

Islamic Theological Studies at the University of Vienna: Between Academic Freedom and the Right of the Islamic Community to Self-Determination

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Abstract

This paper deals with the legal basis for establishing Islamic theological studies at the University of Vienna and the corresponding conflict of norms between academic freedom and the right to (religious) self-determination. The author's central claim is that the relevant legal provision is in accordance with neither the constitutional principle of equality nor the constitutional guarantees on the status of legally recognised churches and religious societies. The study begins with a comparison between the legal situations in Germany and Austria on Islamic theological studies. This is followed by a discussion of § 24 of the Islam Act of 2015, the main legal basis for Islamic theological studies, and a comparison with the legal status of Evangelical theological studies. Finally, the paper examines the role of the Islamic Community in Austria in the appointment of teaching personnel and its self-definition, based on its teachings, tradition and constitution.

Keywords: Islamic Studies, Austria, Germany, Islamic Community, academic freedom, Islam Act, freedom of religion

I. Introduction

On April 1, 2015 a new Islam Act¹ came into effect in Austria, giving rise to regulations, some of them disputed. One such is § 24, which is the legal basis for establishing (Islamic) “theological studies” at the University of Vienna. They were inaugurated in October 2017. The ambition to provide university-level Islamic theological education in Austria is not new. In 2007, the then president of the Islamic Community in Austria (*Islamische Glaubensgemeinschaft in Österreich*; IG-GiÖ), Anas Schakfeh, entered talks with representatives of the University of Vienna and the Ministry of Education on plans for an Islamic theological faculty.² While the introduction of Islamic theological studies had long been both desired and clearly necessary, it soon became apparent, not least during the legislative evaluation process for the *Islamgesetz* or Islam Act, that perceptions on the issue were far apart.³ The impression was soon conveyed in a number of statements that Islamic religious societies should not have any influence on the studies at all. As Heinig had already pointedly suggested in 2010, this entailed an implicit accusation or a warning against a “hostile takeover”, with an eye to the case of Germany.⁴

From the legal point of view, the tension between the right of (legally recognised)⁵ churches and religious societies to self-determination on the one hand and academic freedom on the other is of central importance. Since the problems show some similarities to the situation regarding Islamic theological studies in Germany, some comparison with the legal status there may be helpful. The emerging legal situation is further complicated by the circumstance that there is already a legally recognised Islamic religious society (possibly two) at the Austrian or national level. This is not the case in Germany. These somewhat different conditions must also be taken into account.

Of more central importance for this essay is comparison with the status of theological studies of other legally recognised churches and religious societies in Austria, especially the Evangelical theological studies at the Evangelical Theological Faculty (of the University of Vienna). This is because the legal basis for these

1 Bundesgesetzblatt Nr. 39/2015. In the following text, use is made of the official English translation provided by the foreign ministry <https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Islamgesetz/Islam_Law.pdf> [accessed December 7, 2017].

2 Erich Kocina, ‘So wird man islamischer Religionslehrer’, *Die Presse*, June 18, 2007 <<https://diepresse.com/home/wirtschaft/karriere/studenten/311108/So-wird-man-islamischer-Religionslehrer>> [accessed December 7, 2017].

3 ‘Stellungnahme der Islamischen Glaubensgemeinschaft zum Entwurf zum Islamgesetz (2014)’, 68/SN-69/ME XXV. GP p. 20 ff., ad § 15 <https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_02076/fname_371638.pdf> [accessed December 11, 2017].

4 See Hans Michael Heinig, ‘Was sind die rechtlichen Vorgaben für eine Imamausbildung?’, in *Imamausbildung in Deutschland. Islamische Theologie im europäischen Kontext*, ed. by BüilentUcar (Göttingen, 2010), pp. 49–58 (p. 54 and 56 ff.).

5 Richard Potz and Brigitte Schinkele, *Religion and Law in Austria* (Vienna: Wolters Kluwer, 2016), p. 47 ff.

studies, § 15 of the *Protestantengesetz* or Protestants Act of 1961, provided at least a structural model for § 24 of the Islam Act of 2015.⁶

In short, we are posing a couple of questions regarding § 24 of the Islam Act of 2015. Are (Islamic) “theological studies” under § 24 constitutional? Do the regulations meet the requirements of the right to self-determination of (legally recognised) churches and religious societies, as guaranteed under art. 15 of the *Staatsgrundgesetz* or Basic State Law of 1867?⁷ Can the tension between this right and academic freedom be resolved, and, if so, how? Do the regulations under the Islam Act comply with the principles of equality (art. 7 of the *Bundes-Verfassungsgesetz*/Federal Constitutional Law) and of parity (art. 15 of the Basic State Law of 1867)?

These constitutional concerns derive from the religious policy question of whether § 24 of the Islam Act of 2015 transgresses or at least infringes upon the Islamic Community’s rights to self-determination and (corporate) freedom of religion. To clarify these constitutional concerns, we shall naturally have to look closely at how the regulations came about, but also at Islamic self-definition.

II. Comparison to Germany

The best way to understand the exceptional status of Muslims in Austria can often be by contrasting it with the situation of Muslims in Germany. To understand the following section, it may be useful to ask why Islamic theological studies were started in Germany before Austria. Demand was growing in both countries, but even more in Austria, where the percentage of Muslims in the country’s population was higher than in Germany.⁸

6 ErlRV 446 BlgNR XXV. GP 9 ad § 24 <https://www.parlament.gv.at/PAKT/VHG/XXV/II/I_00446/fname_377359.pdf> [accessed December 11, 2017]; for the English translation of the foreign ministry see <https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Islamgesetz/Islam_Law_-_Commentary.pdf> [accessed December 11, 2017].

7 Reichsgesetzblatt no. 142/1867 version of Bundesgesetzblatt no. 684/1988 <<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000006>> [accessed December 11, 2017]; Since this constitutional provision is of central legal importance, we cite it here:

“Every legally recognised church and religious society has the right to communal public religious practice and may organise and administer its internal affairs independently and retain possession and beneficiary use of all and any institutions, foundations and funds for the purposes of worship, education or charitable activities, but remains, like any other society, subject to the general laws of the state.”

This and following translations are by the author. Citations of the Islam Act of 2015 are taken from the official translation of the foreign ministry, unless otherwise indicated.

8 Stichs, *Wie viele Muslime leben in Deutschland?*, December 14, 2016 <http://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/WorkingPapers/wp71-zahl-muslime-deutschland.pdf?__blob=publicationFile%7CSudie> [accessed August 27, 2017]; cf. Goujon/Jurasszovich/Potančoková, *Demographie und Religion in Österreich - Szenarien 2016 bis 2046*, Ös-

There has been an Academy for Islamic Religious Education (*Islamische Religionspädagogische Akademie*)⁹ in Austria since 1998/99. It operates entirely within the Islamic Community of Vienna (*Islamische Religionsgemeinde Wien*), which is part of the Islamic Community in Austria. There is still no comparable institution in Germany. Islam has been legally recognised in Austria since at least 1912 and a unified religious organisation for all Muslims has existed for decades. In Germany, no such recognition has been given to Islamic religious societies (as public corporations), except for the *Ahmadiyya Muslim Jamaat* in Hessen (in 2013).

As mentioned above, the then president of the Islamic Community, Schakfeh, held talks on establishing an Islamic theological faculty in 2007, alongside negotiations with the Federal Minister of Education, Elisabeth Gehrler, on a concrete draft for a new Islam Act. Both plans took as their starting point the legal status of the Evangelical Church.¹⁰ All the circumstances suggested that Islamic theological studies would be established at Austrian universities first.

In 2010, the German Academic Council (*Wissenschaftsrat*) recommended the establishment of Islamic theological studies at German tertiary institutions.¹¹ The concept involved differed somewhat from what the Constitution envisaged,

terreichischer Integrationsfond 2017 <https://www.integrationsfonds.at/fileadmin/content/AT/Downloads/Publikationen/Forschungsbericht_Demographie_und_Religion_inkl_Vorwort_Web.pdf> [accessed August 27, 2017].

9 Martina Schmied, 'Die Islamische Religionspädagogische Akademie', *Österreichisches Archiv für Recht und Religion*, 46 (1999), 434–43.

10 According to Schakfeh, the plans were abandoned after release of the so called "Islamic teacher study" (*Islam-Lehrer-Studie*) or "Khorchide study" (*Khorchide-Studie*), which suggested, among other things, that more than a fifth of Islamic religious education teachers reject democracy. See Mouhanad Khorchide, *Der islamische Religionsunterricht zwischen Integration und Parallelgesellschaft: Einstellungen der islamischen ReligionslehrerInnen an öffentlichen Schulen* (Wiesbaden: Verlag für Sozialwissenschaften, 2009). See also Kocina, 'Khorchide-Studie: Islam-Lehrer als Problemfall', *Die Presse*, January 28, 2009

<http://diepresse.com/home/panorama/oesterreich/447494/KhorchideStudie_IslamLehrer-als-Problemfall> [accessed August 27, 2017]. The study was promoted by the "Austrian Integration Fund" (*Österreichischer Integrationsfonds*), then a public fund associated with the Federal Ministry of the Interior and the Secretary of Integration, Sebastian Kurz (2011–2013). This relationship moved, with Kurz, to the Ministry for Europe, Integration and Foreign Affairs. Although the study's methodology and results were immediately criticised as "bad science," one result was probably that Schakfeh did not run again for the presidency of the Islamic Community in 2011. See ORE, 'Bildungsforscher: Islam-Lehrer-Studie "wissenschaftlich unhaltbar"', <http://religionv1.orf.at/projekt03/news/0901/ne090130_hopmann_fr.htm> [accessed August 27, 2017]. Cf. Farid Hafez, *Anas Schakfeh. Das österreichische Gesicht des Islams* (Wien: Braumüller, 2012), p. 180 et seqq.

