

Religion and the Secular State in Switzerland

I. INTRODUCTION

Today, Switzerland is a secular state in which state and religion are in principle separated. This does not mean, however, that religion is totally banned from public law. On the cantonal level, the state acknowledges a privileged status to different important religious communities. Moreover, the state reacts to the rise of religious plurality. It tries to solve the legal and factual problems which occur due to the emergence of non-western religious communities. The focus of the state policy is to a lesser extent on the laity of the state than on the religious neutrality; in areas which are of interest for the state, it cooperates with the religious communities.

The present contribution explains the basic norms concerning the regulation of the relationship of the state and the religious communities in the Swiss Confederation. Along with the description of the current development and some exemplary court decisions these norms will illustrate the secular state's position concerning religious matters.

II. HISTORICAL AND SOCIAL CONTEXT

Like elsewhere, the constitutional law on religious matters in Switzerland is the result of a long historical development. It responds to more recent denominational developments as well. Without any claim of completeness, this paper begins with a few references to the historical development. This may provide for better understanding of the current system.

At the beginning of the 16th century, the Swiss Confederation consisted of a conglomerate of autonomous counties which were connected by a network of alliances.¹ Depending on their positions, these counties were either fully autonomous or only allocated. Other parts of today's Switzerland were tributary districts of one or several of these counties. Until the end of the Middle Age, people in the counties naturally identified with the one and only Christian church. The splitting of belief of the churches in the wake of the Reformation was an important test for the system of alliances of the Confederation. Some of the counties turned to the Reformation, whereas others stayed with the old belief. To solve the conflict of belief in the common tributary districts, the first *Landfriede* (land peace) was concluded in Kappel near Zurich in 1529. This grew from the religious

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1. On the constitutional history of Switzerland in general, see Hans Conrad Peyer, *Verfassungsgeschichte der alten Schweiz* [*Constitutional History of the Old Switzerland*] (Zurich: Schulthess, 1978); *Handbuch der Schweizer Geschichte*, vols. I & II (Zurich: Berichthaus, 1980); René Pahud de Mortanges, *Schweizerische Rechtsgeschichte* [*Swiss Legal History*] (Zurich: Dike, 2007); Comité pour une Nouvelle Histoire de la Suisse, ed., *Geschichte der Schweiz und der Schweizer* [*The History of Switzerland and the Swiss*], 3rd ed. (Zurich: Schwabe, 1986); Alfred Kölz, *Neuere Schweizerische Verfassungsgeschichte* (*Newer Swiss Constitutional History*), vols. I & II (Bern: Stämpfli, 1992 and 2004); Andreas Kley, *Verfassungsgeschichte der Neuzeit* [*Constitutional History of Modern Times*], 2nd ed. (Bern: Stämpfli, 2008). For a concise overview of the history of the Swiss state church legislation, see Dieter Kraus, *Schweizerisches Staatskirchenrecht: Hauptlinien des Verhältnisses von Staat und Kirche auf eidgenössischer und kantonaler Ebene* [*Swiss State Church Law: The Main Lines of the Relationship of State and Church on Federal and Cantonal Level*] (Tübingen: Mohr, 1993), 14 ff.

principle of territorial exclusivity (*cuius regio, eius religio*). The denominational variation among groups from county to county was recognized on the level of the constitution. The living together of the two Christian denominations in the tributary districts nevertheless led to several armed conflicts. The complete constitutional equality of the two denominations (*parity*) in the tributary districts was not established until the fourth *Landfriede* (land peace) of 1712.

In the fully autonomous counties, however, the denominational exclusivity remained until the end of the old Confederation in 1798. Whoever did not want to be part of the official religion could move away, but had to leave his possessions. Only a few protestant counties mercifully granted an *ius emigrandi*. Even until 1847, denominational disputes led to armed conflicts between the cantons. Only in the Constitution of the young Confederation which was founded 1848 after civil war (*Sonderbundkrieg*) was the freedom of conscience established as a fundamental right, though restricted to the Christian denominations. For Jews, there was neither a freedom of belief nor a freedom of establishment at first. In the old Confederacy they could only in the “Jewish villages” of Eendingen and Lengnau on the German border. Their dead could only be buried on an island in the Rhine.² The denominational restrictions of the freedom of establishment and religion were dropped in 1866 and 1847. With the revision of the Constitution in 1874, a number of denominational exception norms aiming at the Catholic Church were introduced. These norms were not removed until 1979, 1999, and 2001.³

The federal census of 2010⁴ reports the following religion affiliations among the Swiss population: 38.8 percent Roman Catholic Church; 30.9 percent Swiss Protestant Church; 0.2 percent (17,914 people) Jewish; 4.5 percent Islamic communities; 5.5 percent to various other Christian and non-Christian religious communities. 20.1 percent of the population calls itself “irreligious”. The numbers concerning religion and denominations have been relatively unchanged for a long time. Only in the decades after World War II has the religious landscape evolved.⁵ Due to migration of workers from Italy and Spain, which are traditionally Catholic countries, the number of Catholics in the population rose considerably until 1970. Since the mid-1970s, foreign workers have been increasingly recruited from the traditionally Christian Orthodox and Muslim areas of South Europe. During the Balkan wars in the nineties, Switzerland took in many refugees from the former Yugoslavia. The number of Muslims has been multiplied by fifteen since 1970; the Muslims now constitute the third biggest religious community in Switzerland.⁶

Simultaneous to the religious multiplication, the percentage of persons without a religious denomination rose from 1.5 percent in 1970 to 20.1 percent in 2010. Particularly in the urban centers of Switzerland, like Zurich, Basel and Geneva, the moving away from churches is pronounced. In the cantons of Basel-Stadt and Geneva, the Roman Catholic Church and the Protestant Church are confronted with a dramatic loss of members. In the

2. See Willy Guggenheim, Florence Guggenheim-Grünberg, and Ralph Weingarten. *Juden in der Schweiz: Glaube-Geschichte-Gegenwart* [Jews in Switzerland: Faith, History, Present] (Zurich: Kurz, 1982).

