

ARTICLE

# Religious Education in Germany in Light of Religious Diversity: Constitutional Requirements for Religious Education

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## Abstract

In Article 7, paragraph 3, the German Constitution provides that religious education shall be a part of the curriculum of public school. This is one of the three approaches of dealing with religious education existing today. Originally, religious education as a regular subject at public schools in Germany was only offered by the two Christian Churches—Catholic and Protestant. As the number of Christians decreased and the number of Muslims increased, the demand for Islamic religious education at public schools grew. Therefore, the question arose whether the constitutional law concerning religion is capable of facing the new challenges of religious diversity. This Article tries to answer this question with regard to the introduction of Islamic religious education as a measure of adaptiveness. In the first step, the requirements of Article 7, paragraph 3 of the Constitution posed to religious education will be outlined in order to be able to examine in the second step whether Islamic religious education may be introduced at public schools as a regular subject. In this regard, the issue of the qualification of an umbrella association as a religious society and the constitutionality of the advisory board model will be discussed.

**Keywords:** Religious education; Islamic religious education; religious diversity; religious society, advisory body (“Beirat”)

## A. Introduction

Education touches upon the core of a state’s foundational values. Religious education, as an aspect of education, raises crucial questions about the purpose of education in shaping individual identity, character, and conscientious beliefs,<sup>1</sup> and is “one of the ‘battlefields’ between religion and certain ideologies or political streams.”<sup>2</sup> It implicates a range of constitutional rights, including the rights of children to education, the child’s right to freedom of religion or belief, and rights of parents and legal guardians to ensure their child is educated in conformity with their own convictions. Where minorities are involved, religious education can also emerge as a point of contention for ensuring the accommodation of minorities. Furthermore, religious education may also become a contested area in vindicating the proper constitutional arrangement between state and religion. These issues and more are also reflected in how the German state has addressed religious education over the years.

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<sup>1</sup>W. Cole Durham, Jr., *Introduction*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF RELIGIOUS EDUCATION 1, 2 (Derek H. Davis & Elena Miroshnikova eds., 2013).

<sup>2</sup>Juan G. Navarro Floria, *Religious Education in Latin America*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF RELIGIOUS EDUCATION, *supra* note 1, at 197.

According to Article 7, paragraph 3 of the German Constitution,<sup>3</sup> religious education shall be part of the curriculum of public schools and, indeed, has been part of it for the last seventy years since the German Constitution came into existence. Prior to that, a corresponding rule had also been included in the 1919 Constitution of the Weimar Republic.<sup>4</sup> Such religious education has typically been taught in a denominational way, in other words, in accordance with the principles laid down by the relevant religious society. This constitutional choice that religious education shall be part of the curriculum of public schools is neither historically mandatory nor, compared to other European countries, self-evident. During medieval times, the education system in Europe was solely organized by the Christian church, but it was focused on the training of clergy.<sup>5</sup> General education—such as the teaching of values, standards, vocational skills, and abilities—was mainly done by one’s own family and social class. A formal education was not available for everyone at that time.<sup>6</sup> This changed with the French Revolution in 1789, in which various nations modified their relationship between church and state, and thus also the understanding of religious education.<sup>7</sup> Jean-Jacques Rousseau had a significant impact on the development in France: He claimed in *The Social Contract* that a “religion civile” had to be created for which the state was solely responsible.<sup>8</sup> In the course of these events, the Prussian state established the “Prussian Common Law” in 1794, which institutionalized schools as a part of the state and mandated public education for its citizens.<sup>9</sup> Thus, one can notice a shift of education in general from the church, family, and social environment to the state. Furthermore, religious education also shifted increasingly to the schools since the nineteenth century. This is due to the fact that schooling became compulsory.<sup>10</sup> In connection with the Enlightenment, the state attempted to separate itself from church and social class structures in order to realize the principles of freedom and equality. In the Prussian State, this led to the quite radical educational approach that children should be shielded from their parents so that they wouldn’t be shaped by their social background and environment.<sup>11</sup> Therefore, in the Prussian Constitution of 1850, the only right parents had was bringing their children to school.<sup>12</sup>

<sup>3</sup>GRUNDGESETZ [GG] [BASIC LAW] art. 7, translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html), which states:

- (1) The entire school system shall be under the supervision of the state.
- (2) Parents and guardians shall have the right to decide whether children shall receive religious instruction.
- (3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state’s right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.

<sup>4</sup>See WEIMARER VERFASSUNG [WV] [WEIMAR CONSTITUTION] Aug. 11 1919, art. 149 (Weimar Republic) [hereinafter Weimar Const. 1919], which states:

Religious instruction shall form part of the regular school curriculum, except in the non-confessional (secular) schools. Its form will be regulated by laws relating to schools. Religious instruction shall be given in conformity with the principles of the religious society concerned, without prejudice to the State’s right of supervision.

The imparting of religious instruction and the performance of religious acts is left to the decision of the teacher, while the participation in religious lessons, acts, and ceremonies is a matter for the decision of those who have the right to determine the religious education of the child.

The theological faculties in the universities shall be maintained.

<sup>5</sup>Udo Friedrich Schmälzle, *Religious Education in Germany*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF RELIGIOUS EDUCATION, *supra* note 1, at 122.

<sup>6</sup>See *id.*

<sup>7</sup>*Id.*

<sup>8</sup>See *id.* at 122–123.

<sup>9</sup>See *id.* at 123.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>See *id.* at 124. See also VERFASSUNG FÜR DEN PREUßISCHEN STAAT [VPS] [CONSTITUTION] Jan. 31, 1850, art. 21 (Prussia).

On the contrary, the church did not adhere to this position and argued that the parent's rights superseded the state law, and thus the state's monopoly on education as well.<sup>13</sup> The confrontation between church and state ended in the so-called *Kulturkampf*.<sup>14</sup> The state tried to radically push back the influence of the Church in all areas, but did not succeed in the end. The Church retained its position. Nonetheless, some changes lasted, such as the limitation of the Church's supervision of schools.<sup>15</sup> Clergymen were still local school inspectors, but the next highest supervision was transferred to state officials.<sup>16</sup>

In the Weimar Constitution, the balance between church and state was further settled in the so-called *Kulturkompromiss*.<sup>17</sup> On the one hand, school supervision by the Church was finally completely abandoned, and thus the separation of church and state in principle was established.<sup>18</sup> On the other hand, parental rights, as proclaimed by the church, were emphasized.<sup>19</sup> Moreover, both the Catholic and Lutheran churches were allowed to hold religious education classes in public schools according to their own denominational understanding. Under Article 146 paragraph, 2 of the Weimar Constitution,<sup>20</sup> denominational schools could even be established at the request of parents—the so-called Weimar School compromise.<sup>21</sup> The German Constitution adopted more or less the same arrangements, but with the slight modification that the guarantee for denominational schools wasn't adopted.<sup>22</sup> As a compromise, the importance of denominational religious education at school was stressed.<sup>23</sup> Therefore, the historical events—such as the Enlightenment and the *Kulturkampf*<sup>24</sup>—had a significant impact on the specific form of religious education in Germany today.<sup>25</sup>

The offering of denominational religious education in public schools is the predominant model in Europe, and even in other parts of the world. For example, in Austria, the Netherlands, Poland, Spain, and Italy; as well as in Latin American countries, such as Colombia, Chile and Peru, denominational religious education is offered.<sup>26</sup> Of course, each country has its specific characteristics.<sup>27</sup> Compared to Germany, France experienced a different development. The process of separation of state and church in France culminated in the introduction of laicism on December 9, 1905.<sup>28</sup> Consequently, no teaching of or about religion is offered in public schools,

<sup>13</sup>Schmälzle, *supra* note 5, at 123–124.

<sup>14</sup>For details on the *Kulturkampf*, see PETER UNRUH, RELIGIONSVERFASSUNGSRECHT para. 35 (2018).

<sup>15</sup>*Id.* at para. 35.

<sup>16</sup>Schmälzle, *supra* note 5, at 124.

<sup>17</sup>See UNRUH, *supra* note 14, at para. 37.

<sup>18</sup>See Weimar Const. 1919, *supra* note 4, at art. 137, para. 1 (“There shall be no state church.”).

<sup>19</sup>See also Schmälzle, *supra* note 5, at 124.

<sup>20</sup>See Weimar Const. 1919, *supra* note 4, at art. 146, para. 2, which states:

Within the Communes, however, on the petition of parents and guardians, popular schools professing their own faith or philosophy of life shall be established, insofar as this does not interfere with an organized school system in the sense, also, of paragraph 1, *supra*. As far as possible the will of the parents and guardians shall be taken into consideration. Details shall be regulated by Lands legislation based on principles prescribed by a Reich law.

<sup>21</sup>See Schmälzle, *supra* note 5, at 124. For details on the so-called Weimar school compromise (*Schulkompromiss*), see Peter Badura, Art. 7, in GRUNDGESETZ KOMMENTAR para. 40 (Theodor Maunz & Günter Dürig eds., 2018).

