

Access of Muslim Organizations to Religious Instruction in Public Schools: A Comment on the Decision of the Federal Administrative Court of 23 February 2005

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A. Introduction

In the last years, several Muslim associations applied at the competent Ministries of Education of the German Federal States for the introduction of Islamic religious instruction in public schools.¹ These applications raise a series of legal questions, in particular, whether the States are obliged to allow associations to teach their version of Islam in schools. Of particular concern is that this religious instruction may not have a religious purpose, but rather a political², or even militant or criminal, purpose. Further, there is the possibility that the associations may invite students to take part in a "holy war", to call for racial hatred, or to proclaim that women were inferior human beings.³ The answer to these questions is laid down in Article 7 paragraph 3 of the German Basic Law which is a typical provision of the German Law on Church and State that is molded not by a strict separation or

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¹ Federal Government (ed.), *Bundestagsdrucksache* 14/4530 from 11 November 2000, 42.

² Stefan Muckel, *Religionsfreiheit für Muslime in Deutschland*, in: DEM STAATE, WAS DES STAATES IST – DER KIRCHE, WAS DER KIRCHE IST. FESTSCHRIFT FÜR JOSEPH LISTL ZUM 70. Geburtstag, 239, 243 (Josef Isensee/Wilhelm Rees/Wolfgang Rübner eds., 1999).

³ See, e.g., Wolfgang Bock, *Verfassungsrechtliche Probleme der Einführung islamischen Religionsunterrichts*, 49 RECHT DER JUGEND UND DES BILDUNGSWESENS (RDJB) 330 (2001); Michael Frisch, *Grundsätzliches und Aktuelles zur Garantie des Religionsunterrichts im Grundgesetz*, 49 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT (ZEVKR) 589, 629 (2004); Ulf Häußler, *Rahmenbedingungen und Gestaltungsmöglichkeiten für die Einrichtung islamischen Religionsunterrichts*, 20 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR) 255 (2000); Martin Heckel, *Religionsunterricht für Muslime? Kulturelle Integration unter Wahrung der religiösen Identität. Ein Beispiel für die komplementäre Natur der Religionsfreiheit*, 54 JURISTENZEITUNG (JZ) 741 (1999); Stefan Muckel, *Islamischer Religionsunterricht und Islamkunde an öffentlichen Schulen in Deutschland*, 56 JZ 58 (2001).

laicism as it is, for instance, in France⁴ but by a cooperation of the State and the religious communities.⁵

I. The Constitutional Guarantee of Religious Instruction

According to Article 7 paragraph 3 sentence 1 of the Basic Law, religious instruction shall form part of the ordinary curriculum in public schools, except in secular schools. The term “religious instruction” in this provision describes a subject that, on the one hand, aims at the transfer of knowledge; it introduces the students to the tenets of a religious faith. On the other hand, it comprises elements in which religious contents are promulgated as absolute truths. Thus, religious instruction is linked to the doctrine of a certain denomination.⁶ The designation of religious instruction as a part of the regular curriculum makes clear that it is a task and concern of the State.⁷ The State is the “entrepreneur”⁸ of religious instruction. Notwithstanding the neutral State is not competent to convey religious contents by claiming that they are truth and binding, and to express an opinion thereof.⁹ As a consequence, Article 7 paragraph 3 sentence 2 of the Basic Law states that, without

⁴ Raphaël Piastra, *De la loi de 1905*, 181 RECUEIL DALLOZ 1876 (2005); Athanasios Gromitsaris, *Laizität und Neutralität in der Schule*, 121 ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR) 359, 381 (1996); Roland Minnerath, *Das Verhältnis von Gesellschaft, Staat und Kirche in Frankreich*, in: ZWISCHEN NATIONALER IDENTITÄT UND EUROPÄISCHER HARMONISIERUNG. ZUR GRUNDSPANNUNG DES ZUKÜNFTIGEN VERHÄLTNISSSES VON GESELLSCHAFT, STAAT UND KIRCHE IN EUROPA, 47, 48 and 56 (Burkhard Kämper/Michael Schlagheck eds., 2002); Gerhard Robbers, *Staat und Religion*, 59 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVStRL) 231, 238 (2000); Christian Walter, *Staatskirchenrecht oder Religionsverfassungsrecht?*, in: RELIGIONSFREIHEIT ZWISCHEN INDIVIDUELLER SELBSTBESTIMMUNG, MINDERHEITENSCHUTZ UND STAATSKIRCHENRECHT. VÖLKER- UND VERFASSUNGSRECHTLICHE PERSPEKTIVEN, 215, 221 (Rainer Grote/Thilo Marauhn eds., 2001).

⁵ See about the principles of the German Law on Church and State recently, e.g., Bernd Jeand’Heur/Stefan Koriath, *GRUNDZÜGE DES STAATSKIRCHENRECHTS*, at 60 (2000); Arnd Uhle, *STAAT – KIRCHE – KULTUR*, 53 (2004); Jörg Winter, *STAATSKIRCHENRECHT DER BUNDESREPUBLIK DEUTSCHLAND. EINE EINFÜHRUNG MIT KIRCHENRECHTLICHEN EXKURSEN*, 51 (2001).

⁶ BVerfGE 74, 244, 253; recently in literature, e.g., Karl-Hermann Kästner, *Die Konfessionalität des Religionsunterrichts an öffentlichen Schulen zwischen Religionspädagogik und Jurisprudenz*, in: BÜRGERLICHE FREIHEIT UND CHRISTLICHE VERANTWORTUNG. Festschrift für Christoph Link zum Siebzigsten Geburtstag, 301, 303 (Heinrich de Wall/Michael Germann eds., 2003).

⁷ Muckel, *supra* note 3, 56 JZ 58, 59 (2001).

⁸ See Wolfgang Loschelder, *Der Islam und die religionsrechtliche Ordnung des Grundgesetzes*, in: 20 ESSENER GESPRÄCHE ZUM THEMA STAAT UND KIRCHE, 149, 169 with further references in footnote 167 (Heiner Marré/Johannes Stütting eds., 1986).

