

Ans :

**RETHINKING NON-DISCRIMINATION AND
MINORITY RIGHTS**

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tial) victims would be engaged in seeking recognition for their identity that differs from the national standard. This difference is often constructed through discrimination, and may not have any visibility. The main reason for the people who are considered "different" by the wider society, and because of their alleged difference they are defined as potential victims of ethnic or cultural discrimination, to be engaged in, for example, anti-discrimination programmes, is not to receive socio-economic support, in the first place. They are aspiring to recognition of their identity. This kind of message is sent out by many immigration organisations, at least in Germany, who stress that the missing recognition is actually the discrimination, and that this discriminatory non-recognition results, among other disadvantages, in socio-economic problems (unemployment, homelessness, integration problems etc.).

One way to solve this possible paradox could be reached if states would recognise the difference of its inhabitants without evaluating the "foreign" or "other" as something that potentially causes discrimination. The anti-discrimination movement would not need to operate with "suspect lists" reproducing the categories of (potential) discrimination. The paradox of rights, as I have called it here, proposes that the anti-discrimination co-determines not only the categories of discrimination but also reproduces in an essentialist manner potential victim groups of discrimination.⁵⁶ At the same time, the non-reflected use of concepts such as equality, culture, ethnicity and race, guarantees that discrimination will in future remain the number one problem of our societies. The potential victims of racist and ethnic discrimination are, at the moment, compelled to organise themselves in a very peculiar (and uniform) way, in order to be able to make any kind of rights claims. These organisations, however "natural" or "foreign" they might be for the people engaged in them, are the only possibility for them to seek recognition. In this context the ideological use of both concepts, equality and culture, are of indispensable importance.

The only possible solution I could offer in this paradoxical situation is to return to following the path opened by Edward Said and try to take the context of the research seriously, and to understand what is really going on in a concrete situation in which culture and equality are debated.

⁵⁶ Again: we shall of course not forget that many programmes have succeeded in changing potentially xenophobic young people to tolerant ones!

10. DEATH, RI(GH)TES, AND INSTITUTIONS IN IMMIGRANT SWITZERLAND

Joanna Pfaff-Czarnecka

1. INTRODUCTION

Immigrant religions confront European societies (that look back at long trajectories of Judeo-Christian accommodations) with new challenges. Two issues are especially at stake: firstly, all over Europe institutional solutions have been developed geared towards secularisation, even though they provide a striking variety of national patterns.¹ Secondly, in many countries, century-long tensions between Christian religions (e.g. the so-called *Kulturkampf*) have called for laws and practices in order to contain the conflicts. As current research indicates, these individual national solutions have recently been challenged in particular ways by immigrant religions.² When adherents of religions (which are very diverse in themselves) such as Islam, Hinduism and Buddhism settle in European countries, their specific religious practices frequently confront institutional obstacles, and also public disapproval. On the other hand, the national constitutions are prone to cultural conflict³ while striving to

¹ Françoise Champion, "The Diversity of Religious Pluralism", *MOST Journal on Multicultural Societies*, Vol. 1, No. 2 (1999), available at <http://www.unesco.org/most/v1n2cha.htm>; Matthias König, "The Public Incorporation of Muslim Migrants in Western Europe: A Comparative Perspective" (unpublished manuscript, 2003); Sabine Mannitz, "Religion in vier politischen Kulturen", in Werner Schiffauer et al. (eds.), *Staat, Schule, Ethnizität: Politische Sozialisation von Immigrantenkindern in vier europäischen Ländern* (Münster: Waxmann, 2002) pp. 101–219; Werner Schiffauer, "Einleitung: Nationalstaat, Schule und politische Sozialisation", in Schiffauer et al. (eds.), *idem*, pp. 1–19.

² Steven Vertovec, "Religion and Diaspora" (University of Oxford, Transnational Communities Programme: Working Papers Series, 2001). Available at http://www.transcomm.ox.ac.uk/working_papers.htm.

³ Walter Kälin, *Grundrechte im Kulturkonflikt: Freiheit und Gleichheit in der Einwanderungsgesellschaft* (Zürich: NZZ-Verlag, 2000).

reconcile the right to religious freedom with other freedoms guaranteed for all individuals living within the state borders.

