THE LEGAL AND POLITICAL FRAMEWORK FOR THE INTEGRATION OF MIGRANTS WITH A NON-TRADITIONAL RELIGION IN SWITZERLAND: A SYSTEMIC ANALYSIS

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## 1.	Definition: Conditions for incorporation

In my research as a constitutional lawyer, specific issues such as: "Is it permitted to wear a headscarf at school? Is it allowed to hang a crucifix on a courtroom wall?" I find less and less interesting. Since a while I concentrate more on a *systemic view* of the relation between state and religion. I am now dealing with questions as for instance: How does the general framework of a state has to look like, in order to allow the practice of religion in a fair way? What rules apply to established religious communities and what to the ones more recently formed?

And concentrating on the newly formed religious communities in Switzerland like Muslims, we also need to ask ourselves: Is it possible to separate those questions from the discussion about what conditions a state needs to provide in order to have a positive impact on the *integration of migrants* into the local society?

One problem about the *notion* of "integration" is that it is strongly *normative*. Migrants have no choice but to become integrated in order to be accepted by society. Furthermore, the notion focuses on individuals: What do they do to become integrated? My line of vision as a lawyer is exactly the opposite: What political and legal framework does the state provides, so as to make it possible for members of religious communities to become integrated?

Several Social Scientists in Switzerland propose to talk about **incorporation** instead of integration. What they mean by this is a multidimensional and interactive process of integration. This process focuses not only on the efforts of groups and individuals, but also on the institutional structures of the host society.

Strictly speaking there is an *interaction* between the general framework of state and society and the integration process. The extent to which integration succeeds and the way members of religious communities organize their lives depends to a large extent on this general framework.

The effect of the general framework can be socially including or excluding. The nature of the impact depends on how the framework is structured and to whom it is addressed:

-	As an example: Religious communities disposing of a recognition under public law have in Switzerland the possibility to offer *religious education* in public schools and *pastoral care* in public institutions. Furthermore they have the opportunity to receive financial support from the state for doing so. Those circumstances do probably have an including impact.

-	But if the religious practices of a religious community are subject to substantial legal restrictions, the effect of the framework will possibly be excluding.

Thus, the legal incorporation regime can take different effects.

All these questions are relevant for migrants and their religious practices, but also for members of

established religious communities. However, it is not mandatory that the conditions for incorporation are the same for both groups.

To put it simply, conditions for incorporation are conditions a society sets for social inclusion. They can be of varying nature. Besides legal conditions there are also conditions for incorporation of *social*, *economic* and *political* nature. They can either be the result of deliberate negotiation and decision-making. Or they can evolve in a rather unconscious and unreflecting manner.

This concept I would like to discuss with you. I will focus on the situation in Switzerland, as this is what I am most familiar with. But this concept might also be relevant for other countries.

First some social facts about religion in Switzerland:

2.   Social Facts

The *federal census* of 2010 reports the following religion affiliations among the Swiss population: 38.6 % Roman Catholic Church; 28% Swiss Protestant Church; 5.5% other Christian Churches; about 0.2% Jewish; 4.5% Islamic Communities and 1.1% non-western beliefs (Hindu, Buddhists). 20.1% of the population does not belong to any religious domination. The religious or denominational affiliation of the remaining 2% of the population is not known.

The numbers concerning religion and denominations have remained relatively unchanged for a long time. Only in the decades after World War II has the religious landscape evolved. Due to *migration* of workers from the traditionally Catholic countries Italy and Spain, 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 and today they constitute the third biggest religious community in Switzerland.

Simultaneous to the religious multiplication, the percentage of persons *without* a religious denomination rose from 1.5% in 1970 to 20.1% in 2010. Particularly in the urban centers of Switzerland, like for instance Zurich, Basel, and Geneva, the importance of churches within society has been decreasing. Especially in the big cities like Basel-Stadt and Geneva, the Roman Catholic Church and the Protestant Church are confronted with a dramatic loss of members. In the 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, and services of churches are increasingly only sought 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.

3. The Swiss incorporation regime

So much for the facts. Now I would like to take you on a short helicopter flight over Switzerland and explore the topography of the Swiss incorporation regime with you. Let's first look at:

3.1. The concept of the federal state

The Swiss Confederation is a federal state composed of the Confederation and the member states called cantons. The *cantons* are autonomous, insofar as their sovereignty is not restricted by the federal constitution (Art. 3 Cst.). The sovereignty of cantons plays an important role when it comes to constitutional religion law. I will show you in a moment.

