Switzerland

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I. Introduction

1.Contested Neutrality amid Russia' Military Attack on Ukraine

1.1. Secluded Neutrality as Part of Switzerland's National Identity

For much of the 20th and 21st centuries, Switzerland cultivated a self-perception of being a detached spectator of the events taking place on a distant world stage. *'Stillesitzen'* – 'sitting still' in German – amid the wars and upheavals beyond its borders has amounted to Switzerland's principle of conduct for centuries. Nothing illustrates this more emblematically than the Swiss federal government's official reaction – or the lack thereof – to the fall of the Berlin Wall. On 10 November 1989, *Lorenzo Schnyder von Wartensee*, a career diplomat and the official spokesperson of the Swiss Federal Department of Foreign Affairs (FDFA), was approached by journalists asking for a statement by his superior, *René Felber.* Mr. *Felber* was the member of the Federal Council, the executive branch of the federal government, heading the FDFA and as such responsible for Switzerland's foreign policy. Still, Mr. *Schnyder von Wartensee* declined the journalists' request, stating that it would be 'impossible for Federal Councilor *René Felber* to comment on each and every political event', as, after all, 'something important' would happen 'almost every day.'[1] This deliberate seclusion from world politics is deeply intertwined with the country's longstanding commitment to permanent and armed neutrality. Over the course of the 20th century, neutrality has evolved into 'a national myth of almost religious consecration'[2]. Between 2012 and 2022, 95 percent of the Swiss were, on average, in favor of maintaining neutrality.[3]

1.2. Instrumental Character Neutrality and its Gradual Erosion

Over the past three centuries, neutrality has played a crucial role for Switzerland as a small multilingual and multi-denominational republic surrounded by hegemonic neighbors routinely waging wars against each other. Neutrality has been instrumental in avoiding internal strife between the German, French, and Italian linguistic communities, in preserving Switzerland's independence amid the conflict between the neighboring great powers, in maintaining vital trade as a small and open economy without natural resources, in contributing to sustaining the balance of power in Europe, and in providing humanitarian aid and good offices (mediation, protecting power mandates, host state) to the international community.[4]

With the end of the Second World War, the value of these five functions has considerably eroded. The end of the Cold War, epitomized by the fall of the Berlin Wall, and European integration, bringing an end to Franco-German enmity (German: *'Erbfeinschaft'*), rendered both the integrating effect of neutrality in domestic politics and Switzerland's contribution to the balance of power in Europe almost obsolete. The proliferation of advanced long-range weapons systems has further reduced Switzerland's capacity to autonomously defend itself. To conduct an entirely independent trade policy, including maintaining the 'courant normal' with parties to an international armed con-

flict, is increasingly associated with often untenable diplomatic costs.

The invasion and occupation of parts of Ukrainian territory by the Russian Federation on 24 February 2022 delivered a further blow to the viability of neutrality. The Federal Council immediately condemned Russia's military attack as 'a serious violation of international law', and, on 28 February 2022, adopted most European Union (EU) sanctions against Russia and Belarus. The Federal Council, at the same time, stressed that Switzerland, in line with its commitment to permanent neutrality under international law, would continue to comprehensively respect all obligations of neutral powers (rf. II/1). It has since proved increasingly challenging for Switzerland not to be mistaken for a free rider but to credibly convey to its partners that it is, owing to its neutrality, uniquely well placed to make a distinctive contribution to peace and security in Europe.