11 Wissenschaftsrat, 'Empfehlungen zur Weiterentwicklung von Theologien und religionsbezogenen Wissenschaften an deutschen Hochschulen', 2010, p. 7 ff.

<<https://www.wissenschaftsrat.de/download/archiv/9678-10.pdf>> [accessed December 11, 2017]; for a comprehensive overview on the status quo in Germany see Moritz Indenhuck, *Islamische Theologie im staatlichen Hochschulsystem*, Schriften zum Religionsrecht, 7 (Baden-Baden: Nomos, 2016), vii.

however. Instead of involving the relevant religious communities, as per art. 140 of the (German) Basic Law and art. 137, para. 3, of the Weimar Constitution (whose content is very similar to art. 15 of the Austrian Basic State Law of 1867),¹² which imply a need for formal agreement between the state and the religious community, the Council suggested getting so-called (and then non-existent) “advisory councils” involved. These advisory councils would comprise representatives of Islamic umbrella associations, members of the “academic community”, and representatives of the “majority of non-organised Muslims”.¹³

Heinig points out, with a reasonable degree of scepticism, that the justifications given for this model were the same as for the lack of nationwide Islamic religion classes in Germany, viz,¹⁴ a lack of organisational density compared to Christian churches,¹⁵ politicians’ doubts as to whether the “Coordination Council of Muslims” (the umbrella organisation for almost all lower-level Muslim umbrella associations) and its member umbrella associations really met the criteria of a religious community (despite expert evidence that they did)¹⁶ doubts as to how representative these Islamic umbrella associations were, and political reservations.

As a result, the advisory councils’ model continued in the mould of the German Islam Conference. This meant that, as well as determining which representatives of Islamic umbrella associations were acceptable (some were rejected),¹⁷ the

12 German Bundesgesetzblatt I 1949, p. 18

<[https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*\[%40attr_id%3D%27bgbl149s0001.pdf%27\]#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl149s0001.pdf%27%5D__1513121674043](https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*[%40attr_id%3D%27bgbl149s0001.pdf%27]#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl149s0001.pdf%27%5D__1513121674043)> [accessed August 27, 2017].

13 See Farid Hafez, ‘Disciplining the “Muslim Subject”: The Role of Security Agencies in Establishing Islamic Theology within the State’s Academia’, *Islamophobia Studies Journal*, 2 (2014), 43–57 (p. 49 ff.).

14 Heinig, ‘Imamausbildung in Deutschland’, p. 54 ff.

15 Muslims in Austria were denied recognition by the usual route of an application under the Recognition Act of 1874, which is why recourse was considered necessary to a special act of parliament, the Islam Act of 1912. For more on this argument, see Rijad Dautović, ‘Der Sonderweg österreichischer Islampolitik’, *Österreichische Zeitschrift für Politikwissenschaft*, 2019, forthcoming.

16 See Engin Karahan, ‘Rechtlich zweifelhaft, politisch 10 Jahre in der Vergangenheit’, <<http://www.migazin.de/2015/11/25/rechtlich-zweifelhaft-politisch-10-jahre-in-der-vergangenheit/>> [accessed August 27, 2017]; cf. Volker Beck and Cem Özdemir, ‘Den Islam und andere Religionen der Einwanderer ins deutsche Religionsverfassungsrecht integrieren’, *Kirche und Recht* (2015) 129–41.

17 Cf. Karahan, ‘Islamische Theologie an deutschen Universitäten’, 2013, p. 1 <https://www.academia.edu/4861163/Islamische_Theologie_an_deutschen_Universit%C3%A4ten_-_Die_Problematik_der_fehlenden_Verretung_der_muslimischen_Gemeinschaften> [accessed 29 August 2017]; for more on the problem, see Engin Karahan, ‘Verfassungsschutzberichte und IGMG - Erfahrungen und Auswirkungen’, in *Islam und Verfassungsschutz: Dokumentation der Tagung am 7. Dezember 2006 an der Universität Münster*, ed. by JaberndOebbecke, Bodo Pieroth, and Emanuel Towfigh (Münster: Peter Lang, 2007), pp. 91–112, and Werner Schiffauer, ‘Suspect Subjects: Muslim Migrants and the Security Agencies in Germany’, in *The Social Life of Anti-Terrorist Laws. The War on Terror and the Classification of the ‘Dangerous Other’*, ed. by Julia Eckert (Bielefeld: Transcript, 2008), pp. 55–78.

state (acting here not as a neutral mediator but as a party to the state-church/religious society relationship) would be the one appointing representatives for a supposed unorganised majority of Muslims and people the state considered experts.¹⁸ In this way, the state would have been creating “a cooperation partner pleasing to itself.”¹⁹

The reasons the Government felt the advisory council model was necessary and why the recognition²⁰ of Islamic societies has been advancing so slowly in Germany are by their nature vague and any proper investigation of them would have to take religious self-definition into account. More importantly, the state is here acting as judge and jury, as it were, which is giving rise to a conflict of interest in the state-church relationship over the advisory councils. If the state finds – with whatever justification – that Islamic umbrella associations do not meet the requirements for recognition as religious communities under art. 140 of the Basic State Law, in conjunction with art. 137, para. 3, of the Weimar Constitution, then under constitutional law it cannot institutionalise Islamic theological studies at public universities. Without a relevant religious partner, the state “cannot itself take responsibility for theological content, because of its obligation of neutrality.”²¹ This is precisely what has happened, however. The very concept of advisory councils and how they were constituted express the state’s aspiration of being both a moderating authority and to the side at the same time, which is not logically possible. If it has been politically possible – but no less constitutionally dubious – it is only because of the status of the Islamic umbrella associations has been left unresolved and of the denial that they are the major representatives of German Muslims.

In Austria the legal status and recognition of the Islamic Community remains generally undisputed. The sole Muslim partner of the Austrian state was, at least until 2013, undoubtedly the Islamic Community in Austria, which therefore had the guarantees of art. 15 of the Basic State Law of 1867 on its side. The issue of Islamic theological studies was not taken up again until 2012, however, when it was discussed by the Federal Ministry of the Interior, represented by then

18 Luis Manuel Hernández Aguilar, ‘Welcome to Integrationland. On Racism and the German Islam Conference’ (doctoral dissertation, Goethe University Frankfurt am Main, 2015), p. 23 et seqq.

19 Heinig, ‘Imamausbildung in Deutschland’, p. 57; Schirin Amir-Moazami, ‘Pitfalls of Consensus-Orientated Dialogue: The German Islam Conference (Deutsche Islam Konferenz)’, in *Approaching Religion*, 2011, 1, 2–15; Hafez, ‘Disciplining the “Muslim Subject”: The Role of Security Agencies in Establishing Islamic Theology within the State’s Academia’, p. 45 (fn 5). For a comprehensive analysis, see Luis Manuel Hernández Aguilar, *Governing Muslims and Islam in Contemporary Germany: Race, Time, and the German Islam Conference*, Muslim Minorities, 26 (S.l.: Brill, 2018); Luis Manuel Hernández Aguilar, ‘Suffering Rights and Incorporation. The German Islam Conference and the Integration of Muslims as a Discursive Means of Their Racialization’, *European Societies*, 19.5 (2017), 623–44 <<https://doi.org/10.1080/14616696.2017.1334950>>.

20 The German concept of “recognition” is ambiguous and differs from Austria’s; see Riem Spielhaus and Martin Herzog, ‘Religionspolitische Ansätze und Maßnahmen zur Rechtlichen Anerkennung des Islams’, *Kirche und Recht*, 2016, 14–36 (p. 15 ff.).