<sup>22</sup>Badura, *supra* note 21, at para. 40.

<sup>23</sup>See Schmälzle, *supra* note 5, at 124.

<sup>24</sup>See for the impact the *Kulturkampf* had on the current form of theological faculties at public universities Christian Waldhoff, *Theologie an staatlichen Hochschulen*, in HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND para. 6 (Dietrich Pison, Wolfgang Rübner, Michael Germann & Stefan Muckel eds., forthcoming).

<sup>25</sup>For the impact history has on current policies about religious education, see Durham, Jr., *supra* note 1, at 2.

<sup>26</sup>Silvio Ferrari, *Religious Education in the European Union*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF RELIGIOUS EDUCATION, *supra* note 1, at 101.; Durham, Jr., *supra* note 1, at 7–8.

<sup>27</sup>For an overview about the specific characteristics of denominational religious education in European countries, see Ferrari, *supra* note 26, at 101.

<sup>28</sup>UNRUH, *supra* note 14, at paras. 37, 578.

with the exception of Alsace-Moselle due to historical reasons.<sup>29</sup> Only in secondary schools can parents or students request the creation of a chaplaincy. If the school authorities authorize this, the chaplain can offer religious education on the school premises to those students who are interested in it, but it neither can take place during school time, nor is it part of the regular curriculum.<sup>30</sup> Hungary and the Czech Republic follow this approach and do not offer lessons of, or about, religion as part of the regular curriculum.<sup>31</sup> Beyond Europe, the U.S., Japan, South Korea, and China also do not allow religious education in public schools.<sup>32</sup> A third approach to religious education can be found, for example, in the U.K.<sup>33</sup> This can be described as a middle course. Instead of offering no religious education at all, non-denominational teaching about religion is offered. Thus, the knowledge and information about several different religions is taught from an external point of view.<sup>34</sup>

The incorporation of denominational religious education as part of the obligatory subjects at public schools in Germany is based on the belief that schools—as the places where knowledge is imparted and values are taught—<sup>35</sup>cannot ignore the “religious dimension of human existence.”<sup>36</sup> Furthermore, religiously determined moral education may function as a precondition for the existence of a free democratic constitution. As Böckenförde put it in his famous dictum, “[t]he liberal, secularized state lives on prerequisites which it cannot guarantee.”<sup>37</sup> Religious education may help to establish these prerequisites.<sup>38</sup> In addition to Article 7, paragraphs 2 and 3 of the German Federal Constitution, most of the state constitutions contain corresponding guarantees. They are substantiated by state laws, as well as several church agreements and concordats.<sup>39</sup>

As indicated, religious education is a common concern of the State and the Church, and thus belongs to the group of so-called “*res mixtae*.”<sup>40</sup> Article 7, paragraph 3 imposes on the state an obligation to ensure that the institutional and organizational requirements of religious education are met, while the religious societies decide its instructional contents. Therefore, religious education is marked by close cooperation between the state and the religious societies. It illustrates the existing so-called “limping” separation of church and state in Germany.<sup>41</sup> The relationship between state and churches, or religious societies, varies widely—as already alluded to above—even in liberal democracies.<sup>42</sup> Whereas France, for example, has a very strict separation of church and state, England and Sweden still have state churches.<sup>43</sup> Germany represents

<sup>29</sup>Ferrari, *supra* note 26.

<sup>30</sup>Ferrari, *supra* note 26.

<sup>31</sup>Ferrari, *supra* note 26.

<sup>32</sup>Durham, Jr., *supra* note 1, at 5.

<sup>33</sup>For a general overview about the three models of religious education in the public sector, see Ferrari, *supra* note 26; Durham, Jr., *supra* note 1, at 4–9.

<sup>34</sup>Ferrari, *supra* note 26.

<sup>35</sup>See generally REX J. AHDAR & IAN LEIGH, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* 243 (2015).

<sup>36</sup>Gerhard Robbers, *Art. 7, in GRUNDGESETZ KOMMENTAR* para. 115 (Hermann von Mangoldt, Friedrich Klein & Christian Starck eds., 7th ed. 2018).

<sup>37</sup>ERNST-WOLFGANG BÖCKENFÖRDE, *STAAT, GESELLSCHAFT, FREIHEIT. STUDIEN ZUR STAATSTHEORIE UND ZUM VERFASSUNGSRECHT* 60 (1976).

<sup>38</sup>See Schmäzle, *supra* note 5, at 125; AHDAR & LEIGH, *supra* note 35, at 270.

<sup>39</sup>For more information, see UNRUH, *supra* note 14, at paras. 53–62.

<sup>40</sup>Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 74 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 244, 251, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1999/02/lk19990217\\_1bv1002697.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1999/02/lk19990217_1bv1002697.html); BERND JEAND’HEUR & STEFAN KORIOETH, *GRUNDZÜGE DES STAATSKIRCHENRECHTS* para. 306 (2000).

<sup>41</sup>More information to the so-called “limping” separation of church and state in Germany can be found in JEAND’HEUR & KORIOETH, *supra* note 40, at paras. 159–165. The term “limping separation” was imposed by Ulrich Stutz in *DIE PÄPSTLICHE DIPLOMAT, IER UNTER LEO XIII.* 54 n.2 (1926).

<sup>42</sup>Perry L. Glanzer & Konstantin Petrenko, *Religion and Education in Post-Communist Russia: Russia’s Evolving Church-State Relations*, 49 J. CHURCH & STATE 53 (2007) (providing further references).

<sup>43</sup>Bernd Grzeszick, *Islamischer Religionsunterricht an öffentlichen Schulen*, in *ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT [ZEVKR]* 362, 363 (2017).

a middle course by having a cooperative relationship between the state and religious societies.<sup>44</sup> Each approach of regulating the relationship between the state and the religious societies may lead to different concepts of religious education, as seen above, and thus, of course, faces its own specific problems when it comes to religious diversification.

Therefore, this Article tries to highlight a problem which a cooperative approach of church and state relations is particularly exposed to—the issue of changing religious demography. Initially, only the two Christian churches—Catholic and Protestant—offered religious education in accordance with Article 7, paragraph 3. This remained consistent, as even until 1950, 96.5 % of the Western German population and 92 % of the Eastern German population were members of either of these two big Christian churches.<sup>45</sup> But in 1990, the number of Christian church members dropped down to around 72 %, the number of Muslims reached about 3.7 %, and non-denominational individuals made up about 22.4 %. This trend continues today: In 2015, only 56 % of the German population were members of one of the two Christian churches, whereas 5.5 % belonged to Islam, 2.1 % were part of a free church or other special communities, and 2.0 % belonged to the Orthodox or Oriental church. The percentage of non-denominational citizens increased to 31.4 %. In addition to the decrease in the total number of religious people, Germany also experienced a religious diversification. Corresponding to this diversification, the claim to establish other types of religious education rose. In particular, the claim for Islamic religious education has grown stronger in the recent past as people practicing Islam make up the second largest group after Christian believers, and their numbers are expected to grow further.<sup>46</sup>

This leads to the essential question: Is the German Constitution capable of facing the new religious diversity? How does the state respond to it? This Article tries to answer this question with regard to the establishment of Islamic religious education. In the first part, the legal requirements of Article 7, paragraph 2 concerning religious education will be outlined. This then permits an examination, in the second part, of which legal problems will have to be solved before Islamic religious education can be offered as a regular subject at public schools.

## B. Legal Significance of Article 7, Paragraph 3

Article 7, paragraph 3, sentence 1 of the Constitution<sup>47</sup> is what, in German constitutional law, is referred to as an institutional guarantee.<sup>48</sup> As such, Article 7, paragraph 3 ensures that religious education is part of the public school curriculum. Thus, the state cannot abolish religious education but must provide a framework that allows religious education to be taught.<sup>49</sup> The constitutional principle of neutrality in ideological or religious matters prohibits the state from teaching religious education on its own, or even from deciding the instructional contents. Consequently, Article 7, paragraph 3, sentence 2 provides that religious education be taught in accordance with the principles of the religious society. This institutional guarantee operates within an understanding of neutrality in the German Constitution, which can be called a “positive neutrality”.<sup>50</sup> This is

<sup>44</sup>*Id.* at 363.

<sup>45</sup>For the statistical data here and below, see *id.* at 365.

<sup>46</sup>See *id.* at 365–366; Guy Beaucamp & Karin Wißmann, *Islamischer Religionsunterricht—Warum ist das eine unendliche Geschichte?*, 2017 DEUTSCHES VERWALTUNGSBLATT 1517 (2017).

<sup>47</sup>GRUNDGESETZ art. 7, para. 3, which states:

Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state’s right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.

<sup>48</sup>Stefan Mückl, *Staatskirchenrechtliche Regelungen zum Religionsunterricht*, 122 ARCHIV DES ÖFFENTLICHEN RECHTS 513, 520 (1997).

<sup>49</sup>JEAND’HEUR & KORIOTH, *supra* note 40, at para. 307.

