Islam and Christian–Muslim Relations

ISSN: 0959-6410 (Print) 1469-9311 (Online) Journal homepage: https://www.tandfonline.com/loi/cicm20

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To cite this article: Fabian Spengler (2019) *Sharʿī* norms and German Schools: Court Challenges to Participation in Swimming Lessons, School Trips and Sex Education, Islam and Christian–Muslim Relations, 30:3, 363-382, DOI: 10.1080/09596410.2019.1652451

To link to this article: https://doi.org/10.1080/09596410.2019.1652451

ISLAM AND CHRISTIAN–MUSLIM RELATIONS
2019, VOL. 30, NO. 3, 363–382
https://doi.org/10.1080/09596410.2019.1652451

Sharʿī norms and German Schools: Court Challenges to Participation in Swimming Lessons, School Trips and Sex Education

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ABSTRACT

This article examines the treatment by German courts, from the early 1970s to 2016, of requests made by Muslims to be exempted from school activities for religious reasons. Based on a qualitative reading of 72 court rulings, the article demonstrates a shift in the courts' decision-making, from initially tolerating Muslim requests for exemption to firmly denying them. Arguments from the court rulings are substantiated by an analysis of the public discourse on Muslims in German schools. The results suggest that the transformation of court attitudes corresponded with the rise of broader concerns about multiculturalism and manifestations of Islam in the public sphere, the liberalization of gender norms, and increasing secularism within German society. The article further demonstrates that, contrary to public perception, requests for exemptions from school activities were not a distinctly Muslim phenomenon. Christian families have challenged school activities in a similar way.

ARTICLE HISTORY
Received 4 June 2018
Accepted 2 August 2019

KEYWORDS
Islam and integration; education; swimming; sex education; multiculturalism; Islam in Germany; Islam and society

Introduction

The 2017 German Federal elections and the rise of the right-wing populist party *Alternative für Deutschland* (Alternative for Germany), known for its anti-Islamic and anti-immigration tendencies, have demonstrated that concerns about manifestations of Islam in the public sphere are polarizing German society. While these concerns have been aggravated by the recent influx of refugees from Muslim countries, they are not a new phenomenon. Since the late 1990s, Germans have been debating the role of Islam in their society, with particular attention given to perceived conflicts between *sharʿī*-based norms and regular school-life at German state schools. A main reflection and a catalyst of this debate are legal challenges brought by Muslim parents against decisions taken by school administrations that refuse to allow their children to be exempted from school activities on religious grounds.

A survey of dejure.org, an online search engine for judicial rulings, suggests that, between 1972 and 2016, German courts issued rulings relating to 21 cases involving requests by Muslim parents and 15 cases involving requests by Christian parents to exempt their children from three types of activities: swimming lessons, school trips and

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sex education. In line with the stipulations of German law, the files reveal few details about the biographies of the petitioners, but they do sum up the arguments presented by the parties and the judges' reasoning.

While some of the cases attracted considerable public attention, this small number of legal challenges regarding exemptions from school activities suggests that the vast majority of Muslim parents either do not perceive any contradiction between their religious norms and participation in German school activities, or perceive a contradiction but lack the means or the will to bring a challenge. The reality in German schools is that almost all Muslim pupils participate in all school activities, as is demonstrated by a large-scale quantitative study carried out in 2009, *Muslimisches Leben in Deutschland* (Muslim Life in Germany). This study found that only 2.9% of Muslim pupils avoided swimming lessons for religious or 'other'[1] reasons, 5.4% avoided school trips, and 2% avoided sex education (Haug, Müssig, and Stichs 2009, 184–188). Nonetheless, because in some schools in Germany activities such as school trips will not take place if as few as 10% of the class will not participate, it is possible that the abstention of three pupils would result in the activity being cancelled.

The examination of court cases presented in this article is thus in no way a reflection of Muslim life in Germany at large. It does, however, demonstrate German courts' approach to multiculturalism and Islamic norms – and a significant metamorphosis in that approach, which has to date attracted little academic attention.

The main thesis of the article is that, while the pertinent constitutional clauses on religious freedom and education have not changed, their interpretation by German courts has. While initially the courts would emphasize the obligation on the part of the state to accommodate religious diversity, particularly in the case of Muslims, by the mid-2000s they were gradually adopting an approach that did not allow space for such accommodations. This article suggests that this development was encouraged by a changing socio-political climate and changing attitudes toward Germany's Muslim population.

Following an introduction to the relevant aspects of the German legal and educational systems, the article traces the shift in court rulings regarding exemptions from swimming lessons, school trips and sex education, and offers possible explanations for it.

Education and the German constitution

The German constitution delegates almost absolute autonomy to the 16 *Länder* (constituent states) in matters pertaining to education (Badura 2018, 416–417). Each *Land* has its own Education Act. These Acts tend to be phrased in similar terms but differ to some extent in their implementation. Regarding co-education, for example, the Education Act of North Rhine-Westphalia stipulates in paragraph 2 that: 'Female and male pupils are usually taught and educated together' (Land Nordrhein-Westfalen 2005).[2] Likewise, the Education Act of Berlin states in paragraph 4: 'In schools, female and male pupils are taught and educated together' (Land Berlin 2004). It is common practice in Berlin to teach physical education (PE) and swimming in single-gender classes for teenagers after puberty, but co-education is the norm in North Rhine-Westphalia.

Education Acts leave room for compromise on the requirement for mixed-gender activities in some areas. One reason for separating the sexes is the notion that girls and boys feel less pressured in swimming lessons when they do not have to worry that

pupils of the opposite gender are watching and judging them. Another reason is based on the different preferences and abilities of girls and boys (Boldt and Grote 2012, 171; Graff 2012, 96; Mutz and Burrmann 2014, 7–8).

The Education Acts stipulate conditions for exempting pupils from school activities. In North Rhine-Westphalia, the Act states in paragraph 43: 'The headteacher can exempt a pupil for an important reason from school or from participation in a specific class or school activity upon request by the parents for up to one year' (Land Nordrhein-Westfalen 2005). If a headteacher refuses to exempt a pupil, the latter can challenge the decision in court. Judges then determine whether the headteacher should have exempted the pupil because, for example, non-exemption infringes a constitutional right of the pupil or the family.

