

# Switzerland: Freedom of creed and conscience, immigration, and public schools in the postsecular state—compulsory coeducational swimming instruction revisited

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*Switzerland's model of power sharing in a multiethnic society—assimilation of the “new minorities—public primary schools—social cohesion versus cultural distinctiveness—Muslim students and compulsory swimming lessons—unconstitutional according to Swiss Federal Supreme Court decision in 1993—reconsidered by the Court in 2008*

*Given its constitutional framework and political culture, Switzerland offers an example for the gradual inclusion of minorities resulting in a distinctive model of power sharing in a multiethnic society. However, global migration with its “new minorities” entails a fundamentally different challenge. Public primary schools, which are attended by virtually all children residing in Switzerland, thus face the difficult task of providing both for equal opportunities for all children and for social cohesion via a clearly defined educational agenda. This must be achieved at the same time the state respects the distinctive cultural and religious background of each student. The question of whether Muslim students should be obliged to attend compulsory swimming lessons in public primary schools has been widely discussed in both the legal and political arena after a decision by the Swiss Federal Supreme Court in 1993 found such an obligation to be unconstitutional. With a case decided on October 24, 2008, the Court was given the opportunity to reconsider the issue. This paper critically assesses this recent decision by the Swiss Federal Supreme Court in its social, political, and dogmatic context.*

## 1. A challenge to a “paradigmatic case of political integration”

Alluding to Switzerland's commitment to quadrilingualism and its safeguards for ethnic and denominational minorities in both constitutional law and political culture, the late Karl W. Deutsch coined the phrase describing Switzerland as a

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“paradigmatic case of political integration.”<sup>1</sup> The largely peaceful coexistence of several ethnic, linguistic, and denominational groups on Swiss territory stems from a distinctive form of power sharing. Its main characteristic is the interplay between a particular concept of democracy, on the one hand, and a strong emphasis on federalism, on the other, thereby protecting traditional minorities against detrimental majority decisions.

The Swiss Federal Constitution links elements of representative and direct democracy to a system of “semi-direct democracy.”<sup>2</sup> Whereas proportional representation emerged as a paramount feature of Switzerland’s system of representative democracy, the distinctive mode of direct democratic decision making emphasizes the respective interests of the member states (cantons), each with their own linguistic and denominational peculiarities. Not only are revisions and amendments to the Swiss Federal Constitution subject to a popular vote requiring a double majority of both the population and the cantons<sup>3</sup>—a provision significantly increasing the weight of the small, overwhelmingly Roman Catholic cantons of central Switzerland<sup>4</sup>—but all federal statutes and most international treaties may be put to a popular vote, so long 50,000 citizens (currently about 1 percent of all voters) ask for such an optional referendum.<sup>5</sup> The mere possibility of an optional referendum exerts a moderating effect on the formation of opinion in parliament, since a broad coalition of parties and interest groups is needed, ultimately, for a bill to be approved at the ballot box.<sup>6</sup> Thus, the optional referendum transformed Switzerland’s political system into a power-sharing arrangement called consensus democracy or “concordance democracy.”<sup>7</sup>

<sup>1</sup> KARL W. DEUTSCH, *DIE SCHWEIZ ALS EIN PARADIGMATISCHER FALL POLITISCHER INTEGRATION* [SWITZERLAND AS A PARADIGMATIC CASE OF POLITICAL INTEGRATION] (1976).

<sup>2</sup> Wolf Linder, *Direct Democracy*, in *HANDBOOK OF SWISS POLITICS* 101, 108 (Ulrich Klöti et al. eds., 2nd ed. 2007).

<sup>3</sup> Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst], Costituzione federale della Confederazione Svizzera [Cost.] [Federal Constitution], April 18, 1999, SR 101, RS 101 [hereinafter SWISS FED. CONST.] art. 142; and SWISS FED. CONST. art. 140, ¶ 1 (a).

<sup>4</sup> For empirical evidence see Adrian Vatter & Fritz Sager, *Föderalismus am Beispiel des Ständemehrs* [Federalism Using the Example of the Majority of Cantons], 2 *SWISS POLITICAL SCIENCE REVIEW* 1, 13–14 (1996).

<sup>5</sup> See SWISS FED. CONST. art. 141, ¶ 1.

<sup>6</sup> For empirical evidence, see Pascal Sciarini & Alexandre H. Trechsel, *Démocratie directe en Suisse: L’élite politique victime des droits populaires?* [Direct Democracy in Switzerland: The Political Elite as a Victim of Popular Rights?], 2 *SWISS POLITICAL SCIENCE REVIEW* 201, 207 (1996); and Adrian Vatter, *Consensus and Direct Democracy. Conceptual and Empirical Linkages*, 38 *EUROPEAN JOURNAL OF POLITICAL RESEARCH* 171, 185 (2000).

<sup>7</sup> See Wolf Linder, *Political Culture*, in *HANDBOOK OF SWISS POLITICS*, *supra* note 2, at 15, 26–28.

