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Religion, Migration, Law, and Negotiation: Pluralism and Pragmatism in Accommodating the Immigrants' Religious Objectives in Switzerland

Joanna Pfaff-Czarnecka

Introduction

Migration creates situations which require flexibility as well as the willingness and ability to accommodate to new circumstances from everybody who is involved. Especially the migrants are compelled to adjust to the established forms of the "host society", that is, laws and institutional practices as well as highly held values and norms. Each culture, well, the culture as such, enables people to find flexible solutions within the cultural-religious orders. Hence, those who arrive in Switzerland today and intend to stay on, will have to make concessions when it comes to language, life-style and religious practice. However, Ari Zolberg and Long Litt Woon (1999) are right to claim that the cultural luggage the migrants carry over the national borders is of a diverse nature. It can, indeed, it must be expected that immigrants learn new languages, and have the ability to switch between different tongues. In the case of religion, however, this option doesn't work. Religion cannot be left behind at the national border, and nobody can be induced to convert to a new faith.

Over the last decade, the Swiss public has been confronted time and time again – though not as often as in other Western European countries (Pfaff-Czarnecka 1998) – with wishes and grievances of non-Christian minorities to enjoy religious freedom in a more extensive way than it has been possible so far. Muslims, Sikhs, Hindus and Buddhists (in their internal diversity) who represent about 3% of the Swiss population increasingly claim rights going beyond inner religious freedom. Nowadays, they seek the right to practice outer freedom of religion consisting in the right to live their lives according to their own religious rules (Pfaff-Czarnecka 1999). Hence, the Swiss population as well as state and public bodies are increasingly confronted with manifold demands put forward by people of non-Christian faith. Among them are religious prescriptions regarding dress, prayer and food in schools, hospitals or prisons, demands to be exempted from particular civic duties, to bury the dead according to own religious norms, or to have their own religious community officially acknowledged. Dealing with these cases results in fierce value debates, involves more and more actors in negotiations, and calls frequently for readjustments in the legislation and policy-making.

The Supreme Court, the cantonal legislatures and executives, commissions, political parties, associations and initiatives, Churches as well as inter-religious and other working groups and forums have been seeking to manage the problems which religious minorities

face, and they are going to be occupied in this field in future. In this essay, I should like to highlight that, first, the integration of religious objectives is to be seen as the result of negotiations and mutual readjustments between the "host societies" and the people who immigrate. By no means need the migrants adapt to unchangeable rules and social forms. Even if the existing institutions and especially the Basic Law frame the practice of accommodation, with the negotiations over religious forms, the authorities are nevertheless made – as Walter Kälin (2000) claims – to justify their own position, to expand the areas of discretion, and to find solutions that are acceptable to as many parties involved as possible.

My second aim will be to discuss the European variety in accommodating religious difference that shows in different value attitudes towards minorities, in the actual practice of accommodation as well as in the public understanding of discretion and willingness to readjust. The discussion of the distinct national modes of minority accommodation will finally lead me to a reflection on the multiplicity of means – legal and non-legal – in responding to the religious minorities' objectives and grievances. It will be argued that the option to try various solutions when solving societal problems renders the solutions more flexible and accommodating.

National variety in dealing with claims by religious minorities

Over the last ten years the representatives of different religions have established a large platform where their objectives are represented and, hence, become an issue within the Swiss public sphere. Indeed, even if they remain foreigners, the members of religious minorities today form part of the Swiss society confronting it with new types of aims and objectives that become new types of *mutual* problems. When we look across the border, however, the Swiss minorities seem to be rather docile and modest in their demands. In comparison to other Western countries, the Swiss negotiations over the cultural difference are still at the stage of a take-off.

Religious objectives and claims by immigrant non-Christian minorities have become the subject of manifold negotiations in most Western societies. We could expect that in view of the similar nature of the grievances, all the immigration countries (*Einwanderungsländer*) would also have found similar solutions to similar religious concerns. Almost every Western country accommodates people of all faiths of the world. As all of them operate in transnational networks, there is a widespread circulation of practical information (Vertovec 2000). Discourses of injustice rapidly spread around through the available means of communication. But also stories of success in negotiations with governments and "host societies" become public knowledge all over the world immediately. Even "territorial gains" by a religious congregation in other countries put the adherents of this faith in Switzerland under a severe pressure to succeed. Furthermore, all Western countries dispose of legal provisions that are not only confined to the citizens of a given country. The immigrant minorities are protected by laws of anti-discrimination, and they enjoy the freedom of religion and religious practice.