Migration creates situations requiring flexibility, as well as the willingness and ability to adapt to new circumstances by all societal "stakeholders". Migrants are especially compelled to adjust to the established forms of the "host society", that is, laws and institutional practice as well as highly held values and norms.⁴ However, as the experiences from all Western immigrant societies over the last decades indicate, the societal majorities are also under strong pressure to re-adjust their institutions and value-orientations.⁵ The recent history of immigration to Western societies can be seen as resulting in on-going processes of societal negotiations, calling upon individuals and groups to find common grounds in order to enter into negotiations, to establish room for manoeuvre and in order to seek compromises.⁶ It seems that all parties involved are compelled and able (even if not always prepared) to find flexible solutions within their cultural-religious orders.

Over the last decade, the Swiss public has been confronted time and again — though not as often as in other Western European countries⁷ — with wishes and grievances of non-Christian minorities to enjoy

⁴ Aristide Zolberg and Litt Woon Long, "Why Islam Is Like Spanish: Cultural Incorporation in Europe and the United States", *Politics & Society*, Vol. 27, No. 1 (1999), pp. 5–38.

⁵ Seyla Benhabib, *Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002); Sebastian Poulter, *Ethnicity, Law, and Human Rights: The English Experience* (Oxford: Clarendon Press, 1998); Peter H. Schuck, *Diversity in America: Keeping Government at a Safe Distance* (Cambridge, MA and London: The Belknap Press of Harvard University Press, 2003).

⁶ Gerd Baumann and Thijl Sunier, "Die Schule im gesellschaftlichen Raum", in Schiffauer et al. (eds.), *loc. cit.* (note 1), pp. 23–36; Andreas Wimmer, "Kultur als Kompromiss" (to be published).

⁷ Jaques Cesari, *Etre musulman en France aujourd'hui* (Paris: Hachette, 1997); Françoise Gaspard and Fährad Khosrokhavar, *Le foulard et la république* (Paris: La Découverte, 1995); Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (London: Palgrave, 2001); Joanna Pfaff-Czarnecka, "Let Sleeping Dogs Lie! Non-Christian Religious Minorities in Switzerland Today", *Journal of the Anthropological Society of Oxford*, Vol. 29, No. 1 (1998), pp. 29–51; Poulter, *op. cit.* (note 5); Jan Rath et al. (eds.), *Western Europe and Its Islam* (Leiden: Brill, 2001); Schuck, *op. cit.* (note 5); J. Christopher Soper and Joel S. Fetzer, "Explaining the Accommodation of

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 three per cent of the Swiss population⁸ increasingly claim rights to expressions of outer religious freedom.⁹ Hence, the Swiss population as well as the state and public bodies are increasingly confronted with manifold demands put forward by people of non-Christian faiths. Among them are prescribed religious practices regarding dress, prayer and food in schools, hospitals or prisons, demands to be exempted from particular civic duties, to have their own religious community officially acknowledged, and — as will be discussed later at a greater length — to bury their dead according to their own prescribed religious customs. Also, public recognition of religious organisations has been on the political agenda of many Western countries. Dealing with these cases results in fierce value debates, involves more and more actors in negotiations, and calls frequently for readjustments in the legislation¹⁰ and in policy-making.

The Supreme Court, the cantonal legislatures and executives, manifold 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 religious minorities face, and they are going to be occupied in this field in the future. In this article, I shall argue that 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 migrants adapt to un-

Muslim Religious Practices in France, Britain, and Germany", *French Politics*, Vol. 1, No. 1 (2003), pp. 39–59.

⁸ Christop Peter Baumann and Christian J. Jäggi, *Muslims unter uns. Islam in der Schweiz* (Luzern & Stuttgart: Rex Verlag, 1991); Jaques Waardenburg, "Muslims as Dhimmis. The Emancipation of Muslim Immigrants in Europe: The Case of Switzerland", in Wasif Abd ar-Rahman Shadid et al. (eds.), *Muslims in the Margin: Political Responses to the Presence of Islam in Western Europe* (Kampen: Kok Pharos, 1996), pp. 145–163; Peter Wittwer, "Islamische Gemeinschaften in Zürich", *Bulletin der Städtischen Koordinationsstelle für Ausländerfragen*, 15 (1994), pp. 14–16.

⁹ Joanna Pfaff-Czarnecka, "Chancen öffentlicher Eingliederung muslimischer Gemeinschaften in der Schweiz", *Tangram*, 7 (1999), pp. 33–35.

¹⁰ Peter Karlen, "Das Grundrecht der Religionsfreiheit in der Schweiz", *Zürcher Studien zum öffentlichen Recht*, 73 (1988).

changeable rules and social forms. Even if the existing institutions and especially the Basic Law frame the accommodation practices, the negotiations over religious forms compel the authorities nevertheless — as Walter Kälin¹¹ 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.

