The Accommodation of Religious Minority Beliefs in Prisons in Germany and the United States

A Transatlantic Comparison

Pauline Margarete Sophie Weller

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 20 May 2020

European University Institute
Department of Law

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Examining Board

Professor Gàbor Halmai, EUI (Supervisor)
Professor Mathias Siems, EUI
Professor Christoph Möllers, Humboldt University of Berlin
Professor Susanna Mancini, University of Bologna

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Department of Law – LL.M. and Ph.D. Programmes

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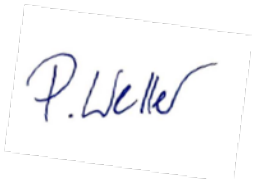

Abstract

This thesis critically compares the accommodation of religious minority beliefs in prisons in Germany and the United States. Following the approach of critical secularism scholarship, it investigates if there is a Christian bias in the recognition of the religious needs and practices of inmates in both countries.

The first part of the thesis examines and compares the relevant frameworks. The first chapter explains the relevant actors and the key figures of the prison system of Germany and the U.S. The second chapter sheds light on the history of religion in the prison domain and clarifies the theoretical strands of deterrence, retribution, and rehabilitation. It analyzes the prison reforms during the 1970s and 1980s in both countries and shows that the motivations and circumstances of these reforms have impact on the accommodation of religion in the prison domains today. The third chapter discusses religious diversity in numerical as well as textual terms. Against the background of the immigration history of each country, the third chapter shows how religious diversity has developed differently in Germany and the U.S. and how this has shaped different notions of religious equality and fairness in each country's constitutionalism. The fourth chapter compares the relevant constitutional framework in light of the state-religion model, the constitutional religious freedom and equality doctrine, and the fundamental rights status of inmates in each country.

The second part of this thesis starts with a theoretical and normative investigation of the concept of religious accommodation. Based on multiculturalism research, it is argued that unequal treatment of religious minorities is normatively relevant as their alienation likely undermines their equal standing in society. Subsequently, the empirically most essential needs and practices of inmates are doctrinally analyzed and compared: that to participate in chaplaincy programs, to follow religious dietary guidelines, and to use and possess religious objects and literature. The comparison shows that while the discrimination of non-Christian beliefs is a common element in both jurisdictions, the generally better treatment of inmates in Germany has to be confronted with a higher relevance of religious claims in the U.S. federal prison system.

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This thesis becomes a reality with the kind support of many individuals. I would like to express my sincere gratitude to all of them.

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This thesis is dedicated to Vivian Kube - with love.

Table of Contents

Introduction

The introductory chapter explains the overall thesis. It discusses the research issue and context (I). It describes the research question and objectives against the background of the current state of research (II). Part III explains the methodology (III). The course of study shows how the thesis is structured and gives an overview of the individual chapters (IV).

I. Research Issue and Context: Law, Religious Minorities & Prisons

To accommodate religious needs and practices in the prison domain is a timely challenge. The concept of religious accommodation, which originates from the Anglo-American legal tradition, is intended to enable religious minorities to practice their religion in an environment shaped by the majority.[1] Equality and justice are, therefore, fundamental to the concept.[2] The legislator, courts, and prison administrations in Germany and the U.S. have to deal with inmates' requests and must find solutions for the conflicts that occur between the inmate's religious freedom and the institution's interest in maintaining security and order. Religious diversity has increased in the societies of both Germany and the U.S., and the prison domain reflects these developments.[3] Some of the needs and practices of the diverse prison population bear new security risks and administrative and financial costs. Prisoners invoke religious freedom to request more diverse prison menus that allow them to follow religious dietary requirements, they call for religious advisors of their faith to be available at their institution, and they challenge the restrictions of their religion regarding personal possessions, such as religious items and literature.[4]

In Germany in particular, it has recently become more salient that the religiosity of inmates of religious minorities, most notably of Muslims, is not accommodated in prisons.[5] In contrast, religious minorities in the federal prison system in the U.S. enjoyed a fair amount of success

[1] The concept of religious accommodation is embedded in the broader theory of reasonable accommodation. It is not only a matter of compensating for the structural disadvantages arising for religious persons, but also for disabled people and others. Hence, accommodations can be not only religious, but also physical or academic, etc. For the legal definition under U.S. law, see, e.g., https://definitions.uslegal.com/r/reasonable-accomodation/

[2] For a profound explanation and theoretical discussion of the concept of religious accommodation, see Part 2, Chapter I, 1.

[3] Religious diversity inside and outside of prisons in both Germany and the U.S. is examined in chapter II of Part 1.

[4] Generally discussing the issue of religious diversity in prisons: James A. Beckford, *Religious Diversity in Prisons*, 42 STUDIES IN RELIGION/SCIENCES RELIGIEUSES 190 (2013).

[5] Sarah Jahn e.g. shows the difficulties of Muslims to exercise their religion in German prisons. See, e.g., Sarah Jahn, *Zur (Un-)Möglichkeit 'islamischer Seelsorge' im deutschen Justizvollzug*, CIBEDO, 2014.

with claims protecting their religious needs and practices. However, the material and practical life of religion are tightly controlled, with much being proscribed.[6] Also, in the federal prison system of the U.S., religious minorities often struggle with the existing standard of religious accommodations. [7]

Despite the specific circumstances of the prison institution, "prisons are a persistent trope in the imagining of the modernity"[8]. Scholars have turned continuously to the prison institution to understand the complex questions of the modern state better. These scholars argue that the broader legal and political context reflect in a prison's policy.[9] The underlying assumption of these studies is that in the regulated microcosm of prisons, the handling of religion can be observed particularly well. In this vein, this thesis uses the defined space of prisons and the imprint left by the national specificities in each country's constitutionalism to the prison institution for an in-depth analysis of (minority) religion.

At the same time, this thesis acknowledges and takes into account the circumstances specific to the prison domain, namely their influence on religion. The first aspect that makes prisons distinct is the power of the authorities over the individual.[10] The special bond between state and inmates in the prison setting allows for a unique form of control and leads to numerous interferences of the state with the inmate's privacy. There is no other domain in the democratic state which exposes the individual to the control mechanisms of the state in a comparable way. In the social sciences, Erving Goffman, therefore, coined the concept of the penal system as a "total institution".[11] For Goffman, what is special about the prison system

[6] Irene Becci & Joshua Dubler, *Religion and Religions in Prisons: Observations from the United States and Europe*, 56 JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 241 (2017), p. 242.

[7] For example, a Muslim inmate's request for a pamphlet was denied based on the argument that he failed to show how the existing volume of religious literature substantially burdened his ability to practice his religion (Echtinaw v. Lappin, WL 604131 – Dist. Court, D. Kansas 2009). Moreover, it is difficult for inmates to procure items outside the prison's approved vendor catalog (Fernandez-Torres v. Watts, WL 1173923, - Dist. Court, S.D. Georgia 2017).

[8] Winnifred Fallers Sullivan, Prison Religion: Faith-Based Reform and the Constitution (Princeton University Press. 2009), p. 6.

[9] Id. (with further references).

[10] Foucault's work on prisons extensively deals with the power relationship between the state and the inmate, in addition to and as the foundation of the questions about the effects of surveillance, MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON, 2nd Vintage Books ed (Vintage 1995). See, most importantly, under the chapter PUNISHMENT (Part 2), p. 73 et seq.

[11] Erving Goffman, Asylum. Essays on the Sociological Situation of Mental Patients and Other Inmates (Anchor Books 1961), p. 4-5.

is that self-determination and individuality are abolished in favor of a restrictive order and regulating everyday life.

Apart from the totalitarian character of the prison institution, religion in prisons is special because of the historically grown intimacy between religion and prisons.[12] Ever since, religion and religious thought have had a significant impact on the correctional setting, and still, religion is a managing tool used by the authorities.[13] Moreover, religion is important for the detained individual and can help to cope with the deprivation of liberty in detention.[14] "[…]He descends into his conscience, he questions it and feels awakening within him the moral feeling that never entirely perishes in the heart of the man".[15] This old and idealized version of what happens inside of a prisoner's mind when detained and isolated was written a long time ago. But indeed, there is still something to it that the working of the conscience itself will act upon the convict. In this light, it is noteworthy that the empirical data on the religiosity of inmates suggests that the participation in religion inside of prisons is higher than outside of them.[16] There might be several reasons which can explain the particular interest of inmates in religion (for example, it may simply be a welcome distraction to participate in religious services). But certainly, the wish for a higher authority that gives answers to ultimate questions of life and death and to guilt and forgiveness, that become particularly pressing in the restricted space of prisons, is one of these reasons.

The U.S. Constitution, as well as the German Basic Law, contain the obligation on the side of the state to provide inmates in prison with equal opportunities to practice their religion.[17] This promise – an open secret for scholars and practitioners of the field – is difficult to keep. First of all, there is a contradiction between the state's promise to provide liberty and the restricted environment of the incarcerated. There is no protected private sphere, but instead all sorts of management and meddling.[18] Seen from the perspective of the state, the religious

[12] Tobias Brandner, Gottesbegegnungen im Gefängnis (Verlag Otto Lembeck 2009), p. 56.
[13] Olivier Roy, *The Diversification of Chaplaincy in European Jails: Providing Spiritual Support for New Inmates or Countering Radicalism?*, *in* RELIGIOUS DIVERSITY IN EUROPEAN PRISONS: CHALLENGES AND IMPLICATIONS FOR REHABILITATION (Irene Becci & Olivier Roy eds., 2015) Introduction.
[14] With a discussion of the working of the conscience of the prisoner, FOUCAULT (1995), p. 230 et seq.
[15] Journal des économistes, II, 1842, cited in id. at. 235.
[16] Pew Research Center, Religion in Prisons - A 50-State Survey of Prison Chaplains (2012), p. 23; (See Part 1, chapter III).
[17] The fundamental rights of inmates are protected in both Germany and the U.S.; (See Part 1, Chapter IV, 3).
[18] SULLIVAN (2009), p. 1-18.

opportunities that are provided to inmates are "limited by judicial deference to the demands of prison governance, domestic security, and national security".[19] In almost all cases, the interest in maintaining security and order must be taken into account when dealing with religion in prison In some cases, the infringements are obvious, for example, if a religious object is objectively dangerous to third parties, thus, potentially violating their constitutional rights".[20] In other cases, the balancing is more complicated, for example, when dealing with administrative costs of a policy, the likelihood of inmate's resentment, and the appearance of discrimination.[21]

Courts, legislators, and prison administration cannot decide cases about the accommodation of religious needs and practices without the careful examination of the requests. Therefore, the state is necessarily getting involved, and to some extent, decisions reflect the state's ideas on religion.[22] Many scholars have noted that Western secular states define religion according to Christian assumptions.[23] This thesis investigates the question of a Christian bias in recognition of religious needs and practices of inmates in prisons and comprehensively examines which factors are decisive for the lack of accommodation of the needs and practices of religious minorities in prisons in Germany and the U.S.

II. The Current State of Research and Research Question and Objectives

The following section provides an overview of the current state of research (1). Subsequently, the chapter presents the research question and objectives of this thesis and illustrates how this research project contributes to the field of research (2).

[19] Id. at. 6.
[20] See Part 2, Chapter IV.
[21] A profound discussion of the dimension of security concerns in prisons is provided by the authors of the Harvard Law Review Association, cf. The Harvard Law Review Association, *Developments in the Law: The Law of Prisons* 115 HARVARD LAW REVIEW 1838 (2002), p. 1895.
[22] I recognize that states do not have agency. The term "the state" refers to a category of the modern secular state, but it is seen that secular states are diverse (for the *prima facie* differences between Germany and the U.S., see III.1. of this introduction).
[23] Tim Jensen, *When Is Religion, Religion, and a Knife, a Knife—and Who Decides?: The Case of Denmark*, *in* AFTER SECULAR LAW (2011), p. 341-64 (Denmark's presumably secular law applies a Protestant understanding of religion); L. Scott Smith, *Constitutional Meanings of Religion Past and Present: Explorations in Definition and Theory*, TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW 89 (2004), p. 89-142, 92-4 (U.S. constitutional law applies Protestant understanding of religion).

1. The Current State of Research

The thesis uses literature from different research fields. Most relevantly, it takes into account law and religion literature, research on religion in prison from the legal perspective, religion in prison from a social science perspective, and religious diversity. Law and religion literature has been growing for years and increasingly refers to the changing processes of religion in society. Essential and highly regarded research in this area in Germany is published by Hans-Michael Heinig, Ute Sacksofsky, Stefan Huster, Gerhard Robbers, Karl-Heinz Ladeur, Gerhard Czermak, and Christoph Möllers.[24] For the doctrinal constitutional investigation of religious freedom in the U.S., Thomas C. Berg Russel Sandberg, Martha Minow, Andrew Koppelmann, Kent Greenawalt, and Michel Rosenfeld are particularly worth mentioning.[25] The notable work of Martha Nussbaum was important for this thesis because she illustrates how central religious equality is in U.S. constitutional doctrine and how it is enshrined in U.S. history.[26]

Legal scholars who have researched religion in prisons in Germany are, amongst others, Michael Köhne[27], Liora Lazarus[28] and Susanne Eick-Wildgans[29]. Of increasing importance is the research on Muslims in German prisons. So far, most importantly, Silvia Tellenbach and Vigor Fröhmcke have dealt with the subject of Muslims in prison from a legal perspective. In a short article, Tellenbach summarizes the topic in general terms by discussing statistical developments, peculiarities of the Islamic tradition, and the tensions it contains about prison law.[30] In his dissertation, Fröhmcke dealt extensively with the legal position of Muslims in prison. Fröhmcke concludes that there is no need for legislative action concerning Muslims in the prison system.[31] As far as can be seen, there is no legal research directly dealing with further religious minorities in the German prison system.

[24] See Bibliography for their numerous publications.
[25] See Bibliography for their numerous publications.
[26] See most importantly, Martha Craven Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality (Basic Books 2008).
[27] Michael Köhne, *Eigene Ernährung im Strafvollzug*, 11 NEUE ZEITSCHRIFT FÜR STRAFRECHT 607 (2004).
[28] Liora Lazarus, Contrasting Prisoners' Rights: A Comparative Examination of England and Germany (Oxford University Press 2004).
[29] Susanne Eick-Wildgans, Anstaltsseelsorge: Möglichkeiten und Grenzen des Zusammenwirkens von Staat und Kirche im Strafvollzug (Duncker & Humblot 1993).
[30] Silvia Tellenbach, *Muslime im deutschen Strafvollzug in* MULTIRELIGIÖSITÄT IM VEREINTEN EUROPA. HISTORISCHE UND JURISTISCHE ASPEKTE (Hartmut Lehmann ed. 2003).
[31] Vigor Fröhmcke, Muslime im Strafvollzug: die Rechtsstellung von Strafgefangenen muslimischer Religionszugehörigkeit in Deutschland (Wiss. Verl. Berlin 2005).

The U.S. legal literature dedicated to religion in prison takes into account the diverse needs and practices of inmates of different religions. In this vein, Barbara Knight focuses on the interplay between free exercise and equal protection.[32] Winnifred Sullivan has studied religion in prison extensively. In her book, "Prison Religion – Faith-Based Reform and the Constitution", she investigates the influence of evangelization on "faith-based prison programs" and what they mean for the constitutional separation between church and state.[33] Even though she primarily focuses on cases from state prisons, her ideas and arguments about the fundamental rights status of inmates are similarly relevant for this thesis. Her research shows the vulnerability of inmates and their dependence on the state for their religious practice. Various authors have studied the constitutionality and application of the Religious Freedom Restoration Act (RFRA). They have shown that it offers a more favorable standard for the inmate's religious freedom than previous tests.[34]

In the past decade, also social science research on religion in prisons has been growing.[35] Authors have examined specificities in the practices and perceptions of religion among inmates and prison agents[36] and the locations of religion in prison.[37] Research also focuses on the changes occurring in religion in Western societies (i.e. decreasing importance of Christian churches, the increasing importance of Islam, and religious diversity) and how this development affects prisons.[38] For the European area, the study by James Beckford and Sophie Gilliat-Ray, should be mentioned above all.[39] Their research examines the relations

[32] Barbara B. Knight, Religion in Prison: Balancing the Free Exercise, No Establishment, and Equal Protection Clauses, 26 JOURNAL OF CHURCH AND STATE 437 (1984).
[33] SULLIVAN (2009).
[34] T. W. Brown, Ensuring the Application of RFRA and RLUIPA in Pro Se Prisoner Litigation, 41 OHIO NORTHERN UNIVERSITY LAW REVIEW 29 (2014); John Wibraniec et al, Religious Regulation and the Court: Documenting the Effects of Smith and RFRA', 46 JOURNAL OF CHURCH AND STATE 237 (2004); Ira C. Lupu, Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act 56 MONTANA LAW REVIEW 171 (1995); See Part 1, Chapter IV, 2.b.bb.
[35] For the German context, however, there are no large n studies, while in the U.S., there is only one by the Pew Research Center, (Religion in Prisons, 2012).
[36] Sarah Jahn, Being Private in Public Space? The 'Administration' of 'Religion' in German Prisons 9 JOURNAL OF RELIGION IN EUROPE 402 (2016); Sarah Jahn, Institutional logic and legal practice: Modes of regulation of religious organizations in German prisons, in RELIGIOUS DIVERSITY IN EUROPEAN PRISONS (Irene Becci, Olivier Roy ed. 2015); GOTTESDIENST IM GEFÄNGNIS: ERFAHRUNGEN, ORIENTIERUNGEN, KONKRETIONEN (Herbert Koch ed., Luther. Verlagshaus 1984).
[37] Sarah Hodgson, *The other side of the wall: the free exercise and establishment of religion in prison*, 27 Whittier Law Review 315 (2005); Irene Becci, Religion and prison in modernity: Tensions between religious establishment and religious diversity - Italy and Germany (Thesis, European University Institute ed. 2006).
[38] E.g. Religious Diversity in European Prisons: Challenges and Implications for Rehabilitation (Irene Becci & Olivier Roy eds., Springer International Publishing. 2015).
[39] James Beckford & Sophie Giliat, Religion in Prison, Equal Rites in a Multi-Faith Soceity (Cambridge University Press 2005).

between the Church of England and other faiths in the chaplaincy programs in prisons. It shows how the struggle for equal opportunities in a multi-faith society is politicizing relations between the Church, the state, and religious minorities. And, it considers the increasingly controversial role of the Anglican chaplains in facilitating the religious and pastoral care of prisoners from non-Christian backgrounds, whose numbers among the prison population have been growing. By doing so, chaplaincy in prisons is seen as indicative of changes in religion, state, and the broader society.

Since the path-breaking study by Beckford and Gilliat, an increasing amount of literature has addressed religious diversification in the prison context. In Germany, most importantly, Sarah Jahn studied religion in prisons.[40] Irene Becci has compared religion in the prisons of Germany and Italy in her doctoral thesis and beyond.[41] She and others have shown the multiplicity of functions a chaplain can assume within this total institution, as well as the limitations that the omnipresent security imperative imposes on him or her.[42] Recently, Lisa Harms-Dalibon has compared Muslim prison chaplaincy across Germany's federal states showing a taxonomy of different approaches of the studies of religion in prison.[43] In the U.S., there are numerous publications on the practice of religion and religious diversity in prisons. Michael Hallett has discussed the resurgence of religion in U.S. prisons.[44] Hamid Reza Kusha and others have studied the role of Islam in U.S. prisons.[45] The Pew Forum on Religion & Public Life has extensively reported on religion and religious diversity in U.S. prisons and empirically studies religion in prisons.[46]

[40] E.g. Sarah Jahn, Götter hinter Gittern, Die Religionsfreiheit im Strafvollzug der Bundesrepublik Deutschland (Campus Verlag 2017), Jahn, Journal of Religion in Europe (2016); Sarah Jahn, *Religiöse Vielfalt als Handlungsfeld im Strafvollzug*, *in* Krise - Kriminalität - Kriminologie (Nicole Bögelein, Frank Neubacker ed. 2016).
[41] Becci (2006); Becci & Dubler, Journal for the Scientific Study of Religion (2017).
[42] Wolfram Reiss, Auswirkung der religiösen Pluralität auf staatliche Institutionen und die Anstaltsseelsorge (V & R Unipress 2015).
[43] Lisa Harms-Dalibon, Surveillance and prayer - comparing Muslim prison chaplaincy in Germany's federal states, COMPARATIVE MIGRATION STUDIES 8 (2017).
[44] Michael Hallett, The Resurgence of Religion in America's Prisons, 5 RELIGIONS 663 (2014).
[45] Hamid Reza Kusha, Islam in American prisons: Black Muslims' Challenge to American Penology Routledge, 2010; Mark S. Hamm, Prison Islam in the Age of Sacred Terror, 49 THE BRITISH JOURNAL OF CRIMINOLOGY 667 (2009).
[46] Pew Research Center, Religion in Prisons (2012).

The emerging critical secularism scholarship is also highly relevant for this thesis.[47] Critical secularism scholarship refers to a school of thought that critiques common presumptions about secularism and recognizes that "religion" is a modern, Western category. Critical secularism studies show that secularism is not a neutral or universalist ideology and that it's Christian tradition molded its approach to religion.[48] From this perspective, "religion" is a category that is produced by secularism, rather than preceded by it.[49]

2. Research Question and Objectives

Following the approach of critical secularism scholarship, this thesis unfolds the concept of religion in the prison domain. The main research question is: Is there a Christian bias in the recognition of the religious needs and practices of inmates in prisons in Germany and the U.S.? The thesis analyzes the Christian bias on two levels: firstly, at the constitutional level, and secondly, by examining the specific factors of the prison domain.

Prima facie, it is argued that there are different constitutional notions of religious equality and fairness in German and U.S. constitutionalism, which stem from the socio-religious differences of Germany and the U.S. The relevant questions here are: What do constitutions have to say about the changing socio-religious demography of the polity? Does the immigration history of the state generate influence on how the constitution responds to the claims of newer religions? In this light, the thesis examines how the historical and societal context of each country has shaped this constitutional notion and how it affects the accommodation of religious needs and practices in prisons today.

Secondly, this thesis argues that the domain in which the law gets applied is decisively relevant for the shaping of constitutional principles. For example, state neutrality in the domain of schools may come with different meanings and limits than state neutrality in the judiciary.[50]

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[47] See Talal Asad. *Genealogies of religion.* Baltimore: Johns Hopkins University Press, 1993; Gil Anidjar. "Secularism." *Critical Inquiry* 33:1 (2006), p. 52-77; David Scott and Charles Hirschkind, eds., *Powers of the secular modern* Stanford: Stanford University Press, 2006.

[48] Talal Asad. *Genealogies of religion.* Baltimore: Johns Hopkins University Press, 1993.

[49] Lena Salaymeh & Shai Lavi, Religion is secularized tradition: the case of Jewish and Muslim circumcisions in Germany, p. 1 (unpublished manuscript) (forthcoming).

[50] For example, religious symbols, such as the Muslim headscarf and the Christian cross, are treated differently in schools and the judiciary because of an increased need for "neutrality" in the judiciary (critically: Nahed Samour, *Die erkennbare Muslimin als Richterin: Das Recht auf Sichtbarkeit in der Öffentlichkeit, auch in der Justiz*, 1 ZEITSCHRIFT DES DEUTSCHEN JURISTINNENBUNDES 12 (2018)).

More concretely, applied to the prison domain, this thesis argues that the institution of prison in the respective country has peculiarities attached to it that also influence religious accommodation. Questions in this regard are: How are the underlying notions of the inmate's rehabilitation shaped in each country, and how do they affect religion and religious accommodation? How does the history of religion in prisons affect the role of religion and religious accommodation in prisons today? What relevance does the administrative framework and the discretion of prison authorities have for the accommodation of religious needs and practices?

Investigating these questions and the obstacles to the accommodation of religious needs and practices of inmates in prisons in Germany and the U.S., this thesis not only takes into account the constitutional framework, legislation, and case law but also the dimension of how the law is applied on the ground. For this purpose, the thesis uses empirical sources and collected data from more than 30 prisons in Germany.[51]

Normatively speaking, this thesis is vested in liberal multiculturalism research and the idea that the state must compensate for the disadvantages of religious minorities living in a majoritarian made society.[52] Based on Cécile Laborde's theory[53], this thesis argues that minority religions must have equal rights to the majority, and their alienation is normatively relevant in case the existing practices are likely to undermine their equal standing in society.[54] Translated to the prison context, this is assumed in the case of two scenarios. First, if it is part of the prison's status quo that the authorities decide that religious needs or practices of inmates are not protected under the law as they were not part of the inmate's religion. Second, if the authorities decide that the existing accommodation of religious needs and practices is sufficient to meet what is required under the inmate's religious freedom and equality, although it favors the majority.[55]

[51] For a discussion of the empirical research conducted in the course of this research project, see under III.4. of this introduction.
[52] Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Clarendon Press 1995).
[53] Cécile Laborde, Critical Republicanism - The Hijab Controversy and Political Philosophy (Oxford University Press 2008).
[54] This argument is elaborated in detail in chapter I of Part 2.
[55] The normative vision of this thesis is discussed under Part 2, Chapter I, 2.

Most importantly, this thesis helps to answer two questions that have not yet been sufficiently researched. First, it offers profound insights into the situation of religious minorities in Germany and the U.S. Second, it contributes to a deeper understanding of the constitutional concept of religion in times of increasing religious diversity.

There is a fundamental research deficit regarding the status quo of religious freedom in prisons. This deficit applies both to empirical research and to legal doctrinal research. This thesis contributes to closing the existing gaps by providing insights to the otherwise closed world of prisons and by showing the state of religious minorities in prisons. The findings of the analysis of the constitutional concept of religion in prison are also relevant outside of prison. On the analytical level, this thesis explains the multilayered obstacles to the accommodation of the needs and practices of religious minorities. In addition to an underdeveloped equality component in the doctrine of religious freedom, also the administrative framework is relevant here. With regard to the doctrine of religious freedom, this thesis offers new insights through the critical secularism approach, which focuses on the role of the Christian majority and religious minorities in law in addition to conventional legal interpretation methods.

III. Methodology

First and foremost, this thesis belongs to the field of comparative constitutionalism. Second, this research project is based on the conviction that legal research can learn and profit from a view into other disciplines. The following discusses comparative constitutionalism (a) and interdisciplinarity (b) as methods and explains how this thesis uses them.

1. Comparative Constitutionalism

Comparative constitutional law is vested with a particular task: to acquire knowledge of the fundamental principles that forge the relationship between sovereign power and citizen's freedom in different constitutional systems.[56] Importantly, in this thesis, constitutions are understood as living instruments that evolve in response to the emergence of new societal

[56] Antonia Baraggia, Challenges in Comparative Constitutional Law Studies: Between Globalization and Constitutional Tradition. Special Issue - Comparative Law', LaM October 2017, http://www.lawandmethod.nl/tijdschrift/lawandmethod/2017/10/lawandmethod-D-17-00009 *(last accessed 30.08.2019)*.

needs and new political wills.[57] Hence, context is crucial.[58] The conviction that informal changes and processes have an impact on the final implementation of codified norms is essential. This assumption led to the concept of "cryptotpyes".[59] These are implicit rules that deeply influence the concrete implementation of codified norms. Identifying a cryptotype (which is facilitated when an idea implicit in one system is explicit in another) may help to explain why, in different legal systems, identical statutes or scholarly formulas give rise to different applications, and, conversely, identical applications are produced by different statutes or different scholarly formulas.[60]

Given such a multidimensional relationship between law and context, the constitutional comparatist has to take into account not only the formal constitution, but also the "living constitution".[61] This is a crucial methodological challenge: this perspective makes the comparatist go beyond the merely classificatory exercise and deep into discovering the roots and the reasons why certain ideas developed in a given moment and the ultimate purpose of certain rules – similar or dissimilar – was adopted in different legal systems over time. The comparison ultimately is fostered by the dialectic tension between different legal orders, which moves between the two poles of the "Unterschiede" and the "Gemeinsamkeiten".[62]

Hence, the aim when conceptualizing the project was to select two countries that would make sense to compare in terms of their similarities and differences. "Making sense" here means that the differences and commonalities between the two countries are telling and can bring the whole set of complexities and difficulties of the issue - the accommodation of religious needs and practices of religious minorities in prisons - to visibility. In methodological terms, the comparison thus serves the overriding interest in the concept of religious accommodation

[57] Morton J. Horowitz, Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 HARVARD LAW REVIEW 32 (1993).
[58] Susanne Baer, *Verfassungsvergleichung und reflexive Methode: Interkulturelle und interseubjektive Kompetenz* 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND ÖFFENTLICHES RECHT UND VÖLKERRECHT 735 (2004) p. 735; 750; 756.
[59] Rodolfo Sacco, *Legal Formants: A Dynamic Appraoch to Comparative Law* 39 AMERICAN JOURNAL OF COMPARATIVE LAW 343 (1991), p. 385-386 (explained by Baraggia, Challenges in Comparative Constitutional Law Studies: Between Globalization and Constitutional Tradition, http://www.lawandmethod.nl/tijdschrift/lawandmethod/2017/10/lawandmethod-D-17-00009 *(last accessed 30.08.2019)*.
[60] Sacco, *Legal Formants: A Dynamic Appraoch to Comparative Law* 39 AMERICAN JOURNAL OF COMPARATIVE LAW 343 (1991), at. 385.
[61] Originally: Roscoe Pound, *Law in the books and law in action* 44 AMERICAN LAW REVIEW 12 (1910), p. 12–36.
[62] Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law (Oxford University Press First edition ed. 2014) p. 238.

that takes sufficient account of the needs and practices of religious minorities.[63] Ran Hirschl has developed a helpful methodological concept for the selection of the countries to be compared, which helps to illustrate the differences and commonalities concerning the variable that is to be examined by way of comparison.[64]

	Possible Explanation I Scope of religious freedom under the constitution	Possible Explanation II Scope of religious equality under the constitution	Possible Explanation III Full acknowledgment of the constitutional status of inmates	Possible Explanation IV State-religion relationship	Possible Explanation V Religious diversity in constitutionalism (the notion of religious equality and fairness)	Possible Explanation VI The domain-specific difference of the overall liberal prison system	Dependent Variable: Equal RA for religious minorities in prisons
Germany	X1	X2	X3	X4	Not X5	X6	Not Y
USA	X1	X2	X3	Not X4	X5	Not X6	Y

According to the "most similar cases" logic of Ran Hirschl's principles of case-selection[65], Germany and the U.S. are selected to test the hypothesis that two diverging factors cause the differences in religious accommodation in prisons of each state (possible explanation V and VI). Explanation V concerns the differences in religious diversity in each state that are also reflected in each country's constitutionalism and, thus, the constitutional notion of religious equality and fairness (X5). Explanation VI relates to the domain-specific circumstances of the prison conditions of each state; the German prison system provides inmates with various personal freedoms, whereas the U.S. federal prison system has a rather restrictive approach (X6).

The dependent variable of the comparison is the accommodation of religious needs and practices of minority religions (Y). Simply put, German prisons do not equally accommodate the religious needs and practices of religious minorities (not Y). The U.S. prison domain, to the contrary, is an accommodation friendly environment for the religious needs and practices of religious minorities (Y). When X5 is present, and X6 is not, the result is Y. When X5 is not

[63] Jackson categorizes such middle-level research of theorizing towards "good or just principles" as the "Universalist Search for Just or Good Principles", Vicki C. Jackson, *Comparative Constitutional Law: Methodologies in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michel Rosenfeld & András Sajó eds., 2012) p.61.
[64] Hirschl uses the "toolkit of considerations to be addressed" in comparative research in the social sciences for comparative constitutional law's methodological matrix. HIRSCHL (2014), (for an overview, see his Introduction).
[65] Id. at. Chapter 6 [Case Selection and Research Design in Comparative Constitutional Studies].

present, but X6 is, the result is not Y. It appears that the presence of X5 and the absence of X6 is necessary to generate the result Y. This supports the hypothesis that the two possible explanations X5 and X6 cause Y, and not possible explanations X1, X2, and X3. The possible explanation I (X1) is concerned with the constitutional right to religious freedom. Possible explanation II (X2) focuses on the constitutional right to religious equality, and possible explanation III (X3) is concerned with the constitutional status of inmates. As will be shown, with regard to these three factors, both constitutional orders, the German and U.S., show significant similarities: both orders doctrinally protect religious freedom and equality of inmates.

A third prima facie difference between Germany and the U.S., besides religious diversity and the general conditions of prisons, is the state-religion relationship (possible explanation IV). The German Basic Law, unlike the U.S. Constitution, stipulates the cooperation between religious community and state. At least formally, religion in the U.S. has been disavowed as an explicit partner of the state. This is different in Germany, where the constitutional arrangements demand the state and church to cooperate. In the prison domain, a prominent example for such constitutionally demanded cooperation between state and church are the chaplaincy programs which are organized by the religious community and state together.[66] Historically, these cooperation structures were most importantly designed for the cooperation between the state and the Christian churches. Especially for Muslim communities, it is an ongoing struggle to participate in these cooperation structures equally.[67] Hence, according to the hypothesis which the framework of this thesis postulates, the difference of the state-religion relationship is not directly influencing the accommodation of religious needs and practices of religious minorities in prisons. Rather, the prison has developed its own logic of the relationship between state and religion.[68]

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[66] Prison chaplaincy falls within the common remit of the state and the religious communities and is considered and exercised as a common task (res mixtae): Article 141 WC "To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons, or in other public institutions, religious societies shall be permitted to provide them, but without compulsion of any kind."