21 Heinig, ‘Imamausbildung in Deutschland’, p. 53.

Integration Secretary Kurz, and the Islamic Community within a new framework, the “*Dialogforum Islam / Dialogue Forum on Islam*,”²² itself modelled on the German Islamic Conference. This move came only after the Austrian Constitutional Court had ruled in 2010 that there could be more than one Islamic religious society,²³ undermining the legal claim of the Islamic Community to represent all the Muslims of Austria.²⁴ This created the impression that the issue of Islamic theological studies had been postponed only until circumstances of plural representation like those in Germany had been attained.²⁵

III. Prologue at the Dialogue Forum on Islam

Although the Dialogue Forum on Islam was not the formal forum for negotiating the Islam Act of 2015, this perception was nonetheless regularly fostered by politicians involved and in a certain sense it did set the course for establishing Islamic theological studies (and for the Islam Act in general). One work group ad-

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- 22 See *Dialogforum Islam - Bericht*, ed. by Bundesministerium für Inneres (Wien, 2013) <https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Publikationen/DFI_Bericht_Web.pdf> [accessed August 29, 2017].
- 23 Austrian Constitutional Court, December 1, 2010, B 1214/09 (VfSlg 19240/2010) <https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=4a12129f-5080-4cd7-a773-1c8feec6527d&Position=1&Abfrage=Vfgh&Entscheidungstyp=Undefined&Sammlungsnummer=&Index=&SucheNachRechtssatz=True&SucheNachText=True&GZ=B1214%2f09&VonDatum=&BisDatum=11.12.2017&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JFT_09898799_09B01214_00> [accessed December 11, 2017].
- 24 This is related to legal recognition of the “Islamic Alevi Religious Community in Austria” (ALEVI), which took place in 2013. On background, see Richard Potz and Brigitte Schinkele, ‘Eintragung bzw. gesetzliche Anerkennung alevitischer Gruppen in Österreich’, *Österreichisches Archiv für Recht und Religion*, 58 (2011), 137–55; The fact that ALEVI changed its self-definition as “Islamic”, dropping the term from its name and constitution (see the administrative decision BKA-KA9.020/0007-Kultusamt/2015, dated November 5, 2015) a few months after the Islam Act of 2015 came into effect, raises a number of not just legal but also political questions and contributes to the general confusion. See the Administrative Court of Vienna, August 8, 2016, VGW-101/069/4623/2016-11. Cf. the Regional Administrative Court of Lower Austria, December 20, 2016, LVwG-AV-1262/001-2016, and Farid Hafez, ‘Institutionalised Austrian Islam: One institution representing the many’, in *Debating Islam: Negotiating Religion, Europe, and the Self*, ed. by Samuel M. Behloul, Susanne Leuenberger, and Andreas Tunger-Zanetti, Global-Local Islam (Bielefeld: Transcript, 2013), pp. 227–42 (p. 235 ff.).
- 25 Karahan speaks of a roll-back of the relation between the Austrian state and Muslims to times prior to the formation of the Islamic Community in Austria; Karahan, ‘Stellungnahme zum Bericht des Dialogforums Islam in Österreich’, 2013 <https://www.academia.edu/4861073/Stellungnahme_zum_Bericht_des_Dialogforums_Islam_in_%C3%96sterreich> [accessed May 21, 2017]. For a more political analysis see Hafez, ‘Disciplining the “Muslim Subject”: The Role of Security Agencies in Establishing Islamic Theology within the State’s Academia’, *Islamophobia Studies Journal*, 2 (2014), pp. 43-57.

dressed itself to the “Education, Training and Postgraduate Training of Imams” at state universities, the topic dealt with under § 24 of the Islam Act. The Forum’s report drew the conclusion that the Islamic Community in Austria’s responsibilities were restricted to providing for the graduates’ professional practice, while their “fundamental academic and theological education” should take place “at university.”²⁶

The role of the Islamic Community in Austria in this seems at first glance unclear. The report says that “the framework for the establishment of an academic degree course” shall “be stipulated by the University of Vienna, in cooperation with the Islamic Community in Austria, under contract.” The same paragraph contains provision for this cooperation, referring to “internships during their degree course” and “subsequent practical vocational preparation,”²⁷ but a note on the previous page states that that this must involve “full retention of academic freedom.” There is no mention of the right of the churches and religious societies to self-determination, even though this is always in play when dealing with theological studies and should always be mentioned in the same breath. The Islamic Community in Austria was thus not allocated a role in Islamic theological studies of the sort given both the Catholic and the Evangelical Church in the relevant courses of theological studies and as provided for by the constitution.

In the report, emphasis is placed on “the diversity of Islam”, which is to “occupy an important place in the curriculum”. Some participants from the Islamic Community in Austria may have understood this cryptic formulation at that time as an abstract recommendation to look to its own internal diversity, given that ALEVI had only just received legal recognition when the report was published.²⁸ In the event, however, it led to using § 24, para. 2, of the Islam Act of 2015 to provide a legal basis for establishing a distinct branch of theological studies for each Islamic religious society. The upshot was that the reference to Islamic theological studies was relevant not just to the Islamic Community in Austria but to ALEVI as well (even though ALEVI would “de-islamicise” itself in 2015, and the ALEVI branch of the studies still exists only theoretically in the Islam Act).²⁹

26 *Dialogforum Islam - Bericht*, ed. by Bundesministerium für Inneres (Vienna 2013), p. 14 <https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Publikationen/DFI_Bericht_Web.pdf> [accessed August 29, 2017]. Comparison shows that text of this section of the report was directly incorporated into the explanatory notes to the government bill (i.e. the ministerial draft).

27 Bundesministerium für Inneres, *DFI-Bericht*, p. 14 ff.

28 Bundesgesetzblatt II no. 133/2013 <<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008416>> [accessed December 11, 2017].

29 See also section 31 of the curriculum for the BA course in Islamic theological studies- issued on June 26, 2017 - no. 140-163, <http://iits.univie.ac.at/fileadmin/user_upload/p_iits/Dateien/Curriculum/Curriculum_Islamische_Theologie_2017.pdf> [accessed August 27, 2017].

IV. § 24 of the Islam Act of 2015 compared to § 15 of the Protestants Act of 1961

The next step set the framework conditions for the state and the university's relations with the Islamic Community over Islamic theological studies. We will elaborate on this in the following section. First, we will confine ourselves to comparing § 24 of the Islam Act of 2015 and § 15 of the Protestants Act of 1961 in terms of equality, since, although the former was based on the latter structurally, they differ substantially at crucial points.

Islam Act of 2015:

Theological Studies

§1) .24) As of January 2016 ,1, the Republic of Austria is to maintain the existence of a theological education at the University of Vienna to the ends of theological research and education and for the scientific formation of clerical young academics of Islamic Religious Societies. For these a total of up to six positions for teaching personnel are to be provided.

(2) According to this federal law, a specific branch of study for each of the Religious Societies is to be provided.

(3) University professors, postdocs as well as associate professors in the sense of the collective bargaining agreement for university employees in accordance with § 108 para. 3 law on universities are to be considered as teaching personnel in accordance with para. 1.

(4) Before positions according to para. 1 are filled, contact on the respective candidate is to be made with the Religious Societies, whereby in the theological core area it is to be considered, that the person be a follower of the doctrinal theology (school of law[, religious orientation]³⁹) affiliated to the respective Religious Society recognised by this federal law.

Protestants Act of 1961:

§ 15 Evangelical Theological Faculty

(1) The Republic of Austria shall maintain for the Evangelical Church an Evangelical theological faculty at the University of Vienna for the scholarly education of young clerical academics, as well as for the purposes of theological research and teaching, with at least six ordinary chairs, including one each for the systematic theologies of the Augsburg and the Helvetic confessions. The predominantly Lutheran character of the Evangelical Church shall be taken into account.

(2) Members of the teaching staff of the Evangelical Theological Faculty, that is its ordinary and extraordinary university professors, emeritus university professors, university docents and contract lecturers, shall belong to the Evangelical Church.

(3) Guest professors, guest docents, guest lecturers, and other academic and non-academic personnel may belong to other churches or religious societies, especially member churches of the Ecumenical Council of Churches.

(4) When filling a position, the Evangelical Theological Faculty's council of professors shall make contact with the leadership of the Evangelical Church on prospective candidates, before forwarding its recommendations to the Federal Ministry of Education.

While § 15 of the Protestants Act of 1961 governs the legal status of an existing institution within the University of Vienna (since 1821),³⁰ § 24 of the Islam Act 2015

30 See Karl W. Schwarz, 'Die Inkorporierung der Evangelisch-theologischen Fakultät in die Alma Mater Rudolfina im Jahr 1922', in *Wiener Jahrbuch für Theologie*, ed. by Karl Fröschl, Gerd Müller, and Thomas Olechowski (Wien: Vandenhoeck & Ruprecht, 1998), II, 393–428.

aimed to create and maintain a degree course that did not yet exist (n.b. despite the reference to “As of January 1, 2016”, the degree course did not in fact begin until the 2017/18 winter semester).³¹ § 24 is also relevant insofar as it is related to § 11, para. 2, of the Islam Act of 2015. According to the latter, in addition to “authorisation from their religious society”, religious ministers (chaplains) appointed for the spiritual care of the various Islamic religious societies’ members in the “armed forces [...] in judicial or administrative confinement [...] in public medical institutions, patient-centred care, nursing homes or similar institutions” (para. 1) must have “completed academic studies in accordance with § 24 or an equivalent qualification.”³² The provision does not make clear who will decide whether a qualification is equivalent to that of § 24, but the assumption seems to be that it should be done by competent subject-specific bodies or parts of the University of Vienna (whether by some form of general recognition or nostrification decision). A constitutional interpretation would necessarily reach a different result, based on art. 15 of the Basic State Law.

