

Universal Periodic Review 42nd Session – Stakeholders' Report

Switzerland:
Solidarity Crime, Discrimination on Basis of Religion

Joint Submission to the Human Rights Council's
Universal Periodic Review Working Group, the 42nd Session

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Submission by:

Freikirchen.ch

Swiss Evangelical Alliance SEA-RES

The European Evangelical Alliance

The World Evangelical Alliance

Freikirchen.ch is a national church federation with 19 Free Churches from German-speaking Switzerland, including over 750 local churches and their diaconal works. It was founded in 1918.

www.freikirchen.ch

The Swiss Evangelical Alliance SEA-RES is a national association for local Evangelical churches, NGOs, and individuals since 1875. Today, 680 local congregations and 255 Christian NGOs are members of the alliance's French-speaking or German-speaking branches. SEA-RES serves as a platform for 250'000 Evangelical believers in Switzerland.

www.each.ch / www.evangelique.ch

The European Evangelical Alliance is an alliance of more than 50 European grassroots national and transnational evangelical movements from all Protestant traditions in 35 European countries. The EEA serves as a platform for common action and a voice for Europe's 15+ million Evangelicals.

www.europeanea.org

The World Evangelical Alliance is a network of churches in over 140 nations that have each formed an evangelical alliance and over 100 international organizations joining together to give a worldwide identity, voice, and platform to more than 600 million evangelical Christians worldwide. The WEA was founded in 1846 in London and has special ECOSOC Consultative Status since 1997.

<http://worlddea.org>

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1. This report focuses on three issues; first, it will address the criminalization of persons assisting illegal migrants in Switzerland. Second, it will address a specific issue concerning the right to freedom of associations and discriminatory practices in the area of tax exemptions. Thirdly, the report will mention a particular religious freedom challenge in the Canton of Geneva, where the State refuses to grant authorization for certain religious communities to use the public area for religious celebrations.

I. The criminalization of the assistance to illegal migrants: the “crime of solidarity” (*délit de solidarité*)

2. Art. 116 of the Foreign Nationals and Integration Act (FNIA) addresses the issue of "Encouraging unlawful entry, exit or an unlawful period of stay." It states that *“any person who in Switzerland or abroad, facilitates the unlawful entry or departure or the unlawful period of stay in Switzerland of a foreign national or assists a foreign national to prepare for the same (...) is liable on conviction to a custodial sentence not exceeding one year or to a monetary penalty. (...). In minor cases, a fine may be imposed.”*

3. Under this provision, one of the harshest in Europe, persons giving assistance out of humanitarian concerns to migrants staying in Switzerland without valid authorization and often facing great distress, including migrants who unsuccessfully requested refugee status, have been sentenced and fined. In most other European countries, persons acting out of a humanitarian motive are not sentenced when facilitating a person's stay without valid authorization.

4. It is unclear how many persons received sentences under this provision, even though they acted purely for humanitarian reasons. According to Amnesty International¹, in 2018, 972 people were convicted in Switzerland for violating Article 116 FNIA. However, only 32 cases concerned migrant smugglers and persons taking profit from this activity. Apart from 58 judgments related to finding foreign nationals employment in Switzerland without the required permit, the other 900 convictions were against people acting out of solidarity, compassion, family duty, or in the context of a marriage. Further, data from the Federal Office of Statistics shows comparable data. In 2021, 890 persons were condemned under Art. 116 FNIA, only 14 were against migrant smugglers (aggravated cases) and 39 about finding foreign nationals employment in Switzerland without the required permit. In 2020, 869 persons were condemned; 28 were cases of migrant smuggling and 38 about finding foreign nationals employment in Switzerland without the required permit. And in 2019, 1020, 31 were cases of migrant smuggling, 51 about finding foreign nationals employment in Switzerland without the required permit.²

5. The conviction of Pastor Norbert Valley, former president of the Swiss Evangelical Alliance, is an emblematic example of the unfair application of this provision. The pastor was sentenced in August 2018 to a suspended fine of CHF 1,000 and procedural costs of CHF 250 for having *“facilitated the unlawful period of stay”* of a Togolese national. This man, whom he had accompanied and befriended, was so deeply distressed that the pastor had serious

¹ Amnesty International, "Compassion sanctionnée: la solidarité devant la justice au sein de la Forteresse Europe", 2020

² Office fédéral de la Statistique (OFS), "Adultes: condamnations pour un délit ou un crime au sens des articles de la loi sur les étrangers et l'intégration (LEI), Suisse", Etat du casier judiciaire du 22.04.2022

reasons to believe he was at risk of committing suicide. The pastor gave him access to an unoccupied flat in his church, as well as money, in order to help him. The cantonal Court eventually lifted the sentence in an appeal ruling, as the Court found that in that particular case, the help the pastor had provided for only a few nights here and there was not enough to amount to an offense under Art. 116 FNA. The sentence would have been maintained if the pastor had assisted his friend for a more extended period. It is unclear from this judgment how much help one can give in a situation like this.

