Minorities’ self-determination in contemporary Switzerland – an assessment

Switzerland as a federal state is often cited as a political entity where minorities are well accommodated. While this might be true for the past the following paper is asking how religious and linguistic minorities are accommodated in contemporary Switzerland. Do minorities have the possibility of self-determination on the basis of religious and linguistic diversity? In following liberal political theory, Lijphart (1995) and Kymlicka (2007) the papers claims that first, self-determination of linguistic and religious minorities in Switzerland is only possible for those minorities, which were part of the conflict driven foundation of the federal state due to the religiously motivated civil war (Sonderbundskrieg) in 1848. And second, that the freedom of minorities’ self-determination is only legitimate within the liberal constitutional framework of the state based on individual human rights. In analysing the Swiss case the paper first supports the claim that new linguistic minorities are pre-determined, whereas the statement of a pre-determination of religious minorities can’t be confirmed. However, it turns out to be buttressed that self-rule of religious minorities is only regarded as legitimate in the framework of liberal constitution in respect of equal individual human rights. As a consequence religious minorities’ self-rule is attained through a joint effect of basic individual rights, public and civil law. Federalism in the Swiss case helps as a structural variable to promote self-determination of “new” religious minorities, whereas it pre-determines the self-rule of new linguistic minorities.

Introduction

What we see today is that states around the globe are confronted with political problems rooted in conflicting national, religious, ethnic or linguistic claims of minorities sometimes emerging from past historical experiences sometimes from actual political circumstances. In the efforts to (re-) conciliate these tensions or violent conflicts federalism could and sometimes did offer possibilities to resolve these problems. This paper will not focus on political hot spots as for instance Iraq (nation-building on the basis of a plural religious and ethnic society), Kosovo or South Ossetia (secession) but on Switzerland.

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1 For my definition of federalism I rely on the one by ELAZAR, p. 12, which is quite open but will fit for the purpose of this article: federalism “is self-rule plus shared rule [original emphasis]. Federalism thus defined involves some kind of contractual linkage of a presumably permanent character that (1) provides for power-sharing, (2) cuts around the issue of sovereignty, and (3) supplements but does not seek to replace or diminish prior organic ties where they exist.”
Switzerland, as a federal state, is by some said to do well in accommodating its minorities. Because of its history of religious and linguistic cleavages I want to have a closer look at linguistic and religious minorities or better said I want to know how these minority communities fit into the institutional framework given by the federal state and how they are “accommodated” in a peaceful way. However, it is worth to remember that the absent of conflict is – also in the Swiss case – due to the peaceful interactions of individuals and communities rather than because of well designed institutions itself or to cite Elazar: “The essence of federalism is not to be found in a particular set of institutions but in the institutionalisation of particular relationships among the participants in political life.” By my common sense I would say both elements are true and important and that federalism – the institutionalised arrangements of institutionalised relationships among participants in (political) life - seeks to bridge or politically integrate minorities’ aspirations of self-rule within common institutions of a state by shared rule.

In questions of the accommodation of minorities one has to keep in mind that the acceptance of diversity of individuals or communities in reference to culture, tradition or language is in tension with the acceptance of the equality of all people on the basis of at least one equal right – the right of freedom by birth to rule over one self – qua human being. Tocqueville has written about the inherent problem of democracies that majorities can, if there weren’t any security valves, tyrannise its minorities. However, the aim of this paper is not to analyse the conceptual relationship between nation-state and diversity or to illuminate theoretically the question of the legitimation of state power. The aim of this paper is as written above to assess how religious and linguistic minorities are accommodated in contemporary Switzerland to prevent such a tyranny and furthermore enable minorities’ self-determination.

In doing so the papers structures as follows: In a first step I deduce my hypothesis from the relevant political theory. In the next section I then look at the historical context of the Swiss constitution making in the aftermath of the civil war in 1848 for it served as the foundation of

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2 See for instance LINDER, p. 5; AREFAINE, pp. 159.
3 As a “minority” I refer to a numerous minor group within a given territory as for instance the territory of Switzerland or one single Swiss canton: e.g. Israelites in the canton of Basle-town or French speaking people in reference to the whole population of Switzerland.
4 ELAZAR, p. 12.
5 See also FLEINER/KÄLIN/LINDER/SAUNDERS, p. 40.
6 See e.g. Rousseau, p. 61, 66.
7 TOCQUEVILLE; see also SARTORI, p. 137-182, in particular p. 139-143.
8 See for instance in general HOBBES, LOCKE, ROUSSEAU or HABERMAS, 277-308, in reference to Switzerland BASTA, p. 3 – 40; Under the term “power” I subsume in this context terms/ ideas like sovereignty of the state and the individual. I do not use the term “power” in a sociologic-political way as for instance DAHL, 37-58, WEBER, p. 28 or ARENDT, 36-58 did.
minority protection in Switzerland. In a third step I will briefly focus on the mechanisms of minority protection in the Swiss federal constitution of 1999 and then turn to the analysis of the possibility of linguistic and religious minorities’ self-determination within the cantons. In the last section I draw a conclusion.