II. Major Constitutional Developments

1. Neutrality under International Law

In the Treaty of Paris of 1815, Switzerland's perpetual neutrality was recognized under international law based on mutual declarations by Switzerland and the 'Great Powers' (Austria, France, Prussia, Russia, United Kingdom). The law of neutrality is primarily governed by the 1907 Hague Conventions V[5] and XIII[6] and international custom. On this basis, a neutral state is under an obligation to refrain from participating in any international armed conflict. It is barred from favoring either party of such conflict, whether with its own troops, by the supply of armaments, or by making its own territory or airspace available to either party. A neutral state must also refrain from entering into any obligation compromising its commitments in the event of an international armed conflict. Joining the 'North Atlantic Treaty Organization' (NATO), a military alliance based on the guarantee of mutual military assistance would therefore be irreconcilable with Switzerland's commitment to neutrality. Neutrality applies exclusively to international armed conflicts between states. It, therefore, does not apply to internal armed conflicts ('civil wars') or measures authorized by the United Nations Security Council under Chapter VII of the UN Charter for the maintenance or restoration of international peace and security, nor does it preclude a neutral State from defending itself against an armed attack by another state, either alone or in cooperation with third states.

2. Neutrality According to the Constitution: a 'Political Directive'

The Swiss Federal Constitution[7] mentions 'neutrality' only twice: It authorizes the Federal Assembly (parliament) and the Federal Council (federal executive branch), respectively, to take measures to safeguard Switzerland's 'external security, independence, and neutrality'[8]. In contrast, neither the article on the 'purpose' of the Swiss Federation nor the clause on Switzerland's foreign policy goals make mention of 'neutrality'.[9] This omission is deliberate. When drafting the first Federal Constitution of 1848, the Diet *('Tagsatzung')*, the congress of the envoys of the cantons, refrained from granting 'neutrality' constitutional status.[10] The majority argued that neutrality was 'currently' an appropriate 'means to an end' (*'Mittel zum Zwecke'*) to 'preserve Switzerland's independence' and should, therefore, remain a mere 'political directive' (*'politische Massregel'*).[11] For similar reasons, neither the Federal Constitution of 1874[12] nor the current Federal Constitution of 1999[13] accord constitutional protection to neutrality. The two constitutional provisions authorizing the legislative and the executive branch each to take measures to safeguard 'neutrality' are thus of a purely *procedural nature*: They grant both authorities the right to take measures to uphold Switzerland's neutrality without committing the country to remain permanently neutral in international armed conflicts.

3. Neutrality – Awaiting a Late Yet Painful Awakening?

The international law of neutrality has its origins in the age of imperialism, when wars of aggression were considered, to allude to *Carl von Clausewitz*'s definition of 'war', a legally sanctioned 'mere continuation of politics by other means'[14]. Consequently, to adhere to the fundamental principle of neutrality under international law – to impartially treat all belligerents in the same manner[15] – was not only legally permissible but, for the most part, also morally defensible. Owing to the United Nations Charter of 1945 prohibiting the use of force and establishing a system of collective security, this assessment no longer holds unreservedly true. Inaction or blockade of the Security Council can place a permanently neutral power in the dilemma of having to treat both belligerents in a war of aggression in the same way. Russia's military aggression in Ukraine made this abundantly clear. However, despite growing international pressure, neither the Federal Assembly nor the Federal Council has shown much inclination to come to a conclusion as to whether or not neutrality remains an appropriate concept for safeguarding Switzerland's national interests. This hesitant, sometimes wavering, approach carries the risk that the country will have to belatedly adjust its position due to untenable external pressure, as illustrated by Switzerland's unilateral abandonment of its banking secrecy law in 2014. This would attest to an observation by *Denis de Rougemont*: 'The Swiss gets up early but wakes up late.'[16]

4. Constitutional Amendments

In 2022, two proposed constitutional amendments were approved at the ballot box – one prohibiting 'any form of advertisement for tobacco products reaching children and young people'[17], another raising the rate of the value-added tax to fund old-age insurance.[18] The higher tax rate was tied to the increase of the retirement age for women from 64 to 65 by 2028, the latter having been approved in a separate referendum. Increased support to 'Frontex', the European Border and Coast Guard Agency, and an opt-out system in the realm of organ donation (i.e., organ donors are those who have not expressed their opposition to donating their organs) were approved in referendums on federal statutes.[19]

III. Constitutional Cases

1. 'Laïcité' – Constitutional Secularism in France and the Swiss Canton of Geneva