⁹ Stefan Muckel, *RELIGIÖSE FREIHEIT UND STAATLICHE LETZTENTSCHEIDUNG. DIE VERFASSUNGSRECHTLICHEN GARANTIEN RELIGIÖSER FREIHEIT UNTER VERÄNDERTEN GESELLSCHAFTLICHEN VERHÄLTNISSSEN*, 72 with further references (1997).

prejudice to the State's right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. This means that the religious communities define what shall be taught in "their" religious instruction.¹⁰ After all, the correlation of sentences 1 and 2 of paragraph 3 rules a job-sharing between the State and the religious communities: The State is obliged to bear the costs for religious instruction and to ensure the personal and factual prerequisites for its realization¹¹, whereas the religious communities are responsible to determine the contents, the substantial components of such an instruction. From the character of that mutual relationship result some requirements associations applying for the introduction of religious instruction do have to fulfill. These requirements are the subject of the lawsuit leading to the Federal Administrative Court.

II. Proceedings before the Federal Administrative Court

The plaintiffs in that lawsuit were two Muslim umbrella organizations: the *Zentralrat für Muslime in Deutschland* (Central Council of Muslim People in Germany) and the *Islamrat für die Bundesrepublik Deutschland* (Islamic Council for the Federal Republic of Germany). They have made a common concept for Islamic religious instruction and applied at the competent Ministry of Education of North Rhine Westphalia for the introduction of an instruction according to the principles mentioned in their concept. But the Ministry rejected the application. It argued that the plaintiffs did not represent all Muslim people in the State and for this reason

¹⁰ Martin Heckel, *DER RECHTSSTATUS DES RELIGIONSUNTERRICHTS IM PLURALISTISCHEN VERFASSUNGSSYSTEM*, 27 (2002); Hartmut Maurer, *Die verfassungsrechtliche Grundlage des Religionsunterrichts*, in: *ABHANDLUNGEN ZUM KIRCHENRECHT UND STAATSKIRCHENRECHT*, 234, 236 (*id.* ed., 1998); Stefan Muckel, *Wann ist eine Gemeinschaft Religionsgemeinschaft? Überlegungen zum Begriff der Religionsgemeinschaft im Sinne von Art. 7 Abs. 3 GG unter besonderer Berücksichtigung muslimischer Dachverbände*, in *RECHT IN KIRCHE UND STAAT. JOSEPH LISTL ZUM 75. Geburtstag*, 715, 717 (Wilhelm Rees ed., 2004).

¹¹ Arnulf Schmitt-Kammler, in: *GRUNDGESETZ. KOMMENTAR*, Art. 7 at 46 (Michael Sachs ed., 3rd edition, 2003); Max-Emanuel Geis, in: *BERLINER KOMMENTAR ZUM GRUNDGESETZ*, VOL. 1, Art. 7 at 50 (Karl Heinrich Friauf/Wolfram Höfling eds., loose-leaf book, state: July 2005); Gerhard Robbers, in: *KOMMENTAR ZUM GRUNDGESETZ*, VOL. 1, Art. 7 at 135 (Hermann von Mangoldt/Friedrich Klein/Christian Starck eds., 5th edition, 2005); Janbernd Oebbecke, *Reichweite und Voraussetzungen der grundgesetzlichen Garantie des Religionsunterrichts*, 111 *DEUTSCHES VERWALTUNGSBLATT (DVBL.)* 336, 338 (1996); Hans Markus Heimann, *Alternative Organisationsformen islamischen Religionsunterrichts*, 56 *DIE ÖFFENTLICHE VERWALTUNG (DÖV)* 238, 239 (2003); Heike Jochum, *Islam in der staatlichen Schule*, in: *RELIGION UND WELTANSCHAUUNG IM SÄKULAREN STAAT. TAGUNGSBAND 41. ASSISTENTENTAGUNG ÖFFENTLICHES RECHT*, 101, 109 (Andreas Haratsch/Norbert Janz/Sonja Rademacher/Stefanie Schmahl/Norman Weiß eds., 2001); Markus Thiel, *DER ERZIEHUNGS-AUFTRAG DES STAATES IN DER SCHULE. GRUNDLAGE UND GRENZEN STAATLICHER ERZIEHUNGSTÄTIGKEIT IM ÖFFENTLICHEN SCHULWESEN*, 106 (2000).

did not have the religious authority to define the tenets of the Islamic religious community.¹² This was, of course, with regard to Islam and its numerous movements, schools, sects, and groups¹³ as less a sufficient reason than it would have been in the case of Christianity.

So the plaintiffs went to court, but the Administrative Court in Düsseldorf and the Higher Administrative Court of North Rhine Westphalia in Münster held that the suit was, nevertheless, not well-founded. The two Courts mainly based their decisions on the assumption that the plaintiffs being umbrella organizations were not religious communities as understood by the Basic Law and, therefore, could not apply for the introduction of Islamic religious instruction.¹⁴ It was, then, the first time that a federal court was called upon to decide about the constitutional demands on Muslim organizations wanting to give religious instruction in public schools in the sense of Article 7 paragraph 3 of the Basic Law. The Federal Administrative Court seized the opportunity to make some important clarifications and statements to aspects that had been disputed in legal literature.

B. The Federal Administrative Court's Reasoning

I. Art. 7 Paragraph 3 of the Basic Law as a Basis for Subjective Rights

At first, the Federal Administrative Court explained the nature of the regulations in Article 7 paragraph 3 of the Basic Law. According to its view, Article 7 paragraph 3 sentences 1 and 2 contain basic rights in favor of the religious communities.¹⁵ The

¹² See about the procedural history of the lawsuit the account in the decision of the Federal Administrative Court, Decision of 23 February 2005 – 6 C 2/04, 58 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2101 (2005).

¹³ Durán Khálid/Munir D. Ahmed, *Die Stellung des Islams und des islamischen Rechts in ausgewählten Staaten: Pakistan*, in: DER ISLAM IN DER GEGENWART, 330, 337 (Werner Ende/Udo Steinbach eds., 4th edition, 1996).