Theoretical Framework

For a coherent look at the theoretical framework it is unavoidable to take a short glimpse at the (classical) political theory of liberalism. At the core of liberal (political) theory stands the idea that free, rational, self-interested people, only bound by the laws of nature, agree to conclude a contract to overcome a hostile environment with the permanent threat of a possible war all against all. With the treaty each and everyone assigns his absolute liberty (individual sovereignty) of whatever he likes to do to an institution (in Hobbes contractual theory to a very powerful “human God” on earth, the leviathan, in Rawls\textsuperscript{10} theory of justice to institutions created by the people through a process of deliberation under a veil of ignorance). In classical liberal theory this assignment and the contractual unanimity is the beginning of a peaceful society, a society in which every individual due to his assignment of sovereignty to a common institution bears equal rights of freedom, protection or possession. Following the evolution of this argumentation it is only under the rule of law based on equal \textit{individual} rights that the transformation of a rude conglomerate of human beings into a society of citizens can take place. The theoretical framework created by the early thinkers like Hobbes and Locke can be seen as the foundation of constitutional democracies. Contemporary constitutions mirror this theoretical idea of a pact of individuals to overcome a hostile environment in guaranteeing fundamental human rights.

Following back the string of argumentation it can be seen that liberty stands at the origin of reasoning and liberal thinkers’ concerns were above all about turning liberty into real freedom. This was only possible due to the status of bearers of equal rights and equality in front of the highest arbitrary power of a created treaty community. In this sense the status of people was designed to be a legal-political equality with the aim to guarantee a maximum of individual freedom within the legal framework of the society. In this thinking the role of the state was meant to be very limited. Social equality was not part of this logic and entered the contractual liberal theory not until the work of John Rawls in the 1970s.

\textsuperscript{9} With classical liberal theory I refer especially to the contractual theory of Hobbes and Locke.

\textsuperscript{10} Rawls
To return to the point, classical liberalism with its conception of equal, autonomous i.e. socially unbound and in the here and now anchored rational and self-interested human beings, offered ideas of a state order, which are based on the equality of all people before the law and which still serve – in deviations - as a foundation of contemporary reflexion and argumentation of normative as well as practical reasoning\textsuperscript{11}. In this sense (the political theory of) liberalism\textsuperscript{12} is the crucial foundation of western democracies\textsuperscript{13}. However, liberalism with its idea of a maximum of individual freedom is in tension with the democratic principle. The equality of liberalism, broadly spoken, ends where the strengthening and protection of individual freedom is achieved\textsuperscript{14}. Equality means in particular the equal right of personal freedom, which can imply a big difference of people’s wealth, education, health, chances etc. By contrast, the idea of democracy is the search of equality in political and social life. Inequality and differences are seen as somehow unnatural and the principle of equality is seen as a guideline for the same treatment of people in a specific sphere of life as for instance the right of education for everyone. As a result the principle of democracy (equality) is looking for some kind of uniformity through social integration, cohesion and redistribution, whereas liberalism seeks to protect personal freedom and pluralism\textsuperscript{15}. Consequently democracy develops more a horizontal and liberalism more a vertical (political) line of impact. Furthermore, liberalism with its aim to protect individual freedom can be seen as an endeavour to limit the power of the state whereas democracy stands for the idea of the sovereignty of the people and the exclusive decisional power of the majority\textsuperscript{16}. In this sense theories of democracy are more concerned with exercising (delegated) public power than with constraining it or one could also say democracy is more concerned with the content of politics than with its form\textsuperscript{17}. However, liberal and democratic theories fit to some extend together because the very liberal claim of a “constitutional pact” and of equal political and legal rights to defend individuals’ freedom serves as a starting point for further democratic demands for (social) equality based on majority rule.

\textsuperscript{11} See also KOHLER, p. 247 – 253.
\textsuperscript{12} One has to note that liberal thinkers such as HOBBES or LOCKE do not talk of liberalism in their theories. The term liberalism was invented long after their theoretical reflexions. One also has to pay attention to distinguish analytically political from economic liberalism, which both stand for a different kind – political vs. economic system - of liberalism (see SARTORI, p. 359 - 366).
\textsuperscript{13} I am well aware that the term “western democracies” contains a eurocentric view (see for a critical discussion on eurocentrism CONRAD/ RANDERIA) on democracies world wide. Nevertheless I use the expression here for countries like the member states of the European Union, Switzerland, Australia, Canada, the USA, Japan.
\textsuperscript{14} See SARTORI, p. 334, 369-371.
\textsuperscript{15} See ibidem, p. 374.
\textsuperscript{16} Ibidem, p. 376.
\textsuperscript{17} Ibidem, p. 376.
Tocqueville has very well described the possible threat that emanates from the democratic principle of majority rule\(^\text{18}\). In order to prevent a tyranny of the majority by the people he regarded as an effective barrier on the one hand the legal system especially the jurisprudence of civil law and the institution of trials by jury. The author assumed that common people acting in a jury were educated in their civic virtues and that this would help to reduce the possibility of a tyranny of majority. On the other hand he thought a decentralised public administration and autonomous local governments effective hurdles hard to overcome by (a nation wide) system of majority rule, leaving enough room of manoeuvre in implementing the majorities will\(^\text{19}\). In its essence the democratic principle leads to the question of the protection of minorities and in terms of the liberal conception of western democracies this is a problem to be solved in the design of the constitution. To assure the protection of minorities we are looking for a limited principle of democracy and majority rule respectively\(^\text{20}\).