While considering the legal practice as embedded in social relations, this contribution adopts a social science perspective. Concentrating upon one particular case of negotiations over establishing a Muslim cemetery in the city of Zurich (in the Canton of Zurich in Switzerland), it will reflect upon the multiplicity of the “stakeholders” involved as well as the multiplicity of means — legal and non-legal — deployed in responding to the religious minorities’ objectives and grievances. This discussion aims at highlighting the option to try various solutions, when accommodating the immigrants’ religious objectives. The discussion of this case will indicate the augmented potential of reaching flexible solutions when several options are possible.

2. CASE STUDY: NEGOTIATIONS OVER ESTABLISHING A MUSLIM CEMETERY IN ZURICH

The negotiations aimed at the creation of a Muslim cemetery in the Swiss city of Zurich go back to the year 1994 when the city executive acknowledged that the lack of arrangements for burying the dead according to Muslim customs at Zurich’s cemeteries could be seen as discriminatory.¹² In Switzerland, only the Muslims in Geneva have their own cemetery, while until the late 1990’s in other parts of Switzerland the Muslims have not even had burial grounds at public cemeteries that would be allotted especially to them. In the course of the last four years several municipalities have allowed the creation of Muslim spaces suitable for Muslim burial customs at public cemeteries in order to respond to demands put forward by Muslim organisations and their supporters from among the

¹¹ Kälin, *op. cit.* (note 3).

¹² Norbert Loacker and Christoph Hänsli, *Wo Zürich zur Ruhe kommt. Die Friedhöfe der Stadt Zürich* (Zürich: Orell Füssli, 1998); Niccolò Raselli, “Schickliche Beerdigung für Andersgläubige”, *Aktuelle Juristische Praxis (AJP)*, Vol. 9, No. 96 (1996), pp. 1103–1110.

Swiss population.¹³ Also in Zurich, their own burial places and especially their own cemetery have been repeatedly requested by Muslim organisations which have been highlighting the fact that the vast majority of the deceased from among Muslim community have had to be shipped to their countries of origin for burial. This practice, Muslim organisations have claimed, place many hardships upon the relatives. From the very beginning, these organisations have referred to the existence of Jewish cemeteries as constituting a precedent. Indeed, in the Canton of Zurich as in many other parts of Switzerland, in the second half of the 19th century, Jewish communities were granted the right to purchase their own plots of land in order to administer their own cemeteries.¹⁴

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 indeed threatened. Making Muslims send their dead back home (in the case of those who have a “home”) for there are also numerous conversions to Islam, the authorities argued, was acting against the principle of assuring a dignified burial (*schickliche Bestattung*) for all.¹⁵ But there was a problem relating to the Swiss legal norms concerning deaths. Since 1874, public institutions — and not Churches — have been in charge of burying the dead: ensuring that everybody can have a place at a public cemetery, that burials are dignified, and generally that equal treatment is observed for all deceased.

When the claims of Muslim organisations began reaching public institutions and the public sphere in the late 1990’s, the authorities acted quickly, eager to find an appropriate solution. The local authorities in Zurich have, however, been confronted with a special difficulty due to the Cantonal ban, which is non-existent in almost every other Swiss can-

¹³ Hans Mahnig, “L’intégration institutionnelle des Musulmans en Suisse: l’exemple de Bâle-Ville, Berne, Genève, Neuchâtel et Zurich”, *Tangram*, 8 (2000), pp. 102–111.

¹⁴ Salomon Bloch-Roos, *Wie die Israelitische Gemeinde in Basel zu einem eigenen Friedhof gekommen ist. Eine Berichterstattung* (Basel: Basler Handelsdruckerei, 1902); Emil Dreifuss, *Juden in Bern. Ein Gang durch die Jahrhunderte* (Bern: Verbandsdruckerei Betadruk, 1983); Georg Guggenheim, “Zur Eröffnung des Friedhofes am obern Friesenberg”, in *Israelitische Cultusgemeinde Zürich (ICZ)* (ed.), *Erinnerungsschrift zur feierlichen Eröffnung des Friedhofs’ Oberer Friesenberg* (Zürich: Israelitische Cultusgemeinde Zürich, 1952), pp. 12–18.

¹⁵ Raselli, *loc. cit.* (note 12).

ton, against dividing cemeteries into separate sections. The rule not to subdivide cemeteries has been considered as a means of assuring equal treatment to everyone, not discriminating through special provisions. But what does equal treatment mean? When it comes to allotting plots at Zurich's cemeteries, the graves are dug in order of registration of the dead person, one after the other in *parallel rows*. 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 came into a conflict with the principle of religious freedom. The Muslim prescription that the dead should face Mecca is in conflict with the Swiss authorities' idea of how to maintain order at public burial grounds.