<sup>50</sup>Durham, Jr., *supra* note 1, at 8; see Schmälzle, *supra* note 5, at 124–128.

due to the cooperative relationship between church and state. On the one hand, the state has to provide a framework for religious education in public schools. On the other hand, the state may not identify itself with a specific religion, and it must not determine the content of the religious education.

Nonetheless, the legal effects of Article 7, paragraph 3 are not limited to an institutional guarantee. It also houses a fundamental right. There is—nearly unanimous—agreement that Article 7, paragraph 3 at least grants religious societies a fundamental right to teach religious education.<sup>51</sup> It, however, remains controversial whether pupils and their parents have a corresponding fundamental right that they or their children receive religious education. The prevailing view favors such a right.<sup>52</sup> According to this view, Article 7, paragraph 3 is seen as part of the section of the Constitution that guarantees fundamental rights. Moreover, supporters of this point of view consider religious education to be complementary to the fundamental right of religious freedom and expression, which otherwise would be neglected. They maintain that religious education is part and parcel of religious expression.<sup>53</sup> In this context, it is important to point out that, in any event, only the state, not the religious society, is bound by Article 7, paragraph 3. Thus, even if one follows this opinion, parents or their children can only demand the establishment of religious education from the state. They cannot force the religious society itself to offer religious education.

Those who deny a fundamental right to religious education of parents and pupils point out that the text of Article 7, paragraph 3 suggests that this provision only equips religious societies with a fundamental right.<sup>54</sup> Furthermore, they maintain that all the state can do is provide an institutional and organizational framework for religious education. The state is constitutionally banned from teaching religious education directly through its own agents due to its obligation of neutrality in religious and ideological matters.<sup>55</sup> It is left to the religious societies to decide whether they avail themselves of their right. As mentioned before, Article 7, paragraph 3 does not entail the right of the parents or their children to force the religious society to offer religious education. If the religious society decides to refuse to offer religious education, it is the legal consequence of Article 7, paragraph 3 that the state won't be able to offer this particular religious education.<sup>56</sup> That a religious society decides to do so is rather unlikely, but it is part of their constitutionally granted right of self-determination. Therefore, the state is not in a position to ensure that all those who want to take religious education as a subject can do so.<sup>57</sup> A conditional fundamental right, which is dependent on the consent of the religious society, hardly improves the legal status of parents and their children. Moreover, such a conditional fundamental right is generally not known to the Constitution.<sup>58</sup>

### C. Religious Education as a Regular Subject

As mentioned before, Article 7, paragraph 3, sentence 1 stipulates that religious education has to be a regular subject at all public schools except in non-denominational schools. Article 7, paragraph 3 is the only rule in the German Constitution that prescribes a particular subject to be taught in schools. Nevertheless, religious education is not privileged in its rank and treatment compared to other subjects, but is secured in a specific way by the Constitution.<sup>59</sup>

<sup>51</sup>JEAND'HEUR & KORIOTH, *supra* note 40, at para. 311; THORSTEN KINGREEN & RALF POSCHER, GRUNDRECHTE para.786 (2018); Mückl, *supra* note 48, at 521.

<sup>52</sup>Mückl, *supra* note 48, at 521–522; Robbers, *supra* note 36, at para. 123.

<sup>53</sup>Mückl, *supra* note 48, at 521–522.

<sup>54</sup>JEAND'HEUR & KORIOTH, *supra* note 40, at para. 311; Frauke Brosius-Gersdorf, *Art. 7, in GRUNDGESETZ KOMMENTAR* para. 90 (Horst Dreier ed., 3rd ed. 2013).

<sup>55</sup>Brosius-Gersdorf, *supra* note 54, at para. 90.

<sup>56</sup>*Id.*

<sup>57</sup>JEAND'HEUR & KORIOTH, *supra* note 40, at para. 311; Brosius-Gersdorf, *supra* note 54, at para. 90.

<sup>58</sup>Brosius-Gersdorf, *supra* note 54, at para. 90.

<sup>59</sup>Robbers, *supra* note 36, at para. 118.

### I. Religious Education

The doctrine of the religious society itself is taught. This follows from Article 7, paragraph 3 stating that “religious instruction shall be given in accordance with the tenets of the religious community concerned.”<sup>60</sup> Thus, religious education courses offered in schools are not inter-denominational; there is no requirement that the courses provide comparative reflections on religious doctrines, nor are they mere lectures on moral philosophy, or the history of customs and manners, or the history of religion. Quite the contrary: In these courses, the doctrine of the particular religious society is taught and often presented as the only truth.<sup>61</sup> This is an essential difference from a non-denominational religious education, as it exists in the U.K. and Denmark. Still, this does not preclude the possibility of emphasizing or preferring a certain religion in the non-denominational religious education lessons.<sup>62</sup> For instance, in Denmark and the U.K., non-denominational religious education classes tend to emphasize Christianity.<sup>63</sup>

Pursuant to Article 7, paragraph 3, religious education is taught in a denominational way.<sup>64</sup> Nevertheless, it is possible for the religious societies to organize an ecumenical religious education or to allow pupils belonging to a different denomination, or to none at all, to attend the denominational religious education offered by them.<sup>65</sup> That said, education also requires that knowledge be imparted. Therefore, a fine line needs to be drawn between religious education within the meaning of Article 7, paragraph 3 and the preaching of religious doctrine. For example, if the religious education lessons simply consist of praying, rites, cults, or meditation, this is considered to be preaching and hence it contradicts Article 7, paragraph 3.<sup>66</sup> Thus, the provision of religious education cannot be construed as creating a “church within the school.”<sup>67</sup>

### II. Public Schools

The provision of religious education under the German Constitution applies only to public schools, a term that is conventionally understood as all schools belonging to a governmental body. This broad definition means that religious education must be a regular subject at all schools providing a general education, as well as at professional training schools, except for technical schools and evening schools.<sup>68</sup> Yet, private schools are excluded even if they are open to the public at large. As a result of Article 7, paragraph 3’s character as an institutional guarantee, non-denominational schools—in other words, schools that have renounced a religious commitment and are strictly secular or ideological—cannot be established as a rule.<sup>69</sup>

### III. Regular Subject

As religious education must be a regular subject, the subject thus enjoys the same rank and must be treated just like any other so-called regular subjects.<sup>70</sup> This means that religious education must be integrated into the curriculum and be taught within the regular classrooms inside the school.<sup>71</sup>

<sup>60</sup>Badura, *supra* note 21, at para. 70.

<sup>61</sup>74 BVERFGGE 244, at 252–253.

<sup>62</sup>Ferrari, *supra* note 26.

<sup>63</sup>Ferrari, *supra* note 26.

<sup>64</sup>74 BVERFGGE 244, at 252–253 (citing Gerhard Anschütz, *Art. 149 WRV, in DIE VERFASSUNG DES DEUTSCHEN REICHES* para. 4 (Gerhard Anschütz ed., 14th ed. 1933)).

<sup>65</sup>Robbers, *supra* note 36, at para. 127.

<sup>66</sup>Badura, *supra* note 21, at para. 70.

<sup>67</sup>Mückl, *supra* note 48, at 523.

<sup>68</sup>Robbers, *supra* note 36, at para. 128.

<sup>69</sup>Robbers, *supra* note 36, at para. 129.

<sup>70</sup>Robbers, *supra* note 36, at para. 130.

<sup>71</sup>JEAND’HEUR & KORIOETH, *supra* note 40, at para. 308.

It is not an elective subject but a compulsory one. A registration to participate in religious education is not necessary.<sup>72</sup> Nevertheless, it is possible to opt-out.<sup>73</sup> According to Article 7, paragraph 2 of the German Constitution, the legal guardian, usually a parent, can decide on behalf of the child whether s/he will attend classes in religious education, unless the child has acquired the legal capacity to decide. This flows from the right of religious freedom—Article 4, paragraphs 1 and 2 of the Constitution—and the parental right to educate their children in the way the parents so choose—Article 6, paragraph 2 of the Constitution.<sup>74</sup> The conditions under which children can decide for themselves whether or not to attend religious education are laid down in the law concerning the religious education of children—“Gesetz über die religiöse Kindererziehung” [RelKERzG].<sup>75</sup> According to the law, parents can decide the child’s religious education until the child reaches the age of twelve. Thereafter, the parents’ decision requires the child’s approval between the ages of 12 and 14, and, finally, from the age of 14 onwards, children can decide on their own.

Furthermore, religious education must not be discriminated against in terms of the number of lessons per week or its position on the time-table.<sup>76</sup> Nevertheless, just as in the case of any regular subject, classes in religious education may be offered under the condition that a particular quorum of participating pupils is reached.<sup>77</sup> In a comparative perspective, this is nothing surprising, as a lot of countries offer denominational religious education on the basis that a specific quorum of pupils is reached.<sup>78</sup> A pupil’s performance has to be graded.<sup>79</sup> The final mark one receives in religious education can be decisive for promotion to the next grade.<sup>80</sup>

In addition, each German constituent state is responsible for a proper religious education. Thus, the state must—through appropriate colleges or universities—ensure that qualified personnel are available to teach religious education.<sup>81</sup> The state has to employ sufficient number of teachers and must pay their salaries and cover other costs of providing religious education, including providing books and other teaching materials.<sup>82</sup> Irrespective of their official position, those who teach religious education may attend school staff meetings with an equal right to vote on decisions taken during those meetings.