Because of Switzerland's constitutional commitment to federalism, each canton enjoys considerable autonomy. The Swiss Federal Constitution states that "[t]he regulation of the relationship between church and state is a cantonal matter."<sup>8</sup> As a consequence, each of the twenty-six cantons provides for a unique regulatory framework regarding the relationship between church and state, thus turning Switzerland into a laboratory of constitutional law, so far as the regulation of religious issues is concerned. Yet, as all federal and international law takes precedence over cantonal law,<sup>9</sup> any regulation at cantonal level must be consistent with individual freedom of creed and conscience as guaranteed by the Swiss Federal Constitution<sup>10</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>11</sup> While two cantons provide for a strict separation of church and state, the remaining twenty-four recognize Protestant churches and Roman Catholicism as established faiths with certain privileges and duties based on public law.<sup>12</sup> Therefore, Swiss constitutional law regarding religion rests upon the principles of individual freedom of creed and conscience, religious and denominational neutrality and tolerance by the state with regard to matters of religion, and, in almost all cantons, parity of the two main Christian denominations.<sup>13</sup> However, this constitutional provision for neutrality regarding religion is categorically different from *laïcité*—the French version of secularism firmly banishing religion to the private sphere<sup>14</sup>—since it is not hostile toward but, rather, “blind” with regard to religion in order to preserve

<sup>8</sup> SWISS FED. CONST. art. 72, ¶ 1.

<sup>9</sup> See SWISS FED. CONST. art. 49, ¶ 1 (stating that “Federal law shall take precedence over any conflicting provision of cantonal law”).

<sup>10</sup> SWISS FED. CONST. art. 15, ¶ 1 (stating that “[f]reedom of religion and conscience is guaranteed”).

<sup>11</sup> Council of Europe, The European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, CETS No.: 005, 213 U.N.T.S. 222 [hereinafter ECHR], art. 15, ¶ 1 (stating that “[e]veryone has the right to freedom of thought, conscience and religion . . .”).

<sup>12</sup> For an overview, see René Pahud de Mortanges, *System und Entwicklungstendenzen des Religionsverfassungsrechts der Schweiz und des Fürstentums Liechtenstein* [System and Trends in Constitutional Law Concerning Religion in Switzerland and the Principality of Liechtenstein], 52 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT [JOURNAL OF EVANGELIC CHURCH LAW], 439, 507–515 (2007); for a detailed account, see DIETER KRAUS, SCHWEIZERISCHES STAATSKIRCHENRECHT [SWISS PUBLIC LAW REGARDING RELIGION] 153–314 (1993).

<sup>13</sup> Bernhard Ehrenzeller, *Glauben, Gewissen und Weltanschauung* [Faith, Conscience, and Philosophy of Life], 301, 301–325 in HANDBUCH DER GRUNDRECHTE: GRUNDRECHTE IN DER SCHWEIZ UND IN LIECHTENSTEIN [HANDBOOK ON FUNDAMENTAL RIGHTS: FUNDAMENTAL RIGHTS IN SWITZERLAND AND LIECHTENSTEIN] (Detlef Merten & Hans-Jürgen Papier eds., 2007); and PETER KARLEN, DAS GRUNDRECHT DER RELIGIONSFREIHEIT IN DER SCHWEIZ [THE FUNDAMENTAL RIGHT TO FREEDOM OF RELIGION IN SWITZERLAND] 41–53 (1988).

<sup>14</sup> See 1958 CONST. art. 1 (France) (stating that “France shall be an indivisible, *secular* [French original: ‘*laïque*’], democratic, and social Republic.” (emphasis added)). See also *infra* note 76 .

the accessibility to state-run institutions, such as public schools, for persons of all faiths.<sup>15</sup>

In light of both the constitutional framework and the political culture of Switzerland, it appears that the gradual integration of the country's traditional minorities resulted from channeling the interests of such groups through the political process. This implies that the members of minorities, those who are not Swiss per se, are without various political rights. The right to vote is granted only to "[a]ll Swiss citizens over the age of eighteen."<sup>16</sup> Since roughly one in five of Switzerland's inhabitants is a non-Swiss citizen, 20 percent of the Swiss population is deprived of political rights and, thus, of the opportunity of advocating their interests directly through political processes.<sup>17</sup> Of the country's permanent resident population, 24.1 percent are foreign-born, which amounts to about the same fraction as in Australia though a considerably larger proportion of the population than in other traditional immigration countries, such as Canada, New Zealand, or the United States.<sup>18</sup>

Additionally, the relatively restrictive rules on becoming a citizen result in naturalization rates being rather low in comparison with other countries.<sup>19</sup> Lacking Swiss citizenship and, as a consequence, political rights, the majority of the members of "non-traditional, 'new' religious minorities," such as Hindus, Orthodox Christians, Jehovah's Witnesses, or Muslims, are currently barred from voicing their interests in the political arena.<sup>20</sup> This is especially

<sup>15</sup> Juliane Kokott, *Laizismus und Religionsfreiheit im öffentlichen Raum [Laicism and Freedom of Religion in the Public Sphere]*, 44 DER STAAT [THE STATE], 343, 361 (2005) (differentiating between "neutrality" and "blindness" of the state regarding religion).

<sup>16</sup> SWISS FED. CONST. art. 136, ¶ 1 (stating that "[a]ll Swiss citizens over the age of eighteen, unless they lack legal capacity due to mental illness or mental incapacity, shall have political rights in federal matters.").