3. These included the prohibition of Jesuits and convents, the prohibition of electing clerks into the highest federal authorities and the so-called bishopric article. Compare with Kraus, supra n. 1 at 142 ff; Christoph Winzeler, *Strukturen von einer “Anderen Welt”* [Structures of an “Other World”], vol. 2 of *Freiburger Veröffentlichungen zum Religionsrecht* (Fribourg: Schulthess, 1998).

4. Bundesamt für Statistik, ed., *Eidgenössische Volkszählung [Federal Census] 2010*; see also *Religionslandschaft in der Schweiz [Religious Landscape in Switzerland]* (Neuenburg, 2011), 1 ff.

5. Werner Haug, “Die Religionsgemeinschaften der Schweiz im Spiegel der Volkszählung [Switzerland’s Religious Communities in the Mirror of the Census],” in *Kooperation zwischen Staat und Religionsgemeinschaften nach schweizerischem Recht. Coopération Entre Etat et Communautés Religieuses Selon le Droit Suisse [Cooperation between the State and Religious Communities under Swiss Law]*, eds. René Pahud de Mortanges and Erwin Tanner, vol. 15 of *Freiburger Veröffentlichungen zum Religionsrecht* (Zurich: Schulthess, 2005), 13 ff.

6. Marcel Heiniger, “Muslime und Musliminnen in der Schweiz – ein statistischer Überblick [Muslims and Muslim Women in Switzerland – A Statistical Overview],” in *Muslimen und Schweizerische Rechtsordnung. Les Musulmans et L’ordre Juridique Suisse [Muslim and Swiss Legal Systems]*, eds. René Pahud de Mortanges and Erwin Tanner, vol. 13 of *Freiburger Veröffentlichungen zum Religionsrecht* (Fribourg: Academic Press Fribourg, 2002), 6.

more rural regions of Switzerland, the decrease is smaller, but even there the tie between the members and their churches is becoming more of a formality, with services of churches increasingly sought only for baptisms, funerals, and weddings. On the other hand, it is remarkable that most Swiss remain members of their churches despite considerable church taxes. They consider that their church nevertheless does something useful, even though they do not need it for their own purposes.

III. CONSTITUTIONAL AND POLITICAL CONTEXT

After the counties had held the church sovereignty during the Ancien Régime, the framers of the federal state of 1848 abstained from stipulating a federal competence in this field. According to the effective Federal Constitution (hereafter “Constitution”),⁷ which entered into force in 2000, the following applies: The relationship between the churches and the state is governed by the cantons.⁸

The federal state itself does not have a religion and does not favor any religion. On this level, the state and religion are in principle separated. The preamble of the Federal Constitution indeed starts with the invocation of God (“In the name of God Almighty!”). This is supposed to point out the existence of a higher power besides the people and the state. The invoked God must not only be understood in its Christian meaning; nor shall thus be founded a Christian state. The separation of the state and religion is not explicitly mentioned in the Constitution, but is derived from the freedom of religion which is protected directly on the level of the Constitution like the other fundamental rights. According to Article 15 of the Constitution, the freedom of religion and conscience is guaranteed.

In Switzerland, apart from the freedom of religion, which has been developed by the Swiss Supreme Court, the majority of the state church law is cantonal law. Therefore, with 26 cantons, we have 26 *different systems of state church law*. Politicians adhere to the cantonal sovereignty in this matter; this policy finds its justification in the small-area spaces and the considerable linguistic and cultural differences between the cantons. However, the basic allocation of competences cannot prevent the Confederation from legislating on religiously relevant issues like pastoral care in the army, development aid, or asylum and refugee laws.

The Federation of Swiss Protestant Churches (FSPC) has formulated suggestions for a framework article in the Federal Constitution a few years ago.

This could have been a legal basis for the regulation of the relationship between the state, the churches and other religious communities.⁹ But these suggestions were met with little interest by political parties because they were perceived as a turning away from the secularism by the Confederation. In accordance with that, there is *no administrative office* at federal level which deals with religious questions. The religious communities have to seek different contact persons in the federal administration depending on their factual question. If a member of the Federal Council receives religious communities, it generally only happens in the form of a delegation which contains members of all the important religious communities. By this means they aim to avoid that a religious community has a privileged access to the supreme federal public authorities.

The majority of the political parties keep a certain distance towards the religious communities as well. In the past years, the “Christlichdemokratische Volkspartei” (CVP), which was the party of the Catholics until the 1970s, has deliberately distanced itself from the position of the Roman Catholic Church in multiple factual questions. The other big

7. Bundesverfassung der Schweizerischen Eidgenossenschaft [Federal Constitution of the Swiss Confederation] of 18 April 1999 (SR 1010).

8. Id. art. 72.

9. See Ueli Friederich, Roland J. Campiche, René Pahud de Mortanges, eds., *Bundesstaat und Religionsgemeinschaften. Etat Fédéral et Communautés Religieuses [State and Religious Communities]*, supp. 4 of *Schweizerisches Jahrbuch für Kirchenrecht* (Bern: Peter Lang, 2003), 93 ff.

political parties have a party platform with a neutral philosophy of life. A few other small parties have a party platform with a religious character, but these parties are of little importance in the political process. The religious communities, therefore, present today just one voice among many others in the political life of Switzerland – this besides the parties, labor unions and lobbying-organizations.

IV. LEGAL CONTEXT I: RELIGIOUS FREEDOM

Article 15 of the Constitution guarantees the freedom of religion, which, for historical reasons, is called “freedom of conscience and belief” in Switzerland.¹⁰ The constitutional text reads as follows:

Paragraph 1: Freedom of religion and conscience is guaranteed.

Paragraph 2: Everyone has the right to choose freely their religion or their philosophical convictions, and to profess them alone or in community with others.

Paragraph 3: Everyone has the right to join or to belong to a religious community, and to follow religious teachings.

Paragraph 4: No one shall be forced to join or belong to a religious community, to participate in a religious act, or to follow religious teachings.