[67] Wiebke Hennig, Muslimische Gesellschaften im Religionsverfassungsrecht. Die Kooperation des Staates mit muslimischen Gemeinschaften im Lichte der Religionsfreiheit, der Gleichheitsätze und des Verbots der Staatskirche (Nomos 2010).

[68] Furseth and Kühle have argued that "there is no necessary direct link between overall policies on multi-religious societies and the actual accommodation of Muslims and other religious minorities in public institutions like prisons". They explain the discrepancy between governance of religion and Muslim prison chaplaincy, for example, stems from the "perceived urgency of the radicalization of Islam" which plays a bigger role inside the prison domain, Furseth & Kühle, *Prison Chaplaincy from a Scandinavian perspective* 153 ARCHIVES DE SCIENCES SOCIALES DES

The accommodation of religious needs and practices in prisons is approached in light of the relationship between state and individual. The central focus is put on the axis minority religions and the majority religion Christianity. Religious minorities encompass all recognized religions that appear in the prison context of each country, but Christianity. In numerical terms, the most relevant religious minorities in prisons seem to be Muslims, Jews, Buddhists, Hindus, and only in the U.S, Native American religions.[69] Islam in Germany and the U.S. is increasingly being investigated as a specific phenomenon.[70] The specific dynamics between the state and Islam are sometimes taken into account within the framework of this research project; however, the focus is not on the specifics of the individual religious minorities, but on the minority-majority dynamics as a whole.

All minorities have in common that they are likely under pressure to sacrifice some of their religiosity in order to obey the majoritarian made law. Despite the differences in the particular trends of the Christian population in Germany and the U.S. and the different organizational structures of Christian communities in each state, all of them are treated as members of the majoritarian religion of Christianity.[71] Unlike religious minorities, Christians in Germany and the U.S. generally do not pose particular challenges for the exercise of their religious freedom in the prison context.[72] In some instances, to illustrate the religious doctrinal framework, the axis religion-non-religion is discussed. However, the substantive analysis of the accommodation of beliefs, other than religious ones, is not part of this thesis. Therefore, this research project cannot comprehensively tackle the difficult issue of how to deal with the preference of religion over non-religion.[73]

RELIGIONS 123 (2011), p. 123.

[69] There is no comprehensive data revealing the religious affiliation of inmates in the prison domain of each country. The statement is based on all the material - case law as well as reports, data etc. - used in this research project.

[70] See for example, WIEBKE HENNIG, MUSLIMISCHE GEMEINSCHAFTEN IM RELIGIONSVERFASSUNGSRECHT (Nomos 2010); Khaled A. Beydoun, *Islam Incarcerated: Religious Accomodation of Muslim Prisoners before Holt v. Hobbs*, 84 UNIVERSITY OF CINCINNATI LAW REVIEW 99 (2016); DANIÉLE JOLY, JAMES A. BECKFORD, FERHAD KHOSROKHAVAR MUSLIMS IN PRISON (Palgrave Macmillan 2005); Jahn, *Zur (Un-)Möglichkeit 'islamischer Seelsorge' im deutschen Justizvollzug*, CIBEDO, 2014.

[71] Germany, since the Reformation, has mainly been a bi-confessional country of the two big Lutheran and Catholic Churches. In the U.S., to the contrary, immigration also brought a variety of Christian denominations such as Methodist, Baptist, Presbyterian, Lutheran, Disciples of Christ, Episcopalian and Congregational (mainline Protestant) and Catholics, which are the largest single denominational family of today (see Part 1, chapter III).

[72] That it is generally easier for Christians to exercise religion in prisons in Germany and the U.S. is also suggested by the empirical studies of religious exercise in prisons (Pew Research Center, Religion in Prisons, 2012). For Germany, the same is suggested by the research findings of Jahn, see e.g.: Jahn, Religiöse Vielfalt als Handlungsfeld im Strafvollzug, 2016.

[73] Amongst others, Brian Leiter criticizes the preferential treatment of religion over other moral beliefs, see: BRIAN

The thesis analyzes and compares the three empirically most relevant needs and practices of religious inmates: to participate in chaplaincy programs, to follow religious dietary guidelines, and the right to use and possess religious objects and literature.[74] Arguably, because the state has a different role in the private prison sector, and private prisons only exist in the U.S., only the public prison system of each state is taken into account for the comparison. Especially the U.S. has a complex prison landscape with prisons under federal, state, county, or city control. Here, the federal prison system of the U.S. and its institutions for adult men are part of the examinations; in terms of the relationship between state and individual, it is arguably the most relevant strand of the prison system of the U.S. and best suited for a comparison with the German prison system which is not in private but public hands.[75] In Germany, all prisons are operating under the jurisdiction of the individual *Länder* but have comparable legislative standards for the accommodation of religious needs and practices.[76] Therefore, for the German context, no further limitation is required.

The type of sources that are used differs for each part and chapter of this thesis. The examination of the historical framework relies on sources of legal history.[77] The chapter on the socio-religious framework discusses religious diversity in Germany and the U.S. and compares it in numerical as well as textual terms in prisons and outside of them. Therefore, it uses not only legal sources but also research and literature from the social sciences. The examination of the constitutional religious freedom and equality framework in chapter IV discusses the relevant landmark cases of the U.S. Supreme Court and the Federal Constitutional Court of Germany (FCC) and legal doctrinal literature.

The analysis in the three chapters of Part 2 uses case-law as well as socio-legal sources, including the existing empirical data on the accommodation of religious needs and practices in prisons in Germany and the U.S. The methodological choice to only consider the federal

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LEITER, WHY TOLERATE RELIGION? (Princeton Univ. Press 2013).

[74] The relevance of the selected religious needs and practices is one of the outcomes of the comprehensive study of Prison Chaplaincy in the U.S. by the Pew Research Center, Religion in Prisons (2012).

[75] The entire federal prison system is administered under the Bureau of Prisons (BOP,) and it's guidelines (See Part 1, Chapter I, 2.). Moreover, the Religious Freedom Restoration Act (RFRA) applies to the federal prisons system (See Part 1, Chapter IV, 2.b.bb).

[76] See Part 1, Chapter I.1.a.

[77] The interdisciplinary research approach of this thesis is discussed in more detail in the subsequent section (2).

prison system leads to a reduction in the number of relevant case-law as only RFRA cases get selected.[78] However, in the U.S., the number of potentially relevant sub-constitutional cases is still so high that further selection criteria are needed. Based on the existing body of case-law, this thesis developed categories of conflicts that recur in connection with the particular religious need or practice. For the more detailed analysis, those cases are selected which are the most representative for the prison institution's approaches to religious accommodation of needs and practices of minorities.

Another methodological challenge is that there is much less case law from the German prison domain. This is partly because legal protection in German prisons underlies the discretion of the prison authorities and is extremely limited.[79] Besides, there is - unlike in the U.S - no vivid prisoner rights culture that encompasses greater interest and commitment on the part of the civil society. In the U.S., several university law clinics and NGOs focus on the protection of prisoners' rights and provide legal advice to inmates.[80] The relatively low numbers of German case law allows to include all cases which deal with religious accommodation in prisons. The analysis of the selected case law for the chapters in Part 2 relies on the method of doctrinal analysis, i.e. to undertake "a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation"[81].

The theoretical-normative chapter (Part 2, Chapter I) on the concept of religious accommodation and the normative vision of what constitutional regulation for religious accommodation of minority beliefs would be desirable, relies on multiculturalism research and Michel Rosenfeld's pluralist constitutional approach. Cecile Laborde's theory of "critical republicanism" is applied to multiculturalism research and developed further for the particular context of this thesis.[82]

[78] In some instances, case law from state prisons is taken into account too. Instead of RFRA, RLUIPA applies to state prisons. Both acts, however, have a comparable standard of legal protection. See Part 1, Chapter IV, 2.b.bb.
[79] Johannes Feest, Totale Institution und Rechtsschutz: eine Untersuchung zum Rechtsschutz im Strafvollzug (Wolfgang Lesting & Peter Selling eds., Westdt. Verl. 1997); See Part 1, chapter IV,3.a.
[80] Further explanatory approach for the difference in numbers of German and U.S. prison litigation are the historical differences between both countries; See most importantly under Chapter II.2.b in Part 1, which discusses the empowerment of U.S inmates during the Civil Rights Movements of the 1970s and 1980s.
[81] Terry C. Hutchinson, Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era, 106 LAW LIBRARY JOURNAL 579 (2014), p.584; Jackson (2012), p. 61.
[82] LABORDE (2008).

2. Interdisciplinary Research

The questions that arise in connection with the accommodation of religious needs and practices of minority religions in prisons cannot get fully answered through purely legal-doctrinal research. Therefore, this thesis approaches the phenomenon from an interdisciplinary perspective. Since the term is used differently in different contexts, it is necessary to explain in more detail how it is understood here.[83]

In particular, it is controversial whether interdisciplinarity means turning to another discipline as an auxiliary science to one's own, or whether it is assumed that both disciplines stand equally side by side. This distinction is also crucial for the existing reservations about interdisciplinary research.[84] Indeed, jurisprudence opened up to other disciplines in many respects, and it became more common to take into account sociological, historical, and anthropological considerations in legal research.[85] However, the method in detail is controversial; often, interdisciplinarity is criticized because of its ambiguity.[86]

This thesis uses the findings of the neighboring disciplines as complementation for the legal-doctrinal analysis and the comparison. For this research project, incorporating sociological sources is necessary for at least two reasons. First, the analysis of legislation and case law alone does not allow to draw conclusions as to what the status quo inside the institution of the prison is, i.e. if and how prisons implement the legal requirements. Therefore, the limited existing body of empirical data is taken into account and complemented with own data. The questionnaire used for this research project comprised seventeen questions and relied on predefined response options.[87] These questions relate partly to the general situation of religion in prison and partly to the concrete religious needs and practices which are analyzed

[83] For an overview of the different understandings, Philipp W. Balsiger, Transdisziplinarität: systematisch-vergleichende Untersuchung disziplinenübergreifender Wissenschaftspraxis (Fink 2005), p. 135-185.

[84] The traditional mutual reservations of jurists and social scientist are discussed by Susanne Baer, in: Susanne Baer, *Recht als Praxis. Herausforderung der Rechtsforschung heute* 2 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 213 (2016), p. 219-220.

[85] Christian Boulanger, et al., *Versuch über das Sein und Sollen der Rechtsforschung - Bestandsaufnahme eines interdisziplinären Forschungsfeldes in* INTERDISZIPLINÄRE RECHTSFORSCHUNG: EINE EINFÜHRUNG IN DIE GEISTES- UND SOZIALWISSENSCHAFTLICHE BEFASSUNG MIT DEM RECHT UND SEINER PRAXIS (Christian Boulanger, et al. eds., 2019).

[86] Baer, ZEITSCHRIFT FÜR AUSLÄNDISCHES UND ÖFFENTLICHES RECHT UND VÖLKERRECHT (2004). Fn. 4: „In Deutschland wird die Frage nach der Öffnung der Rechtswissenschaft für die Sozialwissenschaften [...] nur im Ausnahmefall positiv beantwortet"; Eric Hilgendorf, *Bedingungen gelingender Interdisziplinarität am Beispiel der Rechtswissenschaft*, 65 JURISTENZEITUNG 913 (2010).

[87] For the full questionnaire and corresponding data, see appendix.

and compared (chaplaincy, religious diet, and religious objects and writings). The questionnaire was answered by the prison management of more than 30 prisons, often with the help of the institution's chaplains. Prisons of the large majority of the German federal states took part in the survey.[88] Prison law often underlies the discretion of prison authorities so that much is legally justifiable. The response options of the questionnaire were all within this scope so that it can generally be trusted that the questionnaire was answered truthfully.

The results of the questionnaire helped to get a realistic impression of the situation on the ground; the data shows that – despite similar legal frameworks in German federal states – the accommodation of religious needs and practices differ. For some of the questions of the questionnaire, little to no data existed yet so that the collected data can offer a valuable starting point for further and more profound research projects. By contacting the different prison management and criminological services of the federal states, it was possible to obtain numerous assessments from people working in the prison sector. In several personal background interviews, I learned more about the informal procedures and practical problems for the accommodation of religion. I visited the largest prison institution of Hamburg and interviewed the prison management as well as the Chaplain sent by the Protestant Church. For the U.S. context, this thesis uses data from the Pew Research Forum. Moreover, the BOP publishes profoundly about religious accommodation in federal prisons.

The second reason for the necessity to include social-scientific findings into this research project is that it prevents quick conclusions and may lead to a critical questioning of the concepts that the law uses.[89] If, for example, religious minorities are described as "other religions," this can create an exclusionary narrative which is unlikely questioned from a solely legal standpoint. With the classical canon of legal methods, everyday understandings of "normalcy" get implemented into the law.[90] These understandings affect the legal argumentation; therefore, a questioning of these assumptions is necessary to avoid that they

[88] Based on the research agreements with the Ministries of Justice of the Länder, Länder-specific data may not be published.
[89] Baer, Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht (2004), p. 737.
[90] Susanne Baer, *Schlüsselbegriffe, Typen und Leitbilder als Erkenntnismittel und ihr Verhältnis zur Rechtsdogmatik*, *in* METHODEN DER VERWALTUNGSRECHTSWISSENSCHAFT (Eberhard Schmidt-Aßmann & Wolfgang Hoffmann-Riem eds., 2004) p. 223.

have an impact on the research results.[91] Another relevant example is the supposedly neutral legal subject of the "inmate" which is commonly marked by specific assumptions, a negative attribution as the culprit. Hence, these examples show that unconscious preconceptions must be reflected upon and get deconstructed: A task to which a broadened disciplinary perspective positively contributes.

IV. Course of Study

The thesis is divided into three parts:

Part 1: The Frameworks of Religious Accommodation in the German and U.S. Prison Domain

The individual chapters of the first part of the dissertation, which refer to the different frameworks, take up the relevant features for religious accommodation in prisons in Germany and the U.S.

- Chapter I: The Institutional Framework: The German and U.S. Prison System

The first descriptive chapter explains how the prison systems of Germany and the U.S. are organized under consideration of the relevant actors and the key figures. Overall, prison conditions get compared because of their impact on religion; in an environment of severe restrictions, freedom of worship can become particularly important for inmates. Moreover, financial considerations can be a relevant factor for religious accommodation. Secondly, the chapter introduces the German Prison Act(s) and the prison law of the U.S. The statutory purposes of imprisonment in both countries are discussed and compared in light of religion. This includes a discussion of the notions of rehabilitation and resocialization. Thirdly, it shortly examines the guiding principles of the prison administration of each country.

- Chapter II: Historical Framework: Religion and Prison Reforms

The chapter briefly introduces how religion has developed in the prison setting of Germany and the U.S. in early history and clarifies the theoretical strands of deterrence, retribution, and rehabilitation. Subsequently, it examines the circumstances of the prison reforms in Germany and the U.S., which took place during the 1970s and 1980s. In both countries, this

[91] Baer, Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht (2004), p. 736.

was a time of important changes which led to the better protection of the fundamental rights of prisoners. Prisoners of each state still benefit from these developments today. As will be shown, the role of religion and the state in these reforms differed considerably in Germany and the U.S, which is argued to be relevant for the status quo of religion in prison today.

- Chapter III: The Socio-Religious Framework: Religious Diversity Inside and Outside of Prisons

The third chapter examines and compares religious diversity in numerical as well as textual terms. Against the background of the immigration history of each country, the chapter shows how religious diversity has developed differently in Germany and the U.S. Because of the interactionalist relationship between the worlds inside and outside the prison, the chapter further describes religious diversity in prisons in Germany and the U.S. The main argument of the chapter is that the different religious demographic realities of Germany and the U.S. contributed to the different constitutional notions of religious equality and fairness.

- Chapter IV: Constitutional Framework: Religion and the State in Prisons and Beyond

The last and fourth chapter of Part 1 examines the relevant constitutional framework of Germany and the U.S. in three main steps. The first section explains the different state-religion model in each, Germany and the U.S. (1). Whereas the constitutional framework of the U.S. generally follows an approach of separation between state and religion, the German Constitution, in various places, demands the cooperation between state and religious communities. It is shown how this general set-up is focused on the prison domain. The second section examines the doctrine of religious freedom and religious equality in Germany and the U.S. (2). The third section portrays the protection of fundamental rights in prisons in light of the constitutional status of the inmate of today (3). It shows how the status quo of the legal status of prisoners is justified and compares the opportunities of inmates for judicial protection and remedy in each jurisdiction.

Part 2: Religious Accommodation in Prisons in Germany and the U.S. in Practice: An Analysis

Before the accommodation of religious needs and practices of inmates are analyzed and compared (Chapter II-IV), the first chapter theoretically approaches the concept of religious accommodation and introduces the normative vision.

- Chapter I: Religious Accommodation: Theoretical Foundations and Normative Vision

This chapter illuminates the concept of reasonable accommodation theoretically. It explains the different forms of religious practice in prison in light of their equality- and/or freedom dimension. This typology serves as a basis to explain the normative vision underlying the further analysis. Based on multiculturalism research, it is argued that unequal treatment of religious minorities is normatively relevant as their alienation is relevant in case the existing practices are likely to undermine their equal standing in society. This argument is refined with Cecile Laborde's theory of critical republicanism, which gets applied to the prison context.

- Chapter II: Religious Practice and Chaplaincy Programs

This chapter analyzes the opportunities of religious inmates to participate in chaplaincy programs of Germany and the U.S. These programs offer various opportunities for inmates to exercise religion, such as individual counseling, group services, and chapel visits. Mainly, the difficulties of religious minorities to participate in these programs are identified, compared, and explained.

- Chapter III: Religious Diet and Prison Meals

This chapter discusses the different ways of how, if at all, religious diet guidelines get legally accommodated in German and U.S. prisons, and critically compares them. After explaining the legal framework, the chapter shows which arguments are used by courts and the legislator to limit the right of inmates to a diet that fulfills the requirements of their religion and contextualizes these arguments into the broader frameworks of each state.

- Chapter VI: The Use and Possession of Religious Objects and Writings in Prison

This chapter compares how the German and U.S. prison system accommodates the right of inmates, especially religious minorities, to possess and use religious articles and literature. It shows under what circumstances it is allowed for inmates to possess and use personal possessions and sheds light on the equality dimension of this legal framework.

Part 3: Comparative Conclusion

The main conclusion in the third and last part summarizes the main findings of the analysis and comparison in this thesis.

Part 1: The Frameworks of Religious Accommodation in the German and U.S. Prison Domain

The following four chapters examine and compare the frameworks: the institutional framework (I), the historical framework (II), the socio-religious framework (III), and the constitutional framework (IV).

I. The Institutional Framework: The German and U.S. Prison System

The chapter discusses the prison system of Germany and the U.S. Considering that the conditions inside prison influence the practice of religion, the chapter firstly discusses the general status quo and the key figures of each prison system. Briefly, the section also explains the legal framework. (1.a. & 2.a). Then, the concepts of resocialization and rehabilitation as envisaged under German and U.S. law are examined against the background of religion in prison (1.b. & 2.b.). Subsequently, the most important principles of the prison administration are pointed out by showing their potential bearing on the accommodation of religion. (1.c. & 2.c.). The last section summarizes the most important differences and similarities of the institutional prison framework in Germany and the U.S. with a bearing on the accommodation of religious needs and practices (3).

1. Germany

The chapter starts with an overview of the organization of the German prison system, the key figures, and prison law in order to gain a general understanding of the institutional prison setting in Germany (a). The next section discusses the notion of resocialization and the other statutory purposes of imprisonment as laid down in sections 2-4 of the federal Prison Act (b). The last section highlights the guiding principles of prison administration (c).

a. Organization, Key Figures and the Legal Framework

In Germany's 16 federal states, there are approximately 179 prison facilities which are classified into different security standards and which comprises two levels: "open" and "closed".[92] Open prisons have low or minimal security with perceptible exterior fortifications, and they are rather the exception.[93] The large majority of prisons are closed prisons, which

[92] World Prison Brief, available at http://www.prisonstudies.org/country/germany *(last accessed 30.08.2019)*.
[93] KLAUS LAUBENTHAL, STRAFVOLLZUG (Springer 7., neu bearb. Aufl. ed. 2015), at 345 et seq.

have a high level of internal and external security.[94] Inmates with longer sentences, typically violent offenders, occupy these.. Also here, the prisoner shall only be separated from his fellow inmates if this is necessary to avoid danger to the safety and order of the institution.[95] Prison laws differentiate between different types of isolation; either they are temporary or permanent.[96] Under German criminal law, all forms of imprisonment must be used only as an ultima ratio, i.e. as a consequence of particularly socially damaging behavior.[97] This approach is also reflected in the comparably low prison rate in Germany of less than 65 000 inmates in total (November 2018).[98]

The overall conditions in German prisons are relatively good, and the German prison system is globally viewed as an example for the humane treatment of prison inmates.[99] It offers most inmates comparably many freedoms, such as living in their private cells, the opportunity to move freely within the prison building most of the day, and various leisure activities.[100] It is controversial which role work should play within the penal system.[101] On the one hand, prison work provides structure and prepares inmates for the time after detention.[102] On the other hand, the lack of voluntariness on the part of the inmates represents a problem, also against the background of the below-average remuneration.[103]

In an extensive reform in 2006, the German parliament reorganized relations between the federal government and the federal states, and responsibility for some areas of policy was passed from the federal (national) government to the Länder.[104] This development was a

[94] Id. at. 351.
[95] Schwind & Grote, in Schwind et at, StvollzG, *§ 88*, at. 14.
[96] LAUBENTHAL (2015), at. 717.
[97] Id. at. 1.
[98] World Prison Brief, available at http://www.prisonstudies.org/country/germany *(last accessed 30.08.2019)*.
[99] Nicholas Turner, Jeremy Travis, *What We Learned from German Prisons*, The New York Times, 2015 *(available at* https://www.nytimes.com/2015/08/07/opinion/what-we-learned-from-german-prisons.html, *last accessed 30.08.2019).*
[100] The relatively good circumstances in the penitentiary system can also be explained by the fact that the detention period itself may not contain an element of punishment in addition to deprivation of liberty, LAUBENTHAL. (2015), at. 12.
[101] For a historical overview: Hans Lohmann, Arbeit und Arbeitsentlohnung des Strafgefangenen (Lang 2002), p. 31 et seq.
[102] One of the declared aims of prison work is to help inmates to develop self-confidence which is considered an important prerequisite for successful resocialization after release, BVerfG, ZfStrVo 1984, p. 315; BVerfGE 98, 169 (201); BVerfG NStZ 2004, p. 514.
[103] LAUBENTHAL (2015), at. 396.
[104] Hans Meyer, Die Föderalismusreform 2006, Konzeption, Kommentar, Kritik (Duncker & Humblot, 2015).

response to demands for clearer lines of responsibility and fewer areas of shared responsibility between different tiers of government.[105] Prison policy is one of the areas with a clear transition of legislative authority: prior to the 2006 reforms, policy in prisons was exclusively a matter for the national government (although typically in the German context, the Länder were responsible for policy implementation, namely the running of prisons as well as the issuing of relevant regulations).[106] Thereafter, responsibility transferred to the Länder, subject to conformity with the German Basic Law. [107]

The decision to make prisons fall under the competence of the Länder proved highly controversial, and critics argued that it lacked any sound rationale: while there admittedly was some operational pressure leading to policy differentiation (such as the availability of open prison places), they argued there was no requirement for a different legal basis in each Land.[108] The phrase "competition of harshness" *(Wettbewerb der Schäbigkeit)* was often used by critics who feared that Länder would out-bid each other in terms of being seen to punish prisoners and to release funds for more popular purposes than serving prisoner's needs.[109] Regional variations are reported to exist, especially with respect to the overall quality of buildings and the availability of work in prisons.[110] However, the feared *Wettbewerb der Schäbigkeit* did not occur.[111]

After power shifted, only some of the Länder were immediately keen to legislate autonomously. Several Länder, including the largest (North-Rhine Westphalia), were still relying on the federal legislation for years after the reforms.[112] This should, perhaps, not be a surprise given the relatively tight parameters set on prison laws by both the Basic Law and

[105] Carolyn Rowe & Ed Turner, Let's Stick Together? Explaining Boundaries to Territorial Policy Variation: The Case of Germany's Prisons Legislation, 25 GERMAN POLITICS 193 (2016), pp.193–209.
[106] LAUBENTHAL (2015), at 14 - 15.
[107] The competence to regulate judicial legal protection proceedings in prisoner cases, however, was not transferred to the Länder id. at. 15; See Part 1, Chapter IV, 3.a.
[108] Uwe Kopp, Keine Verlagerung der Gesetzgebungskompetenz für den Strafvollzug auf die Länder - Gesetzgebungskompetenz für den Strafvollzug muss bei dem Bund bleiben 1 ZEITSCHRIFT FÜR STRAFVOLLZUG UND STRAFFÄLLIGENHILFE (2006), p. 3.
[109] Rowe & Turner, GERMAN POLITICS (2016), p. 201.
[110] Frieder Dünkel & Horst Schüler Springorum, *Der „Wettbewerb der Schäbigkeit" ist schon im Gange!*, FORUM STRAFVOLLZUG 145 (2006), p.149.
[111] Frieder Dünkel, *Strafvollzug in Deutschland - rechtstatsächliche Befunde* AUS POLITIK UND ZEITGESCHICHTE 7 (2010), p.7.
[112] According to Article 125 a Basic Law, the federal Prison Act remained in force for the time the legislator stayed inactive.

verdicts of the FCC.[113] During the last few years, all federal states have passed their own prison laws. Yet, legal deviations in the Prison Acts of the Länder are relatively rare.[114] The existing differences are, most importantly, of a systematic nature so that the order of the provisions may differ from one Prison Act of one Land to another.[115] As far as religion is concerned, the Prisons Acts of the Länder only differ from each other in exceptional cases. In this thesis, the prisons for male adults from all federal states are taken into account. The provisions of the federal Prison Act are examined by way of example. Only in case of deviations, which are relevant for the accommodation of religious needs and practices of prisoners, the Prison Acts of the Länder are directly discussed.

b. The Prison Act(s) and the Statutory Purposes of Imprisonment

The German Prison Act 1976, which came into force on 1 January 1977 and which is the model of today's Prison Acts of the Länder, includes several underlying general principles as well as approximately 200 provisions setting out the detailed regulation of the prison system.[116] The fundamental principle underlying the German penal system is the goal of the inmate's resocialization.[117] The concept is defined as the sum of all efforts in the prison system to enable the prisoner to lead a socially responsible life without criminal offenses in the future.[118] Under prison law, it is stipulated under section 2 of the federal Prison Act. In the first sentence, it reads: "By serving his prison sentence the prisoner shall be enabled in future to lead a life in social responsibility without committing criminal offenses (objective of treatment)". [119] The next section, paragraph 3, reiterates the reintegration of prisoners following their release, stating that "[i]mprisonment shall be so designed as to help the prisoner to reintegrate himself into life at liberty".[120] According to section 2 II of the federal Prison Act, the treatment

[113] See Part 1, Chapter II.1.b., where these parameters are discussed in more detail in light of the German prison reform of the 1970s.
[114] Differences and similarities can easily get tracked with the help of https://strafvollzugsgesetze.de/; Rowe & Turner, GERMAN POLITICS (2016).
[115] For example, the regulation on religious dietary rules is sometimes part of the regulatory context of religious practice and sometimes part of the regular provisions on diet.
[116] Act concerning the execution of prison sentences and measures of rehabilitation and prevention involving deprivation of liberty [Prison Act], (Federal Law Gazette Part I, 16 March 1976).
[117] The terms rehabilitation and resocialization are often used synonymously in the German context; however, as this chapter will show, they do not necessarily have the same meaning; Heinz Cornel, Zum Begriff der Resozialisierung, in H. Cornel, et al. (eds) Resozialisierung (Baden Baden: Nomos, 2009).
[118] Heinz Schöch & Günther Kaiser, Strafvollzug (2002), p. 159 et. seq.
[119] [In Ger.] § 2 StVollzG [Aufgaben des Vollzuges] Im Vollzug der Freiheitsstrafe soll der Gefangene fähig werden, künftig in sozialer Verantwortung ein Leben ohne Straftaten zu führen (Vollzugsziel).
[120] [In Ger.] § 3 StVollzG [Gestaltung des Vollzugs] (3) Der Vollzug ist darauf auszurichten, dass er dem Gefangenen hilft, sich in das Leben in Freiheit einzugliedern.

approach to the implementation of prison sentences should also serve the aim to protect the general public from further crimes. Section 2 Sentence 2 reads: "The administration of the prison sentence also serves the protection of society from further offenses."[121]

The specific wordings of both objectives - resocialization and safety of society - differs within the Prison Acts of the Länder.[122] Bavaria and Baden-Württemberg first mention the protection of the general public and then the resocialization of offenders. The model law (*Musterentwurf*) published in 2011, however, which was drawn up jointly by the federal states, names the goal of the resocialization of inmates before the protection of the general public as a function of prison. This was adopted by all other federal states (Hamburg further emphasizes that the protection of society is equally as important as the resocialization of the inmate in its Prison Act[123]). Thus, the entire German prison regime (planning, relaxation, early release, etc.) is first of all geared towards the goal of resocialization. It must be critically noted though that the concrete measures to achieve this objective do not seem very effective.[124] There is no empirical evidence that the prison actually leads to the effective resocialization of the inmates.

