

CHURCH AUTONOMY AND RELIGIOUS LIBERTY IN SWITZERLAND

by Gregor A. Rutz, lic. iur.

Institute of canon and ecclesiastical law, University of Fribourg / Switzerland

1. Historical development of the religious liberty

Freedom of conscience and worship was guaranteed for the first time in Switzerland by the Helvetic constitution of 1798. These rights were restricted soon after by the Constitution of 1802. After the collapse of the Helvetic Republic, the pre-revolutionary order was re-established. It was only the federal Constitution of 1848 that permitted a free practice of divine services, initially for adherents of the Christian faith. The same was valid for the freedom of establishment: This right was solely granted to Christians until 1866, at which time Jews were also given the same rights. The revised Constitution of 1874 finally guaranteed complete freedom of conscience, freedom of worship and religious liberty to all citizens. Therefore, historical trends and certain political and religious particularities guided the evolution of Swiss public law concerning religious bodies, as well as the ecclesiastical constitutional law between 1848 and 1874.

In the actual federal constitution dated 29th May 1874 religious liberty and freedom of conscience are declared as inviolable (Art. 49 of the Federal Constitution¹). Freedom of worship is granted in Art. 50 of the Federal Constitution, which allows independent practice of divine services as long as morality, public decency and public order are not violated. Therefore, freedom of worship protects certain forms of religious practices, whereas religious liberty and freedom of conscience may be interpreted more broadly.

Contrary to the United States, separation between church and state is not the responsibility of the Swiss federal government; this task is attributed to the cantons. Swiss public law concerning religious entities needs to be placed within the comprehensive context of historical events that have led to the established *direct-democratic institutions* and the *principle of subsidiarity*. Thus the religious liberty of the individual is legally assured by the state, whereas the cantons control the institutional relationship between the state and the various religious communities.

According to the federal court, the breadth of religious liberty is the same as the guarantees granted by the European Human Right Convention. The guarantees accorded by the cantonal constitutions do not extend beyond similar provisions contained within the federal constitution.

2. Models of relations between state and church

In Switzerland the authority to recognize and acknowledge religious communities is given to the cantons. The cantons therefore have state-wide ecclesiastical sovereignty. The federation limits its authority to the protection of religious liberty and freedom of conscience. In addition, the federation also monitors that certain confessions do not have too much influence on public order and everyday life. This corresponds to the federal tradition captured in the maxim of Art. 3 of the Federal Constitution.

Cantonal ecclesiastical sovereignty is as well a reflection of the religious liberty guaranteed by the Federal Constitution as also a possible threat to it: The cantons have to observe religious liberty and at the same time legal equality, yet they are not obliged to stay neutral concerning religious matters. Therefore there is no one order that oversees the national church's matters in the Swiss federal

¹ Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874 (SR 101).

constitution; rather the system is comparable to a heterogeneous mosaic that is compiled of 26 individual systems with various historical backgrounds.

2.1. Connection between state and church

2.1.1. Recognition by public law

Not all churches are recognized in the cantons by public law. Most cantons recognize the major religious beliefs (such as the Roman Catholic Church and the Protestant Church) as cantonal public law corporations. In the cantons of Zurich, Bern, Solothurn, Basel-Stadt, Basel-Landschaft, Aargau, Lucerne, Schaffhausen and St Gallen, the Christ-Catholic Church is recognized by public law as well, whereas the Israelite community is recognized in the cantons of Basel-Stadt, St Gallen, Berne and Fribourg.

The position as an entity of public law expresses itself mainly in the right to self-raise taxes from their adherents.

2.1.1.2. Direct consequences for the corporative religious freedom

Not only are the religious communities given sovereign authority through public and legal recognition, but they are also somewhat incorporated in public law. Those communities organized by public law have a corporative religious liberty that concerns the shaping of their doctrine and worship. However, their freedom of organisation is affected by fundamental state rules. The structure of the public law concerning religious bodies' organisation may be guided by congregations that exceptionally demand exercising a democratic principle that is contrary to the parish of canon law. That is not necessarily an inadmissible impairment of constitutional rights, because the basic tenets of public legal recognition is considered a privilege and no longer a coercive measure against the church. Hypothetically a religious community could choose to renounce having the privilege of a public legal position.

2.1.1.2. Dualism in churches recognized by public law (“Landeskirchen”)

The religious and political dualism is a well-known characteristic and an intrinsic part of the Swiss state-structure, as well as a feature of present-day Western culture. The example of the Roman Catholic Church illustrates this characteristic. The Roman Catholic Church is organized independently from the public legal system. Nevertheless it is always recognized by it, either as a subject of international law or as a community *sui generis*: Its existence and organisation are preconceived for the federal legislator. This example demonstrates why churches are not often granted a public legal entity, but the canonic parishes are given congregations of cantonal public law. Contrary to the case of the Protestant Church, this example points to a dualism of the institutions that can lead to serious internal ecclesiastical or also political conflicts (last bishopric Chur).