6. Another example is the case of a person who offered his couch for only two nights. For this act of generosity, Alain Guillez was sentenced to pay a fine in 2018 by the public prosecutor's office of the canton of Fribourg. A third example is pastor Christian Zwicky, who was fined in 2018 for hosting a rejected asylum seeker in his church. The public prosecutor's office of the canton of St. Gallen finally decided to waive the sentence, considering that pastor Zwicky's responsibility was too weak given the decision had been taken collectively by a church body. However, the costs of the proceedings of 350 CHF were maintained at his expense.

7. In certain cantons, such as the Canton of Bern, private persons can pass a contract with relevant social services to host rejected asylum seekers in their private homes in the case where these asylum seekers cannot be expelled from the country and even though their remaining in Switzerland is illegal. According to the Swiss government, this is an acceptable practice, as the authorities are informed of the whereabouts of those people.³ However, in most parts of Switzerland, such contracts are not offered. Thus, a person wanting to assist and similarly host a person and would be willing to do so transparently is still facing criminal charges.

8. Recommendation: Revise Art. 116 of the Foreign Nationals and Integration Act (FNIA) to decriminalize humanitarian assistance to migrants in illegal situation.

II. Freedom of association for religious communities: discriminatory practices in the area of tax exemptions

9. The undersigned organizations would like to highlight a specific issue of discrimination concerning the possibility for donors to deduct donations to religious associations from their income. The Special Rapporteur on the rights to freedom of peaceful assembly and association has highlighted such a possibility as a good practice because “those privileges foster associations’ ability to seek, secure and use resources and to do their work more effectively.”⁴ The Special Rapporteur also recommended in another report to “Strengthen the financial sustainability of civil society organizations through diverse and flexible forms of financial and non-financial support, including institutional funding, meaningful tax benefits, promotion of the activities of civil society organizations in State-supported media, and support for philanthropy, local crowdfunding platforms and other new, innovative

³ See the government’s response in “Postulat 20.4015 (Streff-Feller) – “Fournir un toute transparence un logement à un demandeur d’asil débouté ne doit pas être assimilé à un crime” -

<https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20204015>

⁴ A/70/266, §81 - <http://undocs.org/en/A/70/266>

mechanisms” and “incentivize support of the work of the not-for-profit sector.”⁵ It is also widely recognized that SDGs, in particular SDG16 about peaceful, just, and inclusive societies, can only be implemented effectively if civil society – including also the religious associations – are engaged and supported.

10. In Switzerland, the so-called “State Churches” (*Landeskirchen*) – the Roman Catholic and the Protestant Church, plus the Christian Catholic and the Jewish communities in some cantons – receive public funds in most cantons. They also automatically benefit from tax exemption, and donations to them can be deducted from the donor’s income in most cantons, unlike other religious communities. In order to be tax exempted and for donors to benefit from contribution deduction, the other religious associations (religious communities and NGOs) have to demonstrate to the cantonal government that they fall under the category of charitable nonprofit associations and submit an application. Religious celebrations and teachings are not considered charitable nonprofit activities falling under that category, but other activities such as social and community services fall under it. In most cantons, those religious associations either have to book these activities separately so that donors can deduct specific donations for social activities, or they have to create two distinct associations. This practice has been considered acceptable by most Evangelical communities and NGOs, as long as their donors can deduct their donations for the most charitable activities (social and community work) from their income. The programs of the Evangelical Churches have been recognized by a major independent study carried out by the Swiss National Science Foundation as providing important charitable services to the population.⁶

11. However, there is an increasing trend towards adopting a strict understanding of charitable activities carried out by religious associations, whereby an activity that is primarily and predominantly charitable but also includes some religious dimensions (such as a meditation, a prayer, etc.), automatically gets excluded from the activities for which donors can exempt their donations from their income taxes. An example of such a negative development happened in the Canton of Bern. Since 2019, a restrictive and new interpretation of Art. 38A and 90c of the Tax Law of the Canton of Bern now implies it is getting increasingly difficult for donors to deduct their donations to evangelical communities. This new and more restrictive practice in the Canton de Berne is currently being challenged in courts. Such a restriction is a disincentive for donors and thus reduces resources for these associations. It is also discriminatory as it only applies to specific religious communities and not to the so-called “State-Churches.” There is also a risk of spillover to other Cantons. According to the Canton of Bern, other Cantons such as Zürich, Basel, Lucerne, and Aargau have similar practices. However, Evangelical communities have not reported encountering similar problems in those Cantons.