<sup>17</sup> See STATISTISCHES JAHRBUCH DER SCHWEIZ [STATISTICAL YEARBOOK OF SWITZERLAND] 36, 47–49, 513 (Swiss Federal Statistical Office ed., 2008) (stating that 21.8 percent of the resident permanent population of Switzerland are non-Swiss citizens).

<sup>18</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], INTERNATIONAL MIGRATION OUTLOOK: ANNUAL REPORT 2008 EDITION, 53–55, 338 (2008).

<sup>19</sup> Bundesgesetz über den Erwerb und Verlust des Schweizer Bürgerrechts [BüG], Loi fédérale sur l'acquisition et la perte de la nationalité suisse [LN], Legge federale su l'acquisto e la perdita della cittadinanza svizzera [LCit] [Federal Statute regarding Citizenship], Sept. 29, 1952, SR 141.0, RS 141.0, art. 14 & 15 (Switz.) (stating that the usual way to obtain Swiss citizenship is via a process demonstrating proper integration, which, in particular, implies being familiar with Swiss laws, customs and ways of life and also having at least twelve years of residence, whereas the years spent in Switzerland between an age of ten and twenty are counted double). For a comparison of the naturalization rates of selected OECD countries see OECD ECONOMIC SURVEYS: SWITZERLAND 120 (2007).

<sup>20</sup> For empirical evidence see CLAUDE BOVAY & RAPHAËL BROQUET, RELIGIONSLANDSCHAFT IN DER SCHWEIZ [RELIGIOUS AFFILIATIONS IN SWITZERLAND] 31–33 (Federal Statistical Office ed., 2004), available at <http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/22/publ.Document.50514.pdf> (stating

true for the Muslim community. Muslims accounted for 4.26 percent of the resident permanent population of Switzerland in the year 2000, yet only 11.7 percent of them were Swiss citizens and, therefore, entitled to vote.<sup>21</sup> As a result, these new minorities have felt increasingly impelled to assert their rights and interests through the judiciary, and not by means of the customary political institutions as was the case with Switzerland's traditional minorities.

## 2. Public schools as agents of social cohesion

Of all children and juveniles raised in Switzerland, 97.3 percent complete their compulsory primary education in public rather than in private non-subsidized schools.<sup>22</sup> Of these students, 23.5 percent are non-Swiss citizens.<sup>23</sup> Hence, public schools play a crucial role paving the way for social cohesion and equal opportunity for all children. The role of schools, as agents of social cohesion and integration, can be traced back to the nineteenth century during which the *Kulturkampf*, the struggle of anticlerical liberals seeking to repudiate the conservative influence on politics of the Roman Catholic Church ("Ultramontanism"),<sup>24</sup> resulted in three constitutional pillars on which public primary education has rested since 1874: compulsory schooling, free of charge; neutrality, in matters of religion and denomination; and exclusive governmental oversight.<sup>25</sup> Historically, these principles were aimed at pushing the Roman Catholic Church out of primary education so as to allow for the coeducation of members of all religions and denominations.<sup>26</sup>

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that, in the year 2000, 92.5% of Hindus, 88.3% of Muslims, 78.1% of Orthodox Christians, and 42.4% of Jehovah's Witnesses residing in Switzerland were foreign nationals).

<sup>21</sup> BOVAY & BROQUET, *supra* note 20, at 32, 48–51.

<sup>22</sup> STATISTISCHES JAHRBUCH DER SCHWEIZ, *supra* note 17, at 339–340.

<sup>23</sup> *Id.*

<sup>24</sup> For an overview in the Swiss context see Franz Xaver Bischof, *Kulturkampf*, in HISTORISCHES LEXIKON DER SCHWEIZ [THE HISTORICAL DICTIONARY OF SWITZERLAND], available at <http://www.hls-dhs-dss.ch/textes/d/D17244.php>.

<sup>25</sup> Bundesverfassung der Schweizerischen Eidgenossenschaft [aBV], Constitution fédérale de la Confédération suisse [aCst] [Federal Constitution of 1874], May 29, 1874, AS 1 (1875), 1 RO, 1 (1875), art. 62, ¶2 (stating that "[p]rimary school education shall be mandatory and be managed or supervised by the state" and be "free of charge"). See FRITZ FLEINER, SCHWEIZERISCHES BUNDESSTAATSRICHT [SWISS FEDERAL CONSTITUTIONAL LAW] 518 (1923); regarding the revised Constitution of 1999, *supra* note 3, see, e.g., RENÉ RHINOW & MARKUS SCHEFER, SCHWEIZERISCHES VERFASSUNGSRECHT [SWISS CONSTITUTIONAL LAW] 289–294, 687–689 (2nd ed., 2009).

<sup>26</sup> See WALTHER BURCKHARDT, KOMMENTAR DER SCHWEIZERISCHEN BUNDESVERFASSUNG VOM 29. MAI 1874 [COMMENTARY ON THE SWISS FEDERAL CONSTITUTION OF MAY 29, 1874] 200–203 (3rd ed. 1931); FLEINER, *supra* note 25, at 520–521.