Two constitutional rights give legitimacy to demands for exemptions. The first is the right to religious freedom, grounded in Art. 4 paras 1 and 2 of the German *Grundgesetz* (Basic Law – the German Constitution), which stipulates that, unless another right is infringed, religious rituals and practices are permitted in society (Anger 2003, 79–81). Constitutional religious freedom in Germany secures freedom of religious expression and practice in private and in public. It also directs the state to actively support equality between religious communities and provide them with space in the public sphere (Bielefeldt 2003, 27). The second is the right of parents to raise their children according to their beliefs and values (hereafter 'parental right'), grounded in Art. 6 para. 2 sent. 1 of the Basic Law, which includes the right to make choices on their children's religious standards and practices – including dress codes and prohibiting participation in immodest acts (Anger 2003, 185–186; Gartner 2006, 176–177). Application of the parental right is quasi analogous to that of the right to religious freedom.

In contrast, a third constitutional right encourages schools to insist on the participation of all pupils in all classes: the right of the state to organize the education system (hereafter 'state's right') as stipulated in Art. 7 para. 1 of the Basic Law. It authorizes the state to delineate the content of the curriculum and school activities according to its ideological ethos (Gartner 2006, 177–178). Alongside the communication of knowledge, the state's right encompasses a duty to support the integration of minorities in Germany and to encourage personal development for all children (Spenlen 2010, 132).

When judges are asked to determine whether an exemption from a school activity is legally justified, the main task they face is to find a balance between these three constitutional rights. Legal battles during the past three decades over demands that Muslims be exempted from school activities reflect major transformations in this balancing act.

Swimming lessons

Between 1986 and 2016, the courts considered 17 cases concerning exemptions from swimming lessons. Fifteen of these involved Muslim families and two involved Christian families. These cases, more than those concerned with any other issue, reflect a radical shift in the attitude of German courts toward religiously grounded exemptions.

Swimming is not alien to Muslim tradition. According to a Hadith, the Prophet encouraged swimming as one of only four non-religious pastimes – the others being horseback riding, archery and playing with one's wife (al-Nasāʾī 1421/2001, Hadith 8889). Nonetheless, swimming is encouraged only within limits. The consensus among Islamic jurists is

that women should not reveal any part of their body to men other than the face and the hands, and that both women and men should not reveal any part of their body between the navel and the knee to members of the same gender (Shavit and Winter 2011, 267–269). These concepts of modesty draw on the fear of *fitna* (in this context: sexual temptation), which could lead to illicit sexual relations outside the bond of marriage (272).

Religious norms do not necessarily reflect social and cultural practices. Personal observations of this author in the field, both in the Arab world and in Europe, suggest that even observant Muslims, who are aware of the requirements of *sharīʿa*, neglect to apply some of its regulations about modesty when swimming. For example, in Morocco, some public pools (as well as gyms) allow mixed-gender participation, and some Moroccans who consider themselves religious do not avoid those public spheres.

Nonetheless, generally speaking, people raised in Muslim countries tend to be more body-conscious and modest than people raised in Western countries. It is not always possible to distinguish the line between a religiously-grounded norm and a cultural habit and that line sometimes even appears non-existent. Ultimately, however, at least for some Muslims, the thought of their children bathing in mixed-gender environments is offensive. The Muslim parents in Germany who challenged school practices in courts pointed to a breach of religious norms. Court files typically paraphrase the families' argument as being that 'Islam does not allow girls and boys to swim together',[3] or that a girl in a bathing suit 'is exposed to the looks of boys' in a way the family deems 'incompatible with modesty requirements of Islam'.[4]

The first recorded legal challenge of swimming lessons involved a Christian family in Munich,[5] who in 1986 requested the exemption of their two daughters – in 6th and 9th grade (age 11/12 and 14/15), respectively. This was based on a decree of their religious community, the Palmarian Catholic Church, which was founded in 1978 as a splinter group from the Catholic Church. The Pope of the Palmarian Catholic Church decreed that women were not allowed to visit public pools or beaches and that contravening these rules would result in excommunication. The court decided in favour of the family. It argued that, in refusing to exempt the girls from swimming lessons, the headteacher had infringed their right to religious freedom and the parental right. The judges made clear that they were aware that granting an exemption would potentially encourage many other parents to follow suit; even this hypothetical situation, the judges argued, was no reason to deny individual applicants their constitutional rights. The judges valued religious freedom over the organizational and doctrinal concerns of state schools.

It is possibly not a coincidence that legal challenges to school activities were not made by Muslims until the mid-1980s. By then, second-generation immigrants had acquired German-language skills and familiarized themselves with the German political and legal systems, and felt more assured of their position in German society (Koenig 2010, 152; Spielhaus 2013, 180). The skills and confidence they acquired encouraged them to adopt a firmer stance vis-à-vis their civil rights.

Indeed, the first court case involving Muslims arose in 1986, when a family living in Berlin petitioned a court with a request for exemption from swimming lessons. The father of an 11-year-old girl appealed in court against a fine he had received from the Berlin school authority for preventing his daughter from participating in swimming lessons.[6] The father explained that he followed the Hanafi school of law in Sunni Islam, and that he would not permit his daughter to expose her hair, arms or legs in public,

or to wear tight-fitting clothes. The daughter expressed her fear that Allah could make her sick if she were forced to participate in swimming lessons. She agreed, however, to attend PE lessons, where she was able to wear loose-fitting clothes.

In their ruling, which annulled the father's fine and exempted the girl from swimming lessons, the judges' reasoning closely resembled that of the judges in the Munich case: the girl, they stated, enjoyed the right to religious freedom and, thus, the right and freedom to abide by *sharʿī* modesty rules. They argued that, as there was no modest way for her to swim with the rest of her class, the headteacher should have exempted her. The judges added that this ruling did not bring into question the principle of co-education because the girl participated in all other classes. Minor alterations to the curriculum, they opined, were justified to guarantee religious freedom.

In 1993, judges ruled on the case of a 13-year-old Muslim girl who requested an exemption from both PE and swimming lessons. The girl explained that Islam prohibited her from exercising with boys and from wearing trousers.[7] At the first two hearings, the judges granted the girl an exemption from swimming lessons but refused to exempt her from PE lessons. They ruled – as in the previous cases – that participating in swimming lessons infringed the girl's right to religious freedom and that there was no option for a compromise between *sharʿī* modesty and swimming. For PE lessons, the judges found, the girl could dress modestly, allowing for a compromise between the right to religious freedom and the state's right.