A further difference between § 24 of the Islam Act of 2015 and § 15 of the Protestants Act of 1961 is that they deploy different designations for the courses of study, i.e. as constituting a faculty or not. The former refers to “theological education,” while the latter refers to an “Evangelical theological faculty” (and para. 1 refers explicitly to the “Evangelical Church”). In the first case, the aim may have been to weaken any denominational relation of theological studies to the Islamic religious societies - the ministerial draft of the bill had in fact included the title “Islamic theological studies.”³³ In our view, this is largely a matter of symbolism.³⁴ The references to “Islamic religious

31 This already reveals a qualitative difference, as faculties enjoy a different legal status to degree courses. Such unequal treatment may be justified at least for the time being, however, insofar as the institution is under development. This may change; see Stefan Schima, ‘Gutachten zu Entwurf zum “Bundesgesetz, mit dem das Gesetz betreffend die Anerkennung der Anhänger des Islam als Religionsgesellschaft geändert wird”’, 2014, p. 19 <https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_02194/imfname_372317.pdf> [accessed December 24, 2016]. It is noteworthy that the then-president of the Islamic Community, Fuat Sanac, proceeded on the assumption that there would be a faculty. See ‘Dialogforum Islam - Zwischenbericht’, ed. by Bundesministerium für Inneres, 2012, p. 3. This proved to be an assumption that died hard in the Islamic Community; see the Shura Council, *Minutes of the session on February 15, 2015*, p. 5.

32 This eligibility requirement was added (as were other requirements, e.g. the need for three years of relevant professional experience) shortly before the ministerial draft was released on October 2, 2014. In a draft of July 11, 2014, circulating amongst the media in September, these requirements were missing. See Rijad Dautović and Farid Hafez, ‘Institutionalising Islam in Contemporary Austria: A Comparative Analysis of the Austrian Islam Act of 2015 and Austrian Religion Law with Special Emphasis on the Israelites Act of 2012’, *Oxford Journal of Law and Religion*, forthcoming; cf. Richard Potz, ‘Islamische Theologie an der Universität’, in *In mandatis meditari.: Festschrift für Hans Paarhammer zum 65. Geburtstag*, ed. by Stephan Haering and others (Wien: Duncker & Humblot, 2012), pp. 929–49 (p. 932 f. and fn 17).

33 ‘Entwurf. Bundesgesetz, mit dem das Gesetz betreffend die Anerkennung der Anhänger des Islam als Religionsgesellschaft geändert wird’ (2014), 69/ME XXV. GP, p. 5 § 15 <https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00069/fname_367084.pdf> [accessed December 11, 2017].

34 Both the cover sheet (VbRV 446 BlgNR XXV. GP 3) and the explanatory notes to the bill (ErlRV 446 BlgNR XXV. GP 9 ad § 24 (for the English translation see fn 6)) also still refer to “Islamic theological studies.”

societies” in § 24 (“to the ends of theological research and education and for the scientific formation of clerical young academics of Islamic Religious Societies”)³⁵ and the connection to § 11, para. 2, demonstrate convincingly that these provisions relate to studies with a clearly denominational purpose and relevance.

Another eye-catching difference relates to the number of professorships and subordinate positions. While § 15 of the Protestants Act of 1961 guarantees “at least six ordinary chairs,” § 24 of the Islam Act of 2015 speaks of “up to six positions for teaching personnel.” Schima sees no grounds for this difference.³⁶ Given that both courses of study are “to the ends of theological research and education” and for the “formation of clerical young academics,” one can only assume that quantitative aspects matter for the question of substantial parity. Current data suggest that there are at least twice as many Muslims³⁷ as evangelical Christians in Austria.³⁸ Twice the number of Muslims should presumably mean twice as many graduates (as Imams), which would require twice as many (and not fewer) instructors (n.b. only two professorial posts have been filled).

A major and, during the legislative procedure, contested aspect related to the denominational affiliation of teaching staff. As the provisions make clear, § 14,

35 The ministerial draft refers to “education” (*Ausbildung*, as also in § 15 of the Protestants Act of 1961). According to then officials of the Islamic Community, this alteration was made on an initiative of the Islamic Community out of concern that the term “education” might imply that imams should be educated entirely and exclusively at the University of Vienna. The terminological change to “formation” (*Heranbildung*; cf. art. V., § 1, para. 1, of the Concordat 1933/34) should make clear, especially against the backdrop of the plans then current for the Imam-Hatip school in Vienna, that reference to a degree course represents only a “basic academic education,” an “academic formation of clerical young academics”, which could either precede or follow additional education (the latter was already assumed by the Dialogue Forum on Islam), while admission exams would be necessary for acceptance into service by the Islamic Community (the idea was clearly to create a relationship comparable to that between the Imam-Hatip schools and university-level theological studies in Turkey or between Madrasas and university-level Islamic theological studies in Bosnia). Cf. Bernhard Ichner, ‘Imam-Hatip: “Die Probleme sind hausgemacht”’, *Kurier*, 2017 <<https://kurier.at/chronik/wien/imam-hatip-die-probleme-sind-hausgemacht/283.096.870>> [accessed August 29, 2017]. For the sake of comparison we would like to point to the development of the Evangelical Church’s role in university exams and its waiver of “internal qualifying tests (Examen pro candidatura)”. See Karl W. Schwarz, ‘Die Evangelisch-Theologische Fakultät der Universität Wien im Spannungsfeld zwischen Brüssel, Bologna und Wittenberg’, *Österreichisches Archiv für Recht und Religion*, 55 (2008), 327–43 (p. 334). Given the terminological difference referred to in § 24, para. 2, of the Islam Act of 2015 and its background, it may be considered an explicit, but nonetheless purely declarative (i.e. legally not necessary) sign of differing from the practice chosen by the Evangelical Church.

36 Stefan Schima, ‘The Austrian Islam Act 2015 against the Background of Austrian Law on Religion’ (presented at the 5th Research Conference on ‘Democracy and Islam’ of the Austrian Research Association. Working Group on Democracy, Vienna, 2015, p. 15; Schima, ‘Gutachten zum IslamG-Entwurf’, p. 19.

37 Ca. 700,000 (2016). See Goujon et al., ‘Religious Denominations in Austria - Baseline Study for 2016 - Scenarios until 2046’, <http://www.integrationsfonds.at/fileadmin/content/AT/Fotos/Publikationen/Forschungsbericht/Forschungsbericht__Demographie_und_Religion.pdf> [accessed August 29, 2017].

38 302,964 members. See ‘Zahlen und Fakten - Evangelische laut eigener Zählung 2016’ <<https://evang.at/kirche/zahlen-fakten/>> [accessed August 29, 2017].

para. 2, of the Protestants Act of 1961 requires teaching staff be members of the Evangelical Church, whereas § 24, para. 4, of the Islam Act of 2015 only requires that, “whereby in the theological core area it is to be considered, that the person be a follower of the doctrinal theology (school of law, religious orientation) affiliated to the respective Religious Society recognised by this federal law.” Originally not even this was provided for in the ministerial draft or government bill.³⁹ According to Potz/Schinkele, the ministerial draft should have been clarified to read “that the members of the teaching staff must be members of the Islamic Community in Austria (or some other, yet-to-be recognised Islamic religious society).”⁴⁰ The changes made during parliamentary procedure may give the impression that expert demands were met, but a close look at the wording shows that the formulation remains selective and so avoids making membership of an Islamic religious society a requirement.

In agreement with Potz/Schinkele, the Islamic Community in Austria has also demanded, in its official statement in the parliamentary evaluation procedure and in renegotiation attempts in December 2014, that teaching staff be members of Islamic religious societies. This was initially met by an unaccommodating government position.⁴¹ In this context, the changes later made to the relevant passage in § 24, para. 4, should be understood as an accommodation meeting demands halfway, in the absence of readiness to countenance complete (and meaningful) formal parity with the Evangelical Church.

A crucial provision found in both acts raises legal questions. It involves application of the barely translatable term “Fühlungnahme”⁴² to either the “candidate” (§ 24, para. 4, Islam Act), or “candidates” (§ 15, para. 4, Protestants Act of 1961) when filling positions. An existing and institutionalised⁴³ modus was thus

39 See Rijad Dautović and Farid Hafez, ‘MuslimInnen als BürgerInnen zweiter Klasse? - Eine vergleichende Analyse des Entwurfes eines neuen Islamgesetzes 2014 zum restlichen Religionsrecht’, *Jahrbuch für Islamophobieforschung*, 3 (2015), 24–54 (p. 45). This passage was only added under an amendment application (*Wittmann/Gerstl*) at the constitutional affairs committee (of the National Assembly) on February 12, 2015 (see AB 469 BlgNR XXV. GP). After an amendment application from the same representatives (AA 76 BlgNR XXV. GP) on February 25, 2015, the term “religious orientation” was added out of deference to a different use of terminology by ALEVI.

40 Richard Potz and Brigitte Schinkele, ‘Stellungnahme zum Entwurf eines Bundesgesetzes, mit dem das Gesetz betreffend die Anerkennung der Anhänger des Islam als Religionsgesellschaft geändert wird (69/ME XXV. GP)’, 2014, p. 18 <https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_02154/imfname_372284.pdf> [accessed November 6, 2016].

41 Shura Council, *Minutes of the session on February 15*, 2015, pp. 1 ff. and 3.

42 In the official foreign ministry English translation “in Fühlungnahme treten” is translated as “to contact”. This is neither linguistically accurate (the closest literal translation would be “to get in touch”) nor does it take into account the terms significant legal implications or the context of its legal usage.

43 Wolfgang Wieshaider, ‘Die Fühlungnahme’, *Österreichisches Archiv für Recht und Religion*, 62 (2015), 49–59 (p. 49); see Ehlers in *Allgemeines Verwaltungsrecht*, ed. by Martin Burgi and others, 14th ed. (Berlin - New York: De Gruyter, 2010), p. § 5 Rz 62.

adopted. Two aspects require attention, however, namely the use of the singular in the Islam Act, while the Protestants Act uses the plural, and the meaning of “Fühlungnahme”. Wieshaider has gone into both aspects extensively (see previous footnote), so we may limit ourselves to a summary.