Minority protection can be achieved on constitutional level by creating institutions of shared power, which allow for minorities self-determination in the lap of a common state. Lijphart distinguishes four basic principles that should provide efficient protection for sub-societies or segments\(^\text{21}\) as he calls minorities within a state: grand coalition and segmental autonomy, proportionality and minority veto\(^\text{22}\). A grand coalition is an executive power were the political leaders of all significant segments participate as for instance the federal or the cantonal council in the Swiss federation\(^\text{23}\). Autonomy of the segment means subsidiarity of political responsibility and power: as much decision-making power as possible should be left to the separate segments of society and only those issues of common interest or which exceed the capacities of the sub-society should be handed over for decision-making to the joint segments. Federalism can be seen as a special form of segmental autonomy, which is in particular suitable for plural societies with geographically concentrated segments\(^\text{24}\). As a principle of political representation proportionality is especially important to guarantee minorities a fair representation in policy and decision-making while the minority veto is the ultimate weapon segments need to protect their vital interests and prevent the system of majority rule to turn into a tyranny as

\(^{18}\) Tocqueville, p. 139 – 181.

\(^{19}\) Ibidem, pp. 160.

\(^{20}\) See also Sartori, p. 139 – 143.

\(^{21}\) Sub-societies are according to Lijphart segments within the society of a state, sharply divided along religious, ideological, linguistic, cultural, ethnic or racial lines, p. 276. Segments in his view don not necessarily have to be minorities. That segments can and often are minorities follows the logic that even if a sub-society is the biggest segment in a society it often forms a minority in reference to the whole population of a country.

\(^{22}\) Lijphart, pp. 277.

\(^{23}\) The federal council and the cantonal council consist of seven (at cantonal level sometimes five) elected representatives of the dominant political parties. Federal councillors are elected by the federal parliament, cantonal councillors by the cantonal electorate.

\(^{24}\) Lijphart, p. 278.
described by Tocqueville. Lijphart’s concept of self-determination refers to a process or method that gives minorities certain rights within the state which allow them to manifest themselves instead of deciding on their segmental identity in advance of constitution making\textsuperscript{25}. Contrary his notion of pre-determination means that segments that are to share power are identified before constitutional engineering and that these sub-societies are granted particular rights in power-sharing according his four basic principles\textsuperscript{26}. Lijphart states that “both in contemporary and historical cases of consociationalism\textsuperscript{27}, pre-determination is more common [than self-determination] (…)\textsuperscript{28} Following Lijphart’s concepts and statements I content that linguistic and religious minority protection in modern Swiss federation of 1848 followed the idea of pre-determination. As a result there is in contemporary Switzerland no room for self-determination for other or “new” linguistic and religious segments.

Due to this institutional stability it makes sense to refer in the thesis above to the 1848 constitution as a starting point for possible minorities’ pre-determination\textsuperscript{29}. Because cantons – as such manifestations of minorities’ protection - were left considerable autonomy to rule in linguistic and religious affairs it might nevertheless be possible that other minorities were granted special rights within the constitutional and legal framework of a canton.

The question of whether or not granting special rights of self-rule to minorities, which regard themselves as for instance a spiritual, linguistic or ethnic community within the wider (sub-) society to enable a stable societal structure, has caused remarkable normative debate between scholars of different strands of political theory. To keep it very short, one could say that communitarian theorists criticise the anthropological concept of liberalism – rational, socially unbound and self-interested men - as being too simplistic to explain the emergence of a peaceful and good society\textsuperscript{30}. Contrary,

“Communitarians (…) view people as “embedded” in particular social roles and relationships; instead, they inherit a way of life that defines their good for them. Rather than viewing group practices as the product of individual choices, communitarians view

\textsuperscript{25} Ibidem, p. 275.
\textsuperscript{26} Ibidem, p. 276.
\textsuperscript{27} LIJPHART uses the term consociationalism as a synonym for power-sharing, p. 276.
\textsuperscript{28} Ibidem, p. 276.
\textsuperscript{29} Although in 1874 and 1999 major revisions of the Swiss constitutions took place the institutions of federalism stayed relatively stable. So was for instance in the 1999 total revision – though discussed – the composition of the council of the states not changed. Neither was for example the rule of double majority - the stronghold of minority veto in federal referendums for constitutional amendments - which gives (territorial based) minorities strong veto-power. Note that I do not talk here about the instruments of semi-directive democracy. With the introduction of the optional referendum in 1874 and the popular initiative for partial revision of the constitution the democratic system of representation altered significantly, LINDER (Direkte Demokratie), p. 111.
\textsuperscript{30} See for an overview of the debate ARENHÖVEL, p. 235-266.
individuals as the product of social practices. Moreover, they often deny that the inter-
est of communities can be reduced to the interests of their individual members. Privi-
leging individual autonomy is therefore seen as destructive of communities [original
emphas][31]

