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## **Panacea or pathetic fallacy? The Swiss ban on minarets**

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## Panacea or Pathetic Fallacy? The Swiss Ban on Minarets

*Lorenz Langer\**

### ABSTRACT

*On November 29, 2009, Swiss voters adopted a ballot initiative introducing a constitutional ban on the construction of minarets. This Article provides a thick description of the minaret vote's context. A legal analysis addresses the implications of the ban under national, regional, and international normative frameworks. The Article argues that the ban is irreconcilable with the Swiss constitutional bill of rights and several international human right provisions. In Switzerland, however, respect for the vox populi potentially trumps any concern over conflicting international obligations, and there is no effective judicial review of initiatives. This lack of judicial review is partly a result of the myth system of modern Switzerland and its emphasis on popular sovereignty. Yet, the fears that fueled the prohibition of minarets in Switzerland are widespread in Europe. Hostility to Islam is partly rooted in*

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*historical traditions and partly due to disagreement over how to integrate newcomers into Western society, and this Article suggests an approach that carefully balances expectations of Muslim adaptation with a less exclusive construction of European identity.*

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## I. INTRODUCTION

*And the Lord came down to see the city and the tower, which the children of men builded. And the Lord said, Behold, the people is one, and they have all one language; and this they begin to do; and now nothing will be restrained from them, which they have imagined to do.*

— *Genesis 11:5–6*

Why do we build towers? The first tower, if we are to believe the Old Testament, was constructed in the plane of Shinar, where the now numerous descendants of Noah decided to build a city and a tower. With the tower reaching unto heaven, they hoped to make themselves a name, lest they be scattered abroad upon the face of the earth.<sup>1</sup> Provoking the wrath of a God jealous and fearful of their ascending power, the builders of Babylon achieved the opposite: for their alleged hubris, they were dispersed, their speech confounded, and their name forgotten.<sup>2</sup>

The Babylonians have vanished, and Babylon is no more—even though the *zikkurat* of Babylon was, contrary to the biblical account, actually completed.<sup>3</sup> Yet people still build towers, spires, and skyscrapers, presumably for the same reason as the Babylonians: to provide a shared identity and lasting monument to their community. Towers also continue to be perceived as a symbol of budding ambition and power. They may arouse jealousy and resentment—not only of the divine sort, but of rivaling communities that fear the eclipse of their own identity and name.

These fears may help to explain why on November 29, 2009, Swiss voters passed a ballot initiative for a constitutional ban on the construction of minarets by a majority of 57.5 percent.<sup>4</sup> The vote was preceded by a campaign focusing on the alleged spread of political Islam in Switzerland, warning of the slow and subversive ascent of an alien Muslim community to prevalence and, eventually, dominance. A minaret ban, its proponents argued, would effectively protect the Swiss constitutional order, safeguard fundamental rights, and halt the spread of Sharia law. In short, it would offer a panacea to the ills of Islamization.

1. *Genesis 11:1–4* (King James).

2. *Id.* at 11:5–9.

3. For the reconstructions suggested since Robert Koldewey started excavations in 1899, see HansJörg Schmid, *Rekonstruktionsversuche und Forschungsstand der Zikkurat von Babylon*, in *DAS WIEDER ERSTEHENDE BABYLON* (Barthel Hrouda & Robert Koldeweyeds eds., 5th ed. 1990).

4. Bundesratsbeschluß über das Ergebnis der Volksabstimmung, Nov. 29, 2009, *BUNDESBLATT [BBL]* 3437, 3440 (2010). Voter turnout was 53.8 percent. *Id.*

Prior to the vote, the Swiss government made it clear that it might be difficult to reconcile the ballot initiative with the country's constitutional bill of rights and with international human rights obligations.<sup>5</sup> The two chambers of Parliament recommended rejection of the ballot initiative by wide margins.<sup>6</sup> With the exceptions of the Swiss People's Party and the Confederate Democratic Union, which launched the initiative,<sup>7</sup> all political parties opposed the ban, as did the Protestant and Catholic Churches.<sup>8</sup> Opinion polls suggested that a comfortable, if narrowing, majority opposed the proposal.<sup>9</sup> Yet, unexpectedly, the voters adopted the ballot initiative by a considerable margin. Article 72 of the Federal Constitution (*Bundesverfassung*, BV), which addresses the federal and cantonal competences over organized religion, is now complemented by a third subparagraph reading that "the construction of minarets is prohibited."<sup>10</sup>

The Swiss minaret ban might well be dismissed as an oddity or curiosity, the outcome of a peculiar political system in an introspective country that still seems (or hopes) to stand isolated from the currents of history.<sup>11</sup> But the prohibition of new minarets is

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5. Bundesrat [Federal Council], Botschaft zur Volksinitiative 'Gegen den Bau von Minaretten' [Government Report on the Ballot Initiative 'Against the Construction of Minarets'], BBL 7603 (2008). For convenience, I use the phrase "bill of rights" for the fundamental rights listed in Title 2, Chapter 1 of the Swiss Constitution, even though these provisions do not hold a special status vis-à-vis other constitutional norms. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, arts. 7–36. An unofficial English translation of the Swiss Constitution is available at <http://www.admin.ch/ch/e/rs/1/101.en.pdf>.

6. BBL 4381 (2009). For details, see *infra* note 47 and accompanying text, cataloguing parliamentary rejection of the minaret ban. Mirroring the structure of the U.S. Congress, the Federal Assembly is composed of the National Assembly (*Nationalrat*, 200 members) and the State Assembly (*Ständerat*, 46 members). In the following, "Parliament" is used interchangeably with Federal Assembly.

7. With 26.6 percent of the vote, the right-wing Swiss People's Party (*Schweizerische Volkspartei*) had garnered the largest share of votes in the 2007 election to the Swiss National Assembly. The Confederate Democratic Union (*Eidgenössische Demokratische Union*) is a conservative fringe-party (1.5 percent of votes in the 2007 election) advocating Christian values. For the results of the 2007 election, see BBL 8015 (2007). For an overview of the Swiss political landscape, see Andreas Ladner, *Political Parties*, in *HANDBOOK OF SWISS POLITICS* 309, 311 (Ulrich Klöti et al. eds., 2d ed. 2007), arguing that direct democracy weakens the influence of Swiss political parties.

8. See *Für religiösen Frieden—gegen Minarettverbot*, NEUE ZÜRCHER ZEITUNG [NZZ] (Zurich), Sept. 3, 2009, at 14.

9. Less than two weeks before the ballot, only 37 percent of those questioned supported a ban, while 53 percent rejected it. *Mehrheit stimmt gegen Minarett-Initiative*, TAGESANZEIGER (Zurich), Nov. 18, 2009, available at <http://www.tagesanzeiger.ch/schweiz/standard/Mehrheit-stimmt-gegen-MinarettInitiative/story/10402950>.

10. BV Apr. 18, 1999, SR 101, art. 72.

11. See Andrea Brandt, *Angst vor Eurabien*, DER SPIEGEL (Ger.), Dec. 7, 2009, at 112; Laurent Joffrin, *Absurde*, LIBÉRATION (Fr.), Nov. 30, 2009, at 2.

bound to have wider implications. In the short term, the ban raises a number of specific legal questions. For instance, after the implementation of the ban, the history of which is set out in Part II, the Swiss Constitution contains provisions guaranteeing equality and freedom of religion, as well as a provision that selectively restricts one religious community. These contradictions are the result of a constitutional system that attributes extraordinary influence to voters through ballot initiatives and referenda while severely limiting judicial review of popular decisions.

Part III discusses whether the minaret ban contravenes national, regional, or international legal provisions. Constitutional experts in Switzerland have assumed that the ban violates international human rights norms,<sup>12</sup> but a detailed analysis is still outstanding. This Article argues that the minaret ban is indeed irreconcilable with Switzerland's international obligations under the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

Conflicts between national law and international obligations are not exclusive to Switzerland, but due to the significant participatory rights of Swiss voters in policymaking, the conflict between democratically legitimized norms on the national level and obligations on the international level is particularly acute. Does the minaret ban stand for the continuing prevalence and superior legitimacy of national norms and perhaps even provide an object lesson on how to establish a democratic commonwealth? Direct (or, more precisely, semi-direct) democracy<sup>13</sup> is rarely seen as a danger; complaints are usually made about too little democratic participation, particularly within emerging supranational structures such as the European Union.<sup>14</sup> But should reverence for the *vox populi* be absolute? Should the majority always have its way, even at the expense of fundamental rights enshrined in constitutions and conventions? Or should votes not only be counted, but weighed as well?

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12. Alain Griffel, *Vom Umgang mit verfassungswidrigen Initiativen*, NZZ, Dec. 9, 2009, at 13; Jörg Paul Müller, *Wie weiter nach dem Minarettverbot?*, NEUE ZÜRCHER ZEITUNG AM SONNTAG [NZZaS], Dec. 6, 2009, at 12; René Rhinow, *Will 'das Volk' wirklich Minarette verbieten?*, NZZ, Dec. 9, 2009, at 13; see Robert Kolb, *Völkerrecht und Völkerpolitik—Gedanken zur Minarettinitiative*, 19 SWISS REV. INT'L & EUR. L. 467 (2009) (providing one of the first legal analyses after the vote took place).

13. Even though the Swiss system is more accurately described as "semi-democratic," cf. WALTER HALLER ET AL., ALLGEMEINES STAATSRECHT 76, 79–86 (4th ed. 2008), in the following I generally refer, for convenience's sake, to direct-democratic participation.

14. See, e.g., Stephen C. Sieberson, *The Treaty of Lisbon and Its Impact on the European Union's Democratic Deficit*, 14 COLUM. J. EUR. L. 445 (2008) (analyzing the Lisbon Treaty's "potential for reducing the European Union's 'democratic deficit'").

Comparing ballot initiatives in Switzerland and the United States, Part IV asserts that the concept of unbridled popular sovereignty is the central tenet of a (relatively recent) Swiss national narrative. Yet I argue that the mythical veneration of direct democracy is based on historical misconceptions and overstates the level of actual popular participation, past or present. Based on these observations, Part V suggests that Switzerland's current constitutional framework for ballot initiatives requires some recalibration to ensure that the majority exercises its prerogative within the confines established by fundamental human rights provisions.

Constitutional reform might prevent a repeat of similar initiatives. It will not, however, remedy the underlying conditions of which the minaret vote was a symptom. The adoption of the ban confronts us with the question of how political communities, oscillating between prejudice and justified concerns, may react to a world where the clear cultural delineations of yore (if indeed they ever existed) have dissolved.<sup>15</sup> From a sociological viewpoint, the vote on minarets was not primarily motivated by concern for the Swiss constitutional order, and it certainly was not motivated by any real threat to that order posed by pointy turrets. It was a vote on integration and exclusion, and on the terms under which we are willing to welcome—a somewhat euphemistic term—the “other” in our midst.

Part VI, therefore, addresses controversies about the place of Islam and Muslims in Western societies, which is a question that is by no means exclusive to Switzerland. Due to the peculiarities of their political system, Swiss voters were able to express their views in an unmitigated and unfiltered way, but there is little doubt that in other European countries the outcome of a vote on minarets would be similar.<sup>16</sup> Part VI sets out how such hostile attitudes to Islam are partly rooted in historical traditions and partly influenced by discussions over how to integrate newcomers into Western society, and suggests an approach that carefully balances expectations of Muslim adaptation with a less exclusive construction of European identity.

Clearly, a society requires some consensus on what normative framework should be binding on everyone, and in this context, concerns over fundamentalist threats to a liberal constitutional order are legitimate, even imperative. I also argue that Muslims themselves might need to reconsider their perceptions of Western

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15. Cf. Daniel Thürer & Lorenz Langer, *Combating Racism—A Call for Justice*, in *INTERNATIONAL LAW, CONFLICT, AND DEVELOPMENT* 181, 185 (Walter Kälin et al. eds., 2010).

16. See *infra* note 402 and accompanying text (noting speculation that votes in other European countries would likely lead to a similar ban on minarets).

society and of their relations with it—whether they want to remain Muslims in Europe, or become European Muslims. However, whether a change in Muslim attitudes would result in less European hostility towards Islam remains questionable; the circumstances of the minaret vote show that negative views of Islam are not related to actual exposure to and interaction with Muslims.<sup>17</sup> Instead, vague fears of outsiders were “instrumentalized” for political gain and channeled towards symbols of “the other.” Under a pathetic fallacy, the difficult debate over integration was reduced to an emotional quarrel over the alleged baleful influence of an architectural structure.

## II. THE BALLOT INITIATIVE AGAINST MINARETS: ORIGINS, CAMPAIGN, AND OUTCOME

The origins of the minaret initiative can be traced back to Wangen, a small community in the canton of Solothurn. There, a Turkish cultural association obtained permission in 2003 to use a building in the industrial area as a clubhouse and community center with rooms for administration, catering, and prayer.<sup>18</sup> In 2005, the association applied for a permit to add a symbolic minaret of about six meters to the building’s rooftop.<sup>19</sup> After the request had been rejected twice by the communal planning commission, it was eventually granted upon administrative appeal with the restriction that no prayer call be raised.<sup>20</sup>

This decision was contested by the municipality and two neighbors; the latter claimed that adding a minaret transformed the building into a mosque and therefore required an additional permit.<sup>21</sup> The cantonal administrative court rejected these appeals and observed that the original permit allowed for praying rooms: just as a church was a church with or without a tower, a minaret would not alter the purpose of the existing building.<sup>22</sup> The administrative court addressed the matter exclusively under the legal framework for planning applications, which does not differentiate between a minaret and a chimney.<sup>23</sup> Neighbors and members of the community appealed to the Federal Supreme Court, arguing that the religious

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17. See *infra* note 506 and accompanying text (noting that “[o]f the voters supporting the ban, only 15 percent had based their decision on criticism of Muslims in Switzerland”).

18. Verwaltungsgericht [Cantonal Administrative Court] Nov. 24, 2006, VWBES.2006.293 (SO), 19 SOLOTHURNISCHE GERICHTSPRAXIS [SOG] 92 (Solothurn).

19. *Id.* at 89.

20. *Id.* at 89, 93.

21. *Id.* at 93.

22. *Id.*

23. *Id.* at 95.



need for the minaret should have been assessed by an expert, but the Court denied any need for an expert's report on the religious relevance of adding a minaret to prayer rooms.<sup>24</sup>

This court victory and the subsequent construction of the token minaret in Wangen brought biblical wrath and jealousy on Muslims in Switzerland. When the minaret was eventually erected in early 2009, it was only the fourth such structure in Switzerland.<sup>25</sup> Another three or four minarets were at an early planning stage or had been stalled by legal proceedings similar to the conflict in Wangen.<sup>26</sup> Despite this negligible number, the Swiss People's Party and the Confederate Democratic Union took up the issue. Through parliamentary motions in several cantonal legislatures, they unsuccessfully tried to prohibit the construction of minarets.<sup>27</sup> In April 2007, the two parties launched a ballot initiative to establish a constitutional ban on minarets at the federal level.<sup>28</sup>

Swiss ballot initiatives have an extraordinarily low threshold (100,000 signatories within 18 months suffice to submit any issue to a nationwide ballot);<sup>29</sup> they are passed by a simple majority of voters and of cantons;<sup>30</sup> they are always aimed at amending the Constitution;<sup>31</sup> and they address a wide variety of policies.<sup>32</sup> Apart from the formal restriction on combining unrelated subject matters in a single ballot, the only substantive limit is drawn by peremptory norms of international law or *jus cogens* (which the Constitution does

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24. Bundesgericht [BGer] [Federal Supreme Court] July 4, 2007, docket no. 1P 26/2007 (Switz.), available at <http://www.bger.ch>. For an outline of the procedural stages of appeal, see *infra* note 121.

25. In 1963, the *Ahmediyya* movement built the first minaret in Zurich. Other minarets have been constructed in Geneva and Winterthur. Petra Bleisch Bouzar, *Von Wohnungen und Fabrikhallen zu repräsentativen Moscheen—aktuelle Bauvorhaben von Moscheen und Minaretten in der Schweiz*, in *BAU UND UMWANDLUNG RELIGIÖSER GEBÄUDE* 49, 57 (René Pahud de Mortanges & Jean-Baptiste Zufferey eds., 2007); Susanne Anderegg, *Besuch in der Moschee von Winterthur*, *TAGESANZEIGER*, Nov. 7, 2009, at 21.

26. Several projects were abandoned in the face of staunch local resistance. BBL 7603, 7614–15 (2008). However, the permit for a minaret in Langenthal was upheld on appeal by the cantonal building department in September 2010. The authorities argued that the permit had been granted prior to the ballot initiative and was, at the time, in conformity with building regulations. *Grünes Licht für Minarett in Langenthal*, *NZZ*, Sept. 22, 2010, at 13.

27. For an overview, see *id.* at 7615 n.32.

28. BBL 3231 (2007).

29. With over 5,030,000 eligible voters, *Vorlage Nr. 544 Übersicht*, SCHWEIZERISCHE BUNDESKANZLEI, <http://www.admin.ch/ch/d/pore/va/20090927/det544.html> (last visited Sept. 26, 2010), this equals less than 2 percent of the electorate.

30. BV Apr. 18, 1999, SR 101, arts. 139(5), 142(2).

31. *Id.* art. 139(1).

32. See *infra* note 41 (discussing various ballot initiatives rejected by Swiss voters).

not further specify).<sup>33</sup> Competence to adjudicate the validity of initiatives is not vested in a judicial body such as the French *Conseil Constitutionnel*,<sup>34</sup> but rests exclusively with the bicameral Federal Assembly, Switzerland's legislature.<sup>35</sup> Unless the Assembly finds an initiative invalid on formal or substantive grounds, it adopts a recommendation to voters based on a report by the Federal Council that contains the government's nonbinding views on validity.<sup>36</sup> The Assembly—and the government in its recommendations—have construed this restriction in very narrow terms. Essentially, the standard established by the obiter dictum of the International Court of Justice in *Barcelona Traction (Belgium v. Spain)*<sup>37</sup> has been applied: if an initiative does not promote aggression, genocide, slavery, or racial discrimination and does not violate a core provision of international humanitarian law, it is submitted to the voters.<sup>38</sup> So far, only one initiative has been invalidated on material grounds.<sup>39</sup> Parliamentary motions to declare the minaret initiative void as a violation of *jus cogens* were unsuccessful.<sup>40</sup>

Ballot initiatives allow Swiss voters not only to *react* to policy proposals, but to initiate and actively *shape* policies, ranging from mundane matters such as the post office network to fundamental policy decisions on healthcare, finances, environmental protection, culture, security, and immigration.<sup>41</sup> Even the fundamentals of

33. BV Apr. 18, 1999, SR 101, art. 139(3). For an overview, see Etienne Grisel, *Les droits populaire au niveau fédéral*, in VERFASSUNGSRECHT DER SCHWEIZ/DROIT CONSTITUTIONNEL SUISSE 383 (Daniel Thürer et al. eds., 2001).

34. 1958 CONST. arts. 60–62 (Fr.).

35. See BV Apr. 18, 1999, SR 101, art. 139(3) (vesting authority to review the validity of a popular initiative in the Federal Assembly). On the structure of the legislative, see *supra* note 6 and accompanying text.

36. BV Apr. 18, 1999, SR 101, art. 139(3); BUNDESGESETZ ÜBER DIE BUNDESVERSAMMLUNG [Federal Assembly Act] Dec. 13, 2002, SR 171.10, arts. 97–98, 100. The Federal Council (*Bundesrat*) is the highest executive body. Its seven members (with one member holding the annually rotating presidency) take decisions *in corpore*. BV Apr. 18, 1999, SR 101, arts. 174–76. In the following, “Government” refers to the Federal Council, and “minister” is used interchangeably with Federal Councillor.

37. *Barcelona Traction, Light & Power Ltd. (Belg. v. Spain)*, Second Phase Judgment, 1970 I.C.J. 3, 32 (Feb. 5). The ICJ did not expressly refer to *jus cogens*, but implied its existence when addressing obligations *erga omnes*. Stephan Wittich, *Barcelona Traction Case*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 26 (Rüdiger Wolfrum ed., 3d ed. 2007).

38. Bundesrat, Botschaft über eine neue Bundesverfassung [Government Report on a New Federal Constitution], BBL I 362 (1997).

39. The Swiss People's Party initiative “for a sensible asylum policy” violated the peremptory principle of *non-refoulement*. BBL I 1355 (1996); BBL III 1486 (1994).

40. See *infra* note 47 (discussing unsuccessful challenges to the validity of the minaret initiative).

41. An initiative for maintaining an extensive network of postal offices was rejected in 2004. Other initiatives included increasing federal spending on culture (1986, rejected); abolishing the army (1989, 2001, rejected); re-criminalization of abortion (2002, rejected); a ten-year moratorium on nuclear power plants (1990,

international policy and membership in international or supranational organizations can be directly determined through popular decision.<sup>42</sup> Democratic participation at the federal level is complemented and often extended by the cantonal constitutions, some of which provide not only for constitutional ballot initiatives and referenda, but also for statutory initiatives and budget referenda.<sup>43</sup>

For the minaret initiative, more than the required 100,000 signatures were collected by July 2008, well before the eighteen-month period passed.<sup>44</sup> In its subsequent report to the Federal Assembly, the Federal Council discussed the validity of the minaret initiative at length, arguing that the initiative did not violate peremptory norms of international law and was therefore valid.<sup>45</sup> Nevertheless, the Council still recommended its rejection at the ballot box.<sup>46</sup> The National Assembly adopted the conclusions of the government on the validity of the initiative: a motion to dismiss the initiative based on incompatibility with peremptory international norms was defeated by 128 to 53 votes. The Assembly also joined the government, by 129 to 50 voters, in recommending that voters reject the ballot initiative.<sup>47</sup> During the subsequent campaign, supporters of the ban did not recoil from using controversial means to secure a

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adopted, 2003 renewal rejected); IVF prohibition (2000, rejected); introducing a public option for health insurance (2007, rejected); and legalizing marijuana (2008, rejected). Initiatives on limiting immigration and naturalization were rejected in 1922, 1970, 1974, 1977 (twice), 1988, and 2000. Pending initiatives demand, *inter alia*, a constitutional protection of Swiss banking secrecy, a pay cap for executives, and a ban on the sale of SUVs (with the latter potentially clashing with WTO rules). For a chronological list of ballot initiatives, see *Chronologie Volksinitiativen*, SCHWEIZERISCHE BUNDEKANZLEI, [http://www.admin.ch/ch/d/pore/vi/vis\\_2\\_2\\_5\\_1.html](http://www.admin.ch/ch/d/pore/vi/vis_2_2_5_1.html) (last visited Sept. 26, 2010).

42. The ballot initiative "For Swiss Membership in the United Nations" was adopted in 2002. In 1986, membership had been rejected in a referendum. Swiss participation in UN peace-keeping forces was rejected in a referendum in 1994. BBL III 1251 (1994). The relationship with the European Union has also been shaped through the ballot box. Membership in the European Economic Area (EEA) was narrowly rejected in 1992, Alan Riding, *Swiss Reject Tie to Wider Europe*, N.Y. TIMES, Dec. 7, 1992, at A7, while a ballot initiative for EU membership application was overwhelmingly turned down in 2001. *Swiss Say 'No' to EU*, BBC NEWS, Mar. 4, 2001, <http://news.bbc.co.uk/2/hi/europe/1201133.stm>. Referenda on the conclusion of sectorial bilateral agreements with the European Union, BBL 3773 (2000); accession to the Schengen Agreement and Dublin Regulation, BBL 5183 (2005); free movement for citizens for new Member States Bulgaria and Romania, BBL 6903 (2005); and on development aid to new EU members, BBL 451 (2007) were approved.

43. ULRICH HÄFELIN ET AL., SCHWEIZERISCHES BUNDESSTAATSRECHT ¶¶ 1384–85 (7th ed. 2008).

44. BBL 6851 (2008).

45. BB1 7603, 7609–12. (2008).

46. *Id.* at 7651.

47. Amtliches Bulletin der Bundesversammlung [AB] [Official Bulletin of the Federal Assembly] I, 118–19 (2009). In the State Council, the validity of the initiative was also unsuccessfully challenged (with 16 to 24 votes), and the recommendation to voters to reject the ballot adopted by 36 votes to 3. AB III 545 (2009).

yes vote; the posters for the initiative showed a veiled woman in front of a Swiss flag pierced by countless minarets.<sup>48</sup> The Minister of Justice was accused of supporting female genital mutilation when she argued against a ban.<sup>49</sup>

When the ban was adopted, disbelief and surprise in Switzerland were mirrored in the international media.<sup>50</sup> Regional and international bodies quickly expressed concern over the vote.<sup>51</sup> Unsurprisingly, criticism was particularly vocal in Muslim countries.<sup>52</sup> Turkey's Prime Minister Recep Tayyip Erdogan saw the vote as evidence of "increasingly racist and fascist attitudes in Europe," and President Abdullah Gül called it a disgrace for Switzerland.<sup>53</sup> In a letter, the ambassadors of the Organization of the Islamic Conference (OIC) member states in Geneva voiced their hope

48. See Michael Kimmelman, *When Fear Turns Graphic*, N.Y. TIMES, Jan. 17, 2010, at AR 1 (discussing one such poster). In some cities, the posters were held to violate the criminal provision against racism and their use was prohibited. Cf. SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 311.0, art. 261bis (2010). It was not the first time that posters of the People's Party caused controversy. In 2004, the People's Party fought expedited naturalization of third-generation immigrants with a poster on which dark-skinned hands grabbed Swiss passports. Paul Valley, *Switzerland: Europe's Heart of Darkness?*, INDEPENDENT (London), Sept. 7, 2007, available at <http://www.independent.co.uk/news/world/europe/switzerland-europes-heart-of-darkness-401619.html>. When collecting signatures for a ballot initiative to deport criminal foreigners in 2007, it used white sheep kicking a black sheep off the Swiss flag. *Id.* For more on this initiative, see *infra* note 383 (discussing deportation measures).

49. *Symbole in der Religionsfreiheit*, NZZ, Oct. 16, 2009, at 13.

50. Deborah Ball & Nicholas Birch, *Swiss Ban Minarets in Controversial Vote*, WALL ST. J., Nov. 30, 2009, at A8; Stéphane Dupont, *Suisse: l'interdiction des minarets met le monde en ébullition*, LES ECHO, Dec. 1, 2009, at 18; Serge Enderlin, *Les Suisses sonnent le glas des minarets*, LIBÉRATION, Nov. 30, 2009, at 2; Elisalex Henckel, *Hass tritt unter der Decke von Harmonie hervor*, DIE WELT, Nov. 30, 2009, at 3; Oliver Kamm, *Swiss Minaret Ban Fits Pattern of Populist Protest in Western Europe*, SUNDAY TIMES (U.K.), Nov. 30, 2009, at 29.

51. Press Release, Council of Eur. Parliamentary Assembly, *Minarets in Switzerland—Reaction of PACE President* (Nov. 30, 2009), available at <http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2266>; Press Release, Thorbjørn Jagland, Sec.-Gen., Council of Eur., *Concern About Referendum on Minarets* (Nov. 30, 2009) [hereinafter Sec.-Gen. Jagland], available at <https://wcd.coe.int/ViewDoc.jsp?id=1549357&Site=DC>; European Comm'n Against Racism and Intolerance, *Statement on the Ban of the Construction of Minarets in Switzerland*, COUNCIL OF EUR. (Dec. 1, 2009), [http://www.coe.int/t/dghl/monitoring/eeri/activities/35-Declaration\\_minarets/Declaration\\_en.asp](http://www.coe.int/t/dghl/monitoring/eeri/activities/35-Declaration_minarets/Declaration_en.asp); *Swiss Minaret Ban Discriminates Against Muslims, Says UN Expert*, U.N. NEWS CENTRE (Nov. 30, 2009), <http://www.un.org/apps/news/story.asp?NewsID=33089>.

52. Deborah Ball, *Muslim Leaders Condemn Swiss Ban*, WALL ST. J., Dec. 1, 2009, at A14; *Iran zitiert Botschafterin [Iran Summoned the Swiss Ambassador]*, NZZAS, Dec. 6, 2009, at 11.

53. *Heftige Reaktion der Türkei*, NZZ, Dec. 2, 2009, at 11. The Turkish Minister for European Affairs also called upon wealthy Muslims to withdraw their deposits from Swiss banks and instead invest the moneys in Turkey. *Demonstration in Ankara*, NZZ, Dec. 3, 2009, at 15.

“that the Swiss Government would do all in its powers to rescind this decision through appropriate parliamentary and judicial measures.”<sup>54</sup> More recently, Colonel Muammar Gaddafi called for *jihad* against Switzerland as an infidel state that destroys mosques, declaring that any Muslim in any part of the world working with Switzerland would be an “apostate” and “against Muhammad, God and the Qur'an.”<sup>55</sup>

Official criticism was not limited to Muslim states and organizations. When presenting the annual Human Rights Report by the U.S. Department of State, the Assistant Secretary of State for Democracy, Human Rights, and Labor singled out the Swiss minaret ban as the prime example of an increasing trend of discrimination against Muslims in Europe.<sup>56</sup> During its spring session, the UN Human Rights Council also adopted a resolution, introduced by Pakistan, that “strongly condemned” the minaret ban.<sup>57</sup> And in June, the Parliamentary Assembly of the Council of Europe expressed particular concern about the vote and urged “the Swiss authorities to enact a moratorium on and repeal” the prohibition on the construction of minarets “as soon as possible.”<sup>58</sup>

Prior to the vote on the initiative, the Swiss government warned that a ban on minarets might have serious political, economic, and legal consequences at the international level.<sup>59</sup> However, even though the reaction in the Muslim world was harsh and outspoken, no retaliatory measures have been implemented so far. Muslim states and their regional organizations do not seek a repetition of the “days of rage” that followed the publication and republications of the

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54. *The OIC Secretary General Is Disappointed, and OIC Group in Geneva Strongly Condemns Decision to Ban Construction of Minarets in Switzerland*, OIC NEWSL. (Org. of the Islamic Conference, Jeddah, Saudi Arabia), Dec. 9, 2009, available at <http://www.oic-oci.org/newsletter.asp> (browse the dropdown menu for the correct date and click “view”).

55. Mark Tran, *Gaddafi Calls for Jihad Against Switzerland*, THE GUARDIAN (London), Feb. 26, 2010, at 18. This outburst is the latest salvo in an acerbic bilateral dispute originating in the 2008 arrest of one of Gaddafi's sons in Geneva. Gail Collins, Op-Ed., *Score One for the Diplomats*, N.Y. TIMES, Sept. 25, 2009, at A23. At one point, Gaddafi suggested to the G-8 and the United Nations that Switzerland be divided between France, Germany, and Italy. *Id.*

56. Michael H. Posner, *Briefing on the Release of the 2009 Country Reports on Human Rights Practices*, U.S. DEPT OF STATE (Mar. 11, 2010), <http://www.state.gov/g/drl/rls/rm/2010/138263.htm>. The minaret vote is documented extensively in the Report. U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2009 HUMAN RIGHTS REPORT § 2(c) (2010), <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136061.htm>.

57. H.R.C. Res. 13/16, ¶ 8, U.N. Doc. A/HRC/Res/13/16 (Mar. 25, 2010); see *infra* note 266.

58. Resolution on Islam, Islamism and Islamophobia in Europe, PARL. ASS. COUNCIL OF EUR. DOC. (RES 1743) (2010).

59. BBL 7603, 7645, 7649 (2008).

Danish Muhammad cartoons.<sup>60</sup> Swiss business leaders expressed their hope that rational Muslim investors and consumers would not hold the vote against companies such as ABB or Nestlé and still visit Switzerland as tourists.<sup>61</sup> As it took several months for the full scale of the backlash against the cartoons to emerge,<sup>62</sup> this sanguine view might yet prove overly optimistic.