Paragraphs 2 and 3 reinforce the principle of paragraph 1. The list does not have to be understood as conclusive; just some important examples of the protected activity are enumerated. Religious freedom covers the *inner* freedom to choose to believe or not as well as the *external* freedom to express, practice and spread the religious and philosophical convictions within certain boundaries.¹¹ Whereas paragraph 2 and 3 treat the *positive* part of the protected freedom of religion, paragraph 4 lists important cases of the *negative* part of the matter. The positive aspect of the freedom of religion protects in particular the religious or philosophical self-determination of each person and the (even collective) practice of his convictions in this regard. Concerning the negative content of the freedom of religion, the primary objective is to protect people from state constraint in religious matters; a religious act cannot be imposed.¹² As several court rulings show, problems center to a lesser extent on the apparent constraint than in the hidden, indirect constraint.

Freedom of religion is not limited to granting the individual subjective rights. Beyond that it also features objective and programmatic contents. The state, for example, is obliged to denominational and religious *neutrality*: any state partisanship shall be prevented to protect religious peace. This commandment is not absolute, however; the cantons may recognize individual religious communities under public law due to their church sovereignty. These recognized religious communities are thereby subjected to better conditions than the others who are not so recognized. This privilege has to be based on factual reasons; otherwise Article 8 of the Constitution (“equality before the law”) would be violated.¹³ Moreover, this neutrality does not obligate a ban on the topic of

10. See also Christoph Winzeler, *Einführung in das Religionsverfassungsrecht der Schweiz [Introduction to the Constitutional Law on Religion in Switzerland]*, 2nd ed., vol. 16 of *Freiburger Veröffentlichungen zum Religionsrecht* (Zurich: Schulthess, 2009), 15 ff; Kraus, supra n. 1 at 73 ff.

11. BGE (decision of the Supreme Court of Switzerland) 118 Ia 56; 119 Ia 184; Andreas Kley, Urs Josef Cavelti, Bernard Ehrenzeller, Philippe Mastronardi, Rainer J. Schweizer, and Santander Vallender, eds., *Die Schweizerische Bundesverfassung [The Swiss Federal Constitution]*, 2nd ed. (Zurich: Dike/Schulthess, 2008), note 6 to art. 15 Cst.; Jörg Paul Müller, *Grundrechte in der Schweiz [Fundamental Rights in Switzerland]* (Bern: Stämpfli, 1999), 86; René Rhinow, *Grundzüge des Schweizerischen Verfassungsrechts [Basic Features of Swiss Constitutional Law]* (Basel: Helbing and Lichtenhahn, 2003), n. 1344/1348.

12. Jean-François Aubert and Pascal Mahon, eds., *Petite Commentaire de la Constitution Fédérale de la Confédération Suisse du 18 Avril 1999* (Zurich: Schulthess, 2003), n. 5 ff to art. 15 Cst; Winzeler, supra n. 10 at 24 ff.

13. See Cla Reto Famos, *Die Öffentlichrechtliche Anerkennung von Religionsgemeinschaften im Lichte des Rechtsgleichheitsprinzips [The Public Legal Recognition of Religious Communities in the Light of the Legal Principle of Equality]*, vol. 6 of *Freiburger Veröffentlichungen zum Religionsrecht* (Friborg: Schulthess, 1999),

religion from the public sphere or, for example, from schools. Schools are indeed not allowed to identify with a particular or specific religious view – of the majority or minority – which would create a disadvantage for the members of other denominations.¹⁴ The phenomenon of religion has to be considered at school however; an anti-religious attitude or a militant laicism would not be neutral.¹⁵

The fundamental right protects primarily *individual* persons. According to the jurisprudence, freedom of religion can only be invoked by *juristic* persons if they pursue a religious purpose¹⁶. Juristic persons of the economic life are denied the right to invoke the freedom of religion. Therewith, the Swiss Supreme Court protects at the same time the church taxes of juristic persons which are provided for in some cantons. If a corporation has to pay church taxes according to cantonal law, it cannot argue that a majority shareholder is not a member of the churches recognized under cantonal public law, for example.¹⁷

According to the current legal situation, it has to be assumed that religious communities recognized under public law, in particular the Protestant and Catholic national Churches, cannot invoke Article 15. With the recognition under public law, the respective religious community becomes a state institution. The state does not have a fundamental right against itself in principle. According to the doctrine, the churches recognized under public law should at least have the possibility of accessing the Swiss Supreme Court if they act on behalf of their members.¹⁸ A number of authors think that the national churches need to have a comprehensive right of self-determination. In other words, the *corporate* dimension of the freedom of religion needs to be extended.¹⁹

Like every fundamental right, the freedom of religion can be restricted. In accordance with Article 36, such a *restriction* requires a legal basis, a public interest, and has to be proportionate. Moreover, the essence of the freedom of religion must not be restricted. Sometimes, such restrictions result from the positive law itself, like for example from Article 72, Paragraph 2 of the Constitution: the Confederation and the cantons can take (police) measures to protect the public order between the members of the different religious communities. In other cases, the authorities have to undertake a balancing of the legally protected interests.

This balancing has to withstand the control of the Swiss Supreme Court should the situation arise²⁰. However, the restriction must not touch the *essence* of the fundamental right in any case. What this essence includes must be concretized by the jurisprudence and the doctrine. Part of the essence certainly is the prohibition to force someone into becoming a member of a denomination, not part of the essence is the public practice of a denomination, and thus any public demonstrations or actions in relation with worship services.²¹

According to Article 35, Paragraph 3, the authorities have to arrange for the fundamental rights to be effective between individuals if they are suitable. Thus, the Constitution accepts an indirect (respectively collateral) *horizontal effect* of fundamental rights; state norms therefore have to be interpreted in compliance with the fundamental rights. In connection with the freedom of religion, this is of importance for the labor law,

101 ff; Felix Hafner and Georg Gremmelspacher, "Islam im Kontext des Schweizerischen Verfassungsrechts [Islam in the Context of the Swiss Constitutional Law]," in Pahud de Mortanges and Tanner, *Muslime und schweizerische Rechtsordnung*, supra n. 6 at nn. 1361 ff, 1373 ff.

14. BGE 116 Ia 261; see also Müller, supra n. 11 at 90 ff; Rhinow, supra n. 11 at n.1352 ff; Mahon, supra n. 12 at n.14 ff.