Applying these constitutional provisions, the Swiss Federal Supreme Court not only declared the placement of religious symbols, such as crucifixes, in classrooms of public primary schools unconstitutional<sup>27</sup> but also barred a female teacher of Swiss citizenship from teaching while wearing a *khimar* as part of the *hijab* (the Islamic headscarf) because of the constitutional obligation of public schools to display neutrality in matters of religion.<sup>28</sup> At the same time, the Court committed public schools to granting members of religious minorities, such as the followers of the Worldwide Church of God, exemptions from school attendance on their religious holidays even if the absence could amount to five or six consecutive days.<sup>29</sup> Finally, on June 18, 1993, the Court had ruled that public schools were obliged to exempt female minors of the Islamic faith from mandatory swimming lessons on the account of religion.<sup>30</sup> This judgment became widely known as the “swimming pool case”. Hardly any other decision of the Swiss Federal Supreme Court, in recent years, regarding the role of religion was met with such persistent and harsh criticism, mainly in the public arena and the mass media.

### 3. Revisited and revised

On October 25, 2006, a Swiss permanent resident of Tunisian citizenship and Islamic faith filed with the competent council of education a request to exempt his two sons, ages nine and eleven, from compulsory attendance of swimming lessons as a part of their mandatory education at a public primary school in the city of Schaffhausen; this provided the Swiss Federal Supreme

<sup>27</sup> Bundesgericht [BGR] [Federal Court] Sept. 26, 1990, 116 Entscheidungen des Schweizerischen Bundesgerichts [BGE] Ia 252 (Switz.).

<sup>28</sup> BGR Nov. 12, 1997, 123 BGE I 296 (Switz.); application subsequently declared inadmissible by the European Court of Human Rights, see *Dahlab v. Switzerland*, App. No. 42393/98, 2001 Eur. Ct. H.R., available at <http://www.echr.coe.int/echr>. *Contra* JÖRG PAUL MÜLLER & MARKUS SCHEFER, GRUNDRECHTE IN DER SCHWEIZ [FUNDAMENTAL RIGHTS IN SWITZERLAND] 276–277 (4th ed. 2008) (casting doubt on the Swiss Federal Supreme Court’s decision).

<sup>29</sup> BGR Feb. 19, 1988, 114 BGE Ia 133 [hereinafter BGR., *Worldwide Church*]. For an overview, see WALTER KÄLIN, GRUNDRECHTE IM KULTURKONFLIKT: FREIHEIT UND GLEICHHEIT IN DER EINWANDERUNGSGESELLSCHAFT [FUNDAMENTAL RIGHTS IN THE CONFLICT OF CULTURES: FREEDOM AND EQUALITY IN THE IMMIGRATION SOCIETY] 136–137 (1999), available at [http://www.oefre.unibe.ch/unibe/rechtswissenschaft/oefre/content/e700/e1357/e772/e2750/e2751/NFP-Buch-Nov99\\_ger.pdf](http://www.oefre.unibe.ch/unibe/rechtswissenschaft/oefre/content/e700/e1357/e772/e2750/e2751/NFP-Buch-Nov99_ger.pdf).

<sup>30</sup> BGR Jun. 18, 1993, 119 BGE Ia 178 [hereinafter BGR., *swimming pool case*]. For a review of the scholarly literature on *Schwimmbadfall*, see Obergericht des Kantons Schaffhausen [OGer. SH] [Supreme Court of the Canton of Schaffhausen], Dec. 14, 2007, Nr. 60/2007/24, § 2d/cc [hereinafter *Obergericht Schaffhausen*], available at <http://www.obergerichtsentscheide.sh.ch/oge/default.htm>.

Court with an opportunity to reconsider its controversial decision.<sup>31</sup> The petitioner argued that being a Muslim would not allow him to send his two sons to swimming lessons together with girls in view of chapter 24, verse 30, of the Qur'an, according to which "the believing men . . . should lower their gaze and guard their modesty [in the presence of women]."<sup>32</sup> According to the Swiss Civil Code, "parents are free to determine the child's religious upbringing" until the "child is sixteen years of age."<sup>33</sup> The petitioner argued, consequently, that an obligation for his sons to attend these lessons would infringe on his own right to freedom of religion as guaranteed by both the Swiss Federal Constitution<sup>34</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>35</sup> Not only the council of education but all the appellate bodies of the canton, including the Supreme Court of the canton of Schaffhausen,<sup>36</sup> rejected the petitioner's claim. The authorities, thereby, overruled their own long-standing practices, which were rooted in the previously mentioned precedent by the Swiss Federal Supreme Court,<sup>37</sup> by claiming that not only the sociocultural but legal determining factors had significantly altered.<sup>38</sup>

On October 24, 2008, the Swiss Federal Supreme Court upheld the decision of the local authorities.<sup>39</sup> The Court found that the petitioner's fundamental right of freedom of creed and conscience was affected but not violated by the local authorities. As opposed to the court of lower instance, the Swiss Federal Supreme Court refrained from clarifying whether or not the prohibition for boys to attend swimming lessons together with girls amounted to a "central element" of Islam, holding that "the state which is neutral in matters of religion is not allowed to reassess whether certain religious norms are theologically accurate or not."<sup>40</sup> Consequently, the Court had to establish whether the limitation

<sup>31</sup> See BGer Oct. 24, 2008, 135 BGE I 79., [hereinafter BGer., *Schaffhausen*].