On 26 April 2018, Geneva's *'Grand Conseil'*, the Canton of Geneva's parliament, adopted the 'Act on *Laïcité* of the Canton' ('Geneva *Laïcité* Act').[20] On 10 February 2019, the Act was approved in a referendum. The Act commits members of the executive and judicial branches, both while performing official functions and interacting with the public, and members of parliament, when sitting in plenary sessions and during official representations, to 'refrain from indicating their religious affiliation verbally or by visible signs' (by, e.g., wearing a kippah, an Islamic headscarf, a Sikh turban, or a necklace with cross pendant). The Act, furthermore, holds that religious events must be held on private property. Permissions to use the public domain may only be granted 'exceptionally'.

On appeal by a Muslim association, the Geneva Constitutional Court *('Cour de Justice')* set aside the clause committing members of parliament to neutrality on religious matters but upheld the remainder of the 'Geneva *Laïcité* Act'. It was, therefore, on a further appeal for the Swiss Federal Supreme Court to decide on the constitutionality of the other clauses of the Act.

The Geneva Constitution characterizes the Canton of Geneva as being *'laïque'* (loosely translated as 'secular') and commits the latter to 'neutrality in religious matters'.[21] This constitutional obligation is seemingly reminiscent of the French Republic's concept of *'laïcité'* (adjective: *'laïque'*). The neologism, which doesn't lend itself to an accurate translation, refers to a distinctive form of constitutional, at times combative and anti-clerical secularism with traits of a civil religion stemming from a republican notion of civic equality, according to which rights and duties of citizens within the French Republic are determined irrespective of a person's adherence to a particular religious or ethnic group or his or her denominational, ethnic, or private identity.[22] In order to provide for civil equality, the citizen is thus facing 'the Republic' *('la République')* or 'the nation' (*'la nation'*) in the guise of a 'natural person', stripped of all individual or group-specific characteristics such as ethnicity, origin, religious affiliation, or gender identity. Therefore, France's constitutional concept of *'laïcité'* not only prohibits official recognition or support of any religious denominations but precludes religious exemption from duties ascribed in general applicable laws. It is, therefore, legally permissible to both bar students in public schools from wearing symbols 'ostentatiously' demonstrating religious affiliation[23] and to prohibit displaying the Christmas nativity scene within the confines of public buildings, seats of public authorities, or public services.[24]

2. Federalism and Freedom of Religion: Constitutional Architecture to Mitigate Confessional Strife

Firmly banishing religion to the private sphere on account of *'laïcité'* under the umbrella of an 'indivisible, secular, democratic, and social republic'[25] constitutes a distinctively French, and at times, a decidedly combative approach to overcoming religious tensions, particularly with the Roman Catholic Church. In Switzerland, to which Geneva acceded in 1814 after it had been annexed to France in 1798, the confessional strife between Catholics and Protestants formed the dominating cleavage in the political realm from the Protestant Reformation of the 16th century until the late 20th century.[26] In 1847, tensions between liberal-Protestant and conservative-Catholic cantons erupted in a brief civil war in which an alliance of conservative cantons suffered a resounding defeat.[27] The first Swiss Federal Constitution of 12 September 1848 converted the Swiss Confederacy into a federal state while seeking to accommodate the defeated Catholic cantons.[28] The ensuing constitutional architecture has remained in place ever since: freedom of creed and conscience as an individual constitutional right, adequate basic education, both free of charge and religiously neutral, as an enforceable social right, and the relationship between church and state as a matter for each of the 26 cantons to legislate upon (federalism).[29] In most cantons, at least the Reformed Protestant and Roman Catholic congregations still hold a distinctive status under public law, granting them the right to collect church taxes, often from individuals and corporations alike, through the state tax returns.[30] In contrast to this model of *parity* between the Protestant and the Roman Catholic Church, Geneva is one of only two cantons separating church and state.