The task of resocialization follows two central constitutional principles: the principle of respect for human dignity[125] and the principle of the welfare state[126]. In the Lebach-Case, the FCC emphasized that "as bearer of the guaranteed fundamental rights to human dignity the convicted offender must have the opportunity, after completion of his sentence, to establish himself in the community again"[127]. Hence, according to the FCC, the integration into societal

[121] [In Ger.] § 2 StVollzG [Aufgaben des Vollzuges] II Der Vollzug der Freiheitsstrafe dient auch dem Schutz der Allgemeinheit vor weiteren Straftaten.
[122] For an overview of all Landesstrafvollzugsgesetze: LAUBENTHAL. 2015, at. 151.
[123] § 2 HmbStVollzG [Aufgaben des Vollzugs] Der Vollzug dient dem Ziel, die Gefangenen zu befähigen, künftig in sozialer Verantwortung ein Leben ohne Straftaten zu führen. Gleichermaßen hat er die Aufgabe, die Allgemeinheit vor weiteren Straftaten zu schützen. Zwischen dem Vollzugsziel und der Aufgabe, die Allgemeinheit vor weiteren Straftaten zu schützen, besteht kein Gegensatz.
[124] For concrete examples, LAUBENTHAL. 2015. At. 141.
[125] Art. 1 in conjunction with Art. 2 I Basic Law stipulates that the penal system must be geared to the (re-)social engineering of the prisoners, BVerfGE 45, 187 (239); BVerfG, NStZ 1996, p. 614; BVerfGE 98, 169 (200); BVerfGE 116, 69 (85).
[126] Art. 20 I and Art. 28 I BL oblige the state to provide the necessary resources for the realization of socialization efforts, BVerfGE 35, 202 (236).
[127] BVerfGE 35, 202, (235-36); Also see Life imprisonment case, where the FCC noted that penal institutions are obliged, even in the cases of life imprisonment, to promote the rehabilitation of the inmates to maintain their ability and willingness to function as a human being and to offset damaging consequences caused by the loss of freedom and thereby especially counter all deforming alterations of personality, BVerfGE 45, 187.

life is one important element of the inmate's resocialization. This even gives inmates in Germany - albeit not directly enforceable - a personal right to resocialization.[128]

The aim of resocialization derives further from the principle of the welfare state as a formative definition of the state's objectives. This implies that the state has a constitutional obligation to assist "those groups in the community who, because of personal weakness or shortcomings, incapacity or social disadvantage, have been adversely affected in their social development."[129] Prisoners and ex-prisoners belong to this group.[130] Part of this is that the state must provide the necessary means for the staffing and equipment of the institutions.[131]

Liora Lazarus shows that the concept of resocialization stands in tension between two profound interests of the modern prison system.[132] On the one hand, it needs a robust regulatory regime to guarantee legal security. On the other hand, it needs legal concepts which allow progress and hence which are open to interpretation. The term treatment, for example, which is related to the resocialization of inmates, is not defined in concrete terms so that recent developments in psychology and medicine can get taken into account for the specific prison program.[133] The necessity that the penal system is open to progress was also acknowledged in an obiter dictum of the FCC in the life imprisonment case:

> "There has been further progress from rather crude to more humane and from more simple to more differentiated forms of punishment. The road still to be covered is becoming clear. Judgement as to what is in accordance with human dignity can hence only be based on the current state of knowledge and cannot lay claim to timeless validity"[134]

The role of religion in this system that strives for both security and modernization is multi-layered and also marked by contradictions. Historically, the idea that human rehabilitation is even possible stemmed from Christian reformist thinking.[135] In this sense, the concept as such is toned by religious ideas. In the penal system today, however, religion and rehabilitation

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[128] BVerfGE 45, 187 (239); Klaus Jünemann, Gesetzgebungskompetenz für den Strafvollzug im föderalen System der Bundesrepublik Deutschland § 32 (Peter Lang 2006) p. 446 et seq.
[129] Dieses verlangt "staatliche Vor- und Fürsorge für Gruppen oder Gesellschaft, die aufgrund persönlicher Schwäche oder Schuld, Unfähigkeit oder gesellschaftlicher Benachteiligung in ihrer persönlichen und sozialen Entfaltung behindert sind; dazu gehören auch die Gefangenen und Entlassenen", BVerfGE 98, 169 (200).
[130] BVerfGE 98, 169 (200).
[131] BVerfGE 40, 267 (284).
[132] LAZARUS (2004), p. 50 et seq.
[133] Id. at. 51.
[134] BVerfGE 45, 187 (229).
[135] BRANDNER (2009), p. 56.

relate to each other in multiple ways.[136] The concept of chaplaincy, which is still most importantly performed by the Christian Churches, has a religious origin but is today also shaped by other disciplines as well, namely psychology and pedagogy. As a result, the Christian chaplain, representative of the church as well as part of the ordinary staff of the penal institution, is no longer solely perceived as a religious representative but also as a psychological supporter.[137] This makes the Christian Chaplain in some institutions a contact person also for non-Christian inmates.[138]

Historically, the German concept of resocialization was controversial.[139] It was criticized that this enforcement objective gave the employees of the criminal justice system a considerable margin of discretion as to the length and nature of the prisoner's sentence based on their assessment of the possible "improvement" of the offender. In view of some, the consequence of this was to make resocialization an effective duty that paternalistically "pathologized" offenders.[140] Others, however, defended the ideal of resocialization for various reasons. One line of argumentation picked up the arguments of the FCC: detention without the given perspective of resocialization someday was inhuman.[141] Another line of argumentation was to distinguish the German term "resocialization" from the Anglo-American term "rehabilitation". It was claimed that "rehabilitation" referred to the treatment of a criminal offender but that "resocialization" referred only neutrally to the process in which the prisoner who violated the basic conditions of social coexistence by insulting others is reintegrated into society.[142] Resocialization was, therefore, less about curing offenders of their "illness" than about restoring their relationship to society sufficiently to prevent them from committing further crimes. As also emphasized by Lazarus, however, this dissociation from pathology is not completely convincing.[143] It is difficult to make a clear distinction between the objectives of "treating a criminal offender" and "assisting a criminal offender in reintegrating into

[136] Sarah Jahn, Gefängnisseelsorge: Nicht nur Hilfe für die Seele, in HANDBUCH JUGENSTRAVOLLZUG (Marcel Schweder ed. 2015); Jahn, Zur (Un-)Möglichkeit 'islamischer Seelsorge' im deutschen Justizvollzug, CIBEDO, 2014.
[137] Husamuddin Meyer, *Muslimische Gefangenenseelsorge*, FORUM STRAFVOLLZUG 20 (2014) p. 20; Ismail Altintas, *Kann ein nicht-muslimischer Seelsorger Aufgaben der muslimischen Seelsorge übernehmen?*, BEWÄHRUNGSHILFE – SOZIALES, STRAFRECHT, KRIMINALPOLITIK 29 (2008).
[138] Meyer, FORUM STRAFVOLLZUG (2014), p. 20.
[139] LAZARUS (2004), p. 60-65.
[140] Günther Kaiser, *Resozialisierung und Zeitgeist in* KULTUR, KRIMINALITÄT, STRAFRECHT: FESTSCHRIFT FÜR THOMAS WÜRTENBERGER ZUM 70. GEBURTSTAG AM 7.10.1977 (Rüdiger Herren & Thomas Würtenberger eds., 1977), p. 305-8.
[141] Id. at. 371.
[142] KLEINES KRIMINOLOGISCHES WÖRTERBUCH (Günther Kaiser ed., Müller 3., völlig neubearb. und erw. Aufl. ed. 1993).
[143] LAZARUS (2004), p. 61.

society" because of the potential similarity of the means of achieving these objectives. This contradiction or tension is also reflected in the role of religion in the prison system. It can be seen both as a means of increasing individual freedom and as a means for the state to control the inmates, thereby taking away their moral agency.

c. Guiding Principles of the Prison Administration

Before the introduction of the Prison Act, prison administration in the Länder was equipped with a great deal of power to implement the legal requirements. The Prison Act 1976 was an expression of the newly created fundamental rights status of inmates; the FCC had decided prior to the adoption of the new law that a legal basis (*Ermächtigungsgrundlage*) was required in order to legitimate encroachments on the fundamental rights of inmates. Hence, the Prison Act gave life to the newly established fundamental rights status of prisoners. However, the Act should maintain previous administrative flexibility. It thus represents a compromise between the ideal of strengthening the rights of inmates and the political imperative of retaining administrative discretion in prison. The fundamental principle of the resocialization of inmates, described in the previous section, also sets the tone for prison administration.

Accordingly, under paragraph 154 I of the Prison Act, prison administrative agents must closely co-operate together towards the resocialization of offenders.[144] Under section 151 II of the Prison Act, prison inspectors are advised to work with specialists when inspecting prison treatment and other measures.[145] Furthermore, the Act requires each state's justice administration (*Landesjustizverwaltung*) to establish a "criminological service" which, together with penal research institutions, should develop and refine treatment methods to further resocialization. Hence, the overall prison climate and the structure and organization of the prison administration must be conducive to resocialization (*resozialisierungsfreundlich*).[146]

[144] 154 Prison Act: (1) All members of the prison services shall co-operate and contribute towards fulfilling the functions of the prison.

[145] 154 Prison Act: (2) Close co-operation with the authorities and agencies engaged in the care of released prisoners, with probation officers, the supervisory agencies for the supervision of conduct, the Employment Agencies, the social insurance organizations and social assistance agencies, the relief facilities of other authorities, and charitable welfare institutions, shall be striven for. The prison authorities should co-operate with persons and associations whose influence may further the prisoner's rehabilitation.

[146] LAUBENTHAL (2015), at. 97.

In addition to the resocialization principle, other core principles have a significant impact on prison administration. These include the "principle of approximation" *(Angleichungsgrundsatz)* anchored in section 3 I of the federal Prison Act.[147] Accordingly, the prison conditions are to mirror life outside of prison to the greatest extent feasible. By minimizing unnecessary discord between life within and outside of prison, this principle shows respect for human dignity and sets the stage for an easier transition back into society following incarceration. Furthermore, section 3 II of the federal Prison Act protects the "principle of damage reduction": prison authorities must counteract the damaging effects of imprisonment *(Gegensteuerungsgrundsatz).*[148] The third, the "integration principle" *(Integrationsgrundsatz),* compels the administration to design the prison regime in order to reintegrate the prisoner into society.[149]

As these examples show, administrative prison law lays down important principles with a decisive influence on the structure and design of everyday prison. These principles do not give rise to directly enforceable prisoners' rights, but it follows from them that each inmate must have a treatment program.[150] This program may entail elements such as work and training activities, treatment groups, and preparation for release.[151] In agreement with the criminological services, certain standards of care and security and order (*Dienst- und Sicherheitsvorschriften im Strafvollzug*) have been agreed upon across all federal states. Moreover, administrative guidelines on the Prison Act *(Verwaltungsvorschriften zum Strafvollzugsgesetz)* and Prison Standing Rules *(Vollzugsgeschäftsordnung)* guide prison administrators in exercising discretion under the Prison Act. In addition, some of the German Länder have developed their own detailed administrative regulations.

As far as can be seen, however, there are no detailed guidelines for the accommodation of religion which set a particular standard for all German prisons. Inmates do not get systematically informed about their specific right to religious freedom and equality while in

[147] Section 3 (1) Prison Act: Life in prison should, as far as possible, reflect the general relationship of the outside world.
[148] Section 3 (2) Prison Act: Administrators should work to limit the damaging effects of imprisonment.
[149] Section 3 (3) Prison Act: The administration of prison is to be aimed at assisting the prisoner to adapt to life in freedom.
[150] LAZARUS (2004), p. 84.
[151] LAUBENTHAL (2015), at. 158.

detention.[152] Because the German prison system offers comparably large freedoms, there are some religious needs and practices that do not require specific accommodation; rather, they are covered under the scope of general freedoms (for example, some prisons offer pork-free diet options allowing Muslim inmates to follow religious dietary requirements without this being labeled as a religious accommodation). As further analysis will show, however, with many other religious needs and practices of religious minorities, accommodations are missing.

2. United States

The following three sections explain the institutional framework of the U.S. federal prison system. The first section explains how the complex U.S. prison system is organized, taking into account its responsible actors, key figures, and the legal framework (a). Section b discusses the various meanings of rehabilitation. The last section provides an overview of the most important administrative guidelines of the BOP (c).

a. Organization, Key Figures and the Legal Framework

The U.S. prison system is divided into federal, state, and county controlled prison systems.[153] In general terms, federal courts possess jurisdiction over crimes that violate federal laws, occur on federal property, are committed against federal institutions and federally regulated institutions, or involve the crossing of state lines.[154] Federal crimes are most commonly investigated by the Federal Bureau of Investigations, the Internal Revenue Services, or the Department of External Affairs, depending on the crime committed. What constitutes a crime in one state may not constitute a crime in another. The vast majority of state laws that deal with criminal activity are analogous; however, few are distinctly divergent. These divergent laws can vary greatly among states and include directives, or lack of directives, that significantly affect crime rates and prison populations. However, the state is responsible for most crimes that occur within the state boundaries, amongst others, fraud, drug trafficking,

[152] Many prisons seem to provide inmates at the beginning of their detention with detailed information about their rights. The material sighted did not specifically address religious rights.

[153] J.D PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS (Elsevier 2010). For an overview of the judicial system, p. 1-20; Rachel O'Connor, *The United States Prison System: A Comparative Analysis,* Graduate Theses and Dissertations, (2014), available at https://scholarcommons.usf.edu/etd/5086 *(last accessed 30.08.2019).*

[154] The system of jurisdiction is explained online on the BOP's official homepage: https://www.bop.gov/about/facilities/federal_prisons.jsp *(last accessed 30.08.2019).*

and domestic violence. In those rare instances in which state and federal laws are conflicting, federal law supersedes the state law under the Supremacy Clause in the U.S. Constitution.[155]

Additionally, there is also a prospering private prison industry in the U.S., which generally holds inmates under federal as well as state jurisdiction.[156] Because of the subordinate role of the state in this sector, this thesis does not discuss the private prison sector further. Instead, the focus is on the federal prison system, which is organized by the BOP. Structurally, the BOP divides the federal prison system into six different regional systems.[157] Federal prisons total only around 120 institutions, while state facilities amount to almost 1200 and local jails equal around 3300 prisons.[158] The system is categorized according to different security levels (minimum, low, medium, high).[159] Low-security levels still include a significant amount of security with fenced and secure perimeters, separate housing units, and visual surveillance. Medium security prisons typically feature double-fenced perimeters with armed guards, a patrol tower, and separate housing units with specialized trap gates. Consequently, high or maximum-security prisons contain all the qualities of a medium one with additional manpower, guard isolation and protection, and isolated cell houses with double fencing. Juveniles and women are housed separately from adult male offenders, however, occasionally within the same facility.[160]

Seen as a whole, the U.S. has the largest prison system in the world and boasts a prison population of nearly more than that of Russia's and China's combined.[161] At year end 2017, prison populations totalled almost 1,489,363 inmates who were either under the jurisdiction of state or federal prisons or in the custody of local jails.[162] Except for public order cases,

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[155] Article VI, Paragraph 2, U.S. Constitution.

[156] The numbers of prisoners held in private facilities decreased 5 % from 2016 to 2017, E. Ann Carson Jennifer Bronson, *Prisoners in 2017* U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (2019), p. 1.

[157] A map of the BOP's field structure is available at: https://www.justice.gov/jmd/organization-mission-and-functions-manual-federal-bureau-prisons *(last accessed 30.08.2019).*

[158] The BOP has facilities in all states (available at: https://www.bop.gov/locations/) *(last accessed 30.08.2019).*

[159] The different security levels of the prison system are explained online on the BOP's official homepage: https://www.bop.gov/about/facilities/federal_prisons.jsp *(last accessed 30.08.2019).*

[160] The different housing units of the prison system are explained online on the BOP's homepage: https://www.bop.gov/inmates/custody_and_care/female_offenders.jsp *(last accessed 30.08.2019).*

[161] Rachel O'Connor, The United States Prison System: A Comparative Analysis, Graduate Theses and Dissertations, (2014), p. 1. (available at https://scholarcommons.usf.edu/etd/5086 *(last accessed 30.08.2019).*

[162] Bureau of Justice Statistics, Prisoners in 2017, Jennifer Bronson (et. al), p.1. (available at https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6546) *(last accessed 30.08.2019).*

nearly every crime in the U.S. is punishable by imprisonment. The U.S. burgeoning prison population continues to strain the system at capacity levels, with many prisons facing the problem of overcrowding.[163] In accounting for what is frequently called "mass incarceration," scholars point to racial prejudice, economic reconfiguration, and political dysfunction.[164] Maximum capacity levels affect prison conditions, and overcrowded prisons are susceptible to a reduced ability to supply recreational services to inmates. Reportedly, in this climate, religious practice can become very important for prison inmates.

Prison litigation is confusing; Congress repeatedly has enacted piecemeal legislation that addresses some of the issues but has created in the process a patchwork of statutes and has caused difficulty in their interpretation and application.[165] There are several federal statutes affecting prison organization and the status of prisoners. Most importantly, there is the Prison Litigation Reform Act (PLRA)[166], the Federal Tort Claims Act[167], and the Americans with Disabilities Act.[168] Of particular importance for this thesis are the Religious Freedom Restoration Act (RFRA)[169] and the Religious Land Use and Institutionalized Persons Act (RLUIPA)[170] which guarantee freedom of religion in the U.S. prison domain and set the peculiar limits for religion in prisons.[171]

b. The Different Meanings of Rehabilitation

The U.S. Supreme Court has dealt with rehabilitation in several decisions, interestingly with the result that there are now competing meanings of rehabilitation. Rotman illustrates that rehabilitation has not only been used by the Court to strengthen the status of prisoners and their rights but that the Court has also used the pretext of rehabilitation to justify the

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[163] Penal Reform International, Overcrowding, available at: https://www.penalreform.org/priorities/prison-conditions/key-facts/overcrowding/ *(last accessed 30.08.2019).*

[164] Raphael Steven, *The Socioeconomic Status of Black Males: The Increasing Importance of Incarceration*, *in* POVERTY, THE DISTRIBUTION OF INCOME, AND PUBLIC POLICY (David Card Alan Auerbach, John Quigley ed. 2015); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (Russell Sage Foundation 2006).

[165] PALMER (2010), p. 441-449.

[166] Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e. (1996).

[167] Federal Tort Claims Act, ch.646, Title IV, 60 Stat. 812 (1946).

[168] Americans with Disabilities Act, 42 U.S.C. § 12101 (1990).

[169] Religious Freedom Restoration Act (RFRA), 42 U.S.C. Sec. 2000bb (1993).

[170] Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2000).

[171] The constitutional doctrine and constitutional background of RFRA and RLUIPA are explained under Part 1, IV, 2.b.bb.; How both acts are applied in prisoner's religious freedom lawsuits and how they relate to other First Amendment claims and the inmate's legal status is explained under Part 1, IV,3.b.

reduction of the prisoner's fundamental rights.[172] In *Wolff v. McDonnell*, the majority opinion argued that the application of safeguards for due process, such as enabling confrontation and cross-examination, to the deprivation of "good time" would hinder rehabilitative goals.[173] Conversely, the dissenting opinion concluded that greater procedural fairness improved rehabilitation.[174] In *Procunier v. Martinez*, the majority opinion justified a regulation authorizing censorship of prisoner mail based on the state's interest in rehabilitation.[175] Justice Marshall, however, saw in the regulation a restriction of the rehabilitative function of communication with the outside world.[176] As these examples show, rehabilitation is used both as a justification for disciplinary measures of the state and an argument for advanced prisoner's rights.[177] Hence, two contradictory rehabilitation models underlie the ambivalent statements of the U.S. Supreme Court on the functions and significance of rehabilitation goals: "one authoritarian and paternalistic in nature and the other humanistic and liberty-centered".[178]

An important aspect of the challenge in promoting a liberty-centered idea of rehabilitation in the U.S. is that even if it exists, it is constantly competing with other goals of imprisonment. This reality is illustrated in *Powell v. Texas,* in which the U.S. Supreme Court upheld a public intoxication conviction and noted that rehabilitation is not constitutionally mandated to be the only purpose of penal sanctions.[179] Justice Stewart, concurring in *Furman v. Georgia*, however, stressed the importance of rehabilitation, noting the obvious fact that the death penalty did not serve rehabilitative goals.[180] This reasoning begs the question of whether decrying punishments that prevent rehabilitation is analogous to stating that prisoners must, at some point, be given the opportunity for rehabilitation. One could argue that a negative prohibition (no ultimate denial of opportunity for rehabilitation or no degradation while in

[172] Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 1023 (1988).
[173] Id. at. 1025; *Wolff v. McDonnell*, 418 U.S. 539 (1974) The majority opinion considered that if disciplinary proceedings were to comply with constitutional requirements, it "would…make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution", id. At 563.
[174] The reasoning of the majority in *Wolff v. McDonnell,* expresses a coercive concept of rehabilitation opposed by Justice Marshall's opinion (concurring in part and dissenting in part). He underlined the negative effect on rehabilitation of the feelings of powerlessness and frustration resulting from arbitrariness, *Wolff*, 418 U.S. at 589.
[175] *Procunier v. Martinez*, 416 U.S. 396 (1974).
[176] Id. It. 413.
[177] Rotman, The Journal of Criminal Law and Criminology 1023 (1988), p. 1025.
[178] Id. at. 1025.
[179] *Powell v. Texas*, 392 U.S. 514 (1968).
[180] *Furman v. Georgia*, 408 U.S. 238 (1972).

prison) could be viewed as (leading to) a positive right (the right of prisoners to rehabilitation). However, to date, the right of inmates to rehabilitation remains unrecognized by the U.S. Supreme Court.

The conditions within the prison are closely related to the concept of rehabilitation. In turn, the conditions within the prison are strongly influenced by the political climate. Historically, it was falsely assumed that the detention itself could be rehabilitative.[181] Today, rehabilitation is still tied up with imprisonment but in a very different sense. The negative consequences of detention require "a counteractive rehabilitative action". [182] These actions depend on the political will to spend money on the inmate's rehabilitation; hence, it depends on the political climate.[183] The deterrence policy of the last decades has worsened the conditions of U.S. prisons. Emblematic of this shift to deterrence was the rise of the "Supermax" prison, which is designed to control prisoners' behavior through restricted movement and separation not only from other prisoners but also from direct collaborators.[184] In 1984 there was only one high-security facility. According to a more recent study, as of 2004, 44 states throughout the country are operating one or more Supermax facilities.[185] The strict isolation in these facilities - prisoners spend all but one hour a day alone in their cells - requires a significant reduction in liberty-centered rehabilitative services. This turning away from liberty-centered rehabilitation becomes evidenced by increased frequency of life sentences without parole, severe sentencing under "three strikes" legislation, modern life sentencing for drug violations and with the increasing use of accompanying punishments in prisons in the U.S.[186]

As shown, in contrast to the German concept of resocialization, the U.S. rehabilitation concept also provided a label for the treatment methods of the state which did not actually help to improve the inmate's liberty.[187] This explains that both proponents and opponents of more

[181] Rotman, The Journal of Criminal Law and Criminology 1023 (1988), p. 1034.
[182] Id. at. 1034.
[183] In the 1970s, in response to a public outcry for law and order, the rationale for criminal law from its alleged rehabilitative effects changed to the idea of deterrence.
[184] For an explanation of the Supermax Model: Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons* 51 UCLA LAW REVIEW 1505 (2004), p. 1525.
[185] Jesenia M. Pizarro & Raymund E. Narag, *Supermax Prisons - What We Know, What We Do Not Know, and Where We are Going* 88 THE PRISON JOURNAL 23 (2008), p. 24 (quoting Mears, D. P. (2006). Evaluating the effectiveness of supermax prisons. Washington, DC: Urban Institute Justice Policy Center).
[186] Rais Gul, Our Prisons Punitive or Rehabilitative? An Analysis of Theory and Practice, 15 POLICY PERSPECTIVES 67 (2018).
[187] LAZARUS (2004), p.62.

severe punishments have leveled criticisms at rehabilitation over the past few decades.[188] As Weiland pointed out, the civil rights objections against rehabilitation were not important in the German context where the understanding of resocialization refers to the purpose of prison administration but is not understood as the purpose of punishment.[189] Punitive forms of treatment, under the label rehabilitation, can therefore only exist in the U.S.[190] Here lies an important difference of resocialization in Germany and rehabilitation in the U.S.

Religion is also subject to this tension, with the consequence that it stands in a different - even contradictory - relation to the rehabilitation goal. In *Nicholson v. Choctaw County*[191], rehabilitation was considered to reinforce the first amendment's arguments supporting the free exercise clause of religion.[192] Also in *Barnett v. Rogers*[193], religion was considered as subservient to the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality.[194] Nevertheless, the state uses religious exercise as a tool to control inmates in some cases. If, for example, faith-based prison programs are operated solely by the state, the religious practice inside the program can no longer be seen as an expression of the freedom of religion of the individual.[195] Instead, the First Amendment rights of inmates of the diverse prison population are likely violated by the mandatory participation in the Christian prison programs.

c. The Bureau of Prisons and its Guidelines

The federal prison system is administered by the BOP.[196] The Bureau acts as an agency within the United States Department of Justice and provides a wide range of institutions and programs, reflecting the diversity of sentences meted out to offenders sentenced or held on remand under Federal law. The declared mission of the BOP "is to protect society by confining offenders in the controlled environments of prison and community-based facilities that are

[188] Rotman, The Journal of Criminal Law and Criminology 1023 (1988), p. 1036.
[189] Thomas Weigend, *Neoklassizismus - ein transatlantisches Missverständnis* 94 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 801 (1982), p. 801; LAUBENTHAL (2015), at 157-160.
[190] Weigend, Zeitschrift für die gesamte Strafrechtswissenschaft (1982), p. 801.
[191] *Nicholson v. Choctaw County*, 498 F. Supp. 295 (S.D. Ala. 1980).
[192] Id. at. 311 "Besides being a right guaranteed by the First Amendment, the free exercise of religion can provide positive rehabilitative benefits to an inmate".
[193] *Barnett v. Rogers,* 410 F.2.d 995 (D.C. Cir. 1969).
[194] Id. at. 1002.
[195] SULLIVAN (2009).
[196] The Federal Bureau of Prisons (BOP) was created by the Act of May 14, 1930 (ch.274, 46 Stat. 325), signed into law by President Herbert Hoover (for general information about the agency: https://www.bop.gov/).

safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens."[197] Thus, *prima facie* the rehabilitation of the inmate is one of the professed aims pursued in the federal prison system.

The BOP not only organizes the superordinate organizational processes, such as the running of the buildings, etc. but also comprehensively regulates the internal processes by means of guidelines and technical references. One of the main aims of the prison system is to introduce and maintain security and order.[198] The security interest of the state, intrinsically anchored in the penal system, influences every form of freedom exercised by the inmates. In addition to deprivation of liberty, measures with an aggravating or punitive effect are not visibly anchored in the guidelines of the BOP.[199] Alleged or actual misconduct on the part of the inmates can, however, result in punishment as a disciplinary measure.[200] These relate in particular to measures involving deprivation of liberty, i.e. solitary confinement or, in the worst case, bondage.

There are comprehensive guidelines for the exercise of religious freedom, which are supplemented by technical references.[201] For different forms of religious practice, such as eating religious food, praying alone or in a community, or the use of sacred objects and writings, precise guidelines are laid down within this regulatory regime. These refer very specifically to the common needs and practices of each different religion; hence, they reflect the religious diversity of the inmates. The anchoring of religious freedom and equality within the BOP's regulatory regime should not obscure the fact that freedoms are generally only guaranteed to a very limited extent in the U.S. federal prison system. Religion must, therefore, be understood as a possibility for inmates to create some freedom inside the restrictive environment of prison life. For religious minorities, the practice of religion can nevertheless

[197] Organization, mission and function of the BOP, available at https://www.justice.gov/jmd/organization-mission-and-functions-manual-federal-bureau-prisons *(last accessed 30.08.2019).*
[198] Id. at.
[199] Id. at.
[200] Deborah M. Golden, The Federal Bureau of Prisons' Abuses of Solitary Confinement, D.C. Prisoner's Project, Washington Lawyers' Committee for Civil Rights and Urban Affairs, 2014 (Written Testimony for the Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights), p. 2.
[201] BOP Program Statement: Religious Beliefs and Practices (2004), BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002).

be particularly difficult. As will be shown in detail later, this is the case for different reasons, for example, economic considerations.

3. Comparative Conclusion

The high prison population and proportionate size of the country make the United States one of the most substantial prison systems worldwide. The U.S. has exponentially more facilities, personnel, and guards than Germany. Moreover, it functions under three jurisdictions while Germany's prison system functions only under two. Sentencing is, therefore, more diverse in the U.S. than in Germany. The conditions of prisons in Germany vary significantly from the U.S. federal prison system, particularly in the areas of population and capacity levels. The U.S. prisons are often overcrowded, whereas in Germany, criminals only receive custodial sentences for committing serious crimes.

As shown in this chapter, the general conditions within the prison have implications for religion in prison. In the U.S., where conditions are restrictive, religion inter alia offers an opportunity to expand personal freedom. In Germany, the liberal system potentially makes possible some forms of religious practice for inmates without the necessity of accommodating religious needs and practices. Moreover, as will be shown more clearly in the course of the analyses in Part 2, economic considerations have effects on the accommodation of religious needs and practices. Therefore, also the economic status of the prison is potentially relevant for the accommodation of religious needs and practices of religious minorities.

Apart from institutional differences and different overall conditions of prisons in Germany and the U.S., the notions of resocialization and rehabilitation differ. In the U.S., it is contested whether there is a constitutional obligation to the rehabilitation of the criminal offender, while the FCC recognizes the right of the inmate to resocialization in Germany. Moreover, it was shown that especially in the U.S., the notion of rehabilitation is ambivalent, or even contradictory: the idea of rehabilitation was not only applied by courts to strengthen the inmate's freedom rights but in some instances also to justify the limitations of the inmates' liberty. These contrary understandings of the concept are also reflected in the perceptions of prison religion. As will be shown later in the course of this thesis, religion, too, can be both a means of coercion used by the state or a means for the inmate to improve personal liberty.

Another significant difference lies in the different administrative anchoring of religion in the prison domain of each country. While the BOP regulates the practice of religion comprehensively in guidelines and technical references and thus makes it visible inside the institutional structure, freedom of religion of inmates leads a shadowy existence in the administration of prisons in Germany. Although the Christian religious communities and the prison institution are intertwined institutionally in Germany, religious accommodation is not comprehensively addressed in the administrative material of prisons.

II. The Historical Framework: Religion and Prison Reforms

The second chapter discusses the historical framework of religion in prison. Firstly, it shortly sketches the prison history of the 19th century in Germany and the U.S. to illustrate the existing link between the two institutions, religion and prison. (1.a & 2.a). Secondly, the chapter discusses the modern prison reforms of each country and shows that these reforms in both countries have been driven by different actors. (1.b & 2.b). Unlike in Germany, religious inmates in the U.S. were significantly involved in the reforms and pushed for more religious freedom. The last section summarizes the most important differences and similarities in the comparative conclusion (3).

1. Germany

The section discusses the cornerstones of prison history of the 19th century and shows how the idea of correctional detention was introduced (a). The second section focuses on the post-1945 prison reforms which were strongly influenced by the horrors of the Nazi-Regime and which fundamentally redefined the fundamental rights status of prisoners (b).

a. Reforms of the 19th Century: The Invention of Correctional Detention

The enlightenment period brought fundamental changes to the penal system across Europe. The intellectual environment of that time, and the ideas of thinkers like John Locke, Jean Jacques Rousseau, and Baron De Montesquieu who challenged old orders and created new attitudes regarding government and authority, also created a platform for momentous inquiry and publications regarding prisons. The concern often focused on the treatment of criminals and the conditions of prisons. Prominent examples are the publications by Jeremy Bentham[202] and Voltaire[203] which significantly impacted the field of crime and punishment during that time.

Prison emerged as a humane alternative to the brutal physical and public punishments of the 17th and 18th centuries.[204] It became the alternative to the guillotine, the instrument of

[202] Introduction to the Principles of Morals and Legislation (1823), Panopticon (1791), The Constitutional Code (1832).
[203] A commentary on the book of Crimes and Punishments (1764).
[204] For an overview of the first approaches to modern correction detention: LAUBENTHAL (2015), at 91-96.

execution during the French Revolution. The establishment of the prison also reflected an economic and social transformation. With the rise of industrial capitalism, corporal punishment receded into the background.[205] The ideological core of the early prison institutions was the belief of the possibility of man's improvement. The regulated punishment of soul and spirit was introduced as the more effective means of securing public order.

Like Montesquieu in his 1748 work "De l'esprit des lois"[206], the Milan philosopher Cesare Beccaria advocated moderate punishment in his 1764 book "Dei delitti e delle penne".[207] He was of the opinion that for actions which a law declared punishable, the citizen pledged to the state not life and limb but only a part of his or her freedom.[208] Thus, in the 19th century, imprisonment became the standard form of state criminal punishment. Howard and Wagnitz provided the essential impulses for the reform of prisons. After years of studying numerous European institutions, the Englishman and Quaker John Howard came to the conclusion that prisons should not only serve the inmates' custody but that they should also educate the lawbreakers through work and morals. In his work "The State of the Prisons of England and Wales"[209], published in 1777, he sketched out the plan of a correctional execution, following his guiding principle "make men diligent and they will be honest".[210] Howard proposed different measures.[211] These measures included solitary confinement to prevent "mutual criminal infection", compulsory labor combined with the payment of wages, and the obligation to save part of it for the time after imprisonment. In addition, he demanded that inmates should receive benefits for good behavior, including a shortening of the detention period. These proposals were disseminated in Germany by the prison chaplain Heinrich Wagnitz from Halle.[212] He dealt with the proposals and also advocated the improvement of conditions and the concept of the improvement of criminals through useful work and prayer. The belief in the possible rehabilitation and resocialization of the human being was, as argued

[205] Id. at. 98.
[206] Book VI, Chapter 9, Edition Görlitz, 1804.
[207] Dei delitti e delle pene (1911), Edition Milano.
[208] Id. at. 21 et seq.
[209] John Howard, The State of the Prisons in England and Wales: With Preliminary Observations, and an Account of some foreign Prisons and Hospitals (Printed for J. Johnson, C. Dilly, and T. Cadell. 1972).
[210] Id. at. 44.
[211] With an overview of Howard's proposals: LAUBENTHAL (2015), at 99.
[212] Heinrich Wagnitz, Historische Nachrichten und Bemerkungen über die merkwürdigesten Zuchthäuser in Deutschland (Johann Jacob Gebauer 1791), p. 15.

by Brandner, mainly influenced by reformist Christian thought.[213] As he shows, an important impetus for prison reforms and the present understanding of rehabilitation came from a former Protestant milieu.[214]

The historical interaction between prison and Christianity in Germany still finds expression today in chaplaincy programs and the concept of rehabilitation.[215] This interaction was only interrupted during the Third Reich, where prisons were reflecting the ideology of the National Socialists and prisons became a place of the retribution of the prisoner from which the Christian Church was mostly excluded (not only for ideological reasons, but also because the former pastoral staff, has eventually been inducted to war).[216] Post-1945, there were widespread calls for the total reform and the denazification of criminal and penal law.[217] The horror of the Third Reich provoked widespread claims for the "re-humanization" of the prison system. Hence, the denazification of criminal and penal law became the purpose of reform efforts.

b. Post-1945- Reforms and the Adoption of the Prison Act of 1976

Almost immediately after the Second World War, a working group was formed for the urgently needed reforms of the criminal justice system.[218] It demanded a return to the Weimar period and to the ideas developed before the National Socialists (1933-1945). The reforms had already started before the beginning of the war in the 1920s and had primarily aimed at strengthening the prisoner's legal guarantees. Traditional criminal law had been reshaped in a new spirit of prevention policy and individualized treatment of the offender. A draft of a new Prison Act that took these ideals into account was published in 1927.[219] It was largely the result of the work of Gustav Radbruch (1876-1949), professor of criminal law, legal philosopher, and former minister of justice.[220] Before the newly drafted criminal code and Prison Act came into

[213] BRANDNER (2009), p. 56 et seq.
[214] Id. at. 56.
[215] Jahn, Journal of Religion in Europe (2016), p. 406.
[216] Nikolaus Wachsmann, Hitler's prisons: Legal Terror in Nazi Germany (Yale Univ. Press. 2004).
[217] Max Grünhut, *The Reform of Criminal Law in Germany* BRITISH JOURNAL OF CRIMINOLOGY 171 (1961); Albin Eser, *The politics of criminal law reform Germany* 21 AMERICAN JOURNAL OF COMPARATIVE LAW 262 (1973); HEINZ MÜLLER-DIETZ, STRAFVOLLZUGSGESETZGEBUNG UND STRAFVOLLZUGSREFORM § 55 (Heymanns 1970).
[218] LAUBENTHAL (2015), p. 124.
[219] "Amtlicher Entwurf eines Strafvollzugsgesetzes des Bundes", printed in "Materialien zur Strafrechtsreform", Band 6, 1954.
[220] Grünhut, British Journal of Criminology (1961), p. 171.

power, however, they were interrupted by the coming to power of the National Socialists'. Criminal law and prisons quickly became an instrument of their ideology, and punishment became the same deterrence *(Abschreckung),* atonement *(Sühne)* and retribution *(Vergeltung)* of the prisoner.[221]

With the introduction of the Basic Law in 1948 and the growing importance of the rule of law, a prison law was inevitably demanded in order to strengthen the fundamental rights status of prisoners. In fact, there was no primary or secondary legislation at the time that dealt with the detention of prisoners and the legal status of prisoners. The demands for reforms in this period came predominantly from the scientific milieu. Academic research was at the core of the reforms and a decisive influence on prison law, a trend known as the *Verwissenschaftlichung* of the German prison reform.[222] Prison reforms were therefore primarily based on constitutional and criminal justice arguments of the legal academy and the state authorities.[223]

In the new reformist political climate that had characterized German society since the mid-1960s, the proposals of the Reform Committee for Prison Administration and the idea of criminal commitment to prisoner law and rehabilitation were finally adopted as government legislative proposals.[224] This climate contributed not least to the fact that the committee's proposals were quickly adopted by the government in the early 1970s. This development and political climate contributed to the groundbreaking decision of the FFC in 1972.[225] In its landmark decision, the FCC ruled that it was a violation of the rule of law and that there was no legal basis for the violation of the fundamental rights of prisoners. The FCC decided that the fundamental right of prisoners can only be restricted by law or on the basis of a law.[226] With this decision, the FCC ended the established doctrine of the "special relationship of subordination" that had justified the prisoners' limited legal status for decades.[227]

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[221] LAZARUS (2004), p. 49.