<sup>32</sup> Qur'an 24:030 (Abdullah Yusuf Ali trans.), available at <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/quran/024.qmt.html>.

<sup>33</sup> Schweizerisches Zivilgesetzbuch [ZGB], Code civil suisse [Cc], Codice civil svizzero [Cc] [Civil Code], Dec. 10, 1907, SR 210, RS 210, art. 303 ¶ 1 & 3 (Switz.); on the scope and the limits of the provision see CYRIL HEGNAUER, GRUNDRISSE DES KINDESRECHTS [FUNDAMENTALS OF CHILD LAW] 198 (5th ed. 1999).

<sup>34</sup> SWISS FED. CONST. art. 15, ¶ 1 (stating that "[f]reedom of religion and conscience is guaranteed").

<sup>35</sup> ECHR art. 15, ¶ 1 (stating that "[e]veryone has the right to freedom of thought, conscience and religion . . .").

<sup>36</sup> See *Obergericht Schaffhausen*, *supra* note 30, § 2e.

<sup>37</sup> BGer., *swimming pool case*, *supra* note 31.

<sup>38</sup> *Obergericht Schaffhausen*, *supra* note 30, § 2d/gg, hh.

<sup>39</sup> BGer., *Schaffhausen*, *supra* note 31.

<sup>40</sup> *Id.* § 4.4.

of the petitioner's freedom of religion was justified in light of the particular circumstances of the case.

According to the Swiss Federal Constitution, limitations of fundamental rights require a proper legal basis and must be justified by a public interest and proportionate to the goals pursued in order to be constitutional.<sup>41</sup> Additionally, the “essence” of the basic right in question is “inviolable.”<sup>42</sup> According to the Court, it is only the so-called *forum internum*—in this context, meaning the right to have a religion perceived as a personal commitment—that accounts for this intangible core of the fundamental right to freedom of creed and conscience. On the other hand, the dimension of the fundamental right affected by the local authorities' decision, the *forum externum*—that is, religion conceived as an individual or communal behavior—would fail to enjoy the same invariant protection.<sup>43</sup> In applying the constitutional provision, the Court not only deemed the official curriculum of the canton of Schaffhausen to be a proper legal basis for the obligation to attend coeducational swimming lessons but held this obligation to be in the public interest as it would not only provide for personal safety but would be conducive to equal opportunity for all children regardless of gender as well as to the integration of persons of different cultural or religious origins.<sup>44</sup> The Court, therefore, balanced the public interest according to which all students are obliged to attend swimming lessons against the petitioner's fundamental right to freedom of creed and conscience.<sup>45</sup>

The Court then touched upon both the increased importance attached to the issue of integration in federal regulations regarding foreigners as well as the increased number of Muslims residing in Switzerland; it then highlighted the crucial significance of accustoming children and juveniles to the “basic social conditions of Swiss society” in order to ensure equal opportunity and social peace.<sup>46</sup> Furthermore, the Court stated that someone who “emigrates to a foreign country is bound to accept certain limitations and alterations of his or her own habits,” a fact which, according to the Court, does not call the essence of the individual freedom of religion into question.<sup>47</sup> After having underlined the paramount role of public schools in the process of integration, the Court asserted that

<sup>41</sup> SWISS FED. CONST. art. 36, ¶ 1-3.

<sup>42</sup> SWISS FED. CONST. art. 36, ¶ 4.

<sup>43</sup> BGer., *Schaffhausen*, *supra* note 31, § 5.1, citing BGer, Feb. 27, 2008, 134 BGE I 56, 60–61, § 4.3.

<sup>44</sup> BGer., *Schaffhausen*, *supra* note 31, §§ 6.5, 7.1.

<sup>45</sup> *Id.* § 7.2.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

even if the petition were granted, the petitioner's two sons would still "catch a glimpse of the part of the female body in question [the so-called *Awrah*, that is, the part of the body not meant to be exposed in public] on a daily basis" both in public as well as in the mass media.<sup>48</sup> In considering and balancing these factors, the Court found no violation of the petitioner's individual right to freedom of creed and conscience as guaranteed by the Swiss Federal Constitution and international law and, as a consequence, it dismissed the application.<sup>49</sup>

#### 4. Freedom of creed and conscience in public schools of the postsecular state

The vast majority of religions, as they perceive themselves, each constitute a "comprehensive doctrine" that claims the authority to shape and guide the form of life of both society and its members in an all-embracing way.<sup>50</sup> However, in a democratic society resting upon fundamental human rights, this claim is constrained by the state committed to the principle of neutrality in matters of religion, thus allowing for religious freedom amid diversity.<sup>51</sup> At the same time, of course, religious communities continue to be present in the public sphere. This not only constitutes the core of what Jürgen Habermas has labeled the "'post-secular' society"<sup>52</sup> but lies at the heart of the case discussed here.

Although the Court does not entirely fail to take into account this state of affairs,<sup>53</sup> it still frames the present case as an issue of immigration and, consequently, of the integration of migrants rather than one of religion per se. The unacknowledged strategic motivation for this way of framing the question might have been that this was how the Court could establish its claim that considerably altered legal factors exist; this would, in turn, render possible overruling its previous judgment. In fact, the new Federal Statute Regarding Foreigners, enacted on January 1, 2008, puts far more emphasis on integrating foreign nationals than the preceding statute.<sup>54</sup> Still, the relevant difference

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* §§ 7.3.