This regulation is problematic from the point of view of the Muslims and has long historical roots. It was designed shortly after the promulgation of the Swiss Constitution of 1874 that was an expression of the profound societal transformations in 19th century Switzerland. In the context of our case study, two interrelated processes need to be considered. First, state measures against the on-going *Kulturkampf* between the Protestants and the Catholics,¹⁶ that is between the two major religions to which almost equal shares of the population adhere in Switzerland (with some four per cent of Protestant adherents dominating over the Catholics). Second, the secularisation of the Swiss society that has resulted in the state taking upon itself multiple roles that have been previously managed by the Church. Among the major spheres of influence newly managed by public bodies was education, marriage and running of cemeteries.

In Switzerland, burials are managed by public institutions, while the rules and regulations which are left to the Cantons, differ from one Swiss Canton to another.¹⁷ The Zurich Cantonal Law prohibiting the subdivision of cemetery grounds has to be seen as a progressive late 19th century provision geared against discrimination. It was established in order to counter tendencies to exclude particular individuals (*e.g.* persons who committed suicide) or groups (*e.g.* the Jews) and above all to

work towards maintaining religious freedom between the Protestants and the Catholics by providing common burial space. Also, the 19th century problems with the orderly running of cemeteries and public hygiene should not be overlooked. As Barbara Richner¹⁸ argues, the 19th century authorities were facing numerous problems regarding threats to health as well as problems of planning due to the increasing population pressure. Eventually regulations were formulated in order to protect drinking water sources and clean air in the areas of cemeteries. Additional regulations were directed at the size of tombs and their depth and rules on the duration of tombs became more and more important due to overcrowding.

More than a hundred years later, however, it was this progressive rule which precluded the subdivision of the cemeteries. And along with several new regulations it proved cumbersome when the issue of Muslim burials emerged. The Muslim wish for separate provisions meant reversing the decision — that a minority must not be separated against its will. Hence, some of the problems the Swiss Muslims have been confronted with did not arise from provisions specifically drawn up against their aims. Rather, they were pre-existing institutional settings. These settings included laws and regulations that have developed over centuries and that have been the outcome of former negotiations and endeavours aimed at secularisation and geared towards promoting religious peace, proved inappropriate when it came to the particular needs of an immigrant religion.

In 1996, the problem posed by the existence of the Cantonal regulation, precluding the subdivision of cemeteries, was solved by the municipal executive by allotting the Muslim committee a very nice plot of land just next to one of the public cemeteries in Zurich's commune of Altstaetten. The authorities had formulated conditions: firstly that the Muslim organisations should pay for it; secondly that prescribed rules regarding the manner of the burial procedures should conform to the Cantonal rules, that is following the time-schedule, preclude the use of cloth while using coffins, and renouncing the important Muslim reli-

¹⁶ Peter Stadler, *Der Kulturkampf in der Schweiz. Eidgenossenschaft und katholische Kirche im europäischen Umrkreis 1848-1888* (Zürich: Chronos, 1996).

¹⁷ In the Swiss Constitution of 1874, still in force during most of the negotiations over the Muslim burials in the Canton of Zurich, Article 53 states that the management of cemeteries is with in the hands of the public authorities ("Verfügung über die Begräbnisplätze steht den bürgerlichen Behörden zu").

¹⁸ Barbara Richner, "Im Tod sind alle gleich. Das Problem schicklicher nicht-christlicher Bestattungen in der Schweiz", in Elke Huwiler and Nicole Wachter (eds.), *Integrationen des Widerläufigen* (Münster, Hamburg, London: LIT Verlag, to be published).

gious rule of establishing eternal tombs.¹⁹ Another provision was that all people claiming to be Muslim could be buried there. In this case, the Swiss authorities were using their knowledge of the tensions existing between the various Muslim communities — an issue otherwise not known to the public. At that time 14 Muslim organisations were registered in Zurich, displaying a variety of religious orientations, degrees of religiousness (orthodox or liberal) as well as national origins. The authorities have correctly anticipated that this diversity would buttress exclusionary practices and impede collective action.