[222] An in-depth analysis of the Verwissenschaftlichungstrend of the penal system is provided by Kreissl: REINHARD KREISSL, SOZIOLOGIE UND SOZIALE KONTROLLE: DIE VERWISSENSCHAFTLICHUNG DES KRIMINALJUSTIZSYSTEMS (Profil. 1986).

[223] LAZARUS (2004), p. 51.

[224] Heinz Müller-Dietz, Strafvollzugsrecht (De Gruyter. 1978), p. 53 et seq.

[225] BVerfGE 33, 1.; LAZARUS (2004), p. 56; Also see: Horst Schüler-Springorum, *Das Getriebe der Vollzugsreform*, 85 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 916 (1973), p. 923 et seq.

[226] BVerfGE 33, 1, (11).

[227] This institution of the special relationship of subordination (*besonderes Gewaltverhältnis)* stipulated that categories of persons who were in an unusually close relationship to the state, such as prisoners, public servants,

After the landmark decision of the FCC, it was time for the legislator to pass a new prison law. In 1976, the legislator finally passed the *Strafvollzugsgesetz*.[228] Prisoners were now fully protected by law, and their rights could only be restricted if the restriction was justified under the Prison Act and the restriction fulfilled a constitutional purpose in itself. Religion did not play a central role in the German prison reforms at that time. Neither the reform groups were particularly concerned with religion, nor did inmates explicitly fight for their religious freedom. Institutionally, however, religion should continue to play an important role. The newly passed prison law also stipulated for religious communities to become a constitutive part of the administration of the prison.[229] They were to organize chaplaincy programs, and it was stipulated that state and religion would jointly take care of guaranteeing the religious rights of inmates.

However, at the time the law was enacted, religion was more or less synonymous with Christianity. Thus, the difference between individual prison religion and organized prison religion, e.g. in pastoral care, was relatively insignificant at that time. Becci called this fusion of individual and organized religion, the "neutralization of Christianity".[230] Only with the increasing religious diversity of the German society in the 1970s and 1980s and the prison population did this equation between individual and organized prison religion lose its equilibrium.[231] The institutionalized offer of religious practice was no longer sufficient to satisfy the more diverse religious needs and practices. In particular, the increasing number of Muslim inmates made it clear that the one-dimensional institutionalized offer of religious practice in the prison system would no longer be sufficient to equally guarantee religious freedom.

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school students, and members of the armed forces, were not protected by the full range of basic rights. Albert Bleckmann, *Zum Sonderstatus insbesondere der Straf- und Untersuchungsgefangenen* DVBI 991 (1984), p. 991-996; For a more profound discussion, see Part 1, Chapter IV, 3.

[228] BR-Drs. 121/76.; In power as of 1.1.1977 (BGBI. I 1976, p. 581 et seq.).

[229] According to section 157 I Prison Act, religious staff are employed by the state in agreement with the religious community: (1) Chaplains shall be appointed on a full-time basis or engaged by contract in agreement with the respective religious community.

[230] Becci uses the term of the neutralization of Christianity, also under reference to Mary Douglas' concept of 'naturalization', MARY DOUGLAS, HOW INSTITUTIONS THINK (Syracuse University Press 1986), p. 52.

[231] The institutional resistance in relation to recognizing the new challenges of religious diversity is discussed by Becci, under consideration of the theoretical literature on prisons, in particular Durkheim and Foucault , see-Irene Becci, *Institutional Resistance to Religious Diversity in Prisons: Comparative Reflections Based on Studies in Eastern Germany, Italy and Switzerland*, 28 INTERNATIONAL JOURNAL OF POLITICS, CULTURE, AND SOCIETY 5 (2015), p. 6 et seq.

2. United States

This section briefly recapitulates the development of the U.S. prison system in the 19th century and the competing ideologies of the solitary and silent system (a). The next section discusses the more recent development of the prisoners' rights movement in the 1960s and 1970s which fundamentally reshaped the fundamental rights status of inmates (b).

a. Reforms of the 19th Century: The Pennsylvania and Auburn Plans

John Howard's proposals for the introduction of correctional detention were taken up by the North American prison movement. The "Philadelphia Society for Alleviating the Miseries in Public Prisons" was in contact with Howard by letter and opened the first Eastern Penitentiary[232] in 1825 in Philadelphia as a model for the "solitary system".[233] The prison building was constructed as a single-story star-shaped wing using the radiation construction method.[234] Centrally placed supervisory personnel were able to monitor all individual cells from the center of the panoptically designed institutions.[235] In these, the inmates spent their prison time in unrestricted solitude in accordance with Howard's idea.

Within the solitary system, religion was relevant in two respects.[236] First, it was an important means to organize the daily routines in time: Worship, religious instruction, and prayer times structured the day. Secondly, it was assumed that the inner devotion to God leads to the improvement of the inmates. The rule of isolation was adhered to throughout. Inmates were to pray alone in their cells and were accommodated in separate boxes during church visits.[237] It was not long before the solitary system came under criticism. It was feared that total isolation caused complete social alienation of the inmates and damage to their health.[238] In order to reduce such risks, the Governor of the State of New York had a prison opened in Auburn in 1823, deliberately designed in contrast to the "Eastern Penitentiary".[239]

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[232] From Latin „peonitentia".
[233] Michael Meranze, *The Penitential Ideal in Late Eighteenth-Century Philadelphia* 108 PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY 419 (1984).
[234] Jeremy Bentham, Panoptikum oder Kontrollhaus (Matthes & Seitz 2012), p.7 et seq.
[235] Id. at. 7.
[236] Randall McGowen, *The Well-Ordered Prison: England 1780-1865*, *in* THE OXFORD HISTORY OF PRISONS. THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY (David Rothman Norval Morris ed. 1995), p. 86-89.
[237] Hans-Dieter Schwind, *Kurzer Überblick über die Geschichte des Strafvollzugs in* STRAFVOLLZUG IN DER PRAXIS (Günter Blau, Hans-Dieter Schwind ed. 1988), p. 8.
[238] Thilo Eisenhardt, Strafvollzug (Kohlhammer 1978), p. 40.
[239] JOHN ROBERTS, REFORM AND RETRIBUTION (American Correctional Association 1997), p. 38 et seq.

According to the Auburn-plans, inmates served their sentences only at night and in their free time in single cells, while during the day they had to work. Communication among prisoners was not allowed, and a strict daily routine and labor schedule was forced upon the inmate.[240] The silence was supposed to protect the prisoners from the danger of "criminal infection". What was similar in both systems - the solitary and the silent - was that prison started to be viewed as a tool to reform the criminal. In regards to punishment, this period marks two key transformations: a comprehensive transition away from physical punishment and the receding of the public spectacle. As described by Rothman & Morris, all rehabilitative practices took place far away from the public eye.[241] This resulted in a separation between society and inmate, which contributed to the exclusion and stigmatization of criminal offenders.

The different ideologies of the solitary and silent system led to a dispute that largely prevented any reforms of the prison system in other federal states.[242] Finally, the silent system prevailed. This was mainly for economic reasons.[243] The work of the prisoners opened up possibilities for making a profit, and the architectural requirements of the solitary system were lower than in the silent system where the isolation of the prisoners required many individual rooms. The Anglo-American system competition also influenced the prison domain in Germany. In Germany's particular states, a juxtaposition of diverging systems and forms of imprisonment developed.[244]

b. The Prisoner's Rights Movement of the 1970s and 1980s

The prisoner's rights movement of the 1970s and 1980s redefined the status of prisoners. The movement was a broad attempt to redefine the status of prisoners in U.S. society, not only legally, but also morally, politically, and economically.[245] In the pre-1960s, prisoners filed complaints only periodically (primarily before state courts for abusive treatment in prisons), usually without much success. At that time, it was a common understanding of the judiciary to adhere to the "hands-off" doctrine and not to interfere with punitive practices by

[240] Id. at. 40.
[241] David Rothman Norval Morris, *Introduction in* THE OXFORD HISTORY OF THE PRISON (David Rothman Norval Morris ed. 1995), at xii.
[242] David Rothman, Perfecting the Prison: United States 1789 – 1865 (1995), p. 117.
[243] LAUBENTHAL (2015), at. 102 (with further references).
[244] Id. at. 109.
[245] James B. Jacobs, The Prisoners' Rights Movement and Its Impacts, 1960-1980, 2 CRIME AND JUSTICE 429 (1980).

investigating prisoners' allegations of rights violations.[246] It has been argued that prison officers were solely responsible for determining how prisons are run.

In the early 1960s, the "hands-off" doctrine of the judiciary changed, and judges were rapidly involved in prison cases. This development must be seen in light of the "fundamental democratization"[247] that has transformed American society since the Second World War and especially since the 1960s.[248] Since the Black Civil Rights movement in the mid-1950s, one marginal group after another has pushed for inclusion in mainstream society.[249] Although each group has its own history and character, the general trend has been to extend citizenship rights to a larger proportion of the population by recognizing the existence and legitimacy of group complaints. In addition, in the 1960s, the majority of inmates in the prisons of some states were black.[250] The civil rights movement awakened awareness in the black community that they could no longer tolerate the rights violations. Hence, it was only natural that this generation of minority prisoners also demanded their rights in prison. Inmates identified strongly with the struggle of other "victimized minorities" and pressed their claims with vigor and much moral indignation.[251]

The U.S. Supreme Court played a crucial role in the success of the prisoners' rights movement. It was the decision of the U.S. Supreme Court in *Cooper v. Pate* in 1964 that opened the doors of the federal courts to constitutional actions by prisoners.[252] In *Cooper,* the court ruled on an

[246] Gerald D. Robin, Introduction to the criminal justice system: principles, procedures, practice (Harper & Row 1984), p. 439.

[247] The term and concept of fundamental democratization was developed by Karl Mannheim (1883 - 1947). He discusses in his theory the tensions resulting from the unbridled conflicts of individual and collective desires. The element of ‚fundamental democratization' describes the process of a democratization of access to positions within elites. See HANS BLOKLAND, MODERNIZATION AND ITS POLITICAL CONSEQUENCES (Yale University Press 2006). Chapter Three (Karl Mannheim) 61 et seq. (79).

[248] Mark Newman, The Civil Rights Movement (Edinburgh Univ. Press. 2004).

[249] An in-depth overview of the background and context of the protest of the black community in the U.S. at that time is provided in ENGINES OF THE BLACK POWER MOVEMENT: ESSAYS ON THE INFLUENCE OF CIVIL RIGHTS ACTIONS, ARTS, AND ISLAM (McFarland & Co. 2007). See also STEVEN F. LAWSON, CIVIL RIGHTS CROSSROADS: NATION, COMMUNITY, AND THE BLACK FREEDOM STRUGGLE (Univ. Press of Kentucky 2005).

[250] Christopher E. Smith, *Black Muslims and the Deveopment of Priosoners' Rights*, 24 JOURNAL OF BLACK STUDIES 131 (1993). p. 132.

[251] Jacobs, CRIME AND JUSTICE (1980), p. 430.

[252] Cooper v. Pate, 378 U.S. 546 (1964). Ten years later, the Court decided: Procunier v. Martines, 416 U.S. 396 (1974). It stated, "traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration…this attitude springs from…perceptions about the nature of the problems and efficacy of judicial intervention…But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims…", at 404-405.

appeal against a lower court ruling that preserved the discretion of prison officials to deny Muslim prisoners their Quran and the possibility of worship. Legally, the Court's decision was narrow and concerned with the alleged religious discrimination under Section 1983 of the resurrected Civil Rights Act of 1971. However, the prisoners' movement was not determined by the breadth of the decision but by the Supreme Court's determination that prisoners had constitutional rights; prison officials were no longer free to deal with prisoners as they wished.[253]

Religion was crucial for the reforms. As a result of the Immigration Act of 1965, American society became more diverse, which eventually became apparent in an increasingly religiously diverse prison population.[254] Especially the Black Muslims in prisons protested against the rights violations. In the 1960s, the relevance of Islam increased in U.S. prisons which caused problems for prison administrators for whom Protestantism, Catholicism, and Judaism were the only readable religions. Supported by the efforts of free citizens and prison reform groups, the Black Muslims, with the help of prison lawyers, succeeded in challenging prison officials who had long ignored or punished their efforts to practice their religion.[255] As part of the broader Civil Rights Movement, state prison inmates were able to successfully use the Civil Rights Act of 1871 as an effective mechanism for improving prison conditions.[256] The vibrant culture of complaints from the prison context is still reflected today in the comparably high numbers of complaints. There is still relatively large involvement of civil society and a number of organizations that actively support prisoner's rights. In this respect, successes of the "era of the rights of prisoners" extend to the present day.

As Rothman argues, the fact that the disputes between prisoners and prison officials were religious controversies and not just struggles for institutional control contributed to the movement's success.[257] The right to read religious literature and to pray at will was so fundamental to American values and constitutional history that it was difficult to deny them. In the wake of the challenge by the Black Muslims, the question of religious freedom was

[253] Jacobs, CRIME AND JUSTICE (1980), p. 433.
[254] Gabriel J. Chin, The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965, NORTH CAROLINA LAW REVIEW 273 (1996), p. 276.
[255] Jacobs, CRIME AND JUSTICE (1980), p. 434-435.
[256] Id. at. 434.
[257] David Rothman, *Decarcerating prisoners and patients*, 1 CIVIL LIBERTIES REVIEW 8 (1973), p. 8.

taken up by various prisoner groups who saw the possibility of formulating their objections to prison life and their rejection of prison officials as religious controversy.[258] The most dramatic example was the Church of the New Song, a "religion" started by federal prisoners in Marion, Illinois, which soon spread to other federal and state institutions.[259] The Church attracted national media attention; its leader proclaimed himself Bishop of Tellus, as prophesied in the Book of Revelations; its "liturgy" required porterhouse steaks and Harvey's Bristol Cream and its agenda called for the total destruction of the American prison system. The Church's status of the New Song was vigorously challenged in the Fifth and Eighth Circuit of Federal Courts; the prisoners achieved several legal victories that required prison authorities to grant them the same opportunities and privileges as traditional religions.[260]

Hence, the pursuit of the Black Muslims for religious freedom successfully led to the accommodation of religious minorities in the prison domain. The many complaints of the Black Muslims - many of which were successful - established that the religious needs and practices of Muslim inmates were taken seriously. As shown, these successes were not only relevant to the Black Muslims themselves but also important for the successes of other inmates. The Black Muslims paved the way for further religious minorities in prisons and their claims for religious freedom and equality.

3. Comparative Conclusion

The brief discussions of the prison history of the 19th century in Germany and the U.S. have shown that religion influenced the reforms of that time in different ways. It was important in both ideological systems - the solitary and the silent - for the everyday structure in prison and fundamental for the belief in the possible rehabilitation of inmates. In this respect, religion is closely connected to the identity of the prison institution of both countries, Germany and the U.S.

[258] James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80*, 2 CRIME AND JUSTICE (1980), p. 440, 441.
[259] id. at. 429, 435.
[260] Id. at. 453.

Historically, there has been a paradigm shift in the role of religion: Religion is no longer just a formal strategy of prison control but has become increasingly important as a constitutional right of the individual prisoner. As shown in this chapter, the important prison reforms in the second half of the 20th century in Germany and the U.S. differed in this respect. While the empowerment of inmates in Germany was largely the result of the rule of law reforms pushed forward by the state, the reforms in the U.S. were initiated by the inmates themselves.

Interestingly, the religious diversity of the prison population was already an important issue of the U.S. prison environment at the times of the reforms and an important issue during the prisoners' rights movement. This was different in Germany where religious minorities played no role in the reforms of the 1970s. Although both reforms showed similar results in improving the legal status of prisoners, the ways to achieve this goal were substantially different in both countries. The strengthening of religious freedom and equality was decisive for the protests in the U.S., whereas in Germany it was not a matter of improving certain freedoms but rather a matter of fundamentally improving the legal status of the prisoners in light of broader reforms of the rule of law. Consequently, the role of the state differed fundamentally within both reforms: in Germany, the state itself was the initiator of the reforms; in the U.S., the reforms were initially directed against the state.

After the horrors of Nazi Germany, the German authorities granted the Christian Churches an important institutional role in the prison system. However, violations of the freedom of religion of individual inmates were not in the focus of the reforms. Also, because the religious diversity of the prisoners was not an issue at that time in German prisons, religion was not used as an instrument of individual empowerment but above all regarded as an institutional group right of the Christian churches. As shown, the prison population in the U.S. was already religiously diverse during the reforms. It was the Black Muslims who carried the torch of the protest to pave the way for many other religious minorities who also tried to improve their religious freedom.

The different circumstances and motivations of these reforms reveal what is still relevant today for the accommodation of religious needs and practices in prisons in Germany and the U.S. In the U.S., religion in prisons is associated with notions of individualism, identity, and

rights. In Germany, religion in prisons is historically seen rather as a group right of the religious communities, which is closely institutionally connected with the penal system and thus only slowly adapts to the religious diversity of the prison population

III. The Socio-Religious Framework: Religious Diversity Inside and Outside of Prisons

The third chapter discusses the differences of religious diversity in Germany and the U.S. – inside as well as outside of prisons. Religious diversity is approached in this thesis in two ways. Firstly, it is measured by the numbers of different religious groupings represented in German and U.S. society and the prison domain (based on available empirical data). This simple measure of diversity alone, however, would neglect that the differences of immigration history are also of relevance for a cultural understanding and acceptance of religious diversity. Therefore, religious diversity is also approached in textual terms; hence, it is also approached in light of the different notions of Americanness and Germanness and how open these notions are to people in their religious differences. These objectives will be achieved in two steps. The first sections of this chapter provide for empirical data on religious affiliation and show how the religious demography has changed in each country in light of the political developments (1.a & 2.a.). The second sections of this chapter illuminate the religious diversity in the prisons in Germany and the U.S. (1.b and 2.b.). The conclusion summarizes the findings of the comparison (3).

1. Germany

The first section of this chapter describes the drastic changes of the religious demography of Germany over the last decades and how Germany has developed from a homogenous society to one of the largest immigration countries of the world (a). This discussion is foundational for the second section, which discusses the religious affiliation of German prison inmates (b).

a. From Homogeneity to Heterogeneity: Germany as an "Einwanderungsland"

Religious demography in Germany had changed fundamentally since the 1950s when still 96 percent of Germans described themselves as Christians.[261] Most importantly, it has changed in two ways. Firstly, the number of members of the Christian churches has decreased. Secondly, the number of religious minorities, especially Muslims, has increased. These

[261] Stefan Korioth, Ino Augsberg, Religion and the Secular State in Germany, International Center for Law and Religion Studies, 2015, p. 320 (*available at* http://www.iclrs.org/index.php?blurb_id=975&page_id=3) *(last accessed 30.08.2019).*

developments are considered typical for most countries of the Western world.[262] What is unique about the case of Germany is its temporary division into two different states which belonged to two politically and ideologically different systems. The division into the Federal Republic of Germany and the German Democratic Republic (GDR) between 1949 and 1990 played an essential role in the decreasing relevance of the Christian Churches. In the GDR, the socialist regime practiced an anti-religious agenda that was remarkably successful.[263] At the time of reunification in 1990, barely 30 percent of the population in the GDR was still of a Christian denomination.[264] Today, more than a third of Germany's population is undenominational (36 %), with 28,9 % Roman Catholics and 27,1 % Protestants.[265] Based on the extrapolation of the Federal Ministry of Migration and Refugees from 2016, there are 4,4 % Muslims living in Germany.[266] The remaining 3,6 % are believers of smaller religions, such as Jews, Buddhists, and Jehovah's Witnesses[267], which is a number steadily increasing[268].

As indicated by the data, the relevance of Muslims and other religions significantly increased over the last decades. Especially during the so-called "refugee crisis"[269], the migratory flows to Germany were under a lot of political attention and media repercussions. An essential aspect of the controversies was the religious affiliation of those who were seeking asylum in Germany because many of them happened to be Muslim.[270] These debates about the role of

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[262] CHARLES TAYLOR, A SECULAR AGE (Belknap Press of Harvard Univ. Press. 2007), p. 423 et seq.

[263] See, for example, Christian Dietrich, *Revolution und Kirche in der DDR: Politischer Wandel in kirchlicher Perspektive in* RELIGION UND POLITIK (Ronald Lutz, Doron Kiesel ed. 2015), p. 150 et seq; Detlef Pollack, *Von der Volkskirche zur Minderheitskirche. Zur Eintwicklung von Religiosität und Kirchlichkeit in der DDR*, *in* SOZIALGESCHICHTE DER DDR (H/Kocka Kaelble, J./Zwhar, H. ed. 1994), p. 271-294.

[264] For an overview of the statistics of church membership in the GDR, Bernd Martens, *Kirchennähe und -ferne* (2010), *available at* http://www.bpb.de/geschichte/deutsche-einheit/lange-wege-der-deutschen-einheit/47190/kirchennaehe?p=all *(last accessed 30.08.2019).*

[265] Forschungsgruppe Weltanschauungen in Deutschland (FOWID), *Religionszugehörigkeiten in Deutschland 2015* (2015), *available at* https://fowid.de/meldung/religionszugehoerigkeiten-deutschland-2015 *(last accessed 30.08.2019).*

[266] Id. at.; See also: Wie viele Muslime leben in Deutschland? Eine Hochrechnung über die Anzahl der Muslime in Deutschland zum Stand 31.Dezember 2015 (Bundesamt für Migration und Flüchtlinge) (2015), available at https://www.bamf.de/SharedDocs/Meldungen/DE/2016/20161214-studie-zahl-muslime-deutschland.html *(last accessed 30.08.2019).*

[267] FOWID, Religionszugehörigkeiten in Deutschland 2015 (2015).

[268] Religionswissenschaftlicher Medien- und Informationsdienst e.V (REMID), *Religionen & Weltanschauuungsgemeinschaften in Deutschland: Mitgliederzahlen* (2015), *available at* http://remid.de/info_zahlen/ *(last accessed 30.08.2019).*

[269] As pointed out by Justice of the FCCt of Germany, Susanne Baer, in her interesting speech at the I*CONS conference in Berlin in 2016, the so-called 'refugee-crisis' should rather be called a 'human rights crisis', see: http://verfassungsblog.de/icons-2016-session-2-inequalities-with-susanne-baer-and-catharine-mackinnon/

[270] According to statistics from 2015, 73, 1 % of asylum seekers in Germany are Muslims (compare: https://de.statista.com/statistik/daten/studie/452202/umfrage/asylbewerber-in-deutschland-nach-

Islam in Germany, however, started way earlier. They were already taking place in the 1960s when the German government wooed large numbers of Gastarbeiter from Turkey and other countries.[271] Eventually, many of them stayed in Germany to establish new homes and families, which contributed to a change of the German society. Then, as now, the discussion about the religious affiliation of immigrants has shifted the debate from an open debate about migration to a debate about Islam.[272] Religion is, therefore, of great importance in the discussion of migration. The public debates are primarily carried out at the level of collective identities and thus - according to political-cultural research - at the level of the political community.[273] Therefore, the different answers to the question of who belongs to the political community, and who does not, are a reason for the division observable in the German and European populations and polarization in societies.[274]

Today's demographic composition and immigration figures clearly show that Germany is an immigration country.[275] This reality, however, has been denied for decades by the Federal Government. Instead, it defended the model of a homogeneous society in politics, legislation, and public discourse. Still, in 1982, the coalition agreement between the coalition partners CDU/CSU (Christian Democratic Union and Christian Social Union) and the liberal FDP (Free Democratic Party) was given the political formula: *Die Bundesrepublik Deutschland ist kein Einwanderungsland*.[276] This refusal to recognize the German national and cultural identity of immigrants had problematic long-term consequences. No support or political measures were taken to promote the diversification of society and the coexistence of all different groups of

religionszugehoerigkeit/) *(last accessed 30.08.2019).*

[271] For an introduction of the debate of Germany as an Einwanderungsland and the role of Gastarbeiter, see Jochen Oltmer, *Einwanderungsland Bundesrepublik Deutschland in* DEUTSCHLAND EINWANDERUNGSLAND: BEGRIFFE, FAKTEN, KONTROVERSEN (Karl-Heinz Meier-Braun ed. 2013); FRIEDRICH HECKMANN, DIE BUNDESREPUBLIK: EIN EINWANDERUNGSLAND? ZUR SOZIOLOGIE DER GASTARBEITERBEVÖLKERUNG ALS EINWANDERUNGSMINORITÄT (1981).

[272] Susanne Pickel & Gert Pickel, Migration als Gefahr für die politische Kultur? Kollektive Identitäten und Religionszugehörigkeit als Herausforderung demokratischer Gemeinschaften 1 ZEITSCHRIFT FÜR VERGLEICHENDE POLITIKWISSENSCHAFT 297 (2018), p. 312.

[273] Monica Ferrin & Hanspeter Kriesi, How Euroepans view and evaluate democracy (Oxford University Press. 2016).

[274] Gert Pickel, Zeitschrift für Vergleichende Politikwissenschaft (2018), p. 313.

[275] Statistical numbers on the inflows of foreigners to Germany are provided by the OECD in their international migration database and show that since several years the inflows of people to Germany are higher than anywhere else (see: Organization for Economic Co-Operation and Development (OECD), *International Migration Database* (2017), *available at* https://stats.oecd.org/Index.aspx?DataSetCode=MIG, *last accessed 30.08.2019).*

[276] Ergebnis der Koalitionsgespräche (1982), p. 7, In its report about the coalition talks, the CDU further suggests to take all appropriate humanitarian measures to limit immigration (in German: *Es sind daher alle humanitär vertretbaren Maßnahmen zu ergreifen, um den Zuzug von Ausländern zu unterbinden).*

society. Finally, academic debates triggered the systematic transformation of the thesis of Germany as a non-immigrant country and led to a new understanding of Germany as a multicultural society that slowly found its way into the political and public mainstream.[277] Finally, in 1998, the new government of the SPD (Social Democrats) and Die Grünen (Greens) officially recognized the importance of German immigration history. They began to take the urgently needed political measures to meet the challenges of the finally recognized social changes.[278] However, the narrative of these policy measures was still mostly based on a narrow understanding of "being German". It was based on the assumption that the key to success was the assimilation of immigrants. Integration was successful if *they* became like *us*.

For the attempt to define religious diversity in textual terms, secularism is a helpful analytical tool.[279] For a long time, the classical secularization thesis referred in particular to the decline of religion.[280] Today, this argument is largely contested after it became evident that these predictions of religion "going away" did not come true. [281] In this vein, Casanova shows that religion has returned as a contentious issue to the public sphere and especially newer religions are of increasing relevance in Europe and beyond.[282] Nevertheless, secularism is still largely understood as the "separation of state from religion" which is challenged by recent critical secularism scholarship.[283] Here, secularism is understood as a development shaping modern governance. From this perspective, "religion" is a category that is produced by secularism, rather than preceded by it.[284]

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[277] HECKMANN (1981), p. 228.

[278] See Koalitionsvereinbarung zwischen der Sozialdemogratischen Partei Deutschlands und BÜNDNIS 90/DIE GRÜNEN (SPD/DIEGRÜNEN), Aufbruch und Erneuerung - Deutschlands Weg ins 21. Jahrhundert (1998), p. 27 et seq.

[279] Horst Dreier, Staat ohne Gott (C.H. Beck 2018), p. 33.

[280] José Casanova, Public Religions in the Modern World (The University of Chicago Press 1994) p. 211.

[281] Id. at. 211 et seq; For the German context, see also Christian Hillgruber, Staat und Religion: Überlegungen zur Säkularität, zur Neutralität und zum religiös-weltanschaulichen Fundament des modernen Staates (Schöningh. 2007); Also see, Pollack's critical assessment of the secularization theory, which supports Jürgen Habermas' concept of post-secularism, alleging that the old secularism idea was a myth: Detlef Pollack, Säkularisierung – ein moderner Mythos? (Mohr Siebeck. 2003); Jürgen Habermas, *Secularism's Crisis of Faith: Notes on Post-Secular Society*, 25 New Perspectives Quarterly 17 (2008).

[282] CASANOVA (1994), p. 211 et seq.

[283] Critical secularism scholarship refers to a school of thought that critiques common presumptions about secularism and recognizes that "religion" is a modern, Western category. See Talal Asad. *Genealogies of religion.* Baltimore: Johns Hopkins University Press, 1993; Gil Anidjar. "Secularism." *Critical Inquiry* 33:1 (2006), p. 52-77; David Scott and Charles Hirschkind, eds., *Powers of the secular modern* Stanford: Stanford University Press, 2006.

[284] Lena Salaymeh & Shai Lavi, Religion is secularized tradition: the case of Jewish and Muslim circumcisions in Germany (forthcoming).

More concretely, critical secularism studies show that secularism is not a neutral or universalist ideology and that it's Protestant Christian tradition molded its approach to religion.[285] The privileging of Christianity, however, is not only evident in the legal understanding of religion.[286] This privileging is also illustrated by the argument of the cultural relevance of Christianity to justify the preference of Christianity over other religions. For example, there is a Christian bias permitting Christian symbols and banning Muslim ones, which is "justified" with the cultural relevance of Christianity.[287] This transformation of Christian religion into the culture was one of the results of the secularization-processes of the last half-century. In short, Christianity as a religion was banished to the background but continued to have influence as "culture".[288]

One has to realize that such culturalization of Christianity means that some religious content is protected as a necessary condition for the constitutional state of Germany, while other religious content is not.[289] Problematic about this process is that it is highly selective, which in itself is in contrast to the idea of culture as a holistic phenomenon. [290] Moreover, as pointed out by Möllers, the societal problem of incorporating new religions is taken out of the *democratic* shaping process of society.[291] The narrow understanding of German culture creates a danger for religious minorities to always be seen as foreigners. Yurdakul shows that religious minorities in Germany face a severe risk of "entering into the one way street of getting included as a minority but simultaneously excluded from the German majority".[292] As

[285] Talal Asad. *Genealogies of religion.* Baltimore: Johns Hopkins University Press, 1993.

[286] Mahmood and Danchin argue, "in all modern states we can see a consistent pattern of protecting state-sanctioned traditions or dominant religions and a corresponding insensitivity to and denial of the claims of minority, nontraditional, or unpopular religious groups." Saba Mahmood & Peter G. Danchin, *Immunity or Religion? Antinomies or Religious Freedom* 113 THE SOUTH ATLANTIC QUARTERLY 129 (2014), p. 154. See, inter alia, IDLO, "Freedom of religion or belief and the law: current dilemmas and lessons learned" (Rome: International Development Law Organization, 2016), p. 7.

[287] For example, the German states allow Christian crosses in the judiciary, but not Muslim headscarves worn by judges and state persecutors.

[288] Dreoge discusses the problem of using ‚culture' as a legal category in depth, see MICHAEL DROEGE, STAATSLEISTUNGEN AN RELIGIONSGEMEINSCHAFTEN IM SÄKULAREN KULTUR- UND SOZIALSTAAT (Duncker & Humblot 2004), p. 123 et seq.

[289] Christoph Möllers, *Religiöse Freiheit als Gefahr?*, 68 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 47 (2009), p. 61 et seq.

[290]With respect to the problematic understanding of 'culture' in law, see Christine Langenfeld, *Integration und kulturelle Identität zugewanderter Minderheiten; eine Herausforderung für das deutsche Schulwesen*, 123 ARCHIV DES ÖFFENTLICHEN RECHTS 375 (1998), p. 419 et seq; Also see: GABRIELE BRITZ, KULTURELLE RECHTE UND VERFASSUNG: ÜBER DEN RECHTLICHEN UMGANG MIT KULTURELLER DIFFERENZ (Mohr-Siebeck 1. Aufl. ed. 2000), p. 93 et seq.

[291] Möllers, VVDStRL 2009, p. 61.