#### D. Implementation

According to Article 7, paragraph 3, sentence 2, religious education is based on the central doctrine of faith and the central moral philosophy of the religion.<sup>83</sup> That is what is meant when the Constitution speaks of religious education being offered in accordance with the principles of the religious society. The denominational character of religious education is clearly envisaged under the German Constitution.

<sup>72</sup>JEAND’HEUR & KORIOETH, *supra* note 40, at para. 312.

<sup>73</sup>JEAND’HEUR & KORIOETH, *supra* note 40, at para. 312.

<sup>74</sup>JEAND’HEUR & KORIOETH, *supra* note 40, at para. 312.

<sup>75</sup>See Gesetz über die religiöse Kindererziehung [KERzG] [Law on Religious Parenting], July 15, 1921, REICHSGESETZBLATT [RGBL], at § 5.

<sup>76</sup>Bernhard Schlink, *Religionsunterricht in den neuen Ländern*, 1992 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1008, 1009.

<sup>77</sup>Mückl, *supra* note 48, at 525.

<sup>78</sup>Durham, Jr., *supra* note 1, at 8.

<sup>79</sup>Schlink, *supra* note 76, at 1009.

<sup>80</sup>Schlink, *supra* note 76, at 1009.

<sup>81</sup>Robbers, *supra* note 36, at para. 135.

<sup>82</sup>Robbers, *supra* note 36, at paras. 133–134.

<sup>83</sup>Mückl, *supra* note 48, at 528.



### *I. In Accordance with the Principles of the Religious Society*

In order to be qualified as a religious society in terms of Article 7, paragraph 3, a number of requirements must be fulfilled.<sup>84</sup> In view of the close cooperation between the state and the religious society, the latter must identify a contact person on its behalf to ensure that the state can communicate with them. The prevailing view is that the religious society does not necessarily have to be organized as a corporation under public law—Article 140 of the German Constitution in conjunction with Article 137, paragraph 5 of the Weimar Constitution of 1919.<sup>85</sup>

Religious societies participate in the preparation of the curriculum of religious education, and they can influence the teaching method, the content of the schoolbooks, and the content of other teaching aids.<sup>86</sup> They decide basically on their own, insofar as the content of the religious education is concerned.

The religious societies also participate in employment-related decisions concerning the teaching staff. Only teachers who have received an ecclesiastical authorization can teach religious education.<sup>87</sup> Protestant churches of the *Länder* issue the *vocatio*, while the Catholic Church issues the *missio canonica*. This requirement seems similar to what is required by other countries offering denominational religious education. For instance, in the Netherlands, Poland, Austria, Spain, and Italy, an ecclesiastical authorization of the church is mandatory, too.<sup>88</sup> Article 7, paragraph 3, sentence 3 of the Constitution, however, also provides that no one has to teach religious education against his or her will. In this regard, Article 7, paragraph 3, sentence 3 again relates to the religious freedom protected under Article 4, paragraphs 1 and 2.<sup>89</sup> There is also a close link to Article 33, paragraph 3 and Article 3, paragraph 3 of the Constitution, which provide that no person is to be discriminated against on the ground of his or her faith. A teacher refusing to teach religious education must not suffer any official or unofficial disadvantages because of that decision.<sup>90</sup> Finally, the religious societies also have a right to inspect classes of religious education taught on their behalf.<sup>91</sup>

Interestingly, the scope of freedom of religion and non-discrimination protection under the German Constitution is wider than in certain countries where religious education is taught in a non-denominational way. For instance, in the U.K., it is the state that selects, appoints, and dismisses teachers; defines the curriculum and syllabus, and approves textbooks without direct interference from the religious society.<sup>92</sup> Nonetheless, this does not exclude the possibility of cooperating with religious societies in certain activities.<sup>93</sup>

As mentioned before, religious societies have a right, not an obligation, to offer a religious education. If the religious societies do not avail themselves of their right, the state may create and offer a similar subject.<sup>94</sup> Nonetheless, due to its obligation of neutrality in religious and ideological matters, the state must neither teach the doctrine of a particular religious society nor present it as the only truth.<sup>95</sup> On the contrary, the state might offer a non-denominational, comparative reflection on religious doctrines or a history of different religions. The difficulties of this substitute will be outlined later.<sup>96</sup>

<sup>84</sup>For more details, see *infra* Section G.I.

<sup>85</sup>Christoph Link, *Religionsunterricht*, in II HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 439, 500 (Joseph Listl & Dietrich Pirson eds., 1995); Robbers, *supra* note 36, at para. 151.

<sup>86</sup>Mückl, *supra* note 48, at 529.

<sup>87</sup>Mückl, *supra* note 48, at 529.

<sup>88</sup>Ferrari, *supra* note 26, at 101.

<sup>89</sup>JEAND'HEUR & KORIOTH, *supra* note 40, at para. 308.

<sup>90</sup>Robbers, *supra* note 36, at para. 162.

<sup>91</sup>Mückl, *supra* note 48, at 530.

<sup>92</sup>Ferrari, *supra* note 26.

<sup>93</sup>Ferrari, *supra* note 26.

<sup>94</sup>Robbers, *supra* note 36, at para. 160.

<sup>95</sup>Robbers, *supra* note 36, at para. 160.

<sup>96</sup>See *infra* Section F.

## II. Governmental Supervision

As part of the public school curriculum, religious education is subject to governmental supervision. But in this case, the usual governmental supervision is modified and limited.<sup>97</sup> As has already been said, the religious societies basically decide the content of the religious education on their own. They influence the curriculum, the teaching method, and the contents of schoolbooks and of other teaching aids. They are free to present their religious doctrine as the only truth. The state must accept a new teaching method if the religious societies choose to change the content or intention of the education they offer.<sup>98</sup> Consequently, governmental supervision is limited to issues not related to questions of faith and religious doctrine, such as pupils' discipline. Governmental supervision also is admissible in so far as it aims to ensure that the organizational and personal requirements for proper religious education are satisfied.<sup>99</sup>

### E. Scope of Application—So-Called LER in Brandenburg

To be clear, Article 7, paragraph 3 of the German Constitution does not apply throughout Germany. According to Article 141 of the Constitution, Article 7, paragraph 3 does not apply to a *Land* where on January 1, 1949, religious education was governed by a different legal regime. Article 141 refers to a *Land* that did not guarantee religious education as a regular subject at public schools at the beginning of 1949. This rule was originally included in the German Constitution to account for regional particularities that at the time applied to Bremen and Berlin. Therefore, Article 141 became known as the Bremen clause. In Berlin, the consequence of Article 141 was that the government decided in 2006 to introduce compulsory non-denominational teaching about religion—"ethics"—into the regular curriculum. Thus, while Germany in general follows the approach of denominational teaching of religion, Article 141 of the Constitution allows the *Länder*, where the Bremen clause applies, to follow a different approach. This, again, demonstrates that even in Germany, the denominational approach of religious education is not self-evident.

In addition, it is controversial whether Article 141 applies to all *Länder* in Eastern Germany as well. This largely theoretical question rose to prominence in 1996, when the *Land* Brandenburg decided to include a compulsory subject called "living-ethics-religion" ("LER") into its public school curriculum instead of religious education. Religious education was instead offered as an elective subject. LER was to be taught in a non-denominational way. Brandenburg relied on Article 141 of the Constitution to justify its decision. The merits of this argument depend on the interpretation of the word "*Land*" in Article 141 of the Constitution. If that term refers to the regional identity of the territory,<sup>100</sup> then Article 141 applies to Brandenburg: At the beginning of 1949, religious education was not guaranteed as a regular subject at public schools in the territory of what is now known as the *Land* Brandenburg. Religious education was rather considered an exclusive concern of the religious societies. If the term "*Land*," refers to the legal identity of a certain territory,<sup>101</sup> then Brandenburg could not rely on Article 141. Brandenburg was not created until the German reunification in 1990. Furthermore, the legal regime Article 141 speaks of must comply with basic democratic principles and the rule of law. Due to the influence of the former Soviet Union, it can hardly be said that the rules in 1949 in the territory now known as

<sup>97</sup>JEAND'HEUR & KORIOTH, *supra* note 40, at para. 309; Robbers, *supra* note 36, at para. 146.

<sup>98</sup>74 BVERFG 244, at 252.

<sup>99</sup>Robbers, *supra* note 36, at para. 147.

<sup>100</sup>Markus Thiel, *Art. 141*, in GRUNDGESETZ KOMMENTAR para. 13 (Michael Sachs ed., 8th ed. 2018); Schlink, *supra* note 76, at 1010–1013.

<sup>101</sup>Peter Unruh, *Art. 141*, in GRUNDGESETZ KOMMENTAR, *supra* note 36, at para. 8; Arnd Uhle, *Die Verfassungsgarantie des Religionsunterrichts und territoriale Reichweite*, 1997 DIE ÖFFENTLICHE VERWALTUNG 409, 410 (1997).