The legal implications of the vote are equally difficult to predict. In the government's view, the proposed ban was irreconcilable with constitutional provisions on nondiscrimination and freedom of religion,<sup>63</sup> and ran counter to the exclusive competence of the cantons to regulate religious matters.<sup>64</sup> The ban was also considered incompatible with (non-peremptory) Articles 9 and 14 of the European Convention of Human Rights (ECHR), which protect freedom of thought, conscience, and religion, and prohibit discrimination.<sup>65</sup> Finally, the ban was inconsistent with (equally non-peremptory) Articles 2, 18, and possibly 27 of the International Covenant on Civil and Political Rights prohibiting discrimination, guaranteeing freedom of conscience, religion, and belief, and protecting minorities.<sup>66</sup> On the other hand, supporters of the initiative claimed that it did not affect the religious freedom of Muslims.<sup>67</sup> They argued that, because the Qur'an does not mention minarets, the structures are not of a religious nature and therefore are not protected by the right to freedom of religion.<sup>68</sup>

### III. THE NORMATIVE FRAMEWORK AND ITS IMPLEMENTATION

The minaret ban affects three distinct but interdependent normative orders: Swiss constitutional law, regional human rights law, and international human rights provisions. The norms of each body of law are applied and implemented either concurrently or

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60. Cf. ANDERS JERICHOW & MILLE RODE, PROFET-AFFÆREN: ET PEN-DOSSIER OM TWELVE MUHAMMAD-TEGNINGER—OG HVAD SIDEN HÆNDTE: DOKUMENTER & ARGUMENTER 133 (2006).

61. Ball, *supra* note 52, at A14; Gabriela Weiss & Daniel Hug, *Marke Schweiz ist stärker als alle Boykott-Aufrufe*, NZZAS, Dec. 6, 2009, at 41; *Keine Katastrophenstimmung*, NZZ, Dec. 2, 2009, at 11.

62. JYTTE KLAUSEN, THE CARTOONS THAT SHOOK THE WORLD 39 (2009).

63. BV Apr. 18, 1999, SR 101, arts. 8(2), 15; BBL 7603, 7615–17 (2008).

64. BV Apr. 18, 1999, SR 101, art. 72; BBL 7603, 7619, 7649 (2008).

65. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 2, 18, 27, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; BBL 7603, 7631–39 (2008).

66. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; BBL 7603, 7630–43 (2008).

67. AB I 95 (2009).

68. AB I 90, 95 (2009).

separately by three distinct judicial systems. Switzerland gives immediate effect to self-executing international treaties.<sup>69</sup> Breaches of self-executing regional or international human rights instruments can therefore be invoked before Swiss courts separately or in conjunction with constitutional provisions.<sup>70</sup> On the regional level, the European Court of Human Rights (ECtHR) adjudicates violations of the ECHR. And on the international plane, treaty-based bodies, such as the UN Human Rights Committee (CCPR), watch over the implementation of the respective treaties and sometimes act as an adjudicative body. In the following subparts, I discuss the scope of the pertinent material provisions of each normative order; how, by whom, and before which judicial bodies these norms can be invoked; and the likely consequences on the national, regional, and international plane.

#### A. National Norms: The Swiss Constitution

##### 1. Freedom of Religion, Equality, and the Ban on Minarets

Article 8(1) and (2) BV guarantee equality before the law and prohibit discrimination based on, *inter alia*, origin, race, sex, way of life, as well as religious, ideological, or political convictions. Article 15 BV protects both the internal and external aspects of freedom of religion: everyone is free to hold and profess a belief or *Weltanschauung*.<sup>71</sup> Religious practices fall within the scope of the norm if they are a consequence of, and directly linked to, religious convictions, and the courts generally defer to the respective religious community on the religious relevance of a practice.<sup>72</sup> Thus, the Federal Supreme Court rightly refused to assess the necessity of the minaret in Wangen from a religious viewpoint.<sup>73</sup> The Court has clearly established that building permits for religious structures

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69. The ECHR and the ICCPR (unlike the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]) are considered self-executing. BGer Sept. 22, 2000, 126 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] I 240, 243; BGer Apr. 10, 1996, 122 BGE I 109, 114. For an overview of the position of international law in Swiss municipal law, see HELEN KELLER, REZEPTION DES VÖLKERRECHTS 345–72 (2003).

70. Mark Villiger, *Die Wirkungen der Entscheide der EMRK-Organen im innerstaatlichen Recht, namentlich in der Schweiz*, 104 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 471 (1985).

71. BV Apr. 18, 1999, SR 101, art. 15(1)–(2) (*bekennen, professer, and professare* respectively in the original).

72. See BGer Oct. 24, 2008, 135 BGE I 79, para. 4.4 (ruling that compulsory mixed swimming classes are constitutional).

73. See *supra* note 24 and accompanying text (discussing the denial of the need for an expert report on the religious relevance of adding a minaret to prayer rooms). In BGer Oct. 24, 2008, 135 BGE I 79, para. 4.4, the Court confirmed that the secular state must not judge on the theological justifications of religious practices.

affect religious freedom.<sup>74</sup> It has not yet specifically addressed minarets, but academic opinion has predominantly subsumed such architectural features of mosques under Article 15 BV.<sup>75</sup> The perception of minarets as a symbol of Islam<sup>76</sup> suggests that they fall under the scope of the constitutional protection of religious manifestation. It may well be true, as pointed out by the ban's supporters, that the turrets have not been a feature of Muslim places of worship from the beginning of Islam,<sup>77</sup> that there are numerous mosques without minarets,<sup>78</sup> and that minarets were not originally linked to the call to prayer.<sup>79</sup> But the decision of what forms part of religious practice should be left to the faithful whenever possible.<sup>80</sup>

However, neither equality nor religious freedom is absolute under the Swiss Constitution. Legislative acts may prescribe discriminating treatment on "reasonable and objective grounds" necessitated by the subject matter of the legislation.<sup>81</sup> Similarly, legislation that attaches differing consequences to one or several of the criteria listed in Article 8(2) BV only creates a presumption of discrimination, which can be overcome by proving that the differences are proportional<sup>82</sup> and justified on objective grounds.<sup>83</sup> The freedom

74. BGer June 21, 2004, docket no. 1P 149/2004, *available at* <http://www.bger.ch> (analyzing the permitted construction of an illuminated 25-foot cross using religious freedom tenets); BGer Mar. 19, 2003, docket no. 1A.69/2002, *available at* <http://www.bger.ch> (Islamic cultural center).

75. PETER KARLEN, *DAS GRUNDRECHT DER RELIGIONSFREIHEIT IN DER SCHWEIZ* 233, 251 (1988); REGINA KIENER & MATTHIAS KUHN, *INTEGRATION UND HABITAT* 33–34 (2004); Christoph Jäger, *Kultusbauten im Planungs, Bau- und Umweltschutzrecht*, in *BAU UND UMWANDLUNG RELIGIÖSER GEBÄUDE*, *supra* note 25, at 110, 119; Wolf S. Seidel & Bernhard Waldmann, *Sakralbauten im Lichte der Grundrechtsbindung und Grundrechtsverwirklichung*, in *BAU UND UMWANDLUNG RELIGIÖSER GEBÄUDE*, *supra* note 25, at 71, 79–80; Bernhard Waldmann, *Moscheebau und Gebetsruf*, in *MUSLIME UND DIE SCHWEIZERISCHE RECHTSORDNUNG* 221 (René Pahud de Mortanges & Erwin Tanner eds., 2002). *Contra* 2 ANDREAS AUER ET AL., *DROIT CONSTITUTIONNEL SUISSE: LES DROITS FONDAMENTAUX* ¶ 473 (2d ed. 2006).

76. JONATHAN BLOOM, *MINARET: SYMBOL OF ISLAM* 7 (1989).

77. For a discussion of the origins of minarets, see *infra* note 100, noting the identifiability and significance of minaret architecture.

78. See *infra* note 106 (discussing instances in which there is opposition to minarets).

79. ROBERT HILLENBRAND, *ISLAMIC ARCHITECTURE: FORM, FUNCTION, AND MEANING* 129 (1994).

80. BGer Oct. 24, 2008, 135 BGE I 79, para. 4.4.

81. See, e.g., BGer Nov. 23, 2004, 131 BGE I 1, para. 4.2 (ruling it discriminatory to impose a levy for road maintenance only on land owners); BGer Mar. 19, 2003, docket no. 1A\_69/2002, para. 3.3, *available at* <http://www.bger.ch> (upholding a limit on the number of people admitted to Friday prayer in an Islamic cultural center for safety reasons).

82. BGer Mar. 19, 1997, 123 BGE I 152, para. 7 (holding that the fixed quotas for women in public administration demanded by a cantonal initiative (under the equivalent provision of the 1874 Constitution) disproportionately discriminated on a gender basis).



of religion guaranteed by Article 15 BV may also be subject to restrictions. The Court is free to assess the consequences of “religion as a social phenomenon”<sup>84</sup> and to balance religious commands with other values protected by the Constitution.<sup>85</sup> Restrictions are permissible if they are enacted by law, pursue a public interest in a proportional manner, and leave the core of religious freedom intact.<sup>86</sup> The proportionality test for both Articles 8 and 15 is subdivided into an assessment of suitability (can the public interest be achieved at all through the proposed restriction?), necessity (is a less intrusive means available?), and proportionality in a narrow or strict sense (does the public interest, on balance, outweigh the consequences of a restriction?).<sup>87</sup> The legality principle requires restrictions to be based on “substantial” law (i.e., on a general and abstract norm); severe restrictions have to be established by formal act (i.e., a norm adopted by the legislature).<sup>88</sup> Both criteria are met by Article 72(3) BV.<sup>89</sup>

What public interest may the proponents of the ban have hoped to achieve with their initiative? Interests that are generally held to justify restrictions include the protection of public safety, health, morals, or the fundamental rights of others; safeguarding the environment or animals; guaranteeing sustainable urban and regional planning; maintaining peace between different language groups or religions;<sup>90</sup> and even furthering the integration of Muslim immigrants.<sup>91</sup>

The first argument by minaret opponents in the official ballot pamphlet was that the Muslim population living in Switzerland grew from 56,000 in 1980 to over half a million.<sup>92</sup> This rapid growth, they argued, created a difficult challenge for Switzerland because Muslims in Switzerland did not merely exercise their religion but “increasingly

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83. BGer Nov. 21, 2003, 129 BGE I 392, para. 3.3 (stating that the limitation of political rights of aliens is objectively justified, while wholesale preferential treatment to Swiss citizens (as demanded by a *cantonal* ballot initiative) is not).

84. BGer June 18, 1993, 119 BGE Ia 178, para. 4c (ruling that compulsory mixed swimming classes are unconstitutional).

85. BGer Oct. 24, 2008, 135 BGE I 79, para. 7.

86. BV Apr. 18, 1999, SR 101, art. 36 (enumerating the conditions for permissible restrictions on fundamental rights).

87. HÄFELIN ET AL., *supra* note 43, ¶¶ 320–23.

88. *Id.* ¶¶ 307–11.

89. Rainer J. Schweizer, *Art. 36, in* DIE SCHWEIZERISCHE BUNDESVERFASSUNG: KOMMENTAR, paras. 10–12 (Bernhard Ehrenzeller et al. eds., 2d ed. 2008).

90. *Id.* para. 19. Keeping religious peace is an aim explicitly listed in the Constitution. BV Apr. 18, 1999, SR 101, art. 72, para. 2.

91. BGer Oct. 24, 2008, 135 BGE I 79, para. 7.2.

92. SCHWEIZERISCHE EIDGENOSSENSCHAFT, VOLKSABSTIMMUNG VOM 29 NOVEMBER 2009: ERLÄUTERUNGEN DES BUNDESRATS (2009). These brochures are sent to voters prior to the quarterly votes on ballot initiatives and contain the voting recommendations of the Federal Council and the Federal Assembly as well as the condensed arguments of the committee that launched the respective initiative.

started to lay claim to legal and political rights.”<sup>93</sup> According to the ban’s proponents, the minaret is not mentioned in the Qur’an and has “nothing to do with religion”; instead, the minaret is a symbol of Islam’s political and social claim to power.<sup>94</sup> Turkish Prime Minister Erdogan was quoted reciting a poem that described democracy as a train boarded by Islamists to ride to power and compared minarets to the bayonets of the faithful.<sup>95</sup> Accepting minarets, the initiators further asserted, would unavoidably entail the call of the muezzin.<sup>96</sup> Thus, minarets were—just as the burqa, forced marriages, and female circumcision—a claim to power.<sup>97</sup> They functioned as spearheads for the introduction of Sharia law and would lead to the Islamization of Switzerland and to irreconcilable conflicts with the fundamental freedoms and rights granted by the Constitution. Whoever wanted to live in Switzerland, the ban’s proponents argued, had to respect the Swiss Constitution, and the minaret ban would drive that message home.<sup>98</sup>

These arguments are reproduced here at some length because they are central in assessing the objectives that the ban is supposed to achieve. It was presented as a panacea to a plethora of gravamina caused by the spread of an alien religion. Yet, notably, the ban’s supporters encountered difficulties in making up their mind as to the exact nature of minarets: even though allegedly and essentially nonreligious, minarets nevertheless served to propagate Islam. The ban’s supporters did not explain how the minaret—whether religious in nature or not—threatened public peace, safety, or morals. Obviously, protecting equality of women; preventing female circumcision and forced marriage; maintaining the rule of law; and safeguarding the fundamental rights of others would all justify the restriction of religious freedom.<sup>99</sup> But were these the aims addressed by the initiative? And if so, was the initiative an effective way to address them? Parts IV and VI discuss possible ulterior motives of

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93. *Id.* at 27. This would correspond to 6.5 percent of residents. Cf. BUNDESAMT FÜR STATISTIK, DEMOGRAFISCHES PORTRÄT DER SCHWEIZ 7 (2009) (providing census data). For a discussion of census data, see *infra* note 406.

94. SCHWEIZERISCHE EIDGENOSSENSCHAFT, *supra* note 92, at 27.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. In 2008, the Federal Supreme Court held that it was constitutional to oblige Islamic youths to attend co-ed swimming classes. See BGer Oct. 24, 2008, 135 BGE I 79, para. 7 (justifying the rule by holding that, while religious dress codes and rules on exposure to the other sex were protected by the right to freedom of religion, the “considerable public interest” in providing equal education to both sexes, and to further integration of immigrant children militated the restriction on individual liberty). This overturned a 1993 ruling in a similar case, where the Court had attributed higher importance to the free exercise of religion. BGer June 18, 1993, 119 BGE Ia 178, paras. 7, 8.

the ballot's proponents; presently, this Part establishes whether there was a rational and effective connection between the aims professed and the ban proposed.

The initiators did not give a definition of minarets, presumably assuming that the term described structures with definite and exclusive properties. The matter is probably somewhat more complex (sacral architecture tends to fulfill several purposes, which often vary over time<sup>100</sup>), but even assuming that we know all the phenomenological qualities of a minaret and all its possible occurrences, the rationale for the ban suffers from several deficiencies.

The ban's proponents were very unclear about the ontological nature of minarets. Allegedly nonreligious in nature, the towers nevertheless spread a religion (Islam), and religious law (the Sharia).<sup>101</sup> The notions of what such religious law encompasses are vague at best. The odious practice of female genital mutilation, for instance, has cultural rather than religious roots and is not limited to Muslims<sup>102</sup>—otherwise it would be difficult to explain why, up until the 1950s, clitoridectomies were performed in the West for allegedly medical indications.<sup>103</sup> Cultural traditions also may partially account for practices such as prearranged or forced marriages, or the burqa, even though here the link to religious norms and their varying

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100. Robert Hillenbrand, *Manāra, Manār*, in 6 ENCYCLOPAEDIA OF ISLAM 361 (C.E. Bosworth et al. eds., 2d ed. 1991) states that “[u]nlike the other types of Islamic religious building . . . the minaret is immediately and unambiguously [recognizable] for what it is.” Its use for the call to prayer, however, which is frequently considered a defining element, e.g., Jonathan M. Bloom, *Minarets*, in 4 THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD 6 (John L. Esposito ed., 2009), cannot be a sufficient quality, as the four minarets in Switzerland may not be used by a muezzin. Another criterion might be the slender, pencil-sharp shape of the towers, yet this is but one of many architectural variants of minarets. See *infra* notes 495–97 and accompanying text (discussing various styles of minarets). Most scholars agree that minarets developed in Syria during the Umayyad dynasty, inspired by the towers of the Damascene basilica that was replaced by a mosque at the beginning of the eighth century C.E. BLOOM, *supra* note 76, at 11. Some minarets were indeed “a lance aimed at the infidels,” such as the Minaret of Jam in Afghanistan, erected in contested territory and inscribed with suras related to military victory and conversion. ROBERT HILLENBRAND, ISLAMIC ART AND ARCHITECTURE 155 (1999). More importantly, minarets—like church towers—provided a focal point for the community. The construction of minarets was also an important opportunity for patronage. Hillenbrand, *supra*, at 365.

101. Cf. *infra* notes 104–05 (discussing veils as both a religious and secular symbol).

102. Etin Anwar, *Female Genital Mutilation*, in 2 THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, *supra* note 100, at 244–45.

103. Cf. John Duffy, *Masturbation and Clitoridectomy: A Nineteenth-Century View*, 186 J. AM. MED. ASS'N 246, 246–48 (1963) (discussing the history of the controversial practice of performing clitoridectomies to combat female masturbation and its allegedly grave physical and mental ills it supposedly induced); see also JOEL BRASLOW, *MENTAL ILLS AND BODILY CURES* 165–68 (1997) (analyzing the practice in California in the first half of the twentieth century).

construction by the faithful and by religious authorities is more obvious. In particular, the question of female veiling is, in the West, an issue almost exclusively associated with Islam. As a prescription applying only to women, the veil raises complex gender issues;<sup>104</sup> as a religious symbol, the headscarf has also led to controversy in Switzerland over the religious neutrality of public schools.<sup>105</sup>

Gender equality and the separation of state and religion are legitimate concerns of the body politic, as is the curbing of religious extremism and ideologies of intolerance or violence. However, none of these threats to a democratic society are causally linked to minarets. A turret, no matter how prominent, piercing, or phallocratic, does not influence the content of sermons held in the adjacent mosque. There is no connection between the construction of minarets and extremism; in the Muslim world and elsewhere, minarets adorn the mosques of moderate, pious, or fanatical congregations. Rather, some of the movements most closely associated with fundamentalist Islam actually *reject* the construction of minarets as ostentatious or as an illicit innovation.<sup>106</sup> Criminal law can, and does, address female genital mutilation.<sup>107</sup> Similarly, forced marriages may be countered by family and possibly criminal law provisions.<sup>108</sup> Moreover, the underlying issue of gender equality has unfortunately proven

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104. For a brief overview, see generally Fadwa El Guindi & Zuhur Sherifa, *Hijab*, in 2 THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, *supra* note 100. For a gender perspective, see generally ETIN ANWAR, GENDER AND SELF IN ISLAM 104–08 (2006).

105. The Federal Supreme Court has held that prohibiting a female teacher at a public school from wearing a headscarf was a proportional means to protect the religious peace and neutrality of state institutions. BGer Nov. 12, 1997, 123 BGE I 296. The judgment was upheld by the European Court of Human Rights. *Dahlab v. Switzerland*, 2001–V Eur. Ct. H.R. 447. Similarly, the Federal Supreme Court ruled that the display of crucifixes in classrooms was unconstitutional. BGer Sept. 26, 1990, 116 BGE Ia 252.

106. In Wahhabism the minaret has sometimes been opposed as unnecessary and a deviation from original practice. Hillenbrand, *supra* note 100, at 361. Shia mosques frequently lack minarets for the same reason. Bloom, *supra* note 100, at 6.

107. Female genital mutilation is punishable under Article 122 STGB (grievous bodily harm). STEFAN TRECHSEL & REGULA SCHLAURI, UNICEF, WEIBLICHE GENITALVERSTÜMMELUNG IN DER SCHWEIZ 9–13 (2004). The first conviction took place in 2008. *Bedingte Freiheitsstrafe wegen Beschneidung der Tochter*, NZZ, June 27, 2008, at 39. For Germany, compare Andrea Hagemeyer & Jens Bülte, *Zum Vorschlag eines neuen § 226a StGB zur Bestrafung der Genitalverstümmelung*, 65 JURISTEN ZEITUNG 406 (2010).

108. Forced marriages performed abroad violate the Swiss *ordre public* and therefore, are not recognized in Switzerland. BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [International Private Law Code] Dec. 18, 1987, SR 291, art. 27, para. 1. Within Switzerland, a marriage that has been entered into under pressure is valid, but its annulment may be requested within limited time. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE] Dec. 10, 1907, SR 210, arts. 107, para. 4, 108, para. 1. Under criminal law, forced marriages may constitute coercion. STGB art. 181.

persistent in non-Muslim societies as well. Solving this problem requires a long-term approach and the enforcement of nondiscrimination provisions in family,<sup>109</sup> labor,<sup>110</sup> constitutional,<sup>111</sup> and international law.<sup>112</sup>

The legitimate public aim of curbing religious extremism cannot, therefore, be attained through prohibiting minarets; indeed the latter is unrelated to the former. Consequently, the requirement of suitability of a measure restricting religious freedom is not met, and the ban constitutes an unjustified infringement on Article 15 BV.<sup>113</sup> Nor can the discriminatory nature of a prohibition of minarets be justified. By preventing only Muslims from building religious structures within the limits set out by planning laws, a collective punishment is meted out to the entire Muslim community for the extremist views of some of its members. Even worse, this punishment is unrelated to the extremism and intolerance in question. The question of necessity, then, is moot. If a restriction of a fundamental right is not effective to achieve the purpose proclaimed, it becomes unnecessary to consider whether there might be an equally effective, but less intrusive measure. Nor can proportionality in its strict sense be assessed.<sup>114</sup>

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109. Until 1988, the Swiss Civil Code presumed that the husband represented and was the head of the conjugal union, that he chose the place of abode, and that he “duly provided for the maintenance of wife and children.” ZGB Dec. 10, 1907, AS 24, 233, arts. 160–67 (1912). The wife, in turn, was expected to “assist him, to the best of her abilities, by word and deed in his effort to maintain their home,” and manage the household affairs. *Id.*

110. GLEICHSTELLUNGSGESETZ [GLG] [Equality Law], Mar. 24, 1995, SR 151.1.

111. See BV Apr. 18, 1999, SR 101, art. 8(3) (guaranteeing equality of the sexes). The clause on equal payment has a horizontal effect. It is noteworthy that women were granted the right to vote on the federal level only in 1971 by a referendum (with a view to the ratification of the ECHR; an earlier attempt in 1959 had failed). BBL I 485 (1971); BBL I 61 (1970). In Appenzell Innerrhoden, women obtained the cantonal vote only in 1990 by fiat of the Federal Supreme Court. BGer Nov. 27, 1990, 116 BGE Ia 359.

112. See Convention on the Elimination of All Discrimination Against Women art. 3, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (creating an obligation on state parties—including Switzerland who ratified the Convention in 1997—to take “all appropriate measures, including legislation to ensure the full development and advancement of women”); see also Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, Oct. 6, 1999, 2131 U.N.T.S. 83 (granting to individuals of state parties—including Switzerland who ratified the Protocol in 2008—the right to complain to the Committee on the Elimination of Discrimination Against Women about violations).

113. See *supra* notes 86–87 and accompanying text (discussing the test for determining whether restrictions are permissible).

114. See BV Apr. 18, 1999, SR 101, arts. 15, 36 (providing for enumerated religious freedoms and an independent limit that state intrusions on said “fundamental rights” must be “proportionate”); see also HÄFELIN ET AL., *supra* note 43, ¶¶ 320–23 (raising suspicion on the ability to assess the proportionality of restrictions on liberty).

## 2. The Least Dangerous Branch: The Role of Swiss Courts in Implementing Constitutional Norms

Two weeks after the minaret ban passed, two complaints were lodged directly with the Federal Supreme Court.<sup>115</sup> These complaints argued that the initiative violated constitutional and international law.<sup>116</sup> They were summarily dismissed; ballot initiatives may be challenged only on the grounds of electoral irregularities.<sup>117</sup> As discussed, there is no antecedent judicial review of constitutional amendments.<sup>118</sup> In Switzerland, the judiciary is the least dangerous branch of government. With the vote on November 29, 2009, the construction of minarets is prohibited with immediate effect and regardless of contradictions with other constitutional provisions or international law.<sup>119</sup> The Swiss Federal Supreme Court also lacks the competence for abstract review of the legality of an initiative *ex post*; it examines claims of alleged violations of federal or international law only in the context of a specific case under consideration.<sup>120</sup> For the Court to make a pronouncement on the minaret ban, a private party would therefore have to apply for a permit to build a minaret and appeal the predictable rejections through the various administrative and judicial instances to the Court.<sup>121</sup>

On what norms would an appellant have to rely? The Court is equally bound by federal acts and international law.<sup>122</sup> As the supreme federal law, the Swiss Constitution must be binding on the Court as well, although this is not made explicit. The Constitution

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115. BGer Dec. 14, 2009, docket no. 1C\_529/2009, *available at* <http://www.bger.ch>; BGer Dec. 14, 2009, docket no. 1C\_527/2009, *available at* <http://www.bger.ch>.

116. BGer Dec. 14, 2009, docket no. 1C\_529/2009; BGer Dec. 14, 2009, docket no. 1C\_527/2009.

117. BUNDESGESETZ ÜBER DIE POLITISCHEN RECHTE [BPR] [Federal Act on Political Rights] Dec. 17, 1976, SR 161.1, art. 77(1).

118. *See supra* notes 34–35 and accompanying text (discussing how competence to adjudicate the validity of initiatives is vested exclusively with Switzerland's bicameral Federal Assembly).

119. BV Apr. 18, 1999, SR 101, art. 195; Dieter Biedermann, *Art. 195, in* DIE SCHWEIZERISCHE BUNDESVERFASSUNG: KOMMENTAR, *supra* note 89, paras. 5–6.

120. BV Apr. 18, 1999, SR 101, art. 189(1)(a)–(b); HÄFELIN ET AL., *supra* note 43, ¶¶ 2071–72.

121. Procedures and remedies vary from canton to canton. In most cases, the initial application would be submitted to a local building commission (in smaller communities usually a political lay body), the decisions of which are first appealed to the cantonal building department and then to a cantonal administrative court, all of which are bound by federal law and, therefore, obliged to impose the federal minaret ban. A public law appeal may then be lodged with the Federal Supreme Court. BUNDESGERICHTSGESETZ [BGG] [Federal Court Act] June 17, 2005, SR 173.110, art. 82(a).

122. BV Apr. 18, 1999, SR 101, art. 190.

does not elevate fundamental rights above other constitutional guarantees; as *lex specialis* (and *posterior*), the minaret ban in Article 72(3) therefore supersedes the guarantees of nondiscrimination and freedom of religion in Articles 8 and 15 BV,<sup>123</sup> and the Court will henceforth have to construe these guarantees in conformity with the minaret ban. If a Muslim community persists in obtaining a building permit for a minaret and appeals to the Federal Supreme Court, an application based solely on constitutional law is unlikely to succeed.

Yet, applicants may also invoke international treaty law before Swiss courts, in general, and the Federal Supreme Court, in particular, because international law is binding on the Court.<sup>124</sup> Relying on the equal status of federal acts and international law, the Court strives to construe the former in conformity with the latter. However, the Constitution does not indicate which normative order should prevail in case of irreconcilable differences. On the face of the constitutional set-up, the Court would therefore not even be allowed to find unconstitutional a mere federal act. In 1999, however, the Court stated that international law, and human rights norms in particular, trump colliding national law *on principle*.<sup>125</sup> This conclusion complements Article 5(4) BV, which obliges both federal and cantonal authorities to heed international law. Article 5(4), however, is not construed as a strict conflict-of-law rule,<sup>126</sup> and the Court has previously held that new federal law prevails over international obligations if the law is passed in deliberate contradiction to international obligations.<sup>127</sup> If a federal act may thus trump international law, the same would *a minore* hold true for the Constitution.

When considering a complaint against a refusal to grant a building permit, the Federal Supreme Court could arrive, at least in theory, at any one of several findings: it could reject the application because the Constitution bans the construction of minarets, and (a) the construction of minarets is not protected by international human rights law; or (b) the Constitution trumps any contravening

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123. Cf. 1 ANDREAS AUER ET AL., DROIT CONSTITUTIONNEL SUISSE: L'ÉTAT ¶ 1890 (2d ed. 2006).

124. See *supra* notes 70, 122 and accompanying text (noting that breaches of international human rights instruments can be invoked before Swiss courts and that the Federal Supreme Court is bound by international law).

125. BGer July 26, 1999, 125 BGE II 417. The Kurdistan's Workers Party invoked procedural and substantive guarantees of the ECHR against the confiscation of propaganda materials. *Id.*

126. Yvo Hangartner, *Art. 5, in 1 DIE SCHWEIZERISCHE BUNDESVERFASSUNG: KOMMENTAR, supra* note 89, para. 49.

127. If Parliament intentionally adopts a federal act that contravenes an earlier international agreement, the Court defers. BGer Mar. 2, 1973, 99 BGE Ib 39. Yet the Court generally gives international human right norms and particularly the provisions of the ECHR deference even over more recent federal acts. Yvo Hangartner, *Art. 190, in 2 DIE SCHWEIZERISCHE BUNDESVERFASSUNG: KOMMENTAR, supra* note 89, para. 32.

international law. Conversely, the Court could find for the applicants because (c) the minarets are protected by international human rights norms that have precedence over any constitutional provisions banning minarets.

A politically prudent Court will most likely opt for option (b). The Court (if it respects the respective construction by the ECtHR and the CCPR) might find it difficult to maintain that a ban would not be problematic under the ECHR, and certainly under the ICCPR<sup>128</sup>—even though the Court is not bound by international precedent and may choose to provide a novel and independent interpretation of an international norm.<sup>129</sup> Option (c) would expose the Court to criticism because of the importance that both the constitutional system and the Swiss myth system place on popular sovereignty.<sup>130</sup> Institutional concerns may also make the Court wary of an overly assertive stance on a democratic decision; judges are elected by the Federal Assembly and have to stand for reelection every six years.<sup>131</sup> Therefore, applicants would have to bring their claim to a different forum; the most obvious option would be an application to the European Court of Human Rights for a breach of Articles 9 and 14 of the ECHR.

#### B. *The Minaret Ban and the European Convention on Human Rights*

##### 1. Does the ECHR Protect the Construction of Minarets?

In his statement the day after the vote, the Secretary General of the Council of Europe (CoE) pointed out that “the ban on the construction of new minarets [was] linked to issues such as freedom of expression, freedom of religion and prohibition of discrimination guaranteed by the European Convention on Human Rights.” If an applicant files a claim with the ECtHR, it would be “up to the European Court of Human Rights to decide . . . whether the prohibition of building new minarets [was] compatible with the Convention.”<sup>132</sup>

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128. See *infra* Parts III.B.1 and III.C.1 (discussing whether the European Convention protects the construction of minarets, and the scope of any protection).

129. Still, the provisions would have to be construed in conformity with international principles. Even though the ECHR is directly applicable in Switzerland, it is so as an international treaty and not as domestic law. Mark E. Villiger, *supra* note 70, para. 8.