The authorities' solution seemed easy and convincing, but it proved controversial and hard to realise. One of the difficulties was the agitation of a right-wing political party alerting the population of Altstaetten to the potential of public disturbances that could occur on the occasion of burial processions. Having found little support on this issue, information was circulated by this party's members that the Muslims would be granted the land for free. This proved to be an argument that brought a rather strong public reaction, while it was largely neglected that the Muslim taxpayers have, in fact, always indirectly supported Church institutions. The concerned authorities — members of political parties, state officials, members of commissions dealing with immigrant issues as well as public figures — were time and again involved in organising meetings between Muslim representatives and concerned citizens. There were several objectives underlying these meetings. It was deemed necessary to discuss the options and to come to a better understanding of each other. I remember that on the occasion of one meeting an older Swiss man stood up and asked the Muslims present: "Why don't you want to rest along side us?" Yet another important objective was to disseminate correct information — that is that the Muslims would pay for the land allotted for their burial ground.

However, this information proved incorrect in practice. The 40,000 Muslims of Zurich have been unable to collect the necessary funds amounting to approximately one million euros. Individual households failed to contribute their share while religious organisations in Arab countries seemed to argue that Switzerland was not really so poor that it needed to be subsidised by them. Another difficulty came from the in-

¹⁹ Erwin Tanner, "Kann und darf sich der Islam in der Schweiz etablieren? Eine juristische Grundsatzdebatte...", in Schweizerische Akademie der Geistes- und Sozialwissenschaften (ed.), *Muslime in der Schweiz, Tagung vom 24. und 25. Mai 2002* (Bern: Schweizerische Akademie der Geistes- und Sozialwissenschaften, 2003), pp. 117–138.

ternal division among the immigrants from Kosovo, Macedonia, Serbia, Albania, Morocco, Syria, Lebanon, India, Indonesia, Iran, Sudan, Somalia, Tunisia and others. Let me note in passing that unlike such countries as Germany or Great Britain which have had a prolonged period of immigration of large, religiously homogenous groups, Switzerland has experienced Muslim immigration on a comparatively larger scale only in the course of the last two decades. With around three per cent of the entire population and with few immigrant enclaves, the establishment of cemeteries run by individual Muslim congregations has not been seriously considered. The problem of representation and the difficulty of establishing proportionate shares and competences by the manifoldly (see previous list) subdivided immigrant population within one Muslim organisation have impeded the collection of funds. Most importantly however, the reluctance to provide private funds was eventually outweighed by the opinion that the Cantonal authorities could and should amend the legislation. By dividing the burial grounds it would be possible for religious minorities to comply with at least some of their religious rules, the tombs facing Mecca being considered the most important.

And indeed, notwithstanding these difficulties which affected the negotiations, and together with the doubt and critique repeatedly expressed in public debates, the political authorities of the Canton of Zurich ruled on 1 July 2001 that the communes were free to allot separate religious spaces within public cemeteries. It adjusted the Cantonal Burial Law²⁰ in so far as it stated that special fields allotted to a religious community could be established, but otherwise compelling the Muslims to abide by the general rules and regulations. In its communiqué, the Cantonal Government (*Regierungsrat*) stated that it had decided to amend the law because the orthodox Muslims especially refused to bury their dead together with members of other faiths. After several years of negotiations the Cantonal Government has agreed to adjust its legislation in order to accommodate an objective put forward by an immigrant population. By doing so, it has allowed a correction to be made in existent legal practices.

²⁰ See Article 35, paragraph 2, of the Cantonal Burial Law (1963).

3. NEGOTIATING RELIGIOUS DIFFERENCE: DISCUSSION

This short description indicates the scope and the complexity of seemingly simple problems coming about when dealing with immigrant religious communities' negotiations over issues of their *outer* religious freedom in Switzerland. Within the Swiss federal system such issues as the right to burial according to one's religious rules are regulated by the cantonal legislation, at a sub-national level. In order to consider the solution reached regarding Muslim burials in the Canton of Zurich it is necessary to regard the actual negotiations between stakeholders — religious organisations, municipal bodies, politicians, civil society representatives — all of whom were involved in finding a solution for this religious minority that would end the discriminatory practice.

Apart from important Supreme Court judgments — made in other contexts — this case indicates that multiculturalism in democratic societies is mostly about "negotiating the apparently petty, intricate details of planning permissions, road access, and cemetery spaces".²¹ While legal cases and the related value debates underlying processes of incorporating immigrants' religion are of great importance and fascination, the mundane bureaucratic and legal processes, orchestrating media and exerting political pressure affect in very important ways the outcomes of exchanges between people of different faiths living together in towns and villages. The following discussion aims at demonstrating that the "stakeholders" can have recourse to diverse institutional solutions and to diverse modes of action. Also, the methods of the negotiations and how compromises are reached in every-day practice, have been largely overlooked so far in social science research.