<sup>50</sup> Jürgen Habermas, *Vorpolitische Grundlagen des demokratischen Rechtsstaates? [Pre-political Foundations of the Democratic State Based on the Rule of Law?]*, in *DIALEKTIK DER SÄKULARISIERUNG [DIALECTIC OF SECULARIZATION]* 15, 34 (Florian Schuller ed., 2005).

<sup>51</sup> Habermas, *supra* note 50.

<sup>52</sup> Jürgen Habermas, *Religion in the Public Sphere*, 14 *EUR. J. PHIL.* 1, 15 (2006).

<sup>53</sup> See BGer., *Schaffhausen*, *supra* note 31, § 5 (stating that "certain religiously and culturally rooted codes of conducts, which, with regard to their content, affect [the believers'] everyday lives, may conflict with the rules governing a society").

<sup>54</sup> See Bundesgesetz über die Ausländerinnen und Ausländer [AuG], *Loi fédérale sur les étrangers [LEtr]*, *Legge federale sugli stranieri [LStr]* [Federal Statute Regarding Foreigners], Dec. 16, 2005, SR 142.20, RS 142.20, art. 4 ¶ 1 (Switz.), available at [http://www.admin.ch/ch/d/sr/142\\_20/a4.html](http://www.admin.ch/ch/d/sr/142_20/a4.html).

between the obligation to attend coeducational swimming instructions, as set forth in the canton's law, on the one hand, and the religious norms the petitioners believed they were bound by (that is, the aforementioned passage of the Qur'an),<sup>55</sup> on the other, exclusively stems from religion, not nationality. This differentiation is illustrated by the previous cases regarding a teacher of Swiss citizenship wearing an Islamic headscarf<sup>56</sup> and members of the Worldwide Church of God asking for exemption from compulsory school attendance during religious holidays.<sup>57</sup> A German case regarding a member of an evangelical Christian community who refused to send her children to a public school, claiming that her faith would not allow her to expose her children to, among other things, sexual education and the theory of evolution,<sup>58</sup> provides further evidence that the conflict between religious and legal obligations provoked by topics taught at public schools is generally independent of the citizenship of the individual in question. Under circumstances in which religious minorities face conflicting obligations in relation to state institutions the individual's freedom of creed and conscience is best conceived of as a right to be different.<sup>59</sup>

This right may be limited in the public interest on a proper legal basis—and taking account of proportionality—as long as the essence of the right remains unaffected.<sup>60</sup> Given these constitutional requirements, the petitioner's fundamental right to freedom of creed and conscience must be balanced against the basic requirements of an open, pluralistic, and democratic society requiring of its members that they “take responsibility for themselves” and, “according to their abilities,” to “contribute to achieving the tasks of the state and society,”<sup>61</sup> which themselves amount to a significant public interest. If public schools are to fulfill their crucial role as agents of social cohesion in society, it is indispensable for both the legislative bodies and courts to define a core of cognitive and social skills to be imparted in primary education, regardless of the individual's cultural, ethnic, or religious background, in order to lay a basis that enables the individual to live a self-reliant, emancipated, and responsible life.

<sup>55</sup> *Supra* note 32.

<sup>56</sup> *Supra* note 28.

<sup>57</sup> *Supra* note 29.

<sup>58</sup> From the angle of comparative constitutional law, see Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court], 2 BvR 1693/04, May 31, 2006, available at [http://www.bundesverfassungsgericht.de/entscheidungen/rk20060531\\_2bvr169304.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20060531_2bvr169304.html) (not admitting the case for decision).

<sup>59</sup> For a general understanding of fundamental rights as institutions safeguarding social differentiation, see NIKLAS LUHMANN, GRUNDRECHTE ALS INSTITUTION [FUNDAMENTAL RIGHTS AS INSTITUTIONS] 23–25, 80, 98–103 (4th ed. 1999).

<sup>60</sup> See *supra* notes 41 & 42.

<sup>61</sup> See SWISS FED. CONST. art. 6 (stating that “[a] individuals shall take responsibility for themselves and shall, according to their abilities, contribute to achieving the tasks of the state and society”).

However, by building its argument mainly on immigration the Court only obfuscates the constitutional principles guiding the case and intermingles the petitioner's religious background with his alleged cultural imprint as an immigrant. This runs the risk of creating double constitutional standards for Swiss citizens, on the one hand, and for foreign nationals, on the other, with regard to freedom of creed and conscience. Notwithstanding the fact that culture and religion almost always interact to form a single individual identity, the petitioner based his petition on religious obligations. Hence, it does not appear to be permissible, methodologically, for the Court, as an agent of a state neutral in matters of religion, to depict this obligation, wholly or in part, as culturally rooted, thus allowing for the principle of "integration" stemming from law for aliens to come into play. Nonetheless, by so doing,<sup>62</sup> the Court claims that—as explicitly stated in the Federal Constitution of 1874—religious convictions would generally not exempt one from fulfilling "civil duties."<sup>63</sup> This causes the Court to turn a blind eye on the well-balanced case law concerning this provision, since it was widely accepted that such "civil duties" had to be stipulated by the legislator in a way that respected the individual's freedom of creed and conscience.<sup>64</sup> Only this explains the constitutional obligation to grant students a dispensation from compulsory school attendance—undoubtedly constituting a "civil duty"—on their respective religious holidays as set forth by the same Swiss Federal Supreme Court.<sup>65</sup>

