

## Islam: between inclusion and exclusion - three current examples from Switzerland, France and Germany

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### Introductory thoughts

*The democratic state under the rule of law has as its slogan the participation of all people subject to it. The intensity and extensity of its implementation in law-making, the application of law and the jurisdiction are a measure of its level of development and the quality of its order. A state with a society characterised by human diversity and cultural-religious plurality sooner or later runs the risk of losing respect and acceptance or losing its legitimacy and ultimately its legitimation if its legal system does not allow people from all social groups - whether as individuals or together with others - to be an appropriate part of the legal community, to participate in its life processes or to share in the goods that fall within its regulatory scope. The lack of inclusion leads to an alienation of these people from the state and its law and fosters their individual disintegration and collective segregation in society.*

The following remarks deal with *three current examples of structural exclusion of members of Islam in Switzerland, France and Germany* and with an appeal to these states that the diversity of human identities, in accordance with the existing human diversity and cultural-religious plurality and the logic of the democratically constituted order, must be found on an equal footing in social and state life for the benefit of the common good. In accordance with this factual and legal logic, the state must pay attention to the structural inclusion of members of the most diverse social groups in its political and legal community and their opinion-forming, will-forming and decision-making processes, and guarantee this within the framework of its legal system, without falling into the paradigm of communitarianism or group identities.

## Switzerland: The Geneva Law on the Secularity of the State

In Switzerland, of the 26 cantons, only 2 explicitly describe themselves as *secular (laïque)*, namely *Geneva* and *Neuchâtel*.

The first sentence of Article 3 paragraph 1 of the Constitution of the Republic and Canton of Geneva of 14.10.2012 reads: L'Etat est laïque. (...). - The State is secular/secular. (...)."

Article 1 paragraph 1 of the Constitution of the Republic and Canton of Neuchâtel of 24.9.2000 states: Le canton de Neuchâtel est une république (...) laïque (...). - The canton of Neuchâtel is a (...) secular (...) republic, (...)."

Both cantons thus emphasise that they are transcendentally or religiously emancipated in existential, structural, institutional, actional and functional respects: The state's structural and procedural organisation should neither be modelled on nor linked to a specific spiritual social order, and state action should be oriented in its content and substance, its form and its method according to purely immanent or secular rules and concerns.

The two cantons are subsequently committed to the principle of *separation between the state and religious communities*.

The Constitution of the Republic and Canton of Geneva of 14.10.2012 does not explicitly mention this principle, but it follows the legal tradition in force since 1.1.1909, with the entry into force of the law of 15.6.1907 amending the Constitution of 24.5.1847 and abolishing the budget for religious affairs.1907, as the materials suggest; see, for example, Constitutional Assembly - Commission 1 "General Provisions and Fundamental Rights", Division Report 103 "Secularism and Relations with Religious Communities" of 16.4.2010, p. 6: "This provision [on secularity] is new. It reflects the generally recognised secular character of the State and, consequently, the separation between religious communities and the State, which has been in force in Geneva since the 1907 law abolishing the budget for worship. "

Article 97 paragraph 2 sentence 1 of the Constitution of the Republic and Canton of Neuchâtel of 24.9.2000 reads: L'Etat est séparé des Eglises et des autres communautés religieuses. - The State is separated from the churches and the other religious communities.

Nevertheless, they maintain relations with the religious communities - for reasons stated differently under constitutional law - whether they are mindful of the spiritual dimension of the human being and its value for social life (according to the Canton of Neuchâtel), or whether they are mindful of the basic decision under constitutional law for a pacifying secularity and not for an opposing secularity (according to the Canton of Geneva).