15. BGE 123 I 296.

16. BGE 97 I 120; 118 Ia 46.

17. BGE 102 Ia 468; 126 I 122.

18. See also concerning this topic: Mahon, supra n. 12 at n. 4 to art. 15 Cst.

19. See Winzeler, supra n. 10 at 42 ff for the state of affairs.

20. René Rhinow, *Die Neue Bundesverfassung 2000 [The New Constitution 2000]* (Basel: Helbing Lichtenhahn, 2000), 116.

21. BGE 123 I 301; Winzeler, supra n. 10 at 35; Kley et al., supra n. 11 at n. 6 to art. 15 Cst.; Müller, supra n. 11 at 87 ff; Mahon supra n. 12 at n.11 to art. 15 Cst.

for example. It has to be formed and applied in a manner to allow the employees to practice a religion within the limits of certain boundaries.²² The termination of employment may be abusive if it results from the exercise of the constitutional rights in this area. If an employee works in a company with a religious tendency, an accordant denomination may be demanded.²³

The freedom of conscience and belief is furthermore protected by all the cantonal Constitutions as well as by Article 9 of the ECHR and Articles 18 and 27 of the ICCPR. Occasionally, people appeal to the European Court for Human Rights after the decision by the Swiss Supreme Court, but the court has never extended the range of protection because of the convention.²⁴ Because Article 9 of the ECHR is more precise than the national law concerning the requirement of a predominating public interest respectively the consideration of the principle of proportionality, this conventional norm has nevertheless reached a proper importance in the area of the conditions for a state intervention in religious freedom rights.²⁵

A. Religion at School

School is an area which demonstrates how secular a state really is, because even for religious communities, this is a preferred place to exert influence on young people. According to Article 62 Cst., education is a cantonal matter. The cantons are obliged to ensure a sufficient primary education open to all children. This education is compulsory and is placed under state direction or supervision. Generally, schools in Switzerland are *public schools*. They are operated by the cantons and communities and can be attended by all students, independent from their religious view. The education has to be religiously neutral to respect the students' freedom of religion (refer to subsection III, above). The school and teachers must not identify unilaterally with one religion or proselytize for it. Nevertheless, there may and shall be room for the phenomenon of religion in the general education; it should be presented in a tolerant way.

In many cantons there is a denominational religious education, which is sometimes presented by representatives of the church. This class is optional; parents have the possibility to cancel the registration for their children. Giving religious lessons at public schools is a privilege of the religious communities recognized under public law only (see cipher 6). Alongside many schools offer a class of religious *studies* where regular teachers neutrally inform about the phenomenon religion and the big religious communities. This class aims to increase the general education and is therefore mandatory. By trend, the denominational religious education becomes less important; some schools replace it with a class of religious studies.

Beside public schools, some *private schools* exist. The state does not, therefore, have a monopoly on schools.²⁶ Private schools are not placed under state direction, but state supervision. The supervision is realized by formulating certain requirements for the authorization of the school as well as by conducting inspections.

Besides religious communities, the funding bodies of private schools are organizations with a special philosophical or educational concept (e.g., Rudolf-Steiner schools, Montessori schools, etc.). Up until the 1970s, private schools were mainly funded by churches. Due to the drop of members, in particular of the Catholic order, they were no

22. See Werner Gloor, "Kopftuch an der Kasse – Religionsfreiheit im Privaten Arbeitsverhältnis [Headscarf at Checkout – Freedom of Religion in Private]," *ARV/DTA* 1 (2006): 1 ff.

23. See also Frank Vischer, "Der Arbeitsvertrag [The Employment Contract]," in *Schweizerisches Privatrecht [Swiss Private Law]*, vol. 7.4, 3rd ed. (Geneva and Munich: Helbing & Lichtenhahn, 2005), 239; Article 336 para 1(b) of the Bundesgesetz Betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches [Federal Act on the Amendment of the Swiss Civil Code] (Fünfter Teil: Obligationenrecht) of 30 March 1911 (SR 220).

24. See, e.g., BGE 118 Ia 46; see also cases involving religious laws of the Swiss Supreme Court and the European Court of Human Rights on available at <http://www.religionsrecht.ch>.

25. See also BGE 117 Ia 311.

26. Giovanni Biaggini, *Bundesverfassung der Schweizerischen Eidgenossenschaft [Federal Constitution of the Swiss Confederation]* (Zurich: Schulthess, 2007), n. 4 to art. 62.

longer able to ensure regular schooling in some places. A number of religious schools therefore had to shut down or were placed under state direction.

In a few big cities, primary schools which are funded by Jewish communities exist.

There are some projects for private Muslim schools at the moment. Generally, public schools in Switzerland are of excellent repute, not only because of the high pedagogical standard but also because of the integrating function. Private schools with a religious background are met with a certain mistrust because of the last-mentioned reason.

B. Some Recent Religion Cases of the Federal Supreme Court

In the present section, the state's concrete efforts to protect the freedom of religion, secularism, and religious neutrality will be illustrated by recent Supreme Court decisions. The Supreme Court plays an important role here because it is able to react more quickly to social changes. Its decisions are always actively discussed in the jurisprudential doctrine; this fact shall also be illustrated below. According to the Supreme Court, the freedom of religion not only protects the traditional religions of the Christian churches and religious communities, but *all* the religions, independent of their quantitative distribution in Switzerland. Basically, any conception of the relationship between humans and divine transcendence is protected by the fundamental right. The statement of belief nevertheless has to reach a certain basic ideological meaning; it therefore has to comply with an overall world view.²⁷

Freedom of religion basically includes each individual's right to orient his *entire conduct* towards the teachings of a religion and to act according to his inner beliefs. The freedom of religion therefore also protects beliefs which do not imperatively demand a religiously motivated behavior for a concrete life situation, but which regard the reaction in question as the appropriate instrument to deal with the life situation according to the religious conviction.²⁸

A specific difficulty arises from the Islamic principle which connects faith with the duty to arrange all the areas of human life primarily according to religious rules. The secularism of the state is thus apparently put into question. Here, the state is bound to examine *which* religious statements may claim the protection of the Constitution, because otherwise the freedom of religion loses its contours. A court or an administrative authority thereby cannot rate religious convictions nor verify the theological accuracy nor interpret relevant parts of religious texts.