Whereas liberal scholars argue on the heritage of contractual normative theory that the indi-
vidual is morally prior to the community and that the community only matters because it con-
tributes to the well-being of individuals who compose it; social practises are in the liberal
view only relevant as long as individuals regard them as relevant and the community has
therefore no independent interest in preserving those practises.\[32\] To bridge the normative
clash between the two strands Kymlicka suggests distinguishing between good and bad mi-
nority rights: good minority rights can be seen as supplementing individual rights and bad
ones as restricting individual rights.\[33\]

To practically reconcile minorities’ claims for special rights due to social (for example religious) practises Kymlicka offers a dual concept of “internal restrictions” and “external protections”. Internal restrictions involve the right of a group against its own members, designed to protect the community from being destabilised by internal dissent, e.g. the decision of individual members not to follow traditional practices or cus-
toms.\[34\] External protection gives a minor community the right against the larger society, de-
signed to protect it from external pressures such as economic or political decisions of the lar-
ger society.\[35\]

The dual concept as such is not new as it can be essentially found in the principle of federal-
ism, which grants its territorially based political entities and sub-societies respectively some-
times far reaching internal autonomy for self-rule, while it ensures the sub-society external
protection within the federation through institutions of shared-rule. The originality of the con-
cept lies much more in its practical flexibility, offering a – normative - concept for minorities
self-determination in Lijphart’s sense. Given Kymlicka’s earlier notion about good and bad
minority rights he claims that special “group” rights are legitimate as long as they a) protect
the freedom of individuals within the group founded on basic civil and political rights and b)
promote relations of equality (non-dominance) between different minorities.\[36\]

Following Kymlicka’s argumentation I claim in addition to the first hypothesis that if linguistic and reli-

\[31\] KYM LICKA, p. 27.
\[32\] Ibidem, p. 27.
\[33\] Ibidem, p. 30.
\[34\] Ibidem, p. 31.
\[35\] Ibidem, p. 31.
\[36\] KYM LICKA, p. 32.
igious minorities are granted self-determination, then only within the legal framework of a cantonal constitution respecting basic individual civil and political rights.

Historical context – origin of self- and shared-rule in modern Switzerland

Contemporary Switzerland is a federal state and because of cross-cutting cleavages – especially language and religion – a country of minorities37. Contrary to its neighbouring countries France or Germany the Swiss polity has never since the foundation of the new federal state in 1848 stood under a political vision of a homogenous nation-state based on one ethnic group, culture or language, but followed from its beginning the idea of a multicultural state38. However, the birth of this multicultural federal state wasn’t as smooth as it might occur but was the result of hard political disputes and conflict ridden relations between the religious communities of the Catholics and the Protestants in the Swiss confederation re-established by the Vienna Congress in 1815 after Napoleons defeat. In the aftermath of “Vienna” the Catholics, rooted in hierarchical and confederal beliefs and living mainly in rural areas, were facing rising pressure from the Protestants, anchored in urban and industrialized cantons promoting radical-liberal ideas such as people’s sovereignty, public control of all authorities and a centralised state39. When tensions between the two religious groups grew more intensive Catholic cantons, which formed the minor group, signed a treaty to protect their common interests against the Protestants. This separate treaty, which was regarded by the protestant cantons as secession from the existing confederation, led to a civil war in 1847 called “Sonderbundskrieg”, which resulted in a disastrous defeat of the Catholic army, even if casualties weren’t high. Consequently the victory enabled the liberal-radical forces to embed their beliefs in a new written constitution fundamentally different from the prevailing one. It included in particular a) the transition from a confederal state order with different sovereign states (cantons) to a Swiss federation with the establishment of a central government and the assignment of certain cantonal powers, b) constitutional based power-sharing arrangements between the cantons and the communes on the one hand and the central government on the other hand and c) the establishment of a national democracy with executive and legislative powers, democratic institutions for the member states, including political and basic rights for individ-

37 Burgess, p. 118.
38 Vatter, pp. 80.
39 Linder, p. 6.
uals, the division of power and free elections for the parliament with the people as supreme authority when it came to an altering of the constitution. Although the new federal constitution was clearly the product of the liberal political forces, the covenant took into account some of the needs of the conservative societal formations: so would cantons for instance keep large autonomy guaranteeing religious and cultural freedom. This meant amongst others that none of the major language groups could claim exclusiveness and consequently that the new federation was established on a trilingual basis, assuring French, German and Italian language communities the equal right of existence. However, it has to be said that language conflicts at this time, the time of the formation of modern Switzerland, played almost no role at all. Cleavages were fought along the religious line uniting different language groups from different cantons instead of dividing them. Nevertheless, in recognising the importance of self-rule in reference of cultural aspects cantons were given linguistic sovereignty and the power to legislate over educational matters. For the Catholics more important than language freedom was the cantonal power to self-rule in religious affairs, which implied a far-reaching decentralisation of political authority. Such kind of decentralisation was a thorn in the flesh of the liberal Protestants who originally wanted to establish a strongly centralised government. However, (religious and cultural) peace and (political) stability has its price or how Kriesi puts it: “the price that the victors paid for the acceptance of the new state by the adversaries was (...) that the new centre was to be weak: the essence of political power rested with the cantonal authorities, which allowed the Catholic losers a large measure of control over their own territories.”