Brandenburg were passed in accordance with these principles. Members of Parliament, pupils, parents, and ecclesiastic institutions have appealed to the German Federal Constitutional Court in order to prevent the enforcement of the law and demanded that religious education should be instituted as a compulsory subject at Brandenburg's public schools. The Federal Constitutional Court, however, neither decided upon the proper interpretation of Article 141 nor did it issue a verdict on the constitutionality of the law. Instead, the court proposed a compromise between the different parties: LER may be offered by the *Land* Brandenburg, but there needs to be the possibility to opt-out and choose religious education for the students.<sup>102</sup>

## F. Side Note: Alternative Subjects

Most schools include an alternative subject in the curriculum for those pupils who do not participate in religious education. Pupils who have decided against taking part in religious education usually have to attend classes in moral philosophy or ethics.<sup>103</sup> These are compulsory subjects too. In these subjects, pupils are taught about general moral values, but also about different religions.<sup>104</sup> According to the decisions of the highest courts in Germany, the provision of such an obligatory, alternative subject is constitutional.<sup>105</sup> The school system is subject to governmental supervision according to Article 7, paragraph 1 of the German Constitution. Because the state is responsible for its citizens' education and formation, the state is entitled to create new and additional school subjects. The state has to impart both knowledge and values in order to educate the children to become responsible members of society. Therefore, the state may refer to moral questions and problems in public schools.<sup>106</sup> Nevertheless, moral philosophy has to be taught in strict respect of the principle of neutrality in ideological and religious matters and, with regard to its contents, has to comply with the precept of pluralism. The state must not dictate a particular moral concept as the truth.<sup>107</sup> As far as moral philosophy is an alternative subject to religious education, it is important to note that the attendance of religious education is voluntary. Moral philosophy, therefore, must not be organized in a way that—indirectly—pressures pupils to attend religious education against their will merely to avoid moral philosophy. Otherwise, the right to attend religious education on a voluntary basis would be violated. The state can enforce a compulsory alternative for religious education to substitute the time students abstaining from religious education miss, but the state has to organize it as an equivalent subject with regard to its contents and rank in order to prevent a violation of the right of religious freedom.<sup>108</sup> The state may even introduce it as an additional compulsory subject for all students, including the ones already attending religious education. The double burden for the students also attending religious education is justified by the educational mission of the state.<sup>109</sup>

Legal scholars disagree whether moral philosophy—as an alternative, obligatory subject to religious education—is constitutional.<sup>110</sup> Some writers object to the contents of the subject

<sup>102</sup>Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Case No. 1 BvF 1/96, 104 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 305–310 (Oct. 31, 2002), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2002/10/fs20021031\\_1bv000196.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2002/10/fs20021031_1bv000196.html).

<sup>103</sup>JEAND'HEUR & KORIOH, *supra* note 40, at para. 313; Badura, *supra* note 21, paras. 77.

<sup>104</sup>See Badura, *supra* note 21, at para. 77.

<sup>105</sup>Bundesverwaltungsgericht [BVERWG] [Federal Administrative Court], June 17, 1998, DEUTSCHES VERWALTUNGSBLATT [DVBL] 1344–1350 [hereinafter *Judgment of June 17, 1998*].

<sup>106</sup>*Id.* at 1345.

<sup>107</sup>*Id.* at 1345–1346.

<sup>108</sup>*Id.* at 1347–1348.

<sup>109</sup>*Id.* at 1347–1348; Badura, *supra* note 21, at para. 79.

<sup>110</sup>Gerhard Czermak, *Das Pflicht-Ersatzfach Ethikunterricht als Problem der Religionsfreiheit, des Elternrechts und der Gleichheitsrechte*, 1996 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 450, 452–455 (1996); JEAND'HEUR & KORIOH, *supra* note 40, at para. 314; Ludwig Renck, *Verfassungsprobleme des Ethikunterrichts*, 38 BAYERISCHE VERWALTUNGSBLÄTTER 519, 521 (1992).

and its link to religious education. Insofar as the state is committed to the neutrality in ideological and religious matters, the state must not take a binding view on moral questions or even dictate a particular moral concept as the truth. This raises difficult issues in education: Some writers wonder how the state can instill values in the pupils without, at the same time, violating its obligation of neutrality in matters of religion and ideology.<sup>111</sup> To ensure that a course about religion is neutral and objective is a very delicate issue.<sup>112</sup> Even where good faith and great effort is present in attempting to ensure neutral teaching, problems may arise because some pupils or parents might have a different understanding of neutrality.<sup>113</sup> For instance, in relation to Norway's Christian Knowledge and Religious Ethical Education course, both the European Court of Human Rights and the United Nations Human Rights Committee concluded that the course was not sufficiently neutral and that the provided opt-out option was insufficient.<sup>114</sup>

Another problem might be the close link that exists between moral philosophy and religious education. This problem corresponds to the reflections of the highest court. Religious education is attended voluntarily; there is no duty to participate. The parents, and subsequently their children, can invoke their right of religious freedom when they abstain from religious education. But where these children are made to attend a compulsory alternative subject, this sets up their religious freedom against a state mandate that is not explicitly required under the Constitution.<sup>115</sup> In other words, the decision to opt-out of religious education results in the duty to take part in an alternative subject, which is neither required by Article 7 of the Constitution nor another provision of the Constitution. Furthermore, the court indicates that this duty might not be compatible with the Constitution in relation to Article 3, paragraph 3, whereupon nobody is to be discriminated against on the ground of his or her faith.<sup>116</sup>

### G. Islamic Religious Education

Besides these difficult issues surrounding the implementation of religious education in Germany, one particularly thorny issue that has arisen in the context Germany's increased religious plurality is the provision of Islamic religious education. At the moment, three *Länder* offer Islamic religious education, namely North-Rhine Westphalia ("NRW") since 2012, and Hesse and Lower Saxony since 2013.<sup>117</sup> Berlin offers Islamic religious education as well but in a non-compulsory way, and the religious society is responsible for it on its own.<sup>118</sup> This is possible because Article 141 applies to Berlin,<sup>119</sup> and hence, it is not organized in accordance with Article 7, paragraph 3. In the other *Länder*, Islamic religious education is only offered as a pilot project—in other words, not ubiquitous.<sup>120</sup>

<sup>111</sup>JEAND'HEUR & KORIOETH, *supra* note 40, at para. 314.

<sup>112</sup>See AHDAR & LEIGH, *supra* note 35, at 271.

<sup>113</sup>Durham, Jr., *supra* note 1, at 6; AHDAR & LEIGH, *supra* note 35, at 267–269, 271–276.

<sup>114</sup>See Durham, Jr., *supra* note 1, at 6.

<sup>115</sup>Czermak, *supra* note 110, at 452–453; Renck, *supra* note 110, at 520–521; but see UNRUH, *supra* note 14, at para. 432.

<sup>116</sup>Czermak, *supra* note 110, at 453–455; Renck, *supra* note 110, at 521.

<sup>117</sup>Beaucamp & Wißmann, *supra* note 46, at 1517; Antje von Ungern-Sternberg, *Islamischer Religionsunterricht und islamische Theologie—die Suche nach verfassungskonformen Lösungen*, 64 RECHT DER JUGEND UND DES BILDUNGSWESENS 30 (2016).

<sup>118</sup>Ungern-Sternberg, *supra* note 117, at 31–32; Riem Spielhaus & Zrinka Stimac, *Schulischer Religionsunterricht im Kontext religiöser und weltanschaulicher Pluralität*, 68 AUS POLITIK UND ZEITGESCHICHTE 41, 42 (2018).

<sup>119</sup>See Bundesverwaltungsgericht [BVERWG] [Federal Administrative Court], 110 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 326, 335–336, <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerwG&Datum=23.02.2000&AktENZEICHEN=6%20C%205%2E99>; but see UNRUH, *supra* note 14, at para. 445.

<sup>120</sup>For more details, see Havva Engin, *Die Institutionalisierung des Islams an staatlichen und nichtstaatlichen Bildungseinrichtungen*, in HANDBUCH CHRISTENTUM UND ISLAM IN DEUTSCHLAND. GRUNDLAGEN, ERFAHRUNGEN UND PERSPEKTIVEN DES ZUSAMMENLEBENS 369, 370–391 (Mathias Rohe ed., 2017).