130. See *infra* Part IV.C (discussing the Swiss myth system and the Swiss attitude towards international law).

131. BV Apr. 18, 1999, SR 101, arts. 145, 168(1). Some judges have been threatened with non-reelection after controversial decisions on naturalization, see *infra* note 327, and crucifixes in public schools, see *supra* note 105.

132. Sec.-Gen. Jagland, *supra* note 51.



To fall within the scope of religious freedom governed by Article 9 ECHR, building minarets would have to constitute a manifestation of religion through worship, teaching, practice, and observance.<sup>133</sup> Under the so-called *Arrowsmith*<sup>134</sup> test, the turrets must also be a *necessary* element of Muslim religious manifestation.<sup>135</sup> Unlike the U.S. Supreme Court, the ECtHR reserves the right to establish such necessity, rather than deferring to the claims of applicants.<sup>136</sup> Thus, in the case of a transferred Muslim teacher trying to extend his Friday lunch break to attend a nearby mosque (an obligation confirmed by an Islamic leader before the national authorities), the Commission found that the applicant had not convincingly shown that following his transfer to a school “nearer to mosques,” he was required by Islam to disregard his continuing contractual obligations as a teacher.<sup>137</sup>

Therefore, for the minaret ban to violate Article 9 ECHR, the ECtHR would have to hold that minarets are a religious manifestation through worship, observation, or practice, and that such manifestation was necessitated by Muslim belief. The etymology of “manifestation” implies a visible or even tangible

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133. The list seems to be exhaustive, not just exemplary. *Şahin v. Turkey*, 2005–XI Eur. Ct. H.R. 173, ¶ 105; *Cha'are Shalom ve Tsedek v. France*, 2000–VII Eur. Ct. H.R. 231, ¶ 73.

134. *Arrowsmith v. United Kingdom*, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5 (1978). The (misleadingly named) pacifist Pat Arrowsmith distributed leaflets to British soldiers, urging them not to accept deployment in Northern Ireland. *Id.* While the European Commission on Human Rights accepted that her pacifism constituted a belief for the purpose of Article 9(1), it ruled that the distribution of leaflets to soldiers did not actually express the belief of pacifism, even if motivated or influenced by it, and therefore, did not amount to manifesting practice. *Id.* The element of necessity had already been expressed more explicitly in *X v. United Kingdom*, App. No. 5442/72, 1 Eur. Comm'n H.R. Dec. & Rep. 41, 41 (1974).

135. CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 115–25 (2001); MALCOLM EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 307–12 (1997).

136. *E.g.*, *X v. Austria*, App. No. 8652/79, 26 Eur. Comm'n H.R. Dec. & Rep. 89 (1981); *X v. United Kingdom*, App. No. 8160/78, 22 Eur. Comm'n H.R. Dec. & Rep. 27, 35 (1981); *X v. United Kingdom*, App. No. 5442/72, 1 Eur. Comm'n H.R. Dec. & Rep. 41 (1974); *see also* Peter W. Edge, *The European Court of Human Rights and Religious Rights*, 47 INT'L & COMP. L. Q. 680, 685 (1998) (referring to the “theological jurisdiction of the Court and the Commission”). Still, in some cases, the Court has consulted expert evidence. *See, e.g.*, *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) (1993) (consulting an interest group report); *D v. France*, App. No. 10180/82, 35 Eur. Comm'n H.R. Dec. & Rep. 199, 201 (1983). Conversely, the U.S. Supreme Court usually does not question the religious character of a practice. *See, e.g.*, *Emp't Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 197 Stat. 1488 (upholding the prohibition of the use of peyote (a hallucinogen) as constitutional without doubting that its consumption for sacramental purposes constituted a religious practice).

137. *X v. United Kingdom*, App. No. 8160/78, 22 Eur. Comm'n H.R. Dec. & Rep. 27, 35 (1981). Even if such necessity had been established, it would have been outweighed by his contractual obligations as a teacher. *Id.*

element.<sup>138</sup> However, the Court (or prior to 1998 the Commission) has rarely explicitly subsumed a specific protected manifestation under worship, teaching, practice, or observance, and the four categories have therefore remained somewhat blurred. Leaving teaching aside, do minarets constitute worship, observation, or practice?

“Practice” is the most generic term and could potentially be construed widely to refer to all acts consequential to religion,<sup>139</sup> but, the ECtHR has stated repeatedly that Article 9 does not protect every act “which is motivated and influenced by a religion or belief.”<sup>140</sup> Still, both church bells and the call of the Muezzin would presumably constitute religious practices.<sup>141</sup> If the ringing of church bells is covered by Article 9(1), so might be the steeples that come with the bells<sup>142</sup>—and by analogy their Muslim equivalents.

“Observance” includes customs and rules such as dress codes or growing a beard.<sup>143</sup> In *Manoussakis v. Greece*, the Court ruled that withholding a permit for a place of worship violated the “right to worship and observance.”<sup>144</sup> Under Article 9 ECHR, religious communities are therefore entitled to establish their own structural spaces as an accessory to the right to worship. By extension, this must entail the right to *erect* such spaces as well, in conformity with building and zoning laws. Whether this extends to *specific* architectural structures such as minarets is not evident, but it could be argued that through long-lasting tradition, minarets are seen as part and parcel of mosques.<sup>145</sup>

138. Latin *manifestus* < *manus* and *fendo* = made visible, or rather made tangible by hand. 2 KARL ERNST GEORGES, *AUSFÜHRLICHES LATEINISCH-DEUTSCHES UND DEUTSCH-LATEINISCHES HANDWÖRTERBUCH* col. 706 (7th ed. 1880).

139. EVANS, *supra* note 135, at 305.

140. *Şahin v. Turkey*, 2005–XI Eur. Ct. H.R. 173, ¶ 105; *see also* *Arrowsmith v. United Kingdom*, App. No. 7050/75, 19 Eur. Comm’n H.R. Dec. & Rep. 5, 71 (1978) (noting that “[f]or the purposes of paragraph 1 of Art. 9 the manifestation has to have some real connection with the belief”).

141. BARBARA GARTNER, *DER ISLAM IM RELIGIONSNEUTRALEN STAAT* 189–98 (2006).

142. WALTER BERKA, *DIE GRUNDRECHTE: GRUNDFREIHEITEN UND MENSCHENRECHTE IN ÖSTERREICH* 559 (1999); JOCHEN ABRAHAM FROWEIN & WOLFGANG PEUKERT, *EUROPÄISCHE MENSCHENRECHTSKONVENTION [EUROPEAN CONVENTION ON HUMAN RIGHTS]* art. 14, ¶ 4 (3d ed. 2009). *Ringling* bells might also be more of a *practice* than building the steeple.

143. *X v. United Kingdom*, App. No. 7992/77, 14 Eur. Comm’n H.R. Dec. & Rep. 234, 234–35 (1978) (involving a Sikh turban); *X v. Austria*, App. No. 1753/63, 7 Y.B. Eur. Conv. on H.R., 174 (Feb. 15, 1965) (involving converted Buddhist convict growing beard). Again, the Court merely states that such actions fall under religious freedom without differentiating between the various forms of manifestation.

144. *Manoussakis v. Greece*, 1996–IV Eur. Ct. H.R. 1346, ¶ 36.

145. *Cf.* BBL 7603, 7631–32 (2008) (citing Bayerischer Verwaltungsgerichtshof [BayVGH Ve] [Bavarian Administrative Court] Aug. 29, 1996, 128 Bayerische Verwaltungsblätter [BayVerwBl] 144) (considering the mosque and minaret to constitute an “almost indissoluble unity”).

Even if the ECtHR finds minarets to be protected by Article 9(1), their construction, like any other manifestation of religion, could still be subject to limitations, but “only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”<sup>146</sup> Under this provision, bans have been upheld on certain types of ritual slaughter and on headscarves worn by teachers in public school or by university students.<sup>147</sup>

The minaret ban, through Article 72(3) BV, is prescribed by accessible, predictable, and precise law.<sup>148</sup> In the Turkish headscarf case, the ECtHR held that safeguarding secular values and restraining religious extremism are legitimate aims for restrictions.<sup>149</sup> By analogy, Switzerland would have to argue that it passed the minaret ban for similar purposes, relying on the ECtHR’s general reluctance to question states’ motives for legislation.<sup>150</sup> But even if the Court concurred that the ban was motivated by concerns for public safety, order, religious peace, and the rights of others (rather than out of xenophobic prejudice), the ban would still have to be necessary in a democratic society. In religious matters, the ECtHR grants states a wide margin of appreciation in assessing such necessity, taking into account national traditions and admitting that opinions on the relationship between state and religion “may reasonably differ widely” in a democratic society.<sup>151</sup> Still, this margin of appreciation depends on the right at stake<sup>152</sup> and “goes hand in hand with a European supervision” to ensure a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference.<sup>153</sup>

In the case of the minaret initiative, proportionality requires that there is no means to combat extremism that would be equally effective but less intrusive on Muslim religious freedom. The

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146. ECHR, *supra* note 65, art. 9(2).

147. See *Şahin v. Turkey*, 2005–XI Eur. Ct. H.R. 173 (upholding ban of Islamic headscarf as applied to female medical student); *Dahlab v. Switzerland*, 2001–V Eur. Ct. H.R. 447 (upholding ban on headscarves as applied to teacher in the classroom); *Tsedek v. France*, 2000–VII Eur. Ct. H.R. 231 (upholding restrictions on ritual slaughter performed under Jewish tradition).

148. Cf. *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) ¶¶ 37–40 (1993) (finding criminal law provisions on proselytism sufficiently precise).

149. *Şahin*, 2005–XI Eur. Ct. H.R. ¶ 116.

150. See EVANS, *supra* note 135, at 148.

151. *Şahin*, 2005–XI Eur. Ct. H.R. ¶¶ 109–10; see also *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) ¶¶ 64–74 (1994) (discussing necessity and the margin of appreciation in the context of freedom of expression).

152. See EVANS, *supra* note 135, at 143–44 (noting that in the context of *Manoussakis v. Greece*, the importance of public worship led to a narrower margin of appreciation).

153. *Şahin*, 2005–XI Eur. Ct. H.R. ¶¶ 110, 116–17.

ECtHR—unlike, for instance, the Swiss, German, or Canadian constitutional courts—does not, in a prior step, assess the *suitability* of a measure to reach a legitimate aim.<sup>154</sup> Yet, implicitly the ECtHR will have to consider suitability because it will be impossible to assess the proportionality of means and ends if there is no rational connection between the two. As expounded above, such a connection is difficult to establish for the minaret ban.<sup>155</sup> The ban does not mitigate extremist views (but instead might be used by Muslim extremists to stoke anti-Western resentment), and it certainly will not end the unequal treatment of the sexes. Even if the Court assumed some connection between the ban and religious peace and security, it will find that such connection is too tenuous to justify the limitation on Muslims right to free religious worship, practice, and observance.<sup>156</sup>

In addition, the exclusive focus of the ban—only Muslims are affected—may violate the ECHR's prohibition of discrimination. Article 14 ECHR differs from the constitutional nondiscrimination provision of Article 8 BV in its contingent scope, which prohibits only discrimination that infringes the rights protected in the Convention.<sup>157</sup> Although a violation of Article 14 does not presuppose a violation of Article 9 (or any other right under the ECHR), it does require curtailment on discriminatory grounds of the "enjoyment" of Convention rights.<sup>158</sup> Thus, even if the erection of specific architectural structures for worship does not fall under the scope of Article 9, a state might still violate its obligations under that provision *in conjunction with* Article 14 if it allowed some denominations to build towers but barred others from doing so.<sup>159</sup>

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154. Compare Schweizer, *supra* note 89, ¶ 32, with NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW 26–27 (1996), and Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L. J. 383, 387 (2007).

155. See Bloom, *supra* note 100 (noting the multiple cultural and political purposes of minarets); see also note 106 and accompanying text (noting the prevalence of minarets across all subsets of Islam, from the moderate to the fundamentalist).

156. See BBL 7603, 7634–38 (2008) (discussing the Swiss government's acknowledgment of the difficulties in reconciling the ban with religious rights).

157. Switzerland has not ratified the general prohibition of discrimination added to the ECHR through Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 2000, E.T.S. No. 177.

158. See Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium," 6 Eur. Ct. H.R. 33–35 (ser. A) (1968) ("Article 14 (art. 14) does not form part of the enumeration of rights and freedoms in Articles 2–13 of the Convention . . . and Articles 1–3 of the Protocol . . . for it does no more than prohibit any discrimination in the enjoyment of these rights and freedoms.")

159. Cf. *id.* at 33.

Article 14 (art. 14) condemns only 'discrimination', and the Commission makes a point of stating precisely how it understands this word. In its opinion a State does not discriminate if it limits itself to conferring an 'advantage', a 'privilege'

Discriminating treatment is justified only if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>160</sup> The aim stated by the proponents of the minaret initiative was to ensure respect for civil liberties and equality before the law, and to combat religious extremism.<sup>161</sup> The ECtHR would, no doubt, find such aims legitimate.<sup>162</sup> Yet, not only is there no reasonable relationship of proportionality between these alleged aims and the minaret ban, the Court is bound to rule that there is no relationship at all.

In conclusion, it cannot be ruled out that the ECtHR will find the building of minarets outside the protective scope of Article 9(1) ECHR. More likely, however, the Court will hold that religious edifices are also protected by Article 9(1), and that refusing applicants a building permit for a minaret based on Article 72(3) BV would violate their Convention rights. In addition, such a violation will almost certainly not be considered justified under Article 9(2). If it finds for a violation of Article 9, the ECtHR probably will not consider Article 14 separately,<sup>163</sup> nor apply Articles 9 and 14 concurrently.

If, however, the Court decides that minarets are *not* a manifestation of a religion as encompassed by Article 9(1), Article 14 will be pivotal. Because religious structures still fall within the purview of Article 9(1),<sup>164</sup> the ban would constitute an impermissible discrimination on religious grounds.<sup>165</sup>

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or a 'favour' on a particular group or individual which it denies to others. The question of a possible discrimination arises only if the difference in treatment in issue amounts to a 'hardship' inflicted on certain people.

*Id.*

160. *Id.* at 33, 44; *Gütl v. Austria*, 2009 Eur. Ct. H.R. 453, ¶ 34.

161. SCHWEIZERISCHE EIDGENOSSENSCHAFT, *supra* note 92, at 27.

162. *Cf. Şahin v. Turkey*, 2005–XI Eur. Ct. H.R. 173, ¶¶ 111, 114 (upholding restrictions on the wearing of religious headscarves in the name of equality and secularism).

163. *Cf. Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) ¶ 57 (1993) (declining to reach the Article 14 issue).

164. *See supra* note 159 and accompanying text (discussing the connection between Article 9 and the erection of specific architectural structures for worship).

165. I omit a detailed analysis of a possible breach of the Framework Convention on the Protection of National Minorities, 1 Feb. 1998, E.T.S. 157, which Switzerland ratified in 1998. The Framework Convention is not considered self-executing. BGer Apr. 5, 2006, docket no. 1P 149/2004, *available at* <http://www.bger.ch>; *cf. supra* note 69. Nor does it define "national minorities"; under the definition applied by Switzerland the inclusion of Muslims under the Convention's protective scope is envisaged only for the future. According to its declaration upon signature, Switzerland considers as national minorities only those groups of persons which are outnumbered by the national or cantonal populace, which are Swiss citizens, maintain long-lasting, firm and permanent connections to Switzerland, and which aspire to jointly preserve their shared identity, particularly their culture, their traditions, their religion, and

## 2. Implementing the ECHR

In the run-up to the vote, most Swiss commentators assumed, with the Federal Council, that a minaret ban would violate the ECHR.<sup>166</sup> Possible legal repercussions were discussed only summarily, however, because nobody predicted that the ballot would be adopted.<sup>167</sup>

Shortly after the ballot passed, the proponents of one minaret project vowed to exhaust all avenues of appeal up to the ECtHR.<sup>168</sup> Two individual applications were lodged immediately with the ECtHR within weeks of the vote, followed by several non-formal letters of complaint.<sup>169</sup> These direct submissions seem likely to be dismissed, because private applicants to the ECtHR must exhaust all local remedies<sup>170</sup>—a requirement that cannot be removed by merely pointing to the likely rejection of complaints by national courts.<sup>171</sup> Local remedies need not be exhausted only in exceptional circumstances,<sup>172</sup> and “mere doubt as to the prospects of success of an available remedy” does not justify a direct appeal to the ECtHR.<sup>173</sup> In addition, it would be incorrect to assume that there is local remedy at all against a ballot initiative.<sup>174</sup> Although the vote as such can

their language. BBL II 1325 (1998). If these conditions are met, Muslims would be considered a minority for the purpose of the Framework Convention. *Second Report Submitted Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities*, ¶ 18 (Jan. 31, 2007), [http://www.coe.int/t/dghl/monitoring/minorities/3\\_fenmdocs/PDF\\_2nd\\_SR\\_Switzerland\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_fenmdocs/PDF_2nd_SR_Switzerland_en.pdf).

166. See *supra* note 65 and accompanying text (noting that the ban was incompatible with Articles 9 and 14 of the ECHR).

167. BBL 7603, 7645 (2008); cf. *supra* note 36 and accompanying text (discussing the procedure of the Federal Assembly regarding the validity of initiatives).

168. Christoph Wehrli, *Klares, aber vieldeutiges Nein zu Minaretten*, NZZ, Nov. 30, 2009, at 7; see *supra* text accompanying notes 26 (discussing one minaret project stalled as a result of the vote) and 115–19 (noting two filed petitions).

169. The first application was brought by the former speaker of the Geneva mosque who now heads a foundation to further interreligious dialogue. Claudia Schoch, *Kaum Chancen in Strassburg*, NZZ, Dec. 17, 2009, at 15. Four Muslim associations in Switzerland submitted the second application. *Weitere muslimische Verbände rufen Strassburg an*, NZZ ONLINE, Dec. 18, 2009, [http://www.nzz.ch/nachrichten/schweiz/muslime\\_strassburg\\_1.4244611.html](http://www.nzz.ch/nachrichten/schweiz/muslime_strassburg_1.4244611.html).

170. ECHR, *supra* note 65, arts. 34, 35(1).

171. Counsel for the former speaker of the Geneva mosque have implied that the Court could be seized directly, as local remedies would predictably be fruitless. *Hafid Ouardiri recourt à Strasbourg*, LE TEMPS (Geneva), Dec. 16, 2009.

172. See FROWEIN & PEUKERT, *supra* note 142, art. 35, ¶¶ 29–32.

173. *X v. United Kingdom*, App. No. 6861/75, 3 Eur. Comm’n H.R. Dec. & Rep. 147, 149 (1975).

174. The ECtHR President observed that it was not possible to challenge the outcome of a ballot initiative in the Federal Supreme Court. *Les réactions internationales mettent la Suisse sous pression*, LE TEMPS (Geneva), Dec. 1, 2009 [hereinafter *Les réactions*].

indeed be disputed only on very narrow grounds, the application of the ban will be open to challenges in the courts.<sup>175</sup>

The local remedy restriction, however, does not apply to other members of the CoE, which may refer alleged breaches of the ECHR to the ECtHR under Article 33.<sup>176</sup> So far, thirteen state complaints have been brought before either the Commission or the Court.<sup>177</sup> State complaints are supposed to ensure the “collective enforcement” of the “public order of Europe.”<sup>178</sup> But as an unfriendly act, a state complaint may carry considerable political and diplomatic costs.<sup>179</sup> As a result, such complaints generally have been lodged in extraordinary circumstances (military rule in Greece and Turkey respectively) or concerned longstanding political disagreements, e.g., the disagreements between Ireland and Great Britain or Cyprus and Turkey.<sup>180</sup> In the same vein, Georgia has recently instigated proceedings against Russia for discrimination against Georgian nationals and in relation to the war with Russia in August 2008.<sup>181</sup>

The Council of Europe has four predominantly Muslim member states (Albania, Azerbaijan, Bosnia and Herzegovina, and Turkey).<sup>182</sup> At the first meeting of the Committee of Ministers after the vote, Turkey provided the most outspoken criticism, together with

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175. See *supra* note 117 and accompanying text (noting that the initiative itself may only be challenged for electoral irregularities) and *supra* note 120 (discussing the Swiss Court’s lack of authority to review the initiative in the abstract). At one point the media reported that the Court had admitted one of the direct complaints. *Cf., e.g., Schritt des Rekurses gegen Minarettverbot*, NZZ, May 21, 2010, at 13. The Court, however, had only requested the Swiss government to submit additional information. *Court Moves Forward with Minaret Ban on Appeals*, SWISSINFO.CH, (May 20, 2010), [http://www.swissinfo.ch/eng/politics/Court\\_moves\\_forward\\_with\\_minaret\\_ban\\_appeals.html?cid=921318](http://www.swissinfo.ch/eng/politics/Court_moves_forward_with_minaret_ban_appeals.html?cid=921318).

176. ECHR, *supra* note 65, art. 33. If, however, a state complaint is brought in connection with violations of the Convention rights of an *individual* (rather than against a legislative act or general administrative practice), that individual must also have exhausted local remedies. *Cyprus v. Turkey*, 2001–IV Eur. Ct. H.R. 331, ¶ 99.

177. FROWEIN & PEUKERT, *supra* note 142, art. 33, ¶ 2.

178. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) ¶ 239 (1978); *Austria v. Italy*, App. No. 788/60, 1961 Y.B. Eur. Conv. on H.R. 116, 138. Unlike proceedings under ICCPR Article 41, state complaints under ECHR Article 33 are not subject to reciprocity or possible reservations under ECHR Article 57. See *France v. Turkey*, App. Nos. 9940/82, 9941/82, 9942/82, 9943/82, 9944/82, 35 Eur. Comm’n H.R. Dec. & Rep. 143, 169 (1983).

179. Geir Ulfstein, *Human Rights, State Complaints*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 37, ¶ 25.

180. For an overview and further references, see FROWEIN & PEUKERT, *supra* note 142, art. 33, ¶ 2.

181. *Id.*

182. A list of member states is available at COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en> (last visited Sept. 26, 2010).

Azerbaijan and, somewhat unexpectedly, Sweden.<sup>183</sup> Thus far, however, no state has indicated any intention to lodge a complaint.

### 3. Withdrawing from the ECHR?

What would be the consequences if the ECtHR were to find either for a private or a state applicant and rule that the minaret ban violates the Convention? Few international treaties provide for decision mechanisms with immediate municipal effect. In most cases, state responsibility for a breach of contractual obligations is based on general international law,<sup>184</sup> which obliges a state party to provide reparation through restitution, compensation, and other measures, and requires the state party to take steps to prevent continuing or renewed violations.<sup>185</sup> Article 46(1) ECHR explicitly obliges state parties “to abide by the final judgment of the Court in any case to which they are parties.” But the ECtHR’s judgments are merely declaratory; they do not affect the municipal legal system and cannot be enforced in the municipal courts.<sup>186</sup> In most member states, however, a revision of a municipal judgment may be requested after it has been found by the Court to violate the Convention.<sup>187</sup>

In addition, the ECHR does not empower the Court to annul or repeal national legislation or to order a state party to alter its legislation<sup>188</sup>—hence the subsidiary remedy of just (pecuniary) satisfaction under Article 41. State complaints do not significantly differ from individual complaints with regard to implementation:<sup>189</sup> the ECtHR may similarly award just satisfaction under Article 41. In most cases, however, the finding of a violation has been considered sufficient and damages have been limited to expenses.<sup>190</sup> If a state party successfully brings a claim against Switzerland, it might be

183. Stefan Bühler et al., *Schweden profiliert sich als Hauptkritiker der Schweiz*, NZZAS, Dec. 13, 2009, at 10.

184. JÖRG POLAKIEWICZ, *DIE VERPFLICHTUNGEN DER STAATEN AUS DEN URTEILEN DES EUROPÄISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE* 52 (1993).

185. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 459 (7th ed. 2008).

186. Villiger, *supra* note 70, at 476–77.

187. In Switzerland, an applicant may petition the Federal Supreme Court for a revision of its previous judgment. BGE June 17, 2005, SR 173.110, art. 122(a).

188. See *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) ¶ 78 (1988) (noting Court’s lack of authority to order a change in Swiss legislation); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) ¶ 58 (1979) (same).

189. State complaints, however, are not subject to the admissibility test applicable to individual applications submitted under Article 34. ECHR, *supra* note 65, arts. 27, 28.

190. Franz Matscher, *Kollektive Garantie der Grundrechte und die Staatenbeschwerde nach der EMRK*, in *DER RECHTSSTAAT VOR NEUEN HERAUSFORDERUNGEN* 425 (Bernd-Christian Funk et al. eds., 2002).



difficult to identify the victims of a violation (all Muslims living in Switzerland?) and what damage they have suffered.

In its more recent case law, however, the ECtHR insists on the obligation of states to desist from any practice that has been found in violation of the Convention, implying an obligation to revise domestic laws that result in a violation.<sup>191</sup> Therefore, if the Court found for applicants challenging the minaret ban, Switzerland would be expected to ensure permission to build the minaret in question as an individual measure. As a general measure, Switzerland would have to ensure “through legislative or regulatory amendments” that future building applications would not be dismissed on grounds inadmissible under the Convention.<sup>192</sup>

If the ECtHR finds Switzerland in violation of the Convention, it could implement a judgment by two conceivable approaches. A legislative approach would rescind Article 72(3) BV. As illustrated by the minaret ban, a partial constitutional amendment could be initiated through a ballot initiative. Alternatively, Members of Parliament, the Federal Council, or a canton may propose an amendment, which can then be adopted by the Federal Assembly and subsequently submitted to a general vote.<sup>193</sup> Neither option seems viable for the time being; it would be too easy for the parties supporting the minaret ban to depict proponents of a new amendment as unpatriotic and disrespectful to the “sovereign will” of the people, kowtowing to unelected foreign judges in Strasbourg, and caving to political pressure.

Alternatively, the judiciary may decide to enforce an ECtHR judgment. The applicants who prevail before the ECtHR would have to petition the Federal Supreme Court for a revision of its previous judgment.<sup>194</sup> With a ruling of the ECtHR to invoke, the Court might find it easier to give the ECHR precedence over the constitutional minaret ban, overturn its previous judgment, and rule the ban inapplicable and obsolete. This outcome seems unlikely. It would

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191. *Sejdovic v. Italy*, 2006–II Eur. Ct. H.R. 241, ¶¶ 119–22; *Scozzari v. Italy*, 2000–VIII Eur. Ct. H.R. 471, ¶ 249. For discussion, see FROWEIN & PEUKERT, *supra* note 142, art. 46, ¶¶ 6–13. An inventory of general measures taken by the contracting states to implement the decisions taken by the convention bodies is regularly updated. REPORT OF THE COMMITTEE OF EXPERTS FOR THE IMPROVEMENT OF PROCEDURES FOR THE PROTECTION OF HUMAN RIGHTS [DH-PR], *Measures Adopted to Prevent New Violations of the European Convention on Human Rights* (2006), available at [http://www.coe.int/t/dghl/monitoring/execution/Documents/MGindex\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Documents/MGindex_en.asp).

192. See RULES OF THE COMM. OF MINISTERS FOR THE SUPERVISION OF THE EXECUTION OF JUDGMENTS AND OF THE TERMS OF FRIENDLY SETTLEMENTS R. 6(2)(b)(ii) n.2 (2006) [hereinafter RULES OF THE COMM'N OF MINISTERS] (detailing the factors reviewed by the Committee when evaluating a state's compliance with a judgment).

193. BV Apr. 18, 1999, SR 101, arts. 160, 181, 194(1). The amendment must be approved by simple majorities of both voters and cantons. *Id.* art. 140(1)(a).

194. See *supra* note 187 and accompanying text (noting the ability of parties to petition for such review).

cause a severe backlash against a judiciary that allegedly lacks democratic legitimacy.<sup>195</sup> Politically, it would give additional impetus to the proponents of the ban, who are bound to cry foul at judges overruling the sovereign. From this perspective, judges striking down a ballot initiative at the instigation of foreign judges would add injury to insult—the presumptuous act of an undemocratic, oligarchic cabal and a denial of the fundamental values of the Swiss Confederation. The Swiss People’s Party has already stated that if the minaret ban is revoked based on an ECtHR judgment, it would demand that Switzerland either withdraw from the ECHR or add a minaret-specific reservation.<sup>196</sup>

For these reasons (which will be discussed in more detail in Part 0 below), it is unlikely that Article 72(3) BV will be changed or denied application. What are the likely repercussions for Switzerland? Supervision of implementation falls to the Committee of Ministers,<sup>197</sup> the governing body of the CoE.<sup>198</sup> A violation may call for individual measures aimed at remedying the situation of the applicant,<sup>199</sup> but the Committee of Ministers also examines whether general measures, such as “legislative or regulatory amendments,” have been adopted to prevent “new violations similar to that or those found or putting an end to continuing violations.”<sup>200</sup> The Committee gives priority to supervision of the execution of judgments in which the ECtHR has identified a “systemic problem.”<sup>201</sup>

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195. See *supra* note 131 and accompanying text (discussing the modes of selection and retention of judges, and the fallout from politically unpopular decisions). Unlike their colleagues on most other European supreme courts (e.g., Italy, Spain, Ireland, and the United Kingdom), *all* federal judges are elected by Parliament and therefore, can claim at least indirect democratic legitimacy. BV Apr. 18, 1999, SR 101, arts. 145, 168(1). On the district level, judges are still elected by voters in most cantons and comprise both jurists and laypersons, while appellate judges are elected by cantonal legislatures.

196. Markus Brotschi, *Nach dem Ja zur Minarett-Initiative SVP will notfalls Menschenrechts-Konvention kündigen*, TAGESANZEIGER, Dec. 1, 2009, at 3. The termination of the Convention would entail exclusion from the Council. See *infra* note 214 and accompanying text (noting that Council membership requires ratification of the Convention). Reservations to the ECHR may only be made upon signature or when depositing the instrument of ratification. ECHR, *supra* note 65, art. 57(1). Similar demands were already raised in 1988, after the ECtHR ruled invalid a Swiss reservation to Article 6 ECHR. *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988).

197. ECHR, *supra* note 65, art. 46(2). After the Fourteenth Additional Protocol, entered into force on June 1, 2010, the Committee may now refer to the Court the question of whether a state party has failed to fulfill its obligation under Art. 46(1). If the Court finds a violation of Art. 46(1), it refers the case back to the Committee for further measures. *Id.* art. 46(4)–(5).

198. Statute of the Council of Europe art. 13, May 5, 1949, 87 U.N.T.S. 103 [hereinafter CoE Statute].

199. RULES OF THE COMM. OF MINISTERS, *supra* note 192, R. 6(2)(b)(i) n.1.

200. *Id.* R. 6(2)(b)(ii) n.2.

201. *Id.* R. 4(1).

Cases stay on the Committee's agenda until an effective remedy has been implemented,<sup>202</sup> and the Committee receives communications from the injured party that relate the success of the remedy.<sup>203</sup> In cases of noncompliance, the Committee may adopt interim resolutions, "notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution."<sup>204</sup> In 2006, after continual noncompliance with a judgment of the ECtHR, the Committee requested that member states implement (unspecified) "measures" against Russia.<sup>205</sup> A separate committee established by the CoE Parliamentary Assembly provides additional monitoring.<sup>206</sup>

In many cases, states are willing to cooperate with the Committee of Ministers and remedy the grievances addressed by the Court.<sup>207</sup> For political reasons, other countries have ignored judgments of the ECtHR.<sup>208</sup> Most recently, the Italian government vowed not to implement a ruling that required the removal of crucifixes from public schools.<sup>209</sup> The ECHR itself does not contain any provisions on how to penalize noncompliance, and neither the Convention nor the earlier CoE Statute clarifies the relationship

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202. *Id.* R. 7.