[292] Gökçe Yurdakul, Jews, Muslims and the Ritual Male Circumcision Debate: Religious Diversity and Social Inclusion in Germany, 4 SOCIAL INCLUSION 77 (2016), p. 78.

she points out, cultural acceptance of religious practice is a decisive factor, not only for the social inclusion but also for the institutionalization of certain practices.[293]

According to Brubaker, the struggles of "religious conflicts" typically are not over religion or about religion.[294] Instead, the struggles are about the interest to "secure the conditions of cultural reproduction".[295] In this light, it should be emphasized that Muslim communities have long found it challenging to enter the arena of public religious life, not only in prisons but also in other institutions. The different legal statuses are a powerful control instrument of the state in this process, and especially the status as public law corporation (PLC) can be seen as an indicator for (cultural) recognition.[296] The debates about the questionable loyalty of some religious communities to the state, which is seen by some as a precondition for recognition with certain legal status, show that these are more than just mere societal organization matters. It is fundamentally about the question of what public role is granted also to non-Christian religions and whether these are recognized as equal contributors to the German "culture".

b. Religious Diversity in Prisons

The prison population in German prisons, together with society as a whole, is becoming increasingly religiously diverse. Since inmates do not have to declare their religious beliefs openly, however, there are no reliable figures about their religious affiliation. The religious beliefs of inmates also do not have to be declared or "proven" in the later course of imprisonment.[297] However, social science research has produced some figures that allow identifying trends.[298] Together with the data from the survey that was carried out for this thesis, which asked for estimates from the prison authorities, a picture of religiously diverse imprisonment emerges. Muslims are by far the largest religious minority.[299]

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[293] Id. at. 79.
[294] Rogers Brubaker, *Religious Dimensions of Political Conflict and Violence*, 33 SOCIOLOGICAL THEORY 1 (2015), at 6 et seq.
[295] Id. at. 6.
[296] The different legal statuses are discussed under Part 1, Chapter IV, 1.aa.
[297] As shown in the analysis in Part 2, this has a bearing on the accommodation of religious needs and practices in German prisons: it protects the negative religious freedom of inmates but also means there is no general managing of religious diversity of inmates.
[298] Jahn, Religiöse Vielfalt als Handlungsfeld im Strafvollzug, 2016; BECCI, Religion and prison in modernity: Tensions between religious establishment and religious diversity: Italy and Germany, 2006.
[299] Prisons participating in the questionnaire estimated that 24 % of inmates are Muslim and that another 16 % belonged to further religious minorities (see data appendix). In some prisons, the number of Muslims is reportedly

Müller-Monning describes it as a current trend that attention is paid to the religion of inmates .[300] Only with the increasing religious diversity of prisoners, in particular the growing proportion of Muslim prisoners, has the state's interest in the denominational composition of the prison population risen.[301] This is not least due to increasing security concerns, especially the fear of radicalization.[302]

The fact that inmates only have to provide information about their religious affiliation voluntarily at the beginning of their detention period is due to the protection of their negative religious freedom.[303] However, this protection, which is to be welcomed in that it strengthens prisoners' rights, also has disadvantages. Inmates are not asked about their religious affiliation in any formal procedure and are not registered as members of a religion, even if they want to openly practice their religion during their time in detention.[304] Admittedly, a procedure for the recognition of the religiosity of inmates could potentially get abused or develop into an instrument hindering the accommodation of religious needs and practices. If, for example, inmates have to make their own religious beliefs credible to the state within the framework of a questionnaire, this can mean that the religious affiliation of some inmates is not getting recognized. Since the accommodation of religious needs and practices usually increases the costs for the prison, keeping the numbers of religious inmates low can potentially be of interest for the state. At the same time, however, it must be seen that the visible "registration" of the religiosity and the associated visibility of religious diversity has advantages.

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much higher, "Ausländeranteil in deutschen Gefängnissen erreicht Rekordwert", 2019, available at: https://www.welt.de/vermischtes/article188202545/Auslaenderanteil-in-deutschen-Gefaengnissen-erreicht-Rekordwert.html *(last accessed 30.08.2019)*

[300] Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann ed. 2017), at 1.

[301] Meyer, FORUM STRAFVOLLZUG (2014), p. 20.

[302] "Ausländeranteil in deutschen Gefängnissen erreicht Rekordwert", 2019, available at: https://www.welt.de/vermischtes/article188202545/Auslaenderanteil-in-deutschen-Gefaengnissen-erreicht-Rekordwert.html *(last accessed 30.08.2019).*

[303] Section 182 Prison Act [Protection of Special Data] (1) The religious or philosophical confession of a prisoner and personal data collected on the occasion of medical examinations may not be made general knowledge within the institution.

[304] Reportedly, Hesse collected data about the religious affiliation of inmates in the beginning of 2019. Accordingly, roughly 28 percent of all inmates were Muslim. At the same time, however, it was reported that more than 40 % of all inmates participated in the Muslim Friday prayers, "Zahl der Ausländer in Gefängnissen auf Rekordhoch", 2019, available at https://rp-online.de/politik/deutschland/gefaengnisse-in-deutschland-immer-mehr-auslaender-sitzen-in-haft_aid-36501705, *(last accessed 30.08.2019).*

First of all, an open approach to the religious diversity of the inmates - insofar as they are interested in practicing their religion in prison – would have symbolic relevance. The religious practice in the state-controlled prison setting is under the supervision of the authorities anyway. For almost all kinds of religious needs and practices, inmates rely on the state. The current prison policy, therefore, does not ultimately protect the negative religious freedom of inmates. Second of all, prion authorities often must know which religions are present in prison to accommodate religious needs and practices accordingly. For example, it is a prerequisite for the accommodation of chaplaincy that there is a need for such services. This need is assumed to exist when members of a religion are knowingly present; any further application is not required. Therefore, prison authorities may use the initial registration data about the religious affiliation of inmates as a reference for the accommodation of chaplaincy. However, as confirmed by prison authorities, this is not reliable or contradicts the prison authorities' impressions of everyday life in prison.[305] Under these circumstances, to ensure comprehensive protection of freedom of religion, it would at least be necessary for inmates to be informed about their opportunities to practice their religion and about contact possibilities with chaplains of the respective religion during the further course of their imprisonment.

2. United States

In the following section, the identity of the U.S. as an immigration country is discussed in light of religious diversity in numerical as well as textual terms (a). Subsequently, religious diversity in prions is examined, most importantly, in the federal prison system (b).

a. Immigration as the Story of Origin of the U.S.

According to former President of the United States, Barack Obama, the immigration history of the U.S. is an important part of its identity: "We are and always will be a nation of immigrants".[306] Simultaneously, the U.S. has always been religiously diverse and pluralistic; no single system of belief or way of worship has ever dominated the religious landscape.[307]

[305] Interview with prison director of a prison in Hamburg.
[306] Paul Lewis, Barack Obama: 'We are and always will be a nation of immigrants', THE GUARDIAN, 2005, availble at: https://www.theguardian.com/us-news/2014/nov/20/obama-plan-shield-five-million-undocumented-migrants-deportation-speech *(last accessed 30.08.2019).*
[307] M. Corbett, et al., Politics and Religion in the United States (Routledge 2014), p. 1.

Thus, U.S. society has a diverse composition in religion.[308] In recent decades, religious diversity has surged forward as the 1965 change in immigrant laws increased the flow of adherents from all the world's faiths and new religions continually.[309] However, the religious groupings outside the mainstream Christian churches and communities amount to only a small proportion of the total American population. According to the Pew Forum on Religion in Public life survey from 2017, only 5,9 % of society belonged to a non-Christian faith. Christians comprise 70,6 % and 22,8 % are religious "none's" (atheists, agnostic, and 'nothing in particular').[310]

The most significant proportion of this 5,9 % are Jewish (1,9%). Muslims, Buddhists, and Hindus all make up for less than one percent each.[311] However, the religious diversity of U.S. society does not only result from the changes in the non-Judeo-Christian population. Also, the 70,6 % Christians in the U.S. consist of different denominations.[312] They are not only evangelical protestants and Catholics, which are the two largest faith groups, but also mainline protestants, historically black protestants, Mormons, and orthodox Christians.[313] This should not be overlooked as a background to the deeply rooted tradition of religious pluralism of U.S. society.[314]

As already shown in the previous section on German secularism, secularism can mean very different things. Secularism has a different tradition in the U.S. than in Europe. When describing secularism as the separation between state and religion, one can see that the U.S. has less of established religion than Germany with its two biggest Christian churches.[315] When describing it as the general decrease of religion, we can witness that religion continues to have an essential role in U.S. society.[316] What is more important, though, is the similarity of modern

[308] American society has the "most diversely religious people on earth" Tom W. Smith, *Religious Diversity in America: The Emergence of Muslims, Buddhists, Hindus, and Others*, 41 JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 577 (2002), p. 577.
[309] Id. at. 588.
[310] Religion & Public Life (PRC) Pew Research Center, *Religious Landscape Study* (2017), *available at* http://www.pewforum.org/religious-landscape-study/ *(last accessed 30.08.2019).*
[311] Id.
[312] Id.
[313] Id.
[314] Smith, Journal for the Scientific Study of Religion (2002), p. 577.
[315] Kent Greenawalt, Secularism, Religion, and Liberal Democracy in the United States 30 CARDOZO LAW REVIEW 2383 (2009), p.2384.
[316] Id. at. 2384. [… most citizens sincerely say they are religious and that religion is important in their lives […].

states to construct and regulate religion.[317] This is the case in the U.S. as well as in Germany and elsewhere. In this thesis, it is argued that there is a minority-friendly understanding of religious diversity rooted in U.S. Constitutionalism. I suggest that there are two intertwined components that define the general friendliness towards religious diversity in the U.S. One has to do with the sympathy of people of different religions for each other (i), the other one has to do with the relevance of the idea of freedom in American culture (ii).

Together with Gordon, I argue, there is a generic notion of religion in U.S. Constitutionalism which allows people of one faith to see themselves similar to people of another faith by virtue of their common participation in religion.[318] This generic conception of religion floats above or complements particular religions. To understand this notion, it needs to be seen that there is an integrated development from the recognition that religion is part of the identity, to the acceptance of religious diversity.[319] The "disagreement about the good life" in a diverse society does not only set boundaries for the state and its authority to decide about "what the good is". It also means that all individuals in their strife for the free development of one's identity, have to be treated equally, or have to have the same opportunities. Religion is considered an important part of the self and identity. This republican idea of the free development of the identity of each individual partially explains the sympathy of believers of different religions for each other.[320] The construct of the comprehensive notion of religion allowed a relatively large number of people to see themselves as similar to each other because the common participation in religion meant that "freedom" is used in similar ways.[321]

However, this minority-friendly understanding of religious diversity is in tension and challenged by racism and discrimination against religious minorities that also deeply characterize U.S. society. Racism is rooted in U.S. history and society.[322] Race was and still is a

[317] Secularism and religion as constructs of the state are explained in the previous section about secularism and Germany (Part 1, Chapter III, 1.a.).
[318] Daniel Gordon, *Why Is There No Headscarf Affair in the United States?*, 24 HISTORICAL REFLECTIONS 38 (2008), p. 48.
[319] David Campbell, America's Grace: How a Tolerant Nation Bridges Its Religious Divides, 126 POLITICAL SCIENCE QUARTERLY 611 (2011).
[320] See also Fabian Schuppert, Freedom, Recognition and Non-Domination: A Republican Theory of (Global) Justice (Springer Netherlands. 2014).
[321] Gordon, HISTORICAL REFLECTIONS (2008), p. 49.
[322] William M. Wiecek, Structural Racism and the Law in America Today: An Introduction, KENTUCKY LAW JOURNAL (2011), p. 4.

serious factor for division, which leaves a question mark on the sugarcoated notion of America as the "melting pot".[323] The paradoxical relationship between religion and race as discrimination factors cannot be further investigated in this thesis and requires more research. On the one hand, religion has the potential to bridge the gap between Black and White America.[324] On the other hand, religion has historically been a marker of racial segregation.[325]

Another threat to the diversity-friendly U.S. society is the increasing relevance of the Christian Right in politics and society. Especially for the electoral success of President Donald Trump, the Christian Right was of immense importance.[326] Both, President Trump and the Christian Conservatives prominently represented by the Tea Party, formed an alliance that each side expected to profit from.[327] Historically, the Evangelicals associated with the Religious Right entered the political arena in the 1960s and 1970s as a reaction to the social changes of that time.[328] Ever since, these forces have shaped the political visions of the Republican Party and thereby consolidated the party's power, which is particularly relevant in the context of reproductive rights and benefits of the welfare state.[329] During the presidency of Donald Trump, the political climate in U.S. society has changed. Religious minorities, Black Americans, and U.S. citizens with a visible migration background are increasingly exposed to hatred and exclusion.[330] These developments show that the diversity-friendly notion in U.S. constitutionalism is under threat and that there is a trend of social change which has severe negative influences on the living situation of especially minority groups of U.S. society.

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[323] On the melting pot metaphor, Julia Higgins, The Rise and Fall of the American "Melting Pot", available at https://www.wilsonquarterly.com/stories/the-rise-and-fall-of-the-american-melting-pot/ *(last accessed 30.08.2019).*

[324] Religion is exercised by people of all skin colors.

[325] The Reverend Martin Luther King, Jr., once said "it is appalling that the most segregated hour of Christian America is eleven o'clock on Sunday morning." "11 A.M Sunday is our Most Segregated Hour, The New York times, 1964, available at https://www.nytimes.com/1964/08/02/archives/11-a-m-sunday-is-our-most-segregated-hour-in-the-light-of-the.html, *(last accessed 30.08.2019).*

[326] Michelle Goldberg, *Donald Trump, the Religious Right's Trojan Horse*, THE NEW YORK TIMES, 2017, available at https://www.nytimes.com/2017/01/27/opinion/sunday/donald-trump-the-religious-rights-trojan-horse.html *(last accessed 30.08.2019).*

[327] Id. at.

[328] Compare Randall Balmer, Blessed Assurance: A History of Evangelicalism in America (Beacon. 1999); Vincent Rougeau, Christians in the American Empire: Faith and Citizenship in the New World Order (Oxford University Press. 2011), p. 29.

[329] ROUGEAU (2011), p. 27.

[330] President Donald Trump attacks black people and women by insulting them: https://www.theguardian.com/us-news/2018/aug/10/trump-attacks-twitter-black-people-women;https://www.nytimes.com/2018/11/13/us/hate-crimes-fbi-2017.html.

b. Religious Diversity in Prisons

The great diversity of religious affiliation in the U.S. also influences the prison population. The U.S. Bureau of Justice Statistics routinely reports on a number of characteristics of the U.S. prison population, such as age and gender. However, it does not usually report on the religious affiliation of inmates. The available sources are the figures by the BOP which were published in response to an issued Freedom of Information Act.[331] When comparing the patterns of religious distributions in the correctional facilities with those in the adult population of the U.S., there are two crucial differences. It first appears that members of the diverse denominations constituting the "Christian" group are represented in higher numbers than inmates of other faiths: Christians of all different faiths account for roughly 56 %. Notably, however, this figure is lower than the 70,6 % who identified as Christian in the U.S. general adult population. Besides, the proportion of those professing non-Christian faiths in prison was higher than those professing non-Christian faiths in the general population. This becomes most apparent with regard to the number of Muslims: 8,4 % of inmates are Muslims compared to 0.6 % Muslims of the general population.

More and more U.S. prisoners are attracted to religions outside the Judeo-Christian mainstream.[332] These not only include Islam (al-Islam, Sunni, Shiite, and Sufi tribes of religion as well as American versions including Moorish temple of science, Nation of Islam, Five Percent Nation) but also Buddhism, Hinduism, Sikh Dharma, Indians, Rastafarian, Hispanic religions (Santeria, Curanderism, Espiritismo), black separatist religions (Nation of Yahweh, Black Hebrew Israelism), and white predominance religions: Christian identity, Germanic Wicca, Odinism and its Icelandic counterpart, Asatru.[333]

The treatment of the religious diversity of inmates is strongly institutionalized and becomes visible in the rigidly regulated prison procedures.[334] When prisoners enter a federal prison, they must receive comprehensive information about the existing chaplaincy program during

[331] *Available at*: https://fivethirtyeight.com/features/are-prisoners-less-likely-to-be-atheists/ *(last accessed 30.08.2019)* (for a general discussion about the data on the religious affiliation of inmates).
[332] Hamm, The British Journal of Criminology (2009), p. 667.
[333] Id. at. 667.
[334] The BOP Manual on Inmate's Religious Beliefs and Practices shall assist chaplains and administrative personnel "to appropriately facilitate the religious beliefs and practices of inmates within a correctional environment". BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002), p.i.

the admission and orientation program.[335] Details of activities, the religious rights of prisoners (in the light of RFRA), and the availability of resources to inmates must be provided.[336] The religious affiliation of each inmate, if any, will be stored in a dedicated BOP computer system, the SENTRY record.[337] The basis for this is an interview with the chaplain of the institution. The inmates are free to change their religious affiliation by writing to the chaplain. Once the chaplain has approved an application, he will notify the prisoners' case manager, who will then change the computer record.[338] The chaplains, therefore, act as a way to prevent the abuse of this freedom by monitoring patterns of changes in religious preference declarations. This entry in the SENTRY record is the prerequisite for several forms of religious practice, e.g., the provision of a diet in accordance with religious diet restrictions.

3. Comparative Conclusion

Religious diversity in Germany is different from religious diversity in the U.S. When we approach religious diversity in mere numbers, the comparison of this chapter shows that the general U.S. society is more religiously diverse than the German one. In the U.S., there are various religious minorities, who in total only make up for a small percentage of the population but are more or less equally represented in equal percentages. In Germany, it is mainly Muslims who are part of society alongside Christians. The percentage of Muslims is much higher than in the U.S. and much higher than of any other religion. Also with regard to Christianity, there are essential differences in Germany and the U.S.: while Christianity in Germany consists mainly of the two large churches, Protestant and Catholic, Christianity in the U.S. is more diverse.

Historically, another significant difference is that in Germany, religious diversity in society (and thus the increase of the Muslim population) is a relatively new phenomenon. It was not until the 1970s and 1980s that the relatively homogeneous German society began to change and - influenced by the globalization of the last half-century - members of other faiths, most

[335] Federal prisons provide an Admission and Orientation Handbook to inmates at the beginning of detention.
[336] In the Inmate Handbook for the Federal Correction Complex, Victorville, California, inmates are informed about chaplaincy, their right to follow a religious diet, possess and buy religious items, religious literature, religious counseling etc. (pars pro toto).
[337] SENTRY is a real-time information system consisting of various applications for processing sensitive but unclassified (SBU) inmate information and for property management.
[338] BOP Program Statement: Religious Beliefs and Practices (2004), p. 6.

importantly Muslims, became part of the society. In the U.S., religious diversity was an essential aspect of the "history of origin". This was not only because the U.S was home to several non-Christians but also because the Christian majority consisted of such different faiths. In Germany, to the contrary, the bi-confessional model of Christianity, consisting of Protestants and Catholics, contributed to the homogeneity of German society. That the history of any comprehensive legal and cultural privileging of a single religious tradition is absent in the U.S. is one of the features that openly distinguishes the U.S. from Germany. It arguably produced a different notion of religious equality and fairness that also has a bearing on the accommodation of religious needs and practices in prisons in Germany and the U.S.

The numerical differences and similarities of religious diversity in prisons in Germany and the U.S. are also reflected in the available research on the religious affiliation of prisoners in each country. In both countries, however, the proportion of non-Christian inmates is higher than outside prison. Most evidently, this can be seen in the number of Muslim inmates in the U.S., which is many times higher than outside of prison. These differences of religious diversity are also evident in the intuitional handling of religious diversity in prisons. While the U.S. federal prison system provides for orderly procedures to store the religious affiliation of inmates and to inform the inmates about their rights to practice religion while in detention, the religious diversity of inmates has so far been mostly invisible in German administrative procedures.

IV. The Constitutional Framework: Religion and the State in Prisons and Beyond

The last and fourth chapter examines the constitutional framework of religion in Germany and the U.S. in three main steps. First, it discusses the state-religion relations in Germany and the U.S. and compares them (1). Second, it explains the constitutional doctrine of religious freedom and equality in Germany and the U.S. (2). Third, it assesses religious freedom and equality more closely in light of the fundamental rights status of inmates (3).

1. The Constitutional Relation between State and Religion in Germany and the U.S.

The relation between state and religion differs considerably in Germany and the U.S. The German constitutional framework, in various circumstances, demands direct cooperation between state and religious community. In the U.S., the non-establishment principle under the First Amendment of the U.S. Constitution requires stronger separation between state and religion. The prison domain, however, hardly allows for a strict separation between religion and state. Religious practice in prisons in almost all cases depends on the accommodation of religion by the state. This is particularly evident with chaplaincy that is institutionalized under state control in both countries. The following sections examine the constitutional requirements for the relationship between state and religion in Germany (a) and the U.S. (b), taking into account the landmark cases of the highest courts of both countries. The last section summarizes the most important differences and similarities (c).

a. Germany

The relationship between the German state and religious community is still importantly shaped by provisions of the former German Reich's Weimar Constitution (WC) of 1919.[339] Article 140 of the Basic Law[340] incorporates Article 136 -139 and Article 141 into the present Basic Law. They create a general structure of guarantees, which are commonly called "institutional guarantees". These provisions of the WR become an integral and fully effective

[339] Weimarer Reichsverfassung (11 August 1919).

[340] Article 140 WC [Law of religious denominations] The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law.

part of the German Basic Law.[341] Altogether, these provisions determine the intricate ways of how state and religion are entangled in the German state of today. The first section explains the constitutional cooperation structures between the state and religious communities (aa). An essential component of these cooperation structures are the different legal statuses of religious organizations which are endowed with different privileges. These statuses illustrate how state and religion are interwoven in Germany. Unlike communities of the two biggest churches in Germany, the Christian churches, religious minorities often have difficulties in being recognized within this regulatory regime. For the prison context, this is relevant, as will be shown in the following sections since the cooperation between state and religious community is constitutionally prescribed for chaplaincy (bb).

aa. The Cooperation between State and Religious Communities

According to Article 137 I WC, there should be "no state church" in Germany.[342] However, there is no radical separation between state and religion. Apart from the internal affairs of the religious communities and those who are subject only to state supervision, the German constitution also provides for common affairs: *res mixtae* between religious community and state. These common matters include the conduct of religious education in public schools (Article 7 III BL)[343], and as will be discussed in this chapter, the organization of chaplaincy in prisons and other public institutions.[344] Also, the special labor law regulations for church organizations[345] and the German church tax regime regulated by the state show how closely state and religious community cooperate.[346] The autonomy of the religious communities, in particular about internal spiritual matters, is expressly protected by their right to self-

[341] The full effectiveness of the Articles of the Weimar Constitution, as listed in Article 140 BL, was repeatedly confirmed by the FCC of Germany. See e.g. BVerfGE 83, 341, (351 et seq.).

[342] Article 137 I WC: There shall be no state church.

[343] Article 7 III BL [School System] 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.

[344] Article 141 WC: To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons, or in other public institutions, religious societies shall be permitted to provide them, but without compulsion of any kind.

[345] See, for example, Hermann Lührs, Kirchliche Arbeitsbeziehungen: Die Entwicklung der Beschäftigungsverhältnisse in den beiden großen Kirchen und ihren Wohlfahrtsverbänden, 33 WIP OCCASIONAL PAPERS: WIRTSCHAFT UND POLITIK (2006); ANDREAS SCHOENAUER, DIE KIRCHENKLAUSEL DES [PARAGRAPH] 9 AGG IM KONTEXT DES KIRCHLICHEN DIENST- UND ARBEITSRECHTS / ANDREAS SCHOENAUER § Bd. 55 (P. Lang. 2010).

[346] Compare: Article 137 IV WC: Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with Land law.

determination which is enshrined in Article 137 III WC;[347] religious organizations organize their affairs without the influence of the state.[348]

For areas in which state and religion cooperate, the constitution stipulates requirements which are, among other things, linked to certain organizational preconditions. The most relevant organizational status are the "religious community" and the status as a public law corporation (Art. 137 IV WC)[349]. So what is a religious community in the legal sense? First of all, it must be noted that there is no formal procedure for the recognition of religious organization as a religious community.[350] Instead, there are some conditions that the religious community must fulfill for cooperating with the state. A religious organization is thus indirectly "recognized" as a religious community as soon as it cooperates with the state, for example, cooperation with schools to organize religious education.

The classical definition of the religious community[351] goes back to the constitutional lawyer of the Weimar Republic Gerhard Anschütz. According to this definition, a religious community is an association of members of a religion "which brings together the members of the same creed – or of several related creeds – for the all-round fulfillment of the tasks set by the common creed."[352] There are still only a few organizations of religious minorities that fulfill the requirements of a religious community according to the formula by Anschütz. According to a common understanding in the state church law, they lack the necessary organizational consolidation, the unambiguous membership allocation of natural persons, as well as the all-

[347] Article 137 III WC: Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.

[348] CLAUS DIETER CLASSEN, RELIGIONSRECHT (Mohr Siebeck 2006), p. 107 et seq.

[349] The right to obtain the legal status as PLC is generally protected under Article 137 V WC: Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same rights upon application, if their constitution and the number of their members give assurance of their permanency. If two or more religious societies established under public law unite into a single organization, it too shall be a corporation under public law.

[350] Jörg Winter, Staatskirchenrecht der Bundesrepublik Deutschland: Eine Einführung mit kirchenrechtlichen Exkursen (Hermann Luchterhand Verlag 2008), p. 105 et seq.

[351] In the Weimar Constitution, commonly the term 'religious societies' is used instead of religious communities'. Pursuant to the principle of the unity of the legal order, the terms 'religious societies' used in the Weimar Constitution, and 'religious community' as used in the Basic Law, describe the same. See, for example, Georg Neureither, *Was ist eine Religionsgemeinschaft?*, JURISTISCHE SCHULUNG 937 (2002).

[352] In German: ein Zusammenschluss von Angehörigen einer Religion, „der die Angehörigen ein und desselben Glaubensbekenntnisses - oder mehrerer verwandter Glaubensbekenntnisse - zu allseitiger Aufgabenerfüllung der durch das gemeinsame Bekenntnis gestellten Aufgabe zusammenfasst", GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHS VOM 11. AUGUST 1919 (Wissenschaftliche Buchgesellschaft 1933), Art. 137 WC, Anm. 2, p. 633.

round fulfillment of the tasks resulting from the common faith.[353] The question also arose as to who could speak on behalf of the members in a binding manner. Thus, many problems stem from the fact that the requirements under state church law have historically developed based on the structures of the Christian churches and this is something that especially Islam cannot comply with: they generally have no official church leadership and a corresponding membership constitution.[354]

For some time now, there has been a tendency towards a domain-specific differentiation of the concept of the religious community.[355] In every area of law, it is independently examined whether a religious organization fulfills the requirements as a religious community. As Tabbara shows, the FCC in its decisions on Muslim slaughtering has created a much broader concept of the religious community than is used in the field of religious education.[356] This is to be welcomed since a rigid regulatory regime makes it very difficult for religious minorities to become cooperation partners of the state.[357]

In addition to the status as a religious community, religious organizations can also be granted the status of a public law corporation (PLC).[358] In contrast to the religious community, the PLC status presupposes a state granting this status at the request of the religious organization. This is a matter of the Länder. To a certain extent, both statuses - the religious community and PLC status - stand in a hierarchical relationship to each other. It is prerequisite for obtaining the PLC status under Art. 137 V WC that the religious organization already holds the status as religious community. However, the FCC has made it clear that the granting of the PLC status does not necessarily mean that the religious organization fulfills the requirements of a religious community for all areas of the legal order[359] (for example, their PLC status did not automatically mean that the Jehovah's Witnesses could also offer religious education in schools).

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[353] Discussed by Tabbara, Tarik Tabbara, *Rechtsfragen der Einführung einer muslimischen Krankenhausseelsorge*, ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR) 254 (2009), p. 254 et seq.

[354] Id. at. 254.

[355] Id.

[356] BVerfGE 104, 337, (345) Das Gericht definiert dort den Begriff der Religionsgemeinschaft i.S.v. § 4a Nr. 2 TierSchG als eine „Gruppe von Menschen (...), die eine gemeinsame Glaubensüberzeugung verbindet". Tabbara, ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR), (2009), p. 256.

[357] Id. at. 256.

[358] Frank Fechner, *Zur Verleihung des Körperschaftsstatus an Religionsgemeinschaften*, JURA 515 (1999); See also: STEFAN MAGEN, KÖRPERSCHAFTSSTATUS UND RELIGIONSFREIHEIT (Mohr-Siebeck 2004).

[359] BverfGE 102, 370 (396).

The PLC status comes with significant legal privileges. Apart from having the right to employ civil servants, the most obvious example of the rights attached to the PLC status is the right to tax the community members.[360] This tax functions like a membership fee. The PLC's that do tax their members usually levy a tax of eight or nine percent of what the member pays in state income taxes. The PLC's can use the state's taxation system, which means the state machinery collects the tax for the religious community. For this service, ultimately, the PLC pays four to five percent of its tax revenue to the state.

The legal status of the religious PLC well illustrates the hybrid identity of the German state concerning religion: Germany is neither a laical state that entirely bans religion to the private sphere nor is there a German state church. Despite its public legal status and in contrast to all other corporations under public law, religious communities with PLC status do not become an integral part of the state.[361] The internal proceedings of religious PLC's are decided by the community alone and fall under their right to self-determination as protected under Article 137 III WC. This *sui generis* status[362] of religious PLC's was a result of the missing consensus on the place of religion in post-war Germany: for neither a state church nor entirely private religious organizations could consensus be reached by the mothers and fathers of the German *Grundgesetz* of 1949.[363]

However, the legal identity of religious PLC's was not a new product of this compromise and religious communities as public entities already existed before the adoption of the Weimar Constitution in 1919.[364] In the adoption process of the German *Grundgesetz*, the decision to stick to the previous arrangements of the Weimar Constitution was the result of challenging negotiations. With the incorporation of the Articles of the Weimar Constitution through the

[360] Article 137 IV WC: Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with Land law; Matthias Gehm & Rudolf Titzck, *Kirchensteuer und Grundrechte*, STEUERSTUD 82 (2003), 82-89; Jarass, in Jarass/Pieroth, GG, Art. 137 WC, at. 29 (Gerhard Robbers, *Religious Freedom in Germany International Law and Religion Symposium* 2001 BYU L. REV. 643 (2001), p. 651).
[361] Schmahl, in: Sodan et al, GG, Art. 137 WC, at. 5.
[362] Morlok, in: Dreier et al, GG, Art. 137 WC, at. 77; Critical of the PLC status: Markus Kleine, Institutionalisierte Verfassungswidrigkeiten im Verhältnis von Staat und Kirchen unter dem Grundgesetz: ein Beitrag zur juristischen Methodik im Staatskirchenrecht (Nomos Verl.-Ges. 1. Aufl ed. 1993), p. 201; Defending the PLC status: Korioth, in Maunz & Dürig, GG, Article 137 WC, at 65.
[363] For an overview of the historical development of the PLC status, Korioth (2016) p. 63.
[364] Bernhard Spielbauer, Der öffentlich-rechtliche Körperschaftsstatus der Religionsgemeinschaften in der Bundesrepublik Deutschland: Wesen und aktuelle Legitimation (Kovač. 2005).

newly adopted Article 140 BL, the parties involved also decided to include the more specific content of the Articles of the former Weimar Constitution. For the religious PLC's, this mattered most importantly because of the distinction that is made in Article 137 V WC, namely the difference between old and new PLC's.[365] According to Article 137 V 1 WC, religious communities "shall remain corporations under public law insofar as they have enjoyed that status in the past"(*alt korporierte Körperschaften).*

Today, the two largest churches in Germany, the Catholic and the Protestant Church, are both PLC's because they have already enjoyed the status "in the past", that is before 1919.[366] However, also religious communities of other religions can apply to become a PLC. To become a "new" public law corporation *(neu korporierte Körperschaften),* religious communities have to fulfill several requirements. Several religious communities, also non-Christian ones, were successfully acknowledged as PLC by the federal states. Amongst others, this is, for example, the case for Jewish cult communities, the Seventh-Day Adventist Church, the Baptist Church, the New Apostolic Church, the Anglican Church, several Orthodox Churches, Pentecostal Communities, the Mennonites, the Methodist church, and the Salvation Army.[367] Also, some philosophical, non-religious communities, such as the Alliance for Spiritual Freedom or the Humanist Community, are PLC's.[368]

For the Muslim community, however, reaching the PLC status has posed a challenge over the last decades, and only Hesse and Hamburg have so far acknowledged Muslim communities as PLC's.[369] The general guidelines for the acknowledgment of a religious community as PLC are stipulated in Article 137 V 2 WC.[370] According to this provision, new religious communities *"shall be granted the same rights upon application, if their constitution and the number of their members give assurance of their permanency."* Because of the constitutional

[365] Id. at. 31 et seq.
[366] For the historical development of the Christian Churches with respect to their legal status, see id. at. 20 et seq.
[367] The list of PLC's is created by Robbers, see Robbers, BYU L. REV., (2001), p. 50; Also see the detailed discussion of Huxdorff, who discusses the PLC status with respect to the different religious communities: NINA HUXDORFF, RECHTSFRAGEN DER ERST- UND ZWEITVERLEIHUNG DES ÖFFENTLICH-RECHTLICHEN KÖRPERSCHAFTSSTATUS AN RELIGIONSGEMEINSCHAFTEN (Kovač. 2013).
[368] Robbers, BYU L. REV., (2001), p. 650 et seq.
[369] Brigitte Lehnhoff, Körperschaftsstatus für Islamverbände?, 2019, available at: https://www.ndr.de/ndrkultur/sendungen/freitagsforum/Koerperschaftsstatus-fuer-Islamverbaende,lehnhoffkoerperschaftsstatus100.html *(last accessed 30.08.2019).*
[370] Summarizing all criteria: Schmahl in: Sodan, GG, Article 137 WC, at. 8 et seq.; Also see for the requirements: SPIELBAUER (2005), p. 35 et seq.

requirement to treat all religions equally, generally, all religions must have equal opportunities to obtain the PLC status and to receive the privileges that come with it. The principle of parity enshrined in religious constitutional law contains a prohibition of preferential treatment and discrimination and is an essential component of the religious-ideological neutrality of the state.[371] However, the requirements in Art. 137 V 2 WC are unequally demanding for the differently constituted religious communities.