¹⁴ See Higher Administrative Court of North Rhine Westphalia, Decision of 2 December 2003 – 19 A 997/02, *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport (NVwZ-RR)* 492 (2004); Administrative Court in Düsseldorf, Decision of 2 November 2001 – 1 K 10519/98, 16 *Nordrhein-Westfälische Verwaltungsblätter (NWVBl.)* 196, 200 (2002).

¹⁵ See also Thorsten Anger, ISLAM IN DER SCHULE. RECHTLICHE WIRKUNGEN DER RELIGIONSFREIHEIT UND DER GEWISSENSFREIHEIT SOWIE DES STAATSKIRCHENRECHTS IM ÖFFENTLICHEN SCHULWESEN, 351 (2003); Bock, *supra* note 3, 49 *RDJB* 2001, 330, 333; Heimann, *supra* note 11, 56 *DÖV* 238, 239 (2003); Ulfried Hemmrich, in: GRUNDGESETZ-KOMMENTAR, VOL. 1, Art. 7 at 23 (Ingo von Münch/Philipp Kunig eds., 5th edition, 2000); Uta Hildebrandt, DAS GRUNDRECHT AUF RELIGIONSUNTERRICHT. EINE UNTERSUCHUNG ZUM SUBJEKTIVEN RECHTSGEHALT DES ART. 7 ABS. 3 GG, 109 and 164 (2000); Jeand'Heur/Korioth, *supra* note 5, at 311; Stefan Mückl, *Staatskirchenrechtliche Regelungen zum Religionsunterricht*, 122 *AÖR* 513, 521

Court stated that the responsibility of the State to organize religious instruction in public schools was a means to display, and a support of, the religious communities' freedom of religion granted in Article 4 paragraph 1 and 2 of the Basic Law. Hence, the opposite could be suggested, that religious communities had a right against the State that it fulfill its duties in addition to their claim that the State respect their primary religious liberties.

Furthermore, the Court compared Article 7 paragraph 3 with other provisions of the Law on Church and State, especially those concerning the possibility to get the status of a corporation under public law (Article 140 of the Basic Law in conjunction with Article 137 paragraph 5 of the Weimar Constitution) or to take part in the spiritual welfare service in hospitals and prisons (Article 140 of the Basic Law in conjunction with Article 141 of the Weimar Constitution). Article 7 paragraph 3 of the Basic Law was not less an offer to cooperate with the State than these provisions directly speaking about a "right" of the religious communities. Therefore, it should be understood in the same way, although it only mentioned the State's duty.¹⁶ These explanations are directed against a minority opinion in legal literature claiming that Article 7 paragraph 3 sentence 1 of the Basic Law only provided an institutional guarantee with the consequence that there must be religious instruction in public schools but the religious communities did not have a corresponding right against the State to introduce religious instruction.¹⁷ The Court's understanding reflects the recent trend in jurisdiction and legal literature to interpret constitutional provisions that, according to their wording, are objective regulations as subjective guarantees.¹⁸ It prepares the way for a later constitutional complaint to the Federal Constitutional Court; but the lawsuit is not yet that far.

(1997); Oebbeke, *supra* note 11, 111 DVBL. 336, 339 (1996); Robbers, *supra* note 11, Art. 7 at 123; Mathias Rohe, *Rechtliche Perspektiven eines islamischen Religionsunterrichts in Deutschland*, 33 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 207, 208 (2000); Schmitt-Kammler, *supra* note 11, Art. 7 at 44.

¹⁶ Federal Administrative Court, *supra* note 12, 58 NJW 1201 (2005).

¹⁷ Christian Hillgruber, *Über den Sinn und Zweck des staatskirchenrechtlichen Körperschaftsstatus*, IN: STANDPUNKTE IM KIRCHEN- UND STAATSKIRCHENRECHT, 79, 95 (Christoph Grabenwarter/Norbert Lüdecke eds., 2002); *id.*, *Der Körperschaftsstatus von Religionsgemeinschaften. Objektives Grundverhältnis oder subjektives Grundrecht*, 20 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVWZ) 1347, 1353 (2001); Helmut Goerlich, *Distanz und Neutralität im Lehrberuf – Zum Kopftuch und anderen Symbolen*, 52 NJW 2929, 2931 (1999); Stefan Koriath, *Islamischer Religionsunterricht und Art. 7 Abs. 3 GG. Zu den Voraussetzungen religiöser Vielfalt in der öffentlichen Pflichtschule*, 16 NVWZ 1041, 1042; Maurer, *supra* note 10, 234, 238 and 241; Ludwig Renck, *Institutionell garantierter Bekenntnisunterricht?*, 36 ZRP 137 (2003); *id.*, *Die unvollkommene Parität*, 55 DÖV 56, 65 (2002); for further references see Hildebrandt, *supra* note 15, 122

¹⁸ See in this context, e.g., BVerfGE 102, 370, 387; Hans Michael Heinig, *ÖFFENTLICH-RECHTLICHE RELIGIONSGESELLSCHAFTEN. STUDIEN ZUR RECHTSSTELLUNG DER NACH ART. 137 ABS. 5 WRV KORPORIERTEN RELIGIONSGESELLSCHAFTEN IN DEUTSCHLAND UND IN DER EUROPÄISCHEN UNION*, 328 and *passim* (2003); Stefan Magen, *KÖRPERSCHAFTSSTATUS UND RELIGIONSFREIHEIT. ZUR BEDEUTUNG DES ART.*

II. Umbrella Organizations as Religious Communities

1. Interpretation of "Religious Communities"

After that, the Federal Administrative Court turned to the conditions necessary to activate, or to make use of, the right enshrined in Article 7 paragraph 3 sentence 1 of the Basic Law. It held that the plaintiffs did have the right against the State to introduce religious instruction if they were religious communities themselves or, and this is a new aspect found by the Court, if they were a part of a larger religious community, entitled to enforce that right. Thus, the juridical person or group of people applying for religious instruction may be a representative of a religious community; it does not need to show *in persona* all characteristics of a religious community. For the lower Courts had denied that the plaintiffs were religious communities, the Federal Administrative Court explained very broadly how the term "religious community" in Article 7 paragraph 3 of the Basic Law should be interpreted. Its starting point is the classical definition already used under the Weimar Constitution. According to that definition, a religious community is an association uniting the believers of one and the same religious confession or of several familiar confessions to fulfill all religiously motivated tasks that are regarded as necessary.¹⁹