Even if the central government was weaker than sought of the radical-liberals it was much stronger than the conservatives wanted it to be. In their fears to be overruled from the liberals by constraining federal laws they insisted in the deliberations of the draft for the new constitution to engineer a second federal legislative chamber and consequently to share federal power. The establishment of a second chamber was the most disputed topic in the drafting process having on the one side the liberal forces assuming that a second chamber would slow down the whole policy process and therefore efficiency, having on the other side the conservative

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40 Ibidem, p. 7
41 BÄCHTIGER/STEINER, p. 31.
43 BÄCHTIGER/STEINER, p. 32.
44 According to art. 3 of the 1848 Swiss constitution the cantons were sovereign in all matters where no explicit power was transferred to the federation, which means that the residual powers were laid in the lap of the cantons. Because art. 22 of the constitution from 1848 stipulated only that the federation had the right to establish a university and an institute of technology, cantons hold full authority to organise their educational system freely.
45 KRIESI, p. 15.
46 BÄCHTIGER/STEINER, p. 33.
minority formations underlining the need for effective protection of their interest on the federal level of legislation. Although the political struggle led to the creation of a second chamber following the paragon of the senate of the USA with equal representation of all cantons the delegates were to legislate without instruction by the cantonal governments. This meant a considerable loss of influence of cantonal authority in the process of federal legislation. However, this reduced sphere of influence was counterbalanced in a crucial point: given the residual powers to legislate to the cantons any change for further policy authority for the federal government needed an explicit enumeration in the federal constitution. Such a constitutional alteration was only possible with the approval of a double majority by the Swiss people and the cantons. As a result, the double majority mechanism gave substantial veto-power to the conservative, i.e. rural and Catholic, cantons to protect their respective people from being dominated.

What can be stated so far in reference to the first hypothesis is that minority protection in the constitutional engineering in Switzerland followed the logic of religious pre-determination. The primary goal of the federal architecture was to re-conciliate the adversaries of the civil war - i.e. Protestants and Catholics – and consequently first to leave enough autonomy to the political sub-entities based on relatively homogenous protestant or catholic sub-societies; and second to give these sub-societies the possibility of participation in decision-making at the federal level. The fact that the federal council – a grand coalition - was composed of only radical-liberal Protestants until 1891 and the parliamentarians in the national council were elected by majority rule by the people of the respective cantons until 1919 demonstrates that participation in power-sharing was strongly influenced by the struggle for self-rule. Although not represented in the federal executive until 1891 with an “own” councillor Catholics had as a consequence of equal cantonal representation in the council of the states and the equality of both legislative chambers considerable participation in legislative power. Furthermore as stated already above, the double majority rule for constitutional amendments gave the catholic minority strong potential and also real veto-power. However, it is important to note that because of the majority rule in elections for both the council of states and the national council as

47 HÄFELIN/HALLER, p. 417.
48 All (19) cantons were represented by two deputies in the council of states whereas the half-cantons (6) were represented each with only one deputy: art. 69 of the 1848 Swiss constitution.
49 See art. 79 of the 1848 Swiss constitution.
50 See art. 114 of the 1848 Swiss constitution.
51 Note that other mechanisms of power-sharing were established only after the covenant in 1848: until 1891 for instance the seven members counting federal council consisted of only radical-liberal party members (http://www.admin.ch/ch/d/cf/br/index2.html) and proportional representation was introduced not until 1919 against the background of social riots: WERNLI, p.511.
well as the religious pre-dominance of either the Protestants or Catholics in “their” cantons. Other religious minorities such as for instance Jews were without a chance to participate in federal power-sharing. Additionally, due to the fact that linguistic cleavages played almost no role in the civil war and the fact that linguistic communities were sometimes not congruent with the cantonal territory there were much weaker formal institutions created at the federal level to ensure linguistic minority protection. The federal constitution of 1848 only stated in article 109 the equal status of the three main languages of Switzerland, German, French and Italian, as national languages. This prevented a formal dominance of one language over the others at federal level but didn’t necessarily imply an “active” protection of linguistic minorities. Rumantsch, although a native language of Switzerland in the canton of Graubünden, was not declared a national language. As a result of the constitutional arrangements the protection of linguistic minorities was primarily placed in the autonomy and realms of the cantons.