Article 3 paragraph 1 sentence 2 and paragraph 3 of the Constitution of the Republic and Canton of Geneva of 14.10.2012 reads: Il [= l'Etat] observe une neutralité religieuse. Les autorités entretiennent des relations avec les communautés religieuses. - It [= the state] behaves neutrally in religious matters. The authorities maintain relations with the religious communities. - See also: Constituent Assembly - Commission 1 "General Provisions and Fundamental Rights", Position Paper "Secularity and Religious Communities" of 16.4.2010, p. 1: "This article [3(1)] clearly shows that it is not a question of opposing secularity, but of compliance with neutrality by the State and its departments in matters of religion."

Article 97 paragraph 1 and paragraph 2 sentence 2 of the Constitution of the Republic and Canton of Neuchâtel of 24.9.2000 states: "L'Etat tient compte de la dimension spirituelle de la personne humaine et de sa valeur pour la vie sociale. Il peut (...) les [= les Eglises et les autres communautés religieuses] reconnaître comme institutions d'intérêt public. - The state takes into account the spiritual dimension of the human being and its value for the life of society. It may recognise them [= the churches and other religious communities] (...) as institutions of public interest.

It is therefore surprising that the Geneva legislator, in its law act on the secularity of the state of 26.4.2018, has anchored a militant stance against religious members of the cantonal and communal executive, judiciary and legislative power with a function-related ban on referring to their religious affiliation through statements or signs in public (Article 3 paragraphs 3 and 4) or a militant stance against members of religious communities with a fundamental ban on holding religious events of a cultic nature in public space, which may, however, be waived on an exceptional basis with state authorisation for individual cases (which leads to equal treatment with religious events without a cultic character) (Article 6 paragraphs 1 to 3), whereby these events - with or without a cultic character - are always deemed to have a potential to endanger or disturb public order and security (Article 6 paragraph 4).

The cantonal and federal courts have already dealt with these provisions of the law on appeal and have defused them in the direction of a dynamic, positive secularity, such as the Constitutional Court of the Canton of Geneva with regard to Article 3 paragraph 4 (with decisions dated 21.11.2019) and the Federal Supreme Court of the Swiss Confederation with regard to Article 6 paragraph 2 (with decision dated 23.12.2021). - Subsequently, Article 3 paragraph was deleted and the phrase "exceptionally" in the first sentence of Article 6 paragraph was removed.

Article 3 paragraph 4 of the Law on the Secularity of the State of 26.4.2018 read: *Lorsqu'ils siègent en séance plénière, ou lors de représentations officielles, les membres du Grand Conseil et des Conseils municipaux s'abstiennent de signaler leur appartenance religieuse par des signes extérieurs.* - The members of the Grand Council and of the municipal councils may not show their religious affiliation by external signs at plenary sessions or official occasions.

Article 6 paragraph 2 of the Law on the Secularity of the State of 26 April 2018 reads: *A titre exceptionnel, les manifestations religieuses cultuelles*

peuvent être autorisées sur le domaine public. Dans ces cas-là, les dispositions de la loi sur les manifestations sur le domaine public, du 26 juin 2008, s'appliquent. - Exceptionally, religious worship events may be permitted in public space. In such cases, the provisions of the law on events on public land of 26 June 2008 apply.

Although the principle of secularity of the state affects all religious communities to the same extent, the individual religious communities to different degrees, depending on their view of the structural, organisational and functional connection between religion and state - here the spectrum ranges from the separation of religion and state (example: Christian phrase "Render unto Caesar the things that are Caesar's and unto God the things that are God's".) to the unity of religion and state (example: Islamic phrase "Islam is religion and state/al-islām dīn wa daula). It is such phrases and news about the behaviour of individual religious members or groups of religious members and personal experiences with them that influence perceptions about religious communities. And it is the formula "Islam is religion and state", which runs counter to the principle of state secularity, and views and actions on the Islamisation of society and the polity and its structures and processes, which have terrified the world in light of Islamist and jihadist propaganda, attacks, skirmishes and wars, which have fuelled the Geneva legislative debates and focused attention on Islam.