3.1 Burials and Non-Christian Religious Communities: Options, Resources and Models

At least three options were possible in order to render Muslim burials possible in the Canton of Zurich — of which two may be termed "public" and one "private". The "public" solution reached by the Cantonal authorities consisted in amending the Cantonal legislation. A "public

²¹ Pnina Werbner, "Book Review: Multiculturalism and Minority Religions in Britain. Krishna Consciousness, Religious Freedom and the Politics of Location, by Malory Nye", *Social Anthropology*, Vol. 10, Issue 3 (2002), pp. 395–399.

solution" of a different sort could have been obtained by making public funds (taxes) available. 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. However, this option, if discussed among the authorities in private, has not been publicised. Most probably such a suggestion would have brought about fierce opposition from those sections of the population following the right-wing Swiss Peoples' Party's (SVP) agitation. In order to avoid public dissent, the Zurich authorities have made it repeatedly clear that the land parcel was available, but only if bought with private funds. While not (yet?) possible in Switzerland, in several European countries, for example in Great Britain and in Austria, authorities provide religious organisations with funds, the purpose of which is that these are being used for religious structures and activities. In Great Britain several religious schools are funded; in Austria religious lessons are subsidised by public funds.

In Switzerland, however, providing public funds for non-Christian minorities takes place only very occasionally. Nowadays, Jewish organisations receive some public funds — for instance contributions towards running an old people's home — but most expenses have been covered through private means so far. In fact, leaders of religious organisations have repeatedly stressed that there is an obvious advantage when private means are used. The advantage lies in the greater autonomy since — at least in Switzerland — there is a tendency that receiving public funds brings about stronger public scrutiny. Private funds also allow for private solutions that are more specific to a given situation. Hence, at the private Jewish cemeteries the eternal rest of the dead has been assured, whereas the Muslims using special areas at public cemeteries will have to abide by the same 25-year rule as the Swiss Christian population. It remains to be seen whether Muslim organisations will eventually provide funds for private cemeteries in order to follow their own religious rules.

Hence, the second option lies in collecting private funds. Interestingly in this case, the old-established Jewish community has been a role model for the "new" Muslim immigrants. It seems that immigrants tend to model 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 Jewish communities. Interestingly, the fact that the Jewish communities have been allowed (if in previous times rather: compelled) to maintain their own cemeteries provided information to the Muslims,

who were initially treating this issue as a case of precedent. But, as became apparent in the course of negotiations the Muslims have not only seen it as a precedent. At least initially, it seemed that the Jewish communities had created a role model for the middle classes of other religious communities who have also aspired to collect private funds and, as far as possible, to keep their agendas out of the scrutiny of public bodies and also away from mass media. 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. We may even expect that other religious organisations will follow suit by addressing the Swiss public with their objectives as well — now that non-Christian religious agendas are increasingly become part and parcel of the Swiss public sphere.

In comparison to the Jewish organisations, the course of action eventually taken by the Muslim leaders was increasingly geared at public expressions of one's own presence (*i.e.*, identity politics). While Jewish organisations have so far been compelled *and* able to provide their own financial support for their cemeteries and most other institutions, they have also opted for modes of action one could depict as "very private". The very private character of the Jewish way of solving their problems, the tendency not to make demands, but to look after themselves, has guided other minorities until recently. Consequently, Swiss public institutions have been less affected by minority demands than those in many other Western countries. The abolition of the Cantonal rule proscribing the subdivision of public cemeteries can be seen — along with a few Supreme Court judgments on immigrant religious issues — as a moment of a significant shift in orientation, highlighting the emerging attitude of immigrants to voice their religious objectives in public. This attitude is all the more important to acknowledge since this institutional change demonstrates the success potential of publicly expressed concerns.

As is well-known, migrant diaspora can prove extremely effective in raising funds. That several thousands Muslim households have not been able to raise a rather moderate sum of money for an "own" cemetery, indicates — besides the considerations previously discussed — two more issues requiring attention. Firstly, pressurising for legislation amendment is an important expression of presence. The prolonged negotiations leading to this step indicate the delicacy and the highly politicised character of this issue. However unpopular minorities

are depicted in public, once they have won a case,²² their public presence is acknowledged — even if not by all stakeholders. Furthermore, the legitimacy of their objectives — in our case the right to a "dignified burial", a right which is guaranteed to everybody by the Constitution, is established. Striving for these kinds of solutions is certainly an aim in itself, given its efficiency, but it should not be overlooked that on the part of minorities, identity politics are involved as well. For, almost all persons with strong religious orientations would not really consider burying their dead relatives in Switzerland (and data from Germany confirm this trend). Sending dead bodies to their countries of origin, as decreed as this option was by the Muslim leaders, is considered the most appropriate solution that most Muslims would select. Still, the very fact that Muslim burials are nowadays possible in more and more parts of Switzerland and that authorities have taken recourse to institutional change in order to respond to immigrant religious objectives is indicative of a shift occurring in orientation as well as public acknowledgment of Switzerland's movement towards becoming a country of immigration.