This was the first time judges had ruled that Muslim pupils must tolerate the immodesty of other pupils as long as they are able to maintain their own modesty. The reasoning was that Muslims have to witness immodesty in their daily lives in Germany. However, the Federal Administrative Court (*Bundesverwaltungsgericht*) overruled the lower-ranking courts and granted the girl an exemption from PE lessons as well. The judges argued that, if PE and swimming lessons were important, schools should provide them in a way that made it possible for pupils of all faiths to participate – for example, by implementing gender separation. The court thus forced the *Länder* to adapt their curricula to respect the needs of religious pupils. The right to religious freedom once more outranked the state's right.

On the same day, in a separate ruling, the Federal Administrative Court refused the exemption of a nine-year-old Christian girl.[8] The two rulings shaped not only future legal proceedings but also perceptions of the issue in general.

Several analysts criticized what they considered to be preferential treatment of Muslim over Christian pupils (Hillgruber 1999, 539). This reproach may be too harsh, however. The difference in outcome was not due to any assumption that Muslim religious norms should be approached with greater tolerance, but rather to the failure of the Christian family to convince the judges that their religious beliefs prohibited mixed-gender swimming. Notably, the girl's mother interpreted the Bible as commanding women not to appear in public wearing a bathing suit. As a reference, she quoted 1 Timothy 2.9–10, in which the Apostle Paul states: '[W]omen should dress themselves modestly and decently in suitable clothing, not with their hair braided, or with gold, pearls, or expensive clothes, but with good works, as is proper for women who profess reverence for God' (New Revised Standard Version). The judges, however, disagreed with the mother's interpretation of this passage. They explained that the verses were mere instructions for the correct performance of liturgy, intending to discipline women who wore excessive

jewellery and fine clothes, thus disturbing the decorum of religious ceremony. According to the judges, it is commonly accepted in Christian theology that the cited passage does not contain general instructions for modest clothing.

The judges also noted the fact that the mother was not part of a religious community that commanded strict modesty codes, thus refusing to accept arbitrary behaviour that was only allegedly based on religious norms. Rather, the contested act of faith had to be clearly and directly derived from a canonical text. In contrast to the Muslim girl in the previous ruling, who had been granted an exemption based on *sharʿī* modesty stipulations – accepted by millions of Muslims – the Christian mother presented a unique interpretation of the Bible, which differed from common interpretations of Christian modesty.

During the following twelve years, between 1993 and 2005, no rulings regarding requests for exemption from swimming lessons were issued, either for Muslims or for Christians. In 2005, judges rejected the request for exemption for a nine-year-old Muslim girl.[9] Their main argument was their doubt as to whether the family was serious about *sharʿī* modesty norms because the daughter did participate in PE lessons, where, the judges suggested, modesty regulations would also apply. The judges further found that, according to the Qur'an, modesty requirements only applied to girls after they had reached puberty, and not to nine-year-olds. This was an effort to restrict exemptions from swimming lessons, at least for very young girls.

The family appealed against the decision, but before a ruling was issued at the second hearing, the parents settled the conflict with the school, agreeing, as suggested by the judges at the first hearing, that the girl should participate in swimming lessons in modest bathing attire that covered her whole body.

That modest attire was the now famous *burkini*, invented in 2004 by a Lebanese-Australian, Aheda al-Zanetti, in an attempt to make religious norms and Australian beach culture compatible The word is a combination of *burqa* and bikini, and describes a swimsuit that leaves only the hands, face and feet uncovered and does not cling to the body when wet. Although the *burkini* maintains *sharʿī* modesty for women, most Islamic jurists do not accept it because they hold that women should not be in physically charged environments with men, regardless of their dress (Shavit and Winter 2011, 270–271).

Before the invention of the *burkini*, a Muslim girl in swimming lessons had to expose large parts of her *ʿawra* (parts of the body that should not be exposed). There was no loosely fitting garment suitable for swimming that covered her from head to ankle. The judges thus considered the *burkini* a landmark: a girl wearing it, they argued, covers her own *ʿawra* and is 'only' exposed to the *ʿawra* of other pupils. This, according to the judges, mitigates the harm to the right to religious freedom and opens the door for a compromise with the state's right. Schools no longer have to accommodate religious concerns of Muslim pupils to the fullest extent.

2016 saw the first instance of the Federal Constitutional Court (*Bundesverfassungsgericht* – Germany's Supreme Court) ruling on an exemption from swimming lessons. Here, the judges denied the request of an 11-year-old girl from Frankfurt who explicitly refused to participate in class wearing a *burkini*.[10] The most striking reasoning against the girl can be read in the decision of the Federal Administrative Court – serving as appellate court below the Federal Constitutional Court. There, the judges explained

> that exemption from certain classes cannot function as the routine option for conflict resolution, chosen in every case in which an infringement on religious positions occurs due to the content of the class. […] Given that the state's capacity to tolerate religious concerns is limited for reasons of practicality and especially in view of the role of schools in facilitating integration, all parties involved have to accept a measure of infringement of their religious beliefs […].[11]

The shift from accepting the right of Muslims to abstain from swimming lessons to denying it remains a subject of debate in Germany. Nina Coumont, a lawyer who has authored a book about the legal aspects of Islam in German schools, distinguishes between two main sets of circumstances. She argues that the harm caused by the infringement of religious freedom in mixed-gender swimming lessons for Muslim pupils below the age of puberty is far less than the benefit of participating in such classes: first, because young pupils benefit from the high educational value of co-education; second, because the physical differences between girls and boys at that age are negligible; third, because of the considerable logistical effort required to organize single-sex swimming lessons. In contrast, pupils who have reached puberty should have the right to swim in gender-separated groups – but only if the school does not face logistical problems in offering them. A general exemption for Muslim pupils who have reached puberty is not possible because they should live healthy lives and have the option, when they grow up, of making athletics an important aspect of their lifestyle (Coumont 2009, 13–14). This view does not offer relief for individuals who find mixed-gender swimming daunting, whether for religious or other reasons.