A word on the formula "Islam is religion and state": A look at history up to the present day shows that the relationship between religion and state in Islam has always been, and still is, fraught with tension and can be at times closer and at times more distant. The degree of structural, organisational and functional connection between religion and state was, is and remains controversial among Muslim scholars, who have a different view of it depending on their cultural and political background, their theological-legal orientation and - not least - their possible inclination towards opportunism. It is not the

degree of connection between religion and state that is the hallmark of an Islamic society, but the degree (extent and manner) of the validity of the Sharia, the Islamic system of values and law.

According to Geneva's legislation, faith should take place as far as possible in the private sphere. In principle, the canton of Geneva thus takes a religion-exclusivist position. This affects the Muslim faith community in the application of the Sharia norms and instructions (→ al-aḥkām aš-šarʿiyya), which according to classical doctrine are divided into three groups - namely the faith (doctrine)-relevant norms/instructions (→ al-aḥkām al-iʿtiqādiyya), the morally (doctrinally) relevant norms/instructions (→ al-aḥkām al-aḥlāqīyya) and the actionally (doctrinally) relevant norms/instructions (→ al-aḥkām al-ʿamaliyya) - in a special way. This is because the Shari'ah order should apply beyond the sphere of the religious community in society, if possible in full or at least in part, depending on the political and legal situation and the Islamo-theological and Islamo-legal influence of the corresponding Muslim community, and which meaning and reading of the Shari'ah is decisive there.

In contrast to the two cantons of Geneva and Neuchâtel with their constitutional concept of state secularism, all other cantons refrain from a separation between religion and state in their constitutions, but do not -prohibit it either. It is therefore at the discretion of the democratic constitutional state how far it wants to open itself structurally to religious concerns or not, or to what extent and to what extent it wants to give religious communities space to develop or not, and what structural-institutional proximity it wants to seek to them or not.

The Canton of St. Gallen, for example, shows a far-reaching openness when it says of itself that it has grown on a Christian-humanist basis (Art. 1 para. 3 of the Constitution of the Canton of St. Gallen of 10.6.2001).

Thus, each individual canton - based on Article 72 paragraph 1 of the Federal Constitution of the Swiss Confederation of 18 April 1999 - is authorised to

determine its own relationship with religious communities in general (structural fundamental decision) and with each religious community in particular (institutional individual decision) - while complying with the overriding law that is binding for it, such as the fundamental rights guaranteed under the Constitution and international law (→ freedom of religion, principle of equal treatment and prohibition of discrimination, prohibition of arbitrariness). In this context, their contribution to social cohesion and to the transmission of fundamental values or their social significance and observance of fundamental rights is guiding for his or her decision. The more they recognise their contribution, the closer their structural-institutional relationship with them, and vice versa: the less they recognise their contribution, the more distant their structural-institutional relationship with them (models - from left to right with decreasing closeness: recognition under public law, public recognition, simple cooperation without recognition, no cooperation).

[France: Law No. 20211109 -of 24.8.2021 on strengthening respect for the principles of the republic](#)

On 2 October 2020, in the Parisian suburb of Les Mureaux, French President Emmanuel Macron gave an impressive keynote speech on the fight against segregationist tendencies in France, in which he was unequivocal about France's problems with Islamism and at the same time rejected simplistic and reductionist coping strategies. He underlined the centrality of the principle of secularity, which (1) concerns every person in France because spirituality is personal, and (2) is the cement that holds united France together. He also condemned the equation of Islam and Islamism, or the claim that all Muslims are allies of Islamists. For him, it is important to fight the Islamist segregationist efforts, which - with various forms of action - demand the renunciation of the values of the French Republic and demand and promote the gradual establishment of an Islam-dominated society with communitarian structures, first as a parallel society and finally as a society as a whole.

With a five-point plan of measures, President Emmanuel Macron now wants to take action on the part of the state against the Islamist segregationist efforts:

1. Package of measures "Public Order and Service":

Establish effective instruments to enforce the fundamental principles of the republican system of values and law and the duty of the public service and its staff and of private companies entrusted with public tasks and their employees to observe the duty of religious neutrality in the performance of their tasks.