On the first aspect, one should bear in mind that § 98 of the Universities Act of 2002⁴⁴ sets out the general procedure for appointing university professors. It begins with a public job advertisement (para. 2). Sitting professors in the specialism or, if so decided by the senate, a related field then nominate two reviewers. The rector may appoint an additional reviewer with relevant expertise (para. 3). The senate forms an appointments committee (*Berufungskommission*; para. 4) to review and select applications that meet the advertised criteria (para. 5). The candidates may be presented (para. 5) and the appointments committee then suggests a shortlist of the three most qualified candidates, based on the review and their statements (para. 7). At this point, the rector may choose (para. 8), communicating the choice to the university working group on equal opportunities (*Arbeitskreis für Gleichbehandlung*; para. 9), or may return the shortlist to the appointments committee, if he or she does not believe they are the three best qualified candidates.

According to § 15, para. 4, of the Protestants Act, the responsible organ of the university shall make contact (“in Fühlungnahme treten”) with the Evangelical Church “on prospective candidates”. They can only make contact on candidates before the rector has made his choice, however, as after that point there will be only one candidate left. Moreover, a special provision in § 38, para. 2, of the Universities Act of 2002 (para. 1 contains a special provision on Catholic theological studies) makes it clear that the rector is obliged to make contact in terms of § 15, para. 4, of the Protestants Act “prior to selecting from the shortlist”. Clearly, § 38, para. 2, of the Universities Act of 2002 only serves for clarification (except regarding the rector’s jurisdiction), as the chronological order is already determined by the interplay of § 15, para. 4, of the Protestants Act of 1961 and § 98 of the Universities Act of 2002.

According to Wieshaider, the case is somewhat different for Islamic theological studies, where it is a matter of “making contact on the prospective candidate”, in the singular. Accordingly, the rector is to contact the Islamic religious societies only after selection, when only one candidate remains.⁴⁵ One (theoretical and legal) consequence of this is that the rector would already have made his choice and therefore cannot refer the shortlist of three back to the appointments committee, as per § 98, para. 8, of the Universities Act of 2002. After “contact” with the Islamic religious societies, the only thing left is to inform the working group on equal opportunities of his decision. In other words, the Islamic religious soci-

44 Bundesgesetzblatt I no. 120/2002 version of Bundesgesetzblatt I no. 129/2017 <<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20002128>> [accessed December 11, 2017].

45 Wieshaider, p. 52.

eties would be presented with a *fait accompli* and “contact” amounts to little more than announcement, which is contrary to the sense of “Fühlungnahme”. It seems more likely, that the singular should be understood as meaning the three candidates are not to be presented all at once but one at a time. If the “Fühlungnahme” on the first candidate does not lead to consensus, the rector then presents his “no. 2”, etc. Given that the Evangelical Church is presented all three candidates at once, one must still ask whether even this understanding of the Islam Act of 2015 complies with the principle of equality.

A further interpretation seems even more conclusive. Certain teleological reasons suggest defocusing from the literal wording,⁴⁶ as do aspects of the wording itself. It seems reasonable that the singular in “prospective candidate” may be due to an editorial mistake rather than a conscious distinction. One should, however, note that § 24, para. 4, of the Islam Act of 2015 talks about a “candidate” (singular), but the next line states “whereby in the theological core area it is to be considered, that the person be followers of the doctrinal theology (school of law, religious orientation) affiliated to the respective Religious Society recognised by this federal law.”⁴⁷ The statement and the syntax of the sentence in the original German refer to “followers” (plural) in such a way that they can only refer to the “candidate” (singular). They are not in sync.

This discrepancy can be explained by the genesis of the paragraph. The corresponding passage in the ministerial draft⁴⁸ did not originally involve the procedure of “getting in touch” or “Fühlungnahme.” The provision was “to bring the prospective candidate to the religious societies’ attention and give them a deadline of at least four weeks for a response, prior to filling the position.” The rector was thus merely instructed to inform the (Islamic) religious societies of the selection decision and give them the opportunity to respond. If the only purpose of contacting them was to inform (and not coordinate and agree, which are the purposes of the “Fühlungnahme”), then it is perfectly in line with a system whereby the rector only approaches the religious societies after he already made his decision.

The changes made to the government bill were most probably in response to Potz and Schinkele’s call to follow the language of the Protestants Act as closely as possible with respect to the appointment procedure.⁴⁹ The Islamic Community in Austria also demanded the same. This resulted in “bring to the attention of” being replaced by “to get in touch with” (“in Fühlungnahme[...]zu treten”), albeit without realising the grammatical implications for “candidate”. To assume an editorial mis-

46 N.b. that, although Article V. § 3 of the 1933/34 Concordat between the Republic of Austria and the Holy See says that in seeking consent from the church authorities “for the appointment or admission of professors or docents” only the final candidate has to be made known to the Church, so that in *Religionsrecht* (2003), p. 481, Kalb/Potz/Schinkele start from the premise that consent is given after the rector has chosen. It is nevertheless common practice to present all three candidates to the diocesan bishop.

47 Here we deviate from the foreign ministry translation, since the mistake present in the authentic German version of the Islam Act of 2015 was corrected in the English translation.

48 ‘Entwurf’, p. 5 § 15.

49 Potz and Schinkele, ‘Stellungnahme zum Entwurf des IslamG’, p. 19.

take is also more consistent with the already established application by analogy of § 15, para. 4, of the Protestants Act to filling the chair in Islamic religious education in 2008 (at the University of Vienna).⁵⁰ It also makes more sense in light of any interpretation that assumes compliance with the principle of equality.⁵¹

Wieshaider has given a comprehensive list of legal examples for the use of the term “Fühlungnahme”, with a view to deducing its semantic and legal contents. Its legal uses range from the context of a “right to be heard”, through mere “contact”, to an “accorded course of conduct”, up to “agreement”. Depending on the subject area, some form of consensus is usually intended. Many of the examples quoted by Wieshaider come from international public law, especially international treaty law (concerning the common use of water, aviation law, borders and customs law). Even those which relate to areas of domestic law (e.g. antitrust law) deal with cases of two or more parties coming to an agreement over a common procedure on subjects of concern to all, mostly as a mechanism for making decisions in individual cases on the basis of a general cooperation agreement.

In these examples the parties tend to be “stakeholders” on a common issue, where each one’s acts will affect the others, so that unilateralism is to be avoided, while at the same time avoiding a formal commitment to each other.⁵² The idea of reciprocity is omnipresent. Although the Evangelical Church did not push its claim (comparable to the provisions on *missio canonica* and *nihil obstat* in the case of the Catholic Church) to an “established right” over staffing, because of resistance from the Evangelical theological faculty,⁵³ Schwarz correctly emphasizes that in cases of heresy the Evangelical Church has the option to suspend a suspect professor, i.e. to withdraw recognition of his or her exams.⁵⁴ As would only seem

50 Especially since religious education enjoys *per se* a weaker connection to denomination than theology; see Potz, p. 940.

51 This problem to one side, the fact that no regulation comparable to § 38, para. 2, which refers to § 24 of the Islam Act of 2015, was adopted in § 38 of the University Act of 2002 is of great practical relevance. State-church law is a rarely mastered field in jurisprudence and not every official is familiar with all its provisions (let alone the most current ones), even if they are of concern for their division. § 38, paras. 1 and 2 of the University Act of 2002 have signal effect for the university administration. The lack of such a provision may be the reason why, according to officials of the Islamic Community, no “getting in touch” took place with respect to appointment of the first professor and the administration of the Islamic Community in Austria only found out about it third hand.

52 While neither side is obliged to accept the other’s staffing preferences, the explanatory notes to § 15, para. 4, of the Protestants Act make clear that neither side can decide without the other: “The procedure to be followed regarding the ‘Fühlungnahme’, considered mandatory, is to be determined jointly by the Church and the faculty in agreement”, ‘Erläuternde Bemerkungen’ (1961), ErlRV 448 BlgNR IX. GP, p. 16 <https://www.parlament.gv.at/PAKT/VHG/IX/I/I_00448/imfname_330595.pdf> [accessed December 11, 2017].

53 Georg Traar, ‘Was erwartet die evangelische Kirche von der Neuordnung des gesetzlichen Verhältnisses zwischen Staat und Kirche?’, *Österreichisches Archiv für Kirchenrecht*, 7 (1956), 54–62 (p. 54 et seqq.).

54 Schwarz, p. 337. Cf. the German Constitutional Court, October 28, 2008, 1 BVR 462/06 (*Lüdemann*) <http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/2008/10/rs20081028_1bvr046206.pdf;jsessionid=348E40C88A2ABE23EA3CBA3427E6503F1_cid392?__blob=publicationFile&v=1> [accessed December 11, 2017].

natural, the Evangelical Church can also do this *ab initio* in the cases of candidates appointed against its express will. Avoiding conflicts of this type is the function of the “Fühlungnahme”. The best way to understand it is therefore to consider it a “modus procedendi”⁵⁵ in matters that can only be dealt with effectively together. The “Fühlungnahme” should be understood as a procedural aspect of the right to self-determination, under art. 15 of the Basic State Law of 1867.