It is not really surprising, however, that the national modes of accommodation differ – not only when it comes to accommodative practices, but also in discourses, for instance

regarding the notion of discrimination, the nature of the division of state and religion, or the principles thought to underlie the national unity. As Hollyfield (1997), Wicker (1997) and others have shown, this national diversity is not only confined to religious or cultural questions, but it shows in a particularly intriguing way in this field. Two major patterns of accommodation have emerged, constituting two ends of the spectrum of how the Western societies organise the cultural and religious difference. At one end, we find the "politics of recognition", as formulated and argued for by Charles Taylor (1993). In this model that significantly informs the Canadian integration practice the emphasis lies on the protection of minorities, upon the recognition of cultural difference, upon the quest to protect the integrity of each particular culture, and the care for particular and distinct collective identities. This way collective groups, defined through cultural distinction, are protected, even if this mode often results in limitations put upon the personal freedom of their members.

At the other end of the spectrum we find the politics of assimilation. Especially France exerts a far-reaching pressure to accommodate cultural and religious forms within the public realm. Demonstrations of religious practice are by and large banned from state schools or companies. Switzerland is situated far away from the Canadian pole, seeking – in my view rightly – not to reinforce cultural-religious boundaries. But in comparison to France, Switzerland – in a similar way as Germany – accords more space to cultural-religious difference in the state-public sphere. On the other hand, France, Switzerland and Germany concur in their objective to accommodate religious claims while according rights on an individual rather than on a collective basis. An example of a collective right accorded to a religious minority is provided by Great Britain. In the year 1975, the House of Lords recognised the Sikhs as an ethnic group, and allowed them to make collective claims derived from this recognition (Poulter 1998). Therefore, those Sikhs who wear a turban are exempted from wearing a helmet while driving a motorcycle or when working on construction sites. The same claim being put forward by the Sikhs in Switzerland was turned down by the Supreme Court, and the European Human Rights Commission went along with the Swiss ruling. Obviously, both countries have selected diverse methods of resolution when it comes to claims put forward by religious minorities.

Switzerland has legal provisions granted to collectivities, that is to its own linguistic minorities and to "national churches" (Wicker 1997). On the other hand, when it comes to immigrant minorities, the legislature is geared towards accommodating difference within the universalist-individualist framework, notwithstanding the collective character of religious concerns, grievances and demands. However, as the following example will show, it doesn't work without compromise.

The exemption from swimming lessons

The first case, which I should like to discuss here in more detail, regards the question whether a 12-year old girl from a Turkish Islamic community could be excused from swimming lessons in a co-educational class (see also Kälin 2000: 160-163; Hangartner 1994). This question was initially answered negatively through a Cantonal ruling that rejected the Father's claim by maintaining that attending swimming lessons is an

indispensable part of the educational course and attending school is a civic duty. However, after the girl's Father appealed at a higher instance, the Swiss Supreme Court granted the exemption, substantiating its ruling in the following way: Not attending swimming lessons wouldn't seriously affect the girl's educational course. The judges saw it as a minor failure in her performing civic duties.

The judges have argued that the religious freedom guaranteed by the Swiss constitution as well as the European Human Rights Convention is to be understood as an area where everybody is responsible for him or for herself, and the State must not alienate this right. Religious freedom, "(c)ombines the inner freedom to believe or not to believe, as well as the outer freedom – within particular limitations – to express, to practice and to spread around religious convictions" (translated by the author). The judges conceded that sports lessons are prescribed by law, and that religious convictions do not exempt pupils from performing civic duties such as attending school. They also argued that the Swiss constitution substantiates the priority of state law before religious beliefs or the philosophy of individual persons. However, the judges have claimed, civic duties are not to be accorded the *absolute* priority. Hence, an area of discretion was opened up. (By the way: a German court's ruling went even further, exempting a Muslim girl from sports lessons entirely.) The question whether an orderly and efficient school course could be maintained, notwithstanding this exemption, was answered in the positive. In France, this question was answered in the negative, and therefore all exemptions were ruled out. But, contrary to Switzerland, the French government provides funds to Muslim religious schools. Hence, France has found an entirely different option to the problem as how to guarantee religious freedom, in this special case. The Swiss solution to this claim is opening up a larger field of interpretation within the existing legislation, whereas France retains a more rigid stance in the legal, i.e. public field, but opens up a private space where religious freedom can be enjoyed to a larger extent.