For the *assurance of the permanency* of the religious community, the community must exist since a considerable amount of time.[372] What this concretely means, however, is defined differently from state to state and can be anywhere between five to 30 years.[373] Additionally, the number of community members has to meet a certain threshold. This threshold is generally met in case 0,1 percent of the population of the respective Land belongs to the community that is applying.[374] This regulation represents an obstacle for religious communities if they – as Muslims – are not subject to membership law and as such census and verification of the prerequisite *numbers of members* is not possible.[375]

Further, Muslim communities are not traditionally represented by one particular person or a board that is responsible for taking the interests and concerns of the community to the outside world, or in this case and more concretely, to the state. As argued in some Länder, the personnel structures of Muslim communities and the lack of one representative contact persons who the state can cooperate with, showed that it did not have the *constitution* required under Article 137 V 2 WC.[376] It is thus noteworthy that the organizational structure of the rare Muslim PLC in Hamburg and Hesse Ahmadiyya Muslim Jamaat shows similarities to the organizational structure of the Christian churches. They also have several local communities with their own president but preserve a uniform religious doctrine worldwide.

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[371] „Art 140 GG enthält ... das institutionelle Staatskirchenrecht für eine multireligiöse Gesellschaft. Daraus folgt für die Auslegung des Art. 140 GG in Verbindung mit den dort genannten Bestimmungen der Weimarer Reichsverfassung, dass das Ordnungssystem des Art 140 GG im Blick auf die Stellung nicht-christlicher Religionen weiterentwickelt und ergänzt werden muss“ (VGH Kassel, „Schächturteil“, NVwZ 2004, 890 (892)).

[372] SPIELBAUER (2005), p. 45

[373] Compare, for example, Bavaria (five years) and Bremen (30 years).

[374] V. Campenhause in v. Mangold, et al, GG, *Art. 137 WC,* at. 226.

[375] Id. at. 227.

[376] Matthias Kortmann & Kerstin Rosenow-Williams, Islamic Umbrella Organizations and Contemporary Political Discourse on Islam in Germany: Self-Portrayals and Strategies of Interaction, 33 JOURNAL OF MUSLIM MINORITY AFFAIRS 41 (2013); also see Stefan Muckel, Muslimische Gemeinschaften als Körperschaften des öffentlichen Rechts 48 DÖV - DIE ÖFFENTLICHE VERWALTUNG 311 (1995).

The rather progressive convictions of the community presumably contributed to the good functioning of the cooperation.[377]

The relevance of the content orientation of the religious community for the status as PLC is controversial. This aspect is repeatedly discussed in context with Muslim communities that are accused of not sharing the German set of values.[378] When the Jehovah's Witnesses applied for the PLC status, the Federal Administrative Court, contrary to the lower court's, decided that a religious or philosophical community must be "loyal to the state" to be granted the status of a public law corporation.[379] According to the court, the Jehovah's Witnesses did not meet this requirement because they, as a compelling precept of faith, denied the active and passive right of their members to vote in democratic state elections.[380] Although there is no private legal duty in Germany to vote, the court argued that the denial of participation in public elections undermined the basic principles of the democratic order. However, when the case reached the FCC, the Court vacated the judgment.[381] The FCC pointed out that, indeed, one of the unwritten requirements of Art. 137 V WC was for the religious community to be willing to obey the law and to exercise its rights in accordance with the constitution.[382] However, it also emphasized that it was no requirement that the community showed a more encompassing loyalty to the state.[383] This example shows that these debates on legal status are also about general questions of societal participation. This aspect must be taken into account for the struggles of legal recognition of Muslim communities.

bb. Prison Religion and the cooperation between State and Religious Communities

This section highlights how the collaboration between the state and religion is structured and shaped out in the prison domain. The existing chaplaincy programs illustrate the close

[377] The Ahmadies are translators of the Quran and proselytizers for the faith. However, in many Islamic countries, the Ahmadie have been defined as heretics and non-Muslim, which is not least due to the reformist convictions they share (for example, the Ahmadies strongly believe in the education of girls). They were repeatedly subjected to persecution and systematic oppression, and Germany became a place of refuge for more than 35.000 members.
[378] Brigitte Lehnhoff, Körperschaftsstatus für Islamverbände?, 2019.
[379] BVerwG 7 B 80.05 (2013) = NJW 2006, 3156.
[380] Robbers, BYU L. REV., (2001), p. 650.
[381] BVerfGE 102, 370 (400).
[382] BVerfGE 102, 370 (370); See generally for the relationship between state and religious community and the requirement of compliance: STEFAN MAGEN, KÖRPERSCHAFTSSTATUS UND RELIGIONSFREIHEIT: ZUR BEDEUTUNG DES ART. 137 ABS. 5 WRV IM KONTEXT DES GRUNDGESETZES (Mohr 2004).
[383] BVerfGE 102, 370 (370).

connection between state and religion; Art. 140 BL in conjunction with Art 141 WC stipulates that *"To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons, or in other public institutions, religious societies shall be permitted to provide them, but without the compulsion of any kind."*[384] Doctrinally, the right of religious communities to organize chaplaincy services in prisons and other public institutions is based on a compensation rationale. Arguably, the prison and the other public institutions exclude the bearer of rights from his or her usual social context.[385] Arguably, the prison and the other public institutions exclude the bearer of rights from his or her usual social context, either in prison as a result of the sentencing to imprisonment, or in the hospital as a result of the health conditions of the individual, or because of the personal decision of the bearer of rights, such as in the army. [386] What all these institutions have in common is that they lie in the sphere of the state. This creates an obstacle for the religious community to reach out to their fellow believers. By offering the religious community access to the state-run institution and by institutionalizing their services, the state compensates for this disadvantage. Thus, Article 141 WC is a positive right of the religious community against the state (*kompensatorischer Leistungsanspruch).*[387]

Before 1919, when the Weimar Constitution was adopted, religious welfare was organized by the state alone.[388] Back then, all inmates had to attend Christian services and pastoral work. Some political forces at that time heavily criticized the lack of separation between state and religious authority. Especially the Social Democratic Party of Germany (SPD) and the Democratic Party of Germany (GDP) pushed for a change of this framework in which state and religious power were not separated from each other.[389] After discussions in the Weimar National Assembly, Article 141 WR was finally adopted on 31 July 1919.[390] With the adoption

[384] Weimar Const. Art. 141 [Ger.] [Soweit das Bedürfnis nach Gottesdienst und Seelsorge im Heer, in Krankenhäusern, Strafanstalten oder sonstigen öffentlichen Anstalten besteht, sind die Religionsgesellschaften zur Vornahme religiöser Handlungen zuzulassen, wobei jeder Zwang fernzuhalten ist].
[385] Thiel in Sachs et al, GG, Art. 7 BL, at. 4.
[386] In 2011, compulsory military service was abolished by the German parliament (except for cases of tensions and national defense). Therefore, citizens are no longer drafted for military service, but join voluntarily. (Bundesregierung, Entwurf eines Gesetzes zur Änderung wehrrechtlicher Vorschriften 2011 (WehrRÄndG 2011) (Deutscher Bundestag ed., 2011).
[387] Korioth, in Maunz & Dürig, GG, Article 137 WC, at 6.
[388] Id. at. 4.
[389] Id. ; About the generally problematic relationship between church and state in the Weimar period, see for example Jan Ginter Deutsch, *Some Problems of Church and State in the Weimar Constitution*, YALE LAW SCHOOL FACULTY SCHOLARSHIP SERIES 457 (1963).
[390] Korioth, in Maunz & Dürig, GG, Article 137 WC, at. 4; The historical development of the adoption of Article 141

of Article 141 WC, the role of the state changed. From now on, it had the task to grant the religious communities access to the state institutions so that they would take over the religious care of their fellow believers.[391] Even if the new model refrained from a clear separation between state and religion, the tasks were distributed more clearly by this new regulation.

Still today, prison chaplaincy is understood as a joint affair between the religious community and the state. The religious community assumes responsibility for the denominational content of the events (*Fachaufsicht*).[392] The state is responsible for organizational tasks. This framework requires the functioning cooperation between state and religious community for the accommodation of chaplaincy for the individual inmate. In the case of the Christian churches, this cooperation was successfully implemented, and Christian pastors are part of the staff of German prisons.[393] Although the proportion of Muslim prisoners in German prisons is comparatively high, it has not yet been possible to introduce functioning cooperation between the state and Muslim religious communities and thus to introduce Muslim chaplaincy throughout the country.

Yet, as can be seen in the second part of the thesis, cooperation structures have meanwhile developed between individual prisons and grassroots level organizations.[394] Thus, research shows that the legal status of the religious community does not have to be decisive for admission to prison. As Jahn demonstrates, there is also no direct link between the PLC status and the accommodation of chaplaincy services in prisons.[395] She shows that although Jehovah's Witnesses have the PLC status in some Länder, they do not cooperate with the state within the framework of prison chaplaincy.[396] Nevertheless, the provisions of religious constitutional law remain essential for the institutionalization of chaplaincy in prison. The

WC is furthermore discussed by Ennuschat: JÖRG ENNUSCHAT, MILITÄRSEELSORGE (Duncker & Humblot 1996), p. 132 et seq.

[391] Korioth, in Maunz & Dürig, GG, Article 137 WC, at. 4.

[392] The shared supervision by state and religious community signifies that religious services in prisons and other state institutions is one of the common affairs. For the division of tasks for the operation of religious services in the army, see id. 12 et seq.

[393] See under Part 2, Chapter I.1.a.

[394] Harms-Dalibon, Comparative Migration Studies (2017).

[395] Sarah Jahn, *Religiöse Sinngehalte und konstruktives Recht*, 42 ÖSTERREICHISCHE ZEITSCHRIFT FÜR SOZIOLOGIE 259 (2017), p. 265- 266.

[396] Id. at. 266.

orderly cooperation between the state and communities of minority religions would also express their general recognition as equal members of German society and "contributors" of German culture.[397]

b. United States

The most important provision regulating the relationship between state and religion in the U.S. is the Establishment Clause of the First Amendment of the U.S. Constitution. This chapter explains how the doctrine of non-establishment principle has developed over time and how it was influenced by the broader political climate (aa). Against the background of state-religion separation, it may come as a surprise that chaplaincy programs in U.S. federal prisons commonly exist. The state organizes these programs for the diverse prison population. Unlike in Germany, where chaplaincy programs only offer religious welfare while other religious needs are taken care of by the prison institution directly (such as the religious diet program), U.S. chaplaincy programs are responsible for monitoring all religious needs of inmates. The second section shows how chaplaincy programs fit into the doctrine of the Establishment Clause under consideration of the relevant case law by the U.S. Supreme Court (bb).

aa. The Wall of Separation Between State and Religion

The United States of America is a nation built upon the promise of religious liberty.[398] Religious dissenters in colonial America faced official persecution which eventually led to the enactment of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof…".[399] This opening passage of the First Amendment provides dual protection and contains the two most important clauses that guarantee religious freedom in the U.S. The first one, the Establishment Clause, is the most essential clause shaping the relations between state and religion ever since. It prohibits the government to unduly prefer one religion over another and prohibits actions by the government that disproportionately favor religion over non-religion or vice versa.[400]

[397] For the relevance of institutional recognition for religious minorities, see Yurdakul, SOCIAL INCLUSION, (2016).
[398] For a historical overview of religion in the U.S., see: STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM (Harvard University Press 2014).
[399] U.S. CONST. Amend. I.
[400] Generally about the content and scope of the Establishment Clause of the U.S. Constitution: Andrew Koppelmann, *Phony Originalism and the Establishment Clause*, 103 NORTHWESTERN UNIVERSITY LAW REVIEW 728 (2009), p. 728 - 750.

The non-establishment principle of the First Amendment is not defined by precisely stated constitutional prohibitions but shaped by the principles the U.S. Supreme Court has developed over time.[401] In *Everson v. Board of Education*[402]*,* one of the first religious freedom landmark cases of the U.S. Supreme Court from 1947, the Court decided that the Establishment Clause applies to all American states and not only to the federal government. This decision fundamentally changed the protection of freedom of religion in the U.S. At issue in *Everson* was the constitutionality of a law that reimbursed bus transportation costs to parents of children attending private religious schools. By allowing public money to go to families sending children to Catholic schools, the Court in *Everson* raised the question of whether the government was showing preference to one particular religion. According to Justice Hugo L-Black, the decision carried the Court to the limit of unconstitutionality, but the reimbursement law was finally upheld.[403]

Relevant in the broader context of the decision was the rise of private schools due to the beginning of school desegregation as a consequence of the Court's decision in *Brown v. Board of Education*[404] in 1954. In *Brown*, the Court famously put an end to the policy of "separate but equal" schools for African American children by deciding that this policy was unconstitutional. The case dealt with transportation to the newly opened church-sponsored private school. This became a relevant issue because many white families at that time moved away from the cities to the growing suburbs. Schools argued they were responding to the parents' requests for a more conservative, Bible-based curriculum, but part of this development was that some of these families were displeased with the prospect of their children riding the bus to racially mixed schools.[405]

In this light, it is not surprising that the school domain became an important "battle-field" for the conflicts over the limits of the Establishment Clause.[406] Whether government actions favor

[401] See, for example, Thomas C Berg, The Permissible Scope of Limitations on the Freedom of Religion and Belief in the United States, 19 EMORY JOURNAL OF INTERNATIONAL LAW 1277(2005).
[402] Everson v. Board of Education, 330 U.S. 1 (1947). In Everson, the Court decided whether a New Jersey law that permitted the Board of Education to reimburse parents for bus transportation costs if their children attended parochial school violated the First Amendment and held that it did not.
[403] Everson v. Board of Education 330 U.S. 1, (1947).
[404] Brown v. Board of Education of Topeka, 347 U.S. 483 (1945).
[405] See also Nussbaum's analysis of the broader political circumstances of the decision: NUSSBAUM (2008), p. 282-286.
[406] For an in-depth discussion, see: KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? (Princeton University Press

religion over non-religion or vice versa in an unlawful way, and are hence in breach of the non-establishment provision, was decided in several U.S. Supreme Court cases that followed *Everson* and *Brown*. One of the most prominent tests which the Court developed in one of these cases is the so-called *Lemon-Test* from 1971. Despite the criticism against this test, courts still apply it, and it is a crucial element of the doctrine of the Establishment Clause.[407]

At issue in *Lemon v. Kurtzman*[408] were statutes from Pennsylvania and Rhode Island that allowed the transfer of public education funds to financially weaker religious schools. The Court denied this kind of public aid to private (religious) elementary and secondary schools and held that the respective statute which provided for such financial assistance fosters "the excessive government entanglement with religion"[409]. The court reached its conclusion by applying a three-prong test, which should uphold the separation of state and church. According to this test, any government-sponsored act or legislation is in violation of the Establishment Clause (i.e. has not a pervasively secular intent), unless it meets the following criteria: (1) the action in question must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) it must avoid excessive entanglement between government and religion. Even though the test in its attempt to formalize the criteria for a possible violation of the Establishment Clause was well received by many at the time, the broad scope that is left when answering these three questions led to criticism. [410] In the aftermath of the case, critics argued, the prongs of the test raised new questions which are not easier to answer than the question of what would constitute an establishment itself: how do we define "a secular purpose"? How do we measure the "principal or primary effect" of law or state actions and reliably distinguish it from secondary effects that may nevertheless have important impacts on religious practice? And what does it concretely mean to "advance" or "inhibit" religion?

2007).

[407] Compare Amy J. Alexander, When Life Gives You the Lemon Test: An Overview of the Lemon's Test and Its Application Outstanding Student Articles, 3 PHOENIX LAW REVIEW 641 (2010); Karthik Ravishankar, The Establishment Clause's Hydra: The Lemon Test in the Circuit Courts, 41 UNIVERSITY OF DAYTON LAW REVIEW 261 (2016).

[408] Lemon v. Kurtzman 403 U.S. 602 (1971).

[409] Id. at. 615.

[410] Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute's Secular Purpose*, Vol. 20 GEORGE MASON UNIVERSITY CIVIL RIGHTS LAW JOURNAL 352 (2010), p. 352-415.

However, it was not before the mid-1980s that Justice Sandra O'Connor in her *Lynch v. Donnelly*[411] concurrence proposed a refinement of the *Lemon-test*. In *Lynch,* she introduced the *Endorsement-Test* and suggested to put particular emphasis on the issue of government endorsement of religion when interpreting the "purpose" (1) and "effect" (2) prongs of the *Lemon-test.*[412] As stressed by Justice O'Connor:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions. . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the community.[413]

At issue in *Lynch* were holiday displays that were located in the shopping district of Pawtucket, a city in Rhode Island, during Christmas time.[414] The display included, amongst other displays, a nativity scene. The plaintiff, Donelly, objected to the display, and it was up to the Court to decide whether the nativity scene in the city's display did indeed violate the Establishment Clause of the First Amendment. In a 5-to-4 decision, the Court held that notwithstanding the religious significance of the crèche, the city had not violated the Establishment Clause. Viewed in the context of the holiday season, as argued by the Court, the display was not advocating a particular religious message, and the display merely depicted the historical origins of the holiday. In that sense the Court held, the symbols posed no danger of establishing a state church and it was also "far too late in the day to impose a crabbed reading of the [Establishment] Clause on the country".[415]

As shown by Russel, *Lynch* was remarkable for two reasons.[416] First, concerning the *Lemon test*, this decision showed that judges all applying the test could still reach inconsistent results. Second, because of the scope for interpretation of the Lemon-test, Justice O'Connor introduced the *Endorsement-test* in her concurrence.

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[411] Lynch v. Donnelly 465 U.S. 668 (1984).

[412] For a more detailed description of the Endorsement-Test, see: Mark Strasser, *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPPERDINE LAW REVIEW (2013). at 1273- 1315.

[413] Lynch v. Donnelly 465 U.S. 668, (1984), Id. at 687-88 (O'Connor, J., concurring).

[414] Summary of the facts: Lynch v. Donnelly, Oyez, https://www.oyez.org/cases/1983/82-1256 (last visited Aug 30, 2019).

[415] Lynch v. Donnelly 465 U.S. 668, (1984), at. 687.

[416] Stephanie E. Russell, Sorting through the Establishment Clause Tests, Looking Past the Lemon Notes, 60 MISSOURI LAW REVIEW 653 (1995), p. 661.

The majority of the Court accepted the newly introduced *Endorsement-test* and applied it in *County of Allengheny v. American Civil Liberties Union*[417] in 1989 to determine the constitutionality of public sponsorship of religious symbols. However, Justice Kennedy did not believe in the viability of the *Endorsement-test,* calling it a "most unwelcome, addition to our tangled Establishment Clause jurisprudence."[418] He described the test as "flawed in its fundamentals and unworkable in practice".[419] In *County of Allengheny*, he suggested, instead, to replace the Lemon-test with the *Coercion-Test*. According to this new test, the decisive criterion for the Court was to focus on whether the state action *coerces* citizens into supporting or participating in religious activities.[420]

An example of such unlawful coercion is provided in *Lee v. Weisman*[421]. In this case, the U.S. Supreme Court held the nondenominational prayer at a graduation ceremony of a public school unconstitutional as it coerced religious dissenters into participating. By interpreting coercion in such broad terms, that included social and psychological pressure, the Court also generally introduced an extensive interpretation of the non-establishment rule. It was this reading of the Establishment principle that, amongst others, Justice Rehnquist did not agree with. In his view, the Establishment Clause "[forbids] establishment of a national religion, and preference among religious sects or denominations" but does not forbid "programs that benefit religion, generally, without preferring one religion to another, or religion to non-religion."[422]

Despite the criticisms and the introduction of alternative tests, the Court has not yet agreed upon one sufficiently satisfying standard with which to overrule *Lemon.* More recently, the Court applied the Lemon test in *McCreary County et al vs. ACLU.*[423] In *McCreary County,* the U.S. Supreme Court had to decide whether displaying the Ten Commandments in two county courthouses had a secular purpose or had an "ostensible and predominant purpose of

[417] County of Allengheny v. American Civil Liberties Union 492 U.S. 573 (1989).
[418] Id. at. 668.
[419] Id. at. 669.
[420] Id. at. 577.
[421] Lee v. Weisman 505 U.S. 577 (1992); The Court ruled that including a clergy-led prayer within the events of a public high school graduation violated the Establishment Clause.
[422] Wallace v. Jaffree, 472 U.S. 38 (1985) (Rehnquist, J. dissenting), Id. 91 at 105.
[423] McCreary County v. American Civil Liberties Union of Kentucky et al., 545 U.S. 844 (2005).

advancing religion".[424] By applying the Lemon-test, the Court held the display unconstitutional, concluding that the government's primary purpose for erecting it was not secular, but indeed religious.[425] The majority pointed out that the state was not allowed to take sides. Taking sides violated the commandment of neutrality and tolerance, which required equal respect of both the religious and non-religious views of members of society.

bb. The Non-Establishment Principle of the First Amendment and the Justification of Prison Chaplaincy

The exact boundaries between state and religion in the U.S. were always controversial. Generally speaking, however, the constitutional framework is based on the idea of separation. In the prison domain, this separation is particularly challenging. Necessarily, the totalitarian control over the prison domain by the state also includes control over religion.[426] So far, the U.S. Supreme Court has only addressed the constitutionality of chaplaincy programs within the framework of legislation. In *Marsh v. Chambers* from 1983, the court found that a legislative proposal for chaplaincy in prisons in Nebraska did not violate the Establishment Clause.[427] The court did not base it's assessment of the constitutionality of chaplaincy programs on the Lemon-test or another doctrinal test. Instead, it referred to the history and tradition of chaplaincy and noted that the First Congress approved the appointment of paid chaplains who existed uninterruptedly for more than 200 years.[428] The court made no effort to reconcile *Marsh* with the further Establishment Clause jurisprudence, and as pointed out by Justice Brennan in his dissent, carved out "an exception to the Establishment Clause."[429]

Also in the landmark prisoners case from 2005, *Cutter v. Wilkinson*,[430] the Supreme Court's unanimous decision justified the existence of chaplains in prisons with their rich history and

[424] Id at. II.A. (Syllabus).
[425] Id. at. II.A. (Syllabus), "The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion […] When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being not neutrality when the government's ostensible object is to take sides."
[426] *Developments in the Law – In the Belly of the Whale: Religious Practice in Prison*, 115 HARVARD LAW REVIEW 1891 (2002), at. 1891, also see under Part 2, Chapter II.2.a.
[427] *Marsh v. Chambers* 463, U.S. 783 (1983).
[428] Id. at. 792.
[429] *Marsh v. Chambers* 463, U.S. 783 (1983), at 796 (Justice Brennan dissenting).
[430] Cutter et al. v. Wilkinson et al. 544 U.S. 709 (2005).

tradition.[431] At issue in this case from 2005 was the constitutionality of Section III of the Religious Land Use and Institutionalized Persons Act (RLUIPA)[432], a federal law passed in 2000. Section III established that in state-run prisons, the government cannot ”impose a substantial burden on the religious exercise of a person residing in or confined to an institution”, unless the burden furthers “a compelling governmental interest”, and does so by “the least restrictive means”.[433] In other words, the law required institutions to cater to the religious needs of inmates, unless the prisoners’ demands were so extreme that they significantly interfered with the functioning of the organizations.

However, in *Cutter,* the plaintiffs were denied access to religious literature, prohibited from adhering to the dress requirements of their religions, and not able to attend group worship because the institutions failed to provide chaplains trained in their faiths. The institution responded by arguing that RLUIPA itself was unconstitutional because it violated the Establishment Clause – that is, it extended too many services to religious inmates that inmates with “secular hobbies” did not perceive.[434] Before the case reached the Supreme Court, the court of the 6th Circuit stated that by giving religious prisoners special rights, the state might encourage prisoners to become religious.[435] This was a role that the state could not play under the Establishment Clause.

The Supreme Court, however, reversed the judgment stating that the Sixth Circuit misread their precedents.[436] The Court unanimously found that Section III did not exceed the limits of permissible government accommodation of religious practice. It was of the opinion that RLUIPA’s institutionalized-persons provisions were compatible with the Establishment Clause “because it alleviates exceptional government-created burdens on private religious exercise”.[437] By doing so, it reaffirmed that "there is room for play in the joints between" the Free Exercise and Establishment Clauses, allowing the government to accommodate religion

[431] Id. at. 710.
[432] Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2000).
[433] Id. at.
[434] Cutter et al. v. Wilkinson et al. 544 U.S. 709 (2005).
[435] Cutter v. Wilkinson, 349 F.3d 257, (6th Cir. 2003).
[436] Cutter et al. v. Wilkinson et al. 544 U.S. 709 (2005), at B (quoting, Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987), at 329).
[437] Id. at. A.II. (quoting Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U. S. 687, (1994) at. 705).

beyond free exercise requirements, without offense to the Establishment Clause".[438] Furthermore, it clarified that RLUIPA was not unconstitutional because individual religions were given preferential treatment.[439]

However, a significant difference, with a view to the limits of the Establishment Clause is made between institutionalized chaplaincy programs and faith-based rehabilitation programs operating in prisons. In *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*[440], a case from 2006, the 8th Circuit Court decided that a religiously-oriented rehabilitation program, run by two non-profit organizations under a contract with the Iowa Department of Corrections, violated the Establishment Clause by improperly using tax money to pay for what was characterized as "a 24-hour-a-day, Christ-centered, biblically-based program" that promoted "personal transformation of prisoners through the power of the Gospel." Even though the government did not act to advance religion, the direct aid to the operators of the program was unconstitutional in that it funded proselytizing activity. The reason that chaplaincy programs and faith-based rehabilitation programs are treated differently under the constitution is not only because they both have different origins, but also, and more importantly, that faith-based programs are often bound to one particular denomination.[441]

c. Comparative Conclusion

The chapter shows that Germany and the U.S. are based on different models; while the German constitution provides for cooperation between religion and state, the U.S. constitutional system is strongly influenced by the idea of separation between religion and state. However, the relationship between the two institutions, religion and state, is shaped in both countries by the broader political circumstances. Therefore, the dividing lines have to be renegotiated continually in the course of history.

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[438] Id. at. 718 (quoting Walz v. Tax Comm'n of City of New York, 397 U. S. 664 (1970) at. 669).
[439] Id. at. A.II (…) that "it conferred no privileged status on any particular religious sect".
[440] Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 (8th Cir. 2006).
[441] The increasing relevance of faith-based programs in U.S. prisons is also discussed under Part 2. Chapter I.2.b.. Winnfried Sullivan has extensively published on faith-based organization in the U.S., see inter alia: Winnifred Fallers Sullivan, *Die neuen Gesetze von "Charitable Choice" und die Regelung von Faith-based Organisationen in den USA*, *in* DIE VERRECHTLICHE RELIGION (Hans G. Kippenberg & Gunnar Folke Schuppert eds., 2005); SULLIVAN, Prison Religion: Faith-Based Reform and the Constitution 2009; Winnifred Fallers Sullivan, *Neutralizing religion; Or, What Is the Opposite of „Faith-Based"?*, 41 HISTORY OF RELIGIONS 369 (2008).

In Germany, a pressing issue with the relationship between state and religion are the limits of the right of religious communities to self-determination and the limits of state neutrality. Depending on the context and the particular question, these limits get renegotiated. Religious minorities, especially Muslims, have not equally established themselves as cooperation partners of the state as the Christian churches and are only exceptionally recognized as PLCs. In the U.S., religious diversity in society has visibly flowed into the constitutional doctrine of the Establishment Clause. The tests used to determine violations of the Establishment Clause are also influenced by political changes. Although the Lemon test has been controversial ever since, no other prevailing test was successfully implemented. The Lemon-test is still applied by courts today. In the U.S., the possible violations of the Establishment Clause are primarily concerned with any preference of individual religions over others or over non-religion.

In the prison domain of the U.S., the dividing line between religion and state is shifted to less separation. The state is involved in the practice of religion through the organization of chaplaincy. Doctrinally, the dispute over a possible constitutional violation that this may cause has so far not been conducted in detail by the courts. Instead, the existing Chaplaincy programs are commonly justified by their long existence and history. The boundary of the Establishment Clause, however, is still strictly drawn here with a view to a possible preference of individual religions over others. Undisputedly, programs that are designed according to the image and teachings of distinct religions violate the Establishment Clause.

In the German penal system, the cooperation between state and religion is constitutionally required. As will be seen in the further course of this thesis, the problem here lies in including religious minorities in the cooperation regime. Interestingly, however, the prison domain has developed its own logic of state-religion cooperation, and it sometimes accommodates religious minorities fragmentarily depending on region and individual prison institutions.[442] Essential for the further analysis is the fact that the relationship between religion and state in prisons is structured both in Germany and in the U.S. domain-specifically. The consequences of this domain-specific relationship between state and religion for religious minorities is examined in more detail in the second part of the thesis.

[442] The fragmented structures of Muslim prison chaplaincy are discussed in Part 1, Chapter I,1.c.

2. The Protection of Religious Freedom and Equality in Germany and the U.S.

The following section examines how the right to religious freedom and equality is doctrinally protected under the German and U.S. Constitution and how both rights can get limited. The section starts with the analysis of the protection of religious freedom and equality under the German constitutional framework (a), which is followed by an examination of the right to religious freedom and equality under the U.S constitution. (b) The last section shows the most important similarities and differences between the rights to religious freedom and equality in Germany and the U.S. (c).

a. Germany

The rights to religious freedom and equality are examined in the following sections with reference to Article 4 I, II BL (aa) and Article 3 I, III BL (bb). It examines the protective content of both fundamental rights and explains which constitutional requirements apply to their limitations. The last section enlightens the doctrinal relationship between freedom of religion and religious equality (cc).

aa. Article 4 Basic Law and Religious Freedom

The following section explains the protective content of Art. 4 I, II BL (i) and shows how freedom of religion can be limited (ii).

i. The Scope of Protection of Article 4 I, II BL

Article 4 I, II of the German Constitution, freedom of religion and conscience, is the most crucial provision protecting religious freedom in Germany.

It reads:

> Article 4 [Freedom of faith and conscience]
> (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
> (2) The undisturbed practice of religion shall be guaranteed.
> (3) …

With freedom of faith, freedom of religious belief, and freedom to practice a religion, Article 4 I, II of the Basic Law protects the interest of the holder of fundamental rights in having and practicing religious convictions. According to the FCC, both sections build one fundamental

and all-encompassing right.[443] Hence, one cannot draw sharp conceptual boundaries between the listed freedoms.[444] Art. 4 I, II BL protects not only the inner freedom to hold a religious or ideological belief *(forum internum)* but also the "outer" freedom to profess, spread, and act upon these beliefs *(forum externum)*.[445] Hence, the scope of protection extends not only to the inner freedom to believe or not to believe, i.e. to have a faith, to keep it secret, to renounce a former religion, and to turn to a new one- but also the outer freedom to profess and disseminate one's faith, to promote one's faith, and to proselytize. The freedom to form and hold religious and ideological convictions protects against state influence on the internal processes of religious and ideological identification *(forum internum)*, in other words, against state indoctrination. The freedom to express religious and ideological beliefs protects any religious or ideological behavior *(forum externum).* Accordingly, Art. 4 I, II BL protects (…) "the right of individuals to align their entire conduct with the teachings of their faith, and to act following this conviction, and thus to live a life guided by faith."[446] The FCC explains the broad protective content of Article 4 BL with religious freedom's link to human dignity, which emphasizes the value of religious freedom in the constitutional order.[447]

But according to which standard is it measured whether the scope of Art. 4 I II BL protects concrete religious needs and practices? First of all, in assessing the religious nature of any need or practice, the self-image of the religious community concerned is to be taken into account. The last binding word on the assessment of conduct under freedom of religion or belief must be spoken by the state, ultimately by the courts applying the law; in so doing, however, they must take the self-understanding of the holder of the fundamental right into account to a considerable extent.[448] Concretely, this means that the authorities may analyze

[443] BVerfGE 108, 282 (297) (with further references).
[444] BVerfGE 24, 236 (245) „Die Freiheit, einen Glauben zu bilden, setzt Kommunikation und Praxis des Glaubens, also Bekenntnis und Religionsausübung voraus und führt zu ihnen hin; jedes Bekennen ist zugleich ein Akt der Religionsausübung, wie umgekehrt jeder Akt der Religionsausübung eine Glaubensäußerung enthalten und insofern ein Bekenntnis kommunizieren kann. Deshalb ist Art. 4 I, II GG als die Umschreibung eines einheitlichen Schutzbereichs der Religions- und Weltanschauungsfreiheit zu verstehen".
[445] Germann in Epping/Hillgruber, BeckOK GG, Art. 4 GG Rn. 23f.
[446] [in Ger.] Article 4 I BL 'Schützt das Recht des einzelnen, sein gesamtes Verhalten an den Lehren seines Glaubens auszurichten und dieser Überzeugungen gemäß zu handeln' BVerfGE 108, 282 (297); stRspr seit BVerfGE 24, 236 (246, 247 ff.); BVerfGE 32, 98 (106 f.); zuletzt BVerfG NJW 2015, 1359 Rn. 85.
[447] "In a state in which human dignity constitutes the highest value and in which freedom of self-determination of the individual is, at the same time, recognized as a social value, freedom of religion guarantees the individual a sphere that is free from state interference and in which he can determine his form of life according to his convictions", cf. BverfGE 32, 98, 106 (Gesundpeter-Entscheidung).
[448] BVerfGE 24, 236 (247 f.); BVerfGE 108, 282 (298 f.); BVerfG DÖV 2007, 202; NJW 2015, 1359 Rn. 86; from the

and decide whether it has been sufficiently substantiated, both in terms of its spiritual content and its outer appearance, that the conduct can plausibly be attributed to the scope of application of Art 4 I, II BL.[449] Doctrinally, the authorities do not exercise any free power of determination but must take as a basis the concept of religion intended or presumed by the constitution and corresponding to the meaning and purpose of the guarantee of fundamental rights.[450] In this assessment, authorities have to abstain from any judgment about the citizens' religious convictions and any designation of these convictions as "right" or "wrong".[451] This is especially the case when a religion advances divergent views on such points.