V. The Right to Self-Determination vs. Academic Freedom

Since the co-determination rights of the Islamic religious societies are being infringed upon on the grounds of academic freedom, it would seem necessary to take a closer look at the relationship between the right of churches and religious societies to self-determination and academic freedom. “Theology”, in the sense of the jurisprudential concept of theology (regardless of the name or self-definition applied), is a “science of religion bound to a religion, confession and denomination”,⁵⁶ with an “institutional bonding” to a specific (legally recognised) church or religious society. As an applied form of care for that church or religious society’s teachings, it therefore falls under its internal affairs, which the state, under its obligation of religious and ideological neutrality, can neither teach on its own⁵⁷ nor affiliate unilaterally with the denominational educational institutions of other religious societies.⁵⁸

When taught at state universities (given mutual consent), it becomes a shared matter for the state and the church or religious society, as the (autonomous) spheres of action of both the parties overlap. Whether and under what conditions the theology of a church or religious society can be taught at state universities depend on art. 15 of the Basic State Law, which governs mutual agreement. Where such agreement is lacking, the situation constitutes not only interference into the internal affairs of the church or religious society but a violation of the state’s obligation to neutrality as well.

It was on these grounds that the Catholic and the Evangelical churches⁵⁹ were granted extensive co-determination rights (exercised in a broad sense), especially over staffing, including the right to withdraw the teaching license. So strong a connection is, however, in conflict with academic freedom, under art. 17 of the Basic State Law, which is, moreover, not restricted by any reservation of statutory powers. While academic freedom is still subject to immanent barriers (in terms of the prohibition of restrictions by intentional laws), the right of the legally recog-

55 Schwarz, p. 332.

56 Hans Michael Heinig, *Die Verfassung der Religion* (Tübingen: Mohr Siebeck, 2014), p. 280 and 291; see also Heinig, ‘Imamausbildung in Deutschland’, p. 51.

57 Heinig, ‘Imamausbildung in Deutschland’, p. 53.

58 Heinig, *Die Verfassung der Religion*, p. 280.

59 The latter to a lower extent; see Schwarz, p. 332 ff.

nised churches and religious societies to self-determination is subject to a *sui generis* reservation (i.e. can only be limited by “general state laws”).⁶⁰

While an historical understanding shows that the limitations to academic freedom imposed by the churches and religious societies’ right to self-determination are in line with the historical legislator’s intention, Hammer rightly points out that the use of petrification theory (so that a provision always retains the meaning it had when it came into effect) is inappropriate, not only because of later developments with respect to basic rights, but also because debates at the time the Basic State Law of 1867 came into effect themselves allowed for the assumption “that, with regard to Catholic theology, academic freedom was... not yet fully realised.”⁶¹ Therefore he sees the justification for limiting academic freedom in favour of the churches and religious societies’ right to self-determination as lying less in the “strength” of the latter than in a “moment of autonomy”.

This does not answer the question of how to measure this “moment of autonomy.” Should it be as understood by theologians at state universities (potentially under state influence, as they are embedded in its organisational and financial structure) or according to the doctrinal authority of the respective church or religious society? Precisely this type of conflict existed between the Evangelical theological faculty and the Evangelical Church during negotiation of the Protestants Act of 1961 over the extent of the latter’s co-determination rights, which shows that such a “moment of autonomy” does not necessarily correspond to the church or religious society’s own self-definition.⁶² The differences in view between a church or religious society and any lecturers or studies associated with it may be very great, depending on the extent of alienation existing between them. There must therefore exist a certain minimum of denominational bonding and co-determination (this minimum is a red line that every church and religious society must define for itself) for a legally qualification to teach theology at all.⁶³

Given the tense relationship that currently exists between the director of the “Institute for Islamic theological studies” at the University of Vienna, Ednan Aslan, and the Islamic Community in Austria and the recent revelations of possible foreign ministry involvement⁶⁴ in his “Kindergarten study,” the distance⁶⁵ be-

60 See the Austrian Constitutional Court, December 19, 1955 (VfSlg. 2944/1955) <<http://alex.onb.ac.at/cgi-content/alex?aid=vfb&datum=0020&page=546&size=45>> [accessed December 11, 2017]; and December 16, 1959 (VfSlg. 3657/1959) <<http://alex.onb.ac.at/cgi-content/alex?aid=vfb&datum=0024&page=511&size=45>> [accessed December 11, 2017].

61 Stefan Hammer, ‘Zur konfessionellen Bindung der Theologie aus Sicht der Wissenschaftsfreiheit’, in *Recht - Religion - Kultur. Festschrift für Richard Potz zum 70. Geburtstag*, ed. by Brigitte Schinkele and others (Wien: Universitätsverlag Wien, 2014), pp. 117–32 (p. 118 ff.).

62 Schwarz, pp. 332–37.

63 Heinig, *Die Verfassung der Religion*, p. 295.

64 Florian Klenk, *Frisiersalon Kurz*, Falter 27/17, p. 10-13, <<https://cms.falter.at/falter/2017/07/04/frisiersalon-kurz/>> [accessed September 30, 2017].

65 Which is certainly also of a theological nature. Exemplary of various doctrinal deviations, see *Aslan*, ‘Stellungnahme zur Fatwa des IGGiÖ-Mufti über die Verhüllung im Islam’, March 6,

tween Islamic theological studies and its reference religious society seems large, rather than small. Given these circumstances around a possible “moment of autonomy”, the need arises (both generally and specifically regarding Islamic theological studies) to ask whether one is in fact dealing with an expression of a given theology’s self-definition or a result of proximity to the state and political interests. Where the distance between the self-definition of the theological studies and that of the relevant religious society is too great, one would have to assume insufficient denominational bonding. The legal consequence for theological studies would then either be a loss of constitutional backing, as it would constitute not just unconstitutional interference in church or religious society internal affairs but a violation of the principle of religious neutrality of the state, or a loss of its legal qualification as such studies.

In the end, this conflict between academic freedom and the churches and religious societies’ right to self-determination is a dispute over assignment and naming, as Hammer rightly concludes. In other words, even where a religious society’s self-definition gives rise to a restriction that does not match the understanding of the theology in question, the religious society may still claim legal protection against any external encroachment on its teachings, at least in cases of grave deviation.⁶⁶

VI. Islamic Self-Definition and the Role of the Islamic Community in Austria’s Constitution

On constitutionality and whether the provisions of § 24 of the Islam Act of 2015 conform to the standards of art. 15 of the Basic State Law of 1867 (the right of churches and religious societies to self-determination), the question of Islamic self-definition is crucial, as it provides the primary benchmark for the Austrian Constitutional Court in judging whether there has been interference in internal affairs or not. In this respect, one must distinguish between Islamic self-definition in a substantial sense on the one hand and Islamic self-definition in a formal sense on the other. While the former derives from the Islamic tradition and so the disciplines of Islamic studies, the latter is based on the Constitution of the Islamic Community and the doctrinal statements of its bodies.

Regarding the latter there is already an initial problem with the Islamic Community in Austria’s self-definition. This is because § 6, para. 1, no. 5, of the

2017 <<http://ceai.univie.ac.at/2017/03/06/ein-fatwa-des-iggiu-mufti-zur-verhullung-im-islam/>> [accessed: September 30, 2017]. Cf. Mustafa Mullaoglu (representing the Advisory Council and Mufti of the Islamic Community), ‘Stellung der Verhüllung im Islam’, February 16, 2017 <<http://www.derislam.at/?c=content&p=beitragdet&v=beitraege&cssid=Stellungnahmen&navid=1180&par=50&bid=53>> [accessed September 30, 2017].

66 Hammer, p. 130.

Islam Act of 2015 requires that a “statement of doctrine” form part of the constitution⁶⁷ of any religious society under the act, whereas the doctrinal statement decided on by the Islamic Community (*Lehre der Islamischen Glaubensgemeinschaft in Österreich* of December 20, 2015) does not match the doctrinal statement⁶⁸ approved by administrative decision of the Federal Chancellor on February 26, 2016.⁶⁹ We have two very different texts and must assume that the approved text never came into effect, because no internal decision was ever made.⁷⁰

As to Islamic self-definition in a substantial sense, it should be clear that in neither Germany nor Austria was Islamic theological studies a denominationally bonded academic discipline being created for the first time, even though some lecturers do seem to be of this opinion. It has existed since the 7th century under different collective or particular (for branches) designations. In essence, Islamic

67 Under § 31, para. 1, in conjunction with para. 2 of the Islam Act of 2015, this seems to apply to the Islamic Community as well, which is a novelty, since no (already) legally recognised non-Islamic religious society is required to declare their concept or description of doctrine as a part of their constitution.

68 ‘Lehre der IGGÖ - Genehmigt am 26.02.2016’ <<http://www.derislam.at/deradmin/news/Lehre%20der%20IGG%C3%96%20-%20Genehmigt%20am%2026.6.2016.pdf>> [accessed December 11, 2017].