The Supreme Court made also a point in considering the principle of gender equality, and did not see it endangered since the father promised to give the girl swimming lessons in private. The main reason for granting this exemption was identified in the quest to assure the child's well-being. The judges, as they wrote, sought to avoid any conflict of conscience should the girl be torn in her loyalty between her school and her parental home. Lastly, the Court made a statement regarding the Swiss integration practice. "The foreigners from other countries and from other cultures must abide by legal provisions in the same way as the Swiss must do. But there is no legal obligation to *additionally* adjust their customs and ways of life" (translation by the author).

This case is of interest for at least three reasons. First, because of the broad echo of this case of dispensation in the Swiss mass media, which indicates future conflict potentials within the public sphere. The critics of the Supreme Court's verdict have taken cultural shortcuts: their arguments equated this special provision with gender segregation as well as with female oppression, and the adherence to traditional norms (as displayed by the father of the girl) with fundamentalism. This is an example of the practice of *othering* religious minorities and attributing them with (pejorative) collective identities. It is not surprising, then, that there was no public outcry when a Muslim teacher was forbidden by law to wear a scarf in classes. While a similar case was ruled out in Germany as well, there was at least a fair deal of critique voiced within the German mass media. One of the open questions

discussed was whether a scarf is a religious symbol, or just an expression of secular practice. It seems to me that as long as the Swiss and German public (along with other 'Europeans' – see Zolberg and Woon 1999) *reads* the scarf as a highly symbolically loaded religious symbol, there is little likelihood that this ruling could be changed. In my view, the public opinion tends to affect legal judgements on some religions to a large extent, but it is also important to see that public opinion tends to change over time. For instance, when one remembers how difficult it was for the Swiss Jewish population to acquire dispensation from attending public schools on Saturdays, only three decades ago, it seems that currently the circumstances are more favourable to religious claims than it used to be the case in the past. However, one has to be cautious not to expect a continuous gradual progress in the public acceptance of other faiths than Christianity. The pendulum of the public opinion can go back and forth (Imhof 1996). The possibility of a beginning backlash is also given.

Second, this 'swimming-lesson' case was brought to the Court by an individual person. In view of the very negative press, it seemed initially that the girl's father has created a collective bed. However, the critical voices calmed down after a few weeks. Nowadays (which means 4 years later), all Muslims, but also Hindus, can claim the same right. Hence, this Supreme Court's ruling became a collective good (but, indeed, not a collective right). While the Swiss public interpreted the exemption as a privilege granted to the Muslim collective, I was intrigued by the fact that this dispensation was granted as an individual right. Nevertheless, this dispensation from performing a civic duty on religious grounds displays collective characteristics. It does not "carve a collectivity out of society" as the mentioned acknowledgement of the Sikhs in Great Britain does, since the Sikhs have been recognised as an ethnic group and can derive rights from this fact. Nevertheless, it has got a collective dimension. In the terminology suggested by Will Kymlicka (1995) this dispensation is not a collective right, indeed, but a case of a group-differentiating right. According to Wicker (1997), a tolerance towards this type of differential treatment has been in the increase in Western countries. Therefore, the Supreme Court's dispensation of a Muslim girl from swimming lessons is a compromise. It is a step towards foreign considered values, and it also constitutes a further addition to the catalogue of special solutions granted on collective base, necessary in order to realise the principle of religious freedom in immigrant societies.

However, the term "group-differentiating right" is to some extent misleading, and this is my third point. This dispensation seeking to endorse the norm while providing an exemption is in fact an attempt to accommodate difference in public spaces (school) where several dimensions of social life overlap. In Switzerland, where the vast majority of the population attends state schools, people of diverse backgrounds interact in manifold ways. They meet in the public space that a school provides while having the option to keep *some* dimensions of one's life-style apart. Where such superposition is possible, we need to be cautious not to fall into the "collective trap" for we know that words fuel our imagination. This Supreme Court's ruling is a collective good Muslim girls (and their parents) can take advantage of, but it does not compel all Muslim girls to follow suit. It enables every person to make individual choices according to her or his own individual situation and provides a common ground where to meet and exchange.