203. *Id.* R. 9(1).

204. *Id.* R. 16. *See, e.g.*, Interim Resolution of the Comm. of Ministers, Res. DH(2001)80 (2001) (concerning the judgment of the ECtHR of 28 July 1998 in the case of Loizidou against Turkey).

205. *See* Interim Resolution of the Comm. of Ministers, Res. DH(2006)26 (2006) (addressing the continuing incarceration of the applicants in *Ilaşcu v. Russia*, 2004–VII Eur. Ct. H.R. 318, in spite of several interim resolutions by the Committee).

206. The Assembly's Monitoring Committee is responsible for verifying the fulfillment of the obligations assumed by the member states under the Convention. EUR. PARL. ASS. RES. 1115, ¶ 5 (1997). In the case of noncompliance, the Assembly may penalize persistent failure to honor obligations and commitments by, *inter alia*, adopting resolutions, non-ratification of the credentials of a national parliamentary delegation, or the annulment of ratified credentials. *Id.* ¶ 12. For a list of monitoring proceedings, see The Monitoring Procedure of the Parliamentary Assembly, EUR. PARL. ASS. DOC. AS/Mon/Inf(2008)01rev2 (2008), [http://assembly.coe.int/committee/MON/Role\\_E.pdf](http://assembly.coe.int/committee/MON/Role_E.pdf).

207. *See, e.g.*, FROWEIN & PEUKERT, *supra* note 142, art. 46, ¶ 22 n.29 (noting the changes in Turkish legislation following repeated findings of violation of the right to life).

208. This is particularly true in the context of politically charged state complaints. *Id.* art. 33, ¶ 13 n.141.

209. In *Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (Nov. 3, 2009), the ECtHR ruled that display of the crucifix in public schools violated Article 2 of Protocol No. 1 to the ECHR in coordination with Article 9 of the Convention. Before the Court, Italy argued not only that the crucifix was both the symbol of Italian history and culture, and consequently of Italian identity, but that it also symbolized the principles of equality, liberty, tolerance, and even the Italian State's secularism. *Id.* ¶¶ 13, 35. In response, Prime Minister Berlusconi promised not to implement a judgment that made him "doubt Europe." Flavia Amabile, *Crocifisso: Polemiche e proteste*, LA STAMPA, Nov. 5, 2009, at 8.

between membership of the Council and being a party to the Convention. Under the Statute, each member state of the CoE “must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”<sup>210</sup> Serious violations of this obligation may result in suspension of membership and, ultimately, the Committee of Ministers may ask the offending state to withdraw from the Council.<sup>211</sup> Alternatively, Member States can withdraw voluntarily,<sup>212</sup> which Greece did under the Regime of the Colonels in 1969 to preempt a request to withdraw by the Committee (the country was readmitted after civilian rule had been reestablished in 1974).<sup>213</sup> However, it is the established practice of the CoE Parliamentary Assembly and the Committee of Ministers that Council membership requires ratification of the ECHR.<sup>214</sup>

For a country that puts human rights at the very center of its foreign policy<sup>215</sup> and has admonished some of the more recent CoE members “to catch up and meet the Council’s strict norms and high standards,”<sup>216</sup> the mere possibility of exclusion or forced withdrawal from the Council is highly embarrassing. Switzerland would join Belarus and Kosovo as the only non-member states on the continent.<sup>217</sup>

Although the media bandied about the possibility of expulsion after the vote,<sup>218</sup> this outcome can almost certainly be ruled out. Other countries have been found in repeated violation of the Convention and were not threatened with exclusion.<sup>219</sup> Even

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210. CoE Statute, *supra* note 198, art. 3.

211. If a state does not heed such a request, its membership may be terminated by the Committee. *Id.* art. 8.

212. *Id.* art. 7.

213. Jörg Polakiewicz, *Council of Europe*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 37, ¶ 9.

214. Interim Resolution of the Comm. of Ministers, Res. DH(2001)80 (2001).

215. EIDGENÖSSICHES DEPARTEMENT FÜR AUSWÄRTIGE ANGELEGENHEITEN, FRIEDEN UND MENSCHENRECHTE IN DER SCHWEIZERISCHEN AUßENPOLITIK (2007).

216. Bundesrat, Außenpolitischer Bericht [Foreign Policy Report], BBL 6291, 6355 (2009).

217. Belarus, with an application pending since 1993, does not meet the democratic requirements to join; even the Special Guest status of its parliament was suspended in 1997. *See* EUR. PARL. ASS. RES. 1671, ¶ 1 (2009). Kosovo’s statehood is not recognized by all Council members. *See id.* (noting that “[a]ll references to the territory, institutions or population of Kosovo in the present text are made in compliance with Resolution 1244 of the United Nations Security Council and without prejudice to the status of Kosovo”).

218. Claudia Schoch, *Kaum Chancen in Strassburg*, NZZ, Dec. 17, 2009, at 15.

219. Russia, for instance, has been reprimanded numerous times for its failure to ensure implementation of domestic court decisions. *See* Philipp Leach et al., *Can the European Court’s Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia*, 10 HUM. RTS. L. REV. 346 (2010).

allowing for the difference in political weight, it is highly unlikely that a different approach would apply to Switzerland. In the one instance where expulsion proceedings were instituted, it was against a dictatorial regime that had suspended most civil rights and tortured dissidents.<sup>220</sup>

Additionally, the ECtHR itself does not seem overly eager to assess a constitutional change endorsed by a ballot. It remains unclear whether or how the fact that the ban has been adopted by voters rather than by the executive or legislature will affect the Court's approach. The ECtHR has not yet considered a ballot initiative and will tread carefully, taking into account the democratic legitimacy attached to a ballot vote. Jean-Paul Costa, the president of the Court, even voiced doubts about whether "the decision of an entire people" could be the subject of proceedings before the ECtHR.<sup>221</sup> Merely establishing ECtHR jurisdiction would present "a complex juridical problem";<sup>222</sup> therefore, a challenge to the ban may not be heard by the ECtHR at all.<sup>223</sup> However, unless democratic decisions are assumed per se correct,<sup>224</sup> the modus of adoption should not be relevant as long as a municipal norm violates the ECHR. Such a violation entails international responsibility regardless of Switzerland's internal law.<sup>225</sup>

Predictions over the effect of a ECtHR judgment also are rash because a ruling is several years away.<sup>226</sup> These procedural caveats, however, should not obfuscate the crux of the problem under consideration. Ideally, states become members of the ECHR because they genuinely believe in the values it enshrines, not because they can count on eschewing enforcement. And indeed, in its report on foreign affairs issued two months before the minaret vote, the Federal Council emphasized the overarching significance of CoE agreements for adjudication and legislation; singled out the European Court of

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220. See *supra* note 213 (discussing the circumstances surrounding Greece's voluntary withdrawal); see generally MIKA HARITOS-FATOUROS, *THE PSYCHOLOGICAL ORIGINS OF INSTITUTIONALIZED TORTURE* 21–30 (W. Peter Robinson ed., 2003) (providing historical background on Greece's governing regime).

221. Svetlana Jovanovska, *Schweizer Minarett-Verbot nur schwer anfechtbar*, DER WESTEN (Ger.), Dec. 1, 2009, available at <http://www.derwesten.de/nachrichten/politik/Schweizer-Minarett-Verbot-nur-schwer-anfechtbar-id2195825.html> (quoting ECtHR Chief Judge Jean-Paul Costa).

222. Jean-Pierre Stroobants, *Les minarets helvétiques et la justice*, LE MONDE, Dec. 3, 2009, at 9 (quoting ECtHR Chief Judge Jean-Paul Costa).

223. See *Les réactions*, *supra* note 174 (noting difficulties in mounting a legal challenge to the ban).

224. See *infra* Part IV (discussing rule of law in the context of democratic governance).

225. See Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 332 [hereinafter Vienna Convention] (prohibiting states from invoking internal law as a justification for noncompliance with a treaty).

226. The overall length of proceedings has been estimated at five to seven years. See Brotschi, *supra* note 196.

Human Rights as the main pillar of the Council of Europe;<sup>227</sup> and emphasized that Switzerland “sincerely endeavored to implement decisions of the Court that affect it, and continually incorporates the Court’s jurisprudence into the national legal order.”<sup>228</sup> The resolve to live up to these principles may well be tested if the ECtHR passes judgment on the minaret ban.

### C. *The International Covenant on Civil and Political Rights*

#### 1. Wide Scope of Protection . . .

The ECtHR will be pivotal in assessing the legal consequences of the minaret ban, but the ECHR is not the only relevant international instrument in this context. The Universal Declaration of Human Rights and the (nonbinding) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief also guarantee freedom of religion and prohibit discrimination on religious grounds.<sup>229</sup> Both declarations are resolutions adopted by the UN General Assembly, and their legal status is therefore somewhat complex.<sup>230</sup> The International Covenant on Civil and Political Rights (ICCPR), on the other hand, is a binding international treaty to which Switzerland acceded in 1992.<sup>231</sup>

227. BBL 6291, 6355–56 (2009).

228. *Id.* at 6355.

229. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, arts. 1(1), 2, GA Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 5, 1981); Universal Declaration of Human Rights, arts. 2, 18, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]. The Convention Against Racism, to which Switzerland acceded in 1994, protects from discrimination based on race, color, descent, or national or ethnic origin, but not religion. International Convention on the Elimination of All Forms of Racial Discrimination art. 1(1), Dec. 21, 1965, 660 U.N.T.S. 212 [hereinafter CERD]. The issue of minaret construction was nevertheless addressed in Switzerland’s latest periodic report to the Committee on the Elimination of Racial Discrimination. Comm. on the Elimination of Racial Discrimination, Addendum: Switzerland, ¶ 147, U.N. Doc. CERD/C/CHE/6 (Nov. 14, 2006). In its concluding observations, the Committee noted

with regret the lack of substantial progress made by the State party in combating racist and xenophobic attitudes towards some minorities, including black persons, Muslims, Travelers, immigrants and asylum-seekers. It is particularly concerned at the hostility resulting from the negative perception of foreigners and certain minorities by part of the population, which has resulted in popular initiatives questioning the principle of non-discrimination.

Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶ 7, U.N. Doc. CERD/C/CHE/CO/6 (Aug. 14, 2008).

230. Daniel Thürer, *Soft Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 37, ¶ 11.

231. ICCPR, *supra* note 66; BBL IV 1105 (1991).

In its concluding observations on Switzerland's third periodic report under the ICCPR, the Human Rights Committee (CCPR) expressed its concern over the minaret initiative, observing that if adopted, it would bring Switzerland into noncompliance with its obligations under Articles 2, 18, and 20 of the ICCPR.<sup>232</sup> Under Article 2(1), state parties undertake to grant the rights of the ICCPR to every individual within their jurisdiction "without distinction" based on, *inter alia*, race, sex, or religion. This provision is of an accessory nature (as is Article 14 ECHR) and therefore requires another right enshrined in the Covenant, such as the freedom of religion (Article 18 ICCPR), to be affected.<sup>233</sup>

Article 18(1) guarantees the *forum internum* of religious belief as well as its manifestation "in worship, observance, practice, and teaching." Except for the order of the different forms of manifestations, this formulation is identical to Article 9 ECHR, and the respective discussion applies *mutatis mutandis* to Article 18 ICCPR.<sup>234</sup> In a General Comment, the CCPR states explicitly that the concept of worship also extends to "ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, *including the building of places of worship.*"<sup>235</sup> As a consequence, although religious communities are not entitled to erect whatever structure they dream up, state parties can restrict places of worship only within the limitations listed in Article 18(3). Specifically, any restriction on places of worship must be prescribed by law and necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others.<sup>236</sup> The observations made above with regard to permissible restrictions

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232. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Switzerland, ¶ 8, U.N. Doc. CCPR/C/CHE/CO/3 (Nov. 3, 2009) [hereinafter Concluding Observations]. Initially, the CCPR had mistakenly assumed that the initiative aimed to ban mosques altogether. Human Rights Comm., List of Issues to be Taken up in Connection with the Consideration of the Third Periodic Report of Switzerland, ¶ 19, U.N. Doc. CCPR/C/CHE/Q/3 (Apr. 3, 2009).

233. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY art. 2, ¶ 15 (2d ed. 2005). For an overview, see BAHYYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF 81–92 (1996). For a discussion on ECHR Article 14 see *supra* notes 157–59 and accompanying text.

234. Compare NOWAK, *supra* note 233, art. 18, ¶¶ 21–26 (discussing the ICCPR), with *supra* note 133 and accompanying text (discussing the ECHR).

235. Human Rights Comm., General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights, General Comment No. 22(48), ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993) [hereinafter General Comment No. 22] (emphasis added).

236. These limits are both wider and narrower than their equivalents in ECHR Article 9(2). ECHR, *supra* note 65, art. 9(2). Necessity is not measured by democratic standards; on the other hand, only *fundamental* rights and freedoms of others justify interference.

under Article 9(2) ECHR apply under the ICCPR as well.<sup>237</sup> Even if it is assumed that the minaret ban pursues a legitimate aim, it is not directly (or indirectly) related and proportionate to the specific need on which it is allegedly predicated.<sup>238</sup> For the reasons already set out,<sup>239</sup> the minaret ban is an unsuitable and ineffective way to contain violent religious extremism or to stop discriminatory practices. The ICCPR itself, in Article 20(2), excludes from protection advocacy that incites hostility or violence. Extremist preaching can therefore be countered without resorting to a minaret ban. Consequently, the ban violates Article 18 and also constitutes discrimination inadmissible under Article 2 ICCPR.<sup>240</sup>

Although not invoked by the CCPR,<sup>241</sup> Article 27 ICCPR is also pertinent to the minaret ban. Article 27 guarantees persons belonging to ethnic, religious, or linguistic minorities the right to enjoy their own culture, to profess and practice their own religion, and to use their own language. Some debate whether this provision only protects nationals of a signatory state.<sup>242</sup> The CCPR applies a broader and—in accordance with Article 2(1) ICCPR—more persuasive construction granting protection to everyone within a state's jurisdiction.<sup>243</sup> However, the protective scope of Article 27 includes *Swiss* Muslims even under a narrow definition of “minorities.”<sup>244</sup> Although the wording differs—Article 27 protects

237. See *supra* note 146 and accompanying text (noting that permissible restrictions must be prescribed by law and necessary to the preservation of public security or order, health or morals, or the rights of others).

238. Cf. Human Rights Comm., *supra* note 235, ¶ 8 (requiring such relationship between state actions and the rights which they burden).

239. See *supra* note 156 and accompanying text (arguing that the connection between the ban and the state's interest in security is either lacking entirely or too tenuous to be credited).

240. As *lex specialis*, Article 26 of the Covenant contains a general prohibition of any discrimination that is, unlike Article 2, not restricted to the rights enshrined in the Covenant. NOWAK, *supra* note 233, art. 2, ¶ 15. Switzerland, however, has entered a reservation that Article 26 is applicable only in connection with other rights in the ICCPR. BBL IV 1105–06 (1991).

241. See *supra* note 232 (focusing on Articles 2, 18, and 20 instead).

242. See, e.g., Human Rights Comm., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, ¶¶ 202, 568, U.N. Doc. E/CN.4/SUB.2/384/REV.1 (Jan. 1, 1979); see also NOWAK, *supra* note 233, art. 27, ¶ 17 (noting potentially limited applications of the protection).

243. Human Rights Comm., General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights, General Comment No. 23(50), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) [hereinafter General Comment No. 23]. The CCPR contends that even non-permanent residents and visitors to a State party may constitute minorities. *Id.* ¶ 5.2.

244. The Federal Council argued that Muslims in Switzerland may not qualify as a minority for the purpose of Article 27 due to their ethnic heterogeneity, the diversity of Islamic denominations, and their diverse ways of life. BBL 7603, 7643



professing and practicing a religion, whereas Article 18 ICCPR addresses manifestation in worship, observance, practice, and teaching—the protective scope of the two provisions must be congruent.<sup>245</sup> Whether the rights granted by Article 27 can be limited in analogy with Article 18(3) is, again, controversial,<sup>246</sup> but as discussed above, the conditions for restriction under Article 18(3) are not met by the minaret ban, which, therefore, also violates Article 27 ICCPR.

## 2. . . . But Weak Implementation Mechanisms

The ban on minarets thus constitutes an unjustified and discriminatory restriction of the guarantee of religious freedom of Article 18 and affects a minority protected under Article 27 ICCPR. As with the ECHR, claimants may invoke the ICCPR before Swiss courts, because the self-executing Covenant is part of Swiss law.<sup>247</sup> Yet, for the reasons set out above, the municipal courts are unlikely to overrule the constitutional ban on minarets even if they find that the ICCPR has been violated.<sup>248</sup> Contrary to the ECHR, parties to legal proceedings in Switzerland may not subsequently appeal to an international body if the Covenant is breached; Switzerland is not a party to the first Optional Protocol to the ICCPR, so no individual communication can be submitted to the CCPR.

A communication under Article 41(1) ICCPR by another state party is theoretically possible because Switzerland has accepted the Committee's respective competence.<sup>249</sup> Yet, despite encouragement by the CCPR,<sup>250</sup> and even though over forty parties have now issued

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(2008). Yet the criteria of ethnicity, religion, or language do not have to be met cumulatively. *See* General Comment No. 23, *supra* note 243, ¶ 5.1.

245. The question of what constitutes practice and profession under Article 27 ICCPR has not been addressed by scholars or the CCPR. Yet, as Article 27 does not create new rights, but rather protects the *enjoyment* of rights by specific and vulnerable groups, *see* ICCPR, *supra* note 66, art. 27, it would counter the purpose of the provision to construe it more narrowly than Article 18.

246. Relying on the text of Article 27, Manfred Nowak, *supra* note 233, art. 27, ¶ 53, rejects such an analogy, arguing that the limitations of Article 18(3) may only apply to majority religions. This seems counterintuitive and irreconcilable with the general prohibition of discrimination in Article 2(1) ICCPR.

247. *See supra* note 69 (discussing the self-executing nature of the ECHR and the ICCPR).

248. *See supra* Part III.A.2 (discussing the ban on minarets and the scope of religious freedom governed by Article 9 ECHR).

249. The declaration was originally made for five years in 1991 and has been extended in regular intervals since. The current declaration will be in force until April 15, 2015. AMTLICHE SAMMLUNG DES BUNDESRECHTS [AS] [CHRONOLOGICAL COLLECTION OF FEDERAL LAW] 2987 (2010).

250. Human Rights Comm., General Comment No. 31[80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment No. 31].

declarations under Article 41(1), the CCPR has never received a state communication.<sup>251</sup> Regardless, a state communication to the CCPR would not effectively shame Switzerland. The procedural rules under Articles 41 and 42 are cumbersome, and considerations are confidential and do not result in a finding of violation.<sup>252</sup>

It has been suggested that Switzerland may also face proceedings before the International Court of Justice (ICJ) for breaching its obligations under the ICCPR.<sup>253</sup> Switzerland accepted the ICJ's jurisdiction under Article 36(2) of the ICJ Statute without reservation,<sup>254</sup> and the wide scope of the subject matters listed under that provision covers a violation of Articles 18, 2, and 27 ICCPR.<sup>255</sup> A claim before the ICJ would not require a previous state communication under Article 41 ICCPR, because no subsidiarity requirement applies before the World Court.<sup>256</sup> However, compulsory ICJ jurisdiction under Article 36(2) requires reciprocity,<sup>257</sup> and few Muslim states have made declarations that would allow them to bring a claim against Switzerland.<sup>258</sup> Furthermore, any claimant before the ICJ would itself have to be a party to the ICCPR, and must not have entered reservations to Articles 2, 18, or 27.<sup>259</sup>

It was pointed out before and after the vote that contrary to the ECHR, the ICCPR cannot be denounced.<sup>260</sup> However, discussion of

251. NOWAK, *supra* note 233, art. 41, ¶ 2.

252. See ICCPR, *supra* note 66, art. 41(1)(d), (h)(ii) (explaining the requirements imposed upon the Committee to hold closed meetings, and discussing the reporting requirements of the Committee when a solution is not reached).

253. Marcel Stüssi, *Banning of Minarets: Addressing the Validity of a Controversial Swiss Popular Initiative*, 3 RELIGION & HUM. RTS. 135, 147 (2008).

254. BBL I 1254, 1254 (1948).

255. Cf. General Comment No. 31, *supra* note 250, ¶ 2 (alluding to the variety of enforcement mechanisms available to states); Christian Tomuschat, *Art. 36*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 589, 631, ¶ 74 (Andreas Zimmermann et al. eds., 2006) (noting the extremely wide scope of matters falling under ICJ jurisdiction pursuant to Article 36(2)).

256. Cf. Isabel Feichtner, *Subsidiarity*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 37, ¶ 28 (noting the general lack of obstacles to World Court jurisdiction).

257. The condition of reciprocity is generally held to be implicit in declarations under Article 36(2) of the ICJ Statute. See, e.g., Tomuschat, *supra* note 255, ¶ 27, at 607, ¶ 73, at 630–31. For detailed discussion, see CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 578–84 (2003). Here, the point is moot as Switzerland's declaration explicitly requires reciprocity. BBL I 1254 (1948).

258. See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. OF JUST., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Sept. 26, 2010) (listing the states that have made declarations).

259. Cf. Tomuschat, *supra* note 255, ¶ 28, at 607–08.

260. BBL 7603, 7646 (2008); Jörg Paul Müller, *Gegenvorschlag zur Minarett-Initiative 'nachholen'*, NZZ, Dec. 4, 2009, at 23. The Netherlands at one point threatened to denounce the Covenant, and North Korea notified its withdrawal in 1997. NOWAK, *supra* note 233, at xxxvi. The CCPR promptly stated that obligations would continue regardless of any supposed termination. See Human Rights Comm., General Comment Adopted by the Human Rights Committee Under Article 40,

legal proceedings under the ICCPR is even more premature than similar discussion under the ECHR. States will be unwilling to expose their own human rights record to criticism by attacking a state party that (while far from perfect) pays “sustained attention” to the protection of human rights.<sup>261</sup> In addition, proceedings before the ICJ would be expensive and time-consuming.<sup>262</sup> Moreover, a judgment would offer little practical or reputational gain for an applicant, because effective enforcement of an ICJ judgment is even less certain than effective enforcement of an ECtHR judgment.<sup>263</sup>

Still, Switzerland is unlikely to eschew international criticism altogether. The reactions to the vote by the relevant government actors in Muslim countries might suggest that, while clearly irked and offended by the vote, they are not determined to escalate the issue.<sup>264</sup> Nevertheless, Muslim governments are using international fora such as the UN Human Rights Council to voice criticism.<sup>265</sup> When the OIC revived its push for instruments against defamation of religion and Islamophobia at the Council’s last session, it denounced the minaret ban as a manifestation of Islamophobia that stood “in sharp contradiction to international human rights obligations concerning freedoms of religion, belief, conscience and expression” and warned that the ban would “fuel discrimination, extremism and misperception leading to polarization and fragmentation with dangerous unintended and unforeseen consequences.”<sup>266</sup>

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Paragraph 4 of the International Covenant on Civil and Political Rights, General Comment No. 26, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997). The Swiss People’s Party, nevertheless, demands withdrawal should any court rescind the ban based on the ICCPR. See Henckel, *supra* note 50. Earlier, the party proposed a constitutional amendment prohibiting courts from applying non-terminable international treaties. Press Release, Schweizerische Volkspartei [SVP] [Swiss People’s Party], *Wider die schleichende Aushöhlung unserer demokratischen Rechte!* (Feb. 10, 2009) (on file with the author).

261. Concluding Observations, *supra* note 232, ¶ 3.

262. See Shabtai Rosenne, *International Court of Justice*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 37, ¶ 108 (discussing the onerous litigation process before the ICJ).

263. Cf. Christian Tomuschat, *International Courts and Tribunals*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 37, ¶ 66 (discussing the lack of effective enforcement mechanisms).

264. See *supra* note 60 and accompanying text (noting that “Muslim states and their regional organizations do not seek a repetition of the ‘days of rage’ that followed the publication and re-publications of the Danish Muhammad cartoons”).

265. Human Rights Council Res. 13/16, Combating Defamation of Religions, 13th Sess., Apr. 15, 2010, ¶ 8, U.N. Doc. A/HRC/RES/13/16 (Apr. 15, 2010).

266. See *id.*, which was introduced by Pakistan on behalf of the OIC and adopted by twenty to seventeen votes, with eight abstentions—the closest vote yet on a resolution on defamation of religions in either the Council or the Commission on Human Rights. See generally Lorenz Langer, *The Rise (and Fall?) of Defamation of Religions*, 35 YALE J. INT’L L. 257, 258–62 (2010) (providing background on prior efforts at enacting instruments against defamation of religions).

#### IV. COMPETING VALUES: DEMOCRATIC PARTICIPATION AND THE RULE OF LAW

*Because of the geographical situation, to which attention has been directed, Switzerland being a borderland of most other nationalities of Europe, she had many troubles growing out of racial difficulties. The contentious parties were quick to see in Rousseau's [sic] doctrine of direct legislation, or of popular sovereignty, a chance for personal gain and advantage, the greatest vice that may creep into legislation. Each faction, religious or political (religious being the worse), saw an opportunity by means of the initiative and referendum whereby they could enact a law in spite of the legislature. The initiative, therefore, was born in sin; it was the product of selfishness, simply a scheme employed for party advantage.*

— Edgar B. Kinkhead, *opposing the introduction of Swiss-style democracy to Ohio*<sup>267</sup>

Eventually, the prohibition of minarets may have little international legal consequence for Switzerland.<sup>268</sup> But the larger significance of the minaret ballot transcends the fact that no new minarets may be built between the lakes of Geneva and Constance. The minaret ballot also raises fundamental questions about the relationship between national law and international law.

Conflict between national and international law will persist as a prime concern for both the international and the constitutional lawyer despite the optimistic concept of a “constitutionalization” of the international legal order.<sup>269</sup> The international law perspective is clear, if slightly blasé: according to Article 27 of the Vienna Convention on the Law of Treaties, domestic law is irrelevant to international obligations.<sup>270</sup> From the municipal viewpoint, however, the introduction of direct-democratic instruments further complicates the already tense relationship between the two normative systems,

267. Edgar B. Kinkhead, *Initiative and Referendum*, 52 OHIO L. BULL. 423, 426 (1907).

268. In May 2010, Switzerland was again elected, with 175 votes, to the UN Human Rights Council after serving as an inaugural member from 2006 to 2009. Press Release, General Assembly, General Assembly Fills 14 Seats on Human Rights Council; Approves Funds for Higher UN Troop, Police Levels in Haiti; Sets Date for Communicable Diseases Meeting, U.N. Press Release GA/10939 (May 13, 2010). In June, a former Federal Councilor was elected president of the U.N. General Assembly. Press Release, General Assembly, By Acclamation, General Assembly Elects Joseph Deiss of Switzerland as President of Sixty-Fifth Session, U.N. Press Release GA/10947 (June 11, 2010). In both cases, it had been speculated that the minaret ban might lead Muslim states to support other candidates; fears were also expressed that Swiss influence in organizations such as the World Bank and the IMF might be compromised. Gieri Cavelti & Philipp Mäder, *Eine außenpolitische Herausforderung*, AARGAUER ZEITUNG (Switz.), Oct. 17, 2009, at 3.

269. JÜRGEN HABERMAS, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, in DER GESPALTENE WESTEN 113, 137–42 (2004).

270. See Vienna Convention, *supra* note 225, art. 27.

because, by deferring to “the people,” direct-democratic instruments give preeminence to a decision maker that is largely excluded from constructively participating in the international decision making process.<sup>271</sup> The voters-at-large regularly reject the international policies suggested by their representatives, but the electorate cannot negotiate treaties by itself or implement effective alternatives.<sup>272</sup> In Switzerland, this problem is particularly acute due to the far-reaching participatory rights of voters. The influence of the *Genevois* Rousseau is palpable;<sup>273</sup> his ideals have been realized to an unequalled extent, granting citizens, through ballot initiatives or referenda, an extraordinary level of actual democratic participation.<sup>274</sup>

### A. A Comparative Perspective

*The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.*

— Chief Justice John Marshall in  
*Marbury v. Madison*<sup>275</sup>

*We wouldn't need a Constitution if we left everything to the political process, but if we left everything to the political process, the majority would always prevail, which is a great thing about democracy, but it's*

271. See BV Apr. 18, 1999, SR 101, arts. 140, 141; see also *infra* notes 274, 380. At best, voters can expect to vote on the ratification of some treaties *after* they have been signed (as under BV Article 141), or they may torpedo international agreements *ex post* by adopting contravening national legislation, such as the ban on minarets.

272. This may simply mean that voters have to vote again and again until the original submission is, with some delay, passed. The Irish vote on the Treaty of Lisbon provides a recent example. *Cf., e.g., The Future's Lisbon*, ECONOMIST, Oct. 10, 2009, at 35. On the European level, most governments now avoid consulting the voters altogether on issues relating to the European Union.

273. *E.g.,* FRITZ FLEINER, ENTSTEHUNG UND WANDLUNG MODERNER STAATSTHEORIEN IN DER SCHWEIZ 4–12 (1916). Rousseau's views on the advantage of a small commonwealth for political participation seems tailor-made to Switzerland. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT OR THE PRINCIPLES OF POLITICAL RIGHTS, 68–71, 102–03 (Rose M. Harrington trans., G.P. Puntam's Sons 1893). He described the “troops of peasants” who settled state affairs under the oak tree as the “happiest people of the world”—immune to treacheries and dishonesty, as they were not even refined enough to be duped. *Id.* at 158–59.

274. *Cf. ROUSSEAU, supra* note 273, at 23–24 (arguing that public deliberation “binds all subjects to the sovereign”). For more information on the ballot initiative, which was instituted with the 1874 Constitution, see *supra* note 473 and accompanying text. All federal acts, non-terminable international treaties of unlimited duration, as well as accession to international organizations are, within 100 days, subject to an optional referendum than can be requested either by 50,000 voters or eight cantons. BV Apr. 18, 1999, SR 101, art. 141. Mandatory referenda are held, *inter alia*, on amendments to the Constitution and accession to organizations for collective security or to supranational communities. *Id.* art. 140.

275. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

*not so good if you are a minority or if you're a disfavored minority or you're new or you're different.*

— Theodore B. Olson, Counsel for Plaintiffs in  
*Perry v. Schwarzenegger*<sup>276</sup>

In scope and significance, the closest equivalent to Swiss direct-democratic instruments are state-level ballot initiatives in the United States, which in many instances are actually modeled upon Swiss institutions.<sup>277</sup> However, the United States does not allow ballot initiatives on the federal level because the Founding Fathers feared that even an extended republic might be torn asunder if competing factions were allowed to legislate and further their own advantage.<sup>278</sup> Due to this distrust of “the mischiefs of faction,”<sup>279</sup> Americans do not have to constantly consider whether provisions may be written into the federal Constitution that blatantly contradict the Bill of Rights or (presumably less worrisomely) international treaty obligations. On the state level, however, ballot initiatives have become an important instrument as well as a major industry, most notably (and notoriously) in California.<sup>280</sup> Yet, unlike the Swiss system, state ballots are subject to judicial review both before and after the vote by state and federal courts.<sup>281</sup> A ballot initiative that introduces state legislation must comply both with the state constitution and with federal laws.<sup>282</sup> Alternatively, a ballot initiative may aim to amend

276. Transcript of Record at 45, *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010).

277. See generally JAMES W. SULLIVAN, *DIRECT LEGISLATION BY THE CITIZENSHIP THROUGH THE INITIATIVE AND REFERENDUM* (1893) (discussing direct participation measures). Sullivan, a labor theorist, had travelled to Switzerland in 1888 to study direct-democratic instruments. The institution of initiatives and referenda was challenged as unconstitutional in 1911, allegedly violating Article 4, Section 4 of the U.S. Constitution, which prescribes a republican form of government for states. The Supreme Court ruled the question political. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150 (1912). For a discussion of Swiss influences on ballot initiatives in the United States, see DAVID D. SCHMIDT, *CITIZEN LAWMAKERS* 5–6 (1989).

