageing matchlocks and began to reorganise their military along modern lines.<sup>38</sup>

In 1712 then, trouble started in the Toggenburg, where the Catholic cantons were suspected of scheming to subvert the *status quo*. Zurich and Berne mobilised and successfully attacked the Abbey itself; the Catholic Five Cantons<sup>39</sup> then garrisoned the Catholic-controlled County of Baden in the Aargau, preventing Zurich and Berne from establishing a common border. Berne and Zurich prevailed here, too, and a peace was negotiated, which was rejected by the Papal nuncio. So the Catholic forces resumed hostilities in the Aargau, but were this time roundly beaten at Villmergen by Berne units that

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<sup>37</sup> Luginbühl/Barth-Gasser/Baumann/Piller, 1712: *Quellen*, pp. 49-50; Peyer, *Verfassungsgeschichte*, p. 98-99; Ziegler, *Milizen der Stadt St. Gallen*, pp. 198-201; Zurich's efforts were dogged by supply and organisation problems (Sigg, *17. Jahrhundert*, p. 357), and Berne by problems of training, leadership and discipline (Grosjean, *Kriegsgenügen*, pp. 153-157); Kurz, *Schweizer Heer*, pp. 177-179.

<sup>38</sup> Peyer, *Verfassungsgeschichte*, p. 94; Sigg, *17. Jahrhundert*, pp. 356-357; Schmidt, *Handfeuerwaffen*, pp. 84-85; Rodt, *Berner Kriegswesen*, II, p. 212-224; Grosjean, *Kriegsgenügen*, pp. 157-158; Ziegler, *Milizen der Stadt St. Gallen*, pp. 214-222. The nearly mystical faith in the halberd is illustrated by the Zug general Joseph Leonz Andermatt, confronting the French 1798! – cited after Nussbaumer, *Zuger Militär*, p. 193: *Unsere Infanterie kann der feindlichen an Fertigkeit im Feuern und an Geschwindigkeit im Manövrieren nicht beikommen. Die Halebardiere sind unsere grösste, und da wir keine Kavallerie haben, überaus notwendige Stärke. Die Leibeskräfte, mit denen die Natur die helvetische Nation vor allen anderen begabte, machen ein so bewaffnetes Korps jedem Feinde fürchterlich. Deswegen zielt unsere ganze Taktik darauf ab, mittels der Jäger, Artillerie und Infanterie die Zeit und den Ort zu gewinnen, wo die Halebardiere in's Spiel gebracht werden können, die sodann den Ausgang der wichtigsten Schlacht entscheiden und den vollkommensten Sieg erhalten können* (Our infantry is not able to compete with the enemy's in terms of accomplishment in firing or speed of manoeuvre. Our halbardiers are our chief and, since we have no cavalry, eminently necessary prowess. Physical strength, which nature has lavished on the Helvetic nation before all others, renders a so armed corps terrible to every enemy. That is why our whole tactics aim to use riflemen, artillery and infantry to win the time and place where the halbardiers can be brought into play, who can then determine the result of the most important battle and achieve the most complete victory).

<sup>39</sup> Uri, Schwyz, Unterwalden, Lucerne, and the Valais (associate member). Fribourg, Solothurn and Appenzell Innerrhoden, as well as associate member the Prince-Bishop of Basel, all also Catholic, remained neutral; the Prince-Abbot of St. Gallen had been neutralised. The mostly Protestant Toggenburg has its own complicated history: Dierauer, *Das Toggenburg*.

outmatched the Catholics – who still relied on 17<sup>th</sup> C infantry equipment and tactics, without any cavalry and only minimal (but skilfully deployed) artillery.<sup>40</sup>

Though the outcome was not a foregone conclusion, the military lessons of Villmergen II were clear. While rural cantons like the formerly powerful Schwyz lacked the resources to modernise their militia, Zurich and Berne put in place a new organisational infrastructure and improved equipment. Deficits remained, especially in training, where the political will to follow through was lacking. The parlous state of training led to the formation of private associations of officers who, out of patriotic motivation, sought to improve the training of field and staff officers. However, despite some spirited resistance and a few successes, the Swiss militias 1798-99 proved no match for (and were outnumbered by) Napoleon's armies.<sup>41</sup>

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<sup>40</sup> Luginbühl/Barth-Gasser/Baummann/Piller, 1712: *Quellen*, pp. 51-67; Peyer, *Verfassungsgeschichte*, pp. 99-100; Sigg, *Promenade Militaire*, pp. 34-39; Kurz, *Schweizer Heer*, pp. 191-201; Rodt, *Berner Kriegswesen*, II, pp. 444-562; Grosjean, *Kriegsgenügen*, pp. 161-164; Ulrich, *18. Jahrhundert*, pp. 372-374; Ziegler, *Milizen der Stadt St. Gallen*, pp. 62-63. Zurich's forces were competent but not yet up to scratch – at a joint camp of Berne and Zurich forces 1712, the Zurich commandant was embarrassed by the scruffy and shambolic appearance of his camp and troops when compared to the spit-and-polish Bernese: Sigg, *Promenade Militaire*, pp. 30-31.

The Catholic cantons attempted a re-run of Villmergen in the *Sonderbund* War of 1847, but were quickly and sparingly, but decisively beaten by the Protestant cantons. This paved the way for the first Federal Constitution in 1848 – Maissen, *Geschichte*, pp. 196-204. A final chapter was written in 2006, when thanks to the Good Offices of the Swiss Federal Government, Zurich and St Gallen agreed a settlement with regard to rare books and the magnificent celestial globe, which Zurich had looted from the famed St Gallen College Library in 1712 – Flury/Schmuki/Tremp, *Von der Limmat zurück an die Steinach*, pp. 9-17.

<sup>41</sup> Maissen, *Geschichte*, pp. 159-160; Rodt, *Berner Kriegswesen*, II, pp. 562-694; Nussbaumer, *Zuger Militär*, pp. 42-43, 140-144; Sigg, *Promenade Militaire*, p. 31; Kurz, *Schweizer Heer*, pp. 203-215; Ulrich, *18. Jahrhundert*, pp. 384-389; Ziegler, *Milizen der Stadt St. Gallen*, pp. 239-250. Cf. Wyß, *Politisches Handbuch*, pp. 223-224. Grosjean (*Kriegsgenügen*, pp. 166-171) has some criticism of Berne's preparations in the run-up to Napoleon, but it is hard to see what the Swiss could have done to defeat the French mass armies and operational doctrine.

In Prince-Abbatial St. Gallen, officers worried about the quality of the militia formed “free” or volunteer corps, which trained more frequently and seriously, but the authorities discouraged these as their members did not want to do regular militia service as well, and removing the crack soldiers from the militia would render this completely useless – Menolfi, *Solddienst*, 216. Zug actively promoted an *élite* “free corps” – Nussbaumer, *Zuger Militär*, pp. 172-173. Zurich had a special fund to pay for volunteer extracurricular manœuvres: Wyß, *Politisches Handbuch*, pp. 237 and 244-245; Ulrich, *18. Jahrhundert*, p. 385. In St Gallen city, there was rivalry between the regulars and the select grenadiers: Ziegler, *Milizen der Stadt St. Gallen*, pp. 92-99.