3.2 Immigrant Religious Minorities and Flexible Incorporation

From the beginning the authorities have been considering different options in order to make Muslim burials possible. While establishing a Muslim cemetery was considered the best and easiest option at the very outset, towards the end of 1996, when it became apparent that the Muslims would not raise the necessary sum of money, the option to modify the regulation on the subdivision of cemeteries in the burial regulations (*Bestattungsverordnung*) re-emerged on the political agenda. The director of the Cantonal Ministry of Health (Verena Diener), in charge of burials, decided to conduct an opinion poll among the communes within the Canton of Zurich as well as among Church institutions.²³ The director herself saw several problems: the spatial division of Muslim tombs, the direction of the tombs towards Mecca as well as the rule of "eternal peace" of the dead bodies prescribed in the Muslim faith.

²² Benhabib, *op. cit.* (note 5).

²³ This information has been gathered by Barbara Richner (forthcoming PhD-dissertation).

The director suggested four options in the opinion poll: 1) No amendment to the existing regulation; 2) General termination of the rule precluding confessional subsections at the cemeteries (*i.e.*, amendment of the existing law); 3) Allowing for exceptions; and 4) Delegation of the authority to the communes.

About the same time as the answers were arriving at the directors office, the Supreme Court ruled against the claim of a Swiss man who had converted to Islam and was claiming his right to establish a tomb at the cemetery in one of Canton Zurich's communes where he could perform all the necessary Muslim rites. The Supreme Court substantiated its judgment by claiming that it was possible in Switzerland to establish private confessional cemeteries so that dignified burials could be conducted there. Immediately after this ruling, the director decided to comply with the pre-existing legislation, claiming that 49 communes voted against the amendment of legislation (voting for variant 1). In this decision, the director did not take under consideration the 60 communes that opted for solutions 3 or 4, that is, for allowing exemptions, or for the delegation of the decision to the individual communes.

It was members of the Zurich Forum of Religions as well as Christian clergymen who suggested that an independent expert be called in, in order to establish the relevance of the Supreme Court's judgment in the Zurich case. The renowned legal scholar Walter Kälin came, in his expert opinion, to the conclusion that the Supreme Court's decision was very problematic from the point of view of Constitutional legislation and that the legislation of Zurich did not allow religious minorities a dignified burial, which resulted in diminishing and discriminating practices. Establishing separate burial areas at public cemeteries, he argued, should not be interpreted as a privilege, but rather as an elimination of a less privileged treatment. This expert opinion made the director of the Ministry of Health correct her position, allowing the communities individual solutions.

Accommodating immigrant religions requires, from all parties involved, flexibility and readiness to compromise. The substantial correction in the existent legal practice discussed here indicates the authorities' consciousness of the problem resulting in a change in an institutional solution that had lost its original function. On the other hand, however, those Muslim citizens who really intend to bury their dead at a Swiss cemetery will need to compromise as well. At public cemeteries, they — together with all other faiths — will continue to be allowed to maintain the tombs for no longer than 25 years (while the Jewish community can

erect eternal tombs at their private cemeteries) and Muslims will have to use light wooden coffins instead of cloth (this rule is being followed at the Jewish cemeteries as well). Yet another compromise deserves our attention. 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 by a consultation process (*Vernehmlassungsverfahren*). Due to this decentralised solution, it may be expected that Muslim organisations as well as individuals will continue to pressurise the authorities throughout the Canton.

3.3 Accommodating Religious Difference as a Continuous Process of Societal Negotiations

The progressive legislation against the subdivision of cemeteries, meant as a measure to pursue religious freedom, lasted some 130 years and became a bone of contention when a new constellation of actors emerged. Hence, there is a continuous necessity to negotiate, to be flexible and to compromise. As this discussion about the negotiations over Muslim burials in the Canton of Zurich has revealed, norms and regulations considered by the members of the "settled society" as geared towards equality and individual freedom, may prove ill-suited to the special requirements of immigrant minorities. Switzerland is becoming an immigration country, where religious minorities, or rather their needs run counter to the established patterns, and institutional change is likely to be the result of negotiations geared at enabling new society members to enjoy their freedoms. Legal history is full of examples indicating that laws or rules established under specific societal circumstances lose their adequacy in new societal contexts emerging in the course of time. Hence, although it may sound paradoxical, it is not surprising that the Muslims of Zurich should endure hardships precisely because of the existence of a rule that originally was designed to successfully accommodate religious minorities in late 19th century. It is striking, indeed, that the principle of equal treatment ruling out the subdivision of cemeteries could become discriminatory when immigrant religions require special arrangements.