278. THE FEDERALIST NO. 10, at 52–55 (James Madison).

279. *Id.* at 55.

280. *Sign Here*, *ECONOMIST*, Feb. 6, 2010, at 36–37. For a critical assessment, see also Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 433–34 (1998).

281. Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives*, 31 LOY. L.A. L. REV. 1239, 1241–45 (1998). For a discussion of the interplay between state and federal courts, see Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L. J. 1503, 1545–47 (1990).

282. U.S. CONST. art. VI, § 2 (Supremacy Clause). For the purpose of judicial review, it is irrelevant whether state legislation has been enacted by the state legislature or adopted by voters. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981).

the state constitution, in which case it might still be preempted by federal constitutional norms.<sup>283</sup>

The different levels of initiatives and their review are well illustrated by two successive ballot initiatives in California aimed at limiting marriage to a union between man and woman. Proposition 22, which was adopted in 2000 by 61 percent of voters, amended the Californian Family Code to recognize heterosexual marriages only.<sup>284</sup> In 2008, however, the Supreme Court of California held that the provision violated the right to marriage (as an aspect of the right to privacy) and equal protection under the state constitution.<sup>285</sup> Opponents to same-sex marriage launched a second ballot initiative to overturn this decision by amending the declaration of rights of the Californian constitution to restrict the right to marriage to include only opposite-sex couples.<sup>286</sup>

This initiative was adopted as Proposition 8 in 2008 by 52 percent of voters, and the Supreme Court of California refused to declare Proposition 8 invalid under the state constitution.<sup>287</sup> Supporters of same-sex marriage then turned to the U.S. District Court of Northern California to challenge the constitutionality of Proposition 8 and argued that Proposition 8 was invalid under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.<sup>288</sup> On August 4, 2010, the district court ruled in favor of the plaintiffs, holding that Proposition 8 violated both the Due Process and the Equal Protection Clauses of the U.S. Constitution.<sup>289</sup> Opponents of gay marriage have already appealed the ruling to the Court of Appeals for the Ninth Circuit.<sup>290</sup> After the appeal, the

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283. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1458 (1987). Clashes between state constitutional amendments and federal legislation, on the other hand, would presumably raise issues under the Tenth Amendment of the U.S. Constitution rather than the Supremacy Clause.

284. See generally *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (discussing the constitutional merits of the Proposition 8 ban).

285. Compare *In re Marriage Cases*, 183 P.3d at 384, 419, 433–34, with CAL. CONST. art. I, § 7.5.

286. *Strauss v. Horton*, 207 P.3d 48, 66 (Cal. 2009).

287. *Id.* at 68, 123–24. Petitioners argued that Proposition 8 was not a constitutional amendment, but a more far-reaching revision (which requires two-thirds approval by both houses of the state legislature), and that it violated the separation of power doctrine of the state constitution. The attorney general also advocated invalidating the proposition, but on the ground that the inalienable rights guaranteed by the state constitution were not subject to abrogation by constitutional amendment without a compelling state interest. *Id.* at 63. The court, however, held that Proposition 8 merely created a limited exception to the equal protection clause under the state constitution. *Id.* at 61.

288. *Perry v. Schwarzenegger*, No. 3:09-c-02292, 2010 U.S. Dist. LEXIS 78817, at \*11 (N.D. Cal. Aug. 4, 2010).

289. *Id.* at \*217.

290. Maura Dolan, *Schwarzenegger, Brown Urge Resumption of Gay Marriages*, L.A. TIMES, Aug. 7, 2010, at 1. The court of appeals has already extended the stay on

Supreme Court could grant certiorari to a possible appeal against the circuit court's decision and settle the question conclusively (or at least until it decides to take up a similar case once more).

Therefore, it would seem that in the United States, the conflict between the rule of law and democratic instruments is ultimately defused by the overruling authority of the Constitution, which is fictionalized as a social contract embodying the popular will. The voters in the single states have to defer to the will of this overarching majority, and ballot initiatives that fall foul of the Constitution will be struck down. Thus, judges, even when saying "what the law is," ideally uphold the "original and supreme will" of the people as embodied in the Constitution.<sup>291</sup> Judges are mere guardians of this covenant, although factually their power of interpreting highly abstract formulations amounts to much more than simple guardianship. The constitutional rules guiding these guardians, however, may be changed, and an amendment to the Constitution—any amendment—would bind any court of the land. Yet, the support needed to amend the U.S. Constitution is very high, and amendments are initiated by the representatives of the people, not the people themselves.<sup>292</sup> Thus, although the fundamental law of the land is seen as congruent with, and a reflection of, the will and the values of the governed, direct-democratic governance is strictly limited.

This narrative presupposes that everyone agrees on the limits set by the Constitution, or at least that the interpretations proffered by judges are accepted as authoritative. Yet, the controversies engendered by many Supreme Court decisions on the scope of constitutional provisions (as well as the disagreements between the Justices themselves) indicate that neither precondition may be met.<sup>293</sup>

Nor is there agreement on when courts should step in and review a law adopted by the people directly (or through their representatives). Proposition 8 was passed by a majority of Californian voters. More importantly, it was launched specifically to overrule the 2008 judgment of the Supreme Court of California.<sup>294</sup>

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gay marriage until the appeal is decided. Jesse McKinley, *Court Extends Stay on Allowing Gay Marriage*, N.Y. TIMES, Aug. 16, 2010, at A12.

291. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

292. Constitutional amendments are initiated either by Congress or state legislatures, convening a constitutional convention. U.S. CONST. art. V. Conversely, Akhil Amar argues that the Constitution contains an unenumerated right that would permit a majority of citizens to petition Congress to amend the Constitution and to subsequently ratify the adopted amendments. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994).

293. See, e.g., *Citizens United v. Fed. Election Comm'n*, 129 S. Ct. 2893 (2009) (disagreeing over the tenets that deem inclusion within First Amendment protection).

294. *Strauss v. Horton*, 207 P.3d 48, 66 (Cal. 2009).



Should it be possible, then, to overturn such an immediate and unambiguous expression of the popular will simply by appealing to a federal court? Should it be left to judges to decide an issue that voters just reclaimed for themselves? In the U.S. District Court of Northern California, counsel for plaintiffs argued that the purpose of courts is to protect “individuals who may not be the most popular people” from unconstitutional discrimination.<sup>295</sup> The defendants countered that judges should not tamper with the people’s decision and the political process.<sup>296</sup> In a nutshell, the dilemma is what—if any—issues should ultimately be determined by judges? And why should the will of the many be subject to the whims of a selected few? Should the people correct the judges’ mistakes, or vice-versa?<sup>297</sup>

The United States, therefore, faces questions similar to Switzerland, although primarily within a *domestic* framework. The legality of ballot initiatives and legislation more generally is predominantly discussed from a constitutional viewpoint.<sup>298</sup> The Constitution is assumed to provide the best possible protection for fundamental rights, and there is no need for an additional line of defense on the international level. To the contrary, international instruments are seen as a potential threat to the rights guaranteed by the Constitution and its Bill of Rights.<sup>299</sup> This skepticism towards international human rights law is evident on several levels. The United States still has not ratified some major human rights

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295. Transcript of Record, *supra* note 276, at 45.

296. *Id.* at 55, 72.

297. *Id.* at 56, 71; *see infra* note 314 and accompanying texts (quoting counsel’s statement alluding to institutional tensions inherent in direct-democratic efforts). For criticism of unrestrained democratic decisions, see, for example, Eule, *supra* note 281, at 1522, stating, “If the Constitution’s Framers were keen on majority rule, they certainly had a bizarre manner of demonstrating their affection.” *See also, Amar, supra* note 283 (arguing for a tight and coherent set of federalist checks and balances springing from existing legal institutions); *see generally*, Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293 (2007) (debating the merits of any direct participation). For critical views of judicial review of democratic decisions, see generally MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999), arguing for a “populist” constitutional law; and Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006), arguing against the democratic legitimacy of democratic institutions.

298. *See infra* note 304 and accompanying text (noting the role and interplay of norms).

299. 69 Louis Henkin, *International Human Rights and Rights in the United States*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 51–53 (Theodor Meron ed., 1985).

treaties,<sup>300</sup> and when it does ratify a treaty, it reserves either specific constitutional provisions<sup>301</sup> or the Constitution as a whole.<sup>302</sup>

In the case law of the Supreme Court, international human rights instruments are, at best, mentioned in passing. Since the United States became a party to the ICCPR in 1992, the Supreme Court has referred to the Covenant (which it deems non-self-executing) in only five cases.<sup>303</sup> In these few instances, international provisions are not cited as controlling norms, but rather as mere persuasive support for the Court's interpretation of domestic norms.<sup>304</sup> Such sparse reference hardly suggests a "creeping trend" toward incorporation of human rights treaties.<sup>305</sup> Although much ado is made about allegedly improper reliance on foreign and international law,<sup>306</sup> even the Justices who refer to foreign and international law use it only to cast an additional "empirical light on the consequences of different solutions to a common legal problem"<sup>307</sup> and do not suggest deciding a case based on international rather than constitutional norms.<sup>308</sup> It even appears to be irrelevant whether

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300. *E.g.*, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 44 [hereinafter CRC]; CEDAW, *supra* note 112; ICESCR, *supra* note 65. On the CEDAW, see Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263 (2003) (arguing that the United States will benefit geopolitically from ratification).

301. 138 CONG. REC. S4781-01, at S4783 (daily ed. April 2, 1992) (ratifying the ICCPR and reserving the First, Fifth, Eighth, and Fourteenth Amendments as already prohibiting cruel, inhuman, and degrading treatment).

302. Sweeping reservations of constitutional provisions were made by the United States when ratifying the CERD and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113. The reservations and declarations are available at U.N. TREATY COLLECTION, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last visited Sept. 26, 2010) (follow each respective Convention's hyperlink, and then click "United States").

303. *Medellin v. Texas*, 552 U.S. 491, 522 n.12 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 n.66 (2006); *Roper v. Simmons* 543 U.S. 551, 567 (2005); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 734 (2003); *United States v. Balsys*, 524 U.S. 666, 695 n.16 (1997). A similarly cursory search of the database for published judgments of the Swiss Federal Supreme Court for the same period of time reveals 42 references to the ICCPR, 565 to the ECHR, and 10 to the (non-self-executing) ICESCR. SWISS FEDERAL COURT, <http://www.bger.ch> (last visited September 26, 2010). Only a fraction of judgments are published. Please note, however, that the Federal Court has no discretionary jurisdiction and therefore, a much larger caseload than the U.S. Supreme Court.

304. Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 654 (2007).

305. As suggested by Waters, *supra* note 304, *passim*.

306. *Roper*, 543 U.S. at 622-28 (Scalia, J., dissenting). For criticism of "so-called 'human rights norms,'" see Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119, 1121 (1996) (arguing for a textual approach to rights-based analysis).

307. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

308. *Roper*, 543 U.S. at 578 (citing international norms as non-controlling but "respected and significant confirmation" for its own conclusions, and stressing that

international norms are binding on the United States or not, despite the “inspirational” use of international law.<sup>309</sup>

The clear distinction between the protection of the constitutional sphere and international instruments is reflected in a distinct terminology.<sup>310</sup> Civil rights and liberties are the (exclusive) domain of the domestic courts; human rights, on the other hand, are used in the context of international instruments, and are discussed predominantly from a policy perspective<sup>311</sup> and with a view to their application and protection in other jurisdictions.<sup>312</sup> This does not necessarily imply hostility to international law in general,<sup>313</sup> but, at least in the context of protecting fundamental rights and freedoms, international human rights treaties play a less than marginal role. Consequently, the controversies in the United States focus on the alleged legislative actions of judges and lack the international dimension that is perceived as a threat to popular sovereignty in the Swiss context.

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such reference did not lessen “their fidelity to the Constitution” or their “pride in its origins”).

309. *Id.* at 567. The international norms on the death penalty that the majority adduced in *Roper* were, due to reservations or non-ratifications, not binding on the United States. *Cf.* *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988) (citing to ICCPR); *Burger v. Kemp*, 486 U.S. 776, 823 n.5 (1986) (Powell, J., dissenting) (referring to the ICCPR in much the same way as in *Roper*, although the United States had not yet ratified it). This lack of distinguishing binding international norms from other international or foreign provisions is even more evident in the wholesale condemnation of “foreign and international law.” *Cf.* Nicolas Q. Rosenkranz, *An American Amendment*, 32 HARV. J. L. & PUB. POL’Y 475, 479 (2009) (overlooking notion that respect for international law, at least in the case of ratified treaties, is not a mere whim of activist judges, but the fulfillment of an obligation of the United States towards the other parties to an international agreement).

310. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 309 (2002).

311. *Id.* at 304–06.

312. As evidenced by the annual Country Reports on Human Rights Practices assembled by the State Department. *See* U.S. DEP’T OF STATE, HUMAN RIGHTS REPORTS (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/index.htm>. In the same vein, the State Department’s reports on the U.S. human rights record only address that record with regard to furthering human rights in other countries. U.S. DEP’T OF STATE, SUPPORTING HUMAN RIGHTS AND DEMOCRACY: THE U.S. RECORD 2006, at ii–iv (2007), <http://www.state.gov/documents/organization/80699.pdf>.

313. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 48 (2004); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1106 (1990). The extreme view that all international law is nothing but “policy and politics” for the United States, *e.g.*, Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1761, 1842 (2009), would presuppose an independence from, and irrelevance of, the outside world that does not, and probably never has, corresponded to reality.

### B. A Government of Men, and Not of Laws?

*Attitudes do change. And the political process, not you not the members of the Ninth Circuit, and not even . . . the Justices of the United States Supreme Court are here to reflect the attitudes of the American people. That's what they have ballot booths for, your Honour.*

— Charles J. Cooper, Counsel for Intervenor  
Defendants in *Perry v. Schwarzenegger*<sup>314</sup>

*Those who say, "The voice of the people is the voice of God," are not to be listened to, for the unruliness of the mob is always close to madness.*

— Alcuin of York to Charlemagne<sup>315</sup>

In Switzerland, international norms play a much more important and controlling role in the adjudication of rights claims.<sup>316</sup> As a consequence, they also figure more prominently in discussions over popular sovereignty and majority decisions on the one hand and the rule of law and protection of fundamental rights on the other. The Swiss Constitution provides a far less stable and constant framework for the protection of fundamental rights than its U.S. counterpart. As pointed out above, the threshold for constitutional amendments is much lower in Switzerland, and constitutional amendments are initiated either by representatives or by voters and parties<sup>317</sup> (or, in Madison's terminology, factions<sup>318</sup>). Substantive limits are only imposed by (laxly construed) peremptory norms of international law, and competence to invalidate initiatives lies exclusively with Parliament—courts do not have any say.<sup>319</sup>

This quasi-judicial role of Parliament is not undisputed; the adoption of the 1999 Constitution was preceded by an extended discussion over judicial review. To not endanger the adoption of the new constitution, it was decided to first submit a mere "updated" constitution to voters, and then to piecemeal introduce additional provisions *inter alia* on the federal judiciary and direct-democratic rights.<sup>320</sup> Thus, the introduction of two important judicial reforms

314. Transcript of Record, *supra* note 276, at 71.

315. "*Nec audiendi qui solent dicere: 'Vox populi, vox Dei,' cum tumultuositas vulgi semper insaniae proxima sit.*" *Epistolae Karolini Aevi*, in 2 *MONUMENTA GERMANIAE HISTORICA, EPISTOLAE IV*, at 199 (Ernst Dümmler ed., Berlin, Editio Societas Aperiendis Fontibus 1895). The English translation is taken from STEPHEN ALLOTT, *ALCUIN OF YORK* 86 (1974).

316. See *supra* note 303 and accompanying text.

317. See *supra* notes 31, 193.

318. See *supra* notes 33, 278, 279.

319. See *supra* Part II.

320. The 1999 Constitution had always been "marketed" as an update or *mise à jour* of its 1874 predecessor, rather than a novel instrument. BV Apr. 18, 1999, SR 101, arts. 8, 27, 38. An earlier and more ambitious attempt to adopt a new constitution had foundered; the 1999 revision, therefore, postponed the more contentious issues (such as the reform of the federal judiciary, the formula for inter-cantonal financial distribution,

was postponed—the judicial review of federal acts<sup>321</sup> and a limited role for the Federal Supreme Court in assessing the validity of ballot initiatives.<sup>322</sup> Eventually, both changes were abandoned.<sup>323</sup> Similarly, both the State and National Assembly dismissed suggestions to increase the threshold for ballot initiatives.<sup>324</sup>

The suggested reforms of ballot initiatives and the introduction of judicial reforms failed because they were perceived as a serious restriction of popular sovereignty.<sup>325</sup> The constitutional system, and the distribution of power between the different branches of government, places an elevated importance on the will of the people.<sup>326</sup> Ideally, the will of the people should not be restrained in any manner—the Federal Supreme Court drew much ire in 2003 when it ruled that voters on the communal and cantonal level have to make decisions on naturalization applications in conformity with the constitutional bill of rights.<sup>327</sup> As a consequence, communal votes on such applications are now subject to judicial review.<sup>328</sup> The decision was harshly criticized, even by moderates, who argued that the Court unduly tilted the balance between democracy and the rule of law in

and the reform direct-democratic instruments). Even so, the new constitution was rejected in ten cantons. ANDREAS KLEY, *Geschichtliche Einleitung*, in THE SWISS FEDERAL CONSTITUTION ¶¶ 32–37, at 3 (Bernhard Ehrenzeller et al. eds., 2d ed. 2008).

321. The 1996 Draft Constitution provided for the gradual introduction of judicial review limited to federal acts. BBL I 362, 505 (1997).

322. According to the 1996 draft, the Federal Assembly would have retained primary responsibility for assessing ballot initiatives. If in doubt over an initiative's validity, the Assembly could have referred the matter to the Federal Supreme Court. *Id.* at 483.

323. *Parlamentarische Initiative (Kommission 96.091 SR), Beseitigung von Mängeln der Volksrechte*, BBL 4803 (2001); *Bundesbeschluss über die Änderung der Volksrechte*, BBL 6485 (2002).

324. AB III 1021–28 (1999); AB IV 609–10 (1999).

325. Links to the protocols of the pertinent parliamentary debates stretching over two years are available at *Geschäft des Bundesrates*, DIE BUNDESVERSAMMLUNG—DAS SCHWEIZER PARLAMENT, [http://www.parlament.ch/D/Suche/seiten/geschaefte.aspx?gesch\\_id=19960091](http://www.parlament.ch/D/Suche/seiten/geschaefte.aspx?gesch_id=19960091) (last visited Sept. 26, 2010).

326. *See, e.g.*, FRITZ FLEINER, SCHWEIZERISCHE UND DEUTSCHE STAATSAUFFASSUNG 5 (1929) (“In Switzerland, the home of Rousseau, popular sovereignty is rooted in the view permeating all levels of society that the people are the ultimate source of public authority.”).

327. BGer July 9, 2003, 129 BGE I 217; BGer July 9, 2003, 129 BGE I 232. Obtaining Swiss citizenship through naturalization is preceded by, and contingent on, the residential municipality awarding municipal citizenship. Except for larger cities, applications for municipal citizenship are submitted to a vote of the town meeting. While this grass-root democracy can be seen as the epitome of republican participation (the community itself decides on membership in the *res publica*), it also offers ample opportunity for discrimination. Applicants from some countries were regularly rejected, and the Federal Supreme Court ruled that decisions of the sovereign are subject to substantiated reasoning as well as the prohibition of arbitrariness. BGer July 9, 2003, 129 BGE I 232.

328. BGer July 9, 2003, 129 BGE I 217, 220.

favor of the latter.<sup>329</sup> Within months, the People's Party launched a federal initiative to rule out judicial review of naturalization decisions.<sup>330</sup>

The dogma of popular infallibility has been particularly prominent in the aftermath of the minaret vote. Constitutional and international lawyers may have expressed concern over a lack of respect for the bill of rights or the potential violation of international obligations, but the political forces that pushed for the ban immediately started denouncing any criticism of the result as undemocratic: when members of the government tried to assuage concerns of other countries over the vote, they were labeled dictators and suspected of aligning with foreigners rather than Swiss voters. Opponents of the ban were even called upon to emigrate and join the advocates of international law abroad in their suppression of the people.<sup>331</sup> If the ban violated international law—*tant pis*, or perhaps even the better for it—such a clash would provide an opportunity to roll back the long-criticized encroachment of international law on the legislative monopoly of the people.<sup>332</sup> Indeed, it was even argued that the restriction imposed on ballot initiatives by peremptory norms of international law should be disposed of; because human rights were not endangered in Switzerland, such a limitation was uncalled for and unnecessarily restricted popular democratic rights.<sup>333</sup>

The erstwhile opponents of a ban, chastised by their unexpected defeat at the polls, have not raised any objection to this construction of unfettered popular dominance. The political parties that were defeated at the ballot box did not question the wisdom of the *vox populi* or insist on the principles that had informed their previous opposition to the ban. Instead, they deferred by admitting that the lack of Muslim integration was a justified concern of voters and needed to be addressed, and they then hastened to address it.<sup>334</sup> The reaction to the vote seemed to imply that the people can do no wrong, and the echo of the concept of *sovereign* immunity is no

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329. For a summary of reactions, see Ulrich Zimmerli, *Die vom Volk erlassene Verfassung gilt auch für den Souverän*, NZZ, July 25, 2003, at 15.

330. Bekanntmachungen der Departemente und der Ämter, BBL 2425 (2005). The initiative was rejected in 2008 by 63.8 percent of voters. Bundesratsbeschluss über das Ergebnis der Volksabstimmung, BBL 6161 (2008).

331. Markus Häfliger, *Nach den Muslimen die Europäer*, NZZ, Dec. 6, 2009, at 11.

332. Interpellation (09.4278), Yves Nidegger, Schweizerischen Volkspartei [SVP], Internationales Recht raubt die Handlungssouveränität der Schweiz (Dec. 11, 2009), available at [http://www.parlament.ch/D/Suche/Seiten/geschaefte.aspx?gesch\\_id=20094278](http://www.parlament.ch/D/Suche/Seiten/geschaefte.aspx?gesch_id=20094278).

333. The Swiss People's Party is considering a ballot initiative to that end. *Ideen für Initiativen nach Minarettverbot*, NZZ, Dec. 14, 2009, at 7.

334. See *Aktivismus, Warnungen und Taktik*, NZZ, Dec. 2, 2009, at 11.

coincidence.<sup>335</sup> Under this concept of sovereign immunity, the voters correspond to the Schmittian sovereign: they are the unfettered and ultimate decision maker, which cannot be restricted or overruled.<sup>336</sup> Voters cannot be restrained by rules that they themselves could not overthrow at will, and they certainly cannot and must not be slapped on the wrist by international institutions.

Few other countries would subscribe to such an extensive view of popular sovereignty, and even in Switzerland, this view is at best an ideal—or at worst a caricature—of popular participation. The people might be called to the ballot boxes every three months, yet they can vote on only a fraction of the questions faced by the commonwealth. The laws are drafted by Parliament, and adjudicated not by a people's court, but by the judiciary. Still, the semi-fictional narrative of unrestrained popular sovereignty is highly alluring and continues to shape the political discourse. The supporters of the ban have not been perturbed by international criticism; instead, they seem to thrive on it. Yet, hostility to international law and organizations can only be systematically and gainfully exploited if it is a preexistent and fairly widespread sentiment. I argue here that hostility to international law is inherent in the narrative of a self-sufficient, autarkic, non-elitist, egalitarian society, which forms the basis of the myth system of modern Switzerland.

### C. *A Band of Brothers True . . . : The Swiss Myth System*

*Lasst uns den Eid des neuen Bundes schwören. / Wir wollen sein ein einzig Volk von Brüdern, / In keiner Not uns trennen und Gefahr. / Wir wollen frei sein wie die Väter waren, / Eher den Tod, als in der Knechtschaft leben.*

— Friedrich von Schiller, *Wilhelm Tell*, act II, scene 2<sup>337</sup>

An explanation for the peculiar Swiss attitude toward international law must be sought at the intersection of the myths and facts of Switzerland's tradition, its history, and its political and legal order. On the factual level, Swiss reservations against strong political or judicial institutions reflect the historic absence of one centralized, authoritarian power in the lands that became today's

335. Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*238 ("Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong.")

336. Cf. CARL SCHMITT, POLITISCHE THEOLOGIE 10 (1922) (arguing that the sovereign operates outside the rule of law).

337. FRIEDRICH SCHILLER, WILHELM TELL act 1, sc. 2, at 72, in FRIEDRICH SCHILLER, WILLIAM HERBERT CARRUTH, SCHILLER'S WILHELM TELL (1898). ["Swear we the oath of our confederacy! / A band of brothers true we swear to be, / Never to part in danger or in death! / We swear we will be free as were our sires, / And sooner die than live in slavery!"]. FRIEDRICH SCHILLER, THE DRAMATIC WORKS: WILHELM TELL 360 (Samuel Taylor Coleridge et al. trans., 1917) [hereinafter SCHILLER, DRAMATIC WORKS].

Switzerland. The Alemannic areas south of the Rhine disengaged from the Holy Roman Empire in the high and late Middle Ages and developed their own legal traditions and institutions.<sup>338</sup> Still, the modern Swiss state was not erected on the basis of a unitary entity with a long and shared history. Its predecessor, the medieval Confederacy (*Eidgenossenschaft*), was an association of highly diverse and sometimes divided polities.<sup>339</sup> Prior to the French invasion of 1798, most cantons were oligarchies that were ruled by aristocrats, guilds, or prominent families.<sup>340</sup> Large parts of modern Switzerland were bailiwicks under the rule of one or several of the pre-1798 cantons; the inhabitants of these dominions were unfree subjects.<sup>341</sup>

After the turmoil of the Napoleonic wars, the process of unification and nationalization was initiated not by the members of the old Confederacy, but by outside powers.<sup>342</sup> Russia, in particular, exerted a heavy influence by opposing the reestablishment of the defunct Confederacy.<sup>343</sup> The Congress of Vienna determined the very existence of the New Confederacy, as well as its territorial extent and political structure.<sup>344</sup> The following three decades saw constant friction between progressive republican and conservative forces, and tensions were accompanied and exacerbated by confessional conflicts between Protestant and Catholic cantons that resulted in the

338. This independence was mirrored in the refusal to adopt the institutional reforms initiated by Maximilian I in the late fifteenth century, particularly the jurisdiction of the Imperial Chamber Court (*Reichskammergericht*). ULRICH IM HOF, *MYTHOS SCHWEIZ 1291–1991*, at 56–58 (1991); RENÉ PAHUD DE MORTANGES, *SCHWEIZERISCHE RECHTSGESCHICHTE* 141–42 (2007); cf. JOHANNES CONRADUS KREIDENMANN, *KURTZER TRACTATUS VON DES TEUTSCHEN ADELS SONDERLICH DER FREYEN REICHS-RITTERSCHAFT IN SCHWABEN* 147 (1646).

339. The Old Confederacy (as opposed to the post-1803 Confederacy) eventually comprised thirteen cantons or statelets, which tried to maintain a tenuous balance between metropolitan and rural cantons. 1 ULRICH IM HOF & BEATRIX MESMER, *GESCHICHTE DER SCHWEIZ, UND DER SCHWEIZER* 309 (1982). After the Reformation, armed conflicts between Protestant and Catholic cantons erupted in 1531, 1656, and 1712. 2 ULRICH IM HOF & BEATRIX MESMER, *GESCHICHTE DER SCHWEIZ, UND DER SCHWEIZER* 69–83, 127 (1983).

340. 2 IM HOF & MESMER, *supra* note 339, at 38–40, 116–22; ROGER SABLONIER, *GRÜNDUNGSZEIT OHNE EIDGENOSSEN* 42, 103–04 (2008).

341. Ulrich Im Hof, *Ancien Régime*, in 2 *HANDBUCH DER SCHWEIZER GESCHICHTE* 750–59 (Hanno Helbling ed., 2d ed. 1980); see also André Holenstein, *Politische Partizipation und Repräsentation von Untertanen in der alten Eidgenossenschaft*, in *LANDSCHAFTEN UND LANDSTÄNDE IN OBERSCHWABEN* 233 (Peter Blickle ed., 2000).

342. After an invasion by French troops in 1798, the Old Confederacy was dissolved and replaced by a centralistic republic. Mediated by Napoleon Bonaparte, a federalist structure was reintroduced in 1803, with the former bailiwicks elevated to cantons with equal status. *Id.* After the French withdrawal in 1813, some of the old cantons hoped to reestablish the defunct Old Confederacy and its bailiwick system. 2 IMHOF & MESMER, *supra* note 339, at 172, 244–47.

343. KLEY, *supra* note 320, ¶¶ 5–6.

344. *Déclaration des Puissances sur les Affaires de la Confédération Helvétique*, Mar. 20, 1815, 64 C.T.S. 5.



secession of the latter from the Confederacy and a brief civil war in 1847.<sup>345</sup>

The federal state established in 1848 was, therefore, not the culmination of a century-old tradition of direct-democratic government originating in the valleys of Central Switzerland, where the freedom-loving peasants of Friedrich Schiller's *Wilhelm Tell* take an oath to be a band of brothers true and to sooner die than live in slavery.<sup>346</sup> Instead, the new entity lacked a unifying language, denomination, history, or political tradition; the new Switzerland was an "artificial construct" and the "multicultural antithesis to the national unification process of neighbor countries such as Germany or Italy, which were based primarily on the cultural, linguistic, or even ethnic homogeneity of a people."<sup>347</sup> In 1848, Switzerland was a "State in search of nation."<sup>348</sup>

When a national Swiss identity was successfully shaped over the following decades, the political institutions (which were largely based on the American model) played an important role.<sup>349</sup> Yet, contrary to the constitutional patriotism in today's Germany,<sup>350</sup> Swiss identity does not solely rely on institutions and shared values. The process of political consolidation was accompanied by the construction of a common past, which was both fateful and purposeful.<sup>351</sup> As in the United States, Swiss values and institutions are embedded in a national and heroic narrative that explains how liberty was fought for and won.<sup>352</sup>

American national lore focuses on the American Revolution and the Founders and Framers. However, because of the somewhat inglorious circumstances in which the Federation of 1848 was born,

345. For a historical overview, see 2 IM HOF & MESMER, *supra* note 339, at 158–83.

346. SCHILLER, *DRAMATIC WORKS*, *supra* note 337. The first surviving evidence of the Tell legend in a Swiss context (earlier equivalents are known particularly in Scandinavia) is provided by a 1472 chronicle. 1 IM HOF & MESMER, *supra* note 339, at 171. Schiller's piece was not intended as an accurate account of the Swiss past; rather, he addressed vigilante justice, and commented upon contemporary events and the French Revolution. MICHAEL HOFMANN, *SCHILLER: EPOCHE, WERK, WIRKUNG* 170–77 (2003).