137 ABS. 5 WRV IM KONTEXT DES GRUNDGESETZES, 197 (2004); Martin Morlok/Hans Michael Heinig, *Parität im Leistungsstaat – Körperschaftsstatus nur bei Staatsloyalität? Ein Beitrag zur Dogmatik des Art. 140 GG i. V. m. Art. 137 V 2 WRV*, 18 NVWZ 1999, 697, 699; Heinrich de Wall, *Das Grundrecht auf Religionsunterricht. Zur Zulässigkeit der Verfassungsbeschwerden gegen das Brandenburgische Schulgesetz*, 16 NVWZ 465 (1997); critical Hillgruber, *supra* note 17, 79, 80; Korioth, *supra* note 17, 16 NVWZ 1041, 1045 (1997); *id.*, *Vom institutionellen Staatskirchenrecht zum grundrechtlichen Religionsverfassungsrecht? Chancen und Gefahren eines Bedeutungswandels des Art. 140 GG*, in: DER STAAT DES GRUNDGESETZES – KONTINUITÄT UND WANDEL. FESTSCHRIFT FÜR PETER BADURA ZUM SIEBZIGSTEN GEBURTSTAG, 727 (Michael Brenner/Peter M. Huber/Markus Möstl eds., 2004); Stefan Muckel, *Auf dem Weg zu einem grundrechtlich geprägten Staatskirchenrecht? Anmerkungen zum Zeugen-Jehovas-Urteil des Bundesverfassungsgerichts*, 219 STIMMEN DER ZEIT 463 (2001).

¹⁹ Gerhard Anschütz, *DIE VERFASSUNG DES DEUTSCHEN REICHES VOM 11. August 1919*, Art. 137 at 2 (14th edition, 1933); referring to that definition, *e.g.*, BVerwGE 99, 1, 3; Axel Freiherr von Campenhausen, in: *DAS BONNER GRUNDGESETZ*, VOL. 3, Art. 140 GG/Art. 137 WRV at 16 (Hermann von Mangoldt/Friedrich Klein/Christian Starck eds., 4th edition, 2001); Paul Kirchhof, *Die Kirchen und Religionsgemeinschaften als Körperschaften des öffentlichen Rechts*, in *HANDBUCH DES STAATSKIRCHENRECHTS*, VOL. 1, 651, 680 with footnote 147 (Joseph Listl/Dietrich Pirson eds., 2nd edition, 1994); Heinig, *supra* note 18, 65; Bodo Pieroth, *Muslimische Gemeinschaften als Religionsgesellschaften nach deutschem Recht*, in *MUSLIMISCHE GEMEINSCHAFTEN IM DEUTSCHEN RECHT*, 109, 111 (Janbernd Oebbecke ed., 2003); Bodo Pieroth/Christoph Görisch, *Was ist eine „Religionsgemeinschaft“?*, 42 JURISTISCHE SCHULUNG (JUS) 937, 938 (2002); Georg Neureither, *RECHT UND FREIHEIT IM STAATSKIRCHENRECHT. DAS SELBSTBESTIMMUNGSRECHT DER RELIGIONSGEMEINSCHAFTEN ALS GRUNDLAGE DES STAATSKIRCHENRECHTLICHEN SYSTEMS DER BUNDESREPUBLIK DEUTSCHLAND*, 221 (2002).

The Federal Administrative Court threw light on each single element of the definition: The aspect “association” reveals that the religious community must be seen in the context of the freedom to form a religious organization expressly granted in Article 140 of the Basic Law in conjunction with the incorporated Article 137 paragraph 2 of the Weimar Constitution. Thus, there must be a minimum of organized structure; the communion of Islamic believers, the *umma*, is not a religious community in that sense. However, the religious community must not have the status of a juridical person, for instance a registered society under private law. That view is confirmed by Article 140 of the Basic Law in conjunction with Article 137 paragraph 4 of the Weimar Constitution. These provisions say that religious communities shall acquire legal capacity according to the general regulations of civil law. Thus, the religious community already exists before acquiring legal capacity.

The second aspect “fulfilling all religious tasks” separates the religious community from associations that only have a partial religious purpose (so-called religious associations)²⁰, like those founded to collect money to build a single mosque or to support Muslim people in need. The distinction between religious communities and religious associations is pretended by Article 140 of the Basic Law in conjunction with Article 138 paragraph 2 of the Weimar Constitution.²¹ Hence, it can be assumed that Article 7 paragraph 3 of the Basic Law, by only speaking about “religious communities”, excludes religious associations from the right to offer religious instruction in public schools. The State shall have a partner who is able to give a thorough religious education. Therefore, the religious communities’ tasks and activities must be focused and concentrated on a religious mission; religion is not allowed to play a marginal role. Moreover, the partner must have a precise knowledge about the religious principles to be taught in religious instruction and must be able to decide all relevant questions with regard to doctrine for the neutral State cannot give any assistance in substantial matters of faith. At last, if an association has only a partial religious purpose, there is always a danger that it will use the religious instruction as a platform for its non-religious tasks. By doing so, it would infringe the State’s extensive competences in the field of education (*see further* Article 7 paragraph 1 of the Basic Law) that include, for instance, subjects of social behavior or politics.

The third aspect concerning the possible members of a religious community reveals that it is not necessary that the community unite all believers of one confession, for

²⁰ BVerfGE 24, 236, 246; 46, 73, 86.

²¹ Anger, *supra* note 15, 362.

instance, of Islam. The decision about membership falls under the right to self-determination of the believers.²² Because of their freedom of religion, the believers have the competence to define the contents of their faith. This includes the right to give more weight to common grounds than to differences by forming the community. Therefore, it is not even hindering the recognition of religious communities if there is another community uniting followers of the same faith.²³ As a consequence, within Islam there can be several religious communities although they all see themselves only as Muslims.²⁴ Any other view would have discriminated Muslims towards Christians, and that would not be allowed under the German Constitution that is open to all religions.