Compared to other countries, the citizen's *democratic rights* in Switzerland are strongly developed. The voters do not only elect the public authority but also decide on factual issues by exercising their rights of initiative and referendum (Art. 138 Cst.). In today's public debate, questions concerning foreigners, integration or religion often polarize strongly and therefore become subject to initiatives and referenda. Thus, the citizen's decisions become part of the incorporation regime.

Some *examples* of the last years:

In 2009 the Swiss voters adopted a ban on minarets. This is now directly a norm in the Swiss constitution. Of course this is a strong sign against the presence of Islam in the public sphere. And it is also a strong sign of exclusion.

In several cantons we have these times votes in the cantonal parliaments and by the cantonal population about female students wearing headscarves at school. Again this is a sign that people do not want to see Islam.

3.2. Federal Law
3.2.1 Fundamental rights

The Swiss constitution does not only organize government activity but also defines the citizen's fundamental rights.

Of great importance in our context is the *freedom of religion and conscience* (Art. 15 Cst.). It protects the religious or ideological self-determination of the people. This is concretized, inter alia, by the obligation of the state to remain religiously neutral.

According to the Federal Supreme Court, the freedom of religion does not only protect the traditional religions of the Christian Churches and religious communities, but all religions – even those that may be classified as sects – independent of their quantitative distribution in Switzerland. The wide scope of the religion of freedom can be seen clearly looking at court rulings: most of the

more recent decisions of the higher courts were concerned with the protection of minority religions.

Also relevant is the *equality before the law* (Art. 8 of the federal constitution) as well as the *principle of non-discrimination* and the right to *equality* and equity between men and women.

The constitution also protects the right to *marry* and to have a family. As a consequence of the process of secularization, Switzerland knows a state matrimonial and family law. As for members of religious communities, the religious matrimonial law may only apply after being married under state law. Thus, the application is voluntary. So members of religious communities with an own religious family law have to live with two legal systems at the time: a public one and a private one.

This is somehow typical for migrants: they have to live with several cultural codes at the time: norms, values, behaviours of the culture they come from and norms, values and behaviours of the accomodating culture. Migrants have to train themselves to switch from one culture to the other according to the people they meet. For younger this may be easy, but elder can have problems with that.

3.2.2. Statutory law

Questions relating to religion are not only important in constitutional law but also in other fields of law. As an example, I want to name just *criminal law*. Relevant is here, amongst others, an article of the Swiss criminal code penalizing the attack on the *freedom of faith* and the *freedom to worship* as well as an article of the criminal code: *racial discrimination*. These legal norms support the state in its task to preserve religious peace.

Further fields of law, which are relevant for incorporation, are for example family law, law concerning foreigners, law on naturalization, building law or private international law.

3.3. The cantonal incorporation regime: recognition under public law

For religious communities in Switzerland it is of central relevance that it is the canton's responsibility to regulate the "relationship between the church and the state." Therefore, along with the 26 cantons there are 26 different, autonomous constitutional religion law systems. However, the systems of most cantons are alike. Usually, both of the main denominations, that are the Roman Catholic and the Evangelic-Reformed Church, are *recognized under public law*. This involves a number of *rights* and advantages for those Churches:

- The right to impose *taxes* on their members.

- The possibility to offer *pastoral care* in public institutions such as hospitals, public schools and penal institutions.

- The right to offer denominational *religious education*. Of course, participation is

voluntary.

The recognition under public law constitutes a considerable *advantage* for religious communities. Several minority religious communities strive therefore for recognition under public law.

Over the last decades, some cantons have also recognized their Jewish communities. Other communities, also non-western ones, will follow in the next years. This will be an important step towards equitable conditions for the incorporation of minority religious communities.

3.4. Case law

Ultimately, a state's incorporation regime is also being determined by the decisions of the courts.

With its rulings, the Swiss Federal Supreme Court has in recent years set important *milestones* concerning issues relating to religion law. Several of these decisions pertain to the *Muslims' practice* of religion. The rapid increase in Muslim population has led to legal issues, for which the existing law has not yet provided answers. Here an example:

In 1993, the Federal Supreme Court allowed a Muslim father to remove his daughter from mixed-sex *swimming lessons* in the second year of primary school based on the considerations mentioned above. The Federal Supreme Court based it's decision on a survey carried out by the educational board of the canton of Zurich among several members of Islamic communities. This survey showed that the Koran only requires the covering of the female body from the time of sexual maturity onward. Nevertheless, even younger girls and boys of strong faith are not permitted to take part in co-educated swimming lessons.