347. Wolf Linder & Isabelle Steffen, *Political Culture*, in *HANDBOOK OF SWISS POLITICS* 15, 16 (Ulrich Klöti et al. eds., 2d ed. 2007).

348. *DIE ERFINDUNG DER SCHWEIZ 1848–1998: BILDENTWÜRFE EINER NATION* 170 (Schweizerisches Landesmuseum ed., 1998).

349. KARL WOLFGANG DEUTSCH, *DIE SCHWEIZ ALS EIN PARADIGMATISCHER FALL POLITISCHER INTEGRATION* 14–16 (1976).

350. DOLF STERNBERGER, *VERFASSUNGSPATRIOTISMUS* 13–16 (1979).

351. This dual approach is particularly pronounced in JOHANN CASPAR BLUNTSCHLI, *GESCHICHTE DES SCHWEIZERISCHEN BUNDESRECHTES* (1849).

352. Perhaps the shared conviction that a commonwealth's liberty was a purely autochthon achievement and that freedom has been wrested from an oppressor, might explain why, in spite of the stark discrepancy in power and influence, Swiss and American attitudes to international law are similarly skeptical.

the threads of the Swiss national fabric are spun further back to a misty past and to the independent communities of farmers in Central Switzerland, who in 1291 concluded a pact of mutual assistance to expel their foreign aristocratic oppressors, thus establishing the first Confederacy. Swiss national identity is still strongly shaped by its self-perception as the world's oldest democracy—a seed planted by freedom-loving farmers shaking off the yoke of Habsburg domination and establishing a community that grew into a modern Swiss state. According to the narrative, this state mirrors the ideals of its founders: it is a self-governing and egalitarian Alpine commonwealth that is neutral and peaceful, yet, adamant in defending its values and borders. This is the oft-invoked “exception Switzerland” (*Sonderfall Schweiz*), a pocket of freedom and equality in a Europe dominated first by kings and noblemen, later by totalitarian regimes, and today by a supranational behemoth.

The tangible evidence for this narrative is the Federal Charter—the *foedus pactum* of 1291 concluded between the valleys of Uri, Schwyz, and Unterwalden to ensure general peace and mutual assistance.<sup>353</sup> During the Middle Ages, however, this document was largely unknown and inconsequential.<sup>354</sup> Additionally, the Federal Charter was not an unequivocal declaration of independence or freedom; the agreement explicitly reserved and confirmed existing relationships of servitude.<sup>355</sup> The Charter was elevated to foundational and “national” importance only in the nineteenth century, when it was transformed *ex post* into the starting point of a continuous direct-democratic tradition and a manifesto against foreign dominance and influence.<sup>356</sup>

The culmination of this “discovery” of a shared past took place in 1891, when the 600-year anniversary of the now paramount 1291 pact provided a coda to the process of nationalization and saw the completion of the historiographic<sup>357</sup> and cultural<sup>358</sup> edifice of the Swiss state and nation. The Alpine mountains, passes, and valleys

353. The 1291 Charter is reprinted in HANS NABHOLZ & PAUL KLÄUI, *QUELLENBUCH ZUR VERFASSUNGSGESCHICHTE DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT UND DER KANTONE VON DEN ANFÄNGEN BIS ZUR GEGENWART* 1–3 (1940). For an English translation of the 1291 Charter, see 1 *THE ORIGIN OF THE SWISS CONFEDERATION* § 1 (1933), available at <http://www.admin.ch/org/polit/00056/index.html?lang=en>.

354. Bernhard Stettler, *Bundesbriefe*, in 3 *HISTORISCHES LEXIKON DER SCHWEIZ* 4, 6 (Marco Jorio et al. eds., 2002).

355. NABHOLZ & KLÄUI, *supra* note 353, at 2.

356. GEORG KREIS, *DER MYTHOS VON 1291*, at 34–73 (1991).

357. See WILHELM OECHSLI, *DIE ANFÄNGE DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT* 1–26 (1891) (discussing the origins of the Swiss state).

358. The construction of a Swiss National Museum was approved by the Federal Assembly in 1891. HANSPETER DRAEYER, *Die 'besten Schädel arischer Rasse' als Katalysator für die Gründung des Schweizerischen Landesmuseums*, in *DIE ERFINDUNG DER SCHWEIZ 1848–1998: BILDENTWÜRFE EINER NATION*, *supra* note 348, at 158–69.

served as the geographic foundations of this edifice (even if historically, cities such as Zurich, Berne, and Lucerne played a more prominent role).<sup>359</sup> The farmers of these valleys formed an autonomous community, in the sense proper of auto-nomia: they adopted their own laws democratically and settled their disputes internally and without recourse to outside authorities. The rejection of “foreign judges” is a central tenet of the Swiss myth system.<sup>360</sup> The Federal Charter of 1291 states that the people of Uri, Schwyz, and Unterwalden would “accept or receive no judge . . . who was not a native or a resident with [them].”<sup>361</sup>

Although its members continued to pursue divergent interests, the Confederacy became a distinguishable entity in the fourteenth century.<sup>362</sup> The Confederacy seceded de facto from the Holy Roman Empire in 1499, and the 1648 Treaty of Westphalia confirmed the separation.<sup>363</sup> Therefore, Swiss mythology is not detached from historical events or void of a factual basis. Proto-democratic institutions existed in several cantons.<sup>364</sup> The narrative of freedom-loving peasants was popular prior to 1848, as illustrated by Schiller’s *Tell*, but when appropriated for a national cause, the narrative was greatly embellished and causally connected to the newly established Federation.<sup>365</sup> The national myth of Switzerland as the cradle of popular democracy, however, is false: it took a French invasion to introduce modern notions of liberty and equality.<sup>366</sup> Nor is the picture of seclusion very accurate; politically, culturally, and especially militarily, the Old Confederacy was very much a part of European history.<sup>367</sup>

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359. SABLONIER, *supra* note 340, at 130–33.

360. See, e.g., OECHSLI, *supra* note 357, at 305 (discussing nativism in the Swiss myth system).

361. “Communi etiam consilio et favore unanimi promissimus, statuimus ac ordinavimus, ut in vallibus prenotatis nullum iudicem, qui . . . noster incola vel conprovincialis non fuerit, aliquatenus accipiamus vel acceptamus.” NABHOLZ & KLÄUI, *supra* note 353, at 2.

362. See 1 IM HOF & MESMER, *supra* note 339.

363. Treaty of Peace Between the Holy Roman Empire and France, art. 63, Oct. 24, 1648, 1 C.T.S. 271.

364. 1 IM HOF & MESMER, *supra* note 339, at 153–59.

365. DRAEYER, *supra*, note 358; OECHSLI, *supra* note 357.

366. See *supra* note 342 and accompanying text (noting the role of outside powers on Swiss reunification); see also NABHOLZ & KLÄUI, *supra* note 355 (codifying modernity in the Charter).

367. During the fourteenth and fifteenth centuries, some of the cantons pursued an aggressive policy of expansion, bringing down the kingdom of Burgundy, and at one point controlling Lombardy (the phenomenal efficacy and success of the Confederates was at least, in part, based on their ignoring the chivalric rules of combat, e.g., they usually gave no quarter). 1 IM HOF & MESMER, *supra* note 339, at 291–50. Subsequently, Swiss mercenaries were sought after all over Europe. 2 IM HOF & MESMER, *supra* note 339, at 30. The Papal Guard is the last remnant of this century-old tradition.

Yet the founding myths of seclusion and independence are very much alive in public discourse, and they help to explain negative attitudes toward international law and supranational institutions. In his 2007 speech on National Day, the then-minister of justice explicitly likened international law to the Habsburg governors of yore and suggested that such law takes away the liberty of the people and replaces popular sovereignty with undemocratic rules, euphemistically and misleadingly called the “law of the peoples.”<sup>368</sup> As the instrument of an elitist and unelected transnational camarilla, international law is cast as the opposite of time-honored Swiss tradition.<sup>369</sup> Anti-elitism is an important part of the myth system, particularly with regard to the legal system and its guardians, judges, and legal scholars.<sup>370</sup> In Switzerland, neither courts nor civil servants are supposed to have the final say; the last word is always reserved for “the people.”<sup>371</sup>

Any reassessment of this myth is strongly resented and resisted, particularly if forced upon the community by outside pressure. Over the past years, both the historical self-perception and its translation into economic and business policies have come under sustained attack by other countries and international organizations.<sup>372</sup> It has, therefore, become more difficult to maintain the notion of an

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368. Christoph Blocher, Justizminister, Eidgenössisches Justiz- und Polizeidepartement, 1. August-Rede 2007 (Aug. 1, 2007). On August 1 (the national holiday), the conclusion of the 1291 pact is remembered, but the expulsion of the Habsburg Governors in 1291 and the razing of their castles, so vividly described in Schiller's *Tell*, is as legendary as that play's hero. 1 IM HOF & MESMER, *supra* note 339, at 171–73.

369. See, e.g., Press Release, Schweizerische Volkspartei [SVP], Landesrecht stärken zur Wiederherstellung der Souveränität (Feb. 10, 2009), available at [http://www.svp.ch/g3.cms/s\\_page/78200/s\\_name/pressekonferenzdetail/newsContractor\\_id/33/newsID/115/newsContractor\\_year/2009](http://www.svp.ch/g3.cms/s_page/78200/s_name/pressekonferenzdetail/newsContractor_id/33/newsID/115/newsContractor_year/2009) (criticizing “excessive international law” established by “international experts, top-flight jurists, respected professors, congresses, international fora, international organizations, intergovernmental conferences, and others”).

370. For an early example of the dismissive attitude towards “learned” law and lawyers, see KREIDENMANN, *supra* note 338.

371. AB I 293 (2009); see also FRITZ FLEINER, BEAMTENSTAAT UND VOLKSSTAAT 40–51 (1916) (contrasting the Swiss *Volksstaat* (popular State) with other European states where decisions are taken by a separate civil servant caste).

372. In the 1990s, international pressure eventually prompted a reassessment of Switzerland's policies and economic relations with the Axis powers during the Second World War. For a balanced overview, see JEAN-FRANÇOIS BERGIER et al., DIE SCHWEIZ, DER NATIONALSOZIALISMUS UND DER ZWEITE WELTKRIEG: SCHLUSSBERICHT (2d ed. 2002). More recently, the Swiss off-shore banking model, which has to some extent become part of the Swiss myth system, has come under scrutiny. The United States and Germany in particular, but also the Group of Twenty Finance Ministers and Central Bank Governors (G-20) and the Organisation for Economic Co-operation and Development (OECD) have criticized the distinction between tax evasion and tax fraud (judicial assistance is granted only for the latter). Swiss-banking secrecy has been severely dented and breached on occasion.

autonomous and independent community, and autonomy has acquired an even higher status in times when internationalization increasingly restricts the leeway of the national law-giver, be it the Parliament or the people.<sup>373</sup> Therefore, the insistence on popular sovereignty also covers up an increasing discrepancy between the “operational code” of lawmaking and the myth system of decision making in an autarkic community.<sup>374</sup>

Thus, the founding myth explains why the international legal system is perceived as a dangerous intrusion of the outside world, and why in the face of international law, some Swiss are gripped by an existential *angst*. But this myth and its frequent invocation are significant in another respect. The fight against the house of Habsburg provides a blueprint not only for stemming foreign influence or foreign rules and their application, it also defines the community that is established in the wake of the imagined revolution in terms of exclusion rather than inclusion. The expulsion of the foreign becomes the founding moment of the everlasting *foedus*.

These images matter because the Swiss lack a more tangible shared tradition. The national narrative is not mere folklore, but rather (at least on the conceptual level) a condition for the existence and the survival of the nation. The mythology set out above necessitates a clear distinction between Switzerland and the outside world. Skepticism towards the “other” is an integral part of the system.

When interviewed after the minaret vote, the President of the Federation was asked whether multiculturalism might have been pushed too far in Switzerland. He agreed that the “swallowing capacity” and the “absorbency” of the people might indeed have reached its limit, and he subsequently outlined two potential solutions: either Swiss voters would be able to “cross certain limits” and agree, in the mold of the United States or Australia, to the creation of a new “cultural amalgam” of Swiss and foreign tradition, or immigrants “would simply have to assimilate—a process regrettably resisted by some foreigners.”<sup>375</sup>

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373. For discussion of the internationalization of the legal order in a Swiss context, see generally OLIVER DIGGELMANN, *DER LIBERALE VERFASSUNGSSTAAT UND DIE INTERNATIONALSISIERUNG DER POLITIK* (2005).

374. The terminology is adopted from W. MICHAEL REISMAN, *On the Causes of Uncertainty and Volatility in International Law*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW* 44 (Tomer Broude & Yuval Shany eds., 2008), where it is used to denote the difference between written and applied norms. Though not a member of the European Union, Switzerland, by necessity, has to ensure that its legal order remains compatible with E.U. legislation. After the voters rejected membership in the European Economic Area (EEA), the government officially adopted the self-contradictory policy of “autonomously following” E.U. legislation (*autonomer Nachvollzug*). Bundesrat, Bericht zur Aussenwirtschaftspolitik 92/1 & 2 und Botschaften zu Wirtschaftsvereinbarungen, BBL I 320, 329, 331 (1993).

375. ‘Die Schluckfähigkeit stösst an Grenzen,’ *NZZ* (Switz.), Dec. 6, 2009, at 12.

This juxtaposition with two immigration societies indicates that, unlike its American counterpart, the Swiss myth system is not geared toward the inclusion of new elements. The Swiss system requires more than subscribing to a limited number of principles while maintaining a separate mentality and identity. It demands conformity with a mythology that reaches back several centuries, and in the absence of a shared language or clear geographical boundaries, ensures the persistence of the imagined community. Multiculturalism is not an option; there is no place for minarets in the valleys where the farmer dwells.

#### V. WHERE TO FROM HERE FOR SWITZERLAND?

*All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.*

— Thomas Jefferson, *First Inaugural Address, 1801*<sup>376</sup>

Myths and their use are by no means a priori reprehensible. Greek mythology offers metaphors for the most fundamental passions and conflicts inherent in human nature. Myths may also provide a sense of coherence and common purpose to larger communities. The Swiss myth system established in the nineteenth century served an important purpose, offering a shared narrative for the newly established Confederation. The myth system facilitated the introduction of a political system that has proven highly stable and immune to totalitarian temptations.

But if myths aim to continuously provide meaning for a society and its institutions, changing circumstances may sometimes necessitate adapting or even replacing the traditional tales that have thus far supplied significance and legitimacy.<sup>377</sup> Dogmatic myths, which are overly retrospective and introspective, can become a burden and an obstacle when facing current challenges. Today, boundaries have become osmotic to ideas, information, goods, and people. The Swiss myth system has a strong exclusionary streak that can easily be exploited to haphazardly classify whole groups as undesirables. The notion of a secluded community that can simply shut out the world is reminiscent of the fallacy that toddlers fall victim to when they cover their eyes: when they do not see their surroundings, they assume that no one can see or inconvenience them. Ignoring the world at large and the inconvenient complexities

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376. Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), *reprinted in 1 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897*, at 309–10 (James D. Richardson ed., 1897).

377. FRITZ GRAF, *GREEK MYTHOLOGY* 3 (1993).

of its interactions is not a sustainable solution for Switzerland, and neither is banning whatever does not conform with traditional imagery and self-perception.

How, and by whom, might the decision to prohibit minarets be remedied? From a rule of law perspective, that task would fall to the courts. The Federal Supreme Court could, by giving precedence to international human rights norms, refuse to give effect to the prohibition in Article 72(3) BV. But, for institutional, constitutional, and political reasons, the Court is unlikely to exercise that option.<sup>378</sup> Conversely, and more democratically, the sovereign itself could reconsider and revoke its decision. Yet, given the many decades it took to remove provisions enacted after the establishment of the modern Confederation and during the *Kulturkampf*, this approach might not be available for another century.<sup>379</sup>

Therefore, the fundamental question raised by the vote on minarets remains unanswered: how can the conformity of Swiss laws with international norms be assured? The solution suggested here is based on the assumption—not shared by all Swiss—that conformity with such norms is desirable. International law in general, and human rights provisions in particular, do not have to be seen as an alien norm body forced upon the domestic legal order—particularly not in Switzerland, where all important international agreements are subject to referenda.<sup>380</sup> Nor is international law an end in itself. Rather, it has “a general function to fulfill, namely to safeguard international peace, security and justice in relations between States, and human rights as well as the rule of law domestically inside States for the benefit of human beings, who, in substance, are the ultimate addressees of international law.”<sup>381</sup> The spirit of internationally protected human rights has been approved by the popular sovereign through incorporation into a constitutional bill of rights. It is not the international legal nature of such rights that should command respect and enforcement, but their rationale and their content, whether enshrined in a nonbinding UN resolution, an international treaty, or a constitution.

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378. BV Apr. 18, 1999, SR 101, art. 145, 168(1); see *supra* text accompanying note 131.

379. See *infra* notes 469, 472 (discussing similar culturally engendered controversies). See Jörg Paul Müller & Daniel Thürer, *Toleranzartikel*, in MINARETT-INITIATIVE: VON DER PROVOKATION ZUM IRRTUM 277, 279 (Andreas Gross et al. eds., 2010) for the suggestion to replace the ban by a constitutional provision committing all denominations to mutual respect, tolerance, and the cautious use of public symbols.

380. Optional referenda on international agreements concluded for more than fifteen years were introduced through a ballot initiative in 1921. BBL I 424 (1921). The scope of referenda was extended repeatedly and now encompasses all international treaties that either contain important substantive provisions or require the adoption of federal statutes. BV Apr. 18, 1999, SR 101, art. 141(1)(d)(3); BBL 6485 (2002).

381. 281 CHRISTIAN TOMUSCHAT, INTERNATIONAL LAW: ENSURING THE SURVIVAL OF MANKIND ON THE EVE OF A NEW CENTURY 23 (1999).

Despite the siren songs that promise a return to the days when the country was allegedly self-sufficient, Switzerland will not be able to ignore the ever-expanding norm-body of international law. As a small country, Switzerland should, in fact, be in favor of mutual respect for legal obligations in international affairs. The potential fault lines between an international rule of law and near-unrestricted democratic participation have been exposed by several recent ballot initiatives.<sup>382</sup> A pending initiative on the deportation of delinquent foreigners would violate international human rights norms and also might be difficult to reconcile with peremptory non-refoulement obligations under international law.<sup>383</sup> After the minaret vote, the government and Parliament are palpably perplexed as to how to react to such a proposal.<sup>384</sup> Similarly contentious initiatives are bound to arise. In August 2010, an initiative to introduce the death penalty for sexually motivated murders was launched. Although it was soon withdrawn, the proposal immediately provoked renewed calls for substantial limitations of ballot initiatives, and for an assessment of the admissibility of an initiative prior to the collection of signatures.<sup>385</sup>

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382. Regina Kiener & Melanie Krüsi, *Bedeutungswandel des Rechtsstaates und Folgen für die (direkte) Demokratie am Beispiel völkerrechtswidriger Volksinitiativen*, 110 ZBl 237 (2009); Helen Keller et al., *Volksinitiativen und Völkerrecht*, 109 ZBl 121, 126–30 (2008).

383. The initiative “for the deportation of criminal foreigners” launched in 2007 demands that non-citizens who commit specific enumerated offenses be deported (regardless of their current residence status) and barred from entering Switzerland for up to fifteen years. Eidgenössische Volksinitiative “für die Ausschaffung krimineller Ausländer (Ausschaffungsinitiative)” BBL 4969 (2007). The list of relevant offenses is highly disparate, ranging from felonies (murder, robbery, or rape) to misdemeanors (drug trafficking) and even mere transgressions such as illicitly obtaining social aid, as well as offenses lacking a statutory definition such as burglaries (a combination of theft, willful damage to property, and trespassing) or “serious violent crimes.” *Id.* The initiative does not allow for consideration of individual cases, e.g., delinquents would be deported regardless of any family ties with Swiss citizens or residents. *Id.* The initiative, therefore, would violate Article 8 ECHR and Article 17 ICCPR protecting family life, as well as Article 10(2) CRC. Procedural guarantees under Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms Article 1, Nov. 22, 1984, E.T.S. 117, and under Article 13 ICCPR would be implicated, as would bilateral treaties with the European Union. However, the Federal Council maintained that the initiative could be construed so as not to infringe the *non-refoulement* requirement. *Id.* at 5101. Similar rules for criminal aliens already apply in the United States. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546; cf. Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES, July 17, 1996, at A1 (suggesting that such laws have unintended consequences).

384. In response, and as an alternative to the deportation initiative, the Federal Council had already suggested tightening immigration and residence regulations. Bundesgesetz Entwurf über die Ausländerinnen und Ausländer (AUG), BBL 5129 (2009).

385. The initiative had been cleared by the Federal Chancery and the collection of signatures was about to start. Bekanntmachungen der Departemente und der



Currently, the sole safeguard for international law and the only limit on ballot initiatives is the barrier of peremptory norms of international law.<sup>386</sup> The notion of *jus cogens* has been criticized as little more than an empty formula for easy truths—the kitsch of international law.<sup>387</sup> It is true that peremptory norms, as they stand in international law today, cover only the barest necessities of a minimum world public order.<sup>388</sup> The narrow concept of peremptory norms applied by the Federal Assembly would allow for ballot initiatives that rescind the vote for women, ban the practice of non-Christian faiths, or force women to wear burqas. *Jus cogens*, in other words, leaves fundamental values of a liberal and democratic society unprotected. Until the minaret ban, potential clashes between the international protection of these values and ballot initiatives have garnered little international attention. If “bashing” international law is increasingly perceived as politically promising and gainful, however, violations are bound to increase in frequency and intensity because proponents of this combative approach do not have to pay the resulting reputational and political costs.

It has been suggested for some time now that the construction of a *constitutional* reservation of *jus cogens* should not be restricted by the scope of its equivalent under international law.<sup>389</sup> In the context of domestic constitutional norms, a broader construction of peremptory norms might encompass regional human right standards such as the ECHR as an expression of an “*ordre public européen*.”<sup>390</sup>

Ämter, Eidgenössische Volksinitiative “Todesstrafe bei Mord mit sexuellem Missbrauch,” BBl 5471 (2010). Several political parties had already promised to invalidate the initiative in Parliament. Katharina Bracher, *Volksrechte vor ultimativem Test*, NZZ, Aug. 10, 2010, at 10. Yet a prohibition of capital punishment can hardly be considered part of international *jus cogens*, with several important states regularly imposing the death penalty. Switzerland, however, is under an international legal obligation not to reintroduce capital punishment under any circumstances as it has ratified the Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 U.N.T.S. 414; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, April 28, 1983, E.T.S. 114 (abolishing the death penalty in peacetime); and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances, May 3, 2002, E.T.S. 187.

386. BBl 7603 (2008); AB I 118–19 (2009).

387. Martti Koskeniemi, *International Law in Europe: Between Tradition and Revival*, 16 EUR. J. INT’L L. 113, 122 (2005).

388. Cf. *Report of the International Law Commission on the Work of its Fifty-Third Session*, 2 Y.B. INT’L L. COMM’N 85 (discussing the subordination of peremptory norms to primary obligations and codified law).

389. Daniel Thürer, *Verfassungsrecht und Völkerrecht*, in VERFASSUNGSRECHT DER SCHWEIZ, *supra* note 33, ¶¶ 13–15.

390. Yvo Hangartner, *Völkerrecht ist nicht a priori übergeordnet*, NZZ, Apr. 17, 2009, at 16. For an extensive construction that would include the UDHR, compare MYERS MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 274, 325–27 (1980).

The current constitutional *jus cogens* reservation also was developed through parliamentary practice before it was codified in the 1999 Constitution;<sup>391</sup> and the drafting history of the 1999 Constitution would not rule out such an approach.<sup>392</sup>

Yet, it could be argued with some justification that the popular sovereign, when adopting the 1999 Constitution—if indeed it considered the issue—understood peremptory norms to refer to the limited international scope. After all, the concept of *jus cogens* squarely belongs to the international legal tradition. A constitutional amendment, therefore, would be a more appropriate method than a mere change in practice—even if winning the popular vote on such a change would be difficult. Such an amendment could make compliance with the rights guaranteed in the ECHR a precondition for valid ballot initiatives, with the Federal Supreme Court assessing compliance. However, this approach would place responsibility on the ECtHR as well, and an increasingly expansive construction of Convention rights by the ECtHR would unduly limit the scope of democratic rights in Switzerland. A national margin of appreciation needs to be respected and perhaps even expanded.

In 2007, a parliamentary initiative was submitted to amend the constitutional requirements for valid ballot initiatives. The proposal suggested that submitted initiatives would be invalid if they violated international human right norms or procedural guarantees.<sup>393</sup> But given earlier unsuccessful attempts to reform direct-democratic instruments,<sup>394</sup> the future of the proposal remains uncertain. If Parliament adopted such a constitutional change, it would risk accusations of striking at the core of popular sovereignty.

The government is not eager to address the problem. In a report on the “relationship between international law and municipal law,” published in March 2010, the Federal Council dismissed changes to the current system<sup>395</sup> and held that current regulation of ballot

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391. Prior to the adoption of the 1999 Constitution, the *jus cogens* reservation was gradually developed by constitutional scholars and was adopted by Parliament. See Bundesrat, Botschaft über die Volksinitiativen “für eine vernünftige Asylpolitik” und “gegen die illegale Einwanderung,” BBL III 1486, 1495 (1994) (providing further references).

392. Even though the Federal Council in its draft commentary referred to norms “recognised as peremptory by the international community,” the Council also held that the scope of such norms could not be determined *in abstracto*, but would have to be determined through the practice of Federal Assembly and the Federal Supreme Court. BBL I 362, 446–47 (1997). During the parliamentary debates on the 1999 Constitution, the reservation of peremptory norms was not discussed in any detail.

393. AB I 290–94 (2009).

394. See *supra* notes 321–24 and accompanying text (discussing prior federalist and populist measures).

395. Bundesrat, Das Verhältnis von Völkerrecht und Landesrecht, BBL 2263, 2314, 2320–21, 2330–39 (2010).

initiatives offers “an optimal balance.”<sup>396</sup> It would seem that the government, after repeated failures to implement changes in the past decade,<sup>397</sup> does not want to fail again. The report exudes political caution, and the determination not to touch the taboo of popular sovereignty is palpable. It is true that “any attempt to impose further restrictions on ballot initiatives would lead to political and legal problems,”<sup>398</sup> but the same is true if ballot initiatives ignore international obligations with increasing frequency. The government argues that such conflict can be defused by withdrawing from treaties or, if necessary, by simply “accepting the consequences of violating international obligations.”<sup>399</sup> This sanguine view overlooks that some international norms represent more than an inconvenient barrier to unbridled popular sovereignty. The assumption underlying the international protection of human rights is that human beings have an inherent dignity, as well as equal and inalienable rights, and that these rights should be protected by the rule of law.<sup>400</sup> No popular majority, no matter by what margin, should be allowed to rule otherwise.

## VI. THE LARGER PICTURE: MUSLIMS IN EUROPE

*I am saying that in our culture there is no room for the muezzins, for the minarets, for the phony abstemious, for the humiliating chador, for the degrading burkah. And should that room exist, I wouldn't give it to them. Because it would be like deleting our identity, like nullifying our accomplishments. Like spitting on the freedom that we have earned, on the civilisation that we have installed, on the welfare that we have achieved. It would be like selling my country, my patria. And my country, my patria, are not for sale.*

— Oriana Fallaci, *The Rage and the Pride*<sup>401</sup>

The adoption of a minaret ban in Switzerland was facilitated by a peculiar constitutional architecture built on an exclusionary myth system. In Part 0, I have therefore suggested rebalancing an institutional setup that is skewed in favor of unrestrained popular sovereignty. Such an amendment, however, would only address the means by which the minaret ban was imposed, but not its cause. Swiss direct democracy, and its mythology, cannot account for preexisting, underlying hostility towards Muslims and Islam that allowed the campaign to succeed. These negative sentiments are by

396. *Id.* at 77.

397. BBL I 362, 505 (1997) (discussing judicial reforms); *see supra* text accompanying note 321.

398. BBL 2263 (2010).

399. *Id.*

400. UDHR, *supra* note 229, pmb., ¶¶ 1, 3.

401. ORIANA FALLACI, *THE RAGE AND THE PRIDE* 148–49 (2002).

no means exclusive to Swiss voters; it was speculated after the minaret ban that votes in other European countries were likely to lead to the same result.<sup>402</sup> Similar complaints about Muslims occur in most European countries, and two grievances are particularly common. First, many fear the specter of an unstemmed flow of immigrants coupled with high birth rates juxtaposed with the dwindling numbers of “Europeans proper.” Second, many resent the alleged persistent refusal of the newcomers to integrate with their host societies by adjusting their values and mores.

#### A. *The Power of Numbers*

The ballot pamphlet began its list of grievances with the claimed ten-fold multiplication of Muslims in Switzerland for a reason.<sup>403</sup> The number of Muslims, of course, is entirely unrelated to minarets: there were only four minarets in Switzerland prior to the vote,<sup>404</sup> and it seems unlikely that the ban will significantly affect the number of Muslims. France, with its much larger Muslim population, has fewer than ten minarets.<sup>405</sup> Yet demographic concerns were nevertheless at the heart of the campaign to ban minarets in Switzerland.

The initiators were right in pointing out that the population of Muslims in Switzerland has increased dramatically, even if there is some uncertainty over the exact growth rate,<sup>406</sup> and the demographics suggest that this development is far from leveling out. Roughly 39.2 percent of Muslims are below the age of twenty, their divorce rate has not increased over the past three decades, and Muslim women bear 2.44 children on average, as opposed to a rate of

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402. Brandt, *supra* note 11; Luc Bronner, *Pourquoi la France n'a pas de leçon à donner à la Suisse*, LE MONDE, Dec. 12, 2009, at 2; *Islam and Switzerland: The Return of the Nativists*, ECONOMIST, Dec. 5, 2009, at 70–71; *Österreichs Rechte efreut*, NZZ, Dec. 1, 2009, at 10.

403. See *supra* note 92 and accompanying text.

404. See *supra* note 25 and accompanying text (noting the dearth of minarets in Switzerland).

405. Cécilia Gabizon, *Un débat qui pourrait concerner la France*, LE FIGARO (Fr.), Nov. 30, 2009, at 7.

406. There are no up-to-date census data on religion. According to the 2000 census, 310,807 Muslims resided in Switzerland (4.26 percent of all residents)—compared to 152,217 in 1990 (2.21 percent). CLAUDE BOVAY, EIDGENÖSSISCHE VOLKSZÄHLUNG 2000: RELIGIONSLANDSCHAFT IN DER SCHWEIZ 11, 110 (2004). Part of the large increase in the 1990s was due to the conflicts in former Yugoslavia. *Cf. id.* at 48. Current estimates usually put the number at 350,000 to 450,000 rather than the 500,000 suggested by the supporters of the ban. SCHWEIZERISCHE EIDGENOSSENSCHAFT, *supra* note 92, at 23. Also, compare AB I 107 (2009), where a member of the initiative's committee speaks of 350,000 Muslims in Switzerland.

1.43 among the general populace.<sup>407</sup> The picture in other European countries is similar or even more pronounced.<sup>408</sup>

The correlation between religion and citizenship also sets Muslims apart. In 2000, although 96.9 percent of Protestant residents and 78.2 percent of Catholics held a Swiss passport, 88.3 percent of Muslims were of a foreign nationality.<sup>409</sup> Of the 11.7 percent of Muslims with Swiss nationality, only one-third were born Swiss.<sup>410</sup> The percentage of foreigners traditionally has been high in Switzerland;<sup>411</sup> yet, in the case of Muslims, their religious community is also largely foreign, which facilitates distinguishing traditional Swiss culture and Islam.