Paradoxically, the French solution to this case proves rather collectivist in character: Under the assimilationist state's practices that demand conformity to the secular ethos from every individual person, the dispensation from sports lessons is ruled out at state schools. The dilemma is then solved through state's providing funds for religious schools, so that those Muslim girls who insist upon their outer religious freedom can do so in private schools. Now, this measure creates divisive lines, putting collectivities apart. Such private enclaves lessen the probability for durable encounters within the majority of the population and the small minority of those (usually female) persons secluded through the educational system.

Muslim cemetery in Zurich

The second example touches upon the issue of seclusion, but in a different way, and it carries the theme on the multiplicity of options, attitudes and solutions still further. Let us look at the creation of a Muslim cemetery in Zurich that has been repeatedly requested by different Muslim organisations. From the very beginning, these organisations have referred to the existence of Jewish cemeteries as constituting a precedent. However, Swiss Jewish communities have borne all the costs themselves so far, including the purchase of land from municipalities. Currently in Switzerland, only Muslims in Geneva have their own cemetery. In the course of the last four years several municipalities have allowed Muslims to create their own spaces at public cemeteries. This measure by the municipal authorities is to be seen as a response to claims put forward by Muslim communities who have been repeatedly highlighting the fact that the vast majority of the deceased from among Muslim community are shipped to their countries of origin for burial – a practice, as being claimed, placing many hardships upon the relatives.

After initial reluctance, the municipal government of the city of Zurich came to the conclusion that without a Muslim cemetery, this religious community's freedom of religious observance was threatened. Making Muslims send their dead back home, the authorities argued, was acting against the principle of a dignified burial for all (Raselli 1996). But there was a problem relating to Swiss legal norms concerning deaths. Since 1874, public institutions have been in charge of burying the dead, ensuring that everybody finds a place at a public cemetery, that burials are dignified (*schickliche Bestattung*), and generally that equal treatment for all deceased is observed. But what does equal treatment mean? When it comes to allotting plots in Swiss cemeteries, the graves are dug in order of registration of the dead person, one after the other in a row. From the point of view of the authorities, the principle of 'burial in a row' highlights equality, not discrimination. However, this particular principle of equality conflicts with the principle of religious freedom. The Muslim prescription that the dead should face Mecca is in conflict with the Swiss authorities' idea of maintaining order.

When the claims of Muslim organizations began reaching public institutions and the public sphere generally over the last three years, the authorities acted quickly. Local bodies in Zurich were first faced with the cantonal ban against dividing cemeteries into separate sections – a late 19th century provision against discrimination. This was solved by allotting the Muslim committee a plot of land just next to one of the public cemeteries in the city, on

the condition that the Muslim organisations would pay for it. Another provision was that all people claiming to be Muslim could be buried there; here the Swiss authorities were using their knowledge of the tensions existing between the various Muslim communities – an issue otherwise not known to the public. Up to the present time, the Muslims of Zurich have still been unable to collect the necessary funds.

Several principles are in conflict in this case. First, in Zurich collective demands collide not only with individualist notions, but also with a particular notion of equality. The problematic regulation has historical roots: it was designed a hundred years ago in order to reverse a trend towards separating people of different faiths, in this case Protestants and Catholics. The Muslim wish for separate provision means reversing that decision – that a minority must not be separated against its will. Hence, some of the problems Swiss Muslims are confronted with do not arise from provisions specifically drawn against their aims. Rather, the prevailing legal and institutional settings, geared towards equality and individual freedom within the 'host' society itself, are ill-suited to the special requirements introduced into Switzerland by immigrant minorities. There is some irony in the fact that Muslims in Switzerland today endure hardships relating to rules and regulations which were originally designed to accommodate successfully the various minorities considered 'indigenous'. The second issue is currently emerging in legal debates: is the provision to ensure religious freedom by allowing exemption from the requirement to bury the dead in rows a case of granting a privilege to collectivities? Those lawyers who endorse the granting of a special provision to Muslims seek to justify it in terms of protection from discrimination on individual grounds, not of granting privileges to collectivities.

