

From 1555 to the present: minorities, legal certainty, freedom of establishment and capital flight

*Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland), Solicitor (Hong Kong),
Solicitor (England & Wales)*

The exile of 1555 is a historical episode with a legal structure. A minority was given a choice between conformity and departure, a deadline, permission to sell its property and a procedure for its residual claims. Each of these elements has a modern counterpart in Swiss constitutional law, in international human rights law and in the tax law that governs the departure of persons and companies. This section draws the line from the award of 1554 to the legal questions that advisers in Lugano, Zurich and Geneva meet when clients move persons and assets across borders because of political, religious, regulatory or fiscal pressure. A modern relocation for tax reasons bears no comparison in human terms with the exile of a religious minority. The legal mechanisms are nevertheless related. The history of 1555 helps to explain why Swiss law protects some of them so firmly.

1 Freedom of religion: from imposed choice to individual right

The award of 1554 treated religion as a matter of public order to be settled by the sovereigns. The individual could choose only between the religion of the bailiwick and departure. Modern Swiss law reverses the relationship. Article 15 of the Federal Constitution of 18 April 1999 (SR 101) guarantees freedom of faith and conscience and provides that every person has the right to choose freely his or her religion or nondenominational belief and to profess it alone or in community with others.¹ The guarantee is individual, it protects foreigners as well as Swiss citizens, and it includes the negative freedom not to belong to a religious community. Article 18 of the International Covenant on Civil and Political Rights, which binds Switzerland, and Article 9 of the European Convention on Human Rights give the same protection at the international level.²

The regulation of the relationship between church and state remains a cantonal matter under Article 72(1) of the Federal Constitution. The Confederation and the cantons may take measures within their competences to maintain public peace between the members of the various religious communities.³ Article 72(2) thus preserves, in modern form, the old federal concern with confessional peace that shaped the Landfrieden of 1531 and the award of 1554. The difference is that the instrument of peace is now the protection of every confession, where it was then the separation of confessions by territory or by expulsion. A canton could not today make residence, property or office in a town conditional on membership of a particular church. Any restriction of religious freedom would need a legal basis, a public interest and proportionality under Article 36 of the Federal Constitution, while the essence of the right would remain inviolable.⁴

2 Notes

1. Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101, Art. 15(1) and (2); English translation in International Constitutional Law (University of Bern), https://www.servat.unibe.ch/icl/sz00000_.html ("Every person has the right to freely choose his or her religion or non-denominational belief and to profess them alone or in community with others"). ↩
2. International Covenant on Civil and Political Rights of 16 December 1966, SR 0.103.2, Art. 18(1), German text at Humanium, <https://www.humanium.org/de/pakt-burgerliche-politische-rechte> ("Jedermann hat das Recht auf Gedanken-, Gewissens- und Religionsfreiheit"). Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, SR 0.101, Art. 9. ↩
3. Cst. Art. 72(1) and (2), ICL translation (above). ↩
4. Cst. Art. 36, ICL translation (above) ("The essence of fundamental rights is inviolable"). ↩

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