C. Integration Is More Important Than the Freedom of Religion: No School Dispensations for Swimming Lessons

In 1993, the Swiss Supreme Court allowed a Muslim father to remove his daughter from co-ed swimming lessons in the second year of primary school based on the considerations mentioned above. The Supreme Court based its decision on a poll conducted by the educational board of the canton of Zurich with different members of Islamic communities. This poll showed that the Koran only requires covering of the female body from sexual maturity onward. Nevertheless, even younger girls and boys of strong faith are not permitted to take part in co-ed swimming lessons.

This decision was not met with unanimous assent in the jurisprudential doctrine. By correctly trying to not judge religious convictions, the Supreme Court protected a particularly strict line of the Islam. In order to come to this decision, the Supreme Court subordinated opposing public interests, including Article 8 (equality of men and women). The dress code finally only concerns girls; it therefore provokes an inequality due to gender-specific attributes.²⁹ The public interest of *equalization* should have been ranked

27. BGE 119 Ia 183.

28. BGE 119 Ia 184.

29. Urs Josef Cavelti, "Die Religionsfreiheit in Sonderstatusverhältnissen," in *Religiöse Minderheiten und Recht/Minorités Religieuses et Droit [Religious Minorities and the Law]*, ed. René Pahud de Mortanges, vol. 1

more important.

The decision also implicates other areas of significant public interest. According to Article 62, Paragraph 2 Cst. and the cantonal school law, attendance at school is compulsory in order to assure a *well-regulated and efficient schooling*. The coherence of the different classes and the education shall not be strained excessively.³⁰ The cantonal school laws furthermore point up that the goal of primary school is to facilitate the education and the free development of the personality and to impart skills which allow adolescents to participate in social life.³¹ Primary school is an important place to acquire social values and to develop social skills. From a social point of view, it is an exigent concern for the primary schools to reach this pedagogical goal, precisely in a period of loosening social coherence.

For this reason, the Swiss Supreme Court changed its position in 2008 with the decision BGE 135 I 79. In a similar case to the one in 1993, the request of a dispensation was not granted. In this opinion, the Swiss Supreme Court points out that physical education provides an important basis for the socialization of the students. Furthermore, the school has an important function in the process of the social integration of migrants. As a result *integration* was given priority over the freedom of religion. The cantonal school boards have begun to adjust their directives concerning the practice of granting dispensations.³² In everyday life at school, dispensations for religious holidays are less problematical than dispensations for certain types of school activities, because they are part of a longstanding practice, arising from the time Saturdays were still school days. It was primarily students of Jewish faith but also members of the Seventh-day Adventists who benefitted from such codes of practice.³³ The cantonal school law often has a legal foundation and a frequently used code of practice.

D. Strict Religious Neutrality: No Headscarf for Female Teachers in Primary Schools

In BGE 123 I 296 ff the Swiss Supreme Court protected the decision of the cantonal council of Geneva in which it prohibited a female primary school teacher's wearing an Islamic headscarf.³⁴ It was uncontested that the headscarf as a religious symbol was protected by the freedom of conscience or belief. However, the Swiss Supreme Court had to evaluate if the conditions for a restriction of the fundamental right were present. In particular, the question had to be resolved if the obligation of denominational neutrality as a public interest trumped the private interest of the appellant. The court pointed out that denominational neutrality has particular importance in public schools because school is compulsory for everyone, no matter from what religious background the person is. It shall be guaranteed that the sensitivities of different convictions are respected. At the same time, it shall be avoided that school becomes a place of conflicts between different convictions. Schools should not identify with certain religious convictions to the detriment of members of other denominations. From this point of view the position of the teacher plays an important role. The teacher is able to influence the students by his or her behavior. Furthermore, he or she is a role model for the students, who are very impressionable due to their adolescence, the daily relationship, and the hierarchic nature of the relationship.³⁵ In this particular case, the Swiss Supreme Court also considered that the canton of Geneva was, unlike other cantons, historically bound to a strict secularism.

of *Freiburger Veröffentlichungen zum Religionsrecht* (Friborg: Schulthess, 1998), 51; Marlis Angehrn, "Volksschulen und Lokale Schulbehörden vor Neuen Herausforderungen [Elementary Schools and Local Education Authorities Face New Challenges]," (PhD diss., St. Gallen, 2004), 162 ff.

30. BGE 117 Ia 311.

31. See, e.g., art. 3 of the Gesetz über den Kindergarten, die Primarschule und die Orientierungshilfe des Kantons Freiburg of 23 May 1985 (SGF 411.0.1).

32. For the canton of Zurich, see *Neue Zürcher Zeitung* n. 203 of 3 September 2009, 48.

33. BGE 114 Ia 129; 117 Ia 311; see also Herbert Plotke, *Schweizerisches Schulrecht [Swiss School Law]*, 2nd ed. (Bern: Haupt, 2003), 402 ff.

34. Code of practice of the Swiss Supreme Court 47 (1998), 295.

35. Code of Practice of the Swiss Supreme Court 47 (1998), 307.

Like the first swimming lessons case, this decision was intensely debated³⁶ and was not met with unanimous approval. Some questioned whether the person's behavior should not have been taken into account in the balancing of interests. It is conceivable that a teacher who wears a headscarf comes closer to religious neutrality because of her tolerant attitude and her openness than a "neutrally" dressed person who, in one way or another, reveals sympathy or antipathy for a certain religion.³⁷ Others raised the question as to whether the state might not be honoring atheism by enforcing a too-strict obligation of neutrality which in banning religious signs from the public space.³⁸

In this context, it was pointed out that the obligation of denominational neutrality could theoretically address not only teachers but also students, especially when the wearing of clothes with religious symbolism at school is so widespread as to provoke conflicts with members of other religions. If certain students wear a headscarf, as it is the case in some places, religious neutrality is indeed not yet affected and the religious peace not yet endangered. To current Swiss thinking, a general ban on headscarves for students would be regarded as a disproportional response.³⁹

The changed practice of the Swiss Supreme Court concerning the swimming lessons and the ban on headscarves for a teacher can also be understood as an attempt of the state to preserve its secularism. Actually, those rather new decisions are in line with others in which the state by trend repressed the role of religion in the state area.