When it comes to religious education for Muslims, a crucial issue is the identification of a representative for the religious society. As religious education has to be taught in accordance with the principles of the religious society, the state, as mentioned above, needs a contact person on the part of the religion.<sup>121</sup> The constitutional law concerning religions has been established according to a social condition dominated by the two big Christian churches, which have well-structured internal organizations.<sup>122</sup> In contrast, the Islamic community is more loosely organized and does not have a singular identifiable form of organization.<sup>123</sup> The majority of Muslims are not even members of any Islamic organization, and even the big Islamic umbrella associations (*Dachverbände*) do not represent the majority of Muslims.<sup>124</sup> This has led to the core problem of establishing Islamic religious education. With whom should the state cooperate? If nobody can be identified the project must fail, as the state is not able to define the content of the Islamic religious education itself due to its obligation of neutrality in religious and ideological matters.<sup>125</sup>

The core of the legal debate is thus the question: Which Islamic organizations may be qualified as a religious society in order to nominate an authorized contact person for introducing Islamic religious education?<sup>126</sup>

Besides that, the missing organization of Islam has left the state with the difficult task of determining which children are supposed to take part in Islamic religious education lessons. According to Article 7, paragraph 3 of the Constitution, to be established as a regular subject, registration to participate is generally not necessary.<sup>127</sup> Nevertheless, the state should be able to determine who is taking part in the lessons. If it is not possible to determine whether a child belongs to an Islamic religious society or not, the introduction of Islamic religious education should not be questioned generally—as this seems too formal and contradicts the objectives of Article 7, paragraph 3.<sup>128</sup> On the one hand, Article 7, paragraph 3 highlights the high significance of religious education by explicitly guaranteeing it. On the other hand, the religious society—as part of their right of self-determination—may decide whether it allows people of a related, or even a different confession, to take part in their religious education lessons.<sup>129</sup> Consequently, if the Islamic religious society decides to do so, it must be possible for the pupils—which regard themselves as belonging to the creed or a related creed—to take part in these lessons without having an official membership certificate. This could be realized by registering at school for taking part in Islamic religious education. Therefore, denying the introduction of Islamic religious education just because Islam is not based on membership and thus requiring the parents or the pupils—if they are older than 14 years—to register in order to take part in Islamic religious education seems unconvincing.<sup>130</sup>

A further problem is the availability of qualified teachers. As the state is responsible for the institutional framework, it needs to make sure that there are enough qualified teachers.<sup>131</sup>

<sup>121</sup>Hartmut Kreß, *Islamischer Religionsunterricht zwischen Grundsatzproblemen und neuen Rechtsunsicherheiten*, 2010 ZEITSCHRIFT FÜR RECHTSPOLITIK 14 (2010); Grzeszick, *supra* note 43, at 368; Ungern-Sternberg, *supra* note 117, at 37.

<sup>122</sup>Kreß, *supra* note 121, at 14–15.

<sup>123</sup>Kreß, *supra* note 121, at 14–15; Grzeszick, *supra* note 43, at 371; Ungern-Sternberg, *supra* note 117, at 37.

<sup>124</sup>Kreß, *supra* note 121, at 14–15; Spielhaus & Stimac, *supra* note 118, at 44; Grzeszick, *supra* note 43, at 371–372; Ungern-Sternberg, *supra* note 117, at 37.

<sup>125</sup>See with regard to Islamic Theological Faculties, Waldhoff, *supra* note 24, at § 46 n.67; for an overview of alternative concepts of religious education existing currently in Germany, see Ungern-Sternberg, *supra* note 117, at 34.

<sup>126</sup>See Ungern-Sternberg, *supra* note 117, at 37; UNRUH, *supra* note 14, at para. 459.

<sup>127</sup>UNRUH, *supra* note 14, at para. 429.

<sup>128</sup>See Beaucamp & Wißmann, *supra* note 46, at 1520; UNRUH, *supra* note 14, at para. 459; BARBARA GARTNER, DER ISLAM IM RELIGIONSNEUTRALEN STAAT 255 (2005); Wolfgang Bock, *Islamischer Religionsunterricht oder Religionskunde?, in ISLAMISCHER RELIGIONSUNTERRICHT? 3, 30* (Wolfgang Bock ed., 2007).

<sup>129</sup>See Beaucamp & Wißmann, *supra* note 46, at 1521.

<sup>130</sup>Beaucamp & Wißmann, *supra* note 46, at 1521.; Ungern-Sternberg, *supra* note 117, at 38.

<sup>131</sup>See *supra* Section C.III. See also Waldhoff, *supra* note 24, at § 46 n.66.

Therefore, the state has started to establish Islamic Theology at Universities and colleges.<sup>132</sup> In doing so, it needs to cooperate with the Islamic religious societies once more because it needs to observe the right of self-determination of the religious societies and its obligation of neutrality in religious and ideological matters.<sup>133</sup> Thus, the state faces the same problems as it faces during the implementation of Islamic religious education.<sup>134</sup>

The plurality of schools of thought and sects within Islam is another issue, a full treatment of which goes beyond the scope of this Article.<sup>135</sup> Whether all the different groups would agree to establishing a unified Islamic religious education remains to be seen.

### I. Requirements for Qualifying as a Religious Society

A religious society is an association which brings people of the same creed or several related creeds together in order to fulfil all tasks required by the creed in a comprehensive manner.<sup>136</sup> Therefore, three conditions have to be fulfilled by a religious organization in order to be regarded as a religious society: First, there needs to be a union of people—personal base; second, the people have to share a creed or related creeds; and third, the association has to fulfil the tasks required by the creed in a comprehensive manner. As already mentioned, the prevailing view is that the association does not necessarily have to be organized as a corporation under public law in order to qualify as a religious society.<sup>137</sup> Besides meeting the requirements for qualifying as a religious society, Article 7, paragraph 2 of the Constitution imposes some further conditions in order to be able to establish religious education. First, the religious society must guarantee the continuity of its existence.<sup>138</sup> This is due to the fact that the introduction of religious education involves high expenditures of costs and organization for the state, so the state needs the warranty of a continuous cooperation partner.<sup>139</sup> Second, there is agreement that the religious society must meet a certain allegiance to the Constitution.<sup>140</sup>

### II. Do the Current Islamic Religious Organizations Meet the Constitutional Requirements for Qualifying as a Religious Society?

It is possible that local Mosque associations may fulfil the criteria of a religious society, but they are far too small to justify the introduction of Islamic religious education. Religious education may depend on whether a particular quorum of pupils wishing to take part, and a particular quorum of members of the religious society, is met.<sup>141</sup> In contrast, the big umbrella associations—for example “Zentralrat der Muslime in Deutschland e.V.” and “Islamrat für die Bundesrepublik Deutschland e.V.”—consisting of several Islamic associations, which themselves unite Mosque associations as well as other associations that promote such things as youth or culture,<sup>142</sup> seem to meet the necessary quorum. Therefore, the legal debate focuses on them.

<sup>132</sup>See Ungern-Sternberg, *supra* note 117, at 30; Waldhoff, *supra* note 24, at § 46 n.18, 62–65.

<sup>133</sup>See Ungern-Sternberg, *supra* note 117, at 32; Waldhoff, *supra* note 24, at § 46 n.67.

<sup>134</sup>See also Ungern-Sternberg, *supra* note 117, at 31–42.

<sup>135</sup>Durham, Jr., *supra* note 1, at 8–9.

<sup>136</sup>Bundesverwaltungsgericht [BVERWG] [Federal Administrative Court], 123 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 49, <https://www.bverwg.de/230205U6C2.04.0123>; Beaucamp & Wißmann, *supra* note 46, at 1519; Stefan Koriotoh, Art. 137 WRV, in GRUNDGESETZ KOMMENTAR, *supra* note 21, at para. 14.

<sup>137</sup>Link, *supra* note 85, at 500; Robbers, *supra* note 36, at para. 151.

<sup>138</sup>Beaucamp & Wißmann, *supra* note 46, at 1519–1520; Grzeszick, *supra* note 43, at 369.

<sup>139</sup>Beaucamp & Wißmann, *supra* note 46, at 1520.

<sup>140</sup>123 BVERWGE 49, at 72–75; Grzeszick, *supra* note 43, at 379–380; Beaucamp & Wißmann, *supra* note 46, at 1520.

<sup>141</sup>JEAND’HEUR & KORIOOTH, *supra* note 40, at para. 324; Grzeszick, *supra* note 43, at 369–370. See also Vera Niestegge, *Dachverbandsorganisationen als Religionsgemeinschaften?*, 2018 KUNST UND RECHT 140, 161 (2018).

<sup>142</sup>Niestegge, *supra* note 141, at 149.

For a long time, a controversial issue was whether umbrella associations have the necessary personal base, as they consist of associations instead of individuals.<sup>143</sup> The Federal Administrative Court decided in 2005 that the umbrella associations have the necessary personal base, as they actually represent the members of the associations, which joined the umbrella associations. This representation is given—according to the court—due to the division of labor existing in the whole organization.<sup>144</sup> To bolster this argument, the court stressed that Article 140 of the German Constitution in conjunction with Article 137, paragraph 5, sentence 3 of the former Constitution of 1919 allow religious societies under public law to unite into a single organization without losing its status as a religious society under public law.<sup>145</sup> This has to apply analogously to the merger of religious societies. Therefore, umbrella associations fulfil the criteria of a necessary personal base.