Among German Muslims, opinions differ. The *Zentralrat der Muslime in Deutschland* (Central Council of Muslims in Germany – one of the country's largest Muslim associations) called the ruling by Germany's highest legal authorities a good compromise, emphasizing that many *Länder* opted for gender-separated swimming lessons anyway, and that schools accepted girls wearing the *burkini* (islam.de 2013). The Islamic association Millî Görüş, however, condemned court rulings that forced Muslim girls to participate in swimming lessons, stating that 'the matter is not about justice and law, and about learning to swim, but about an illegitimate stricture on Muslims' (IGMG 2017).

School trips

Between 2002 and 2013, German courts considered six cases regarding exemptions from school trips. Three of these involved Muslim families and three involved Christian families. In the first case, a Muslim girl received a legal exemption from the trip, but all subsequent requests were denied.

School trips often involve over-night stays in youth hostels in Germany or abroad. A minority of Muslim parents fear that, when away from home, their children may engage in *fitna*, drink alcohol, eat pork or neglect their daily prayers. Although it constitutes a minority opinion among Islamic scholars, some Muslims accept the so-called '*Kamel-Fatwa*'. This refers to a *fatwa* issued in 1998 by Amir Zaidan, the then-president of the *fiqh* council of *Islamische Religionsgemeinschaft Hessen* (Islamic Religious Community of Hesse), which states:

> A trip lasting several days, with overnight stays outside of the parental home, is prohibited for Muslim women without the company of a *maḥram* [a close male relative such as husband,

> father or brother] because it contravenes Islamic rules. The Prophet Muhammad said in a Hadith: 'A woman may not travel the distance of a trip of one day and one night without a *maḥram*.' This distance is estimated today by Islamic scholars to be around 81 km. (Quoted in Arpad 2002; cited in Masrar 2015, 18)

Eighty-one kilometres is allegedly the distance a camel can travel in 24 hours. This *fatwa* gained notoriety throughout Germany when media reports used it as proof of the backwardness of *sharī'a*, referring, for example, to Muslims who insist on the norm as 'modern camel jockeys' (Bartsch et al. 2007).

School trips involve potentially uncomfortable situations for Muslims, often resulting in unpleasant memories. Canan Topçu, a Turkish-born German journalist, wrote about her experience on a trip she undertook soon after moving from Turkey to Germany:

> 1974, a youth hostel near Hameln. […] After an eventful day, we were told to take a shower. The girls in one communal shower, the boys in another. Undressing before my classmates already caused discomfort. Then all together in the shower. And in our midst, Frau Bergmann. Our teacher. Naked. With dark pubic hair. I did not know where to look. This scene stayed with me for a long time. I had not even seen my mother naked by that time. I was disturbed. For us, a teacher was a person of respect. We would neither undress in front of her, nor shower with her. (Topçu 2015)

A reading of the court files pertaining to school trips revealed that petitioners – both Christian and Muslim – were concerned about letting go of their children for a period of time during which they were unable to exercise their strict moral authority. Some Christian parents complained that their children would miss the family's daily Bible readings.[12]

The number of court cases challenging refusals by headteachers to grant exemptions from school trips is surprisingly low, given that findings in the abovementioned study *Muslimisches Leben in Deutschland* indicate that there are far more cases of Muslim pupils avoiding participation in school trips than cases concerning swimming lessons or sex education. A possible explanation is that families can exempt their children by producing a doctor's note declaring them sick for the duration of the trip. The same method is more difficult to apply in the case of a weekly school class.

In 2002, there was a case involving Muslim parents requesting that their daughter be exempted from an eight-night-long school trip.[13] The family explained that their daughter should not be so far away from home for such a long time without being accompanied by a *maḥram*. Judges at the first hearing found that the girl's brother, who attended the same school, could accompany his sister on the trip and serve as *maḥram*. The school agreed with this proposal even though the brother was struggling with his school grades and did not want to join the trip – a problem that was ignored by the judges. The brother refused to go along with this solution, but the judges still ruled that the girl should take part in the trip.

The family successfully appealed against the ruling, but the judges at the second hearing trod a fine line in making sure that they rejected a religiously grounded justification. They reiterated that an exemption on religious grounds was impossible because there was the option of a compromise that would safeguard the girl's religious norms. They thus resorted to comparing the girl's situation to that of a mentally ill person who could not travel without assistance. They based their assessment on the girl's statement that, on the upcoming trip, she would constantly fear: (a) being fed pork; (b) missing her five

daily prayers; (c) being bullied by other pupils; and (d) losing her headscarf. The judges declared: 'This situation, characterized by compulsion and fear, is comparable to the illness-like situation of a partially mentally handicapped person, who, because of their handicap, can only travel with assistance.'[14]

It is difficult to evaluate how this ruling reflects on the judges' attitude toward religiously-grounded exemptions in general. On the one hand, they did not privilege the right to religious freedom over the state's right. On the other, they introduced a new kind of justification to legitimize the girl's exemption from the trip. With the limited information available in the court files, it is impossible to conclude which attitude applied.

In subsequent years, five other families – three Christian and two Muslim – requested exemptions for their children from school trips. Judges denied all these requests, reiterating the need for compromise between the right to religious freedom and the state's right. Schools, the judges argued, could insist on participation in school trips as long as the religious needs of pupils were catered to. Nonetheless, the judges took it upon themselves to determine the implications of the latter in practical terms.

In the most recent case, regarding a Muslim family's request for their 12-year-old daughter to be exempted from a four-night-long trip to the island of Rügen in north-eastern Germany, the judges emphasized that they did not accept a *maḥram* as a condition for participation in the trip.[15] The judges explained that they understood the *sharʿī* concept of *maḥram*, but they declared that it was overruled by the state's right to educate. They saw no indication that the girl would be unable to meet her religious obligations on the trip, or that she would be sexually harassed if she went without a *maḥram*. Instead, the judges criticized the parents for not living up to their responsibilities by attempting to hinder their daughter's participation in the trip on religious grounds. The demand for compromise between constitutional rights, highlighted in this ruling, resembles that of cases pertaining to swimming lessons. It shows the attitude to be that religious families need to reconcile their beliefs with the state's education system.