E. No Dominant Religious Symbols in Public Space: Prohibition of Crucifixes at School

The crucifix decision of the Swiss Supreme Court (BGE 116 Ia 252) may serve as an example for how the secular state deals with religious symbols. In 1990, the Swiss Supreme Court committed the Ticino Community Cadro to remove the crucifixes from the classrooms of the public primary schools. Ticino is an area of strong Catholic influence, and various non-Catholic parents had taken offense at this Catholic symbol.

The Swiss Supreme Court pointed out that the religious neutrality prevents a state from expressing its connectivity with a denomination at school. It cannot be denied that a person may feel personally offended by the permanent presence of a symbol of a religion to which he does not belong to. Such a situation may have significant impact on the intellectual development of the students. The Swiss Supreme Court conclusively said that it would have decided differently if the crucifix had been placed in the shared rooms of the school, for example, in the assembly hall or the hallways or the cafeteria.

This decision is consistent with the above-mentioned headscarf case. Because the state is religiously neutral, those who act for the state are not allowed to use invasive symbols of a religion or denomination. This does not mean that state employees are not allowed to wear religious symbols at all, rather that they should be worn discreetly (for

36. See Andreas Auer, "Le Crucifix et le Foulard Devant le Juge Constitutionnel Suisse [The Crucifix and the Veil before the Swiss Constitutional Judge]," in *Recht, Ethik, Religion, Festgabe für Bundesrichter Giuseppe Nay zum 60. Geburtstag [Law, Ethics, Religion, Festschrift for the 60th Birthday of Federal Judge Giuseppe Nay]*, eds. Dietmar Mieth and René Pahud de Mortanges (Lucerne: Exodus, 2002), 210 ff; Yvo Hangartner, "Bemerkungen zu [Remarks on] BGE 119 Ia 178," *AJP/PJA* 5 (1994): 622 ff; id., "Bemerkungen zu [Remarks on] BGE 123 I 296," *AJP/PJA* 9 (1998): 599 ff; Paul Richli, "Berufsverbot für Primarlehrerin Wegen Islamischen Kopftuchs? [Prohibition for a Primary School Teacher for Islamic Headscarf?]," *ZBJV* 134 (1998): 228 ff; Philipp Wyss, "Vom Umgang mit Transzendtem [Dealing with the Transcendental]," *Recht* 4 (1998): 173 ff; Paul Zweifel, "Religiöse Symbole und Kleidervorschriften im Zwielficht [Religious Symbols and Dress Codes in the Twilight]," *ZBJV* 131 (1995): 591 ff.

37. Astrid Epiney, Robert Mosters, and Dominique Gross, "Islamisches Kopftuch und Religiöse Neutralität an der Öffentlichen Schule [Islamic Headscarf and Religious Neutrality in the Public School]," in Pahud de Mortange and Tanner, *Muslimen und Schweizerische Rechtsordnung*, supra n. 6 at 141.

38. Giuseppe Nay, "Rechtsprechung des Bundesgerichts Zwischen Positiver und Negativer Neutralität des Staates [Jurisdiction of the Federal Court between Positive and Negative Neutrality of the State]," in Pahud de Mortange and Tanner, *Kooperation zwischen Staat. . .*, supra n. 5 at 242.

39. See Gloor, supra n. 22 at 2; Jean-François Aubert, "L'islam à L'école Publique," in *Festschrift für Yvo Hangartner*, eds. Bernhard Ehrenzeller et al. (St. Gallen: Dike, 1998), 479 ff; Epiney, Mosters, Gross, supra n. 37 at 137 ff.

example a little cross on the reverse side of the jacket). The wearing of religious symbols and clothes by private persons is protected by freedom of religion. In the Catholic areas of Switzerland in particular, there are some crosses and crucifixes on the wayside. If and how this is compatible with the religious tradition has not yet been publicly discussed.

V. LEGAL CONTEXT II: RECOGNITION UNDER PUBLIC LAW ACCORDING TO CANTONAL LAW

The responsibility to regulate the relationship between the state and religious communities lies, as previously described, with the cantons. Even if 26 state church legal regulations exist, the systems of most of the cantons – except for the cantons of Geneva and Neuchâtel – are similar. The system is characterized by the fact that the two major denominations, the Roman Catholic and the Protestant churches, are recognized under public law. Until the 19th century, there was one state church in most of places, and the other denomination was tolerated at best. Successively, the two churches were put on par by removing the exclusive title of one of the two churches and enhancing the status of the other church. Thus, nearly equal circumstances were created for the Roman Catholic and the Protestant Church in many places; they have both become cantonal *churches recognized under public law*, a notion which was received from the German state church law. The recognition under public law is related to the creation of a corporate body similar to that under German law, though there are also differences.

By the recognition under public law, a new legal personality under cantonal public law emerges. The religious community is lifted out of the circle of entities organized under private law.⁴⁰ By this legal act, the state places itself closer to a religious community. The notion of *recognition* expresses the significance of the concerned religious community for the state; the addition *under public law* specifies the legal organization of this community.

Regulation by public law has different effects for the religious communities. Briefly summarized, they are the following: An important right of the religious communities is the right to raise taxes from their members. Where the canton raises church taxes from juristic persons,⁴¹ the religious communities partake in the tax revenue. To enforce their invoices, the state has means of coercion at their disposal. The church tax is usually raised by the state together with the cantonal and communal tax.

In different cantons the recognized communities are subsidized by the state with general tax money which is often based on a historical convention. In the cantons of Zurich, Bern, and Vaud, for example, the state pays part of the salary of the clergy. The activities of the churches are also supported financially in the interest of the general public. Furthermore, the recognized communities are exempt from taxation; because of Article 56 of the DGB;⁴² the ecclesiastical municipalities are exempt from the payment of the direct federal tax; something similar applies for the cantonal taxes.

Moreover, the recognized religious communities have the opportunity to offer spiritual guidance for their members in establishments like hospitals, schools, and jails. To some extent, they are supported financially by the state, for example by financing a spiritual guidance center.

Furthermore, the religious communities normally have the right to participate in the religious studies at school⁴³ and to use the school facilities for their own denominational classes.