One further, very broad, implication that arose during these debates was a general trend in the argument put forward by minorities. This runs as follows: death cannot be left entirely to the state authorities. Niccolo Raselli, a judge in the Supreme Court, formulated this as follows: in order to ensure freedom of religion, it is enough that, in any commune, just one cemetery is provided and managed by the communal and / or municipal bodies. The need for further cemeteries can be managed privately. Minorities tend to consider the state's inference in the religious sphere as unwanted, although the state's obligation to ensure the protection of religious freedom is widely acknowledged. Yet another interesting question arises from this debate: does the provision to ensure religious freedom by granting exemptions (e.g. from burying the dead in rows) mean that a privilege is being granted? Again, also in this case, the major purpose of the discussion is to establish whether allowing religious minorities to set up their own cemeteries is to be interpreted in terms of minority protection or as granting a privilege to a religious collectivity.

Notwithstanding the above difficulties affecting the negotiations and the doubt and critique repeatedly expressed in public debates, the political authorities of the Canton Zurich have ruled on 1st July 2001 that the communes were free to allot separate religious spaces within public cemeteries. It corrected the cantonal burial law (art. 35, para 2) in so far as it stated that special fields allotted to a religious community could be established, otherwise compelling these communities to abide to the general rules and regulations. In its communiqué, the cantonal government stated that it decided to amend the law because especially the orthodox Muslims refused to bury their dead together with members of other faiths.

This correction responded to the wide-spread wish of many among the ca. 40'000 Muslims living in Canton Zurich. After several years of negotiations, the cantonal government (*Regierungsrat*) has agreed to adjust its legislation in order to accommodate an objective put forward by immigrant population. By doing so, it has allowed a substantial correction in the existent legal practice. On the other hand, however, a compromise was made. The amendment allows the communes to subdivide public cemeteries, but does not compel them to do so. This compromise comes about because many communes have been critical of subdividing the space at cemeteries as it has been established in a consultation process (*Vernehmlassungsverfahren*) the authorities instigated beforehand. Due to this ambiguity, it may be expected that Muslim organisations as well as individuals will continue to pressurise the authorities all over the Canton. Those Muslims who really intend to bury their dead at a Swiss cemetery (in fact, currently it seems that only a small number of persons will take advantage from this new opportunity) will need to compromise on additional issues as well. At public cemeteries, they – together with all other faiths – will not be allowed to maintain the tombs for longer than 25 years (while the Jews can erect eternal tombs at their private cemeteries) and they have to use light wooden coffins instead of cloth (this rule is being followed at the Jewish cemeteries as well).

Let us come back to the Muslims' difficulty to engage jointly in collective action. It has in fact proved very difficult to make such a diverse population group cooperate. The major indicator of this hardship is the fact that the money to buy the plot – i.e. the private option – could not be collected.¹ Obviously, members of minority religion, in this case united by the common denominator 'Islam', but divided by such markers as the country of origin, religious allegiance and class, are very unlikely to follow the authorities' prescription to act jointly. Such difficulties have been reported from all over Europe where joint organisations established at the request of authorities have been nevertheless divided regarding their goals, ideologies and allegiance to the leaders. As Gerd Baumann claims (1996), state authorities tend to create and to maintain artificial categories that are putatively homogenous. In the case of Zurich, this quest to have one organisation speaking with one voice has proved as illusory, even if the leaders are trying to maintain this representation. For the Muslims it is impossible to form an organisation following the model of church hierarchy and structure. The mistrust between the factions, the collision of interests and the struggles over representation are too significant. This case indicates rather neatly how difficult it is for the immigrants to adapt to the prevailing institutional models.

It is not alone the 'host society', however, that provides models. Immigrants also tend to orient themselves – whether with much success or not – after other minority groups that have engaged in similar endeavours beforehand. In the case of burials, the immigrant Muslims could draw upon the experiences of the Jew communities. Interestingly, the fact that the Jewish communities have been allowed (if in previous times rather: compelled) to maintain their own cemeteries has informed the Muslims who were treating this issue as a case of precedent. But they haven't seen it only as a precedent. At least initially, it seemed that the Jewish communities have created a role model for the middle classes of other religious communities who also have aspired to collect private funds and to keep their

¹ Though we may assume that the Muslims were much keener at making the government change the burial legislation – a 'public option' that may be seen as a forceful indicator of public acknowledgment.

agendas out of the public scrutiny. As the outcome of the Zurich case indicates, this trend has been reversed recently. The Muslim leaders and their Swiss supporters have brought about a 'public' solution, as already was the case with swimming lessons. We may even expect that other religious organisation will follow suit by addressing the Swiss public with their objectives as well – now that non-Christian religious agendas have become part and parcel of the Swiss public sphere.

Public or private?