As is the case with swimming lessons, the forced participation of girls in school trips, as imposed by the courts, is fiercely debated in Germany. The conflicting opinions reflect a broader controversy as to how much diversity German society should tolerate. Coumont, for example, has argued that schools do not have to accept a *maḥram* as a condition for Muslim girls' participation in school trips because this contradicts the principle of teaching the children equality between women and men, which is enshrined in the German constitution. There should be no exemptions from school trips because they are important for the development of children and have great educational value (Coumont 2009, 15–16). In contrast, Yasemin Karakaşoğlu-Aydin, a German professor of Turkish Studies and education who has a Turkish background, blasted teachers and politicians who celebrate, as she put it, forcing girls to attend school trips as a victory over *sharʿī* norms. This view, she argues, fails to respect the individual rights of those girls. She holds that schools should engage with religious differences and embrace concepts of diversity (Karakaşoğlu-Aydin 2000, 41–42).

Sex education

Between 1972 and 2015, German courts considered 13 cases regarding exemptions from sex education. Three involved Muslim families and ten involved Christian families. In the

first case, involving a Christian family, their challenge was successful, although all subsequent challenges by Christian families were rejected. Two Muslim families were successful in gaining exemptions for their children from sex education in 1992 and 1997 but in 2004, in line with the general trend of insisting on uniformity in schools, judges in Hamburg denied the request made by the third Muslim family.

Sex education became part of German school curricula in the late 1960s, provoking concerns among conservative Christians over the indoctrination of their children with ideas about sexual liberation (Der Spiegel 1978). Initially, sex education focused on sober biological descriptions, e.g. of a man's sperm uniting with a woman's ovum and the subsequent development of a child. Over time, the content incorporated sociological and psychological aspects of sexuality, including different forms of contraception, emphasis on the cultivation of sexual identity, relationships, lust, the equal value of different sexual orientations, and the flexibility of gender roles. Today, discussions about pornography, prostitution and violence also form part of the curriculum (Sielert 2007, 70). Because of such content, sex education in Germany remains a widely contested issue, not only among religious Muslims. Indeed, public opposition to it is significant and the debate over what represents the desirable content of sex education remains active (Kramer 2015; Kitz 2017).

According to mainstream Islamic jurisprudence, the teaching of sex education itself is not problematic. However, the content of sex education in German schools challenges core religious concepts. Most contemporary Islamic scholars reject premarital sex, contraception and masturbation (Dialmy 2010, 162). They emphasize that the only legitimate place for sexual relations is within the conjugal bond between a woman and a man (Bouhdiba 1975, 162). Although homoeroticism has been a vital part of poetry in Muslim countries since the eighth century, and in spite of the lack of a clear prohibition of homosexuality or homosexual practices in the Qur'an and in high-ranking Hadith, contemporary Muslim jurists agree that homosexual practices are prohibited in Islam (Bauer 2013, 73–77, 81).

The first court challenge to sex education was brought in 1972 by a Christian family from Hamburg. The father complained that his three children, aged 10, 14 and 16, were being taught about sex as a source of pleasure, while the school should limit its teaching to biological facts.[16] The father's main argument was that the parliament of Hamburg had never passed an act delineating the precise extent and content of sex education. The case went all the way up to the Federal Constitutional Court, which decided on the constitutionality of Hamburg's Education Act and whether the latter should indeed include detailed passages about sex education.

The Federal Constitutional Court acknowledged two approaches to sex education in academia and practice: one, that it should be given by the parents, and the other, that the subject is an important aspect of school education. The judges then considered the conflict between, on the one hand, the right to religious freedom and the parental right and, on the other, the state's right. They affirmed that the family was the natural environment in which children learn about sexuality and that parents' religious views play a vital role in their upbringing. But, the state had the right to teach sex education in order to offer all pupils a modern curriculum. Sexuality was, after all, an important aspect of society in general. Children should grow up responsibly in their roles as men and women, being able to take moral decisions regarding partnership, marriage and family.

Ultimately, the Federal Constitutional Court ruled that Hamburg's parliament had neglected the conflict between constitutional rights in sex education by failing to engage with the content of the lesson and detailing that content in the Education Act. This rendered the Education Act unconstitutional. The three children were exempted from sex education. At the same time, the judges stated that, once Hamburg and other *Länder* had passed satisfactory acts, there should be no more exemptions from sex education for religious reasons.

The *Länder* did indeed amend their Education Acts and outlined the curricula for sex education lessons in detail. The measure was successful in that there were no further cases of Christians being granted legal exemptions from the class. Several Christian parents even received short prison sentences because they refused to pay a fine, issued by the local school administration, for preventing their children from participating in sex education lessons. One of the cases was deliberated before the European Court of Human Rights, the highest-ranking European court, where the judges similarly rejected a request for exemption. One of the arguments was that Germany had the right to prevent the establishment of religious parallel societies, not only by Muslims but also by Christians.[17]

Unlike the cases involving Christian families, however, two Muslim pupils were exempted from sex education. In 1992, a Muslim family requested that their daughter in 6th grade (age 11/12) be instructed in a single-gender class.[18] They explained that Islam requires the separation of genders and that it forbids shedding light on sexuality in public. The parents did not ask for a full exemption because they generally welcomed the school's proficiency in sex education, which exceeded their own. The judges granted the girl a temporary injunction,[19] permitting her to not attend sex education until the final court ruling. The school then offered to exempt the girl entirely from the class to resolve the conflict. The judges and family accepted this offer, with the judges claiming that sex education did not in any case play an essential role in the curriculum, thus contradicting the previous legal assessment by the Federal Constitutional Court, and that the girl would not face intolerable disadvantages by missing the class. It appears that the judges struggled to apply to a Muslim pupil the established legal opinion of not granting exemptions from sex education for religious reasons.

The same pattern applied to the second case involving a Muslim family, dating from 1997 in Berlin. In this instance, the family explained that Islam prohibits watching films or pictures containing nudity. To avoid a conflict, the family requested an exemption from those parts of the class that included such content.[20] The judges considered this to be a valid claim because pictures of nudity could harm the girl's sense of modesty and thus her right to religious freedom. As in the previous case, the parents and the school resolved the issue before a final court ruling by agreeing on the girl's exemption. While the judges' attitudes in these two cases are not as clear cut as with exemptions from swimming lessons, they do confirm that, in the 1990s, Muslim pupils could still find a legal way out of undesired school activities.