## II.6. Internal Threat: Insurrection

In addition to fighting between the cantons, there were the occasional revolts and insurrections, where the rural subjects took up arms against their city lords. The most serious of these was the Peasants' War of 1653, which affected the cantons of Lucerne, Berne, Solothurn, Basel and the Aargau. The rural population insisted on the cities' respect for their feudal freedoms, rights and privileges, as well as economic relief. The revolt was put down quickly and brutally by the cities, with the help of the non-affected cantons.<sup>42</sup>

Though the peasants were armed and part of the militia, the officers were members of the city ruling elite, so the insurrectionists lacked expert leadership. Also, the city-based burghers and craftsmen had nothing in common with the peasantry, whom they considered their subjects. Even so – the various insurrections, “troubles” and revolts did not have the effect of disarming the rural populace. The principle of a self-armed militia remained in place.<sup>43</sup>

## II.7. Mercenaries

Other than the subject territories, the issue that preoccupied day-to-day Swiss diplomacy and internal politics was the mercenary business; as practiced in Switzerland, a foreign prince needed to obtain, against a fee, the consent of a canton to raise troops, and once that consent was obtained, negotiate the final price with a mercenary entrepreneur franchised by the canton.<sup>44</sup>

That the mercenary business was huge is documented by the numbers – it is estimated that during the three centuries of the mercenary era, two million Swiss were in mercenary service for some time of their lives.<sup>45</sup> Whether the business benefited just the cantons and entrepreneurs, or the individuals as well, is contentious. The economic reality in

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<sup>42</sup> Fehr, *Absolutismus*, pp. 187-188; Ziegler, *Milizen der Stadt St. Gallen*, pp. 60 and 197-198. Upto the 17<sup>th</sup> C, the *Tagsatzung* was also a forum for mediation between a canton's rulers and its subjects, estates, or subject territories, and so it initially functioned in the Peasants' War – the *Tagsatzung* recommended the satisfaction of the peasants' economic, but rejection of their political demands. However, the intervention did not bring a reconciliation. By the end of the Peasants' War, the cantonal authorities rejected *Tagsatzung* offers to mediate as interference with a canton's internal affairs: Peyer, *Verfassungsgeschichte*, pp. 101-103.

<sup>43</sup> Gmür, *Städte als Landesherren*, p. 191: the peasants did not revolt against the ruling structure, but against perceived infringements of their traditional (feudal) rights; in the Peasants' War, the financial demands were satisfied, the political ones not. For the (many) troubles see: Peyer, *Verfassungsgeschichte*, p. 134-141; Messmer, *Luzerner Patriziat*, pp. 70-72; Jeker, *Rechtsgeschichte Solothurn*, pp. 42-43; also Ziegler, *Milizen der Stadt St. Gallen*, pp. 57-59.

<sup>44</sup> Peyer, *Verfassungsgeschichte*, pp. 130-133; Jeker, *Rechtsgeschichte Solothurn*, pp. 42-44; Messmer, *Luzerner Patriziat*, pp. 73-93; Schläpfer, *Ausserrhoden*, pp. 136-142 and 241-243; Ulrich, *18. Jahrhundert*, pp. 389-391; Kurz, *Schweizer Heer*, pp. 138-139.

<sup>45</sup> Maissen, *Geschichte*, pp. 121-122; Kurz, *Schweizer Heer*, pp. 138-139 – among them 70,000 officers and 700 generals.

Switzerland at the time was that there was a surplus of manpower, and limited opportunities domestically.<sup>46</sup> Also, the nature of service changed; in the 16<sup>th</sup> C, mercenary troops were levied for a specific campaign, and spoils were an integral part of the pay. From the 17<sup>th</sup> C onward, the Swiss regiments abroad constituted part of the standing army of the employing prince. Actions were few and far between, and pay constituted the (meagre but regular) reward for service.

### III. YEOMAN – SUBJECT – CITIZEN

#### III.1. Feudal Law

The lord's typical right in feudal law was the *Mannschaftsrecht* (*ius armorum; ius lustrationis et sequelae; Heerfolge; Reis und Folge*),<sup>47</sup> the right to call his vassals to arms. The expansionist Swiss cantons – especially Berne and Zurich, but it is probably generally true for all city cantons – saw the key advantage of territorial expansion in the acquisition of the *Mannschaftsrecht* over the acquired possessions.<sup>48</sup>

<sup>46</sup> Maissen, *Geschichte*, p. 108; Menolfi, *Solddienst*, pp. 206-211; Sigg, *17. Jahrhundert*, p. 361; Ulrich Bräker, the “poor man from the Toggenburg”, wrote a popular account of his life in the second half of the 18<sup>th</sup> C, which included a stint as a mercenary in Prussia: *Lebensgeschichte und Natürliche Ebenbeuer des Armen Mannes im Tockenburg* (1789); Menolfi, *Solddienst*, pp. 211-213.

<sup>47</sup> Josias Püttmann, *Elementa iuris fevdalis*, p. 47 (§71): *Primum inter iura regalia II.F.56. memorata locum occupant armandia a), quo vocabulo proprie ius armandi vasallos et subditos eosque sub proprio vexillo ducendi, hodie autem omne fere ius armorum significatur. In Capit. Caes. Art. XIX. § 6. Ius armorum dicitur et cum iure sequelae (der Heeresfolge b), nec non iure fortalitorum coniungitur* (The first place among the mentioned rights of rulership is the ‘*ius armandium*’, which term signifies the right to arm vassals and subjects and to lead them under one’s own standard, today though essentially any right related to arms. In ... it is called the right to arm and is mentioned with the right of levy, and often with the right of fortification); Fritsch, *De iure lustrationis*.

Püttmann, *Elementa iuris fevdalis*, elaborates on the *feudal* military service obligation in §§425-436 (pp. 257- 264) - §429 (p. 259) suggests that the *feudal* obligation for non-knightly vassals was defensive, and that a vassal could legitimately refuse to comply with a call-up if the lord’s war was manifestly unjust: *Quodsi enim a domino bellum manifesto iniustum geratur, vasallus seruitia haud iniuria denegat...*, but goes on to say that all that does not apply if the vassal is also a subject: *Fallit tamen hoc tunc, cum vasallus simul est subditus...* When during the Peasants’ War 1653 (Section II.6) the *Tagsatzung* called on the cantons to send troops to help in subduing the peasants, the *Landammann* of Ausserrhoden sent two companies without consulting the *Landsgemeinde*, some Appenzeller objected and demanded a determination whether the objectives were just or unjust – Schläpfer, *Ausserrhoden*, pp. 59-60.

