Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

The Compatibility of an Islamic Kindergarten Curriculum with the Aims of Public Elementary School

Question(s) at stake:

Whether a private Islamic kindergarten complies with the aims of the public elementary school.

Outcome of the ruling:

The curriculum of the private kindergarten (*Kindergartenkonzept*) in question does not meet the legal requirements for state approval as a private school due to the general mixing of religious and secular content.

Topic(s):

- Education

Keywords:

- Compulsory education
- Content of instruction and curriculum
- Faith-based schools
- Freedom of thought, conscience and religion
- Private schools

Tag(s):

- Islam

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Country:

Switzerland

Official citation:

Federal Supreme Court, Judgement of 18 October 2016, BGer 2C_807/2015 (Urteil 2C_807/2015 vom 18. Oktober 2016)

Link to the decision:

https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?lang=de&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=2C_807%2F2015&rank=1&azaclir=aza&highlight_docid=aza%3A%2F%2F18-10-2016-2C_807-2015&number_of_ranks=14

ECLI:

No ECLI number / ECLI number unknown

Date:

18 October 2016

Jurisdiction / Court / Chamber:

Federal Supreme Court (Second Public Law Division)

Remedy / Procedural stage:

Complaints on public law issues

Previous stages:

- Administrative Court of the Canton of Zurich (8 July 2015)
- Cantonal government of Zurich (17 December 2014)

Subsequent stages:

- No information found

Branches / Areas of law:

Administrative law; Public law

Facts:

The “al Huda” association is based in the Canton of Zurich and is managed by two people: A (President and Head of Education) and B (Vice President and Head of Administration). On 22 June 2013, a permit was requested on behalf of the association for establishing the private kindergarten “al Huda” in Volketswil, a municipality in Zurich.

The Elementary School Office of the Canton of Zurich rejected this request. An appeal against this decision was dismissed by the cantonal government of Zurich on 17 December 2014. The Administrative Court of the Canton of Zurich upheld the appeal against this decision with regard to the consequences for costs and compensation, but dismissed the rest of the appeal, thereby confirming the decision of the Elementary School Office to reject the request (Judgement of 8 July 2015).

Subsequently, in an appeal concerning public law matters, the “al Huda” association (the plaintiff) requested that the Federal Supreme Court annul the decision of the Administrative Court of the Canton of Zurich. At the same time, the plaintiff required a license to run a private kindergarten. The plaintiff argued that the right to a fair trial and the right to be heard had been violated. In addition, it was claimed that the ruling of the Administrative Court infringed upon the right to basic education, the fundamental right of freedom of religion and conscience, as well as the right to equal treatment.

Ruling:

The Federal Supreme Court concluded that the complaint was unfounded and had to be dismissed in accordance with the considerations discussed below.

The plaintiff raised various formal complaints.

First, it was claimed that the right to a fair trial, as per Article 29(1) of the Federal Constitution, had been violated. The plaintiff argued that a copy of the

kindergarten curriculum contained handwritten comments by an employee of the Elementary School Office with highly derogatory content (e.g., “paedophilia?”, “schizophrenia?”). These remarks were impertinent, out of place, and capable of suggesting bias on the part of the employee in question. However, as per the uncontested findings of the Administrative Court, the plaintiff intentionally refrained from promptly objecting to the problematic comments. Under these circumstances, a potential violation could not be rectified retroactively.

Secondly, it was claimed that the Administrative Court had violated the right to be heard – as enshrined in Article 29(2) of the Federal Constitution – by assuming that the previous violation of the right to be heard had been remedied. The minimum guarantees of the right to be heard include the right of the concerned person to submit allegations before an administrative decision is rendered. According to established case law, a non-serious violation of this right may exceptionally be considered remedied if there is an opportunity to present arguments before an appellate court that can conduct an independent review of the facts and legal circumstances. The potential violation of the right to be heard was subsequently examined by both the cantonal government and the Administrative Court. In both cases, the plaintiff was able to submit complaints regarding the results of a factual investigation conducted by the Elementary School Office.