A religious society is not obliged to combine all people of the same religion. This is neither possible for an Islamic organization nor for a Christian organization, as both of them split up into different denominations or churches.<sup>146</sup> As already conveyed by the definition of the religious society, a religious society may combine people of different but related creeds. It is part of the religious freedom of the individuals to decide whether they are entitled by their religion to join with a related creed.<sup>147</sup> Consequently, people of the same creed must be free to join different organization, without this leading to a denial of qualifying as a religious society.<sup>148</sup> Therefore, it is not an obstacle for Islamic umbrella associations that people of the same creed are split up into different umbrella associations.

In order to meet the requirement of the comprehensive fulfillment of the tasks required by the creed, it is important that the umbrella association does not compromise on the majority associations which do not, or only partially, fulfil religious tasks.<sup>149</sup> Furthermore, according to the Federal Administrative Court, it is mandatory that the umbrella association itself fulfills tasks which are essential for the identity of the community, otherwise the necessary division of labor is missing.<sup>150</sup> At the level of the umbrella association, this may only be management tasks with regard to the care of the religious creed.<sup>151</sup> Under the care of the religious creed, the Federal Administrative Court understands statements about the content of faith and the religious convictions.<sup>152</sup> Subsequently, the umbrella association needs to have the relevant authority and competence (*Sachautorität und kompetenz*)<sup>153</sup> to enforce these essential tasks against the local Mosque Associations. It is not sufficient that the umbrella association has identically essential tasks, for they must also enjoy actual validity down to the level of the local Mosque Associations.<sup>154</sup>

Whereas 2017 the Higher Administrative Court of North-Rhine Westphalia construed the criteria of authority—established by the Federal Administrative Court in its ruling in 2005—rather strictly and required that the local Mosque Associations or its members treat the statements of the umbrella association as actually binding,<sup>155</sup> the Federal Administrative Court made clear in its

<sup>143</sup>Oberverswaltungsgericht Nordrhein Westfalen [OVG NRW] [Higher Administrative Court of North-Rhine Westphalia], NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT—RECHTSPRECHUNGS-REPORT [NVWZ-RR] 2004, 492, 493-494.

<sup>144</sup>123 BVERWGE 49, at 58; UNRUH, *supra* note 14, at para. 459.

<sup>145</sup>123 BVERWGE 49, at 58–59. *See also* Beaucamp & Wißmann, *supra* note 46, at 1519.

<sup>146</sup>123 BVERWGE 49, at 56.

<sup>147</sup>*Id.*; UNRUH, *supra* note 14, at para. 459.

<sup>148</sup>123 BVERWGE 49, at 56–57 et seq.

<sup>149</sup>123 BVERWGE 49, at 60–61 et seq. *See also* Niestegge, *supra* note 141, at 153; Grzeszick, *supra* note 43, at 373.

<sup>150</sup>123 BVERWGE 49, at 59–60, 66–67. *See also* Niestegge, *supra* note 141, at 153.

<sup>151</sup>Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Case No. 6 B 94.18, para. 16 (Dec. 20, 2018), <https://www.bverwg.de/201218B6B94.18.0>.

<sup>152</sup>*Id.*

<sup>153</sup>123 BVERWGE 49, at 67.

<sup>154</sup>*Id.* at 59, 67; Grzeszick, *supra* note 43, at 370, 373; *see also* Niestegge, *supra* note 141, at 153.

<sup>155</sup>Oberverswaltungsgericht Nordrhein Westfalen [OVG NRW] [Higher Administrative Court of North-Rhine Westphalia], Case No. 19 A 997/02, paras. 36–37 (Nov. 9, 2017), <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=19%20A%20997/02>.

ruling in 2018<sup>156</sup> that this goes too far. According to the Federal Administrative Court, only the following three criteria need to be fulfilled in order to enjoy the necessary authority.<sup>157</sup> First, the umbrella association or the competent body needs to make statements with respect to the doctrine of faith to a certain extent. Second, the members of the umbrella associations need to have easy and reliable access to these statements. And third, the members need to respect these statements and behavioral requirements—for example they either adjust their conduct to them, or they take them seriously into account at least. Therefore, the Federal Administrative Court made clear, in contrast to the understanding of the Higher Administrative Court,<sup>158</sup> that it is sufficient to set guidelines which are being respected by the members. Thus, the solution of the Federal Administrative Court represents a middle course between a mere recommendation and a binding rule. The decisive point for the relevant authority is the necessary respect.

Consequently, in its 2017 decision, the Higher Administrative Court of North-Rhine Westphalia had denied that the relevant umbrella organizations—“*Zentralrat der Muslime in Deutschland e.V.*” and “*Islamrat für die Bundesrepublik Deutschland e.V.*”—have the necessary authority to qualify as a religious society, as they only set non-binding guidelines.<sup>159</sup> As a result, there was hardly any possibility for Islamic umbrella organizations to qualify as a religious society because a binding doctrine contradicts—more or less—the self-conception of Islam.<sup>160</sup> In general, the strict interpretation of authority by the Higher Administrative Court of North-Rhine Westphalia led to a conflict with the right of self-determination of a religious society.<sup>161</sup> The question, whether a binding doctrine is required by the creed of a religious society or not, belongs to the right of self-determination.<sup>162</sup> Therefore, interpreting the requirement of authority in such a way that it cannot be met if a binding doctrine does not exist<sup>163</sup> would contradict the right of self-determination of the religious society. The latest decision of the Federal Administrative Court in December 2018 resolved this conflict. The new comprehension of the criteria of the necessary authority seems also to be met by religious organizations, which deny a binding doctrine. Thus, it should be possible for Islamic umbrella associations to fulfill this criterion, too.

It remains to be seen how the Higher Administrative Court of North-Rhine Westphalia, to whom the case has been remanded, will decide. Even if the Higher Administrative Court of North-Rhine Westphalia should qualify the Islamic umbrella associations as a religious society, they still need to meet a specific degree of loyalty to the Constitution in order to be able to determine a contact person for the state with regard to the implementation of Islamic religious education. On this question, the Federal Administrative Court explicitly didn't rule.

### III. Advisory Body—Constitutional Problems

Due to the lack of a religious society with the necessary quorum of members and political will to introduce Islamic religious education as a matter of integration, the state has introduced the model of an advisory body (*Beirat*) in the meantime.<sup>164</sup> The advisory body shall substitute the lack of an Islamic religious society.<sup>165</sup> The advisory body consists of half representatives of

<sup>156</sup>BVERWG, Case No. 6 B 94/18.

<sup>157</sup>*Id.* at paras. 18–19.

<sup>158</sup>OVG NRW, Case No. 19 A 997/02, at paras. 36–37.

<sup>159</sup>*Id.* See also Niestegge, *supra* note 141, at 154–155.

<sup>160</sup>Niestegge, *supra* note 141, at 160–161. This is because Islam has no teaching authority comparable to Christianity, see Ulrich Willems, *Stiefkind Religionspolitik*, 68 AUS POLITIK UND ZEITGESCHICHTE 9, 9 (2018).

<sup>161</sup>BVERWG, Case No. 6 B 94/18, at para. 19; Kreß, *supra* note 121, at 14–15; Ungern-Sternberg, *supra* note 117, at 38; Grzeszick, *supra* note 43, at 370.

<sup>162</sup>BVERWG, Case No. 6 B 94/18, at para. 19.

<sup>163</sup>Niestegge, *supra* note 141, at 155–156 (stating clearly that a religious society that has no institutional teaching authority cannot meet the requirements laid down by the Federal Administrative Court).

<sup>164</sup>See UNRUH, *supra* note 14, at para. 460; Grzeszick, *supra* note 43, at 374–375.

<sup>165</sup>Grzeszick, *supra* note 43, at 374–375. See also UNRUH, *supra* note 14, at para. 460.



the organized Muslims—for example, representatives of the Islamic associations—and half Muslim public figures.<sup>166</sup> With regard to the Constitution, several legal problems arise, particularly with regard to the obligation of neutrality in religious and ideological matters of the state and—as the other side of the coin—to the right of self-determination of the religious societies according to Article 140 of the Constitution in conjunction with Article 137, paragraph 3 of the former Constitution of 1919.<sup>167</sup>

With respect to the aspect of neutrality, it seems problematic that the state takes the initiative to form an advisory body.<sup>168</sup> Granted, it is not constitutionally forbidden that the state play an active role as long as it observes its neutrality.<sup>169</sup> In practical terms, this means that the state may take the initiative as long as it does not discriminate against any of the Islamic associations.<sup>170</sup> During the formation of the advisory body, it needs to invite all relevant Islamic associations.<sup>171</sup> As long as this is ensured, the state would not violate its neutrality.