<sup>48</sup> Gmür, *Städte als Landesherren*, pp. 187-188; Schib, *Geschichte Schaffhausen*, p. 336; Studer Immenhauer, *Vernaltung*, pp. 202, 206; Bosshard, *Militärunternehmer Thurgau*, p. 18. The German Imperial cities limited their expansion so that the rural was at most equal to the city population (St Gallen city chose this route, which contributed to its second-rate status as a *zugenandter Ort* – Bühner, *Stadtrepublik St. Gallen*). To compare, at the end of the 18<sup>th</sup> C, Nuremberg, the largest German Imperial

In feudal law, that obligation was technically limited to the defence of the fief, it did not extend to an obligation to follow the lord on “foreign” adventures. In the subject territory of the Thurgau, for instance, the yeomen did not feel obliged to follow Zurich’s levy to fight in the Burgundian Wars 1476, and it took authority mandates and *Tagsatzung* intervention to enforce the levy<sup>49</sup> – the transition from the autonomous yeoman, whose fighting obligations were linked to his feudal status, to the “subject”, whose obligation to fight was rooted in authority mandates, was pursued vigorously by the authorities in both their subject territories and in the increasingly “subjectified” rural territories of the cities.<sup>50</sup> But the transition was not an easy one, and the population found ways to passively resist military service.<sup>51</sup>

The converse question was whether a prince had the right to disarm the populace – Ahasverus Fritsch (who specifically addresses the mustering (*lustratio*) and levy (*sequela*) in his *de iure lustrationis et sequelae* on the basis of Roman law) says that the prince has the right to disarm subjects (*subditi*).<sup>52</sup> Fritsch (like Justus Lipsius before him) recommends that a

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city, had a territory of 1,400 km<sup>2</sup> and a total population of 35,000, with half in the city; in Berne, the city had 12,000 inhabitants, but the total Bernese population, on a territory of 9,000 km<sup>2</sup> or just over 20% of Swiss territory (including *Zugewandte* and subject territories), was 400,000 (Zurich 1,700 km<sup>2</sup>, population 200,000, 11,000 in the city); in contrast, the total population of Venice, including the *Terra Ferma*, was over 2,000,000 – Gmür, *Städte als Landesherren*, pp. 182, 187 and 192.

<sup>49</sup> Bosshard, *Militärunternehmer Thurgau*, pp. 20-23; Grosjean, *Kriegsgenügen*, p. 133; similarly in the Toggenburg: Menolfi, *Solddienst*, pp. 216-217. In Zug, some communities refused to contribute their contingent to the cantonal force and instead kept their men for local defence: Nussbaumer, *Zuger Militär*, pp. 102-107. Interestingly, a New York militia contingent used the same argument in 1812: Kerby, *Militia System*, p. 114.

<sup>50</sup> The authorities based their claims on the purportedly old feudal law institution of the *Mannschaftsrecht*, but re-interpreted it to suit their absolutist conceptions – Bosshard, *Militärunternehmer Thurgau*, pp. 20-23; Schib, *Geschichte Schaffhausen*, pp. 336-337; Weissen, *Stuer*, pp. 142-143 and 168; Menolfi, *Solddienst*, p. 217. The service obligation was so matter-of-course that it was not laid down in any mandate – Nussbaumer, *Zuger Militär*, pp. 163-164; Jeker, *Rechtsgeschichte Solothurn*, p. 39. With Wyß (*Politisches Handbuch*, 1796), the obligation was defined purely as a citizen’s obligation (*Staatsbürger*, differentiated as *Bürger* (i.e. a city burgher) and *Landmann* (i.e. a rural subject)) – p. 225. Püttmann differentiates between a vassal’s obligations, which arise out of the feudal contract, and a subject’s obligations: *Elementa iuris feudalis*, §2 (p. 2).

<sup>51</sup> Nussbaumer analysed the situation in Zug and believes that the authorities simply did not have the organisational structure or the means to enforce the draft until the late 18<sup>th</sup> C (*Zuger Militär*, p. 165); see also Bosshard, *Militärunternehmer Thurgau*, pp. 20-23; Menolfi, *Solddienst*, pp. 216-218; Weissen, *Stuer*, pp. 169; Jeker, *Rechtsgeschichte Solothurn*, pp. 29 and 63-64.

<sup>52</sup> See DuCange, *subditi* – the word, as a legal technical term, refers to “subjects”; it could mean, more colloquially, persons that have been “subjected” or “conquered” due to e.g. losing a war, but the former, legal reading seems to me the better view. Fritsch writes (*De iure lustrationis*, p. 10): *Primò, quod communi iure armorum usus privatis sit interdictus* (Firstly, that by common law [i.e. HRE Roman law] the use of weapons is prohibited to private persons); in Fritsch’s opinion, the disarming of the populace is desirable since it prevents insurrection and riot, and subjects anyway make bad troops.

prince's military should consist of paid soldiers, since these are well-trained and reliable,<sup>53</sup> supplemented by select draftees incorporated in peacetimes into the shooting associations.<sup>54</sup> The professional soldiers, though, should in Lipsius' recommendation be raised from the monarch's own population; he rejects the argument that a monarch is better off not arming his own peaceful subjects, but buying in troops from bellicose peoples.<sup>55</sup>

### III.2. Rational Natural Law

The legitimation of feudal law and authority were based on the proposition that Pope and Emperor were jointly tasked to deliver the sanctified order of rule on earth to the Redeemer on Judgement Day. Maximilian I's 1495 *Reichsreform* marked the formal demise of the concept of Christendom unified under the secular leadership of the Holy Roman Emperor; the Reformation did the same to the spiritual leadership of the Pope. Legal scholars therefore sought new ways to found laws on a universal basis.<sup>56</sup>

Natural Law – particularly Rational Natural Law (*Vernunftrecht*) – was based on the Roman law<sup>57</sup> concept of *ius gentium*, referring to the law that applied universally among individuals regardless of nationality, a system of law stripped of the peculiar formalities prevailing among Roman citizens and so having universal application.<sup>58</sup> Natural Law theorists from

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On the other hand, Fritsch (*passim*) strongly recommends that subjects also participate in training and manœuvres. The Roman law references Fritsch relies on are mainly in the *codex* and the *constitutiones novellae* sections of the Corpus Iuris, i.e. the pre-Justinian and Justinian imperial decrees, not the “traditional” Roman law from the late Republic and the Principate assembled in the *digesta*.

<sup>53</sup> Fritsch, *De iure lustrationis*, p. 12: “*Quod miles conductitiuus, ad defensionem Principatus longè utilior ac promptior sit, [...]*” (That a hired soldier is far more useful and ready for the defence of the Principality); Tlusty, *Martial Ethic*, p. 13.

<sup>54</sup> Fritsch, *De iure lustrationis*, p. 8: *Certam cohortem exercitorum civium, quos Schützen vulgariter dicimus, elegerunt, eosq[ue] singulariter as hoc privilegiis, quae alia in aliis locis sunt, donarunt*; Iustus Lipsius, *Politicorum doctrina*, pp. 155-158 and 161-163. This was also generally the practice in the German princely states: Mitteis/Lieberich, *Deutsche Rechtsgeschichte*, §42 I 3, pp. 335-336.

<sup>55</sup> Lipsius, *Politicorum doctrina*, pp. 158-161 – well officered, any people can provide useful troops: *si modò exercitati & prudentes viri Dilectui praeponantur, celeriter manum bellis aptam posse aggregari* (on p. 160).

<sup>56</sup> Welzel, *Naturrecht*, pp. 110-111; Meder, *Rechtsgeschichte*, pp. 261-273.