The evangelistic reformed churches are national churches influenced by public law, even though they more or less positioned for independence in particular cantons. This is contrary to the example and the issues mentioned above, which become practically moot.

2.1.2. “Landeskirchentum”

Originally “Landeskirchentum” was an expression used to describe a group of fellow-believers in a particular territory. This term is still used today in certain cantons. The original Protestant model integrated the “Landeskirche” as a corporation in the structure of the state, which explains why the protestant church of the canton of Vaud is a public law institution and fairly united with the state:

„L'Église évangélique réformée du canton de Vaud est maintenue comme institution nationale“ (Art. 13 of the Cantonal Constitution²). This also holds true for the canton of Zurich, Berne and Basel-Landschaft where the evangelistic reformed churches are quite united with the state as well.

In contrast, the Catholic model respects the church in its autonomy and renounces a corporate registration, legal order and an integration of the church in the state. Primary examples are the original Catholic cantons of central Switzerland. Another example is one of our neighbouring countries, the Principality of Liechtenstein.

2.2. Separation of church and state

In the cantons of Neuchâtel and Geneva there is an extensive separation between the church and the state. There is no religious community that is acknowledged by public law. The constitutional law of the canton of Geneva expresses the separation quite explicitly. The constitution of Neuchâtel on the other hand expresses it in the following way: „L'État reconnaît l'Église réformée évangélique du canton de Neuchâtel et les paroisses neuchâtelaises de l'Église catholique romaine et de l'Église catholique chrétienne comme institutions d'intérêt public [of public interest] représentant les traditions chrétiennes du pays et travaillant à son développement religieux“ (Art. 71 of the Cantonal Constitution³). Contrary to this confusing formulation the confessions mentioned aren't given any public legal status in the cantonal law of Neuchâtel. Due to the organisational separation of church and state there is a lack of a basic cantonal ecclesiastical system. The Catholic and Protestant Church, as many other religious communities, therefore choose a private legal form of organization in the cantons of Geneva and Neuchâtel. The most frequently used form is the so-called “Verein” association (Art. 60 of the Federal Code of Civil Law⁴). It is not the case of a total separation as in France and in the US however. Nevertheless there are several ties with the state. Thus separations shouldn't be understood as legal conceptions but in terms of ecclesiastic-political necessities.

In Switzerland the Free Churches such as all other religious communities not recognized by public law are independent in what concerns their organization, and benefit from the protection granted by the religious liberty and the freedom of association (Art. 56 of the Federal Constitution).

3. Corporative religious liberty in Switzerland

3.1. Which institutions are considered as churches?

The most conspicuous outward appearance of a religion is the community of its adherents. The community is a religious union that cares to maintain the religious life of the believers. Therefore the community is also a worship congregation. In Switzerland only the big Christian religious communities that are most frequently also recognized by public law are called churches. The typical Swiss churches are mainly the Protestant Church and the Roman Catholic Church. They comprise a big part of the population, dispose of a strong institutionalized structure and address their messages to the whole population.

The Christ-Catholic Church covers roundly 30 parishes in Switzerland. A part of them are recognized by public law. The smaller Free Churches exist apart from the main churches and usually aren't recognized by public law. Their adherents are frequently also members of a “Landeskirche”. The largest Free Church in Switzerland is the Methodist Church, with a membership of roughly 20'000 believers. The Swiss Israelite Association counts 28 Jewish communities of which some are acknowledged by public law, consisting of 18'000 members.

² Constitution du Canton de Vaud du 1er mars 1885.

³ Constitution de la République et Canton de Neuchâtel du 21 novembre 1858.

⁴ Schweizerisches Zivilgesetzbuch (ZGB) vom 10. Dezember 1907.

In 1990 there were 152'000 Moslems living in Switzerland, which comprises 2.2% of the Swiss population. Until today, there is no public and legally recognized Moslem community.

3.2. Legal entities as constitutional rights holders

According to the practice of the federal court, legal entities of the private law aren't entitled to have either religious liberty or freedom of conscience except for those that aim religious or ecclesiastical purposes. Religious communities can appeal to have religious liberty themselves however. Religious liberty then extends itself from an individual constitutional right to an association constitutional right. Religious liberty therefore doesn't only guarantee the foundation of religious communities, but also becomes the base of their religious practice.

Conventional doctrine and jurisdiction decline awarding constitutional rights to legal entities of public law. The right to levy a complaint against a violation of their religious autonomy, or to preserve the guarantee of their existence already granted by the constitution, is given to any religious community organized by public law. The federal court applies the same practice for religious communities of public law as for municipalities and other legal entities of public law.

The question of whether religious communities recognized by public law are allowed to refer to themselves based on their freedom of worship, freedom of conscience and religious liberty has yet to be answered by the federal court, as it didn't want to undermine the cantonal ecclesiastical sovereignty with a religious liberty that goes beyond the cantonal provisions.