Societal solutions reached in particular moments of history are likely to be challenged at later times. The measures taken to affect the secularisation endeavours are one case in point. It is worth mentioning that in the course of negotiations in Zurich yet another argument was

put forward. It has been repeatedly stressed over the last years that dealing with death should not be left entirely with state authorities.²⁴ Niccola Raselli, a judge in the Swiss Supreme Court, formulated this problem as follows (summarised by J. Pfaff-Czarnecka): In order to ensure freedom of religion, it is enough that, in any Swiss commune, just one cemetery is provided and managed by the communal and/or municipal bodies. Further cemeteries could be managed privately by the religious authorities concerned. While the state's obligation to ensure the protection of religious freedom is considered crucial, members of minorities tend to consider the state's interference in the religious sphere as unwanted, especially when it comes to such important issues as burial practices.

This concern has not only been voiced by the immigrant religious organisations, but with the growing presence of immigrant religions the solutions reached in the course of the 19th century's secularisation endeavours are currently increasingly under critical scrutiny. It is precisely through negotiations over religious issues with immigrant minorities that religion as such acquires more space in public debates. Also, particular religious demands result in fact in religions' gaining more space in the social life of immigrant societies. Let us consider for a moment the debates over religious symbols in public schools,²⁵ or the on-going negotiations regarding the public recognition of immigrant religious congregations. While a discussion of one singular case does not allow for broader generalisations, it is becoming apparent that the Swiss secularisation measures put into motion in the course of the 19th century are at least in some areas under stress.²⁶ Precisely, because of the public character of negotiations and the increasing tendency of religious individuals and organisations to engage in identity politics the widely acknowledged Swiss trend to treat religious issues as private affaires has been reversed.

Over the last ten years the representatives of different religions and various Swiss interfaith organisations have established a large platform where their objectives are represented and, hence, have become an issue

²⁴ Raselli, *loc. cit.* (note 12).

²⁵ Joanna Pfaff-Czarnecka, *School and Religious Difference*, (to be published).

²⁶ Stadler, *op. cit.* (note 16); Martina Späni, "Die Entkonfessionalisierung der Volksschulen in der Schweiz im 19. Jahrhundert", in Lucien Criblez et al. (eds.), *Eine Schule für die Demokratie. Zur Entwicklung der Volksschule in der Schweiz im 19. Jahrhundert* (Bern: Peter Lang, 1999), pp. 297–323.

within the Swiss public sphere. Indeed, even if they remain foreigners, the members of religious minorities today form part of Swiss society, confronting it with new types of aims and objectives that become new types of *common* problems to be solved in *mutual* dialogue and negotiations. When we look across the border, however, the Swiss minorities seem to be rather docile and modest in their demands. In comparison with other Western countries, the Swiss negotiations over cultural difference are still at a very early stage. For the time being, the Swiss pattern appears to be that authorities, generally, tend to prevent religious minorities objectives from entering public forums, either a.) by silencing the demands, b.) by allowing minority members to find their own solutions, or c.) by supporting private measures through financial contributions. Only when private options do not work out, and the pressures persist, then changes in policies or even legislation may occur.

This discussion on the negotiations over the Muslim burials in the Canton of Zurich was meant to demonstrate that it is becoming increasingly difficult to silence religious minority demands, and that private solutions may not be feasible options. Institutional change is becoming an important option in the Swiss context, even if — as Kälin correctly claims — the Swiss constitutional provisions provide an important basis precluding discrimination. Nevertheless, numerous rules and regulations — as petty as they may seem at a first glance — can become forceful obstacles vis-à-vis immigrant religions. An important aim of this article was to highlight the multiplicity of actors and the means and measures involved in negotiations over immigrant religions when particular institutions attain discriminatory effects. The solutions reached are the outcome of prolonged debates, pressurising and compromising, and this finding clearly indicates that the integration of immigrants and their objectives can never be seen as a one-way process. Rather, mutual negotiations bring about convergence, consisting not in cultural assimilation or adaptation, but in creating *common grounds* for manoeuvre while creating spaces to *accommodate difference*. Another important lesson is to acknowledge that institutional solutions found at a given moment will not last forever.

Ans:

**RETHINKING NON-DISCRIMINATION AND
MINORITY RIGHTS**

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