Finally, the Federal Supreme Court found a violation of the right to examine essential files by not granting the plaintiff access to information on the approval files of other private kindergartens. It was therefore impossible to substantiate the allegation of preferential treatment given to other private kindergarten providers. However, the plaintiff did not claim that the cantonal authorities had refused to provide access to certain files from the proceedings affecting it. The Federal Supreme Court determined that the plaintiff did not actually allege a violation of its right to review essential documents, but rather a violation of its right to provide evidence, which is also derived from Article 29(2) of the Federal Constitution. This allegation was found to be without merit

The Court then outlined the legal framework for education.

The right to adequate and free elementary school education is guaranteed under fundamental rights (Article 19 of the Federal Constitution). Cantons are responsible for the school system. They ensure sufficient compulsory elementary education, accessible to all children. Elementary school instruction is subject to government direction or supervision (Articles 62(1) and 62(2) of the Federal Constitution). While private schools are generally permissible, they are subject to state oversight.

Founding, organizing, and visiting private educational institutions is a constitutionally guaranteed right (Article 15 of the Constitution of the Canton of Zurich). This is a fundamental right, which establishes that citizens have the right to defend themselves against state interference in their affairs. However, private schools that perform the functions of public elementary schools require a cantonal license and are subject to state supervision (Article 117(1) of the Constitution of the Canton of Zurich).

Furthermore, these state law provisions are to be interpreted in the light of the relevant international treaties (Article 5(4) of the Federal Constitution). commit to respecting parents' and legal guardians' liberty to select schools other than public ones for their children. Furthermore, parents have the right to ensure that religious and moral education is consistent with their own convictions (Article 13(3) of the International Covenant on Economic, Social and Cultural Rights). Under the UN Convention on the Rights of the Child (CRC), states are obligated to make elementary education compulsory and freely available to all, directing child education towards specified objectives outlined in Article 29(1) (Article 28(1a) and Article 29(1)).

The educational goals and tasks of elementary schools are also defined at the cantonal level (Section 2 of Elementary School Law Zurich). Students should be educated to behave in accordance with Christian, humanistic, and democratic values. Elementary schools uphold freedom of religion and conscience, taking minority considerations into account. Private schools may seek state approval if the education they offer is equivalent to that provided by public elementary schools (Section 68 of the Elementary School Law Zurich). Accordingly, they must

adhere to the prescribed framework, ensuring that “the leadership of a private school guarantees that the pupils are not exposed to any pedagogical or ideological influences that fundamentally run counter to the objectives of the elementary school”. In this sense, private schools must ensure that the pupils’ performance and their personal physical and mental development are promoted in a manner comparable to that of elementary education. Private schools may set priorities, particularly in terms of content, pedagogy, ideology, religion, or denomination (Article 67 of the Elementary School Regulations (ESR)).

From a substantive point of view, the plaintiff claimed that by refusing to grant a license, various rights were violated.

First, the plaintiff claimed a violation of its right to found and organize private educational institutions (Article 15 of the Federal Constitution). Any restriction of this fundamental right requires a legal basis, a justification based on the public interest or the protection of fundamental rights, and proportionality, while the essence of fundamental rights remains inviolable (Article 36 of the Federal Constitution). The Elementary School Law (including the relevant ordinance) is a sufficient legal basis for restricting the right to establish and organize private educational institutions. Additionally, the kindergarten curriculum failed to meet legal requirements because Arabic and Quranic classes consumed excessive time, and the responsible teachers lacked recognized teaching qualifications. Unlike other private schools, their curriculum did not separate religious-focused lessons from other kindergarten activities. Finally, according to the Administrative Court’s findings, which are based on the expertise of an Islamic scholar, the curriculum showed an exclusionary tendency. Therefore, the cantonal authorities were entitled to deny that the plaintiff’s kindergarten curriculum was equivalent to the education offered at the elementary school under Article 68 of Zurich’s Elementary School Law. There is considerable public and community interest – responsible for the quality of elementary school education (Article 62(2) of the Federal Constitution) – in preparing elementary school children for integration into a pluralistic society. Restricting the right to establish and operate private educational institutions was deemed proportional since it was unclear which

alternative, less restrictive measure could have been applied instead of denying private school approval. In this context, the plaintiff argued that the cantonal authorities could attach conditions to the authorization and carry out unannounced visits. However, when the kindergarten is already in operation, inspections are not an appropriate means of remedying fundamental deficiencies in the original private kindergarten curriculum.