3. Geneva Constitution: 'Laïcité' of Its Own Kind

Although the Geneva Constitution describes the Canton of Geneva as *'laïque'*, it also states that its coat of arms, which combines a black eagle with a 'golden key on a red background', is surmounted by 'a sun (...) bearing the trigram IHS in Greek letters', and defines the phrase '*post tenebras lux'* (Latin for 'light after darkness') as its official motto.[31] The golden key refers to the former bishopric of Geneva (ca. 400–1569), 'IHS', the most common Christogram in medieval Western Europe, denotes the first three letters of Jesus' name in Greek ('ΙΗΣΟΥΣ'), while '*post tenebras lux*', deriving from the Book of Job, had originally been the motto of Calvinism – the strand of Protestantism associated with Geneva's *Jean Calvin* (1509–64) – and was later adopted as a maxim of the entire Protestant movement.

The religiously saturated symbolism and the commitment to secularism, both enshrined in the same Geneva Constitution of 2012, suggest a different meaning of *'laïcité'* from the French concept. The political debate on secularism during the *'Belle Époque'* (1864–1914) in the Third French Republic (1870–1940), culminating in the 'Act on the separation between Church and State' of 1905, had an often combative undercurrent directed against ultramontane Catholicism.[32] In contrast, the *'Kulturkampf'* gradually ebbed and subsided in Switzerland after 1874.[33] The French controversy on *'laïcité'* with its anti-clerical overtones hence was, despite the proximity in terms of time and geography, 'strangely absent' in the political debates on the role of religion in the Canton of Geneva.[34] The reasons for Geneva to abandon its centuries-long tradition of the Calvinist-Protestant Church as the established church in favor of a separation between church and state in

a referendum held on 30 June 1907 were, therefore, quite different from the anti-clerical rationale dominating the debates in the Third French Republic around the same time. Not only were tensions within the Protestant 'Geneva National Church' mounting, but the municipalities around the city of Geneva, transferred from Sardinia-Piedmont and France to the new Canton of Geneva at the end of the Napoleonic Wars in 1815/6, were, unlike the overwhelming Protestant city, predominantly Roman Catholic. The separation of church and state was thus, in large parts, designed to pacify intra-confessional and inter-confessional strife alike – within the established Protestant Church on the one hand and between the urban and the rural parts of the canton on the other hand that is. Since 1907, religious communities in the Canton of Geneva are, thus, established as organizations under private law. Contrary to the French concept of *'laïcité'*, Geneva, however, did neither sever all ties to religious communities nor does it purport to be 'blind' to their existence. The Canton may, based on the 'Geneva *Laïcité* Act' itself, even grant administrative assistance to communities of faith by collecting 'voluntary religious contributions' from taxpayers on their behalf.[35]

Seen through this lens, the 'Geneva *Laïcité* Act', while preserving the distinctive notion of *'laïcité'* under the Geneva Constitution, drew it closer to the French concept, as it bears some of the latter's characteristics: It is not only skeptical if not outright hostile towards religion but seeks to banish visible expressions and activities of faith firmly to the private sphere.

4. Pitfalls of a Purely Textualist Approach to Constitutional Concepts in Comparative Law

The Federal Supreme Court, when assessing whether the 'Geneva *Laïcité* Act' was in line with the guarantee of freedom of creed and conscience according to the Federal Constitution,[36] glossed over such differences between the French and the Geneva Constitution. Relying exclusively on the text of the Geneva Constitution, the Court claimed that 'the "Geneva approach"' to freedom of religion was 'analogue' (i.e., 'similar' or 'analogous') 'to France' and insisted that Geneva 'attached great importance to the *laïcité* [secularity] of the Canton'. This, the Court stated, would guide its assessment of the 'Geneva *Laïcité* Act'.