It is remarkable that the Federal Administrative Court assumed that there is only one meaning of the term "religious community" in the Constitution. By referring to provisions of the Weimar Constitution, the Court revealed that it did not want to define "religious community" in Article 7 paragraph 3 of the Basic Law in another way than, for instance, in Article 137 paragraph 2 of the Weimar Constitution. The discussion about various notions²⁵ was caused by the problematic decision of the Federal Constitutional Court about ritual slaughtering of 15 January 2002 where the Court stated that a religious community in the sense of Section 4a paragraph 1 of the *Tierschutzgesetz* (Animal Protection Act) was just a group of two or more people sharing a common faith.²⁶ Furthermore, the Federal Administrative Court made concessions with regard to the requirement of a religious consent that is in recent literature caught by the slogan "homogeneity of confession".²⁷ The Court's

²² Anger, *supra* note 15, 356; Stefan Magen, in: GRUNDGESETZ. MITARBEITERKOMMENTAR, VOL. 2, Art. 140 at 60 (Dieter C. Umbach/Thomas Clemens eds., 2002); Martin Morlok, in GRUNDGESETZ. KOMMENTAR, VOL. 3, Art. 140 GG/Art. 137 WRV at 26 (Horst Dreier ed., 2000); Stefan Koriath, in KOMMENTAR ZUM GRUNDGESETZ, Art. 140 GG/Art. 137 WRV at 14 (Theodor Maunz/Günter Dürig *et al.* eds., loose-leaf book, state: February 2004).

²³ Magen, *supra* note 22, Art. 140 at 60; Häußler, *supra* note 3, 20 ZAR 255, 264 (2000); ANGER, *supra* note 15, 357; Axel Emenet, VERFASSUNGSRECHTLICHE PROBLEME EINER ISLAMISCHEN RELIGIONSKUNDE IN ÖFFENTLICHEN SCHULEN. DARGESTELLT ANHAND DES NORDRHEIN-WESTFÄLISCHEN SCHULVERSUCHS „ISLAMISCHE UNTERWEISUNG“, 176 (2003).

²⁴ Federal Administrative Court, *supra* note 12, 58 NJW 1201, 2102 (2005).

²⁵ Muckel, *supra* note 10, 715, 722

²⁶ See BVerfGE 104, 337, 353; Janbernd Oebbeke, *Islamisches Schlachten und Tierschutz*, 21 NVWZ 302, 303 (2002); Karl-Hermann Kästner, *Das tierschutzrechtliche Verbot des Schächtens aus der Sicht des Bundesverfassungsgerichts*, 57 JZ 491, 494 (2002); Uwe Volkmann, *Anmerkung*, 117 DVBL. 332, 333 (2002); Pieroth/Görisch, *supra* note 19, 42 JuS 937, 946 (2002).

²⁷ See Bernhard Schlink, *Revisionsbegründung vor dem Bundesverwaltungsgericht*, in INTEGRATION UND RELIGION. ISLAMISCHER RELIGIONSUNTERRICHT AN BERLINER SCHULEN, 52, 59 (Rolf Busch ed., 2000); Ralf

approach is indicated by the classic definition. There must be some fundamental principles that are accepted as part of a common faith by all members of the community but an agreement on every aspect of the doctrine is not necessary. Otherwise the “familiar confessions” had to lose their identity in relation to each other by giving up their distinctive characteristics. The view of the Federal Administrative Court, thus, enables Muslims to form religious communities within Islam that unite under their umbrella, for example, Sunnites, Shiites, and Alevites.

2. Application to Umbrella Organizations

The Federal Administrative Court, then, came to the problem of umbrella organizations. It held, with a number of voices in literature²⁸, that multilevel associations could be religious communities in the sense of Article 7 paragraph 3 of the Basic Law. An association having the purpose to carry out the tasks that were set by the confession must be related to natural persons; the believers must stand in the focus and centre of the religious community. But, as the Court stated, this did not mean that associations could only be religious communities if they have natural persons as members²⁹. The members of a religious community could be juridical persons if there was an organizational bond from the umbrella organization to the natural persons who were, for their part, members of the member associations of the umbrella organization.

By this, the Court recognized that a multilevel association integrates various levels into a consistent new structure, organism or figure. Such a figure can form a religious community. The boundaries of the individual organizational structures are not decisive. They may have been chosen with regard to the requirements of society law or tax law and, thus, arbitrarily under the perspective of the religious mission. As a consequence of that view, the Federal Administrative Court rightly

Poscher, *Totalität – Homogenität – Zentralität – Konsistenz. Zum Begriff der Religionsgemeinschaft*, 39 DER STAAT 49, 60 (2000); Simone Spriewald, RECHTSFRAGEN IM ZUSAMMENHANG MIT DER EINFÜHRUNG VON ISLAMISCHEM RELIGIONSUNTERRICHT ALS ORDENTLICHES LEHRFACH AN DEUTSCHEN SCHULEN, 110 (2003).

²⁸ Heimann, *supra* note 11, 56 DÖV 238, 243 (2003); Martin Heckel, *Unterricht in Islam an deutschen Schulen – seine Gründe und Formen, Voraussetzungen und Grenzen*, 52 RDJB 39, 53 (2004); Anger, *supra* note 15, 360 and 368; Häußler, *supra* note 3, 20 ZAR 255, 263 (2000); Magen, *supra* note 22, Art. 140 at 60; Bock, *supra* note 3, 49 RDJB 330, 340 (2001); Jochum, *supra* note 11, 101, 123.

²⁹ Dissenting Emenet, *supra* note 23, 173; Frank Fechner, *Zur Verleihung des Körperschaftsstatus an Religionsgemeinschaften*, 21 JURISTISCHE AUSBILDUNG (JURA) 515, 516 (1999); Christian Hillgruber, *Der deutsche Kulturstaat und der muslimische Kulturimport. Die Antwort des Grundgesetzes auf eine religiöse Herausforderung*, 54 JZ 538, 545 (1999); Muckel, *supra* note 10, 715, 738; Reiner Tillmanns, *Islamischer Religionsunterricht in Berlin. Anmerkungen zu einem langjährigen Rechtsstreit*, 47 RDJB 471, 476 (1999).

refused the opinion supported by a part of the literature³⁰ that there must be a vivid religious communion on the level of the umbrella organization³¹. The Court explained that in such an organization there was a division of labor; hence, the religious life could mainly take place on the local level, for instance, in local mosque associations. Nevertheless, it was necessary that there were activities relevant to the identity of a religious community on the level of the umbrella organization, too; it was not sufficient if its task was restricted to representing the common interests externally or to coordinating the activities of the member associations.