Furthermore, by mixing immigration issues with religion the Court clearly fails to distinguish between integration and assimilation. Whereas a duty to integrate is constitutionally permissible, an obligation to assimilate fully is not.<sup>66</sup> Not only does the International Covenant on Civil and Political Rights ensure the right of persons belonging to "ethnic, religious or linguistic minorities . . . not to be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language"<sup>67</sup> but contracting parties to the UN

<sup>62</sup> See BGER., *Schaffhausen*, *supra* note 31, § 7.2.

<sup>63</sup> Swiss Federal Constitution of 1874, *supra* note 25, art. 49, ¶ 5.

<sup>64</sup> See BURCKHARDT, *supra* note 26, at 447–448 (reviewing the long-standing practice of the Swiss Federal Supreme Court).

<sup>65</sup> BGER., *Worldwide Church*, *supra* note 29.

<sup>66</sup> See JOSEPH RAZ, *Multiculturalism: A Liberal Perspective*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN MORALITY OF LAW AND POLITICS* 155, 166–167 (1994) (arguing against coerced assimilation). See also BGER, Feb. 25, 2008, 134 BGE II 1 § 5/4.2 (stating that "[a]n obligation to assimilate asking foreign nationals to conform themselves to both local customs and the [domestic] way of life beyond the [existing] legal duties [according to the positive law] cannot be deduced from the principle of integration"); KÄLIN, *supra* note 29, at 41–50, 147.

<sup>67</sup> International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171. See MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 644–646, 648–650, 657–667 (2nd ed.).

Convention on the Rights of the Child, such as Switzerland, are further obliged to ensure the “development of [the child’s] respect” both “for the national values of the country in which the child is living” as well as for “his or her own cultural identity, language and values.”<sup>68</sup> In light of international law, the “right to be different” resulting from freedom of creed and conscience is not limited to either the *forum internum* or the private sphere.

With regard to personal safety constituting a public interest that would allow for the infringement of a fundamental right, it should be noted that the weight of such a public interest should be assessed in view of the degree of damage an obligation imposed by the state (such as swimming instruction) potentially can prevent.<sup>69</sup> Yet, the Court neither takes account of the petitioner’s claim that one of his sons would know how to swim and the other would receive private swimming lessons<sup>70</sup> nor does the Court take into consideration, according to the most recent data, that only about 1.4 percent of the cases of death of persons up to the age of fourteen in Switzerland were caused by drowning.<sup>71</sup> It remains an open question whether any more of these tragic events could have been prevented through mandatory swimming instruction at public schools. As a consequence, the public interest in question boils down, by and large, to the issue of “integration.”

In this regard, the Court might have been inclined to overstate the importance of the integrative function of the school subject in question (swimming lessons) even with the assumption that the pertinent issue in the case was linked to immigration and, as a consequence, to integration. In the most populated canton, which accounts for approximately 17 percent of the entire permanent resident population of Switzerland—the canton of Zurich—swimming instruction in public schools is only “suggested” and, ultimately, is a matter to be dealt with at the local level and is dependent on the communal infrastructure.<sup>72</sup> From the first to the third grade only one swimming lesson every second week is “suggested” by the cantonal authorities and as few as six lessons per

<sup>68</sup> Convention on the Rights of the Child art. 29, ¶ 1 (d), Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>69</sup> See MARTINO MONA, DAS RECHT AUF IMMIGRATION [THE RIGHT TO IMMIGRATION] 399 (2007) (arguing that the justification of governmental actions conflicting with religious practices such as the refusal of blood transfusions should be assessed with regard to the potential damage caused by such activities).

<sup>70</sup> See *Obergericht Schaffhausen*, *supra* note 30, § 2d/hh.

<sup>71</sup> TODESURSACHENSTATISTIK: URSACHEN DER STERBLICHKEIT 2005 UND 2006 [STATISTICS OF DEATH CASES: CAUSES OF MORTALITY 2005 and 2006] 68, 70 (Swiss Federal Statistical Office ed., 2008), available at [www.bfs.admin.ch/bfs/portal/de/index/themen/14/22/publ.Document.111467.pdf](http://www.bfs.admin.ch/bfs/portal/de/index/themen/14/22/publ.Document.111467.pdf) (stating that, in 2005, 7 out of 458 deaths among people aged 14 years and under were caused by drowning, as well as 6 out of 469 deaths in this age range in 2006).