2. Package of measures "Associations“:

- a. Strengthening of behavioural control of state-subsidised associations by means of signing codes of conduct to respect republican values and to comply with minimum standards for social coexistence ("Charter of Secularism") and corresponding sanctioning in case of non-compliance.
- b. Extension of the possibilities for official dissolution of associations beyond the grounds of terrorism, racism or anti-Semitism to other grounds such as violation of human dignity, violation of the republican system of values and law or the use of physical or psychological pressure.

3. Package of measures "School system“

- a. Attendance at school as a "republican melting pot" and "heart of the realm of secularity" is an indispensable stage on the way to a free, self-confident and rational citizenry and must therefore be compulsory for children from the age of three.
- b. Home schooling is now only permitted for health reasons.
- c. Private schooling by schools abroad of Islamic countries which, in addition to imparting technical knowledge, also serve to preserve the language and culture of origin, should - while respecting the freedom to teach - be subject to increased state control, for example with regard to the technical qualities and knowledge of French of the teachers, their respect for republican values, the content of the teaching programme or the financial sources. Corresponding points are to be regulated by state

treaty. - In general, the state should pay more attention to public schools and, in the case of incompatibilities with the republican values and legal system, take appropriate sanctions in individual cases, up to and including closing the school.

#### 4. Package of measures "Islam"

- a. State-sponsored establishment of an enlightened Islam that respects the separation of religion and state, is ideologically moderate and seeks balance.
- b. State-supported development of an organisational framework that has grown in France, is not controlled from abroad, is structurally sound and transparent in terms of its finances and activities, with appropriately qualified staff and a reliable interlocutor for the state authorities for matters to be managed jointly.
- c. Taking into account the Muslim presence in society, expand undergraduate, graduate and postgraduate programmes and courses on Islam and the Arabic language and establish new Islamic Studies institutions with the help of government subsidies to promote knowledge of Islam and Muslim civilisation.

#### 5. Package of measures "Republic":

- a. State and civil society awareness-raising work on republican values and their benefits for every person's life.
- b. Visible and tangible presence of the republican order on the ground through actions by the legislative, executive and judicial powers of the state, for example through lectures in neighbourhoods or schools or police patrols - and through the establishment of new state educational institutions.
- c. Support projects in housing, education, employment and culture to de-ghettoise the peripheries.
- d. Voluntary neighbourhood actions to promote multicultural coexistence.

Finally, on 24.8.2021, President Emmanuel Macron promulgated a law act (No. 2021-1109) to strengthen respect for the principles of the Republic, adopted by the National Assembly on 23.7.2021 and amended by the Constitutional Council on 13.8.2021 after verification of its constitutionality; it was published in the Official Journal on 25.8.2021.

This law act breathes the spirit of a republic determined to fulfil its duty to enforce both its structural principles of indivisibility, secularity and democracy and its action maxim of equality of rights. The principle of respect for different beliefs is subordinate, insofar as there is no duty here for the state to enforce beliefs, but only a duty to take them into account.

Art. 1 of the Constitution of the Republic of France of 4.10.1958 reads as follows: "France is an indivisible, secular/secular, democratic and social Republic. It guarantees the equality of all citizens before the law, without distinction of origin, race or religion. It respects all faiths. (...). "La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances. (...). "

The French state thus strives for the structural inclusion of members of Islam in its political and legal community and their opinion-forming, will-forming and decision-making processes on the basis of citizenship (citoyenneté). The population or people that has become multicultural and multi-religious is not an agglomerate of communities, each with their own religious value and legal systems/hierarchies. The French Republic cannot and must not (any longer) accept a cultural-religious communitarianism with an identitarian withdrawal or even with an identitarian isolation, especially since these efforts for segregation are diametrically opposed to its motto "Liberty, Equality, Fraternity".

Germany: Factual exclusion

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