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

The decision also concerned *other significant public interests*. According to Article 62 section 2 of the Constitution and the cantonal school law, attendance at school is mandatory in order to assure a well-regulated and efficient schooling. The coherence of the school classes and the education should not be strained excessively. The cantonal school laws furthermore points out that the goal of primary school is to facilitate education and to impart skills that allow adolescents to participate in social life. 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, especially in a period of loosening social coherence.

For those reasons, the Federal Supreme Court *changed its position* in 2008. In a similar case to the one in 1993, the request for a dispensation was not granted. In its opinion, the Federal 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 since then adjusted their directives concerning the practice of granting dispensations. The tendency is that dispensations are easily given for holy days in the main religions. Here the students can take some days off. But if parents do not want their children to take part in regular school activities like sport, school camps, biology, the authorities are more strict.

4. School

Let's have a closer look at school.

School is an important element of the social incorporation regime of a state. It is also area that demonstrates the level of *secularity* of a state, because even for religious communities, it is a preferred place to exert influence on young people.

According to Article 62 of the Constitution, education is a cantonal matter. The cantons are obligated to ensure the provision of an adequate basic education available to all children. Basic education is mandatory and is managed or supervised by the state.

Generally, schools in Switzerland are *public* schools. They are administrated by the cantons and municipalities and may be attended by all students, independent from their religious view. The education must be religiously neutral in order to respect the students' freedom of religion. The school and teachers must not identify unilaterally with one religion nor proselytize the students. Nevertheless, there may is room for the phenomenon of religion in the general education; but 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. Being allowed to teach about religion at public schools is a privilege of the religious communities recognized under public law. In addition, many schools offer a class of *religious studies* where regular teachers neutrally inform about the phenomenon religion and the main religious communities. Those classes aim at increasing the general education and are therefore mandatory. By trend, the denominational religious education becomes less important and some schools replace it with a class of religious studies.

Beside public schools, some *private schools* exist. The state does not, therefore, have the monopoly on schools. Private schools are not placed under state direction, but state supervision. The supervision is realized by defining certain requirements for the authorization of a private 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 founded by churches. Due to the drop of members, in particular in the Catholic order, they were no 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 founded by Jewish Communities exist.

Generally, public schools in Switzerland are of excellent reputation, not only because of the high pedagogical standard but also because of their integrating function. Private schools with a religious background are met with certain mistrust because of the last-mentioned reason.

Lately, denominational *Islamic education* has been introduced in individual municipalities in the cantons of Lucerne and Thurgau.

Furthermore, there is an education of Imams under consideration at the university of Fribourg.

School authorities are these days confronted with quite *different needs and attitudes*: those of majority of the population with a traditional Christian background but these days a rather secularized approach, those of migrants coming with "new" cultures and religions, those of parents who do not want any religion at all for their children and those of members of Christians sects, who area against evolution theory in biology class and so on. So school authorities have to deal with all these claims in a fair way, which is not always easy.

5. Conclusion

The helicopter flight over the Swiss incorporation regime has already come to an end – it was far too short! This very cursory overview leads to the conclusion, that today, the Swiss state mostly, but not always *recognizes its obligation* to ensure an incorporation regime that really considers the different religious communities. It of course does so regarding *essential issues*. The state's reaction on religious change follows the idea to grant the more recently established religious communities in Switzerland the same rights as it does to the already recognized Churches and to some Jewish communities.

What we see is that by using the tools of direct democracy population can *undermine* the strategy of the state authorities and give signals of exclusion. This is of course confusion for migrants, especially for Muslims, but also for all the others.

In early 2014 Swiss people voted in favour of a *general restriction* of immigration. Such a restriction is against a basic principle of the EU law, the free movement of people. Switzerland is not member of the EU, but is linked to it by bilateral treaties. So right now we have a problem with the EU. But we also have a problem with the foreign population in our country, who asks themselves if they are still welcome in this country.

Like many other countries Switzerland is somehow *overcharged* by immigration. But different from other countries the population can articulate their fears by using democratic instruments. That is a good thing because it may be a help to avoid social unrest. But even so it is not easy for state authorities to find solutions. Up to a certain extend it is understandable that the Swiss incorporation regime sends mixed signals.