A case in 2004, regarding a girl in 9th grade (age 14/15), marked a turn in the tide vis-à-vis exemptions from sex education for Muslims.[21] The judges in this case applied the legal opinion of the Federal Constitutional Court. Their reasonings left no doubt about their negative attitude toward accommodating the curriculum on religious grounds:

> [The plaintiffs] do not live in island-like isolation in an environment that is subjected to the rules of an understanding of Islam that negates the free development of women. Life in a

> Western metropolis creates, inside and outside of the school environment, numerous different situations in which the applicants will have to accept curtailment of their *Weltanschauung*.[22]

The judges elaborated in detail on the social relevance of sex education, emphasizing that the mother may teach her children Islamic beliefs at home. The constitution, the judges argued, allows schools to develop pupils' personalities in a liberal way.

German politicians and several Muslim associations in Germany welcomed the ruling. Hakki Keskin, born in Turkey and now professor of politics and migration in Germany, feared chaos if every group lived according to its own rules. In his function as president of the religiously neutral Türkische Gemeinde in Deutschland (Turkish Community in Germany), he warned against giving in to Islamists, suggesting that religiously-grounded exemptions for Muslim pupils constitute a form of political Islam. Ahmet Yazici, vice president of Islamische Gemeinden Norddeutschlands (Islamic Communities in Northern Germany), affirmed that 'we live in this country, our chosen home [*Heimat*]', and thus obviously adhere to its rules and laws. 'Islam does not open the possibility for Muslims to create a parallel society', Yazici added and suggested that in order to take the concerns of Muslim parents into account, a curriculum could be negotiated. Nadeem Elyass, the Mecca-born then-president of the *Zentralrat*, said that talking about sex was not taboo in Islam. He warned that the attitude of Muslim children toward society would become distorted if they did not participate in all classes. Muslim parents should rather be more attentive toward school issues, and, for example, attend parent-teacher meetings to influence the curriculum (Leffers 2004).

In contrast, in a forum on islam.de, a website run by the *Zentralrat*, several users complained about the stance the association had assumed. While it is not clear how widespread this disapproval was, the concerns raised show that the issue was debated. User Semir Salam posted that almost all Muslim parents did not want their children to participate in sex education. Salam (2004) described the court ruling as anti-democratic: 'Germany follows the example of France and strips us Muslims of our rights, one after the other.' Salam felt that the *Zentralrat* does not represent the opinions of its members. User Salia Sadini (2004) did not oppose sex education itself, but the content, which, according to her, involved watching 'sleazy movies' and teachers distributing condoms. User Kamran Khandan-Nemati (2004) believed it was un-Islamic to let non-Muslims confront Muslim minors with sexuality in a way that is alien to Islam and *sharʿī* decency, lamenting that Muslims' personal space was being disrespected and their faith ignored.

Explaining the shift

The various cases described above give rise to the question of why German courts experienced this shift from approving requests by Muslims for exemptions from school activities in the 1980s and 1990s, to completely rejecting similar requests since the 2000s.

One reason can be seen in the broader change in attitudes toward multiculturalism in German society. In their reasoning when rejecting exemptions, judges voiced criticism of the segregation of some Muslim families, urging that the latter should not live in island-like isolation in Germany and should instead accept a compromise with standard social practices.

The origin of this argument lies in the debate about multiculturalism. From the early 1990s, parties on the left of the political spectrum in Germany, namely the Social Democrats, the Green Party and the Left Party, were calling for a reform of the citizenship and immigration laws that would allow for the acknowledgement of Germany's status as a country of immigration. They suggested that these reforms would enhance the integration of immigrants. This view clashed with the perception of the ruling Christian Democrats and Christian Social Union (CDU and CSU), which opposed the notion of Germany as a country of immigration and held that German *Leitkultur*, rather than multiculturalism, should guide integration (von Dirke 1994, 522–523; Eckardt 2007, 235–238). The term *Leitkultur* was coined by Syrian-German political scientist Bassam Tibi (2001), who argued that immigrants to Europe should respect the values of European liberalism in the tradition of the Enlightenment. Conservative politicians, such as Friedrich Merz of the CDU, used the term *Leitkultur* to demand that immigrants respect what politicians considered to be German and Christian cultural values. Tibi himself has explicitly distanced himself from this interpretation of *Leitkultur*.

In 1998, the Social Democrats and the Green Party came to power and passed a new citizenship law, which has been in effect since 2000, and which changed the citizenship regime from a *ius sanguinis* system (citizenship based on ethnicity) to a mixed system of *ius sanguinis* and *ius solis* (citizenship based on place of birth). The new law eased conditions for immigrants to obtain citizenship. With these changes in legal status – strengthening Muslims' presence in Germany – expectations grew for their integration into society (Amir-Moazami 2005, 279; Spielhaus 2006, 29).

Integration became a main topic of public discourse and, as part of this discourse, so too did legal exemptions for Muslims from school activities. An analysis of articles in *Der Stern* and *Der Spiegel*, two weekly political magazines with a large circulation, indicates that these two magazines together published, between 1973 (when the first such article was published) and 1997, no more than 15 articles about challenges to the German education system resulting from *sharʿī* norms. Between 1998 (when the Social Democrats and Greens came to power) and 2016, the number rose to 104. The increase in content reflects the changing socio-political climate.

In 2006, a writer for *Der Stern* called on Muslims to learn German and tolerate German culture. He interviewed politicians, such as the federal commissioner for immigration at the time, Maria Böhmer, who promised to implement measures preventing Muslims from boycotting PE lessons and sex education (Schütz 2006). In 2007, *Der Spiegel*, a voice of German liberalism, published on its front cover a photomontage portraying the Islamic half-moon shining brightly above the Brandenburg Gate in Berlin, one of Germany's most famous landmarks. In the cover story, the authors lamented that, for a long time, the majority of Germans had not demanded that Muslims make a greater effort to integrate and that instead, 'German judges paved the way to parallel societies for Islamic fundamentalists' (Bartsch et al. 2007).

In a 2007 interview in *Der Spiegel*, a Constitutional Court judge, Udo di Fabio, explained that German society was – in cultural terms – much more fragmented now than 30 years before and so the education system should be dominated by ideas of integration rather than fragmentation (Hipp and Verbeet 2007). In 2010, an article in *Der Spiegel* criticized German politicians for their failure to insist on the assimilation of immigrants. Both left- and right-leaning parties had ignored concepts of integration

for decades because they viewed Muslims as strangers, tolerating their non-participation in German practices and the inherent loss of contact with other Germans (Bartsch et al. 2010).