Both examples discussed here indicate that the claims and objectives of the immigrant religious communities can be solved through different means and in different ways. The major distinction lies in the public vs. private dichotomy regarding the solution not the objective. As a 'public solution' we may see the amendment and the accommodation of legal norms as well as in new modes of interpretation of legal provisions. This was obtained in the swimming lessons case where the severe rule of attending school as a civic duty was somewhat relaxed through re-interpretation, and it also was the case with the change in the Cantonal burial regulation. Such legal provisions can address the state (prisons), the public (schools) as well as the private sphere (prohibition of polygyny).

'Public solutions' of a different sort obtain where public funds are distributed, e.g. to religious organisations, to their projects, such as old people's homes and private nurseries, and to associations engaging in special tasks. This kind of solutions has not been discussed in this text, but for the mentioned French example, but they are to be considered as feasible options. The authorities could have allotted public funds to the Muslims in order to assist them in buying their own plot of land for a private cemetery. This option, if discussed among the authorities in seclusion, has not been put forward to the public. Most probably such a suggestion would have brought fierce opposition. In order to avoid this kind of public dissent, the Zurich authorities have made it repeatedly clear that the land parcel was available, but only if bought with private funds. However, such a solution cannot be ruled out. In several European countries – e.g. in England and in Austria – authorities provide religious organisation with funds that are being used for such a purpose. Even France sponsors religious schools Muslim girls can attend.

Switzerland however doesn't provide many examples in providing public funds for non-Christian minorities' religious purpose. Jewish organisations nowadays get some public funds – for instance for an old people's home – but most expenses have been covered through private means. There is an obvious advantage, especially regarding autonomy, when private means are in use because there is a tendency that receiving public funds brings stronger public scrutiny. Also, private funds allow for private solutions that are more specific to a given situation. Hence, at private Jewish cemeteries the eternal rest of the dead has been assured, whereas the Muslims using special areas at public cemeteries must abide to the same 25-years rule, together with the vast majority of the Swiss population. It remains to be seen whether Muslim organisations will eventually come up with funds for private cemeteries in order to follow this important religious rule.

Whether established with public or with private funds, specific solutions designed for individual religious communities are rather segregating in character, instead of integrating. In some situation such solutions may be necessary because they may allow for some distancing. In the case of cemeteries, it may be advantageous to create separate spaces for everybody to conduct burial rites in seclusion. On the other hand, the relaxation of the Swiss norm of performing a civic duty when not attending the swimming lessons is integrative in character. The Muslim girls are provided with the opportunity to attend Swiss public schools jointly with the largest portion of the population. Had they been compelled to attend private schools while following the religious proscriptions the opportunity would have been taken away from them to share basic experiences together with the Swiss youth.

Conclusion

All over the Western world, there is substantial variety in value attitudes towards religious expressions such as the one symbolised through the Muslim codes of dressing. How the differing value attitudes impinge upon the means deployed in order to find solutions in accommodating religion is difficult to establish, but the above examples have indicated some interesting trends. It seems that authorities generally tend to prevent religious minorities objectives from entering the public forums by (a) silencing the demands, (b) allowing minority members to find their own solutions, or (c) supporting private measures through financial contributions. Only when private options do not work out, and the pressure persists, then changes in policies or even legislation may occur.

Let us draw some inferences from this account. While concentrating on the problems of accommodating difference in Switzerland, I was trying to simultaneously at least hint at the variety of national practices in this field. Obviously, all countries need to manage such problems, and do it in different ways. The solutions depend upon the historical trajectories of relations between the "host countries" and "their" immigrants, the political and other means of the migrants to exert their voice, the institutional set-ups involved in integration politics as well as the prevalent discourses within national societies, including their political cultures. A comparison of the national modes of integration is important for several reasons. Looking across the borders we can learn, on one hand, about upcoming problems and conflict potentials, but also about the possible solutions, on the other. Comparisons reveal, furthermore, that denying the salience of religious allegiance and banning public displays of religious forms of life, as in France, is certainly no guaranty to impede the on-going segregation of people of other faith within the national society.