At first glance, this demand seems to be surprising against the background of the Court's concept of the division of tasks that aims at attributing the religious life in the local associations to the level of the umbrella organization³². The Court obviously wants the State to get a partner that has its own decision-making power in, at least, a certain amount of religious affairs, that can guarantee for a relative consistence of religious tenets and that has a dominant position towards both the member associations and the natural persons standing behind them. The State shall not enter into negotiations with an organization that does not have primary religious interests and tasks of its own. Thus, the Federal Administrative Court mentioned as activities relevant to the identity of a religious community on the higher level, in particular, that there was a religious authority to be respected and followed by the believers in the local member associations. This reveals the idea of hierarchic leadership; the highest level must make the essential decisions about faith and doctrine. It is doubtful whether this idea, finding its model in the structure of the Roman Catholic Church or the Protestant Churches, is really adequate for the assessment of Islamic groups which do not know a clergy³³. The Court added that the activities of the umbrella organization must be related to the believers in the local associations in a way that it could be seen as a part of the common practicing of faith. This condition could be missing if the umbrella organization was molded by member associations which either did not at all or only partially fulfilled religious tasks³⁴ because, then, the sum of activities on the local level and those on the level of the umbrella organization possibly would not have the quality of an all-embracing fulfillment of the confession's religious mission.

³⁰ See, e.g., Muckel, *supra* note 3, 56 JZ 58, 60 (2001); Emenet, *supra* note 23, 175.

³¹ Frisch, *supra* note 3, 49 ZEVKR 589, 635 (2004), sharing the Court's view.

³² See in this context Anger, *supra* note 15, 361.

³³ Udo Steinbach, *Der Islam – Religion ohne Kirche*, in DIE KIRCHEN UND DIE POLITIK, 109 (Heidrun Abromeit/Götttrik Wewer eds., 1989).

³⁴ Federal Administrative Court, *supra* note 12, 58 NJW 1201, 2104 (2005); Anger, *supra* note 15, 361.

3. Facts of the Case

On the basis of the material delivered by the parties and by the lower Courts, the Federal Administrative Court was not able to decide whether the plaintiffs are religious communities in the explained sense; so it sent the lawsuit back to the Higher Administrative Court of North Rhine Westphalia. It noted that there was an organizational bond from the umbrella organizations to the natural persons being members of the local associations, but it was not clear whether there were activities relevant to the identity of a religious community on the level of the umbrella organization. The statutes of the plaintiffs, for instance, provide that there is a religious authority deciding questions of faith and doctrine, but it is doubtful whether such an institution is realized, and to what extent. Furthermore, the plaintiffs do have a lot of members that, according to their name, do not seem to fulfill extensive religious tasks, for example the *Islamische Arbeitsgemeinschaft für Sozial- und Erziehungsberufe* (Islamic Working Group for Professionals in the Field of Social Welfare and Education), the *Union der türkisch-islamischen Kulturvereine in Europa* (Union of Turkish-Islamic Cultural Organizations in Europe), the *Muslimische Studentenvereinigung in Deutschland* (Association of Muslim Students in Germany), the *Bund Moslemischer Pfadfinder in Deutschland* (Union of Muslim Boy Scouts in Germany), the *Moslemisches Sozialwerk in Europa* (Muslim Social Work in Europe), or the *Deutsch-Afrikanische Transfer-Agency* (German-African Transfer Agency)³⁵. It is not clear what influence these organizations do have on the plaintiffs, whether the religious tasks are eclipsed by social or political tasks.

III. Respecting Constitutional Values as Additional Requirement

The Federal Administrative Court could have finished its explanations at that point but wanted to give some additional advice with regard to the possibility that the lower Court would come to the conclusion that the plaintiffs are religious communities. It stated that being a religious community was not the only requirement for getting the permission to offer religious instruction in public schools. Rather, there were further implicit requirements in Article 7 paragraph 3 of the Basic Law: First, the religious community must, by taking into account its constitution and the number of its members, give assurance of its permanency³⁶. That requirement is “borrowed” from Article 137 paragraph 5 of the Weimar Constitution. The provision is not directly applicable for a religious community in the sense of Article 7 paragraph 3 of the Basic Law need not be a corporation under

³⁵ Federal Administrative Court, *supra* note 12, 58 NJW 1201, 2106 (2005).

³⁶ See also Anger, *supra* note 15, 374; Winter, *supra* note 5, 88.

public law³⁷, as the Federal Administrative Court made clear. But religious instruction is a long-time project connected with an enormous expenditure of logistic planning and costs. It is not only the concept and the sequence of lessons to be elaborated; furthermore, for instance, teachers must be educated, chosen, and employed; school books must be written, printed, and bought.

Second, the religious community must have clear rules about membership so that the State can identify what students have to attend the classes. This is necessary because religious instruction, as a part of the regular curriculum, is a compulsory subject³⁸.

Third, the religious community must grant that its future conduct will not threaten any of the constitutional principles embodied in the so-called everlasting guarantee in Article 79 paragraph 3 of the Basic Law. These include the state protected civil rights of others, and the basic principles of the liberal law on religion and churches of the Basic Law, namely the prohibition of a state religion, the principles of neutrality and parity³⁹. This last aspect is a passage taken from the Jehovah's Witnesses decision of the Federal Constitutional Court from 19 December 2000⁴⁰. It does not really fit or could, at least, be misunderstood in the context of religious instruction.