In Europe, nativist parties of the right or far right have achieved remarkable electoral successes on anti-immigration platforms over the past three decades.<sup>412</sup> Fears of being overrun by foreign hordes are not new in the West, nor are these fears exclusive to Europe. In Samuel Huntington's view, "numbers are power, particularly in a multicultural society, a political democracy, and a consumer economy"<sup>413</sup>—the implication being that at one point, unchecked immigration will threaten the current political and cultural status quo. In the United States, the Chinese, Japanese, and Mexicans have been singled out, at different times, as threats to jobs and the mores of genuine (i.e., Anglo-Protestant) Americans.<sup>414</sup>

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407. BOVAY, *supra* note 406, at 48.

408. See generally EUR. MONITORING CTR. ON RACISM AND XENOPHOBIA (EUMC), MUSLIMS IN THE EUROPEAN UNION: DISCRIMINATION AND ISLAMOPHOBIA 24–29 (2006).

409. BOVAY, *supra* note 406, at 31–34, 119.

410. *Id.* at 34 (stating 91.8 percent of Swiss Protestants and 69.5 percent of Swiss Catholics were born Swiss citizens).

411. In 2007, 21.1 percent of residents were foreigners, compared, for example, to 10.3 percent in Austria, 8.8 percent in Germany, 6.6 percent in the United Kingdom, 5.8 percent in France and Italy, and 4.2 percent in the Netherlands. BUNDESAMT FÜR STATISTIK, DIE BEVÖLKERUNG DER SCHWEIZ 2008, at 13 (2009). The extent to which these discrepancies are due to the varying strictness of naturalization requirements needs further comparative analysis. Regular naturalization (e.g., for applicants without family links to citizens) presupposes twelve years of legal residence in Switzerland. Bundesgesetz über Erwerb und Verlust des Schweizer Bürgerrechts [BüG] [Federal Act on Granting and Withdrawing Swiss Citizenship] Sept. 29, 1959, SR. 141.0, art. 15(1).

412. Such as the Front National in France, the Freiheitliche Partei Österreich (FPÖ) in Austria, the Lega Nord in Italy, the Belgian Vlaams Blok/Belang, the United Kingdom Independence Party, the Dutch Partij voor de Vrijheid, and the People's Party in Switzerland. These parties pursue different policies and their radicalism varies, yet their proponents all maintain that immigration is out of control.

413. Samuel P. Huntington, *The Hispanic Challenge*, 144 FOREIGN POL'Y 30, 44 (2004).

414. Cf. Stanford Lyman, *The "Yellow Peril" Mystique: Origins and Vicissitudes of a Racist Discourse*, in ROADS TO DYSTOPIA 65, 77–80 (Stanford Lyman ed., 2001) (discussing race relations). In 2004, Samuel Huntington shifted his attention from civilizational clefs to a more imminent threat and observed that

[i]n this new era, the single most immediate and most serious challenge to America's traditional identity comes from the immense and continuing

In the case of Europe, this development might be exacerbated by the declining heft of the continent in world politics. After exporting and imposing their own values and culture for much of modern history, Europeans now feel that they are on the receiving end of a slow and gradual invasion by other people and their values. The latest incarnation of this external menace is the so-called Muslim threat to what is now called the “Judeo-Christian” heritage of the Occident<sup>415</sup>—a somewhat surprising label, considering that the West started embracing the Jewish half of its heritage only recently.

The frequent reference to this binary root is problematic because it implicitly excludes newcomers with a different “heritage.”<sup>416</sup> Invoking such a genealogy also forces a clear distinction between those who “belong” and those who do not: the others (or simply, the “other”) threatening a traditional way of life. The supposed danger is not limited to the large number of Muslims coming to Europe; it is perpetuated and exacerbated by their subsequent reproduction.

Frequently, the description of the Islamic expansion to and in the West is steeped in the language of a biological threat. In his influential 1968 essay on “The Tragedy of the Commons,” the ecologist Garrett Hardin argued that a finite world could only support a finite population.<sup>417</sup> Population growth, Hardin maintained, would have a particularly detrimental effect on societies deeply committed to the welfare state, which was threatened by “the family, the religion, the race, or the class (or indeed any distinguishable and cohesive group) that adopts over-breeding as a policy to secure its own aggrandizement.”<sup>418</sup> Today, the opponents of Islam frequently

immigration from Latin America, especially from Mexico, and the fertility rates of these immigrants compared to black and white American natives. . . . This reality poses a fundamental question: Will the United States remain a country with a single national language and a core Anglo-Protestant culture?

Huntington, *supra* note 413, at 32. The semantic change of the term “American natives” is particularly noteworthy. *Id.*

415. See, e.g., BRIGITTE GABRIEL, *BECAUSE THEY HATE* 185 (2006); Bat Ye’or, *Jihad and Human Rights Today*, in *THE MYTH OF ISLAMIC TOLERANCE* 271 (Robert Spencer ed., 2005); Bernard Lewis, *The Roots of Muslim Rage*, *THE ATLANTIC*, Sept. 1990, at 47, 60 (discussing growing cultural tensions); Flemming Rose, *Muhammeds Ansigt*, *JYLLANDS-POSTEN* (Den.), Sept. 30, 2005, at 3. The Dutch right-wing politician Geert Wilders wants to replace the constitutional guarantee of equality with a constitutional preference for the Christian-Judeo tradition. Klara Rosenbach, *Nicht gleich, sondern christlich*, *DIE TAGESZEITUNG* (Berlin), Mar. 22, 2006, at 9.

416. Cf. W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 *YALE L. J.* 401, 415 (1993) (discussing how such modes of thought and speech can lead towards “majority paranoia, parochialism, and xenophobia”).

417. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968).

418. *Id.* at 1246.

identify Muslims both in the Middle East and in Europe as such an “over-breeding” group.<sup>419</sup>

The high percentage of Muslim aliens and the higher-than-average birth rate, however, can only partly explain resentment against Islam. At 92.5 percent, the Hindu community in Switzerland has an even higher share of non-citizens and a birth rate of 2.79<sup>420</sup>—yet they are not generally singled out for criticism. One reason might be their low overall numbers.<sup>421</sup> Another explanation—and one that is gaining currency in the West—would be that the particular problem with Muslims lies not only in their ballooning numbers, but in their very religion. Islam is perceived as a threat incompatible with Western values. Such anti-Muslim sentiments may be more powerful because they feed on, and into, a century-old narrative of conflict and competition.

### B. *A Religion Calculated for Bloodshed?*

The cultural conflict between Islam and Christianity derives from a long history of conflict that began with the Arab expansion in the seventh century.<sup>422</sup> Today’s critics of Islam can consequently point to a long and prominent pedigree. Hugo Grotius in his *de veritate religionis Christianae* described Mohammed as a robber and his first followers as “men void of humanity and piety.”<sup>423</sup> Islam was a religion “plainly calculated for bloodshed,” closed to rational argument or interpretation,<sup>424</sup> and “directly opposed to the Christian religion.”<sup>425</sup> Unlike Christianity, which, according to Grotius, was

419. BERNARD LEWIS, *EUROPE AND ISLAM 18–19* (2007) (suggesting that “in the foreseeable future,” Muslims may constitute a majority in some European countries). According to Srdja Trifkovic, “most Muslim countries regard demography as a political weapon.” SRDJA TRIFKOVIC, *THE SWORD OF THE PROPHET* 283 (2002). Robert Spencer speaks of a “demographic jihad” and observes that “the population in the Muslim world is skyrocketing, while in the lands that once were Christendom it is aging and diminishing.” ROBERT SPENCER, *ISLAM UNVEILED* 170 (2002). According to Fallaci, Muslims in Europe “breed too much”: “at least half of the Moslem women you see in our streets are pregnant or surrounded by streams of children.” FALLACI, *supra* note 401, at 138.

420. BOVAY, *supra* note 406, at 33, 43.

421. In 2000, 27,839 or 0.38 percent of residents were Hindu. *Id.* at 12. Prior to 2000, Hindus were subsumed under “other religions,” so their increase over the past decades cannot be traced.

422. H.A.R. GIBB, *MOHAMMEDANISM: A HISTORICAL SURVEY 1–15* (2d ed. 1970) still provides a convenient overview of early Islamic expansion. For European attitudes towards Islam during the Middle Ages, see generally JOHN V. TOLAN, *SARACENS: ISLAM IN THE MEDIEVAL EUROPEAN IMAGINATION* (2002).

423. HUGO GROTIUS, *THE TRUTH OF THE CHRISTIAN RELIGION* bk. VI, §§ 4–5 (Jean Le Clerc ed., John Clarke trans., 1819) (1627).

424. *Id.* bk. V, § 2.

425. *Id.*

spread through miracles, Islam followed “where arms lead the way.”<sup>426</sup>

In comparing Christianity and Islam and finding the former superior,<sup>427</sup> the Protestant Grotius continued the Catholic tradition of Christian apologetics; after all, impressive Muslim military and cultural successes necessitated justification and explanation of God’s mysterious larger design.<sup>428</sup> In the Age of Enlightenment, religious defensiveness was complemented by the scathing criticism of more secular writers. In his play *Le fanatisme, ou Mahomet le prophète*, Voltaire portrays Mohammed as a cunning, devious, scheming, lecherous, and power-hungry imposter demanding unquestioning obedience.<sup>429</sup>

The disdain of the Age of Enlightenment was followed by the much more purposive contempt of the imperialist period. As Edward Saïd has shown, orientalist scholarship purporting to establish the cultural and even racial inferiority of the Middle Eastern people played an important role in justifying Western imperial rule over Muslim lands in the nineteenth century.<sup>430</sup> The views on Muslims and on Islam were instrumental in justifying the colonial endeavor.<sup>431</sup> It was the Muslims’ debilitating faith that earned them a place among the “silent, sullen peoples” with whose care and betterment the white man was burdened.<sup>432</sup>

The imperial enterprise—at least in its colonial guise—has come to an end. The West no longer “send[s] forth the best it breeds” to “search their manhood” in “exile.”<sup>433</sup> Instead, numerous immigrants arrive from erstwhile colonies and settle in the midst of Western society. Muslims, formerly the object of scholarly study and the subjects of colonial rule, are suddenly uncomfortably close. Negative characterizations of Islam persist; indeed, they mushroomed in the past years, and literature critical and often disparaging of Islam

426. *Id.* bk. VI, § 6.

427. *Id.* bk. VI, § 4.

428. According to Grotius, Mohammed planted his new religion in Arabia “by the just permission of God,” as a punishment for Christian sins. *Id.* bk. VI, § 2.

429. VOLTAIRE, *Le fanatisme, ou Mahomet le prophète*, in 3 ŒUVRES COMPLÈTES 106 (1877).

430. EDWARD W. SAID, *ORIENTALISM* 14–15 (2003). However, it seems doubtful that a feeling of superiority was the “major component” solely of European culture. *See id.* at 7. Most cultures consider themselves superior—the question is whether they have the comparative power to assert and impose this view on others.

431. *E.g.*, ERNEST RENAN, *DE LA PART DES PEUPLES SÉMITIQUES DANS L'HISTOIRE DE LA CIVILISATION* 13–15, 27–28 (5th ed. 1862).

432. RUDYARD KIPLING, *The White Man’s Burden*, in *COLLECTED VERSE* 217 (Doubleday, Page & Co. ed., 1919).

433. *Id.*



could almost be considered a genre of its own.<sup>434</sup> With increasing frequency, the Islamic faith itself is held responsible for the woes of the Muslim world and for the frictions between Muslim immigrants and their European hosts.<sup>435</sup> In the Grotian vein, Islam is depicted as intolerant, violent, and incompatible with human rights<sup>436</sup>—claims often buttressed by martial and exclusionary quotations of the Qur'an.<sup>437</sup> The lack of separation between church and state also is adduced to underline the incompatibility between Islam and modern society.<sup>438</sup>

Such arguments keep gaining wider currency for a reason. Orientalist and colonialist attitudes may linger, but they do not preclude legitimate concerns over the protection of human rights in the face of religious fervor. The sweeping reservations made by Muslim states to international human rights instruments on the basis of Sharia law may, depending on how the latter is construed and applied, jeopardize the object and purpose of such instruments.<sup>439</sup> Persisting gender inequalities in Western societies<sup>440</sup> do not delegitimize concerns over the status of women under Sharia rules. But, painting Islam as inherently hostile to human rights overlooks that religious commands, just like legal commands, require interpretation; they are tools that can be used one way or another. Christians, at times far less tolerant than today's Muslims,<sup>441</sup> no longer proselytize by fire and sword, even though their Scriptures have not changed. A religion as such is rarely intrinsically "good" or "bad" for human rights. Instead, present-day believers or their spiritual leaders bear the responsibility to give meaning to religious commands, and a more constructive approach would strive to

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434. Cf. Roger Boase, *Introduction*, in *ISLAM AND GLOBAL DIALOGUE: RELIGIOUS PLURALISM AND THE PURSUIT OF PEACE* 6 (Roger Boase ed., 2005) (discussing twenty-first century treatment of Muslims).

435. This approach is exemplified by the Dutch politician Geert Wilders, who has "nothing against Muslims," but opposes Islam as a violent ideology. Peter Winkler, *Ob andere uns glauben, spielt keine Rolle*, NZZ, Mar. 4, 2010, at 7.

436. E.g., GABRIEL, *supra* note 415; ROBERT SPENCER, *RELIGION OF PEACE? WHY CHRISTIANITY IS AND ISLAM ISN'T* (2007); TRIFKOVIC, *supra* note 419; IBN WARRAQ, *WHY I AM NOT A MUSLIM* (1995).

437. E.g., ROBERT SPENCER, *THE POLITICALLY INCORRECT GUIDE TO ISLAM (AND THE CRUSADES)* (2005).

438. AB I 109 (2009); WARRAQ, *supra* note 436, at 164.

439. For an overview, see NASRINE ABIAD, *SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS* 63–82 (2008).

440. See *supra* notes 109–11.

441. Particularly towards other "people of the book," Muslim policy tended to be pragmatic. For a somewhat dated, but still relevant analysis, see ARTHUR STANLEY TRITTON, *THE CALIPHS AND THEIR NON-MUSLIM SUBJECTS: A CRITICAL STUDY OF THE COVENANT OF UMAR* (1930).

illustrate the benefits of an interpretation that accords with human rights provisions.<sup>442</sup>

Such an exegetic process, however, cannot be initiated or imposed from the outside; only Muslims themselves can develop the necessary theological and interpretative arguments. Instead, my point is that categorically denying the very possibility of development and reform only bolsters the cause of orthodox and reactionary forces in Islam. Branding Islam as inherently backwards is also unsustainable on a purely practical level. Declaring a faith with over a billion followers to be lost for democracy and human rights would severely darken humanity's prospects.

Admittedly, it is not conducive to Muslim demands for recognition in Europe that adherents of other religions are rarely permitted to manifest their beliefs in Muslim countries—a point frequently raised in the discussions over the minaret ban.<sup>443</sup> It has to be acknowledged that in comparison, Muslims in Europe face fewer restrictions in their religious practice than their Christian peers (or minority Muslim denominations) in the Islamic world.<sup>444</sup> Understandably, it causes resentment when undemocratic regimes in Arab countries accuse Western countries of a lack of tolerance.

However, the argument of reciprocity, although common in international law, fails in the context of human rights both on a practical level and on principle. Democracies can hardly start mistreating their own minorities simply because authoritarian regimes mistreat theirs. More importantly, genuine adherence to human rights values should imply the pursuit of such values as an end in itself, not as a *quid pro quo* on the market of international politics.

Moreover, the reciprocity argument suffers from another fundamental defect because it links the status of Muslims in Europe to the situation in Muslim countries, thus tying Muslim immigrants, residents, or citizens to their countries of origin. They are considered Muslims in Europe rather than European Muslims. Some have argued that Muslims themselves adopt this status, and that they do not truly settle down in Europe and integrate into their host societies, but instead strive to reproduce the cultural, religious, and legal environment they left behind. Indeed, this lack of integration on every level was adduced by the minaret ban's proponents, who

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442. For such an attempt, see generally TARIQ RAMADAN, *WESTERN MUSLIMS AND THE FUTURE OF ISLAM* (2004).

443. AB III 535–36 (2009); AB I 99–100 (2009).

444. TAD STAHNKE & ROBERT C. BLITT, *U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, THE RELIGION-STATE RELATIONSHIP AND THE RIGHT TO FREEDOM OF RELIGION OR BELIEF: A COMPARATIVE TEXTUAL ANALYSIS OF THE CONSTITUTIONS OF PREDOMINANTLY MUSLIM COUNTRIES* 13–18 (2005).

alleged that Sharia law could become a parallel legal system.<sup>445</sup> The specter of a multiculturalism that amounts to little more than the coexistence of separate ghettos is seen as an undesirable alternative to proper integration. But what exactly does “integration” into a host society require? And do different hosts require different levels of integration?

### C. *The Terms of Integration*

In October 2009, the cartoonist Kurt Westergaard was invited to give a talk at Yale University.<sup>446</sup> In 2005, he drew what many Muslims considered the most offensive of the Danish Mohammed cartoons: the prophet wears a turban, in which a bomb inscribed with the *Shahada* (the profession of faith) is nestled.<sup>447</sup> When prompted by a fairly hostile audience to justify his drawing, he adduced the attacks of September 11, 2001. He also argued that Muslims in Denmark should be accepting the values of their host society instead of protesting his exercise of free speech. He stressed that citizens in Denmark paid more than half their income to maintain a welfare state that provided generous support to newcomers; it was only natural to expect integration by Muslim immigrants in return. Westergaard’s view, although widespread in Europe, did not find favor with his American audience.

And indeed, American views on integration might differ due to the country’s long and continuing history of immigration.<sup>448</sup> At least, in theory, being different is part of being American, an approach that is also mirrored in an educational system often organized along

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445. In December 2008, an anthropology professor in Switzerland suggested the introduction of a selective legal pluralism, recognizing, within the limits of the rule of law and human rights, different legal cultures particularly for family and business law. Christian Giordano, *Il pluralismo giuridico: uno strumento legale nell gestione del multiculturalismo?*, TANGRAM, Dec. 2008, at 74. A heated polemic ensued. Pascal Hollenstein, *Scharia-Gerichte für die Schweiz*, NZZ, Dec. 28, 2008, at 9. The issue has proven explosive elsewhere. Ben Russell, *Archbishop of Canterbury Warns Sharia Law in Britain Is Inevitable*, INDEPENDENT, Feb. 8, 2008, at 8. The United States is not immune to such controversy. An alleged favorable remark on Sharia law almost thwarted the appointment of a legal advisor to the U.S. State Department. Eric Lichtblau, *After Attacks, Supporters Rally Around Choice for Top Administration Legal Job*, N.Y. TIMES, Apr. 2, 2009, at 19.

446. For a cursory account of the visit and the accompanying student protests, see Esther Zuckerman, *Cartoonist’s Visit Causes Stir*, YALE DAILY NEWS, Oct. 2, 2009, at 1. The following account is based on my attendance at the event.

447. Rose, *supra* note 415.

448. *Look Out, Europe, They Say*, ECONOMIST, June 24, 2006, at 29–34. Still, the difference may be merely gradual. The audience at Yale might not be representative for general feelings towards immigrants, and the United States has its own history of discrimination against newcomers. See *supra* note 414 and accompanying text (noting a history of economically motivated discriminatory behaviour by Anglo-Americans).

racial, religious, cultural, and social lines.<sup>449</sup> While African-Americans, Asian-Americans, Indian-Americans, or Hispanic-Americans are seen as part of the demographic make-up of the United States, there are no hyphenated Europeans, no African-Germans, Indian-Austrians, or Asian-Swiss. It might be due to narrower conceptions of membership in the body politic based on cultural heritage<sup>450</sup> that a higher level of integration is expected and only a binary option is offered—either Swiss, German, French, or not.<sup>451</sup> The pluralist ideal of diverse groups maintaining distinct identities is largely absent.<sup>452</sup> “Multi-culturalism” may have had positive connotations throughout much of the 1970s and 1980s, but the 1990s and the beginning of the new millennium saw more critical attitudes toward the view that equal recognition of minority groups was “the appropriate mode for a healthy democratic society.” It was no longer taken for granted that the refusal of multiculturalism could “inflict damage on those who are denied it.”<sup>453</sup> Multiculturalism is now denounced as “a cast of mind founded on a sense of guilt,” and as “an ideological cliché rather than a social reality.”<sup>454</sup> The opponents

449. This tendency has been further accentuated by the introduction of charter schools. Martha Minow et al., *Pursuing Equal Education in Societies of Difference*, in JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE 3, 5 (2008). Yet at the same time, such pluralist approaches were always opposed by assimilationist ideologies, as exemplified by the “Americanization” movement of the early twentieth century. Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 300–01 (1988).

450. The emphasis on a majoritarian and traditional definition of culture is also evident in the debates on a “core culture” that re-surface in regular intervals, particularly in Germany. Cf. Peter Finn, *Debate Over a ‘Defining Culture’ Roils Germany*, WASH. POST, Nov. 2, 2000, at A22 (“[I]n history-haunted Germany, even the simplest expression of patriotism elicits a cold shiver in some quarters.”). The term *Leitkultur* was coined by Bassam Tibi. See BASSAM TIBI, EUROPA OHNE IDENTITÄT? 51 (1998). On a regional level, this would also explain the discussions on what the criteria for membership in the European Union are, and whether Turkey would meet such criteria. See *Culture Wars*, ECONOMIST, Feb. 4, 2006, at 50 (discussing the interplay between E.U. membership and a common cultural identity).

451. The binary approach, however, might also have an upside. The hyphenated denomination still implies and perpetuates a distinction between “composite” Americans and Americans *tout court*. Nor should American tolerance towards Muslims be overstated. The opposition to a mosque close to Ground Zero in Manhattan, e.g., *Build That Mosque*, ECONOMIST, Aug. 7, 2010, also paints militant Islamists and other Muslims with the same brush, although admittedly in the much more serious and emotional context of the September 11 attacks. Incidentally, opposition to mosques in the United States is not limited to Ground Zero. Travis Loller, *Far From Ground Zero, Opponents Fight New Mosques*, ASSOCIATED PRESS, Aug. 8, 2010.

452. Post, *supra* note 449, at 302 (emphasizing “Americanization”); see generally Josef Isensee, *Integration mit Migrationshintergrund*, 65 JURISTENZEITUNG 317, 319 (2010) (framing Muslim immigration as a challenge to German culture, defined to include religious traditions).

453. CHARLES TAYLOR & AMY GUTMANN, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 36 (1994).

454. TIBI, *supra* note 450, at 49–50.

of multiculturalism claim that it amounts to a denial of Europe's own cultural identity.<sup>455</sup> In today's Europe, the adjective "multicultural" evokes the same reaction as "liberal" in the United States: it is defended by a shrinking minority, scoffed at by most. Instead, newcomers are expected to "integrate" into their host societies.<sup>456</sup>

What, then, does integration in Europe imply? The "restoration of a whole," as the word's origin suggests?<sup>457</sup> "Fusing together a multitude of separate persons or groups to a single social and cultural unit"?<sup>458</sup> Or perhaps even "bringing into equal membership of a common society those groups or persons previously discriminated against on racial or cultural grounds"?<sup>459</sup> A comprehensive discussion of the complicated issue of Muslim integration in the West would require a treatise of its own,<sup>460</sup> but the minaret ban provides an opportunity to briefly consider what demands Muslims face and to what extent they are willing or able to meet them.

The ban's proponents persistently argued that the ban would halt the alleged introduction of a competing legal system that would undermine the secular Swiss legal order and violate fundamental rights and freedoms.<sup>461</sup> This Article earlier illustrated that there is no causal link between minarets and Sharia law.<sup>462</sup> However, an argument against legal pluralism and relativism can be made independent of a causal link. The basic values of a community as enshrined in constitutions—what we consider to be the fundamentals of a just and equal society—must not be open to cultural relativisation, and the freedoms thus granted must not be abused to undermine the very order they aim to provide. A bill of rights should not be a suicide pact.<sup>463</sup>

The same argument must generally apply to other and less fundamental laws. Defining what exactly constitutes binding law is a task that will continue to challenge legal scholars, but for the present

455. *Id.*

456. *E.g.*, Bundesgesetz über die Ausländerinnen und Ausländer [AuG] [Federal Act on Foreigners] Dec. 16, 2005, SR 142.20, arts. 3–4.

457. Latin *integratio* (n.) / *integro* (v.). GEORGES, *supra* note 138, col. 290.

458. DUDEN: DEUTSCHES UNIVERSALWÖRTERBUCH 839 (Dudenredaktion ed., 4th ed. 2001).

459. 7 JOHN A. SIMPSON & EDMUND S.C. WEINER, THE OXFORD ENGLISH DICTIONARY 1065 (2d ed. 1989).

460. For recent contributions, see generally, JOHN RICHARD BOWEN, CAN ISLAM BE FRENCH? PLURALISM AND PRAGMATISM IN A SECULARIST STATE (2010); JYTTÉ KLAUSEN, THE ISLAMIC CHALLENGE POLITICS AND RELIGION IN WESTERN EUROPE (2005); BHIKHU C. PAREKH, EUROPEAN LIBERALISM AND "THE MUSLIM QUESTION" (2008); RAMADAN, *supra* note 442; BASSAM TIBI, EURO-ISLAM (2009).

461. *See supra* note 445 (discussing opposition on cultural grounds).

462. *Supra* Part III.

463. *Cf.* Terminello v. City of Chicago, 337 U.S. 1, 13 (1949) (Jackson, J., dissenting) (lamenting some of the behaviors made possible by the Bill of Rights); ECHR, *supra* note 65, art. 17 (limiting abuse of rights); ICCPR, *supra* note 66, art. 20 (banning propaganda).

purpose, the criterion is simple: the substantive and procedural norms codified in statutes, acts, and ordinances and applied by administrative and judicial officers are binding. These norms, adopted through and legitimized by democratic procedures, form the basis of any modern commonwealth; it must be assumed that entry and participation are granted to outsiders only on the condition that these rules are respected. Calls for the introduction of concurrent Sharia law, at least insofar as such law contradicts existing legal norms,<sup>464</sup> are unacceptable (even though it is difficult to assess how widespread such demands really are; the particular media interest they generate might lead to a somewhat skewed image).<sup>465</sup>

We have to keep in mind, however, that secular laws, even if apparently value-neutral, also institutionalize specific preferences. Although the same laws are supposed to apply equally to all, some might still be more equal than others. Norms are likely to reflect, at least to some extent, the traditional or fundamental values of the majority—which indeed they have to in order to claim legitimacy and relevance. In a largely homogenous society, this approach may express widely shared community values,<sup>466</sup> but laws also may be passed with the sole intent to exclude, discriminate, or forcibly assimilate a minority. Discriminatory legislation on religious grounds—often under the guise of formally equal treatment—is neither novel nor particularly Swiss. It can be argued that the very purpose of religion is to increase cohesion within a group and facilitate repulsion of outsiders.<sup>467</sup> Minorities are often at the receiving end of norms that buttress majoritarian mores, as demonstrated by the minaret vote.

In the past, this majoritarianism has affected Christian denominations as well. In 1810, the city of Lausanne enacted a law prohibiting Catholics from displaying “external religious signs” such as processions, religious habits, the pealing of bells, and the construction of spires.<sup>468</sup> The first Federal Constitution of 1848 banned Jesuits and the reestablishment of previously suppressed

464. For a discussion of such introduction, see Mathias Rohe, *Application of Shari'a Rules in Europe: Scope and Limits*, 44 WELT DES ISLAMIS 323, 325 (2004).

465. See *supra* note 445 and accompanying text (discussing inherent cultural bias).

466. Post, *supra* note 449, at 299–300. Rousseau had already stressed the importance of shared customs and the dangers of diversity to a political community. ROUSSEAU, *supra* note 273, at 73–74.

467. For this argument from the viewpoint of evolutionary biology, see NICHOLAS WADE, *THE FAITH INSTINCT: HOW RELIGION EVOLVED AND WHY IT ENDURES* 2–5 (2009).

468. The ban on Catholic steeples was lifted in 1872, but the first tower was only built in 1935, with bells added in 1948. BERNARD Secrétan, *Eglise et vie catholiques à Lausanne du XIXe siècle à nos jours* (2005). The author is indebted to Josef Lang, MP, for this reference.

religious orders.<sup>469</sup> In turn, Catholic cantons discriminated against Protestants.<sup>470</sup> Discrimination was even more explicit between differing faiths; prior to 1874, only Swiss citizens of a recognized Christian confession could freely move from one canton to another or invoke a right to free exercise of religion.<sup>471</sup> Under the 1874 Constitution, Article 72(3) BV (the place now taken by the minaret ban) contained a provision requiring state approval for the establishment of Catholic dioceses.<sup>472</sup> The very first ballot initiative in 1894 led to a ban on the ritual slaughter of animals; the ban was, at least partially, a thinly veiled attempt to prevent Russian Jewish emigrants from settling in Switzerland.<sup>473</sup> Many of the current arguments against minarets—including the spread of Sharia law—were already advanced during the heated discussions over Muslim graveyards in the 1990s.<sup>474</sup> That issue has since subsided, but was promptly revived in the wake of the minaret vote.<sup>475</sup>

Despite this potential for bias, there seems to be no alternative to insisting on the applicability and binding nature of legal norms, as long as their discriminatory effects do not transgress certain limits<sup>476</sup>

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469. The ban was justified by the role that Catholic orders and the Jesuits, in particular, allegedly played in the conflict preceding the establishment of the Swiss Federation in 1848. KLEY, *supra* note 320, ¶¶ 13, 21. The ban was lifted only in 1973. Bericht des Bundesrates an die Bundesversammlung, BBL I 1660 (1973).

470. Lucerne did not permit cremation requested by Protestants, arguing that burial provisions requiring interment applied equally to all (erstwhile) citizens and were therefore nondiscriminatory. The Federal Supreme Court found the prohibition of cremation unconstitutional in 1893. BGer May 16, 1919, 45 BGE I 119.

471. KARLEN, *supra* note 75, at 140–43.

472. The prescription was adopted in 1873 during the *Kulturkampf*; it was rescinded by public vote in 2001, with the rationale that such a discriminatory restriction ran counter to important principles of equality and unnecessarily restricted the right to freedom of religion guaranteed by the ECHR and the ICCPR. Parlamentarische Initiative Aufhebung des ‘Bistumsartikels’ (Art. 72 Abs. 3 BV), BBL 5581(2000).

473. PASCAL KRAUTHAMMER, DAS SCHÄCHTVERBOT IN DER SCHWEIZ 1854–2000, at 75 (2000). The ban had been instituted against the recommendation of both Federal Council and Federal Assembly. Bundesbeschluß über das Initiativbegehren betreffend das Verbot des Schlachtens ohne vorherige Betäubung, BBL III 745 (1893). Supporters had argued that Judaism does not really require ritual slaughter. KRAUTHAMMER, *supra*, at 57. In 1973, the constitutional provision was moved to the statutory level. While anti-Semitism played a prominent role in the adoption of the constitutional provision, animal rights are at the center of today’s discussions. Yvo Hangartner, *Rechtsprobleme des Schächtverbots*, 2002 AKTUELLE JURISTISCHE PRAXIS [AJP] 1022, 1024 (2002). A 2002 ballot initiative prohibiting imports of kosher or halal meat (which are permitted) failed to collect sufficient signatures. Bekanntmachungen der Departemente und der Ämter, BBL 6513 (2003).