69 As this was substantially a doctrinal issue but formally a matter integral to the constitution, it constituted a case of overlapping jurisdictions on the part of the Shura Council (art. 36, no. 11) and the Council of Imams (art. 44, para. 1 of the Islamic Community Constitution of 2009. In the Constitution of 2015/16, jurisdiction over doctrinal and religious matters was transferred to the new “Advisory Council”, not to be confused with the above-mentioned “advisory councils” in Germany). According to the minutes of the Shura Council session on December 20, 2015, a document on doctrine, accepted on December 17 by the Council of Imams (i.e. the “Council of Scholars” or “Advisory Council”, as it was already being called, in anticipation of the then still to be passed constitutional decision), was accepted as a part of the constitution. The Religious Affairs (Cultus) Office (of the Federal Chancellery) was notified on December 30, 2015. In a note from the Religious Affairs Office dated January 27, 2016 (BKA-KA9.070/0001-KULTUSAMT/2016), the constitutional document on doctrine and the remainder of the constitutional decision were rejected as flawed. The rejection was communicated and a deadline for response set of February 5, 2016. According to the (positive) administrative decision of the Federal Chancellor (i.e. the Religious Affairs Office) on the Islamic Community’s constitutional decision (including the part on doctrine), dated February 26, 2016 (BKA-KA9.070/0004-Kultusamt/2016), the notification was amended twice, on February 15 and 25, 2016. During the period in question, however, there were no sessions of the Shura Council, as the Religious Affairs Office must have known, since the Shura Council is regularly convoked at intervals of at least 14 days, on analogy with art. 20, para. 9, of the 2009 Constitution (reaffirmed by art. 8, para. 6, of the 2015/6 Constitution). Regular sessions were clearly not possible between February 5 and 15 or February 15 and 25 (and it may consequently be assumed that the supposed amendments lack the seal and signatures of the chair and general secretary of the Shura Council).

70 Note that art. 8, para. 2, no. 16 (on the Shura Council) of the 2015/16 Constitution states that “Decided doctrine of the Islamic Community in Austria is an integral part of this constitution.” A doctrinal document on which the Shura Council has not made a decision cannot be part of the constitution. This problematic is actually quite multi-layered, so that we can only broach the subject here. Comprehensive treatment would require extra discussion.

studies rest on the epistemological concept of an authentic transfer of information in an unbroken chain by competent and trustworthy transmitters. In their foundations, they comply with the authenticity rules of Hadith transmission. What applied originally in the form of *ijaza al-riwaja* (permission of transmission) only to information, in the sense of a traceable and lasting copyright, soon came to be applied to the transmission from teacher to student of skills and abilities in the form of the *ijaza al-diraya/al-tadris* (permission to teach) and *ijaza al-ifta'* (permission to give expert opinions). Nor was this only in the field of religious knowledge.⁷¹

A core element of the *ijaza* was and is transparency. One must be able not just to provide a description of abilities (or conditions and time limitations, or the necessity of brush-ups in specified time periods, etc.) but also deduce an unbroken chain of teachers from the first teacher (in the field of Islam, the prophet Muhammad) based on a suitable certification. Broadly speaking, Islamic doctrine is not defined by a centralised denominational magisterium (a doctrinal authority; we consider certain exceptions below), but by anyone who can reasonably and intelligibly show knowledge that in the end derives from the prophet Muhammad.

This question leads us to the other side of the issue, the recognition of Islamic knowledge and understanding by the Muslim individual and the Muslim community as a whole. There are established criteria for distinguishing the *'alim* (Islamic Scholar) from a charlatan, including acceptance by the community of believers and its "scientific community", which is to say the network of Islamic scholars.⁷² Here, the principle of the infallibility of the community of believers (and their scholars) finds expression. This principle manifests in the literature on *usul al-fiqh* (Islamic legal theory and methodology) over the criteria for accepting scholars' opinions by those without qualifications (*taqlid*) and over the qualification criteria for those claiming to be *mujtahid* (scholars capable of independently applying Islamic legal theory and methodology to new circumstances and questions). Despite some differences between scholars, the following criteria are considered a minimum by most: 1. must be Muslim, 2. must be fully capable of acting, 3. must be righteous,⁷³ 4. must know Arabic and have mastered all the

71 Garrett Davidson, 'Carrying on the Tradition: An Intellectual and Social History of Post-Canonical Sunni Hadith Transmission' (unpublished doctoral dissertation, University of Chicago, 2014), p. 128 et seqq.; cf. Özcan Hidir, 'Wie könnte eine *iğāza* für Imame aussehen?', in *Imamausbildung in Deutschland. Islamische Theologie im europäischen Kontext*, ed. by Büilent Ucar, trans. by Anja Mehrmann (Göttingen: V&R unipress, 2010), pp. 219–26.

72 Jonathan A.C. Brown, 'Scholars and Charlatans on the Baghdad-Khurasan Circuit from the Ninth to the Eleventh Centuries', in *The Lineaments of Islam, Islamic History and Civilization* (Washington D.C.: Brill, 2012), xcv, 85–95 (p. 85 and 89).

73 These first conditions are actually preconditions. Not all scholars make explicit mention of the need to e.g. be Muslim, taking it for granted, as they generally discuss the *mujtahid* as part of the *'ummah*, the Muslim community, i.e. as its scholarly authority; see Wolfgang Johann Bauer, *Bausteine des Fiqh: Kernbereiche der 'Uṣūl al-Fiqh: Quellen und Methodik der Ergründung islamischer Beurteilungen*, Reihe für Osnabrücker Islamstudien, Band 10 (Frankfurt am Main: Peter Lang, 2013), p. 68 ff.

branch disciplines of Islamic studies (Koran, Hadith, doctrines of faith, legal theory and methodology, and a knowledge of the different opinions of scholars)⁷⁴ this last being ascertained by an *ijaza al-ifta'*. These criteria constitute the rough benchmark for ordinary Muslims for recognising a *mujtahid*.

It soon became clear that the uneducated do not find it easy to tell the difference between a scholar and a non-scholar and appearances can hold more sway, as a “scholar in the eyes of the masses is whoever ascends the pulpit”,⁷⁵ which is why the criteria for recognising and accepting a *mujtahid* are addressed both to ordinary believers and to (and sometimes against) the state (even the caliph), with a demand the criteria be respected and observed in appointing imams, judges and teachers and that the appointment of unqualified people not be allowed to establish the mere semblance of religious (scholarly) authority.

There is, therefore, a sort of Islamic magisterium or doctrinal authority but it is not necessarily manifest in a body or council. It resides in the consensus of the collective of Muslims who possess the qualification of *mujtahid*.⁷⁶ The absence of a consensus on much of the detail of Islamic doctrine is not a contradiction in this respect, as even the diversity of opinion over Islamic doctrine is located within a frame determined by consensus (meaning practically that scholars agree on which opinions are within the frame of Islam, even if they themselves do not happen to share them),⁷⁷ if not already by the Koran and the Sunna, the prophetic tradition.⁷⁸

In the realm of *fard al-kifaya*⁷⁹ or the community's collective obligations, general Islamic doctrine accords local and global Muslim leaders a certain authority regarding selection, due to the indivisibility of the obligation. This means that

74 Ibrahim Džananović, ‘Idžtihād’, in *Usul-i-Fikh*, ed. by EnesLjevaković, Hrestomatije, 10 (Sarajevo: ŠtamparijaRijaseta IZ u BiH, 2005), pp. 315–38 (p. 333); AbdulkrimZejdan, ‘Taklid: Slijedenje u Vjeri’, in *Usul-i-Fikh*, ed. by EnesLjevaković, trans. by Ahmet Alibašić, Hrestomatije, 10 (Sarajevo: ŠtamparijaRijaseta IZ u BiH, 2005), pp. 347–51 (p. 367); Abdullah ibn Yusuf Al-Juda’i, *Taysir ‘ilm ‘uṣūl al-fiqh*, 4th edn (Leeds: Al Judai Research & Consultations, 2006), p. 346 ff.

75 Ibn al Jawzi, *Kitab al-Qussas* (Book of Storytellers), p. 109 cited in Jonathan A.C. Brown, ‘Scholars and Charlatans on the Baghdad-Khurasan Circuit from the Ninth to the Eleventh Centuries’, in *The Lineaments of Islam, Islamic History and Civilization* (Washington D.C.: Brill, 2012), xcv, 85–95 (p. 90).

76 Comparable with the magisterium of the episcopal college, but with the difference that the equivalent of the pope, the caliph, is only a member of the college if he himself is a *mujtahid*. A centralized magisterium in one person, as in the case of papal infallibility, is out of question since the death of the prophet Muhammad.

77 Wahbah Al-Zuhayli, *‘Uṣūl al-fiqh al-‘islāmiyy* (Principles of Islamic Jurisprudence), 15th ed., 2 vols. (Damascus: Dar al-fikr, 2007), p. 480 et seqq.

78 In the light of these standards, it is evident that the procedure under § 24 of the Islam Act of 2015, in conjunction with § 98 of the Universities Act of 2002, is insufficient from the Islamic point of view. Prospective candidates are neither necessarily reviewed on these criteria by reviewers appointed by the appointments committee, nor do they automatically have the necessary qualifications to pass such a review. The co-determination rights of the Islamic Community (in so far as there are any) do not allow it to review candidates on these criteria with sufficient legal security.