³⁷ Common opinion; see, e.g., BVerfGE 102, 370, 396 – *obiter dictum*; Administrative Court in Düsseldorf, *supra* note 14, 16 NWVBl. 196, 198 (2002); Frisch, *supra* note 3, 49 ZEVKR 589, 632 (2004); Geis, *supra* note 11, Art. 7 at 60; Heckel, *supra* note 3, 54 JZ 741, 752 (1999); Hans Markus Heimann, *Materielle Anforderungen an Religionsgemeinschaften für die Erteilung schulischen Religionsunterrichts*, in RELIGION UND WELTANSCHAUUNG IM SÄKULAREN STAAT, *supra* note 11, 81, 85; *id.*, *supra* note 11, 56 DÖV 238, 241 (2003); Jochum, *supra* note 11, 101, 111; Christine Langenfeld, *Integration und kulturelle Identität zugewanderter Minderheiten: Eine Herausforderung für das deutsche Schulwesen – Einführung in einige grundrechtliche Fragestellungen*, 123 AÖR 375, 401 (1998); Heiner Marré, *Der Islam in Deutschland – Historische, politische und rechtliche Überlegungen zu einem komplexen Thema*, in KIRCHE UND RELIGION IM SOZIALEN RECHTSSTAAT. Festschrift für Wolfgang Rüfner zum 70. Geburtstag, 553, 572 (Stefan Muckel ed., 2003); Muckel, *supra* note 10, 715, 724; Mathias Rohe, *DER ISLAM – ALLTAGSKONFLIKTE UND LÖSUNGEN. RECHTLICHE PERSPEKTIVEN*, 162 (2001); *id.*, *supra* note 15, 33 ZRP 207, 209 (2000); Martin Stempel, *ZWISCHEN KORAN UND GRUNDGESETZ. RELIGIÖSE BETÄTIGUNG MUSLIMISCHER AUSLÄNDER IN DER BUNDESREPUBLIK DEUTSCHLAND*, 364 (1986); dissenting Koriath, *supra* note 17, 16 NVwZ 1041, 1047 (1997); Jeand'Heur/Koriath, *supra* note 5, at 324.

³⁸ See in this context, e.g., Stefan Muckel, *Islam in Germany*, in ISLAM AND THE EUROPEAN UNION, 41, 72 (Richard Potz/Wolfgang Wieshaider eds., 2004).

³⁹ Federal Administrative Court, *supra* note 12, 58 NJW 1201, 2107 (2005); see also Rolf Gröschner, in GRUNDGESETZ. KOMMENTAR, VOL. 1, Art. 7 at 93 (Horst Dreier ed., 2nd edition, 2004).

⁴⁰ See BVerfGE 102, 370, 392.

Of course, the religious communities, when defining the basic principles that shall be taught in public schools, are obliged to respect the purposes of education as they are defined by the State⁴¹. As religious instruction is an integral part of the State's compulsory educational system⁴², it has to adapt itself to the values that the education in public schools is based on⁴³. A religious instruction that speaks out in favor of intolerance or calls up for a "holy war" is incompatible with the aim to make the students understand the ideas of tolerance⁴⁴, forbearance⁴⁵, and peacefulness⁴⁶ that are mentioned in some of the Federal States' Constitutions and school laws. The State cannot endure a religious instruction that would be contrary to its public school education⁴⁷. Furthermore, the State cannot accept full⁴⁸ responsibility for a subject that may undermine respect for the law, or that may openly appeal for a breach of the law⁴⁹. It is, thus, a little bit odd that the Federal Administrative Court did not refer to a further passage of the Jehovah's Witnesses decision where the Federal Constitutional Court stated that a religious community must comply with the law⁵⁰. At last, the contents of religious instruction may not principally contradict the foundations of the state order that are mentioned in, or at least implicitly required by, the Constitution. As rightly pointed out in legal literature, among these foundations are: the human dignity (Article 1 paragraph 1 of the Basic Law), the prohibition of discriminations on the grounds of sex (Article 3 paragraphs 2 and 3 of the Basic Law), the state monopoly of force and – on the

⁴¹ See Schmitt-Kammler, *supra* note 11, Art. 7 at 59; Frank Fechner, *Islamischer Religionsunterricht an öffentlichen Schulen*, 18 NVWZ 735, 737 (1999).

⁴² Koriath, *supra* note 17, 16 NVWZ 1041, 1048 (1997); Christoph Link, *Konfessioneller Religionsunterricht*, in HANDBUCH DES STAATSKIRCHENRECHTS, VOL. 2, 439, 463 (Joseph Listl/Dietrich Pirson eds., 2nd edition, 1995); Mückel, *supra* note 15, 112 AÖR 513, 524 (1997); Robbers, *supra* note 11, Art. 7 at 130.

⁴³ Marré, *supra* note 17, 553, 574; Muckel, *supra* note 3, 56 JZ 58, 62 (2001).

⁴⁴ See Art. 15 para. 4 of the Constitution of Mecklenburg-West Pomerania; Art. 27 para. 1 of the Constitution of Saxony-Anhalt; Art. 22 para. 1 of the Constitution of Thuringia.

⁴⁵ See Art. 26 para. 1 of the Constitution of Bremen; Art. 7 para. 2 of the Constitution of North Rhine Westphalia; Art. 56 para. 4 of the Constitution of Hesse; Art. 33 of the Constitution of Rhineland-Palatinate.

⁴⁶ See Art. 28 of the Constitution of Brandenburg; Art. 26 of the Constitution of Bremen; Art. 22 para. 1 of the Constitution of Thuringia.

⁴⁷ Stefan Muckel, *Der Islam im öffentlichen Recht*, in BEITRÄGE ZUM ISLAMISCHEN RECHT, VOL. 2, 11, 20 (Hans-Georg Ebert/Thoralf Hanstein eds., 2003); Winter, *supra* note 5, 86.

⁴⁸ See Schmitt-Kammler, *supra* note 11, Art. 7 at 59; also Link, *supra* note 42, 439, 498.

⁴⁹ Muckel, *supra* note 3, 56 JZ 58, 62 (2001).

⁵⁰ BVerfGE 102, 370, 390.

other side of that monopoly – the basic prohibition of the use of force by the individual (*cf.* Articles 19 paragraph 4 and 20 paragraph 2 of the Basic Law)⁵¹.