<sup>57</sup> Püttmann, *Elementa iuris fevdalis*, §6 and §19 (pp. 5 and 13-14). Roman law was the subsidiary common law of the Holy Roman Empire, and then of Germany, until 31<sup>st</sup> December 1899. Simler (*De republica*, ff. 139r-139v), by all due respect for Roman law, applauds the fact that the *Tagsatzung* tended to decide *ex bono et aequo*, not according to strict Roman law.

<sup>58</sup> In D.1.1.pr.: *Ulpianus libro primo institutionum: [...] ius naturale est, quod natura omnia animalia docuit; nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, auium quoque commune est. hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: uidemus etenim cetera quoque animalia, feras etiam istius iuris perita censi. Ius gentium est, quo gentes humanae utuntur. quod a naturali recedere facile intellegere licet, quia illud omnibus*

the 17<sup>th</sup> C saw in Natural Law the transcendental grounding of laws that had previously been provided by universal Christianity and secular Empire. The movement had two foci, related but distinct: One was international law, for which the Dutchman Huig de Groot (known as Hugo Grotius) laid the groundwork; the other was constitutionalism, pioneered by Samuel Pufendorf.<sup>59</sup>

In the feudal order, relations between lord and vassal, their respective freedoms, privileges, rights and obligations, were based in the feudal “contract”, which (theoretically) could be freely negotiated.<sup>60</sup> The governing tools of absolutism were the mandates, i.e. privy council or princely edicts: unilateral, top-down legislation through which the authorities sought to institute *gute Policy* – “good policy” or a “well-regulated commonwealth”.<sup>61</sup> It needs to be borne in mind, though, that there was no change in the legal system; technically, feudal law still applied, and the bearers of feudal law privileges and rights resisted the authorities’ overriding and ignoring them.<sup>62</sup>

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*animalibus, hoc solis hominibus inter se commune sit* (Ulpianus in the first book of the Institutions: natural law is [the law] nature taught to all animals, because that law is not peculiar to the human race, but to all animals which are born on earth or in the sea, as well as birds. From this proceeds the union of man and woman, which we call matrimony, from this the procreation of children, and education. For we also see other animals, wild ones too, judged familiar with this law. The law of nations is [the law] used by the human peoples. One may easily see that it is narrower than the natural one, as the latter is common to all animals, the formed only to humans amongst each other); Iustinianus, *Digesta*, Vol. I.

<sup>59</sup> Hugo Grotius (1583-1645 - *de iure belli ac pacis* and *de mare libero*); Samuel Pufendorf (1632-1694 - *de statu imperii germanici liber unus* (published in Geneva under the pseudonym Severinus de Monzambano), *de iure naturae et gentium libri octo*, *de officio hominis et civis libri duo*). For an overview: Welzel, *Naturrecht*; Silvestrini, *Rousseau, Pufendorf*; Dufour, *Histoire et Droit naturel*, pp. 265-284. International law was further developed by the German polymath Christian Wolff (1679-1754) and given its modern form by the Neuchâtelois Emer de Vattel (1714-1767); Hutson, *Sister Republics*, p. 19.

A comprehensive picture can only be drawn by including the works and theories of Jean Bodin (1530-1596), which laid the foundation for Church-independent, secular absolutism – space does not allow here, but for a treatment relevant to the discussion see Brändle, *Revitalisierung*.

<sup>60</sup> Meder, *Rechtsgeschichte*, pp. 224-225; Weissen, *Stuer*, p. 142; Ulrich, *18. Jahrhundert*, pp. 434-437.

<sup>61</sup> Härter, *Gute Policy*, pp. 29-31. Authorities began unilaterally amending local community charters to unify administration across their possessions and so create a territorial government; Peyer, *Verfassungsgeschichte*, pp. 116-118; Messmer, *Luzerner Patriziat*, p. 74-76; Gmür, *Städte als Landesherren*, p. 191; Jeker, *Rechtsgeschichte Solothurn*, pp. 45-46; Schib, *Geschichte Schaffhausen*, pp. 337-338. Lipsius, *Politiorum doctrina*, pp. 69-75.

<sup>62</sup> Mitteis/Lieberich, *Deutsche Rechtsgeschichte*, §42 III, IV, pp. 340-347; Schib, *Geschichte Schaffhausen*, pp. 324-325; conflicts between estates and their rulers were endemic in the period, and in France culminated in the French Revolution; in my view, Tlusty’s “conflict between law and custom” (*Martial Ethic*, pp. 224-232) actually describes this process.

Natural law (like feudal law) still acknowledges a transcendental anchor for legal relationships, but unlike feudal law, where relationships are specific, in natural law, there are two systems of general



In Natural Law, since the sovereign (*le Souverain*) must defend the commonwealth, the sovereign is also endowed with all the tool necessary to achieve that goal, including requiring citizens (*le Citoyen*, occasionally *le Sujet*) to render military service both in times of war and of peace, as the citizen needs to learn the military arts.<sup>63</sup>

### III.3. Burlamaqui – a Key Swiss Exponent of Modern Natural Law

Jean Jacques Burlamaqui (1694-1748) was of a prominent Geneva family. After studying in Geneva, he spent 1720-21 in England and the Netherlands, where he stayed with Barbeyrac<sup>64</sup> in Groningen. Back in Geneva, he taught natural law after Samuel Pufendorf's *De officio hominis et civis* and Roman civil law, and was active in Geneva politics. He was tutor to the prince at the court of the landgrave of Hesse-Kassel 1735-1739. His book *Principes du droit naturel* (1747) was translated into several languages and was immensely popular and influential thanks to its clarity of thought and lucid prose.<sup>65</sup>

For Burlamaqui, Man's Creator endowed him with not just reason and physical capabilities, but also with the will to pursue his happiness (*bonheur*).<sup>66</sup> Unlike the writers propounding an actual social contract,<sup>67</sup> Burlamaqui saw man as by his nature a social

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and abstract rules: overriding natural law, and the law as promulgated and enforced by the authorities. The potential for conflict between the two was fodder for the literature of the time, as epitomised by the plays of Heinrich von Kleist (*Prinz Friedrich von Homburg*, *Michael Kohlhaas*), Friedrich Schiller (*Die Räuber*, *Wilhelm Tell*) or Johann Wolfgang von Goethe (*Faust*), and hearkened back to the conflict already treated in Sophocles' *Antigone*.

<sup>63</sup> Jean Jacques Burlamaqui, *Principes du droit politique*, pp. 290-291; the inconsistency in the terminology suggests that Burlamaqui did not complete the editing of this passage. The content reflects passages in Pufendorf (*De officio hominis*, pp. 280-281 (II Cap. XIII §§1, 2) and p. 303 (II Cap. XIX §§11, 12)); in Cap. XIII, Pufendorf refers to "civis", in Cap. XIX merely to "miles".

<sup>64</sup> Silvestrini, *Rousseau, Pufendorf*. Born in Béziers (Languedoc) in 1674, the family after the revocation of the Edict of Nantes fled to Lausanne, then Geneva and Berlin, where he graduated in theology in 1693. His translations of Pufendorf's *de jure naturae et gentium* (1706) and *de officio hominis et civis iuxta legem naturalem* (1707) into French earned him a professorship in Lausanne 1711. While in Lausanne, he worked on the translation of Hugo Grotius' *de jure belli ac pacis* – the translation was not completed until 1724, by which time (from 1717) he was teaching in Groningen, where he died 1744.