Other voices in the mainstream media also picked up the topic of court exemptions from class starting from the mid-1990s. On the occasion of the 1993 decision by the Federal Administrative Court to exempt a Muslim girl from swimming and PE lessons, Gisela Dachs, an opinion columnist for the mass circulation weekly *Die Zeit*, objected that '[s]ome of the elementary values of our society include compulsory education, the equal treatment of women […]. No one should shake them, not even in the name of religious freedom' (Dachs 1993). She suggested that Muslim women should insist on becoming modern Europeans and hinted at the situation in Turkey, where it was, at the time, forbidden for women in to wear a headscarf in public buildings.

On the occasion of the 1997 exemption of a Muslim girl in Berlin from sex education, Safter Çınar, a spokesperson for the *Türkischer Elternverein Berlin-Brandenburg* (Turkish Parents Association in Berlin and Brandenburg; the organization represents several hundred parents), argued that

> [i]f someone wants to raise their child like a Turkish child, they should return to Turkey. […] We tell parents: If you see your future here, which you obviously do, […] then you have to make sure that your children learn the language and the social norms of this society. (Borgmann 1997)

On the occasion of the 2004 court rulings on exemptions from sex education and from PE lessons, Bettina Machaczek, local representative for migration policy of the Christian Democrats in Hamburg, complained that some Muslims live according to their own rules and that, for them, religious freedom trumps all other laws (Wood 2004).

Apart from mainstream media, the integration of Muslims also became a favorite topic in non-fiction literature. Necla Kelek, a German sociologist born in Istanbul, wrote a best-seller containing her critique of Muslim patriarchy, in which she argues that exemptions from class impede children's development (Kelek 2007a). A smaller number of authors in media and literature sided with Muslim families who requested exemptions from class. Among them is Patrick Bahners, a German liberal journalist, who, citing the abovementioned study *Muslimisches Leben in Deutschland*, explains in his bestseller that abstentions from class are a minor problem, and that some non-Muslims also welcome gender separation after puberty in swimming and PE lessons. He wonders why the issue has become a big deal at all (Bahners 2011, 252–253).

By the mid-2000s, and amidst growing concerns even among liberals regarding the future of integration, left-leaning parties such as the Social Democrats and the Green Party changed their attitude towards special rights for Muslims in German schools and adopted the stance that Muslims should regularly participate in all school classes (Dreß 2018, 312–313; 387). Until the mid-2000s, the Green Party, for example, maintained an apologetic image of immigrants and Germans with immigrant backgrounds, proposing measures to end discrimination rather than those enforcing limited assimilation. However, in their party platform for the 2005 federal elections, they wrote: 'Participation in school life in its entirety must apply also to girls and must be enforced' (Bündnis90/Die Grünen 2005, 90).

Along with the integration debate, changing perceptions of gender-equality and its importance also potentially impacted the change of attitudes by the courts. Some judges have explained that they view a dogmatic interpretation of *sharʿī* norms as incompatible with the free development of women.

Indeed, gender norms in Germany and attitudes toward sex and the body have gradually liberalized (Paulus, Silies, and Wolff 2012, 16), leading to a situation in which diverging concepts of gender equality among ethnic Germans and those with an immigrant background have increasingly come under scrutiny. While overall appreciation of gender equality among Muslims in Germany is certainly more positive and nuanced than polemics would suggest (Amir-Moazami and Salvatore 2003, 54; Diehl, Koenig, and Ruckdeschel 2009, 278–279), conflicts concerning Muslim pupils in German schools are almost always associated with limitations on the freedom of girls. Feminists and secular Muslims use the issue as an example to warn against patriarchy and to advocate for a Western-normative understanding of gender roles, in which free women are necessarily without a headscarf (Kelek 2007b; Schwarzer 2010b). Alice Schwarzer, Germany's most widely cited feminist, explains in a best-selling book that she resents the use of a *burkini* – because of concerns over gender discrimination among Muslim families and because girls could drown under the weight of the garment. She reproaches judges for allowing this risk (Schwarzer 2010a, 27). Seyran Ateș, a German lawyer and feminist born in Istanbul, argues in another bestseller that there can be no gender equality without the full participation of Muslim girls in all classes. She argues that German courts have in the past ignored the rights of girls and thus locked them in parallel societies (Ateş 2007, 135 255).

In an article in *Der Stern* in 1998, the authors shun multiculturalism for allowing Turkish parents to prevent their daughters from becoming emancipated in line with Western standards (Kohn 1998). *Der Spiegel* published a cover story in 2003 about Islamists who threaten basic tenets of democracy. The authors condemned, for example, 'how recklessly German courts ignore the oppression of girls for the sake of their parents' religious freedom' (Cziesche et al. 2003). In an interview with *Der Spiegel* in 2006, the minister of education of Schleswig-Holstein at the time, Ute Erdsiek-Rave, stated:

> A Turkish boy may not swear at a female teacher, telling her not to give orders because she is a woman. […] It is also unacceptable that parents prohibit the participation of their daughters in school trips or swimming lessons for religious reasons. (Meyer 2006, 37)

Again in 2006, the federal minister of the interior, Wolfgang Schäuble, said in an interview with *Der Spiegel* that, if Muslims want to be accepted in Germany, they should stop claiming exemptions for girls from PE lessons and school trips (Fleischhauer and Stark 2006).

Secularization is a third reason that could have played a role in the judicial shift away from exemptions from school activities. Membership in the two largest Christian churches has been constantly falling. In 1950, more than 95% of German citizens were members of either the Catholic or the Protestant Church. Today, less than 70% of German citizens are members of these two main churches. Belief in God among Christians in Germany has also decreased – from around 90% in 1950, to around 80% in the late 1960s, and less than 70% since the 1980s (Pollack 2016, 11, 19).