Thus, according to the FCC, the scope of protection of Art. 4 I, II BL is broad. Several attempts have been made in the literature to limit the scope of protection of freedom of religion and other fundamental rights. However, to limit the scope of protection to facets of particular importance for the personal development of the individual[452], as well as the view that the scope of protection of the fundamental right under Art. 4 I II BL must be defined restrictively with the aid of materiality criteria,[453] have so far been equally unsuccessful. More recently, critics argued to limit the broad scope of protection by linking individual religious freedom to a collective definition of content by religious communities; the views of the individual should be protected under freedom of conscience.[454] Also, this view could not convince a broader audience. The fundamental core right, also of freedom of religion, cannot be separated from

literature: Isak, Das Selbstverständnis der Kirchen und Religionsgemeinschaften und seine Bedeutung für die Auslegung staatlichen Rechts 1994; Morlok, Selbstverständnis als Rechtskriterium 1993; critical, arguing for further differentiations: Muckel, Religiöse Freiheit und staatliche Letztentscheidung 1997; similarly Huster, Die ethische Neutralität des Staates, 2002, 382; critical of the differentiation between objective and subjective interpretation of religious practices: Heckel, Religionsfreiheit in Heckel, Gesammelte Schriften Bd. IV, 1997, 647 (680); Sacksofsky, VVDStRL 2009, 7 (18); Möllers, VVDStRL 2009, 47 (76).

[449] "The constitutional protection of the freedom of religious and ideological confession in Article 4.1 of the Basic Law also extends to religious convictions that deviate from pure doctrine and therefore do not find official recognition by religious commissioners or other bodies" (BVerfGE 33, 23 (23)); GERRIT MANSSEN, STAATSRECHT II: GRUNDRECHTE (Beck 11. Aufl. ed. 2014), at 87.

[450] BVerfGE 83, 341 (353); also see: BVerwGE 99, 1 (4); BVerwGE 123, 49 (54).

[451] That the state has to sustain from a value judgement of the particular content of the religiosity of people is one of the most important pillars of the state neutrality, see under 2.b.i.; See Jarass, in Jarass & Pieroth, GG, Art. 4 BL, at 5.

[452] Böckenförde, in Der Staat 42, 2003, 165.

[453] See, for example, Schoch in Bohnert et al, Festschrift für Hollerbach, 2001, pp. 149, 153 et seq., 157, according to which the BVerfG had further developed freedom of belief into a "general freedom of religious action".

[454] Classen, Religionsfreiheit und Staatskirchenrecht in der Grundrechtsordnung 2003, 23, (25, 44 ff.); Classen, Religionsrecht 2015, Rn. 89 ff., 158; Mückl STAAT 2001, 96 (115 f.); mit weitergehender grundrechtstheoretischer Verankerung Augsberg AöR 138 (2013), 493 (518–534).

individual self-determination.[455] Hence, irrespective of majority or minority religions, religious needs and practices are comprehensively protected under the scope of protection of Art. 4 I, II BL.[456]

ii. How to Draw the Limits: The Constitutional Doctrine of Limitations of Article 4 I II BL

The purpose of this section is to show under which constitutional rules freedom of religion can be restricted. Possible violations of freedom of religion are tested the same way as all freedom rights under German constitutional law. The test follows three main steps *(Schranken-Trias)*: First, it is tested whether there is an interference with the scope of protection (1), second, whether there is an infringement of the fundamental right (2), and thirdly, if the infringement is justified (3). For the third step, the question of justification, different limitation standards (*Schrankenbestimmungen*) apply for different fundamental rights.[457]

First of all, one has to distinguish between two types of fundamental rights: while some fundamental rights can only get limited by colliding fundamental rights *(kollidierendes Verfassungsrecht),* other basic rights can also get restricted by ordinary law (like the right to privacy of letters, posts, and telecommunications as envisaged in Article 10 II BL).[458] For the first type, most importantly, other people's fundamental rights set limits. For the second type, limits are set by statutory limitations which are not necessarily the direct expression of a conflicting constitutional law.[459] The system of different limitation clauses establishes a hierarchical system of fundamental rights in which the standard applied corresponds to the significance of the fundamental right. The basic idea behind this "panorama of limitation clauses"[460] is that it allows for the most extensive protection of each fundamental right.[461]

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[455] Germann STAAT 2004, 491 (493 f.); also see Heckel AöR 134 (2009), 309 (380 f.); Kästner ZevKR 60/2015, 1 (11); Unruh, Religionsverfassungsrecht, 3. Aufl. 2015 Rn. 99; Walter, Religionsverfassungsrecht 2006, 504 et seq.

[456] According to the FCC, "the number of adherents and the social relevance of the group" is irrelevant for the protection under the freedom of religion", BVerfGE 32, 98, (107) (Gesundpeter-Entscheidung).

[457] The doctrinal principles for the limitation of German constitutional law are importantly shaped by the theory and thought of Robert Alexy, who wrote his habilitation about the foundational theory of constitutional law, compare ROBERT ALEXY, DIE THEORIE DER GRUNDRECHTE (Suhrkamp-Verlag. 1986).

[458] Compare Robbers chapter on limitation clauses under German Constitutional Law: GERHARD ROBBERS, RELIGION AND LAW IN GERMANY (Wolters Kluwer 2010), p. 107-1111.

[459] See id. 108 et seq.

[460] Id. at. 107.

[461] For a comprehensive overview: JOSEF LINDNER, THEORIE DER GRUNDRECHTSDOGMATIK (Mohr Siebeck 2005).

How exactly freedom of religion is to be restricted in Art. 4, I II BL is controversial. According to one opinion, the legal reservation of Art. 136 I WC is incorporated by Art. 140 BL into the Basic Law so that it applies to the practice of religion.[462] However, the application of this provision to Art. 4 I, II BL is to be rejected for systematic reasons.[463] If the constitutional lawmaker had wanted a clause which allows for limitations through ordinary law for religious freedom, it would have included it directly in Article 4 of the Basic Law. However, the ordinary limitation clause of Article 135 WRV was not incorporated into the Basic Law. According to another view, the limitation clause from Art. 2 I and Art. 5 II BL should be transferred to religious freedom *("Schrankenleihe").* However, this view contradicts the independent character of individual liberty rights and the differentiated system of limitation clauses for each fundamental right; the differentiated "panorama of limitation" clauses under the Basic Law thus speaks against a "Schrankenleihe". Consequently, the statutory clauses of other fundamental rights cannot be transferred to Art. 4 I, II BL.[464] Freedom of religion under Art. 4 I, II BL is thus subject exclusively to constitutional limitations and can only be limited by colliding fundamental rights and other law of constitutional rank.[465]

The most important tool to test religious freedom infringements in individual cases is the proportionality test.[466] According to the principle of proportionality (*Verhältnismäßigkeitsgrundsatz*), the limitation is only justified in case it follows a legitimate objective, is suitable, necessary, and proportionate in the narrower sense.[467]

Concretely, by means of "practical concordance" (*Praktische Konkordanz)*, a fair balance must be struck between the fundamental right concerned and the conflicting fundamental right or constitutional good.[468] The idea of this doctrine is that conflicting rights get balanced in a way

[462] Christian Waldhoff, *Inhalt und Grenzen der Religionsfreiheit*, *in* ZWISCHEN SÄKULARITÄT UND LAIZISMUS, DEUTSCH-TÜRKISCHES FORUM FÜR STAATSRECHTSLEHRE (Otto edt. et al. 2005), p. 91.
[463] a.A. *Jarass*, in: Jarass/Pieroth, GG, Art. 4 Rn. 31.
[464] *Germann*, in: BeckOK GG, Art. 4 GG Rn. 47.
[465] Vgl. FCC under reference to Art 4 BL, "Nur kollidierende Grundrechte Dritter und andere mit Verfassungsrang ausgestattete Rechtswerte sind mit Rücksicht auf die Einheit der Verfassung und die von ihr geschützte gesamte Wertordnung ausnahmsweise imstande, auch uneingeschränkte Grundrechte in einzelnen Beziehungen zu begrenzen" BVerfGE 108, 282 (340).
[466] For an overview of further Schranken-Schranken, see ROBBERS, Religion and law in Germany, 2010, p. 111
[467] For a helpful analysis of proportionality in different constitutional states, see: MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE (Cambridge University Press 2013).
[468] The principle of Praktische Konkordanz is explained in more detail by Hesse, see: KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (C.F Müller 1999), p. 139.

which allows for the highest possible scope of protection of each of them.[469] This principle has to be borne in mind every time the legislator or courts are balancing conflicting rights and is especially relevant for those constitutional rights without statutory reservation, such as the freedom of religion.[470]

In addition to the constitutional requirements for the restrictions of religious freedom, the ideas of and about religion play a decisive role in how the courts limit it. Research has shown that Protestant Christian conceptions are evident, for instance, in how the legal principle of "freedom of religion" identifies legitimate religious practices. Even if it is affirmed that certain religious beliefs of religious minorities are covered under the scope of religious freedom, this does not automatically mean that they can also be lived out publicly. Saba Mahmood and Peter Danchin explain that it is the "distinction between forum internum and forum externum that essentially allows the state simultaneously to uphold the immunity and sanctity of religious belief even as it regulates the manifestation of these beliefs...this antinomy is internal to the conceptual architecture of the right [to freedom of belief] itself."[471] Thus, the secular state offers individuals freedom of belief but not the freedom to act publically based on those beliefs.[472]

Concerning the question of how the constitution reacts to the increasing religious diversity of society[473], voices in the literature argue that the socio-religious changes of society can justify restrictions of the protective scope of religious freedom.[474] This argument shows how strongly the religious practice of individuals is subject to public evaluation. However, as also pointed out by Möllers, the practice of individual fundamental rights must not be subject to any further

[469] Id. at. 139.
[470] Vgl. BVerfG unter Bezugnahme auf Art 4 GG, "(…) auftretende Konflikte lassen sich nur lösen, indem ermittelt wird, welche Verfassungsbestimmung für die konkret zu entscheidende Frage das höhere Gewicht hat. Die schwächere Norm darf nur soweit zurückgedrängt werden, wie das logisch und systematisch zwingend erscheint; ihr sachlicher Grundwertgehalt muß in jedem Fall respektiert werden." BVerfGE 28, 243 (261).
[471] Saba Mahmood & Peter G. Danchin, *Politics of Religious Freedom: Contested Genealogies*, 113 SOUTH ATLANTIC QUARTERLY 1 (2014), p. 1-8, (5).
[472] Lena Salaymeh & Shai Lavi, Religion is secularized tradition: the case of Jewish and Muslim circumcisions in Germany, p. 6 (unpublished manuscript) (forthcoming).
[473] The term "Grundrechtswandel durch Verfassungswandel" is used to describe the debate, cf. Möllers, VVDStRL 2009, p. 73-74.; sceptical of the assumption of constitutional change: M.Heckel Religionsfreiheit und Staatskirchenrecht in der Rechtsprechung des Bundesverfassungsgerichts, FS 50 Jahre BVerfG, 2001, 379 (387 et seq.).
[474] Johannes Hellermann, Multikulturalität und Grundrechte – am Beispiel der Religionsfreiheit, in: Grabenwarter C (edt.), Allgemeinheit der Grundrechte und Vielfalt der Gesellschaft, 1994, 129 (142).

social benefit.[475] Therefore, the simple fact of the socio-religious changes of society does not give rise to a restriction of the scope of protection.[476]

bb. Article 3 Basic Law and Religious Equality

The following section examines the protection against (indirect) discrimination on religious grounds (i). The second step shows which standards apply to the justification of unequal treatment (ii).

i. Substantive Equality and Indirect Discrimination on Religious Grounds

The most important provision, protecting equality before the law is Article 3 Basic Law. [477] In addition to the general equality clause in Article 3 I BL[478], there are special guarantees in the two other sections of Article 3 BL. Section II protects the equality of men and women and demands the state to eliminate structural disadvantages existing for women.[479] Section III prohibits discrimination on grounds of faith and religious or political opinions, but furthermore, on grounds of sex, parentage, race, language, homeland, and origin.[480]

> (3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.

The first inquiry of the test for violations of the prohibition of discrimination in Art. 3 III 1 BL is the determination of whether there is an unequal treatment *(Ungleichbehandlung)*. Hence, it presupposes the comparison of at least two situations. The difficulty that already arises in the context of this observation is that it is necessary to ask about the causes of inequality.

In some cases, unequal treatment is the result of legal provisions directly linked to religion. It is indisputable that according to Article 3 III 1 BL, the differentiation criterion

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[475] "Gesellschaftlich nützlich muss die Wahrnehmung von Individualgrundrechten nicht sein", Möllers, VVDStRL 2009, p. 74.

[476] Dieter Grimm, Multikulturalität und Grundrechte, in: Wahl/Wieland (Hrsg.), Das Recht der Menschen in der Welt, 2002, 135 (146 et seq).

[477] For an overview of the protection of equality under Article 3 Basic Law, see: LORNA WOODS SABINE MICHALOWSKI, GERMAN CONSTITUTIONAL LAW - THE PROTECTION OF CIVIL LIBERTIES (Ashgate Dartmouth 1999), p. 161 et seq.

[478] Article 3 BL [Equality before the law] (1) All persons shall be equal before the law.

[479] Article 3 BL [Equality before the law] (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.; See, for the scope and historical background: MANSSEN (2014), p. 247; For the scope of protection, compare: Langenfeld, in Maunz & Dürig, GG, *Article 3 II, III BL,* at 22 et seq.

[480] Also see: MANSSEN (2014), p. 242; Also see: Langenfeld, in Maunz & Dürig, GG, *Article 3 II, III BL,* at 63-122.

(Differenzierungsmerkmal) may in no way be the cause for legal unequal treatment.[481] A prominent example of such direct discrimination is the headscarf legislation for schools, which until 2015, favored Christian occidental symbols over other religious symbols. This favoritism was justified by the special and historically grown significance of Christianity in Germany.[482] In the meantime, the FCC has declared the general ban of headscarfs worn by teachers unconstitutional.[483] Much more complicated than these cases are those in which the unequal treatment results de facto from the structures, without the legislation being linked to the *Differenzierungsmerkmal* religion. If, for example, the wearing of religious symbols is prohibited for all teachers equally, the regulation may appear "neutral" at first glance. However, it is still predominantly Muslim women who are affected by such ban; the ban affects those who belong to a religion with visible religious symbols more than others. Hence, it is a case of indirect discrimination against Muslim women.

Whether substantive equality with a view to religion is also protected under Article 3 III 1 BL is controversial. In the commentary literature, the validity of indirect discrimination within the framework of Art. 3 III 1 BL is disputed. Only a few have so far spoken out in favor. For them, it is the *de facto* disadvantage or preference that matters, whether the measure formally appears "neutral" is irrelevant.[484] Some plead for applicability only within the framework of para. 1 where weakened standards of justification are to apply; the justification requirements are tightened if they come closer to the reasons for differentiation in Article 3 III 1 BL.[485] For another opinion, however, the decisive factor is whether the regulation appears "neutral", hence, formally treating all religions equally.[486] According to this view, Article 3 III 1 BL does not protect from indirect discrimination. Against this view, however, speaks that the effectiveness of the right to equality crucially depends on the protection from indirect discrimination. As the headscarf example shows, due to the existing differences in the practice

[481] *Baer/Markard*, in: v. Mangoldt/Klein/Starck, GG, Art. 3 Abs. 2 und 3 Rn. 426.
[482] BVerfGE 108, 282 (340) (headscarf I: "christlich-abenländische Tradition").
[483] BVerfGE 138, 296 (headscarf II).
[484] BVerfGE 85, 191, (206); 121, 241, (254); 126, 29, (53); *Baer/Markard*, in: v. Mangoldt/Klein/Starck, I, Art. 3 Abs. 2 und 3 Rn. 429, Rn. 430; also see: Osterloh/Nußberger, in: Sachs, GG, Art 3, Rn. 256, 260; Kirsten Wiese, Lehrerinnen mit Kopftuch, Berlin 2008, p. 221 et seq. (with further references).
[485] For an overview of the doctrine of Art. 3 BL, Nora Markard on Verfassungsblog (2017), available at: https://verfassungsblog.de/struktur-und-teilhabe-zur-gleichheitsdogmatischen-bedeutung-der-dritten-option/ *(last accessed 30.08.2019).*
[486] Rüfner, in: BK, GG, Art 3 Abs. 2 und 3 Rn. 566 ff.; Probably also: Boysen, in: v. Münch/Kunig, I, GG, Art 3 Rn. 163.

of religion within the religions, formally "neutral" regulations can lead to unequal treatment because it affects the members of one religion more than members of another religion. In the prison domain, this problem arises, albeit in a slightly different shape, concerning the accommodation of religious dietary regulations. These also differ from religion to religion so that difficult material questions of equality arise. To enforce equality it is, therefore, convincing to recognize the figure of indirect discrimination in the field of religious freedom.

The FCC has long recognized indirect discrimination against women,[487] but so far it has left open whether this is a special dogma for Article 3 II of the Basic Law.[488] However, the court has shown that it does see room for the application of indirect discrimination in Art. 3 III 1 BL. In the context of gender, the FCC ruled in 2017 that civil status law must allow a third gender option, besides men and woman, and that the current civil status law violated Art. 3 III 1 BL.[489] It held, "The purpose of Article 3.3 sentence 1 of the Basic Law is to protect members of groups at risk of structural discrimination from disadvantages."[490] That the FCC indeed sees space for indirect discrimination under the scope of Art. 3 III 1 BL was already apparent in a chamber decision of the second senate in 2004. This decision dealt with the issue of covering the interpreter costs for defendants who did not speak German in preliminary proceedings: "Article 3 para. 3 sentence 1 of the Basic Law prohibits any discrimination on the grounds of language or other criteria listed there. ... The features mentioned in Article 3.3 sentence 1 of the Basic Law may in principle neither directly nor indirectly be used as a connecting factor for legal unequal treatment".[491]

Doctrinally, it is inconsistent to treat gender differently from other grounds of discrimination - here too, as the example of language and religion show, structural exclusions can occur, the effect of which is just as serious as direct discrimination. Legislators will have to deal more and more with equality issues in the future due to the increasing diversity of society. As a result, it is therefore convincing to also recognize the figure of indirect discrimination within the

[487] For the first time in BVerfGE 97, 35 (43) under references of the ECJ; (also see: BVerfGE 147, 1, (59).
[488] BVerfG-K, Beschl. v. 17.2.1999 – 1 BvL 26/97, NVwZ 1999, 756 f.e.
[489] BVerfGE 147, 1.
[490] „Zweck des Art. 3 Abs. 3 Satz 1 GG ist es, Angehörige strukturell diskriminierungsgefährdeter Gruppen vor Benachteiligung zu schützen (cf. BVerfGE 88, 87 (96); Osterloh/Nußberger, in: Sachs, GG, 7. Aufl. 2014, Art. 3 Rn. 236, 244).
[491] BVerfG-K Beschl. v. 27.2.2003 - 2 BvR 2032/01 - Rn. (1-33), Rn 17.

framework of Article 3 III 1 of the Basic Law. It is likely, the social and legal structures will increasingly exclude certain groups of society. In future, therefore, precise grounds for justification will be needed to do justice to this task.

ii. How to Justify Unequal Treatment?

The requirements in Article 3 BL to justify unequal treatment have changed over time. For long, the FCC relied on this test of arbitrariness (*Willkürformel)*[492] to determine violations of the right to equality under Art. 3 I BL.[493] Pursuant to this test, the principle of equality is only violated if there was no reasonable ground for differentiation.[494] The relevant criteria that the difference in treatment is based on have to be in conformity with the Basic Law. In particular, this means that unequal treatment on the grounds of one of the criteria listed in Art 3 III BL is unconstitutional.[495] Secondly, the purposes for which the situations have been treated unequally must be compatible with constitutional principles. Thirdly, the relationship between the criteria determining the different categories and the purpose of that differentiation must not be arbitrary.[496] Because of the wide leeway, the test made is relatively easy to find arguments speaking against arbitrary differentiation. The *Willkürfomel* was more and more in contrast to the highly differentiated balancing method of the FCC's doctrine for freedom rights.[497] By developing a "new formula" (*Neue Formel)*[498]*,* the FCC introduced considerations into the context of equality rights, which resemble the concept of proportionality as applied to freedom rights.

The Neue Formel extended the scope of application of Article 3 I BL. No longer did the FCC restrict its considerations to the question of whether there was a reasonable ground for the difference in treatment, but, in addition, started to examine whether the distinction itself could be justified.[499] From now on, Article 3 I BL was violated if one group of norm addressees is treated differently than another group of norm addressees, although the differences

[492] *Jarass*, in: Jarass/Pieroth, GG, Art. 3 BL at 17.
[493] BVerfGE 1, 14 (16/17): "The principle of equality is violated if no reasonable ground, resulting from the nature of the situation of otherwise being factually plausible, can be found for the legislative differentiation or equal treatment so that the provision must be said to be arbitrary."
[494] SABINE MICHALOWSKI (1999), p. 162 et seq.
[495] Legitimate means and aims under Article 3 I BL, *Kirchhof* in Maunz & Dürig, GG, Art. 3 I, at 249-263.
[496] Id. at. 264-267.
[497] Id. at 240-248.
[498] MANSSEN (2014), at 250 et seq.
[499] The consequences of this more advanced test are explained by Kirchhof in Maunz & Dürig, GG, Art. 3 I, at 268 et seq.

between both groups is *not of such kind and degree* that could justify different treatment.[500] Article 3 III BL is an unlimited guaranteed fundamental right *(schrankenlos gewährleistetes Grundrecht)*; a justification of unequal treatment can therefore only be justified by conflicting constitutional law. Doctrinally, the new formula also applies to justifications pursuant to Article 3 III GG. For indirect discrimination, however, the requirements for justification are controversial. In one view, the requirements are less stringent than for direct discrimination.[501] However, the BVerfG has spoken out in favor of strict justification requirements in connection with gender discrimination, [502] which must also apply in the case of religious discrimination.[503]

cc. The doctrinal relationship between freedom of religion and religious equality

The relationship between freedom and equality in religious constitutional law is doctrinally controversial and in a state of change. Equality was typically only "read into" religious freedom under Art. 4 I, II BL or only marginally mentioned in the jurisprudence. With the increasing relevance of equality in an increasingly diverse society, this limited approach is getting criticized.[504] Rightly so, because equality has its own raison d'être and brings with it increased protection, especially for religious minorities. This becomes particularly visible with cases of multiple discrimination, i.e., in the area of intersectionality.[505] In cases, the unequal treatment concerns multiple discrimination grounds, such as religion *and* gender or race; consequently, the intersectionality of the discrimination cannot be addressed under Article 4 I, II BL alone. This aspect was ignored in the first headscarf decision of the FCC but was addressed in the second decision of 2015.[506] There, the court saw that the ban of religious symbols de facto affected Muslim women; hence, it discriminated against them under Art. 3 II, and III BL.[507]

At the institutional level, the relevance of equality was recognized early on. However, the principle of parity has historically evolved as a response to the existence of two equally strong

[500] Id. at. 268.
[501] Kischel, in: BeckOK GG, Art 3 Rn 137; Osterloh/Nußberger, in: Sachs, GG, Art 3 Rn. 256.
[502] BVerfGE 132, 72, LS 2 und 98.
[503] Also see: Krieger, in: Schmidt-Bleibtreu/Hofmann/Henneke, GG, Art. 3 Rn. 62.
[504] Shino Ibold, Banning the Muslim Veil? The Added Value of an Equality Law Perspective (Unpublished Thesis).
[505] Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color," in The Feminist Philosophy Reader, Alison Bailey and Chris Cuomo (eds.). New York: McGraw-Hill, 2008. 279–309.
[506] BVerfGE 138, 296.
[507] Id. at. 326.

Christian denominations within the Holy Roman Empire of German Nation.[508] Back then, it was understood as a group right for the equal treatment of Catholics and Protestants. Today it is recognized that the principle of parity applies equally to all religions. However, there are still difficulties in the actual implementation; as shown, Christian religious communities still have structural advantages as compared to religious minorities. Also, it is controversial how the principle of parity is to derive from constitutional doctrine. According to one opinion, the principle of parity is a basic unwritten principle of the constitution,[509] another opinion considers it as customary law[510] or as protected under the scope of Article 4 I, II BL.[511] As shown by Schrooten, all of these views ultimately fall back on Article 3 BL.[512] Schrooten illustrates that also the FCC does not follow a clear-cut approach when it applies the principle of parity. The FCC cites the principle of parity by emphasizing its strong relation to state neutrality, but also in the context of further equality principles.[513]

The idea of state neutrality plays an essential role in the constitutional doctrine of religion and relies on both freedom and equality.[514] Apart from the core principle of non-identification[515], state neutrality embraces the idea of abstaining from any value judgment of particular religious content.[516] It is controversially discussed whether state neutrality is a principle on its own or is comprised of further provisions of the Basic Law. The FCC derives neutrality from various constitutional provisions on religion and equality (Article 4 I, 3 III 1, Article 33 III BL, as well as Article 136 I, IV, and Article 137 I WC in conjunction with Article 140 BL).[517] Huster

[508] The principle of parity, especially in its historical dimension is explained by Robbers, compare ROBBERS, Religion and law in Germany. 2010, p. 129 et seq.; From a comparative perspective, also, CLAUDIA E HAUPT, RELIGION-STATE RELATIONS IN THE UNITED STATES AND GERMANY : THE QUEST FOR NEUTRALITY (2012), p. 184 at seq.

[509] Compare Martin Heckel, Gesammelte Schriften, Staat, Kirche, Recht, Geschichte (Mohr Siebeck 1989), p. 253 et seq.

[510] Rudolf Smend, Der Niedersächsische Kirchenvertrag und das heutige deutsche Staatskirchenrecht JZ 50 (1956), p. 53.

[511] Peter Unruh, Religionsverfassungsrecht (Nomos 3. Aufl. ed. 2015).

[512] JOST-BENJAMIN SCHROOTEN, GLEICHHEITSSATZ UND RELIGIONSGEMEINSCHAFTEN (Mohr Siebeck 2015). For an overview of the different approaches, p. 32 - 35. (citing a different view by Meyer-Scheu who argues that the principle of parity – because it stems from the institutional guarantees of Article 140 BL in connection with the Articles of the Weimar Constitution – is distinct from the protection of equality under Article 3 GG that originally protected most of all the individual).

[513] Id. at. 33.

[514] Gerhard Robbers categorizes the sources of the law on religion in Germany into three basic ideas: state neutrality, equal treatment and religious freedom: Robbers, BYU L. REV., (2001), p. 645.

[515] SCHROOTEN (2015), p. 19 et seq.

[516] Id. at. 20.

[517] Shown by Schrooten with further references, Id. at. 20.

refers to Alexy's classifications of principles and also argues neutrality is not a principle.[518] In his view, neutrality lacks the "balancing-component" of a principle.[519] Either the behavior in question is compatible with neutrality, or it is not – in other words, according to Huster, compatibility cannot be created through a balancing process of the conflicting interests and rights at stake.[520] Other accounts propose that neutrality is not even a doctrinal rule anchored in the Basic Law but just an idea of religious policy.[521] In this vein, Schrooten proposes to consider neutrality as the main guideline for the decision-making process (*Entscheidungsgrundlage*) but to add the component of equality for more concrete guidance.[522]

What is not yet explained by all these different doctrinal views is how state neutrality is to be understood in terms of content. Here too, there are different approaches, since it can either be understood openly, in its positive meaning or in a negative way, so that religion is banned from the sphere of the state altogether. [523] The FCC takes a clear stance here. In the headscarf decision from 2015, it emphasized: "The religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs."[524]

b. United States

The following examines the right to religious freedom and equality under the U.S. Constitution. The first section discusses the development of the doctrine of the Free Exercise, most importantly, by reviewing the two landmark cases, *Sherbert v. Verner*[525] and *Wisconsin*

[518] Stefan Huster, Die ethische Neutralität des Staates: eine liberale Interpretation der Verfassung (Mohr-Siebeck 2002), p. 71 et seq.
[519] ALEXY (1986), p. 71 et seq.
[520] See also Karl-Heinz Ladeur and Ino Augsberg, The Myth of the Neutral State: The relationship between state and religion in the face of new challenges, 8 GERMAN LAW JOURNAL 145 (2007), p. 148.
[521] Hans Michael Heinig, Verschärfung der oder Abschied von der Neutralität? Zwei verfehlte Alternativen in der Debatte um den herkömmlichen Grundsatz religiös-weltanschaulicher Neutralität, 64 JURISTEN ZEITUNG 1136 (2009), p. 1136.
[522] SCHROOTEN (2015), p. 27.
[523] Id. at. 25 et seq.
[524] BVerfGE 138, 296 (339) ("Die dem Staat gebotene weltanschaulich-religiöse Neutralität ist indessen nicht als eine distanzierende im Sinne einer strikten Trennung von Staat und Kirche zu verstehen, sondern als eine offene und übergreifende, die Glaubensfreiheit für alle Bekenntnisse gleichermaßen fördernde Haltung").
[525] Sherbert v. Verner 374 U.S. 398 (1963).

v. Yoder[526] (i). The second section examines *Employment Division v. Smith*[527] in light of its aftermath and the adoption of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLIUPA) (ii). Thirdly, the section illuminates how religious equality is protected and doctrinally located under U.S. law (iii).

aa. The Free Exercise Clause: Sherbert and Yoder Revisited

After sorting through the Establishment Clause Tests in the previous chapter, this section addresses the Free Exercise Clause, the second relevant clause of the First Amendment of the U.S. American Constitution. While the Establishment Clause prevents the citizen from religious obligations imposed by law, the Free Exercise Clause prevents the citizen from illegal infringements burdening a particular religious behavior.[528] Like Article 4 I,II of the German Basic Law, also the Free Exercise Clause reserves the right of the individual to have an inner belief (*forum internum*) and to act in accordance with one's belief (*forum externum*).[529] When faced with the difficult task to determine whether beliefs or actions are "religious" or not, courts in the U.S. have asked whether the belief system addresses "fundamental and ultimate questions", is "comprehensive in nature", and presents "certain formal and external signs".[530] Generally, courts have applied a broad definition of these criteria in Free Exercise cases.

Initially, the U.S. Supreme Court did not use a balancing approach when deciding free exercise cases. In its earliest free exercise decision, *Reynolds v. United States* from 1879[531], the Court held that Mormons should not be exempted from generally applicable law prohibiting polygamy because exemptions for exercise would "make the professed doctrines of religious belief superior to law of the land."[532] In the middle of the twentieth century, the Court began employing the rudiments of a balancing approach, requiring a tight link between legislative means and ends when religion was burdened.[533] The Court also began to examine whether

[526] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[527] Employment Division v. Smith, 494 U.S. 872 (1990).
[528] U.S. Const.,1st Amendment: 'Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof...'*
[529] Compare Hodgson, WHITTIER LAW REVIEW (2005), p. 316.
[530] See, for example, Africa v. Pennsylvania, 662 F.2d 1025, 1032, (3rd Cir. 1981). See also: Dettmer v. Landon, 799 F.2d 929, 931-32, (4th Cir. 1986).
[531] Reynolds v. United States, 98 U.S. 145 (1879).
[532] Id. at. 167.
[533] Daniel J. Solove, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons,* 106, THE YALE LAW JOUNRAL (1996), p. 464.

religious exemptions could be made from general applicability. Finally, with *Sherbert* in 1963, the Court started applying strict scrutiny in free exercise cases.[534]

Generally, judicial review doctrine provides for three different levels of standards that courts use to weigh governments interest against a constitutional right or principle.[535] These three standards of judicial review (rational basis[536] – or minimal - review, intermediate scrutiny[537], and strict scrutiny[538]) are used to test statutes and government action at all levels of government. For the standard that applies to the law that in any way infringes the free exercise of religion, it depends on whether the law is burdening religion directly or only indirectly. For laws that burden religion directly, strict scrutiny applies whereas "religiously neutral" laws are subject to minimal scrutiny, the easiest standard to pass for governmental action.[539] For laws to pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest" and must have narrowly tailored the law to achieve that interest.[540] For the compelling governmental interest, it is required that the law does not merely improve government efficiency but that it is at the core of constitutional issues.[541] Religiously "neutral" laws, however, are hardly challenged as unconstitutional. Instead, the plaintiff will often seek a legal exemption from this generally applicable law.