<sup>65</sup> HLS, entry "Burlamaqui". He was not able to finish the sequel, *Principes du droit politique*, and did not want it published in the shape it was in; nevertheless, his heirs were persuaded to publish his notes in 1751.

<sup>66</sup> Silvestrini, *Rousseau, Pufendorf*, pp. 290-295; Burlamaqui, *Principes du droit naturel*, p. 12. The English edition of 1752 uses the term "happiness" – Burlamaqui, *Principles of Natural Law*, trans. Nugent, p. 13. Thomas Jefferson in drafting the Declaration of Independence preferred Burlamaqui's trinity of "life, liberty and the pursuit of happiness" to John Locke's "life, liberty and property" – Antieau, *Natural Rights*, p. 63.

<sup>67</sup> First elaborated by Thomas Hobbes (1588-1679 – *Leviathan*, 1651), the *contrat social* is now closely associated with Jean-Jacques Rousseau (1712-1778 – HLS, entry "Rousseau"; *Du contrat social*, 1762); Welzel, *Naturrecht*, pp. 156-157. Both Hobbes and Rousseau saw man's natural state as one of

beast. Society as such was therefore part and parcel of the natural state; the difference between the natural state and the civic state lay in the institution of government, the appointment of a sovereign tasked with instituting laws. This entailed a certain loss of autonomy for the individual, but not a loss of liberty, since in the natural state, an individual's autonomy was limited by his fellow man's autonomy – so any liberty an individual enjoyed was precarious, at risk of being taken away by fellow man at any time. The institution of government, which through laws limits an individual's autonomy, therefore assures the individual's liberty.

Government was vested with sovereign power, but that power could not be wielded arbitrarily. Unlike the *contrat social* theoreticians, who saw the authority of government defined, circumscribed and limited only by the social contract, Burlamaqui posited the binding provisions of natural law as not just limiting the powers of government, but imbuing government with a positive purpose, i.e. to promote the individual's happiness.

Burlamaqui's grounding of the limitations of government in natural law provides the intellectual legitimation for constitutionally limited government, i.e. the principle that the sovereign may have the power to do anything, but by law not the *right* to do just anything. In the doctrine of the *contrat social* in the mould of Rousseau, the *volonté générale* reigns supreme, there is no protection of individual liberty or minorities.<sup>68</sup>

### III.4. Legal Philosophy and Roman Law in Switzerland

The Swiss cantons had managed to exempt themselves from the jurisdiction of Maximilian's *Reichskammergericht*, so the legal Romanisation that occurred in the Empire did not happen in Switzerland to the same extent.<sup>69</sup>

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isolation, and man took the conscious step to form a society, subject to conditions set out in the social contract. Rousseau's concept of the social contract is a radically democratic one, without any recognition of individual rights or freedom from State intrusion.

<sup>68</sup> Silverstrini, *Rousseau, Pufendorf*, p. 291. Burlamaqui was avidly read and frequently quoted by the American Revolutionary leaders: Antieau, *Natural Rights*; Hutson, *Sister Republics*, pp. 19-22; Halbrook, *Swiss Confederation*, p. 44.

<sup>69</sup> Jeker, *Rechtsgeschichte Solothurn*, p. 38; Gmür, *Städte als Landesherren*, p. 189; Fehr, *Absolutismus*, p. 182; on the other hand, the ideality of the constitution, including the military constitution, of the Roman Republic was consistently extolled by writers and philosophers (e.g. Niccolò Machiavelli in his *Discorsi sopra la prima deca di Tito Livio*, pp. 270-271 and *passim*, and in *I sette libri dell'arte della guerra*, p. 50), where he likens the Swiss to the ancient Romans – Grosjean, *Kriegsgenügen*, p. 134; Halbrook, *Swiss Confederation*, pp. 38-39. Lipsius in his *Politicorum sive civilis doctrina* refers not to the *corpus iuris*, but to Greek and Latin writers of antiquity, especially Cicero, and wrote a commentary (*De militia romana* (1614)) on Polybius' work on the Roman military constitution). The ruling families saw themselves very much in the mould of the *patres*, referring to Zurich as SPQT (*Senatus Populusque Turicensis*): Ulrich, *18. Jahrhundert*, pp. 367-368; Walter, *Niederländische Einflüsse*, pp. 19 and 99-106.

The reception and development of legal philosophy in Switzerland is a more complex question; on one hand, both Lausanne (in the Vaud, Bernese subject territory) and Geneva were at the cutting edge of the European discussion – on the other hand, as influential as Burlamaqui might have been outside Switzerland, it is very hard to discern whether, and if so to what extent, the new constitutional theories informed or even influenced the ruling classes.

That the Swiss were intellectually curious about the new philosophical trends can be shown – Walter does so for the reception of Dutch thought in Zurich and Berne.<sup>70</sup> But it is one thing for individuals, even if in the governing councils, to be interested, and quite another for this to find reflection in the canton's constitution, especially since, as has been shown, there was no formal change to the underlying legal system.

There are several possible reasons for this: For one, there was a fundamental mismatch between the “modern” advice and Swiss practice: Firstly, legal philosophers assumed that the “sovereign” would be an individual, a monarch or prince, whereas all of the cantonal governments were collective;<sup>71</sup> secondly, more importantly, *all* of the cantons relied on militia – none created the professional, standing army which all writers saw as essential for the realisation of the properly governed, well regulated absolutist state.

But mainly, the members of the Swiss ruling *élites* were practical people; they considered themselves and their regiment instituted by God<sup>72</sup> and saw no need for additional legitimation. In good Enlightenment form, they too professed to be solicitous of their subjects’ “happiness”,<sup>73</sup> but very clearly saw it as their duty to define the nature of that happiness

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<sup>70</sup> Also Eisenhut, *Tugenden*; Ulrich, *18. Jahrhundert*, pp. 443-455; the curiosity was not limited to the ruling classes – the “common man” was educated and travelled enough to participate in the discussion: Brändle, *Revitalisierung*, p. 615; Bräker, *Der arme Mann im Tockenburg*.

<sup>71</sup> This is not a given; with a bit of stretch, the “sovereign” can include privy councils or even just the legal conception of sovereignty divorced from any person.

<sup>72</sup> Ziegler, *Das Große Mandat*, pp. 37-38 and p. 3 of the *Mandat und Ordnung Herren Burgermeister kleiner und grosser Rätben der Statt S. Gallen [...] (St. Gallen: Straub, 1611): Ob wol, zu vermehung der Gottforcht unnd erbaren lebens: unnd hingegen zu abschaffung der lastern und unordenlichen wesens, wir vor disem gute Christliche Mandata angestellt, und dieselben offtermals, ..., durch ein weytleiffig Edict erneuieren, unnd siderbar auch zu mehrmalen ofentlich verkünden lassen: der entlichen zuversicht, man solte, auß der pflicht, so ein jedes zuvorderst Gote im himel, und dann der ordenlichen Oberkeit schuldig ist, denselben unweigerlich gehorsam gewesen seyn* (For the benefit, and for the enhancement of the fear of God and the honourable life; and conversely for the abolition of vice and of dissolute habits; we have promulgated this Christian mandate and renewed the same ... through further edicts and have caused it to be re-published several times: in the ultimate confidence that every one, out of duty owed primarily to God in heaven, so also to the properly appointed authority, shall inevitably be obedient). Also Maissen, *Geschichte*, pp. 129-130; Weissen, *Stuer*, p. 142; Ulrich, *18. Jahrhundert*, pp. 366-371; Jeker, *Rechtsgeschichte Solothurn*, p. 43; Messmer, *Luzerner Patriziat*, pp. 68-69.