Meanwhile, both the Canton's religiously charged symbols (coat of arms and motto) and the administrative assistance offered to communities of faith for the collection of 'voluntary religious contributions', as provided for in the 'Geneva *Laïcité* Act' itself, remained unmentioned in the ruling. Instead, the Court stressed the allegedly 'strict' *('stricte')* or 'very strict' *('très nette')* separation of church and state in the Canton of Geneva no less than five times in its decision. Against this backdrop, the Court argued that *'laïcité'* would, in the Canton of Geneva, constitute a paramount public interest. It was, according to the Court's judgment, therefore, of utmost importance to avoid giving the impression to the public that members of the judiciary or the executive were influenced by their religious beliefs in the performance of their official duties, even though, as the Court conceded, it was 'to some extent inevitable' that officials would base their decisions on 'their philosophical or religious world view', either consciously or 'without being aware of it'. The infringement on the freedom of creed and conscience caused by the prohibition of civil servants to wear any visible sign of their religious beliefs when carrying out their official duties, as provided by the 'Geneva *Laïcité* Act', was considered by the Court to be 'relatively weak' *('relativement faible')*, as the persons concerned were still able to wear their kippahs or crucifix necklaces either at work, when not in contact with the public, or during their leisure time.

For these reasons, the Federal Supreme Court found the provisions of the 'Geneva *Laïcité* Act' in question to be proportionate and, as a consequence, in line with the Federal Constitution, provided that the Geneva authorities refrained from applying them in an 'excessively rigid' manner.

5. Religion as 'Culture' and Courts' Vanishing Religious Literacy

It is not without glaring irony that the very judgement of the Federal Supreme Court, which insisted on the importance of a religiously neutral appearance of officials during public interaction, upheld the previous judgement of the appellate court – the Geneva *Court de Justice* – which, like all official documents of the Canton, bore the coat of arms of Geneva, i.e., both the Christogram 'IHS' and the motto '*post tenebras lux*'. From this point of view, the Court, instead of upholding strict religious neutrality, may have given its constitutional blessing to a peculiar form of secularism that is either blissfully ignorant of its religious roots and their enduring symbols or perceives them as nothing more than 'culture' – historical traditions that have lost their religious significance. The premise that religious precepts and symbols can indeed be stripped of their religious core and transformed into mere ethical 'values' or signs of 'culture' and 'tradition' is itself highly questionable. However, it is one thing to accept a religious symbol such as a crucifix as 'a tradition' in line with the European Court of Human Rights' *Lautsi*-decision[37], but quite another to even fail to discern and legally assess the religious character of official symbols such as the coat of arms of a public body, while at the same time insisting on the importance of the religiously neutral 'appearance' of state officials. Moreover, the Court's insistence on the 'relatively weak' infringement of the prohibition on officials wearing visible signs of their faith, due to its limited duration, overlooks the nature of most religions as comprehensive systems of values, beliefs, and obligations that do not allow for selective exemptions. Wearing a kippah, hijab, or monk's robe is, therefore, often part of a person's identity and not merely a leisure activity.

6. Conclusion: Requisite for Judges in a Secular Democracy to be Literate in 'Religious Grammar'

The case may thus hold two important lessons within the Swiss constitutional realm and beyond. First, assessing and comparing constitutional concepts such as *'laïcité'* on a purely *textual basis* is prone to misleading conclusions. Second, in order to properly adjudicate cases involving freedom of creed and conscience, it is incumbent upon judges to master the 'grammar of religion'. In other

words, in order to assess acts, expressions, and symbols under constitutional law, judges must be adept at discerning their possible religious connotations. The Federal Supreme Court's decision suggests that such religious literacy is waning in increasingly secularized societies, where the formerly dominant religion or denomination is perceived as a mere 'tradition' or 'culture'.

IV. Looking Ahead

Elections for all 246 seats in the Federal Assembly with its two chambers will be held on 22 October 2023. The Federal Assembly will elect the seven members of the Federal Council, the federal executive, at the first sitting of the new parliament in December 2023.

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in December. Apart from this, during the same year, the SCC provided significant decisions on its authority to review the constitutional acts, the rules of fiscal stability, and the questions posed in the referendum.