474. Niccolò Raselli, *Schickliche Beerdigung für “Andersgläubige,”* 1996 AJP 1103 (1996). In 1999, the Federal Supreme Court held that neither the Constitution nor the ECHR and the ICCPR granted a right to a burial on a public graveyard in accordance with Muslim prescriptions. BGer May 7, 1999, 125 BGE I 300, ¶ 3(b)(bb).

475. Christoph Wehrli, *Schwere Kunst des Verlierens*, NZZ, Dec. 4, 2009, at 13.

476. Gustav Radbruch, *Gesetzliches Unrecht und überggesetzliches Recht*, in 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105, 107 (1946).

and specific groups are not excluded from the protection of the norms. This basic requirement of “law-abidingness” applies in any country, but integration into European states seems to require more than obedience to the law, perhaps because modern European states were conceived as nation-states, or as suggested by Westergaard, as the price for extensive social security nets.<sup>477</sup>

The formation of separate cultural and linguistic communities is frowned upon in Europe.<sup>478</sup> But how far should integration in matters of language and mores go? Although acceptance of fundamental values is not contingent on language skills, such skills are certainly conducive to “engaging with societal relations and living conditions” in a host country.<sup>479</sup> Sustainable social and particularly economic and professional integration generally presupposes linguistic adaption. But although there are sound reasons to promote linguistic integration, demands for integration cross the line between negative commands (the prohibition to violate laws) and positive expectations to conform to rules beyond positive laws and moral rules set or imposed by “general opinion.” In other words, these expectations require a minority to avoid conduct that is regarded with “a sentiment of aversion” and displeasure even though it is not in contravention of any positive law.<sup>480</sup>

The issue of dress codes may illustrate this problem. Currently, differing dress codes are still largely considered a violation of the “laws set by fashion.”<sup>481</sup> But in 2006, Prime Minister Tony Blair criticized the full Islamic veil as a “mark of separation.”<sup>482</sup> In France,

477. See *supra* note 446 and accompanying text (discussing Westergaard’s Yale speech).

478. The rise of Spanish, however, might prompt similar demands for linguistic integration in the United States. See *supra* note 414 (discussing racial tensions in the United States).

479. Cf. AuG Dec. 16, 2005, SR 142.20, art. 4(4) (quoting the statute). One canton has recently introduced compulsory language classes for non-E.U. citizens. Non-participation adversely affects immigration status, while fast learners might be rewarded by the expeditious granting of permanent residence. *Sprachkurse: Verbindliche Integrations-Vereinbarungen in St. Gallen*, TAGBLATT ONLINE, Dec. 11, 2009, <http://www.tagblatt.ch/aktuell/stgallen/stgallen/Sprachkurse-Verbindliche-Integrations-Vereinbarungen-in-St-Gallen;art536,1434233>. Under a rather illiberal approach, the Liberals in Zurich suggest that foreigners must learn 1,000 German words within one year of their arrival. *Klare Regeln für die Integration*, NZZ, Nov. 12, 2009, at 20. In the German-speaking part of Switzerland, linguistic integration is considerably impeded by the almost exclusive use of an Alemanic dialect that differs starkly from the standard German taught in language classes.

480. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 146–47 (1832) (1995).

481. See *id.* at 146. Garments with religious connotation for public servants, however, are not merely considered an infringement of a law of fashion. See *supra* note 105 (discussing recent bans on religious symbolism).

482. George Jones, *Veil Seen as Mark of Separation, Blair Tells Muslims*, TELEGRAPH, Oct. 18, 2006, at 2. For an overview of European legislation on veils as of 2005, see Şahin v. Turkey, 2005–XI Eur. Ct. H.R. 173, ¶¶ 55–65.



public school students are already banned from wearing a headscarf or other “conspicuous religious symbols,”<sup>483</sup> and further legislative measures are being pushed through to ban “integral veils” in public spaces.<sup>484</sup> In Belgium, many schools are banning headscarves, and in April 2010, the Belgium House of Representatives (which can agree on little else) voted to ban any clothing that covered the face.<sup>485</sup> After the minaret vote in Switzerland, the ban’s supporters considered similar dress code laws.<sup>486</sup> In none of these countries, however, is the burqa a common sight, which is why proponents of its ban have to invoke principle to justify their endeavors. And a question of principle it may well be, but perhaps the issue is not quite so pressing as to warrant urgency proceedings in Parliament.<sup>487</sup> The Parliamentary Assembly of the Council of Europe has also weighed in, arguing that a blanket burqa ban would unduly affect the religious freedom of women who want to cover their face.<sup>488</sup>

Does architecture also play a part, positive or negative, in integration? In the run-up to the ballot vote, minarets were depicted

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483. Conseil constitutionnel [CC] [Constitutional Court] decision No. 200–228DC, Mar. 17, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France] 5190.

484. The French government attributes high priority to the project, at one point even considering urgency procedures to push the law through, Judith Weintraub, *Burqa: Fillon devrait décréter la procédure d'urgence*, LE FIGARO, Apr. 23, 2010, at 3, even though the *Conseil d'État* (the highest administrative court) cautioned that such a ban would be “legally fragile” and might violate E.U. norms on nondiscrimination. CONSEIL D'ÉTAT, ÉTUDE RELATIVE AUX POSSIBILITÉS JURIDIQUES D'INTERDICTION DU PORT DU VOILE INTÉGRAL 21 (2010). The law will impose a fine of 150 euros for wearing a full-face veil and up to 15,000 euros for forcing others to wear such a veil. Cécilia Gabizon, *Burqa: des amendes allant de 150 euros à 15 000 euros*, LE FIGARO, Apr. 30, 2010, at 11. It was approved on July 13, 2010, by an overwhelming majority in the *Assemblée Nationale*. Sophie Huet, *La loi antiburqa adoptée sans opposition à l'Assemblée*, LE FIGARO, July 14, 2010, at 5. The law was promulgated after an affirmative vote in the *Sénate* on September 14, 2010, and will enter into force in spring 2011. Agnès Leclair, *La loi sur le voile intégral promulguée*, LE FIGARO, Oct. 13, 2010, at 11. The *Conseil Constitutionnel* held that the law was constitutional as long as it permitted wearing the veil in public places of worship. CC decision No. 2010–613DC, Oct. 7, 2010, J.O. 18345.

485. The proposal passed by 136 votes, with two abstentions. Jean-Pierre Stroobants, *La Belgique interdit la voie intégral*, LE MONDE, May 2, 2010, at 1. As its adoption coincided with the collapse of the governing coalition, the bill will only become law when promulgated by a new government.

486. *Keine Burka-Diskussion jetzt*, NZZ, Dec. 8, 2009, at 9; *Vom Burka- zum Verhüllungsverbot*, NZZ, June 18, 2010, at 10.

487. *Contra supra* note 484 (noting overwhelming political support for such measures). Eventually, the government decided to adopt the law through regular proceedings. Valentina Antonova, *Loi sur la burqa: pas de procédure d'urgence*, LE FIGARO, May 7, 2010, at 4.

488. Islam, Islamism and Islamophobia in Europe, *supra* note 58. For a summary overview of European legislation, see Stéphanie Le Bars, *Comment les pays d'Europe gèrent-ils le voile intégral?*, LE MONDE, July 15, 2010, at 8.

as conspicuous religious symbols.<sup>489</sup> There is no question that minarets have to comply with zoning laws—a high threshold, because these laws are often unfavorable to the construction of new religious structures<sup>490</sup>—but conformity with planning and zoning laws still seems insufficient, as illustrated by the aftermath of the dispute over the minaret in Wangen.<sup>491</sup> The underlying objection to minarets seems to be based in principle. Obviously, minarets can be considered alien to Europe merely due to their relative scarcity,<sup>492</sup> but most minarets in Europe also preserve an architectural heritage alien to the European tradition and rely almost exclusively on the slender, pencil-sharp shape rooted in Ottoman tradition.<sup>493</sup> It might be argued that by insisting on a foreign formal vocabulary, minarets are a sign of separation. There are alternatives to sharp minarets piercing the Swiss flag: these slim towers are but one variant of a rich architectural tradition<sup>494</sup>

Minarets come in a multitude of shapes: round, helicoidal, or square.<sup>495</sup> Indeed, to the Western eye, some minarets might be more reminiscent of the towers in San Gimignano and other cities in Tuscany than of the Hagia Sophia in Istanbul.<sup>496</sup> There are many examples, both old and new, where mosques and minarets entered into a symbiosis with the architectural tradition of their host societies.<sup>497</sup> Perhaps integration not only needs to be done, but also

489. BLOOM, *supra* note 76; see SCHWEIZERISCHE EIDGENOSSENSCHAFT, *supra* note 92 (linking minarets to Islam).

490. Jäger, *supra* note 75, at 119. Zoning laws may also be used specifically to block minarets. In the Austrian *Bundesländer* Carinthia and Vorarlberg, the change of zoning laws effectively blocked the construction of minarets while avoiding the stigma of open discrimination. Cf. *Minarette: Kanzleramt mahnt Religionsfreiheit ein*, DER STANDARD, Nov. 30, 2009, at 4.

491. See Verwaltungsgericht Nov. 24, 2006, VWBES.2006.293 (SO), 19 SOG 89, 93 (Sonthurn).

492. Austria, for instance, has only has three minarets, Michael Möseneder, *Die Angst der Bürger vor den "Leuchttürmen,"* DER STANDARD, Nov. 29, 2009, at 2, and France less than ten, Gabizon, *supra* note 402, at 5.

493. Hillenbrand, *supra* note 100, at 366.

494. Vallely, *supra* note 48.

495. For example, the *Malwiyya* in Samarra (Iraq), the Giralda of Seville (Spain), and minarets in Sfax (Tunisia), Marrakesh (Morocco), Aleppo (Syria). BLOOM, *supra* note 76, at 15, 93, 108, 122. For a schematic overview of the many minaret styles, see HILLENBRAND, *supra* note 79, at 130–31.

496. For example, the minarets in Bosra (Syria), Harran (Turkey), and Fez (Morocco). See also BLOOM, *supra* note 76, at 26, 30, 163 (discussing minaret architecture).

497. In China, some of the oldest mosques provide a striking example for a genuinely Muslim interpretation of traditional Chinese architecture. *E.g.*, the Ox Street (Niuji) Mosque and the Dongsu Mosque in Beijing and the Huaiheng Mosque in Guangzhou. In the Great Mosque of Xi'an, the minaret is replaced by a pagoda. For pagoda-style minarets also compare the Chengjiao Mosque and the Xia-Ershe Mosque in Linxia City. For modern interpretations of mosque architecture see generally, the mosque in Penzberg, Bavaria or the Taqwa-Mosque that is currently built in

seen to be done?, and the architectural style of mosques and minarets could serve as a yardstick for the willingness of Muslims to integrate, as the “architectural body language of Islamic integration or the lack thereof”?<sup>498</sup>

The architectural nostalgia for ancestral Muslim countries is understandable, but it results in equating a cultural tradition with a religion,<sup>499</sup> plays into the perception of minarets as foreign implants, and facilitates accusations of outside funding and conservative influence.<sup>500</sup> A novel, independent, and idiosyncratic architectural language would have several benefits. From a purely pragmatic perspective, it might reduce the jealousy and resentment of rivaling communities that fear the eclipse of their own identity and name. More importantly for Muslims, a change of architecture would be another step in the difficult transition from being Muslims in Europe to being European Muslims. The repeated reference by the supporters of a minaret ban to the lack of religious freedom in Muslim states<sup>501</sup> underscores that Muslims in Europe are still seen as representatives, at best—or a fifth column, at worst—of their countries of origin. Indeed, it is common for first-generation immigrants to try to preserve the purity of the culture they left behind. But with time, such nostalgia must be replaced by engagement of the present environment,<sup>502</sup> and cultural purity must

Frankfurt. The architect of the latter has sought a synthesis of old and new, comparing the construction of Ottoman-style mosques in Western Europe to a Disney World approach that lacks authenticity. *Traditionelle Elemente sind wichtig zur Identifikation*, FRANKFURTER RUNDSCHAU (Ger.), Jan. 23, 2009, at 9. Pictures of the mosques mentioned here can easily be found through an Internet search engine.

498. The author owes this succinct formulation to Professor Gerhard Bowering of the Department of Religious Studies, Yale University, who also brought to my attention the architectural variety of mosques in China.

499. TARIQ RAMADAN, FACE À NOS PEURS: LE CHOIX DE LA CONFIANCE 68–69 (2008).

500. Cf., e.g., Jan Dirk Herbermann, *Das Land der Kuhglocken fürchtet den Muezzin*, FRANKFURTER RUNDSCHAU, Nov. 25, 2009, at 6; *Aufregende Minarette in der Calvinstadt*, NZZ, Mar. 28, 2008, at 15. Over the past decade, Saudi money has funded countless mosques both in Europe and the United States and at the same time, has furthered the spread of Wahhabism. Aptullah Kuran, *The Mosque in Politics*, in 4 THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, *supra* note 100, at 71. Even though Wahhabism itself might consider minarets unnecessary, see Hillenbrand, *supra* note 100 (discussing mosques as a distraction), these building projects often include prominent minarets. MARTIN WOKER, *Muslime, Bosnjaken oder Bosnier?*, NZZ, Jan. 21, 2005. However, the importance of Saudi funding through bodies such as the Muslim World League is declining in Western Europe, where groups have moved to self-financing. KLAUSEN, *supra* note 460, at 43.

501. See *supra* note 443 and accompanying text (discussing religious oppression in the Muslim world).

502. “There is no longer a place of origin from which Muslims are ‘exiled’ or ‘distanced,’ and ‘naturalised,’ ‘converted’ Muslims—‘Western Muslims’—are at home, and should not only say so but feel so.” RAMADAN, *supra* note 442, at 52–53. This approach represents a significant shift from earlier, less accommodating views, cf., e.g., SAYYID QUTB, MILESTONES 124 (Mother Mosque Foundation, 1981) (1964).

not be conflated with religious merit. Islam's claim to be a universal religion rather than a cultural tradition originating on the Arabic peninsula can only be bolstered by the use of a universal vocabulary with regard to architecture.<sup>503</sup> Building minarets is, after all, a sign of commitment that Muslims in Europe intend to put down roots and do not see their stay as merely transitory.

Attempts to put down roots, however, presuppose a welcoming ground.<sup>504</sup> If Muslims try to overcome their seclusion and engage their host societies, these societies would have to be willing to acknowledge such efforts and reciprocate accordingly.<sup>505</sup> And there's the rub. It is doubtful whether the actual behavior of Muslims in Switzerland had much influence on the minaret vote. Of the voters supporting the ban, only 15 percent had based their decision on criticism of Muslims in Switzerland.<sup>506</sup> Generally, the opposition to minarets seemed based on a preconceived idea of Islam rather than actual exposure to Muslims. A majority of Muslims in Switzerland live in urban areas.<sup>507</sup> Yet, the share of yes-votes was highest in rural areas; the six biggest cities of Switzerland, on the other hand, rejected the ballot,<sup>508</sup> and the only cantons which posted an overall majority against the ban—Geneva, Vaud, Neuchâtel, and Basle-City—are predominantly urbanized.<sup>509</sup> If minarets are opposed independently of what they look like and how their builders behave, Muslim efforts at integration may not change attitudes toward the turrets or affect negative views of Islam.

But any place where the Islamic Shari'ah is not enforced and where Islam is not dominant becomes the home of Hostility (*Dar-ul-Harb*) for both the Muslim and the Dhirmni. A Muslim will remain prepared to fight against it, whether it be his birthplace or a place where his relatives reside or where his property or any other material interests are located.

*Id.*

503. Such an approach might then help to “extrapolate the essence of the [Muslim] identity from the accident of its actualization in a particular time and place.” RAMADAN, *supra* note 502, at 78.

504. Cf. AuG Dec. 16, 2005, SR 142.20, art. 4(4) (stating as precondition for integration not only the willingness of immigrants, but also the openness of the Swiss populace). Compare for Germany. AUFENTHALTSGESETZ (AUFENTHG) [RESIDENCE ACT], July 30, 2004, RGLB 1 at 1950, §43, para. 1.

505. RAMADAN, *supra* note 499, at 13; RAMADAN, *supra* note 442, at 62–63.

506. 29 HANS HIRTER & ADRIAN VATTER, ANALYSE DER EIDGENÖSSISCHEN ABSTIMMUNGEN 30 (2010).

507. BOVAY, *supra* note 406, at 22, 110.

508. Namely Zurich, Geneva, Basle, Berne, Lausanne, and Winterthur (with Basle and Lausanne having a particularly high percentage of Muslims). See BOVAY *supra* note 406, at 22. In large urban areas, the ban was rejected by 61.4 percent of voters. *Geografie des Protests: Die Stadt-Land-Kluft bei der Minarett-Abstimmung*, NZZ, Dec. 2, 2009, at 11.

509. BBL 3440 (2010). For an overview of urban centers in Switzerland, see MARTIN SCHULER et al., EIDGENÖSSISCHE VOLKSZÄHLUNG 2000: DIE RAUMGLIEDERUNGEN DER SCHWEIZ 131 (Bundesamt für Statistik ed., 2005).

European calls for Muslims to adapt their tokens of faith to the visual appearance of the West would amount to preaching water while drinking wine. Christian churches all over the world perpetuate architectural forms originating in a limited geographical area and often dating back to the Gothic period. Nor can it be said that newly established or expanding Christian communities do not receive outside funding and ideological influences.<sup>510</sup> Apparently, the pull of integration is supposed to work in only one direction: even observers who are highly critical of non-integrating Muslims in the West take it for granted that worldwide, their own cultural preferences prevail.<sup>511</sup>

It is impossible and wrong to expect Europe to completely dispose of its historic heritage, which for two millennia has been intertwined with Christian traditions.<sup>512</sup> The *invocatio Dei* (*Christianorum*) still heads the Preamble of the Swiss Constitution.<sup>513</sup> Religion held—and still holds<sup>514</sup>—a prominent place in what could be called the Western myth system. Even in France, the paragon of *laïcité*, the Christian heritage plays a much more prominent role than is generally admitted.<sup>515</sup> State and religion are far from separated.<sup>516</sup> The cultural, moral, political, and artistic vestiges of religion cannot be dismissed, and holding on to a Christian heritage is not inherently wrong in any way, as long as it does not

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510. For a recent example, see Jeffrey Gettleman, *After U.S. Evangelicals Visit, Uganda Considers Death for Gays*, N.Y. TIMES, Jan. 4, 2010, at A1.

511. Cf., e.g., Lewis, *supra* note 415, at 48 (“We should not exaggerate the dimensions of the problem. The Muslim world is far from unanimous in its rejection of the West...there still is an imposing Western presence—cultural, economic, diplomatic—in Muslim lands, some of which are Western allies.”).

512. It seems more appropriate to refer to a Christian *tradition* (i.e., the historic tradition linked to and based on the institutional organization of Christian denominations), rather than to the Christian faith. It is debatable whether tenets such as charity and forgiveness are more prevalent in Europe than elsewhere.

513. The invocation need not be limited to a Christian interpretation, yet the reference to historic tradition, and the formulation itself (“*Im Namen Gottes des Allmächtigen!*”) strongly suggest a Christian context. Bernhard Ehrenzeller, *Präambel, in DIE SCHWEIZERISCHE BUNDESVERFASSUNG: KOMMENTAR* para. 19 (Bernhard Ehrenzeller et al. eds., 2002). Invocations of God are common in both Muslim and Christian contexts; for a discussion of *invocations* in European constitutions and of the controversy over religious references in a European constitution, see KOLJA NAUMANN, *EINE RELIGIÖSE REFERENZ IN EINEM EUROPÄISCHEN VERFASSUNGSVERTRAG* (Thilo Maruhn & Christian Walter eds., 2008).

514. Jytte Klausen, *Europe’s Uneasy Marriage of Secularism and Christianity Since the 1960s and the Challenge of Religious Pluralism*, in RELIGION AND THE POLITICAL IMAGINATION (Ira Katznelson & Gareth Stedman-Jones eds., forthcoming 2010).

515. Gerhard Robbers, *Hundert Jahre Laizität: Ein Blick auf die religionsrechtliche Situation in Frankreich*, 13 INFORMATIONES THEOLOGIAE EUROPAE 67, 69–71 (2004).

516. A ballot initiative to separate church and state was soundly rejected in 1980. Bundesratsbeschluss über das Ergebnis der Volksabstimmung, BBL II 206 (1980).

entail the exclusion of citizens or residents who might prefer to invoke another God (or no God at all).

However, religious affiliations become problematic if they are not acknowledged for what they are. When the Italian government argued before the ECtHR that the crucifix “was both the symbol of Italian history and culture, and consequently of Italian identity, and the symbol of the principles of equality, liberty and tolerance, as well as of the State’s secularism,”<sup>517</sup> it aimed to transform one religious tradition into (unalterable) norm and normality. Proponents of the minaret ban maintain that churches, unlike minarets, belong in Switzerland because it was a Christian and not a Muslim country.<sup>518</sup> Thus, they aim to exclude Muslims and their faith on principle and in permanence.

The real threat to tolerance of other traditions may not lie in openly acknowledging a (somewhat faded) Christian heritage, but rather in the pretense that our tradition is *not* Christian—that European norms and values are entirely secularized, void of any religious bias, and hence universally applicable. Europeans would then be enforcing majoritarian beliefs and traditions under the guise of secularism and making “conformity to the religious beliefs of others the price of an equal place in the civil society.”<sup>519</sup>

## VII. CONCLUSION: BANNING MINARETS AS A PATHETIC FALLACY

*All violent feelings have the same effect. They produce in us a falseness in all our impressions of external things, which I would generally characterize as the “pathetic fallacy.”*

— John Ruskin, *Of the Pathetic Fallacy*<sup>520</sup>

In an essay on poetry, John Ruskin examined the difference between the “ordinary, proper, and true appearances of things to us; and the extraordinary, or false appearances, when we are under the influence of emotion, or contemplative fancy.”<sup>521</sup> The angry sea, cruel waves, remorseless floods, or ravenous billows—these descriptions do not reflect a sudden agency of the elements. Nevertheless, overcome by strong emotions, the poet irrationally attributes the characters of a living creature to inanimate objects. Such false appearances remain “entirely unconnected with any real power or character in the object”; it is the agitated observer who attributes his own heightened and

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517. *Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2009), available at <http://emiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

518. AB I 90 (2009).

519. *Oregon v. Smith*, 494 U.S. 872, 897 (1990) (Connor, J., concurring).

520. John Ruskin, *Of the Pathetic Fallacy*, in 3 *MODERN PAINTERS* ch.12, § 5 (1891).

521. *Id.* § 4.

irrational feelings to the indifferent matter, which “remains entirely unconnected with any real power.”<sup>522</sup>

The same is true of ominous and menacing minarets. Minarets are made of bricks and mortar, cement, or wood. They do not oppress women, nor do they undermine the rule of law in Switzerland. But a majority of Swiss voters, “borne away, or over-clouded, or over-dazzled by emotion,”<sup>523</sup> succumbed to the pathetic fallacy of ascribing a surprising number of these baleful powers to inanimate structures.

Emotions—fear, resentment, genuine concerns—played a prominent role during the campaign for a ban on minarets. There are serious challenges to the secular state and the rule of law which are, at present and from a Western perspective, associated with Islam in particular. But it would be yet another fallacy to believe that a liberal, secular society can be preserved through illiberal means.<sup>524</sup> It is legitimate and even necessary in a well-ordered democratic society to map out the consensus on the fundamental values to which all comprehensive doctrines (ideologies, religions, etc.) have to subscribe.<sup>525</sup> Ideally, this overlapping consensus would be “the result of a procedure of construction in which rational persons (or their representatives), subject to reasonable conditions, adopt the principles to regulate the basic structure of society.”<sup>526</sup> In reality, the process is messy, contentious, and constant. At no time, however, should we give in entirely to emotions, and a pluralistic society should not impose one comprehensive doctrine over others.

This Article argues that the minaret ban violates international norms protecting religious freedom and prohibiting discrimination, and that it cannot be justified as an effective means to combat extremism. To think that such a ban will ensure gender equality and respect for the rule of law is a pathetic fallacy of the more pathetic sort. The ban, however, did provide an excellent opportunity to clearly state who, or what, is to be considered Swiss. In a time when the world often seems too close for comfort, the minaret ban gave voters the illusion that full sovereignty resides with them and they are still able to keep the “other” out. They were free to reaffirm the insular status of their landlocked country, even if it violated international norms. In the eyes of the Swiss, subsequent criticism from abroad only confirmed that in other countries, decisions taken by the people were neither understood nor respected. Yet, the excessive concern with popular sovereignty, and the constant

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522. *Id.* § 5.

523. *Id.* § 8.

524. ERNST WOLFGANG BÖCKENFÖRDE, *STAAT, GESELLSCHAFT, FREIHEIT* 60 (1976).

525. JOHN RAWLS, *POLITICAL LIBERALISM*, at xv–xviii (2005).

526. *Id.* at xx.

invocation of its mythological roots, does not free one from the obligation to guarantee individual rights and their equal protection.

Swiss voters have ample reasons to be proud of their polity. In more than 150 years, they have generally exercised their far-reaching democratic rights very responsibly. Attempts in the 1930s to abuse ballot initiatives to undermine or even do away with the democratic constitutional order were overwhelmingly resisted.<sup>527</sup> Numerous populist and xenophobic initiatives have been rejected.<sup>528</sup> Overall, voters have displayed a healthy dose of skepticism towards single-issue initiatives launched by interest groups or factions,<sup>529</sup> but insistence on the infallibility of the popular sovereign on principle pretends that Swiss voters are uniquely immune to the temptations of the tyranny of the majority. This uncritical attitude to unrestrained popular sovereignty might be due to the absence of a “Weimar moment”; fortunately, Switzerland has never experienced the introduction of an undemocratic regime through democratic means. The potential danger of a plebiscitarian democracy, so prevalent in Germany, is therefore absent.

One need not conclude, like the one character in Schiller’s *Demetrius*, that wisdom has always been with the few and not the many and that the votes should be weighed rather than counted.<sup>530</sup> At the very least, however, decisions such as the minaret ban should challenge us to provide a convincing rationale for the mantra that more direct-democratic participation is always better.<sup>531</sup>

527. In 1935, Swiss adherents of fascist ideologies (the so-called “Frontists”) unsuccessfully launched a popular initiative to introduce an authoritarian and corporatist constitutional order. The initiative was rejected by 72.3 percent of voters. BBL II 446 (1935). A second Frontist initiative to prohibit free masonry was also rejected by 68.7 percent of voters. BBL III 498 (1937). It is noteworthy that fascist movements remained marginal in Switzerland despite the cultural and geographical proximity to Germany.

528 BBL 7603, 7614–15 (2008)

529. Of 171 ballot initiatives that were voted on, only 16 (or 9.36 percent) have been adopted; compare the listings at *Übersicht in Zahlen*, SCHWEIZERISCHE BUNDESKANZLEI, [http://www.admin.ch/ch/d/pore/vi/vis\\_2\\_2\\_5\\_9.html](http://www.admin.ch/ch/d/pore/vi/vis_2_2_5_9.html). In comparison, Californian voters, between 1912 and 2006, have adopted 104 (or 33 percent) out of 312 ballot initiatives. CTR. FOR GOV’T STUDIES, *DEMOCRACY BY INITIATIVE* 59 (2d ed. 2008). And of the 2,306 state-wide initiatives that took place in the United States between 1904 and 2008, 936 or 41 percent were approved. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 696 (2010).

530. Friedrich Schiller, *Demetrius*, in 10 DRAMATISCHER NACHLASS, act 1, sc. 1 at 533, (Herbert Kraft & Mirjam Springer eds., 2004).

531. The lack of democratic participation is one of the most persistent criticisms leveled at the European Union. It remains to be seen how effective the citizens’ initiative introduced by the Lisbon Treaty will prove. According to Article 11(4) of the Treaty, one million citizens “who are nationals of a significant number of Member States may take the initiative of inviting the European Commission . . . to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.” Treaty of Lisbon Amending the



First, the direct consultation of voters through ballot initiatives may be problematic from a procedural perspective: complex issues have to be simplified to the extent that they can be decided by a “yes” or a “no.” Additionally, voters do not have to take responsibility for implementing their decisions (although they do suffer its long-term effects). Ballot initiatives may grant a sense of empowerment and a temporary high, but they may be followed by a severe hangover and an inevitable desire for more (which is, presumably, why they have been called the “crack cocaine of democracy”).<sup>532</sup>

The second caveat against unadulterated praise of ballot initiatives carries more weight. Perhaps it is true that the well-informed voters would always make the best decisions for the public welfare, and that the bad decisions of the sovereign are solely due to misinformation and deception.<sup>533</sup> But how does one ensure the responsible use of democratic rights if misinformation and deception cannot be precluded? Even Rousseau, the champion of popular sovereignty, did not consider it limitless and believed that the sovereign should not impose restrictions on individuals that proved useless for the community at large.<sup>534</sup> With its strong democratic tradition and a relatively weak judiciary, Switzerland has avoided the counter-majoritarian difficulty,<sup>535</sup> but at significant cost. One of the pivotal tasks of the modern constitutional state is the protection of individual rights, even against the will of the majority.<sup>536</sup> The most significant of these rights have been enshrined in international treaties, but as the minaret vote has shown, voters can ignore these treaties as well as the fundamental values of their own constitution.

Non-lawyers might argue that it is arbitrary to analyze the minarets purely from a legal viewpoint. Why should the policies of a community be judged solely according to (international) legal rules? It is indeed not imperative that the rule of law be the criterion for both legitimacy and legality at once. Politics have, over time, judged their communities by other values and other criteria—including equal distribution of the means of production, absolute compliance with transcendent commands, or even racial or ethnic uniformity. However, apart from the fact that this Article discusses non-legal perspectives, the objection to “legal” judgment fails to acknowledge that, for better or worse, “the law” and our adherence to it are major benchmarks of how well a modern, liberal society organizes itself.

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Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C306).

532. *America's Future*, ECONOMIST, July 11, 2009.

533. ROUSSEAU, *supra* note 273, at 25.

534. *Id.* at 40–42.

535. Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (2d ed. 1986) (discussing the counter majoritarian difficulty generally).

536. *THE FEDERALIST* No. 51, at 317 (James Madison) (Garry Wills ed., 2003).

There are still other competing values. In the case of Switzerland, majoritarian democracy is attributed the same status as the rule of law. However, in my view the rule of law has one merit that majority decisions lack—it sets clear and unmovable limits. Dismissing the rule of law as the final arbiter over how we interact within our society carries the danger of open discrimination and suppression of minorities and tyranny of the majority. Switzerland has so far stayed clear of that slope—partly thanks to the virtues of its citizenry, partly due to good historical fortune.

Ballot initiatives such as the minaret ban push the point and demand clarity about fundamental societal values. If the aim is a culturally uniform society, then this aim should be openly acknowledged. Living up to the promise of equality and human rights is not mandatory. As pointed out by the supporters of the minaret ban, numerous countries do not subscribe to the protection of freedom of religion or other civil and political rights, but a country cannot enjoy the moral self-satisfaction that comes with institutionalized tolerance yet mete out its tolerance selectively. The question, then, is whether the Swiss want the provisions of human rights instruments and their bill of rights to continue to carry substantial meaning and binding force. If so, they will have to rebalance popular sovereignty and the rule of law and amend their Constitution accordingly. Otherwise, they might be bound to continue falling short not only of international standards, but of their own.