79 Abdulkrim Zejdan, ‘Šeri’atskopravna norma (El-hukmuš-šeri’ju)’, in *Usul-i-Fikh*, ed. & trans. by Enes Ljevaković, Hrestomatije, 10 (Sarajevo: Štamparija Rijaseta IZ u BiH, 2005), pp. 27–49 (p. 38 ff.).

in matters of mandatory interest for a Muslim community, its leader may adopt and apply whichever of a range of different views he considers the most reasonable and acceptable. This is not a magisterium. It is not a question of determining doctrinal truth. It is about making decisions in the interest of the community (which may change with circumstances or a different assessment), which believers are obliged to observe (with some reservations comparable to can. 752 of the *Codex Iuris Canonici* of 1983).

That this self-definition is not fully realised under the current constitution of the Islamic Community in Austria is due to structural shortcomings and historic circumstances.⁸⁰ Under art. 2, para. 2, no. 4, of the Constitution of 2015/16,⁸¹ the Islamic Community considers the “education of religion teachers, theologians, chaplains and religious servants” its responsibility. This does not necessarily exclude cooperation with state universities (especially given art. 12, para. 1). The Islamic Community nonetheless sees the education of theologians as an internal matter.

Although art. 12, para. 1, stipulates that the Advisory Council (*Beratungsrat*) is the competent body of the Islamic Community for religious doctrine and religious matters, whose members must have either “a degree from a tertiary institution in Islamic studies or a traditional centre of scholarship”, art. 9, par. 2, no. 17 also determines that the Supreme Council (*Oberster Rat*) has the authority to decide whether “a prospective candidate for a position to be filled at a theological educational establishment at the University of Vienna is a follower of a doctrine represented by the Islamic Community in Austria.” That this strange responsibility regarding a highly religious matter is in the hands of an executive and managerial body of the Islamic Community is in line with art. 3, para. 3, of the Constitution of 2015/16, under which, given the approval of the Shura Council (the *Schurarat* or general assembly of the Islamic Community), the Supreme Council can decide by two-thirds majority to exclude a member of the Islamic Community. In both cases, one must assume an additional cumulative authority of the Advisory Council, under art. 12, para. 1, due to the doctrinal dimension. This is no doubt why a decision of the latter is necessary. Aside from this general competence in religious and doctrinal matters (which may be interpreted extensively because of its generality), the Advisory Council has no special legal status regarding Islamic theological studies.⁸²

The lack of specific and practical internal provisions (i.e. on the recognition of theological degree courses, lecturers, and exams or the suspension of recogni-

80 On the relationship of Islamic doctrine (including normative implications) and the Islamic Community in Austria's Constitution, questions arise as to any contradictions that may exist between them and their relevance. Given the scope of the questions, discussion must be put off to another opportunity.

81 ‘Verfassung der IGGiÖ’, <<http://www.derislam.at/deradmin/news/Verfassung%20der%20IGG%C3%96%20-%20Genehmigt%20am%2026.6.2016.pdf>> [accessed September 30, 2017]

82 While it might be possible to apply art. 11, para. 6, no. 2, to teaching staff at Islamic theological studies by analogy, it would have no immediate effect on the teaching staff.

tion) can be traced back to the fact that the Constitution of 2015/16 itself came into being under quite shady circumstances, even if not to quite the same extent as with doctrine. The first drafts, presented to the Supreme Council no earlier than November 2015 (the deadline for notification of the Federal Chancellor was December 31), offered something resembling an understanding centred on governmental supervision, which was obviously not in the interest of the Islamic Community in Austria. Presentation of the history of the development of the Constitution of 2015/16 would require separate discussion. As a representative example of the general tendency in the text, we would like to point to the fact that the draft of November 23, 2015, (in art. 22, para. 2) the term “chaplaincy” (or pastoral care; *Seelsorger*) was massively extended to cover almost all the religious officials of the Islamic Community, from the caller-to-prayer to the religion teacher. The term was also related to the mandatory commitment (under art. 22, para. 5, of the draft) to the qualification requirements set out in § 11, para. 2, of the Islam Act of 2015. It was also envisaged (art. 22, para. 6, of the draft) that the Supreme Council should be responsible for removing them from office for transgression of the principles and guidelines of their chaplaincy training (provided by the University of Vienna, under § 24 of the Islam Act of 2015).

In other words, under this draft, all religious employees of the Islamic Community would have been bound by substantive imperatives set by the professors of Islamic theological studies at the University in Vienna, and, in case of transgressions of these imperatives, the Supreme Council would have an obligation to discipline and ultimately to remove said employees/officials. This would certainly have established a denominational bonding between the Islamic theological studies at the University of Vienna and the Islamic Community in Austria, but in reverse. The University, a state institution, would have been in the position of mandating religious authority or magisterium. The fact that this use of the (constitutional) term “chaplaincy” in relation to Islamic theological studies at the University in Vienna was dropped from the Constitution of 2015/16 indicates clearly that the doctrinal authority of the Islamic theological studies at the University of Vienna was rejected. The scholarly body of the Islamic Community, the Advisory Council, remains the highest religious authority.

VII. Conclusion

Overall, § 24 of the Islam Act of 2015 does not give the impression of a regulation that satisfies the requirements of denominational bonding, the guarantees of art. 15 of the Basic State Law, or equality considerations vis-à-vis Catholic and Evangelical theological studies. Some of the differences, like falling short organisationally of a faculty, have some justification, given the early phase of development of the new

studies. It is much more difficult to find justifications for the different formulations of the denominational connection to the studies. Here, the question is not just whether there is a lack of the required co-determination, but whether one can talk of a denominational connection at all. To negate such a connection would strip § 11, para. 2, of the Islam Act of 2015 (on pastoral care in the armed forces, prisons, hospitals, etc.) of any legal justification. If the Islamic theological studies at the University of Vienna are not connected to a relevant Islamic religious society, it would be quite difficult to explain why, under § 24 of the Islam Act of 2015, a form of education over which the Islamic Community has no real influence is mandatory for its religious (pastoral) care in state institutions.

From § 24 of the Islam Act of 2015, it is evident that the aim is to transfer doctrinal sovereignty and the power of definition regarding Islam from the (still) sole legally recognised Islamic religious society to the neighbourhood of the state (the University of Vienna). The inevitable impression is created that the state, in the person of the legislator, has left the area of neutrality and is pursuing “state rule over Islam” through the case of Islamic theological studies. This was originally to have been more extensive and pronounced but has failed (for now). This tendency is reflected in the general direction of various parts of the Islam Act of 2015 and seems to be an expression of the current legal policy on Islam in Austria, and other parts of Europe, which Laurence claims “allows European governments to gradually take ‘ownership’ of their Muslim populations because it grants them unique influence over organisations and leadership.”⁸³

When it comes to considering the foreign ministry and the associated Austrian Integration Fund’s alleged involvement in the academic research of the director of the Institute for Islamic theological studies, any reference to academic freedom would only seem to cast even more doubt on the validity of the argument.⁸⁴ In any legal proceedings, a relevant court would surely have to take the actual relation of interests into consideration, with the consequent trade-off of academic freedom against the right to self-determination. One may therefore ask how free academia really is vis-à-vis the sensitive subject of Islam, which is obviously the focus of strong political interests. This question would have to be taken into account in assessment of any potential “moment of autonomy” for Islamic theological studies.

83 Jonathan Laurence, *The Emancipation of Europe’s Muslims: The State’s Role in Minority Integration*, Princeton Studies in Muslim Politics (Princeton, N.J.: Princeton University Press, 2012), pp. 12–13; cited by Hafez, ‘Disciplining the “Muslim Subject”: The Role of Security Agencies in Establishing Islamic Theology within the State’s Academia’, p. 45.

84 Especially as the Islam Act of 2015 may be considered a result of a political process related to the government’s legal policy on Islam, as much as of processes within the Islamic Community. One way this was operationalised was through the study on religious education teachers conducted by Mouhanad Khorchide, *Der islamische Religionsunterricht zwischen Integration und Parallelgesellschaft: Einstellungen der islamischen ReligionslehrerInnen an öffentlichen Schulen* (Wiesbaden: Verlag für Sozialwissenschaften, 2009).

Islamske teološke studije na Univerzitetu u Beču: Između akademske slobode i prava Islamske zajednice na samoodređenje

Sažetak

Članak tretira pravnu osnovu islamskog teološkog studija na Univerzitetu Beč i s time vezan normativni konflikt između slobode nauke i prava na (vjersko) samoodređenje. Autorova centralna tvrdnja jeste da dotična zakonska odredba nije u skladu s ustavnim principom jednakosti niti sustavnim garancijama o položaju zakonski priznatih crkava i vjerskih zajednica. Analiza počinje poređenjem pravnog stanja između Njemačke i Austrije u odnosu na islamski teološki studij, praćena opširnim razmatranjem paragrafa § 24 Zakona o islamu iz 2015. godine, koji predstavlja zakonsku osnovu za islamske teološke studije, i to upoređenju s pravnim položajem evangeličkog teološkog studija. Konačno, članak ispituje ulogu Islamske zajednice u Austriji u vezi s imenovanjem nastavnog osoblja, te njeno samoodređenje zasnovano na vlastitim učenjima, tradiciji i ustavu.

Ključne riječi: islamske studije, Austrija, Njemačka, Islamska zajednica, sloboda nauke, Zakon o islamu, sloboda religije.