Second, the plaintiff also relied on the right to freedom of religion and conscience, as enshrined in Article 15 of the Federal Constitution and Article 9 of the European Convention of Human Rights. As a legal entity, the plaintiff is in principle not protected by the right to freedom of religion and conscience. However, legal entities can invoke the protection of freedom of religion and conscience if they pursue a religious or ecclesiastical objective consistent with their statutes, as is the case for the plaintiff. It is questionable whether the refusal to authorize a private school constituted a restriction on the applicant's freedom of religion and conscience, especially since there is no absolute right to run a private school. Based on the above considerations regarding restrictions on the right to found and organize private educational institutions, the restriction of fundamental rights had a sufficient legal basis and served a legitimate public interest. So, the restriction would also be proportional to the plaintiff's freedom of religion and conscience.

Third, the plaintiff claimed that the Canton of Zurich was inadmissibly identifying itself with Christianity on the basis of the principle of equality and the prohibition of discrimination (Articles 8(1) and 8(2) of the Federal Constitution). The cantonal authorities, however, interpreted the relevant provision in a religiously neutral manner. In particular, the cantonal authorities examined the admissibility of prioritizing a religion in private schools on the basis of religiously neutral criteria. There is no differential treatment between, or discrimination against, the different faiths. Instead, the Administrative Court held that the competent authority had used the present complaint as an opportunity to systematically review the curricula of the other (17 Jewish and Christian kindergartens) private schools with a religious focus.

According to what has been said, the complaint was found to be groundless and thus dismissed.

Main quotations on cultural or religious diversity:

- “[T]he elementary school educates students to behave in a way that is based on Christian, humanistic, and democratic values; in doing so, it upholds freedom of religion and conscience and takes minorities into account.” (para. 3.4)
- “The authorities assumed that the Arabic and Quran classes in the plaintiff’s curriculum took up too much time.” (para 4.2.1)
- “In contrast to other private schools, the plaintiff does not provide for a separation between class times focused on religious subjects and other kindergarten lessons. According to the applicant’s curriculum, religious content should flow continuously into the classes.” (para. 4.2.2)
- “According to the lower court, the application documents submitted by the plaintiff also show that Islam should be conveyed as the real order of everyday life.” (para. 4.2.3)
- “There is considerable interest on the part of the public and the community, which are responsible for the quality of elementary school education […], in preparing elementary school children for integration into a pluralistic society.” (para. 4.3)
- “Religious and ideological state neutrality does not only exist if there is a strict separation of state and religion (secular state tradition) but also if it is based on an attitude that is equally open to different worldviews and faiths (state neutrality).” (para. 5.2)
- “Against this background, it would be incompatible with the principle of neutrality if the approval of a private school with a religious focus would only be permitted to those who belong to, or are close to, a particular denomination.” (para. 5.3)

- “The Canton of Zurich had previously approved numerous kindergarten projects with a comparable religious orientation from Jewish and Christian organizations.” (para. 6)
- “The interpretation of the ‘religious focus’ [...] or the ‘equivalence’ [...] with the education offered by the elementary school is equally binding for all sponsors [of private schools] and is only in accordance with federal law regarding equal treatment if the standards developed in this way are uniformly applied to all private kindergartens with religious.” (para. 6.2)
- “The lower court did not investigate the complaint regarding the admission of 17 Jewish and Christian kindergartens in detail – with the exception of one curriculum, a Jewish kindergarten […] submitted by the plaintiff […]. Instead, the Administrative Court held that the competent authority had now taken the present dispute as an opportunity to also subject the other private school curricula with a religious orientation to a systematic review for compatibility with Section 68 of Zurich’s Law on Elementary School Education” (para. 6.4)