<sup>73</sup> In both the finality of government and in the aims, this fit with European Enlightenment constitutional and philosophical thought, e.g. Lipsius, *Politiorum doctrina*, 43: *Quis finis quoque actiones omnes*

and to guide their charges, who were not capable of doing so themselves, to that end with a firm but merciful hand. The tools were the mandates, instituting *gute Policey*, with the aim of creating a large, healthy, and wealthy populace, equally obedient to their Lord and their masters.

## IV. THE 2<sup>ND</sup> AMENDMENT – A SIDEWAYS GLANCE

### IV.1. “Sister Republics” – Switzerland and the US in the 18<sup>th</sup> Century

In the late 18<sup>th</sup> C, republican commonwealths in Europe were rare – apart from the small free cities dotted across Europe, only Venice and Switzerland were *bona fide* republics of any size.<sup>74</sup> Of the two, the Swiss legend of William Tell, the entire Swiss foundation myth of successful broad-based popular resistance against a tyrannical prince overstepping the legal boundaries of his rule, fit in very well with the ideological needs of the American revolutionary movement.<sup>75</sup> Besides, who could miss the serendipitous parallel between the Thirteen Cantons of the Swiss Confederacy and the Thirteen Colonies?

Also, the Swiss furnished a large contingent among the American immigrants.<sup>76</sup> Several prominent politicians of early America were Swiss-born, and no doubt brought their political culture with them. Two important ones were John J. Zubly and Albert Gallatin:

John J. Zubly (born Hans Joachim Züblin 1724 St. Gallen, died 1781 Savannah, GA) was an ordained Lutheran minister who moved to Savannah, GA, in 1760. He agitated against the British Crown’s tax policy in the Colonies, reminding King George III in a London-published 1775 pamphlet that a handful of Swiss had defeated and defied the might of Habsburg over just such a question. He was member of the Georgia delegation at the

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*Princeps dirigit? Bonum publicum id esse ... Nam moderatori reipub[licae] beata civium vita proposita est ... Nec rempublicam tuam esse, se te reipublicae* (What is the end to which every Prince directs his action? It is the common good... For the happy life of the citizens is prescribed to the rulers of the commonwealth... For the commonwealth is not yours [i.e. the Prince’s], but you are the commonwealth’s).

<sup>74</sup> Simler, *Regiment der Eydgenossenschaft*, p. 3; Hutson, *Sister Republics*, p. 9.

<sup>75</sup> In 1768, Henry Miller (formerly Johann Heinrich Möller, from Basel, 1702-1782) published a William Tell songbook in Philadelphia, in German: Hutson, *Sister Republics*, pp. 14-17. The first musical written and performed by Americans opened in New York City on 18<sup>th</sup> April 1796: William Dunlap’s *The Archers, or the Mountaineers of Switzerland*, essentially the William Tell story, and met with appreciative audiences: Hutson, *Sister Republics*, p. 30; Halbrook, *Swiss Confederation*, pp. 34-45.

<sup>76</sup> How large is impossible to determine, as Switzerland is landlocked, and US immigration records list only the immigrants’ port or country of departure. Also, the Swiss have no own, identifying language: Hutson, *Sister Republics*, pp. 13-15. A sizeable number of the Revolutionary War soldiers were Swiss, and the Pennsylvania or Kentucky rifle was developed from the Swiss *Jäger* rifle by Martin Meylin, a Swiss gunsmith originally from Hedingen, Zurich – Hutson, *Sister Republics*, p. 18.

Continental Congress 1775, but could not bring himself to agree to a break with the Crown and went into exile in 1777 for two years.<sup>77</sup>

Albert Gallatin (born 1761 in Geneva, died 1849 Astoria, NY). Emigrated 1780, first professor at Harvard, 1789 Representative in the Pennsylvania legislature, 1790 elected to the House, 1793 the Senate; Treasury Secretary under Thomas Jefferson 1801-1813, then US ambassador in St. Petersburg, at the Congress of Ghent, Paris and London.<sup>78</sup>

In the constitutional discussion, the Antifederalists argued that the Swiss Confederacy “worked” and there was no need for a federal constitution, drawing on sometimes heavily romanticised descriptions of Swiss conditions.<sup>79</sup> For the Federalists, the reality of the Swiss Confederation showed up the inadequacies of a confederacy, and militated for a federal constitution – a position that ultimately won.<sup>80</sup>

## IV.2. Legislative Environment of the 2<sup>nd</sup> Amendment

The leading politicians of the various States did not operate in a vacuum, but were intimately acquainted with the philosophical streams and political realities of 18<sup>th</sup> C Europe. Though the Antifederalists “lost” the argument on a Federal Constitution, by way of compromise they “won” on their main criticism: The lack of a bill of rights. Without a bill of rights, the sovereign (i.e. Congress and the President) *could* pass a valid and binding law that violated Natural Law and was therefore illegitimate.<sup>81</sup> This was eventually corrected by the first ten Amendments adopted in 1791, which included two clearly inspired by the Swiss tradition: The 2<sup>nd</sup> (and the 10<sup>th</sup>) Amendments.<sup>82</sup>

The Colonies initially followed the British example on militia. While there are again differences between the various Colonies, the militia proved ineffectual in both defence against Native attacks and in the North American theatre of Britain’s wars; issues of cost

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<sup>77</sup> Hutson, *Sister Republics*, pp. 17-18; Halbrook, *Swiss Confederation*, pp. 34-36 and 43-44; Cornell/DeDino, *Well Regulated Right*, p. 493; HLS, entry “Züblin, Hans Joachim”.

<sup>78</sup> Halbrook, *Swiss Confederation*, pp. 64-66; Cornell/DeDino, *Well Regulated Right*, p. 497; HLS, entry “Gallatin, Albert de”.

<sup>79</sup> Some of the sources were serious and legitimate, others written “in a purple prose that seems excessive even for a promoter of tourism”; John Adams, the US’ minister in London, wrote to the Constitutional Convention in April 1787 with a survey of the Swiss cantons’ constitutions culled from these sources – Hutson, *Sister Republics*, pp. 24-29; Halbrook, *Swiss Confederation*, pp. 45-57; Adams, *A Defence*, pp. 22-56. Adams deals with the militia only in his letter on Berne (pp. 38-39), referring to the general service obligation, the individual’s duty to purchase his own arms and uniform, and the *äussere Stand* (Fn 21).

<sup>80</sup> ... and informed the framers of the first Swiss Federal Constitution in 1848: Hutson, *Sister Republics*, pp. 29-38; Hamilton/Jay/Madison, *The Federalist*, pp. 137-139 (Federalist XIX).