In my view, the Swiss and the German modes of religious incorporation bear promising potentials for accommodating difference that fit into their national contexts. By showing flexibility, Muslim girls are enabled to share most important societal experiences within the "host society", while simultaneously finding space for their own faith. At the same time, Switzerland still lacks other important "spaces of incorporation" where people can meet and exchange. So far, there are for instance no communal bodies geared towards support or mediation as in the British town of Leicester (as described by Vertovec 1996), and no communal spaces where different religious communities can pray as in Southern London

(Baumann 1996). Switzerland also lacks cultural-religious mediators who would assist the immigrants in dealing with schools, hospitals and authorities. For instance Holland is developing a curriculum for training Muslim leaders who are well acquainted with the Dutch society. I believe that as many spaces as possible need to exist for people of different cultures in order to meet, to exchange and to develop common experiences, but at the same time options for keeping distance are indispensable. Such areas of exchange are necessary, but they are no guaranty for establishing a persistent willingness to trust each other and to live together. We can observe right now how many people within the Western societies, by no means only those belonging to the right-wing, are ready to erect barriers against the Muslim co-patriots.

This observation leads me to my last point. Integration policies are negotiated and implemented under the ever critical eye of public scrutiny. Most measures, like the Supreme Courts judgement regarding the swimming lessons tend to be critically evaluated by the national audiences. The public opinion significantly affects the scope and the forms of incorporation measures. The "balance of interests" (*Güterabwägung*) is a common formula deployed in legal justifications, for instance when the majority of Swiss parents cannot cope with the fact that a Muslim teacher wearing a scarf could educate their children. The will of own majority prevails over the interest of the teacher. Such discriminatory solutions confront the lawyers who pass the judgements, but also the anthropologists who are involved as analysts or even as advisors with dilemmas that we need to address.

References

- Baumann, G.
1996 *Contesting Culture: Discourses of Identity in Multi-ethnic London*. Cambridge: Cambridge University Press.
- Hangartner, Y.
1994 Dispensation einer muslimischen Primarschülerin vom koedukativen Schwimmunterricht aus religiösen Gründen. *Aktuelle Juristische Praxis* 5/94: 622-626.
- Hirschman, A. O.
1992 *Denken gegen die Zukunft: Die Rhetorik der Reaktion*. München/Wien: Hauser
- Hollifield, James F.
1997 Migration and the democratic context of European political institutions. In E. M. Uçarer and D. J. Puchala (eds.), *Immigration into Western Societies: Problems and Policies*, pp. 28-69. London/Washington: Pinter.
- Imhof, K.
1996 *Die Diskontinuität der Moderne: zur Therapie des sozialen Wandels*. Frankfurt/Main: Campus
- Kälin, W.
2000 *Grundrechte im Kulturkonflikt: Freiheit und Gleichheit in der Einwanderungsgesellschaft*. Zürich: NZZ-Verlag
- Kymlicka, W.
1995 *The Rights of Minority Cultures*. Oxford: Oxford University Press.
- Mahnig, Hans
2000 L'intégration institutionnelle des Musulmans en Suisse: L'exemple de Bâle-Ville, Berne, Genève, Neuchâtel et Zürich. *Tangram* 8: 102-111.
- Pfaff-Czarnecka, J.
1998 Let sleeping dogs lie! – Non-Christian religious minorities in Switzerland today. *Journal of the Anthropological Society of Oxford* 29 (1): 29-51.

- 1999 Collective minority rights in Switzerland? *Tsantsa* 4: 199-203.
- 1999 Chancen öffentlicher Eingliederung: Die Anliegen der Muslimgemeinschaften in der Schweiz. *Tangram* 99/5: 33-35.
- Poulter, S.
1998 *Ethnicity, Law and Human Rights: The English Experience*. Oxford: Oxford University Press.
- Raselli, N.
1996 Schickliche Beerdigung für "Andersgläubige". *Aktuelle Juristische Praxis* 9/96: 1103-1110.
- Taylor, C.
1993 *Multikulturalismus und die Politik der Anerkennung. Mit Kommentaren von Amy Gutman* (Hg.). Frankfurt/Main: S. Fischer
- Vertovec, St.
2000 *The Hindu Diaspora: Comparative Patterns (Global Diaspora)*. London: Routledge.
- Wicker, H. R.
1997 Multiculturalism and the sphere theories of Hannah Arendt and John Rex. In H. R. Wicker (ed.), *Rethinking Nationalism and Ethnicity: The Struggle for Meaning and Order in Europe*, pp. 143-161. Oxford/New York: Berg.
- Zolberg, A. and L. Litt Woon
1999 'Why Islam is like Spanish: Cultural incorporation in Europe and the United States. *Politics and Society* 27 (1): 5-38.