12. Recommendation: Remove discrimination between religious communities in the implementation of charitable contribution deductions.

⁵A /HRC/50/23, §64g and §64i,

<https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/50/23&Lang=E>

⁶ NFP58, 2010: *Dienstleistungen, Nutzen und Finanzierung von Religionsgemeinschaften in der Schweiz*, Projekt FAKIR - https://www.snf.ch/SiteCollectionDocuments/nfp/nfp58/NFP58_Schlussbericht_Marti.pdf

III. Religious freedom and use of public grounds in Geneva

13. In 2019, the Canton of Geneva adopted the *Loi sur la laïcité de l'Etat* (LLE). Art. 6 regulates the use of public grounds by religious associations and distinguishes between religious celebrations and other activities.⁷ All events on public grounds need to be approved. But according to Art. 6 LLE, religious celebrations should be held on private grounds and can only be authorized on public grounds in exceptional cases. In December 2021, the Federal Court judged that religious freedom includes the right to manifest one's beliefs publicly and that religious celebrations should be authorized on public grounds as any other event. According to the Court, a general prohibition of celebrations on public grounds as foreseen in art. 6 LLE is a serious restriction of freedom of religion. It is not pursuing any legitimate aim and is disproportionate. It decided that Art 6§2 had to be rephrased accordingly.⁸

14. LLE art. 4 also foresees a form of registration process for religious communities, whereby registered religious communities can benefit from the support of the Canton of Geneva to collect free donations from tax contributors.

15. In June 2022, the State of Geneva adopted a new practice whereby only registered communities can benefit from the possibility of using public grounds for religious celebrations. Evangelical communities that traditionally organized baptism ceremonies on public beaches of Lake Geneva were denied authorization to do so. Recourses have been deposited.

16. We note that during the lockdown due to the COVID-19 pandemic during the winter of 2020, Geneva had already adopted Switzerland's most drastic religious freedom restrictions by ordering a total ban of religious celebrations for health protection. The Constitutional Court of Geneva decided in a judgment dated May 6, 2021, that this was a disproportionate restriction and a violation of religious freedom.⁹

17. Recommendation: Remove discrimination between religious communities in the use of public grounds for duly authorized religious celebrations in the Canton of Geneva.

⁷ Art. 6 *Manifestations religieuses de nature cultuelle et non cultuelle*

1. Les manifestations religieuses cultuelles se déroulent sur le domaine privé.

2. A titre exceptionnel, les manifestations religieuses cultuelles peuvent être autorisées sur le domaine public. Dans ces cas-là, les dispositions de la loi sur les manifestations sur le domaine public, du 26 juin 2008, s'appliquent.

3. Les manifestations religieuses non cultuelles sur le domaine public sont soumises aux dispositions de la loi sur les manifestations sur le domaine public, du 26 juin 2008.

4. L'autorité compétente tient compte des risques que la manifestation peut faire courir, à la sécurité publique, à la protection de l'ordre public, ou à la protection des droits et libertés d'autrui.

⁸ Tribunal fédéral, 2C_1079/2019, Arrêt du 23 décembre 2021, A. et B. contre Grand Conseil de la République et canton de Genève https://entscheidsuche.ch/view/CH_BGer_002_2C-1079-2019_2021-12-23

⁹ Cour de Justice, Chambre constitutionnelle, ACST/20/2021, arrêt du 6 mai 2021, A. B. C. D. et E. contre le Conseil d'Etat, <https://justice.ge.ch/apps/decis/fr/cst/show/2681272?doc=>

IV. Military chaplaincy and inclusion of religious minorities

18. We would like to conclude this report by highlighting a positive development. Since 2020, military chaplains representing the Free Churches have been included into the Army; in 2022, Muslim and Jewish clergy were also included in the army pastoral care. This makes the army pastoral care more representative of the religious diversity of the Swiss population and increases opportunities for the persons going through military service to exercise their religious freedom and receive pastoral care in line with their personal religious beliefs.