4. A Case Study: The state ecclesiastical situation in the canton of Zurich

The Cantonal Constitution of Zurich recognizes the following as legal entities of public law: the Protestant Church and its parishes, the Roman Catholic Church and its parishes, such as the Christ-Catholic Church of Zurich (Art. 64 of the Cantonal Constitution⁵). The other religious communities make usage of private legal organisation forms.

A cantonal popular initiative that targeted the separation of church and state was dismissed in September 1995. There will be a vote concerning the recognition of several other religious communities in the near future.

According to Art. 64 of the Cantonal Constitution, the religious communities already acknowledged by public law may administer their own intra ecclesiastical matters by themselves. Nevertheless, they remain under the supervision of the state, and legislation regulates their organization as well as their relationship with the state. The independence in controlling the intra ecclesiastical matters isn't only embodied in Art. 64 of the Cantonal Constitution but also in ecclesiastical law. This is precisely why both churches have an ecclesiastical order. The ecclesiastical orders have to be handed in to the cantonal government, which checks whether they are in conformity with the constitution and law.

Fundamentally the external matters of both national churches are taken care of by the state while intra-ecclesiastical matters are regulated by the ecclesiastical legislator. In this domain, the state just has to control whether the ecclesiastical norms correspond to the state's law.

The exact sphere of influence of intra-ecclesiastical matters and their legislative autonomy is not laid down precisely. The church can be given more authority in different domains. If we look at the efforts made for the decartelization between church and state in the canton of Zurich, we may presume that the national churches will be given more autonomy in the domain of legislation in the years to come.

⁵ Verfassung des eidgenössischen Standes Zürich vom 18. April 1869.

6. Bibliography

- **Aubert** Jean-François; Bundesstaatsrecht der Schweiz, Band I; 2. Auflage, Basel und Frankfurt am Main 1991 (zit. „Aubert, Band I“).
- **Aubert** Jean-François; Bundesstaatsrecht der Schweiz, Band II; 2. Auflage, Basel und Frankfurt am Main 1995 (zit. „Aubert, Band II“).
- **Aubert** Jean-François / **Eichenberger** Kurt / **Müller** Jörg Paul / **Rhinow** René A. / **Schindler** Dietrich (Hrsg.); Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874; Zürich 1988 ff. (zit. „Komm. BV“)
- **Brunschwiler** Carl Hans; Modelle des Verhältnisses zwischen Staat und Kirche (Referat am Symposium „Staat und Kirche“ des Liechtenstein-Instituts, Benden FL, vom 25.-27.3.1999).
- **Fink** Urban / **Zihlmann** René (Hrsg.); Kirche, Kultur, Kommunikation – Peter Henrici zum 70. Geburtstag; Zürich 1998 (zit. „FS Henrici“).
- **Giacometti** Zaccharia / **Fleiner** Fritz; Schweizerisches Bundesstaatsrecht; 2. Auflage, Zürich 1949.
- **Grichting** Martin; Kirche oder Kirchenwesen?; Freiburg 1997.
- **Hafner** Felix; Kirchen im Kontext der Grund- und Menschenrechte; Freiburg 1992.
- **Karlen** Peter; Das Grundrecht der Religionsfreiheit in der Schweiz; Zürich 1988.
- **Kraus** Dieter; Schweizerisches Staatskirchenrecht; Tübingen 1993.
- **de Luze** Charles-Henri; L'organisation ecclésiastique dans les cantons suisses; Dissertation, Lausanne 1988.
- **Nay** Giuseppe; Leitlinien der neueren Praxis des Bundesgerichts zur Religionsfreiheit, in: Pahud de Mortanges René (Hrsg.), Religiöse Minderheiten und Recht – Minorités religieuses et droit; Freiburg 1998.
- **Pahud de Mortanges** René; Allgemeine Einführung und Rechtslage in der Schweiz, in: Pahud de Mortanges René (Hrsg.), Religiöse Minderheiten und Recht – Minorités religieuses et droit; Freiburg 1998 (zit. „Pahud de Mortanges, Religiöse Minderheiten“).
- **Pahud de Mortanges** René; Destruktive Sekten und Missbrauch der Religionsfreiheit, in: AJP 6/97, S. 766 ff. (zit. „Pahud de Mortanges, Destruktive Sekten“)
- **Pfister** Rudolf; Kirchengeschichte der Schweiz, Band 3; Zürich 1984.
- **Saladin** Peter; Grundrechte im Wandel; Bern 1982.
- **von Salis** L.R.; Die Entwicklung der Kultusfreiheit in der Schweiz; Basel 1894.
- **Winzeler** Christoph; Strukturen von einer „anderen Welt“ – Bistumsverhältnisse im schweizerischen Bundesstaat 1848-1998, ihr historischer Wandel und ihr Inkulturation; Freiburg 1998.