One thing should be added here to the possibility of self-rule in religious affairs. Due to rising religious tensions between the Catholics and the Protestants in the 1870ties, which became known as the “Kulturkampf”, a constitutional revision was drafted by the federal parliament and accepted by cantons and the people in 1874. The revision aimed at a fully secularised state and led to the withdrawal of the church from public spheres as for instance from education. Article 27 para. 2 of the 1874 constitution stated that cantons – note not the federation - were to offer primary education and that the authority over the public schools lay within the hands of the state, which means the cantons. Para. 3 of the same article underlined that the public schools were open to pupils of any religious affiliation and article 49 claimed religious freedom and freedom of consciousness as a basic individual right. This revision is remarkable insofar as it restricts the cantons’ autonomy – or to say it the other way round, the (group) right of an minority to self rule - in religious affairs to promote individual freedom of religion and consciousness. I will return to this point later on in my argumentation.

The federal constitution of Switzerland of 1999

It was for the first time after the revision of 1874 that the federal legislative elaborated a total revision of the Swiss constitution. The new constitution was accepted by the Swiss electorate and the cantons on April 18, 1999. Although called a total revision it can be seen as an “up-

52 See LINDER, p. 19.
53 See for the result of the referendum http://www.admin.ch/ch/d/pore/va/18740419/index.html
54 LINDER, p. 19.
55 Online http://www.admin.ch/ch/d/pore/va/19990418/index.html
date” of the prevailing one as it renounced substantial alterations and aimed foremost for a clear systematic order and the incorporation of norms so far unwritten or only covered by laws. Core of the federal order and as such of self-rule and shared rule in Lijphart’s sense is thus still the autonomy and equality of the cantons as well as their participation in the decision-making of the federation. In assessing the protection of minorities the vertical power sharing mechanisms are of importance therefore I will concentrate on these and leave aside the horizontal instruments of cooperation between the federal sub-units.

If we look at the federal institutions based on the constitution that grant territorially based minority protection through power-sharing we can enumerate the council of the states, the double majority rule, the cantonal referendum, the cantonal initiative and the pre-parliamentary decision-making process. Furthermore art. 46. para. cst. states that the federation ensures the cantons as much room as possible for manoeuvre in implementing federal laws. In reference to the first hypothesis the interesting point here is that the protective devices for shared-rule aim all for minorities which were pre-determined in the constitutional engineering back in 1848.

To assess if other than these minorities were granted self-determination attention has to be paid to the specific field of interest within the federal constitution. Art. 72 para. 1 of the 1999 constitution declares that the cantons are responsible for the relationship between the state and the church. And para. 2 of the same article states that the federation and the cantons can in the realm of their authority take measures to establish a peaceful co-existence of the diverse religious communities. Since the federal constitution “only” prescribes firstly the individual freedom of religion and consciousness in art. 15 para. 1 and in its para. 4 that nobody must be forced to become a member of a religious community, to be religiously active or to follow religious education; and secondly that primary school has to be under the authority of the state (art. 62 para. 2 cst.1999) we have to have a closer look at the cantonal level. To do so I focus on the cantons of Basel-town and Vaud.

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56 HÄFELIN/HALLER, p. 22.
57 See VATTER, p. 82.
59 Art. 140 para. 1 cst and art. 142 para. 2 cst 1999.
60 Art. 141 cst. 1999.
62 Art. 147 cst. 1999. See for an good explanation of the vertical as well horizontal different institutions VATTER, p. 84 – 95
Possibility of religious minorities’ self-determination in the canton of Basel-town

If we look at the possibility of religious self-determination in Basel-town and refer to its constitution then we first find in contrast to the federal constitution no Invocation Dei – no invocation of God - in the preamble. Interestingly enough there is no preamble at all, renouncing an all encompassing paragraph to create a sense of common identity. In addition there are four religious cults mentioned in the constitution to have an own public legal personality, which gives them the right to self-rule on the foundation of an own legal code and jurisdiction. However, based on the human right of religious freedom and freedom of consciousness, which is granted in the federal as well as the cantonal constitution, everyone is free to become a member to quite the respective cult or to create a new community of peers. Additionally, in case of quarrel between a member and its publicly-legal religious institution it is the cantonal court of appeal and as the highest level of jurisdiction in Switzerland the federal court that judge the dispute.

Every further acknowledgement of a religious group as spiritual community based on a public-legal status demands for a partial revision of the cantonal constitution. Such a partial revision is in case elaborated by the legislative, whose membership is founded on individual civic rights – the right to elect and to be elected for instance. In fact this means that the fundamental individual rights indirectly grant and restrict the possibility of group self-rule within the wider society at the same time. To facilitate self-rule and in Lijphart’s term self-determination of religious minorities the drafters of the contemporary cantonal constitution have foreseen different status for religious groups with diverse dimensions of self-rule. In this respect the status of a public-legal community is the highest and grants most autonomy. The status of an officially recognised religious community is the second highest and easier to achieve because it grants only specific group rights. The less protective status is the one purely based on civil law but also the easiest to achieve. Due to the personal freedom to form associations individuals can according to the Swiss civil code create a corporate body

63 See constitution of Basle-town, online: http://www.gesetzessammlung.bs.ch/sgmain/default.html
64 Constitution of Basle-town § 126 para. 1: the cults are the Protestant (evangelic-reformed), the roman-Catholic, the Christ-Catholic church and the israelitic community.
65 Art. 15 cst. of 1999
66 § 11 para. 1 let. k.
67 § 131, para. 2.
68 § 126 para. 3.
69 § 139 para. 2.
70 § 133 cst. of the canton of Basle-town
71 Art. 23 (federal) cst. 1999 and § 11 para. 1 let. m cst. of the canton of Basle-town.
within the normal legal framework that serves the custom of their religious affiliations. However, this status does not grant any particular minority rights and in comparison to the other status’ only allows very limited self-rule.