<sup>72</sup> See LEHRPLAN VOLKSSCHULE [CURRICULUM OF PUBLIC SCHOOLS] 317 (Bildungsdirektion des Kantons Zürich ed., 2008), available at [http://www.vsa.zh.ch/file\\_uploads/bibliothek/k\\_268\\_Lehrplan/4470\\_0\\_lehrplanfrdienvolksschule.pdf](http://www.vsa.zh.ch/file_uploads/bibliothek/k_268_Lehrplan/4470_0_lehrplanfrdienvolksschule.pdf).

schooling year (or less than 2 percent of all compulsory lessons) from the fourth to the sixth grade.<sup>73</sup> After the sixth grade, physical education, in general, is taught predominantly in gender-separated classes.<sup>74</sup> In light of the constitutional right to be exempt from school attendance for religious holidays even for five to six consecutive days, according to long-standing case law,<sup>75</sup> the Court's judgment appears to be hardly consistent with its own prior rulings and seems based on an overemphasis of the integrative function of swimming lessons. Furthermore, the Court apparently lost sight of the fact that too strict a concept of integration could have adverse effects, as the example of France suggests. The ban on wearing symbols "ostentatiously" demonstrating religious affiliation in public schools<sup>76</sup> caused a considerable number of female students of Islamic faith to enroll in private Catholic schools in order to circumvent the intrusion on their freedom of creed and conscience.<sup>77</sup> A comparable development could possibly, over time, undermine the very integrative function of public schools the Court seeks to uphold.

Finally, with regard to the expressive and symbolic weight every Supreme Court judgment carries, it appears incomprehensible and highly insensitive for the Court to cite a tendentious if not Islamophobic article, with the headline "Switzerland on its way to becoming an Islamic state," as evidence for the estimated number of Muslims currently living in Switzerland—all the more so as the cited Web page neither gives a source for its estimate nor does it live up to even modest standards of objectivity.<sup>78</sup>

<sup>73</sup> See *id.* at 14–15, 317 (listing 22–31 compulsory lessons per year in public schools, as well as 18–40 swimming lessons per year—calculation in text is based on 40 weeks of instruction per year).

<sup>74</sup> *Id.* at 315 (stating that more than half of all classes shall be taught as single-sex-classes).

<sup>75</sup> See BGer., *Worldwide Church*, *supra* note 29.

<sup>76</sup> Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, art. L141-5-1, ¶ 1, at 5190, available at <http://www.legifrance.gouv.fr/initRechCodeArticle.do> (stating as follows: "Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit." [English translation by author: "It is prohibited to wear signs or clothing by which students ostentatiously demonstrate a religious affiliation in schools, high schools, and colleges"]). For a critical assessment, see SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 181–198 (2004).

<sup>77</sup> See Katrin Bennhold, *French Muslims Find Haven in Catholic Schools*, N. Y. TIMES, Sept. 30, 2008, at A6, available at <http://www.nytimes.com/2008/09/30/world/europe/30schools.html>.

<sup>78</sup> BGer., *Schaffhausen*, *supra* note 31, § 7.2, citing the article *Die Schweiz auf dem Weg zum Islam-Staat* [Switzerland on Its Way to Becoming an Islamic State], available at <http://www.israswiss.ch/israswiss/diaspora/50457395aa0bf4206.html>. The article claims that allowing for an officially recognized and subsidized formation of imams in Switzerland would "by decree introduce godlessness in the whole of Switzerland against God's settled will" ["Das somit selbst für die gesamte Schweiz, per Dikret [sic!] gegen Gottes festgesetzten Willen, die Gottlosigkeit über die gesamte Schweiz festgeschrieben werden soll"].

## 5. Conclusion

The decision made by the Swiss Federal Supreme Court may be criticized on several grounds from the perspective of both content and form. First and foremost, the Court apparently blurred the relevant constitutional guidelines that require state authorities to balance the individual's right to freedom of creed and conscience against the crucial role of public schools regardless of the individual's citizenship. Against this backdrop, the judgment by the Supreme Court might best be understood on the basis of its expressive and symbolic function in a distinctive constitutional and political setting while remaining mindful of the fact that the traditional mechanism of integration channeled through the political institutions cannot be applied in the same way with regard to "new minorities" such as Muslims.<sup>79</sup>

Instead, as elaborated above,<sup>80</sup> an alternative strategy must be adopted in which courts bear considerably more responsibility in defining a set of skills as a minimum standard that is mandatory for all students, insofar as these school subjects lay a proper basis enabling the individual to live a self-reliant, emancipated, and responsible life in an open, pluralistic, and democratic society. While physical education, in general, falls into this category, given the crucial social skills gained through competition, games, and exercises, it appears unpersuasive to attach the same importance to swimming lessons, given both the weight of the public interest and the concrete circumstances in the cantons.<sup>81</sup> Against this backdrop, it seems doubtful that the Court decided the issue entirely unaffected by the persistent criticism of the controlling decision made more than fifteen years ago,<sup>82</sup> particularly as the evidence for a considerable alteration of the relevant legal and factual circumstances in the interim looks rather tenuous. The Court not only failed to distinguish clearly between integration, on the one hand, and assimilation, on the other, but also chose the wrong case with which to send the right message empowering public schools. In light of this, the constitutional challenges posed by global migration to Switzerland as "a paradigmatic case of political integration"<sup>83</sup> appear far from overcome.

<sup>79</sup> For brief outline of the constitutional and political context, see *supra* at 754–758.

<sup>80</sup> See *supra* at 763.

<sup>81</sup> See *supra* at 765–766.

<sup>82</sup> See *Schwimmbadfall*.

<sup>83</sup> *Supra* note 1 .