Main legal texts quoted in the decision:

Domestic law:

- Articles 5, 8, 15, 19, 29, 36, and 62 of the Federal Constitution of the Swiss Confederation
- Articles 15 and 117 of the Constitution of the Canton of Zurich
- Sections 2, 68 of the Elementary School Law of the Canton of Zurich
- Section 67 of the Elementary School Regulations of the Canton of Zurich

International law:

- Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms
- Article 13 of the International Covenant on Economic, Social and Cultural Rights
- Articles 28-29 of the Convention on the Rights of the Child

Cases cited in the decision:

Swiss decisions

- Federal Supreme Court, Judgement of 14 February 1992, BGE 118 Ia 46
- Federal Supreme Court, Judgement of 12 November 1997, BGE 123 I 296
- Federal Supreme Court, Judgement of 30 June 1999, BGE 125 I 369
- Federal Supreme Court, Judgement of 13 June 2000, BGE 126 I 122
- Federal Supreme Court, Judgement of 25 October 2005, 2P.152/2005
- Federal Supreme Court, Judgement of 28 August 2013, BGE 139 I 292
- Federal Supreme Court, Judgement of 11 December 2015, BGE 142 I 49
- Federal Supreme Court, Judgement of 13 September 2016, BGE 142 I 195

Commentary

The Compatibility of an Islamic Kindergarten Curriculum with the Aims of Public Elementary School

Switzerland is a federal state. Accordingly, its Federal Constitution establishes the responsibilities of the Federal Government and the cantons, which in turn determine the competencies of the municipalities. In accordance with the principle of subsidiarity, the Swiss Confederation takes on only those responsibilities that exceed the powers of the cantons or require uniform regulation. One of the cantons' responsibilities is education (Articles 19 and 62 of the Federal Constitution). The cantons are responsible for providing adequate elementary education, which is open to all children and free of charge in public schools. At the same time, the cantons are responsible for regulating and supervising compulsory schooling.

Switzerland has undergone a social change in the past three decades. On the one hand, the religious composition of the Swiss population has changed with an increasing number of non-denominational individuals. On the other hand, other religions are also present in Switzerland through immigration. This socio-religious situation can lead to challenges, especially in schools, where several religions meet.

Many legal disputes arise from the clash between these different views, which sometimes end up before the Federal Supreme Court. In recent years, the Federal Supreme Court has decided that there can be no exemption from mixed-gender lessons for religious reasons (Judgement of 24 October 2008, BGE 135 I 79), that there is an obligation to take sex education classes in public schools (Judgement of 15 November 2014, BGer 2C_132/2014), and that there cannot be a headscarf ban for students at a public school (Judgement of 11 July 2013, BGE 139 I 280; Judgement of 11 December 2015, BGE 142 I 49). However, according to the Federal Supreme Court, a headscarf ban for teachers at a public school is permissible (Judgement of 12 November 1997, BGE 123 I 296).

The Federal Constitution grants individual entitlement to adequate and free elementary school education. The cantons, which also exercise state supervision, are responsible for the school system. The classes must be appropriate, suitable, and sufficient to properly prepare the pupils for their responsibilities in modern everyday life. In the cantonal law in question, an orientation towards Christian, humanistic, and democratic values is stipulated, while taking minorities into account and respecting freedom of religion and conscience. The sponsorship of a private school must ensure that pupils are not exposed to pedagogical or ideological influences that are fundamentally at odds with the aims of the primary school. At the same time, government supervision ensures that children are not exposed to intolerant teaching inconsistent with the values of elementary school. In the present case, the imposed values were interpreted in a religiously neutral manner and the admissibility of “religious priorities” in private schools is explicitly mentioned. However, a kindergarten curriculum in which Arabic and Quranic classes take up the lion’s share, and in which religious themes are to be a permanent feature, is fundamentally at odds with humanist and democratic values, as well as with freedom of religion and conscience. Therefore, even with a neutral interpretation, it is not guaranteed “that the pupils are not exposed to any pedagogical or ideological influences that fundamentally run counter to the objectives of elementary school” (Section 68(3) of Zurich’s Elementary School Law).