The recognized communities also have a right to access a report on their members by

40. Famos, supra n. 13 at 42.

41. See Interkantonale Kommission für Steueraufklärung, ed., *Die Kirchensteuern [Church Taxes]* (Bern: 1999), 25.

42. Bundesgesetz über die direkte Bundessteuer of 14 December 1990 (SR 642.11).

43. The churches usually have a right to participate in the creation of the curriculum as well as to provide teachers. In this area, great diversity of state regulations exists which is different from canton to canton. The religious studies are in a period of Switzerland-wide transition at the moment.

the municipality; thus they get informed on arrivals and departures of their members.⁴⁴

In particular with the fiscal law the state delegates part of its sovereignty. This explains the constraints which are often combined with the recognition under public law:

Usually, the state has the supervision on the activities of the religious communities and some oversight of finances. Furthermore, the religious communities are obligated to adopt democratic decision-making structures and to let their members participate in the election of their office holders. Following the tradition of direct democracy in Switzerland, church members have the right to take part in decisions on the percentage and the category of usage of the raised church taxes. The Catholic Church therefore had to create additional structures besides the existing hierarchic organs of the canonical law in charge of the finances.

Not all effects connected with recognition under public law are imperatively reserved to the recognized churches. The cantons of Geneva and Neuchâtel, unlike others, have a strict laical tradition which partially derives from the French example. Here, the big churches were granted different rights by means of a *convention*. In Geneva, the Roman Catholic, the Protestant, and the Christ-Catholic Churches are not recognized under public law, though recognized publicly since 1994. The right to collect a *contribution ecclésiastique* from the state together with the general taxes is connected with public recognition. Nevertheless, the state is not going to use coercion if the taxes are not paid.⁴⁵ The churches fare worse under this regime. The canton of Neuchâtel, which has a new Constitution since 2002, also publicly recognizes the three churches and collects a voluntary *contribution ecclésiastique*. The canton is obligated to pay an additional annual contribution by a concordat which the canton has concluded with the churches.⁴⁶

In some other cantons the churches organized under private law, and other religious communities may apply for a tax exemption. To obtain fiscal sovereignty, a church must be recognized under public law, however. After what has been said it becomes obvious that the relation of the state and religion is regulated predominantly *by law* in Switzerland. The *contractual* regulation of the relation between the state and religion only concerns individual questions. In some dioceses there are concordats under international law dating from the 19th century concerning the participation of state committees in the nomination of the bishop. Treaties that were not concluded under international law concern the faculties of theology, the religious education at school, and spiritual guidance in a public establishment (hospital, jail).⁴⁷

VI. LEGAL CONTEXT III: REVISIONS OF CANTONAL CONSTITUTIONS

In the wake of the revision of the Federal Constitution, several cantons have revised their cantonal Constitutions in the past few years. In the cantons of St. Gallen (2001), Neuchâtel (2002), Vaud (2003), Fribourg (2004), Zurich (2005), Basel-Stadt (2005) and Lucerne (2007), new Constitutions came into effect. The revision of the Constitution put the preparing commission of the parliament and the constitutional council in a position to

44. See René Pahud de Mortanges, "Datentransfer und Datenschutz an der Schnittstelle zwischen Staat und Religionsgemeinschaften [Data Transfer and Data Protection at the Interface between the State and Religious Communities]," in Pahud de Mortanges and Tanner, *Kooperation zwischen Staat...*, supra n. 5 at 595 ff.

45. Loi autorisant le Conseil d'Etat à percevoir pour les Eglises reconnues qui lui en font la demande une contribution ecclésiastique du 7 juillet 1945 (Act to authorize the State Council to be charged to recognized churches who request an ecclesiastical contribution of 7 July 1945) (RSG D 3 75).

46. Concordat entre l'Etat de Neuchâtel et l'Eglise réformée évangélique du canton de Neuchâtel, l'Eglise catholique romaine et l'Eglise catholique chrétienne du 2 mai 2001 (Concordat between the State of Neuchâtel and the Evangelical Reformed Church of the Canton of Neuchâtel, the Roman Catholic Church and the Christian Catholic Church 2 May 2001) (RSN 181.10).

47. All relevant concordats and church conventions which the state has concluded with churches recognized under public or organized under private law are assembled in Christoph Winzeler, *Schweizerische Kirchenrechtsquellen III: Konkordate und Weitere Verträge [Swiss Canon Law Sources III: Concordats and Other Agreements]*, supp. 5 of *Schweizerisches Jahrbuch für Kirchenrecht* (Bern: Peter Lang, 2004).

moot the effective religious constitutional law.⁴⁸ In some cantons, a system change was discussed, but was not enacted afterwards. A development in small and pragmatic steps is thus favored. The separation of the state and the churches, which was proposed in Fribourg following the example of Neuchâtel, was soon abandoned. A mandate tax which was discussed in Fribourg and in Basel-Stadt following the Italian example was also abandoned. What was changed instead of that? If we want to talk about tendencies, the following could be mentioned without making the claim to be complete:

Traces of inequalities between the Roman Catholic and Protestant churches are removed. In the canton of Vaud, the Protestant Church was a state church until the revision of the constitution, while the Roman Catholic Church was a simple society; with the revision, both of the churches became *institutions de droit public*. The canton of Vaud thus became the last Swiss canton to dismiss the state church situation.

Concerns regarding the church taxes for juristic persons expressed by experts in constitutional law, by the economic community as well as by politicians, are taken into account with a *negative appropriation* of the taxes. In BGE 126 I 122, the Swiss Supreme Court abstained from changing its longstanding legal practice in this area, but nevertheless pointed out that the cantons are responsible for changing their laws concerning this matter. A few cantons signaled a willingness to make advances by setting limits to the use of that tax. The revenues from the church tax shall not be used for cultic purpose, but for social and cultural activities of the churches. Thus, everyone benefits, not only the members of the churches.⁴⁹

The recognition under public law is opened up to the Jewish communities. This is the second rather small religious community which is going to be recognized under public law beside the state churches. In nine cantons, the Christ-Catholic Church is recognized under public law apart from the two big churches. In four cantons, the local Jewish communities have been recognized publicly or under public law since the 1980s (Basel-Stadt, St. Gallen, Fribourg, and Bern). Apparently, this is sort of a compensation for a religious minority which was discriminated against for a long time. The cantons of Vaud and Zurich now follow this example. The granted status is “customized” according to the possibilities and the needs of the local Jewish communities.⁵⁰

Concerning the opening of the recognition under public law of other religious communities, the situation is still rather varied. More than half of the 26 cantonal constitutions contain a legal basis for the recognition of “further” religious communities, indeed,⁵¹ but the law which is required for that purpose is not enacted yet apart from some rare exceptions.⁵² There is indeed an interest of several religious communities which are organized under private law on a public recognition or recognition under public law.⁵³ This would in particular be reasonable for different Christian non-denominational churches. Apparently, the political will does not (yet) exist. In particular the request from Islamic organizations in this regard seems to be not capable of winning a political majority.