Germans have assumed a more sceptical attitude toward organized, dogmatic religion, perceiving religious norms, especially those that challenge gender equality, as anachronistic. This leads to views such as the following by Monika Maron, who criticized the idea of separating genders in PE lessons in an article in *Der Spiegel*:

> We live in a largely secular state, which guarantees believers the right to their religion and non-believers the right to be free from religion. No more is expected of Islam than that it spares believers of other faiths and atheists from [engaging with] its religious norms. (Maron 2011, 153)

Some, such as Navid Kermani, a German author of Iranian background, expose the self-conscious and hypocritical nature of German secularism. In a bestseller on contemporary German identity, Kermani sees secularism mainly as a tool with which to draw a line between Muslims and non-Muslims, and as a convenient argument to get the former to adopt a 'German' lifestyle. On the one hand, he explains, religion is celebrated in a folkloristic way, such as when a German is elected as Pope of the Catholic Church or when World Youth Day takes place in Germany. On the other, Kermani believes that 'if you want to create an *us* in Western Europe, Christianity does not suffice to glue together an identity. Enlightenment and secularism are more handy to differentiate between [Western and] other cultures, especially Islam' (Kermani 2016, 35).

Conclusion

An analysis of court cases brought by German Muslim and Christian families asking for their children to be exempted from swimming lessons, school trips or sex education has demonstrated a gradual shift in the courts' attitudes. By the 2000s, the initial inclination to privilege religious freedom and parental authority was being discarded, with courts emphasizing the right of the state to require all children to take part in all school activities, even if these infringe or contradict their religious beliefs. This shift can be attributed to a more critical approach to multiculturalism that developed in Germany, in part following the naturalization of hundreds of thousands of Muslims and the rise of Islamophobic sentiments, the greater sensitivity for gender equality, and the decline of religion in the German public sphere.

This shift was not driven by constitutional amendments. The relevant clauses on which cases were considered did not change; how to find a balance between them did. A lesson for religious minorities, and minorities at large, is that liberal constitutions do not necessarily guarantee minority rights. Their interpretation and application may change with the transformation of the social climate.

The underlying assumption in the public debate holds that legal challenges that demand the accommodation of religious norms are a sign of the failure of integration. This is a possible, and reasonable, interpretation. However, there is another possible interpretation. Legal challenges by Muslim parents could only be made because parents acquired German linguistic skills, knowledge of the German legal system, and a sense that they can and should take part in shaping the country's socio-political landscape. Conclusions from the analysis in this article suggest that the more Muslims have become integrated and rooted in Germany, the less their religious concerns have been tolerated in the political and social spheres.

Notes

1. 'Other' reasons are not defined in the study. The authors suggest that some pupils may have stated 'other' reasons to mask religious reasons.
2. All translations are my own, unless otherwise stated.
3. References to court documents in this article are given in the manner common to German legal databases, naming the court, the date of final ruling, and the case number: VG Köln, June 26, 1990–10 K 2307/89.
4. VG Hamburg, April 14, 2005–11 E 1044/05.
5. The Administrative Court of Munich first ruled on the case in 1986: VG München, February 24, 1986–M 3 K 85.6270. The Higher Administrative Court of Bavaria later reversed the ruling of the lower court: Bayerischer VGH, May 6, 1987–7 B 86. 01557.
6. AG Berlin-Tiergarten, April 25, 1986–286 OWi 17/86.
7. First hearing: VG Gelsenkirchen, June 26, 1991–4 K 2015/90; second hearing: OVG Nordrhein-Westfalen, November 15, 1991–19 A 2198/91; third hearing: BVerwG, August 25, 1993–6 C 8.91; 6 C 30.92.
8. First hearing: VG Würzburg, November 27, 1991–3 K 91.1329; second hearing: Bayerischer VGH, April 8, 1992–7 B 92.70; third hearing: BVerwG, August 25, 1993–6 C 7.93.
9. First hearing: VG Hamburg, April 14, 2005–11 E 1044/05; second hearing: OVG Hamburg, no date of ruling because a compromise was reached between the school and the family–1 Bs 135/05.
10. First hearing: VG Frankfurt am Main, April 26, 2012–5 K 3954/11.F; second hearing: Hessischer VGH, September 28, 2012–7 A 1590/12; third hearing: BVerwG, September 11, 2013–6 C 25.12; fourth hearing: BVerfG, November 8, 2016–1 BvR 3237/13.
11. BVerwG, September 11, 2013–6 C 25.12. Accessed July 21, 2019. https://www.bverwg.de/110913U6C25.12.0.
12. VG Hamburg, April 7, 2009–15 K 3337/08.
13. First hearing: VG Aachen, January 16, 2002–9 L 1313/01; second hearing: OVG Nordrhein-Westfalen, January 17, 2002–19 B 99/02.
14. OVG Nordrhein-Westfalen, January 17, 2002–19 B 99/02.
15. VG Hamburg, April 20, 2012–15 E 1056/12.
16. First hearing: VG Hamburg, April 24, 1972–V VG 165/71; second hearing: OVG Hamburg, January 3, 1973 – Bf. III 5/72; third hearing: BVerwG, November 15, 1974–VII C 8.73; fourth hearing: BVerfG, December 21, 1977–1 BvL 1/75 & 1 BvR 147/75.
17. First hearing: AG Paderborn, June 11, 2008–23 OWi 472 Js. 385/08; second hearing: OLG Hamm, March 5, 2009–Ss OWi 719/08; third hearing: BVerfG, July 21, 2009–1 BvR 1358/09; fourth hearing: ECtHR, September 22, 2011–892175.
18. VG Hannover, May 25, 1992–6 B 2024/92.
19. A temporary injunction ('*Einstweilige Verfügung*') grants the plaintiff the desired action or omission until the final court ruling.
20. VG Berlin, April 29, 1997–VG 3 A 142.97.
21. VG Hamburg, January 12, 2004–15 VG 5827/2003.
22. Ibid, p. 6.

Acknowledgements

This article is based on a Master's thesis. I am thankful to my thesis advisor, Prof. Uriya Shavit, and to Prof. Yosef Schwartz for their advice, as well as to Carl Yonker for editing the article. I am also thankful to the German Academic Exchange Service (DAAD) and to the Israeli Science Foundation (Grant number: 1434/17) for their generous support.

Disclosure statement

No potential conflict of interest was reported by the author.

Funding

This work was supported by the Israeli Science Foundation [grant number 1434/17] and the German Academic Exchange Service (DAAD) [grant number 57314657].

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