Slovenia

After a 17-year period of parallel legal regimes for heterosexual and same-sex couples, the Constitutional Court found that such an approach violates the constitutional guarantee of equality. Consequently, the Court declared the provisions of the Family Code reserving marriage and joint adoption to heterosexual couples unconstitutional.

Spain

In Spain, ruling 66/2022 supported a decision made by a public health service that denied a woman's request to give birth at home as the birth needed to be induced. The Constitutional Court found that protecting the rights of the unborn took precedence over the protection of the mother's rights.

Sweden

In 2022, parliamentary elections took place in Sweden, leading toleading to a change in the of national government. ThisThe government was formed on the basis ofbased on a political agreement between four parties. However, only three of the parties are members of the government, whilewith the nationalist Sweden Democrats party staying remains formally outside of the government.

Switzerland

Neutrality – a political strategy, not a constitutional requirement – has been vital for Switzerland but put into question amid Russia's military aggression in Ukraine. A Federal Supreme Court decision highlights the challenges of comparative methods and the need for judges to master the 'grammar of religion' in constitutional review.

Taiwan

2022 marks Taiwan's three-fold constitutional moment. First, the constitutional amendment's wagon resumed after a long hiatus. Second, the Constitutional Court Procedure Act's implementation takes constitutional review into a new era. Third, a significant shift in Taiwan's geopolitics influenced its meta-constitution due to a visit from Speaker Nancy Pelosi to Taiwan.

Thailand

The poorly designed 2017 Constitution, combined with Prayuth Chan-ocha's inadequate leadership, resulted in a frequent collapse of the House because of internal conflicts within the coalition. While a good political tactic, this undermines the House's credibility, a long-term threat to Thailand's already fragile parliamentary democracy.

Tunisia

In 2022, President Kais Saied continued his dismantling of constitutional institutions and initiated a constitution-making process, which that resulted in the adoption of the Constitution of the Third Tunisian Republic.

Turkey

In 2022, Turkey experienced further deterioration of the rule of law in Turkey. The Erdoğan government kept disregarding the European Court of Human Rights' decisions on the immediate release of Demirtaş and Kavala while packing the Constitutional Court with its factious men before the 2023 elections.

Uganda

In 2022, the most significant constitutional development was the highly publicized and controversial mistreatment of Honorable Dr. Esther Kitimbo-Kisaakye, Justice of the Supreme Court, by Uganda's Chief Justice Honorable Alfonse Chigamoy Owiny-Dollo and the Judicial Service Commission–the body charged with recruitment and discipline of judicial officers.

Ukraine

In Ukraine, 2022 will be remembered as the year of national martial law following unprovoked Russian aggression against Ukraine since February 24th. This conflict significantly impacted all public administration and constitutional policy-making areas in the country during the reporting period.

United Kingdom

In 2022, the United Kingdom had two monarchs, Elizabeth II and Charles III, and three Prime Ministers. Additionally, former Prime Minister Boris Johnson has been fined by the police for breaching the COVID-19 legislation that he introduced. Due to this violation, Johnson is under investigation by the Committee of Privileges.

Uruguay

The most important constitutional development was the rejection, on March 27th, of the referendum appeal against the Law of Urgent Consideration, popularly known by the acronym LUC. Consequently, this led to the popular confirmation of the main project promoted by the Government and the Republican Coalition, Act 19889 2020.

Venezuela

In 2022, Venezuela's deep political crisis continued to intensify. The country should still be considered an authoritarian regime with due to the absence of no separation of powers and the rule of law. The human rights gross violations had significant attention from human rights international and regional human rights bodies, with particular relevance to the International Criminal Court investigation.

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2022 Global Review of Constitutional Law

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Editors

UNIVERSITÀ
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DI TRIESTE

Supported by the Constitutional Studies Program at the University of Texas at Austin

Under the Patronage of the Department of Legal, Language, Interpreting and Translation Studies

ISBN: 978-1-7374527-5-1
ISBN: 978-88-5511-460-8