<sup>81</sup> Cf. the section on Burlmaqui, III.3, esp. *in fine*. Anderson/Cayton, *Dominion*, p. 189.

<sup>82</sup> Halbrook, *Swiss Confederation*, pp. 56-57 and 69; Hutson, *Sister Republics*, p. 29 (without claiming the 2<sup>nd</sup> Amendment as Swiss).

of defence and the corresponding tax load, as well as objections to the compulsory nature of service, dogged the political discussion. When fighting troops were needed, both the Colonies and the British government recruited standing troops in the Colonies for limited terms, often from classes of the population that were not eligible to join the militia; the militia administration essentially provided muster rolls, no more.<sup>83</sup>

Britain itself did not have a fighting militia after the 17<sup>th</sup> C, and the British troops the Colonists encountered during King George's War (War of Austrian Succession), the French and Indian War (Seven Years' War) and the Revolutionary War were all standing army or mercenaries. Especially during the Revolutionary War, they were seen as an instrument of oppression. Therefore, Britain could not serve as model for the States.<sup>84</sup>

The Swiss military organisation offered a template for an effective militia without a standing army. Indeed, the State militia laws referenced by Cornell and DeDino read very much like the Swiss cantons' militia mandates,<sup>85</sup> and Halbrook shows the direct influence of the Swiss model on State and federal legislation, including the 1792 federal Militia Act which – just like the Swiss mandates – required all male citizens to enrol in the State militia and equip and arm themselves.<sup>86</sup> The right to bear arms therefore is neither a private right

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<sup>83</sup> For Pennsylvania: Ward, *Army of Servants*; New England: Anderson/Cayton, *Dominion*, pp. 162-166. The militia proved ineffectual in Shays' Rebellion 1786, leading to the Militia Act of 1792: Kerby, *Militia System*, pp. 106-107; Anderson/Cayton, *Dominion*, p. 186. British mobilisation of Colony forces in the Seven Years' War – successful, in the event – depended on offering generous terms to volunteers: Anderson, *Crucible*, pp. 228-231.

<sup>84</sup> Anderson/Cayton, *Dominion*, p. 189. For the discussion in England (and, with differences, in Scotland) in the 17<sup>th</sup> and 18<sup>th</sup> C, in terms of a standing army being at odds with ancient freedoms, see the references in Metzger, *Milizarmee im Republikanismus*, pp. 245-337. While the militia remained as an institution, the reality was that from the 17<sup>th</sup> C onwards, Britain's fighting military was the standing army, mostly recruited or pressed from classes that were excluded from the militia. Houlding, *Fit for Service*, mentions the militia only in passing. Anderson/Cayton, *Dominion*, pp. 770-771 (n. 26): "The authorized strength of the English militia was 32,000, but the only time that more than 16,000 men actually served was at the height of the French invasion threat of 1759. Even at its theoretical maximum, the English militia would have amounted to less than 3.3 percent of the male population in the sixteen to thirty age range" (with references). For a literary reference to the British militia and the low standing of its officers, see Jane Austen's *Pride and Prejudice*. Breihan/Caplan, *Jane Austen and the Militia*.

<sup>85</sup> Cornell/DeDino, *Well Regulated Right*, pp. 508-510; Kerby, *Militia System*, pp. 108-109, though they do not draw any Swiss references; referring to Switzerland as model: Hummel, *American Militia*, pp. 52-53. Both Zubly and Gallatin, at different times and in different ways, contributed to the discussion on the drafting and the interpretation of these provisions.

<sup>86</sup> Halbrook, *Swiss Confederation*, pp. 56-57 – the link between citizenship (i.e. the right to vote), bearing of arms and military service – typical for the *Landsgemeinde* cantons (Fn 10) – is evident here. The militia concept did not endure; for its westward expansion into Native American lands, the US needed standing troops (Anderson/Cayton, *Dominion*, pp. 192-193). But George Washington, as president, in 1794 called up an army of 12,950 men from various State militias to

of individuals nor a collective right of states; it is a civic right, one exercised by citizens (and only them), acting together for a public purpose;<sup>87</sup> like voting, it is an act of participation in government, not one of opposition to government.

## V. CONCLUSIONS

There is very little in Swiss academic literature on the philosophical grounding of the militias, both in contemporary sources as well as with modern historians, regardless of political outlook.<sup>88</sup> One reason may certainly be that Swiss history for the period is not particularly “sexy”. It is only recently that academic interest is focussing on the 18<sup>th</sup> C in a comprehensive manner.<sup>89</sup>

As repeatedly stated, there was no formal change to the legal system – technically, feudal law still applied;<sup>90</sup> but, as a reading of e.g. Wyß demonstrates, by the late 18<sup>th</sup> C, modernising commonwealths like Zurich had achieved such a “density” of legislation that one can (as Wyß does) speak of a constitutional order that had (nearly) fully overlaid the feudal law substrate.<sup>91</sup>

It is clear that the cantonal oligarchies saw themselves in the mould of the kindly and wise, strict but just, father of their subjects, demanding obedience, educating and guiding but not overburdening their wards, entirely in the absolutist tradition. It is equally clear that they had neither the will nor the means to enforce the absolutist principle.

A key factor is parsimony,<sup>92</sup> which operates at several levels and reveals a vicious (or virtuous) circle: Enforcement required a standing force beholden *only* to the “sovereign”,

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put down the Whisky Rebellion. The effort must have been more convincing than the fiasco in confronting Shays’ Rebellion, since the rebels dispersed before there was action: Anderson/Cayton, *Dominion*, pp. 197-202. Some of the militia performed dismally in the War of 1812, but as in Switzerland, the numerous successful actions carried by some militias show that the weaknesses of the militia system lay in the implementation, not in the principle: Kerby, *Militia System*, pp. 105-107, 120-124 and *passim*.

<sup>87</sup> Cornell/DiDino, *Well Regulated Right*, p. 491.

<sup>88</sup> With obvious exceptions, e.g. Brändle, Gmür, Jeker, Nussbaumer, Peyer, or Walter. Metzger’s thesis over 400 pages deals with the philosophical discussion in England on the militia in the 17<sup>th</sup> C and in the US, but shows no curiosity about the Swiss or even Continental European debate; Studer Immenhauser’s nearly 500 pages avoids mention of the military administration.

<sup>89</sup> Nussbaumer, *Zuger Militär*, pp. 11 and 23 – though much remains to be done, from the preparatory sifting of the – abundant – sources to reflections on a conceptual framework.

<sup>90</sup> The liquidation of feudal rights required by the secularisation of the ecclesiastical estates by Napoleon and then the dissolution of the Holy Roman Empire 1803-1806 were a massive undertaking in legal and actuarial terms.

<sup>91</sup> Püttmann – author of a restatement of feudal law – and Wyß were contemporary.