A second problem is the representation of Muslim public figures. They actually do not represent anybody, and they exercise rights which actually belong to the religious societies.<sup>172</sup> Thus, their participation collides with the right of self-determination of the religious societies coordinated by the religious associations.<sup>173</sup> Therefore, the participation of these public figures can only be constitutional if their rights are limited compared to the rights of the representatives of organized Islam. Some argue that they may only have an advisory voice,<sup>174</sup> others demand that they merely must not outvote the representatives of organized Islam.<sup>175</sup> Last, it may be argued that the rights of the religious societies are preserved anyhow, because such a construction wouldn't be possible against their will at all.<sup>176</sup>

Nonetheless, the model of an advisory body may only be a temporary solution.<sup>177</sup> As the advisory body functions as a substitution for the missing organization of Islam, it may become illegal as soon as the organization of Islam proceeds and Islamic religious societies are formed.<sup>178</sup>

## H. Résumé

The Federal Administrative Court has shown in its 2005 decision that, in principle, the recognition of an umbrella association as a religious society is possible. Therefore, the introduction of Islamic religious education according to Article 7, paragraph 2 of the Constitution is possible, too. Nonetheless, the decision of the Higher Administrative Court of North-Rhine Westphalia led to the assumption that it is unlikely for Islamic Umbrella associations to fulfill the criteria of the relevant authority and thus to qualify as a religious society within the near future.<sup>179</sup> Therefore, the introduction of Islamic religious education analogous to Christian religious education seems

<sup>166</sup>For detailed information about the composition of the advisory body, see UNRUH, *supra* note 14, at para. 460; Ungern-Sternberg, *supra* note 117, at 39–40.

<sup>167</sup>See Ungern-Sternberg, *supra* note 117, at 39–42.

<sup>168</sup>Ungern-Sternberg, *supra* note 117, at 40; UNRUH, *supra* note 14, at para. 461.

<sup>169</sup>Ungern-Sternberg, *supra* note 117, at 41.

<sup>170</sup>MORITZ INDENHUCK, ISLAMISCHE THEOLOGIE IM STAATLICHEN HOCHSCHULSYSTEM 210–211, 216–217 (2016).

<sup>171</sup>See Grzeszick, *supra* note 43, at 378–379; Hendrik Munsonius, *Institutionalisierung Islamischer Theologie*, in GÖTTINGER E-PAPERS ZU RELIGION UND RECHT [GÖPRR] 1, 10 (2017).

<sup>172</sup>UNRUH, *supra* note 14, at para. 461.

<sup>173</sup>Ungern-Sternberg, *supra* note 117, at 41; UNRUH, *supra* note 14, at para. 461.

<sup>174</sup>UNRUH, *supra* note 14, at para. 461.

<sup>175</sup>Munsonius, *supra* note 171, at 10; Ungern-Sternberg, *supra* note 117, at 41–42.

<sup>176</sup>See Ungern-Sternberg, *supra* note 117, at 41; Indenhuck, *supra* note 170, at 206.

<sup>177</sup>Grzeszick, *supra* note 43, at 377; Ungern-Sternberg, *supra* note 117, at 42.

<sup>178</sup>Heinrich de Wall, *Das Verhältnis von Staat und Religionsgemeinschaften in Deutschland*, in HANDBUCH CHRISTENTUM UND ISLAM IN DEUTSCHLAND. GRUNDLAGEN, ERFABRUNGEN UND PERSPEKTIVEN DES ZUSAMMENLEBENS 189, 213 (Mathias Rohe ed., 2017).

<sup>179</sup>See Niestegge, *supra* note 141, at 160–161.

unlikely. Critics decry the German Constitution as being too focused on the well-structured Christian Churches and as incapable of adapting to the new diversity.<sup>180</sup> The ruling of the Federal Administrative Court in 2018 changed this impression because it tried to find a middle ground. On the one hand, the court requires some kind of respect in order to fulfill the criteria of the relevant authority. This seems necessary, as the religious society needs to nominate a contact person with whom the state may coordinate all questions with regard to the content of the religion. It is important for the state that the contact person's opinion and decisions are respected by its members. Otherwise, the state would be confronted with different opinions on what is supposed to be the "correct" content of the religion. But due to its obligation of neutrality in religious and ideological matters, the state wouldn't be able to just choose one of them. Hence, the relevant content of the state based religious education could not be determined.<sup>181</sup> Thus, the implementation of the specific religious education seems doomed to fail. Besides that, one can hardly argue that a person or organization whose statements are not respected is able to represent the individuals. Thus, it cannot be regarded as the bearer of the collective freedom of believe or as a religious society.<sup>182</sup> On the other hand, the court does not require such a strict and binding hierarchy as existing in the Christian Churches. The court has tried to perform a balancing act between the necessary organizational requirements for a state-based religious education, and the necessary flexibilities different self-conceptions of religions, may require. Whether this balancing act works remains to be seen.

In the meantime, the federal governments found a solution in order to introduce Islamic religious education, even if organizational measures are missing. The temporary introduction of the advisory body model is, as argued above,<sup>183</sup> in accordance with the Constitution, as long as it remains a temporary solution.

Thus, we can conclude that even though the new diversification has challenged the Constitution and its rules, on the one hand, the state has found a constitutional way of providing Islamic religious education. On the other hand, the judiciary has tried to find a way of interpreting the term religious society in a way that is open to be fulfilled by religions that do not have such a strict internal organization as the Christian churches. Therefore, the Constitution has proven to be compatible with the diversification of religions, even though it was historically established with regard to the two well-organized Christian churches.<sup>184</sup>

Clearly, the new religious pluralism in German society has created a difficult tension. The state's duty in such circumstances should not be to remove the plurality, but to ensure that the competing groups tolerate each other.<sup>185</sup> The introduction of Islamic religious education is therefore a move in the right direction. Nonetheless, some scholars worry that the introduction of additional, different religious lessons would result in a segregation of students, because they will be split into different religious classes.<sup>186</sup> The introduction of Islamic religious education, especially, may lead to a further segmentation due to the different divisions existing within Islam itself, each of which could request for their own religious lessons.<sup>187</sup> Therefore, some have argued for the introduction of interdenominational and inter-religious education.<sup>188</sup> Under the current constitutional provisions, interdenominational religious education can only be introduced if the religious societies themselves are willing to offer it.<sup>189</sup> They cannot be

<sup>180</sup>Niestegge, *supra* note 141, at 160–161; Grzeszick, *supra* note 43, at 370; Ungern-Sternberg, *supra* note 117, at 37–38.

<sup>181</sup>See Grzeszick, *supra* note 43, at 370.

<sup>182</sup>Niestegge, *supra* note 141, at 155.

<sup>183</sup>See *supra* Section G.III.

<sup>184</sup>See Kreß, *supra* note 121, at 14; Grzeszick, *supra* note 43, at 387–388.

<sup>185</sup>Durham, Jr., *supra* note 1, at 10.

<sup>186</sup>Kreß, *supra* note 121, at 16; Beaucamp & Wißmann, *supra* note 46, at 1522.

<sup>187</sup>Kreß, *supra* note 121, at 16.

<sup>188</sup>Ferrari, *supra* note 26, at 101–102; Ungern-Sternberg, *supra* note 117, at 36–37.

<sup>189</sup>See also Ungern-Sternberg, *supra* note 117, at 36–37.

forced to offer an interdenominational religious education. In this regard, Hamburg has taken a pioneering–role in offering interdenominational religious education, for which the Protestant church is responsible.<sup>190</sup>

As the interdenominational approach cannot be established by the state without the consent of the religious societies themselves, scholars suggest as an alternative a non–denominational educational approach towards religion.<sup>191</sup> As shown, this would legally be possible in Germany even if it would be established as a compulsory subject in addition to the denominational religious education. Yet, this leads to the sensitive issue of teaching about religions and values in a neutral way. A complete abolishment of denominational religious education, as a consequence of this approach, would deny the historical characteristics and advantages—such as acceptance and public control of religions—of the German church–state relations. Thus, despite the fact that it wouldn't be possible without a change of Article 7, paragraph 3 which seems rather unlikely to happen,<sup>192</sup> it is not favorable.<sup>193</sup>

Nevertheless, it seems reasonable to combine both approaches—the non–denominational and the historical denominational approach.<sup>194</sup> As seen above, this combination of both approaches exists due to the exception of Article 141 already in the Constitution. But it is important that the possibility of denominational teaching is not selectively granted to only some of the religions.<sup>195</sup> By making it possible for Islam to offer religious education at public schools, the state has proven to be open to the values of pluralism and non–discrimination. This can be seen as an important step to ensure tolerance within a plural society, and tolerance is vital for the existence and function of a free democratic constitution.<sup>196</sup> Bearing Böckenförde in mind, it is in the state's own interest to impart—especially through religious education—the pluralistic values, which it needs as a precondition for its existence.<sup>197</sup>

<sup>190</sup>Ungern-Sternberg, *supra* note 117, at 36.

<sup>191</sup>Kreß, *supra* note 121, at 17. *See also* Beaucamp & Wißmann, *supra* note 46, at 1522; Ferrari, *supra* note 26, at 102.

<sup>192</sup>*See* Beaucamp & Wißmann, *supra* note 46, at 1522.

<sup>193</sup>*See also* Ferrari, *supra* note 26, at 102.

<sup>194</sup>Ferrari, *supra* note 26, at 102.

<sup>195</sup>Ferrari, *supra* note 26, at 101.

<sup>196</sup>*See* AHDAR & LEIGH, *supra* note 35, at 270.

<sup>197</sup>*See* Schmälzle, *supra* note 5, at 125.