One of the publicly obvious indicator for the autonomy of the israelititc community in the canton of Basel-town is their own graveyard where their people are buried according to the communities custom. On the basis of the law on burial the cantonal council is authorised to allow religious groups, whose religion differs from that of public churchyards, to establish one of their own and they did it to the Jewish community. One interesting remark is worth to be mentioned here: although 7.4 percent of the population of the canton Basel-town indicated in the last census in 2000 that they are affiliated to Islamic religion compared to only 0.8 percent Jewish, there was no demand so far of this community to have their own graveyard or other special treatments and consequently no special right was granted to them by the authorities of Basle. It will be interesting to observe if such needs are to be articulated in the near future and if so, if they are authorised.

What the analysis shows so far is that the first hypothesis can not stand its ground and has to be rejected. Although the original federal constitution of 1848 was only designed in favour of the self-rule of pre-determined minorities - Protestant and Catholics – the 1874 and later the 1999 federal constitution set the frame for possible self-determination of religious minorities within the cantons. Despite the fact that only one canton was analysed to assess the minorities’ potential for autonomy it is sufficient to state that self-determination of religious groups is possible in Switzerland and has taken place as the Jewish case demonstrates. However, it has to be said, and that supports the second hypothesis, that self-determination seems only possible on the ground of the cantonal constitution with its emphasis of basic individual rights. Although certain group rights for self-rule can be granted in form of the legal status of specific communities self-determination purely based on religious custom - leaving aside the core of liberal political theory of an socially unbound, rational and self-interested human being - is denied and seems also to be regarded as illegitimate. As Kymlicka stated “bad” minority rights, which suppress the self-rule of the individual, have to be avoided by granting minority protection.

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72 See art. 52 and art. 60 – 79 Swiss civil code.
73 See also the decision of the cantonal council: Beschluss des Regierungsrates betreffend Bewilligung eines besonderen israelitischen Friedhofs, vom 18. November 1947, Nr.390.900.
74 § 6 para. 2 of the law on burial of the canton of Basle-town.
76 See text above on the “Kulturkampf” and the obligation of religious neutrality of the schools.
77 Opus cited above.
Linguistic minorities’ possibility for self-determination

Art. four of the federal constitution of 1999 states that the languages of the country are German, French, Italian and Rumantsch and art. 70 para. 1 specifies that the former three are official administrative languages of the federal authorities and that in the communication with Rumantsch speaking people this language becomes an official administrative language of the federal authorities, too. In contrast to the constitution of 1848 and the original one of 1874 Rumantsch experienced a protective “upgrade”. In fact this was due to concerns that Rumantsch could become extinct as a language and a popular referendum held in 1996, which proclaimed the equality of the fourth native language of Switzerland with the three others, altered the respective art. 116 in the constitution of 1874. The constitutional change was accepted by all the cantons and 76.2 percent of the participating electorate. The result of the vote demonstrates the sensitivity of the population towards the protection of native language minorities. Additionally, the result puts into perspective the first hypothesis. I do not say yet it falsifies the hypothesis completely (if that is possible) because the Rumantsch was since very early seen as the fourth national language although it was not officially recognised as such. It remains to be seen whether other – not native - linguistic minorities have the possibility of self-termination in Switzerland. However, the changed article was transferred into the new constitution of 1999. Furthermore the contemporary constitution states in art. 70 para. 2 that the cantons decide themselves on their official language. Sentence two of this paragraph highlights the protective character of this article. In stating to uphold peace between the different linguistic groups respect should be paid to the “original” linguistic composition of the cantonal territory and native linguistic minorities within the cantons should be treated with consideration. The norm of this article has become known as the “principle of territory” because it seeks to protect the native linguistic minorities in reference to their territory. In accordance with this article 70 the constitution of the canton of Vaud declares French as the official language of its territory.

Although the principle of territory doesn’t stand as a right for itself but has to be verified in concreto art. 70 potentially stands in conflict with art. 18 of the federal constitution, which

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79 BORGHI, p. 599.
80 See for the results of the vote: http://www.admin.ch/ch/d/pore/va/19960310/index.html
81 BORGHI, p. 595.
82 See ALSO HÄFELIN/HALLER, pp. 149.
83 Art. 3 cst. of the canton of Vaud.
universally guarantees the individual freedom of language\textsuperscript{84}. Tough the federal court stated that the freedom of language protects the mother tongue language or whatever language an individual wants to communicate in, the principle of territory in its function of ancestral linguistic minority protection can delicately restrict the freedom of language\textsuperscript{85}. In a decision made by the federal court the judges underlined the importance for people not speaking the traditional language of the territory they are moving to, to adapt linguistically to the new circumstances\textsuperscript{86}. Given the fact that in 2000 10.5 percent of the population of the canton of Vaud\textsuperscript{87} did originally speak none of the four official national languages their potential for linguistic self-rule according to the federal as well as cantonal constitution was legally not given. Of course these people have as in the religious case the possibility to create a corporate body – for example a language school - on the legal basis of the civil law but as we have seen this protective device offers self-determination in only a very small range.