<sup>92</sup> Peyer, *Verfassungsgeschichte*, pp. 95 and 129; Nussbaumer, *Zuger Militär*, p. 27.

i.e. the privy council, which would have been expensive. Increased tax revenue would have been required, and that could only have come from oppressively higher taxes on the subjects, who would easily have realised that their taxes went to fund the instrument of their oppression.<sup>93</sup> And so the concept went against two fundamental principles of the feudal constitution: That the estate's military might was the responsibility of all feudatories, and that the raising of taxes required the consent of the feudatories.<sup>94</sup>

It cannot be said that the ruling classes were soft – they had no compunction to ruthlessly assert their power when it was threatened, as in the Peasants' War; they had no reservations about risking their subjects' lives in pursuit of their political interests, as they did in both Villmergen Wars. But clearly, there was enough wealth to go around for the rulers to come to the judgement that the marginal cost of increasing their power was greater than the benefit – the mantra-like restatements of the mandates were meant to reiterate the *claim* of authority, while at the same time the authorities made no serious effort at enforcement. On the contrary, they alleviated the economic effects a harsh enforcement of their mandates would have caused. So instead of deeply held philosophical principles or lofty ideals, there is only the realisation that properly oppressing the subjects was just too expensive and would have been too much hassle.

Statecraft does deserve its place: Since the Confederacy's birth, no single canton or alliance of cantons had the might to impose itself on the others; in the constantly shifting alliances, today's winners were quite conscious that they might be tomorrow's losers, so dispute settlements as much as possible sought to re-establish the *status quo ante*. The ruling classes had a commitment to certain principles of statecraft (collective decision-making, live-and-let-live, no standing troops, parsimony) that gave the Confederacy stability, which allowed for general prosperity and a dynamism in the creation of modern administrative structures.<sup>95</sup> It also created a bewildering diversity, which paradoxically was so distinctive that a Swiss identity emerged, recognised in Switzerland and outside.

Diversity meant that everyone had a special deal; this was so for the cantons among themselves, but also within the cantons. Every community had some jealously guarded *acquis* which distinguished it from its neighbour and which was implicitly or explicitly guaranteed

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<sup>93</sup> So explicitly outlined by Wyß, *Politisches Handbuch*, pp. 221-222; also Brändle, *Revitalisierung*, p. 611; Grosjean, *Kriegsgenügen*, pp. 154-156. The generally low tax burdens went a long way to explaining the subjects' quiescence: Ulrich, *18. Jahrhundert*, p. 369. Interestingly, none of the cantons formed anything like a Praetorian Guard, a small and therefore affordable, but professional force beholden to the privy council.

<sup>94</sup> Peyer, *Verfassungsgeschichte*, p. 119; Messmer, *Luzerner Patriziat*, pp. 69-70.

<sup>95</sup> Studer Immenhauser shows the innovative drive in successful city-states (here: Berne) already in the late Middle Ages, though unfortunately does not address the military side at all.



by the others, and could be lost if that community overplayed its hand.<sup>96</sup> So though such special deals went against the principles of absolutism, the authorities (true to the Roman adage *divide et impera*) used them to their advantage.<sup>97</sup> They didn't sweat the small stuff and chose their fights; and when they fought, they made sure they won.

The fact that the armed might of the commonwealth lay in the people, and was not beholden to the rulers, firmly anchored the constitutional structure. Though it was evidently less than ideal in terms of military effectiveness, the communities retained a key role in the military organisation. Never mind how lackadaisical and occasionally farcical the day-to-day reality was, the fact remains that both rulers and subjects in principle agreed that defence of the commonwealth was a community matter. In that, the Swiss remained resolutely rooted in feudal concepts.<sup>98</sup>

Regarding the military side as such, two aspects deserve to be emphasised:

- By no means did the militia organisation emerge as flawed in principle – at least since Villmergen II (where both Berne's and Zurich's forces performed well), Berne and Zurich, the two military heavyweights of the Confederacy, took pains to be up to date. The Swiss collapse in front of Napoleon was primarily political; while it is fanciful to pretend that Berne – or the Confederacy, had it managed to get its military act together – stood a chance against Napoleon's troops, its militia acquitted itself well.
- The organisation that was required in order to recruit, train, arm, equip, supply and pay for the impressive militia troop numbers was a key driver in the modernisation of the administration.

Despite the comprehensive defeat inflicted by Napoleon, Switzerland re-emerged not just in its external borders, but in its internal structure as well, and again as a Confederacy.<sup>99</sup>

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<sup>96</sup> Gmür, *Städte als Landesherren*, p. 188; as Gmür (p. 190) points out, this also rationalised the disenfranchisement of the rural subjects by the city burghers, for if you give legal equality, why not political equality?

<sup>97</sup> Fehr, *Absolutismus*, pp. 188-190 – they even gave the communal institutions additional responsibilities, which reduced the authorities' financial and administrative burden; Jeker, *Rechtsgeschichte Solothurn*, pp. 45-48; Messmer, *Luzerner Patriziat*, pp. 70-71: The ruling *élites* also always set aside their internal quarrels when confronted with subject insurrection.

<sup>98</sup> Jeker, *Rechtsgeschichte Solothurn*, pp. 67-68. It is certainly ironic that the one country in Europe that lived off the business of providing standing *élite* troops to foreign princes, for its own military constitution followed the advice of military and constitutional philosophers alike and relied exclusively on an autochthonous military (though not, as those same philosophers recommended, *professional* troops).

<sup>99</sup> *Sans* subject territories or ecclesiastical principalities. Though not for want of trying – Napoleon's Helvetic constitution had dissolved the cantons and created a centralised state with new administrative districts. Despite the subject territories' initial welcome of the French troops, their high-

it did not abandon faith in the militia principle, and reverted to cantonal militia immediately after Napoleon's ouster.<sup>100</sup>

Ultimately, never mind how far removed the aristocratic patrician or lordly guildmaster was from his disenfranchised urban or rural subject, they all, at a very basic level, seem to have firmly believed in a common political fate. In the 19<sup>th</sup> C, the distinctiveness of Switzerland's political culture nurtured through the 17<sup>th</sup> and 18<sup>th</sup> C allowed the Swiss body politic to leverage the Swiss identity to forge a functioning democratic polity out of twenty-five cantons divided by four languages, two religions, and several cultures.<sup>101</sup>

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handedness and depredations doomed the Helvetic constitution. A federal constitution had to wait until 1848: Maissen, *Geschichte*, pp. 160-171.

<sup>100</sup> Nussbaumer, *Zuger Militär*, p. 205. Until the forming of national military structures, private officers' associations sought to raise technical knowledge, skill and training of both officers and troops – Eugster/Jäger/Bänziger, *Appenzellische Offiziersgesellschaft*, pp. 17-27; the *Theoretisch-practische Anleitung zum Gebrauch des Bajonets als Stoß- und Schlagwaffe, Führung des Morgensterns und Säbels [etc.]*, was put together from various sources by a Grisons officer formerly in French and Swiss service and printed by subscription in 1837 (Zürich: Schulthess, 1837).

<sup>101</sup> Peyer, *Verfassungsgeschichte*, pp. 145-146; Ulrich, *18. Jahrhundert*, pp. 366-367; Fehr, *Absolutismus*, p. 202.

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- HLS: *Historisches Lexikon der Schweiz / Dictionnaire Historique de la Suisse / Dizionario storico della Svizzera* <<http://www.hls-dhs-dss.ch>>