48. See René Pahud de Mortanges, “Kantonale Verfassungsrevision und Religionsrecht in der Westschweiz,” in *Mensch und Staat. Festgabe der Rechtswissenschaftlichen Fakultät der Universität Freiburg für Thomas Fleiner zum 65. Geburtstag [Man and State. Festschrift of the Faculty of Law of the University of Freiburg for Thomas Fleiner on his 65th Birthday]*, ed. Peter Hänni (Fribourg: Schulthess, 2003), 147-160.

49. This is the case in Fribourg, Zurich, and Lucerne.

50. See Gesetz über die Anerkennung der israelitischen Kultusgemeinde des Kantons Freiburg vom 3. Oktober 1999 (Law on the Recognition of the Jewish Community in the Canton of Fribourg of 3 October 1999) (SGF 193.1).

51. See René Pahud de Mortanges, “Zur Anerkennung und Gleichbehandlung von Religionsgemeinschaften [In Recognition and Equal Treatment of Religious Communities],” in Friederich et al., *supra* n. 9 at 58.

52. See, e.g., art. 28 ff of the Gesetz über die Beziehungen zwischen den Kirchen und dem Staat des Kantons Freiburg vom 26. September 1990 (Law on Relations between the Churches and the State of the Canton of Fribourg of 26 September 1990) (SGF 190.1).

53. See the different opinions of representatives of the religious communities in René Pahud de Mortanges, Gregory A. Rutz, and Christoph Winzeler, eds., *Die Zukunft der Öffentlich-rechtlichen Anerkennung von Religionsgemeinschaften [The Future of Public Recognition of Religious Communities]*, vol. 8. of *Freiburger Veröffentlichungen zum Religionsrecht* (Fribourg: Schulthess, 2000), 169 ff.

In the doctrine, but also among the state and churchly authorities, the perception establishes that the future of the Swiss state church law will not lie in the strict separation of the state and the churches and in state secularism, but in the cooperation of the two social powers. On the side of the state authorities, an increased readiness becomes obvious to take seriously the churches and other religious communities as social powers as well as to recognize and compensate their social and cultural efforts. Currently, the doctrine increasingly deliberates on the legal framework and the individual subject areas of this cooperation.⁵⁴

VII. (NO) CIVIL EFFECTS OF RELIGIOUS ACTS

In 1874, the marriage law was secularized and the ecclesiastical jurisdiction was abrogated in Switzerland.⁵⁵ This was done to avoid Catholic marriage tribunals discriminating against Protestants in intermarriages. The religious jurisdiction of Catholics, Jews, or Muslims, for example, is absolutely voluntary today. The decisions of religious courts, for example decisions concerning conjugal matters, are irrelevant for the state. A religious marriage is only possible *after* the civil marriage (compulsory civil marriage).⁵⁶ Correspondingly, a religious dissolution of a marriage is irrelevant for the state. The decisions of religious courts are not enforced with state aid.

International private law is an exception to that rule. When the facts of a case touch two national legal systems, the Swiss court may be obligated to apply foreign laws because of the international private law.⁵⁷ This foreign law is possibly influenced by religious convictions. For example, consider a marriage that is dissolved according to a religious ritual (for example by a unilateral repudiation, *talaq*) in an Islamic country. The state in which the divorce took place acknowledges this action as valid in its jurisdiction. One of the spouses comes to Switzerland and demands the acknowledgement of the divorce here. The Swiss judge can only refuse this if the divorce according to the Islamic ritual contravenes the Swiss *ordre public*.

VIII. OFFENSES AGAINST RELIGION

The offenses against religion are found in the Swiss Criminal Code (SCC)⁵⁸ in the 12th title (of 20) under the so-called *offenses against the public order*. Among them are also a variety of provisions, such as “affright of the population,” “creation of a criminal organization,” and “financing of terrorism.”

The Swiss Criminal Code includes three offenses concerning religion and the exercise of religion:

1. Article 261 SCC (disturbance of the freedom of belief and the freedom of cult)

This clause contains four alternative statements of facts:

- 1) The public revilement or mocking of convictions of others in religious matters;
- 2) the dishonoring of objects of religious adoration (for example through revilement; mocking, contamination)
- 3) the malicious disturbance or obstruction or public mocking of a cult activity guaranteed by the Constitution (this refers to Article 15, Paragraph 2 Cst.);
- 4) the dishonoring of a location or an object which is designed for a cult

54. See Pahud de Mortanges and Tanner, *Kooperation zwischen Staat und Religionsgemeinschaften*, supra n. 5 at 35 ff.

55. See art. 58 para. 2 of the Federal Constitution of 1874.

56. See art. 93 para. 3 of the Swiss Civil Code (SR 210).

57. See Bundesgesetz über das Internationale Privatrecht (Federal Act on Private International Law) (SR 291).

58. SR 311.

activity (for example churches, funeral halls, liturgical vestment, cult objects). The protected object is not God or the relationship of humans with God, the religion or certain convictions by itself. The legally protected interest is rather the respect for fellow men and their convictions in religious matters.

2. Article 261 bis SCC (racial discrimination)

Here religion is one of several imaginable characteristics of discrimination besides race and ethnicity. The protected legal interest of this clause is not religion or a religious conviction itself, but the *human dignity*.

3. Article 262 SCC (perturbation of the peace of the dead)

Here, different alternatives of the perturbation of the peace of the dead are treated. Grave robberies are not unusual in practice. As far as they are suitable, these offenses can also be committed via internet.