An additional interesting remark has to be made here. By the principle of territory and the fact that adhering Swiss citizenship is only possible through becoming a citizen of a community of a canton integration becomes difficult for people who do not know the respective official language well enough. In the case of an application for naturalization made by a couple believing in Islam the federal court had to deal with the judges stated that the refusal of the demand by the respective municipal authorities on grounds of religious beliefs was not allowed\textsuperscript{88}. However, the rejection of the request due to the lack of language and constitutional knowledge was supported\textsuperscript{89}.

The analysis above shows that self-determination for linguistic minorities in Lijpharts sense is not given in Switzerland. Only pre-determined linguistic minorities are granted autonomy and protection within the federal architecture. Although Rumantsch was not officially recognised as a national language in the federal constitution of 1848 and the original of 1874 it was accepted as the fourth language of the country from very early on. It is interesting to state that the protection and autonomy of these four native language groups in form of the principle of territory stands to some extend against the universal freedom of language. Self-rule for other linguistic groups than the four “native” seems on the foundation of the contemporary federal constitution therefore not possible.

\textsuperscript{84} See also BORGHI, pp. 613.
\textsuperscript{85} Decision of the federal court BGE 122 I 236, 238 E.2b and E.2c.
\textsuperscript{86} Ibidem BGE 122 I 236, 240 E.2d.
\textsuperscript{87} Eidgenössische Volkszählung 2000 (Sprachen), p. 23.
\textsuperscript{88} Decision of the federal court BGE 134 I 56, 62f. E.5.2.
\textsuperscript{89} Ibidem BGE 134 I 56, 59 E.3.
Conclusion

The paper followed the question how linguistic and religious minorities are accommodated in the contemporary federal state of Switzerland. To assess this question a theoretical approach had to be developed, which takes on the hand into account the liberal political thoughts of individually granted universal rights as the foundation of constitutionalism and on the other hand the right of protection and self-determination of minority groups. As has been argued in this paper the dualism of majority rule and minority protection is important to avoid a tyranny of the majority. In following Lijphart’s concept of pre- and self-determination I claimed that linguistic and religious minority protection and power-sharing in the modern Swiss federation of 1848 followed the idea of pre-determination and that consequently due to institutional stability there is no room of self-determination for other or “new” linguistic and religious segments in contemporary Switzerland. While this hypothesis has to be rejected for the religious minorities it turns out to be supported in the linguistic case. Due to the principle of territory others than the four original Swiss language are “banned” into the private part of society. Small room for self-rule seems there only possible in the legal frame of civil law in form of a corporate body with specific linguistic statues. In comparison to the range of protection and autonomy granted by the federal constitution to the official language groups the autonomy by civil law can only be regarded as tiny.

A different picture can be drawn in the case of self-determination of religious groups. As the case of the canton Basel-town in reference to the Jewish community shows self-rule for other than the pre-determined minorities is possible. However, it has to be said that the autonomy granted through different legal statuses to a spiritual community is relative. Autonomy based solely on religious custom seems not possible. Basic universal human rights – e.g. freedom of religion and consciousness - have to be accepted within the jurisdictional organisation of the religious communities. As final court of appeal in case of internal quarrels secular courts are responsible and not the religious authorities. This finding supports the second hypothesis based on Kymlicka’s theory that linguistic and religious minorities are granted self-determination only within the legal framework of a cantonal constitution respecting basic individual civil and political rights. In leaving the cantons the autonomy to rule in religious affairs the federation serves as a structural variable enabling self-determination of religious minorities. However, it remains to be seen how this possibility of self-determination is adopted for other religious communities maybe so far less established in the society.
At least one critical remark has to be made here. In focussing of the accommodation of religious and linguistic minorities I tried implicitly to avoid the question of citizenship. As a consequence (direct-democratic) devices for power-sharing by the people in the decision-making process such as the referendum and popular initiative were left aside. The same is true for the question of (proportional) representation in the lower house of parliament, the national council, at federal level as well as for the parliament in the canton of Basle-town. Both political institutions can give Swiss citizen considerable voice in articulation of (Swiss) minorities needs. However, I thought it would be more interesting to assess the possibility of self-determination of minorities in Switzerland primarily independent of their civic status.
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Swiss constitution from May 29, 1874

Swiss constitution from April 18, 1999

List of abbreviations

art. article

cst. constitution

Ed. editor

Eds. editors

e.g. exempli gratia/ for example

let. letter

para. paragraph