Different factors affect a person’s personality, distinguishing between an inner and an outer dimension. The latter includes elements such as family, school, leisure, culture, and religion. In this instance, with regard to religion, the authorities have noted – unlike with other private schools –that the plaintiff did not envision a strict separation between lessons with a primarily religious focus and other kindergarten content. It is interesting to consider whether the result would have been the same if it had been about cultural rather than religious education. For example, when considering language, the kindergarten curriculum offers more hours of Arabic and Quranic lessons than “German as a second language”. Language and culture go hand in hand. Language is fundamental to how culture develops. Because of the focus on Arabic and Quranic instruction, the pupils are also exposed to “purely cultural” impacts that risk a later exclusion from Swiss society, since integration takes place primarily through language (cf. Article 4(4) of the Federal Act on Foreign Nationals and Integration (FNIA)). As the applicant’s kindergarten curriculum is overloaded with religious and cultural content, it is against the aim of elementary school and its orientation towards democratic values concerning educational goals. According to the Court, this does not violate the plaintiff’s freedom of religion and conscience, since the refusal to grant the authorization was not based on the specific religion, but because the organizational requirements for running a private school were not fulfilled.

The plaintiff considered the identification of the Canton of Zurich with Christianity to be inadmissible under the principle of equality before the law and the prohibition of discrimination. Equality before the law or the principle of non-discrimination means that similar cases must be treated equally and different cases must be treated differently. By stating that the Canton of Zurich had previously approved numerous kindergarten projects by Jewish and Christian organisations with comparable religious content without in-depth examination, the plaintiff demanded equal treatment. This presupposes that the cases to be judged are equivalent in terms of the relevant factual elements and that the same authority is constantly deviating from the law, both now and in the future. In the present case, the cantonal authority was prompted to review other kindergarten curricula that had already been approved on the basis of the rule of law. As a

result, requirements were imposed on nine Jewish schools in the Canton of Zurich (Schenkel 2018). Eight of the nine schools subsequently met the requirements, while one was closed because it did not meet the requirements (Public Register of Private Schools, Canton of Zurich, Department of Education, Elementary School Office, Pedagogical Department, as of 4 March 2021). As other private schools were now treated equally, there was no longer a violation of the principle of equal treatment or the prohibition of discrimination.

Literature related to the main issue(s) at stake:

General legal literature on the topic

- Epiney, Astrid and Bernhard Waldmann. 2007. “Soziale Grundrechte und soziale Zielsetzungen”. In Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, 611–637. Zurich: Dike Verlag.
- Mahon, Pascal. 2003. “Art. 19 Droit à un enseignement de base”. In Jean-François Aubert and Pascal Mahon (eds), *Petit commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999*, 176–181. Zurich, Basel, Geneva: Schulthess.
- Pahud de Mortanges, René. 2019. *Muslime und schweizerisches Recht: ein Ratgeber für Experten und Laien*. Zurich: Schulthess.
- Tschannen, Pierre. 2001. “Verfassungsauslegung”. In Daniel Thürer and Oliver Diggelmann (eds), *Verfassungsrecht der Schweiz*, 149–160. Zürich: Schulthess Juristische Medien.
- Tschannen, Pierre. 2011. “Gleichheit im Unrecht. Gerichtsstrafe im Grundrechtskleid”. *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 112 (2): 57–85.

General literature on the topic from other disciplines

- Schenkel, Lena. 2018. “Warum eine jüdisch-orthodoxe Schule den Ansprüchen des Zürcher Bildungssystems nicht gerecht wird”. *Neue Zürcher Zeitung.*

- Suter, Peter. 2014. *Determinanten der Schulwahl: elterliche Motive für oder gegen Privatschulen*. Wiesbaden: VS Verlag für Sozialwissenschaften.

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