The Federal Administrative Court did not sufficiently recognize that the religious communities are not a part of the State and, therefore, do not have to observe the principles mentioned in Article 79 paragraph 3 of the Basic Law for these principles are exclusively addressed to the State. Hence, it cannot be required that the religious communities wanting to cooperate with the State are neutral or do proclaim that all religions were equal (in relation to God), and the religious communities are not obliged to plead for democracy if they think that a theocratic structure is the best form for their own religious organization⁵². The religious communities are even allowed to pray to their God for a new system in which all state order will be abolished in favor of a godly leadership. However, and the Federal Administrative Court might have had that in mind by speaking about a “threat” of the constitutional system, the limits are overstepped if a religious community does not leave it to the transcendental area to change the current system of things but intends to itself eliminate the foundations of the State by repeated aggressive attacks. These attacks may be verbal; in such a case they must go beyond a mere criticism in form of presenting an opposite point of view. The State cannot be obliged to cooperate with a religious community by paying for its teachings in public schools if that religious community behaves in a way that one has to conclude that it is an enemy of the State or of the Constitution.

As a consequence, there is the possibility that the plaintiffs must be excluded from a partnership with the State because they have some problematic members, like the *Islamische Gemeinschaft Milli Görüş* (Islamic Community *Milli Görüş*) that is assimilated with the Islamic party *Refah Partisi* (Party of Welfare), which is banned in Turkey for its fight against laicism and in favor of establishing a universal Islamic life and social order, and is in Germany, not without any reason, under the permanent supervision of the *Verfassungsschutz* (Office for the Protection of the Constitution). Other member associations of the plaintiffs sympathize with the radical *Muslimbruderschaft* (Muslim Brothers)⁵³. These members could have a negative influence on the plaintiffs and mold their attitude towards the State. Whether this is the case is not yet clear. This is another open question to be answered by the Higher Administrative Court of North Rhine Westphalia. After all,

⁵¹ Wolfgang Loschelder, *Islamische Religionsunterweisung an öffentlichen Schulen*, KIRCHE UND RECHT (KUR) 137, 141 (1999) = no. 730, 31, 35; Marré, *supra* note 37, 553, 574.

⁵² See in that context Hillgruber, *supra* note 17, 79, 90 ; Oebbecke, *supra* note 11, 111 DVBL. 336, 342 (1996); Häußler, *supra* note 3, 20 ZAR 255, 258 (2000).

⁵³ Federal Administrative Court, *supra* note 12, 58 NJW 1201, 2108 (2005).

it cannot be foreseen how the lower Court will decide and whether the plaintiffs will ever be allowed to teach at public schools. The future will show it.

C. Outlook

Until now, there is no Islamic religious instruction in the sense of Article 7 paragraph 3 of the Basic Law in any public school in Germany. The Higher Administrative Court of Berlin in 1998 affirmed a suit of a Muslim group, the *Islamische Föderation in Berlin* (Islamic Federation in Berlin), according to which the plaintiff had to be allowed to offer Islamic religious education in the city's public schools⁵⁴. But in Berlin the legal situation is different from that in North Rhine Westphalia. In Berlin, as well as in Bremen, the so-called *Bremer Klausel* (Bremen Clause) of Article 141 of the Basic Law⁵⁵ has effects. That Clause says that Article 7 paragraph 3 first sentence had no application in a federal state in which different provisions of state law were in force on 1 January 1949. Therefore, the State Berlin is not responsible for the introduction of religious instruction. It need not pay for, and supervise the contents of, religious education. The decision of the Higher Administrative Court of Berlin cannot be transferred to states in which Article 7 paragraph 3 sentence 1 of the Basic Law had not been dispensed by Article 141 of the Basic Law⁵⁶.

However, the State North Rhine Westphalia has recently accepted the application of the *Alevitische Gemeinde Deutschland* (Alevitic Community of Germany) to introduce Alevitic religious instruction in public schools; it is planned that within a time period of two years teachers will be prepared for giving religious instruction on the basis of the concept delivered by the Alevitic Community⁵⁷. The State has its own interest in such a religious instruction for it can make an important contribution to teaching the students the values which are the fundamental ethics

⁵⁴ Higher Administrative Court of Berlin, 114 DVBl. 554 (1999); the decision was confirmed by the Federal Administrative Court without further appeal, Federal Administrative Court, 115 DVBl. 1001 (2000).

⁵⁵ See about this Clause recently Christoph Tangermann, *Die Bremer Klausel (Art. 141 GG) angesichts neuer Fragestellungen. Zugleich ein Beitrag zur Zukunft des Religionsunterrichts in der multireligiösen Gesellschaft*, 50 ZEVKR 184 (2005).

⁵⁶ Wolfgang Rübner, *Anmerkung*, 15 NWVBl. 114 (2001); see also Stefan Muckel, *Anmerkung*, 114 DVBl. 558, 559 (1999); Fechner, *supra* note 41, 18 NVWZ 735, 736 (1999); Heckel, *supra* note 3, 54 JZ 741, 755 (1999).

⁵⁷ Ali Sirin, *Das Alevitentum als Schulfach*, 4 ISTANBUL POST no. 16 from 18 April 2005.

of any liberal state order⁵⁸. Thus, the religious communities can support the State by building, protecting, and renewing the spiritual infrastructure of the community of people that is not available for the State; this is a positive secular side-effect of religious communities' activities that remain within the legal and constitutional framework⁵⁹.

⁵⁸ Federal Administrative Court, *supra* note 12, 58 NJW 1201, 2102 (2005); Heckel, *supra* note 3, 54 JZ 741, 746 (1999); Hillgruber, *supra* note 17, 79, 97; Otto Depenheuer, *Religion als ethische Reserve der säkularen Gesellschaft. Zur staatsrechtlichen Bedeutung der Kirchen in nachchristlicher Zeit*, in JAHRES- UND TAGUNGSBERICHT DER GÖRRES-GESELLSCHAFT 2001, 23 (Görres-Gesellschaft ed., 2001).

⁵⁹ Josef Isensee, *Grundrechtsvoraussetzungen und Verfassungserwartungen an die Grundrechtsausübung*, in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, VOL. 5, § 115 at 261 (Josef Isensee/Paul Kirchhof eds., 2nd edition, 2000).