The different levels of judicial review applying to laws burdening the free exercise of religion were the result of the landmark Supreme Court case, *Employment Division v. Smith*[542], from 1990. Before coming back to *Smith* and the outrage of the public that was caused by the decision, the following shortly discusses the pre-Smith era when only one standard applied to all laws that imposed a burden on the person's free exercise of religion. Two important

[534] Sherbert v. Verner 374 U.S. 398 (1963).
[535] Michael Fordham, *Judicial Review in the Supreme Court*, 17 JUDICIAL REVIEW (2012).
[536] The rational basis test is the lowest form of judicial scrutiny. It is used in cases where a plaintiff alleges that the legislature has made an arbitrary or irrational decision. When employed, the rational basis test usually results in a court upholding the constitutionality of the law because the test gives great deference to the legislative branch.
[537] The heightened, intermediate scrutiny test is most importantly used in equal protection challenges to gender classifications, as well as in some free speech cases.
[538] The strict scrutiny test, as the most stringent standard, applies if either a fundamental constitutional right is infringed or when a government action applies to a 'suspect classification', such as race or religion.
[539] Legal Information Institute (Cornell Law School) "Strict Scrutiny", available at https://www.law.cornell.edu/wex/strict_scrutiny *(last accessed 30.08.2019).*
[540] Id.
[541] Id.
[542] Employment Division v. Smith, 494 U.S. 872 (1990).

decision will serve as an explanatory ground. One is *Sherbert v. Verner*[543] from 1963 and the second one is from ten years later, *Wisconsin v. Yoder*[544].

As Nussbaum describes, the times of the *Sherbert* decision were signified by an increasing relevance of the government's role in people's lives.[545] The multiplication of functions of being the primary educator, the primary provider of social welfare benefits, and major employer itself, caused more friction of the state with people's religious requirements.[546] At the same time, religious diversity was rapidly growing because of new immigrants who also brought new religions. These circumstances triggered the need for a new formula for free exercise cases, and as a result, the Sherbert-test was born. According to the test, it needs to be determined whether the government's conduct imposes a "substantial burden" on the person's free exercise of religion. If it does, the second criterion is whether that interference can be justified by a "compelling state interest" that is weighty in itself. Thirdly, the law must be narrowly tailored to achieve this interest in the least burdensome manner.[547]

When applying this test in *Sherbert*, equality considerations which are constituent of the "substantial burden" were at the core of the Court's decision.[548] Adell Sherbert, the plaintiff of the case, was a Seventh Day Adventist (SDA). She had worked at the Spartan Mill in Beaumont five times a week. For a long time, her religious affiliation caused her no problems; she could work from Monday – Friday and worship on Saturdays with her SDA congregation. However, the economic constraints of the late 1950s led all mill owners in the area to introduce a six-day workweek. From then on, Sherbert was forced to also work on Saturdays. After she refused to sacrifice her religious practice, she got fired. Because she refused other jobs, she was turned down when she applied for unemployment compensation because she had declined "available suitable work". Because of the dismissal, Sherbert went to court arguing that her ability to practice religion had been unfairly burdened, which was declined by the state with the simple argument that they are treating everyone the same. This was, as later decided by the U.S. Supreme Court, a violation of Sherbert's religious freedom. That

[543] Sherbert v. Verner 374 U.S. 398 (1963).
[544] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[545] NUSSBAUM. 2008. p. 135 et seq.
[546] Id. at. 135.
[547] NUSSBAUM (2008), 138.
[548] For an extensive overview of the facts and background of the case, Id at. 135-140.

Sherbert was not treated differently from the majority was one of the justifications for the denial of her unemployment benefits. However, in view of the Court, the denial of unemployment compensation put a special burden on Sherbert. When Sunday work was authorized during the war, employees from the Christian majority in South Carolina could refuse to work because of their religiosity, with no penalty at all.

The *Sherbert-test* became the lens through which the Court looked at different kinds of claims for accommodation.[549] In *Wisconsin v. Yoder*[550] from 1972, the Court found both a substantial burden and the absence of a compelling state interest. In *Yoder*, the court invalidated a Wisconsin school law which made high school attendance compulsory for members of the Amish faith before they turned sixteen. As a result of the decision, Amish teenagers were exempted from the compulsion to attend school.[551] When the Court applied the *Sherbert test* to the facts of the case, it first of all held that the "traditional interests of parents with respect to the religious upbringing of their children" is a fundamental right and interest protected under the Free Exercise Clause.[552] From there, it was not difficult for the Court to conclude that the Wisconsin school law substantially burdened the Yoder parents and that the equal application of the law to everyone also did not speak against the right's violation: "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion".[553]

The vital state interest in education which advocates that only school attendance can prepare children to be "self-reliant and self-sufficient participant[s] in society" was without merits because the Amish community was able to show that they were self-reliant and rejected any governmental support anyway.[554] Therefore, the Court also did not find any compelling state interest that was weighty enough to override the interests of the Yoder parents. [555] As sharply analyzed by Nussbaum, concerning religious fairness, both *Sherbert* and *Yoder* pose the issue on slightly different levels.[556] In *Sherbert*, the plaintiff did not have a freedom that the majority

[549] Id. at. 138.
[550] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[551] Id. at. 207-08.
[552] Id. at. 209.
[553] Id. at. 210.
[554] Id. at. 215.
[555] Id. at. 216.
[556] NUSSBAUM (2008) p. 144.

had (i.e. observing religious holidays without harmful consequences). In *Yoder*, however, there was no comparable exemption from the obligation of school attendance for the majority so that the issue of religious fairness which arose was more abstract.".[557]

Years later, in 1990, in *Employment Division v. Smith*, the Court effectively abandoned the broad protection of the *Sherbert-Yoder-line* and decided that the strict scrutiny standard no longer applied to generally applicable laws with only an unintended effect on religion.[558] According to the facts of the case, the Court had to decide whether the state could lawfully deny unemployment benefits to the plaintiff of the case. He was a member of the Native American church who got fired for violating a state prohibition on the use of drugs because he had used peyote for a religious ceremony. According to the Court, the drug laws were not passed with discriminatory intent and therefore did not violate the Free Exercise of Clause.[559] The burden that the law put on the free exercise of religion was a side-effect rather than an intentionally wanted limitation in the view of the Court.[560]

The majority opinion of the case, written by Justice Antonin Scalia, became one of the most widely criticized opinions of recent U.S. Supreme Court jurisprudence.[561] One important reason for the criticism was Scalia's treatment of precedent because not only did he refuse to apply the *Sherbert test*, but moreover, he denied that it has ever been settled law.[562] Another factor for the criticism that not only came from liberals, but also from conservatives, was the way the Court diminished the relevance to protect religious minorities and their religious obligations.[563] Nevertheless, in the *after-Smith* era, the Court decided against applying the strict-scrutiny standard for generally applicable laws which, in view of many, was a dangerous weakening of freedom of religion.[564]

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[557] Id. at. 144.
[558] Employment Division v. Smith, 494 U.S. 872 (1990).
[559] Id. at. 890.
[560] Id. at. 891.
[561] See, amongst others: Amy Adamcyk, JOURNAL OF CHURCH AND STATE (2004).
[562] See, Kenneth Marin, Employment Division v. Smith: The Supreme Court alters the State of Free Exercise Doctrine 40 THE AMERICAN UNIVERSITY LAW REVIEW 1431 (1991), p. 1471-1472.
[563] For further references: id. at. 1475 et seq.
[564] For an assessment of the debate after *Smith*, see: Hamilton, Marci A., Employment Division v. Smith at the Supreme Court: The Justices, The Litigants, and The Doctrinal Discourse, Cardozo Law Review, Vol. 32 (2011), p. 1671- 1699; Only in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* from 1993, the Supreme Court came back to the strict scrutiny standard for generally applicable laws, 508 U.S. 520, 546 (1993). In this case, the Court held that the state cannot restrict religiously-mandated ritual slaughter of animals, regardless the purpose of the slaughter.

bb. Smith's Aftermath and the Adoption of the RFRA & RLUIPA

The protest in Smith's aftermath was heard, and Congress became active to restore the standards of the pre-Smith era. In 1993, it passed by overwhelming majorities in both House and Senate, the RFRA.[565] From then on, the government had to pass a test again for religious freedom infringements, similar to the strict scrutiny standard. According to the test, the government must demonstrate that application of the burden to the person is in furtherance of compelling governmental interest (1) and is the least restrictive means of furthering that compelling governmental interest (2).

However, after only four years with the RFRA in power, the U.S. Supreme Court in *City of Boerne v. Flores*[566] decided that the RFRA exceeded legislative power of enforcement provided in the Fourteenth Amendment and that the act was an infringement of judicative powers.[567] As a consequence, the Act was finally amended in 2003 to only apply for the federal government and its entities. This development had two significant consequences. One of them was that various states started to enact similar protections on the federal level and to adopt RFRA's in the state law. The other one was that the temporal uncertainty as to whether the RFRA can be upheld after the Court's decision in *Boerne*, led Congress to adjust the law in its own terms. Part of the respective discussions was to exclude inmate claims from RFRA. This proposed amendment by Senator Harry Reid, however, failed.[568]

Before the Supreme Court confirmed the constitutionality of RFRA in 2006, when it ruled against the government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*[569] in favor of the RFRA, Congress adapted the RFRA with a view to the concrete areas of state action that it had been given the power to regulate. These were, most importantly, burdens imposed on individual free exercise by "land use regulations" and burdens imposed on people who are

[565] Religious Freedom Restoration Act (RFRA), 42 U.S.C. Sec. 2000bb (1993).
[566] City of Boerne v. Flores 521 U.S. 507 (1997).
[567] Id. at. 512-16.
[568] See I39 CONG. REC. 26,4I3-I4 (I993). But see I39 CONG. REC. 9682 (I993) (statement of Rep. Hughes) (stating that the interests asserted by prisons would be compelling in general). See, Lawson v. Singletary, 85 F.3d 502, 509 (11th Cir. 1996) (noting that in prison free exercise cases, "the Supreme Court has long made clear that federal courts must afford substantial deference to the judgment of prison authorities," and RFRA's legislative history assumes the same deference will apply).
[569] Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal, 546 U.S. 418 (2006); Gonzales involved, like the decision in Smith, the legality of the use of an otherwise illegal substance in a religious ceremony, and it was pointed out by the Court that it is required for the government to show that there is a compelling state interest which can justify restricting the free exercise of religion.

inmates in prisons or mental institutions (institutionalized persons). The result was another Act: The Religious Land Use and Institutionalized Persons Act (RLUIPA).[570]

For the prison domain, the adoption of RLUIPA lead to an important distinction for the application of the two laws: the RLUIPA applied to inmates in state prisons, whereas the RFRA applies to inmates in federal prisons. Although RLUIPA and RFRA are two different laws, both use the same language to describe the religious free exercise protections given to prisoners.[571] Notably, in RLUIPA, Congress took care to define "religious exercise", which previous statutes had always omitted. Under RLUIPA, religious exercise is defined to include "any exercise of religion whether or not compelled by, or central to, a system of religious belief." Thus, RLUIPA protects any and all prisoners' claims to religious exercises, regardless of the importance of a the practice of a particular religion. The threshold under the RLUIPA is whether the beliefs are "sincere" and "religious", not whether they are "essential" or "central". This was previously different under the RFRA standard which defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution" and therefore came with a heavier "substantial burden" requirement. With the adoption of RLUIPA, Congress redefined "exercise of religion" also in RFRA to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Further, it set forth a rule of construction "in favor of a broad protection of religious exercise, to the maximum extent permitted."

cc. Religious Equality and Doctrinal Difficulties

Generally speaking, the equal treatment of all religions is an essential constitutional pillar in U.S constitutionalism. Already in *West Virginia State Board of Education v. Barnette*[572] from 1943, Justice Jackson pointed at the dominant American political tradition of believing in the equality of all citizens:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religions, on other matters of opinion or force citizens to confess by word or act their faith therein" [573]

[570] Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2000).
[571] In fact, prisoners can also cite cases decided under either RLUIPA or RFRA to support their claim, regardless of whether they are in federal or state prison. (See, e.g., Fowler v. Crawford, 534 F.3d 931, 938 (8th Cir. 2008) (holding that a RFRA case "dictate[d] the outcome" in the RLUIPA case before the court).
[572] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1953).
[573] Id.

As also expressed in the loud protests after *Smith v. Employment Division*[574], the conviction that minority religions must be able to exercise their religion freely is firmly rooted in U.S. constitutionalism. However, the U.S. constitutional doctrine encompasses enormously different views of equality, and it is unclear how exactly equality is to be protected doctrinally.[575]

The First Amendment is one crucial source of the right to religious equality. Under the Free Exercise Clause, the state is not permitted to restrict observance of any religious faith. The Establishment Clause makes it clear that the state is not permitted a positive religious agenda of any sort and must provide for equal opportunities for all religions.[576] However, there is disagreement about which of the competing views is most consistent with the fundamental premise of equality. The exemptionist view, most prominently identified with *Wisconsin v. Yoder*[577], holds that the failure to except unconventional religious practices from the general operation of secular legislation in effect condemns those faiths to unequal treatment. The neutralist view, most prominently identified now with *Oregon v. Smith*[578], holds that finding constitutionally compelled exemptions for religious conduct from neutral "generally applicable" law is itself an example of unequal treatment. Thus, as pointed out by Wilkinson, "general agreement on the proposition that the religion clauses prescribe equality of religious belief breaks down when it becomes difficult to determine exactly what equal treatment of religious communities means".[579]

[574] Employment Division v. Smith, 494 U.S. 872 (1990).
[575] NUSSBAUM (2008), p. 33.
[576] J. Harvie Wilkinson, *The Dimensions of American Constitutional Equality* 55 LAW AND CONTEMPORARY PROBLEMS 235 (1992), p. 236; Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion"); Edwards v. Aguillard, 482 U. S. 578, 593 (1987) ("The Establishment Clause . . . forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma"(internal quotation marks omitted)); Lynch v. Donnelly, 465 U. S. 668, 673 (1984) (noting that the Establishment Clause "forbids hostility toward any [religion]," because "such hostility would bring us into 'war with our national tradition as embodied in the First Amendmen[t]'"); "When the government acts with the ostensible and predominant purpose" of disfavoring a particular religion, "it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." McCreary County v. American Civil Liberties Union of Ky., 545 U. S. 844, 860 (2005).
[577] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[578] Employment Division v. Smith, 494 U.S. 872 (1990).
[579] Wilkinson, Law and Contemporary Problems (1992), p.238.

According to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, states are prohibited from denying any person within its territory the equal protection of the laws.[580] Generally, this means that a state must treat an individual in the same manner as others in similar conditions and circumstances. The Federal Government is bound to this premise too under the First Amendment Due Process.[581] The point of the Equal Protection Clauses is to force the state to govern impartially and to not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective.

Calabresi and Salander argue that indeed, and as a matter of original meaning, the anti-discrimination command of the 14th Amendment bans all forms of discrimination based on religion - also when standing alone.[582] What is new and unique about their argument is that they see the protection of religious equality as unrelated to the First Amendment. Other scholars, to the contrary, have argued for an equal protection approach to the Establishment- and Free Exercise Clause. The dispute underlying these opposing views again relates to the question of the fundamental goal of the First Amendment's Religion Clause: is it nondiscrimination or the protection of substantive liberty? Do they primarily require that government not engage in discrimination among religions or between religious and nonreligious ideas? Or do they primarily guarantee decisions about religious matters and religious life a zone of liberty or autonomy against state restriction, or a degree of separation from state involvement?[583]

The two approaches, nondiscrimination versus substantive liberty, overlap and sometimes produce similar results.[584] In their pure forms, however, nondiscrimination and substantive liberty will necessarily produce some divergent results in a society because the different

[580] 14th Amendment [U.S.Const]. Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

[581] Henry P. Monaghan, *First Amendment "Due Process"*, 83 HARVARD LAW REVIEW (1970).

[582] Abe Salander & Steven Calabresi, *Religion and the Equal Protection Clause* 213 NORTHWESTERN UNIVERSITY SCHOOL OF LAW SCHOLARLY COMMONS, FACULTY WORKING PAPERS 1 (2012), p. 4 et seq.

[583] These questions are raised by Berg in the introduction of his paper on religious liberty as quality, compare Thomas C. Berg, *Can Religious Liberty be Protected As Equality?*, 85 TEXAS LAW REVIEW 1 (2007).

[584] Id. at. 2.

approaches require a varying degree of involvement of the government.[585] The involvement of government means that religion is directly confronted with the variety of moral ideals that are promoted by the state. When looking at First Amendment decisions of the U.S. Supreme Court, it can be found to support both nondiscrimination and substantive autonomy.[586] Many observers see the Court's emphasis changing in the last twenty-five years from church-state separation to equal treatment between religions.[587]

There is an important area of equality doctrine for which the non-discrimination approach is absolutely necessary: indirect discrimination. In *Griggs v. Duke Power Co*.[588], the Supreme Court for the first time interpreted Title VII of the Civil Rights Act of 1964 as banning not only overt, purposeful employment discrimination but also "practices that are fair in form, but discriminatory in operation."[589] The theory of Disparate Impact Discrimination does not refer to the motive of state actions but to their actual impact. From this point of view, it has to be examined whether the facially neutral state action actually has discriminatory effects for a group or person. The sole focus on the exercise of freedom can therefore in many cases overlook the equality dimension of religious practice. State actions often have different effects on different religions because of the inherent differences between the religions, for example, some have stricter dietary requirements than others.

For a long time, it was unclear whether disparate impact statutes such as Title VII violate the Equal Protection Clause of the Constitution.[590] This question was raised explicitly by the U.S. Supreme Court in *Ricci v. DeStefano*[591] of 2009, but without finally answering it. However, the fact that the Court even raised this question was of great importance and "a complete turnabout in antidiscrimination law".[592] Although disparate impact theory is primarily about

[585] Id.
[586] In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court stated that "only those interests of the highest order and not otherwise served" can justify the government imposing a burden on religious practice (at 215). This antidiscrimination approach, however, was absent in Employment Division v. Smith, 494 U.S. 872 (1990), where the Court held that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice" are constitutionally permissible (at 233).
[587] Kenji Yoshino, *The New Equal Protection* 124 HARVARD LAW REVIEW 747 (2011).
[588] *Griggs v. Duke Power Co* 401 U.S. 424 (1971).
[589] Id. at 431.
[590] James M. DeLise, Religious Exemptions to Neutral Laws of General Applicability and the Theory of Disparate Impact Discrimination 6COLUMBIA JOURNAL OF RACE AND LAW 115 (2016), p. 117.
[591] Ricci v. DeStefano, 557 U.S. 557 (2009).
[592] Richard A. Primus, *The Future of Disparate Impact* 108 MICHIGAN LAW REVIEW 1341 (2010), p. 1344.

racial discrimination, it has doctrinally considerable similarities to exemption theory for religious persons whose ideals conflict with so-called neutral laws of general applicability.[593] Although *Sherbert, Yoder,* and RFRA do not explicitly refer to the disadvantage facing religious persons as discrimination (as in Title VII), contemporary research on the nexus between equal protection and free exercise jurisprudence confirms that an understanding of equality rooted in the disparate impact theory of discrimination forms the basis of the exemptions approach to religious free exercise.[594]

Like the theory of discrimination expounded in *Griggs*, the theory underlying the exemptions approach to religious free exercise is primarily concerned with the elimination of hierarchy among groups.[595] Instead of racial inequality, however, the exemption theory focuses upon inequalities among religious groups and the relative ability of members of these groups to engage in practices that follow from their religious convictions.[596] It is explicitly concerned with the differential treatment accorded to "powerful and influential" religious groups in the democratic process relative to "unpopular or unfamiliar" groups, theorizing that the latter are more susceptible than the former to burdens engendered by neutral laws of general applicability.[597] Exponents of the exemptions approach to free exercise do not understand this inequality or group disadvantage in terms of intentional or purposeful discrimination, but rather, in terms of insensitivity and ignorance to the demands and needs of these groups.[598] This ignorance and insensitivity are structural—usually, the result of majority-minority relations in democracies—and judicially executable exemptions purport to correct this imbalance of power by ensuring that groups otherwise marginalized by the structural inequality are given a voice.[599]

[593] Bernadette Meyler argues that there is a "distinctive similarity between the structure of free exercise and equal protection claims." Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV 275 (2006), p. 285.
[594] DeLise, Columbia Journal of Race and Law (2016), p. 133.
[595] Id. 131.
[596] Id.
[597] Id.; The normative underpinnings of the concept of religious accommodation are examined in the first chapter of Part 2.
[598] NUSSBAUM (2008) p. 116.
[599] DeLise, Columbia Journal of Race and Law (2016), p. 131.

c. Comparative Conclusion

This chapter showed that religious freedom and equality are protected differently under the constitutions in Germany and the U.S. Under the broad definition of religion in German constitutional doctrine, also minority religions, irrespective of their size, are protected. Freedom of religion in German constitutional law is importantly shaped by human dignity, the highest constitutional value. Its limitation is therefore subject to the strictest scrutiny standard. However, this comprehensive protection under the constitutional doctrine of limitations obscures that especially minority religions - despite their religion being prima facie constitutionally protected - face the risk of not being allowed to practice their religion. In other words, the secular state offers individuals freedom of belief but not the freedom to act publicly based on those beliefs.

For the U.S. context, there have been fewer studies on a Christian-dominated understanding of religion to date. What is striking, however, is that the handling of religious diversity is strongly anchored in the constitutional doctrine on religious freedom. It is, therefore, not surprising that equality is a dimension that is closely linked to the doctrine of the First Amendment Clauses. *Smith's* aftermath and the protests that led to the adoption of RFRA and RLUIPA to reinstall the *Sherbert/Yoder* line has clearly shown the relevance of a minority-friendly notion of religious equality and fairness in U.S. constitutionalism. Religious exemptions, as one kind of religious accommodation, are an important component of religious freedom doctrine and serve as a means to compensate for the existing disadvantages of minorities in the majority society.

In Germany, equality has not yet had a prominent role in the doctrine of religious freedom. The relationship between Art. 4 I, II BL and Art. 3 I, III BL is far from settled. With few exceptions, the scholarly literature covering religious freedom only sporadically discusses equality. More research on the unequal treatment of religion in the light of Art. 3 BL is needed that addresses the complicated doctrinal questions of equality which arise from the increasing religious diversity of society. Because of the increasing diversity amongst members of German society, it is not sufficient to merely enforce formal equality. Also, the protection against indirect religious discrimination is necessary for religious minorities and this requires to include a substantive equality analysis.

3. The Protection of Fundamental Rights in Prisons in Germany and the U.S.

As was shown in the chapter on the historical framework of prisons in Germany and the U.S., it is thanks to a rather new development that inmates today enjoy the protection of fundamental rights in both constitutional orders. The following section examines how religious freedom and equality are protected in the respective prison domain for inmates and what possibilities for legal protection exist.

a. Fundamental Rights in the German Prison Domain

Historically, it is not self-evident that the fundamental rights of inmates are protected. Before the important prison reforms in the 1970s, inmates were not protected under the German Basic Law. The lack of fundamental rights protection was justified with the doctrine of the special relationship of subordination between prisoners and the state (*besonderes Gewaltverhältnis* or *Sonderstatusverhältnis*).[600] This doctrine stipulated that categories of persons who were in an unusually close relationship to the state, such as prisoners, public servants, school students, and members of the armed forces, were not protected by the full range of basic rights.[601] According to the original logic of this principle, those citizens had an increased attachment to the State and thus - voluntarily or not - renounced the exercise of their fundamental rights. They were not seen as part of society, but of the state's internal sphere. Doctrinally, the general requirement of the "legal provisio" (*Gesetzesvorbehalt*)[602] did not apply internally and limitations of the rights of prisoners did not have to be justified by primary statute or secondary legislation.[603]

With the introduction of the Basic Law in 1948 and the growing importance of the rule of law (*Rechtsstaatsprinzip*), the absence of the legal proviso for limitations of the rights of inmates and other groups was under increasing critique.[604] Finally, in 1972, the FCC famously decided the missing legal basis justifying the legal limitations of prisoners violated the rule of law which

[600] The term of the "besondere Gewaltsverhältnis" was later changed to the "Sonderstatusverhältnis".
[601] LAZARUS (2004), at 38 et seq. (Comprehensively: Bleckmann, DVBI (1984).
[602] The legal provisio is protected under Art. 20 III BL (Rechtsstaatprinzip): The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
[603] Bleckmann, DVBI (1984), p. 991-996.
[604] LAZARUS (2004), at 40.

led to the adoption of the Prison Act of 1976.[605] From then on, the German constitution fully protected prisoners.[606]

However, this recognized protection of fundamental rights is difficult to guarantee under the circumstances of detention. The deprivation of freedom of movement inherent in the prison system and the specific daily routine under the control of the state necessarily stand in the way of comprehensive protection of fundamental rights. Critics, therefore, argue that the inmate must accept the restrictions on the actual possibilities of exercising fundamental rights to the extent that these are inevitable consequences of deprivation of liberty, legitimized under Art. 104 BL.[607]

The Prison Act explicitly acknowledges the limitations of Art. 2 I and II BL (right to physical integrity and to freedom of the person) and Art. 10 I (secrecy of post and telecommunications) that are caused by imprisonment.[608] However, the state of imprisonment also affects other fundamental rights of inmates. In this vein, Section 4 of the federal Prison Act, addressing the prisoner's status, stipulates that only such restrictions may be imposed on the prisoner "as are indispensable to maintain security or to avert serious disturbance of order in the penal institution".[609] But what does this mean for the protection of freedom of religion that only can get limited by conflicting constitutional law? Security and order as such are not interests of constitutional rank.[610]

The Basic Law does not explicitly regulate the conditions under which prisons should be administered or the rights that prison inmates should hold post-conviction.[611] Both are, as a result, most importantly determined by the decisions and interpretations of the FCC and lower courts.[612] According to the FCC, restrictions of freedom of religion that are indispensable for the maintenance of an orderly penal system, hence the functioning of the institution, may be

[605] BVerfGE 30, 1.
[606] LAZARUS (2004), 37 et seq.
[607] Bung/Feest, in: Feest/Lesting, StVollzG, § 4, at. 17.
[608] Section 196 Prison Act [Restriction of Basic Rights] By this Act, the basic rights under Article 2 (2) first and second sentences (right to physical integrity and to freedom of the person) and Article 10 (1) (secrecy of post and telecommunications) of the Basic Law shall be restricted.).
[609] Section 4 II Prison Act.
[610] FRÖHMCKE (2005) p. 67 et seq.
[611] LAZARUS (2004, p. 33-35.
[612] Id. at. 33.

justified.[613] Critics argue, the institution's function is closely linked to the guarantee of safe living conditions of inmates and thus the protection of the fundamental rights of all inmates. Doctrinally, the exercise of religious freedom, therefore, finds its limits where the safe and orderly detention of prisoners is called into question or where it poses serious dangers for third parties.[614] In addition, here too courts argue that it is "in the nature of things" that the practice of religion in the penal system is subject to restrictions.[615]

In prison, protection against state restrictions on the practice of religion alone is not sufficient to ensure the practice of religion by religious inmates. It is recognized that freedom of religion is not only a defense right of the individual against the state but also encompasses positive guarantees.[616] This undisputedly does not result in a positive claim of the inmates against the state to provide all infrastructure needed for the practice of religion from their perspective.[617] The exact limits of a positive right to religious freedom, however, are highly controversial. [618] This dispute is also of great importance outside the prison system (do students, for example, have a right for a prayer room on campus?), but it becomes particularly pressing under the conditions of the prison system. As seen, the forum externum in the prison system i.e. the freedom to act according to one's religious convictions is subject to considerable restrictions anyway. Additionally, unlike outside the prison system, the state is involved in almost all kinds of religious exercise inside prison so that inmates are even more at the mercy of state judgments and its discretionary power.

[613] BVerfGE 33, 1, (13); 40, 273, (283).
[614] According to the Berlin Kammergericht: „Die Ausübung der Religionsfreiheit findet dort ihre Grenze, wo sie die für den Vollzug der Freiheitsstrafen notwendige Funktion der Anstalt, die sichere und geordnete Unterbringung der ihr anvertrauten Gefangenen, in Frage stellt und mit schwerwiegenden Gefahren für Dritte verbunden ist". KG, Senat, Beschluß vom 20. Januar 2005, 5 Ws 654/04 Vollz.
[615] LG Zweibrücken, 28. August 1984, 1 Vollz 41/84 = NStZ 1985, 142; „Es liegt in der Natur der Sache, daß die den Vollzug der Freiheitsstrafe gewährleistenden Maßnahmen zugleich auch die zeitlichen und räumlichen Möglichkeiten religiöser Betätigung reduzieren".
[616] Article 4 of the Basic Law not only contains an individual right of defense which forbids the state to interfere in the highly personal sphere of the individual, but it also requires in a positive sense to secure space for the active pursuit of religious conviction and the realization of autonomous personality in ideological-religious areas, BVerfG ZfStrVo 1988, 191 = NStZ 1988, 573.
[617] „Dem steht aber entgegen, dass Art. 4 I, II GG dem Einzelnen und den religiösen Gemeinschaften grundsätzlich keinen Anspruch darauf gibt, ihrer Glaubensüberzeugung mit staatlicher Unterstützung Ausdruck zu verleihen" (OVG Berlin-Brandenburg, Urteil v. 27.5.2010, Az.: 3 B 29/98, at 40, with reference to BVerfG, Beschluss v. 16.5.1995, Rn. 35.)
[618] Müller-Monning, in: Feest, Lesting, Lindemann, Strafvollzugsgesetze, Religionsausübung, at 7 – 13. et seq.

As shown, the secular German state's interpretation of religion is influenced by Christian ideas of religion, which can disadvantage minority religions.[619] Due to the total control of the state over the prison domain, inmates are affected by this notion more likely than outside of prisons. Such "Christian" notion also informs the balancing of security concerns and the religious freedom and equality of inmates. Unequal accommodations for different religions in prisons can be justified when based on objectively identifiable differences in nature.[620] As can be seen from the example of religious items, the safety considerations that are made with respect to religious items of different religions are not always "objectively" comprehensible: why is a Muslim prayer rug sometimes not approved for security reasons, a Christian cross, on the other hand, is?[621]

The debate about Islam in Germany is strongly focused on security concerns.[622] This additionally fuels the security discourse happening in the prison domain. Paradoxically, however, the security concerns towards Islam can also be the reason for the accommodation of religion. As discussed in more detail in the second part of the thesis, the state started to accommodate chaplaincy programs for Muslims as a means to prevent radicalization of inmates and hence as a security measure.[623]

Art. 19 IV BL guarantees access to the courts: "Should any person's rights be violated by public authority, he may have recourse to the courts".[624] Art. 103 BL further defines the criteria for a fair trial and stipulates in paragraph 1 that every person is entitled to a hearing under the law.[625] These rights must also apply to inmates.[626] The Prison Act protects prisoners' right to appeal in different ways. An inmate can, among other things, submit informal complaints to

[619] See under Part 1, Chapter IV, 2.a.aa.
[620] Müller-Monning, in: Feest, Lesting, Lindemann, Strafvollzugsgesetze, Religionsausübung, at 11.
[621] See under Part 2, Chapter IV, 1.c.
[622] Nina Mühe im Gespräch mit Stefan Heinlein, „Wenn über Muslime gesprochen wird, dann als Sicherheitsproblem", 2018, available at: https://www.deutschlandfunk.de/allianz-gegen-islamfeindlichkeit-wenn-ueber-muslime.694.de.html?dram:article_id=421386 *(last accessed 30.08.2019).*
[623] Part 2, Chapter II, 1.c.
[624] BVerfGE 40, 272 (275); 49, 329 (341).
[625] Article 103 BL [Fair trial].
(1) In the courts every person shall be entitled to a hearing in accordance with law.
(2) An act may be punished only if it was defined by a law as a criminal offence before the act was committed.
(3) No person may be punished for the same act more than once under the general criminal laws.
[626] LAZARUS (2004), p. 94 et seq.

the Prison Advisory Board *(Anstaltsbeirat)*[627], to the Prison Director *(Anstaltsdirektor)*,[628] or can also submit a formal complaint about the behavior of officials *(Dienstaufsichtsbeschwerde)* to the prison authorities.[629]

These complaint mechanisms are supplemented by the right of individual complaint to a court and the right to legal remedy. Where the rights of inmates have been violated, they can ask the Prison Court *(Strafvollstreckungskammer)* for different kinds of legal actions,[630] inter alia, relief from a measure *(Anfechtungsantrag*)[631], enforcement of a measure which has been refused *(Verpflichtungsantrag)*[632], or to prevent the enforcement of repetition of a measure *(Unterlassungsantrag)*.[633] The Prison Court proceeding - the first instance of determining violations under the Prison Act - is generally conducted without an oral hearing.[634] When inmates appeal the decision of the Prison Court, they must do so in front of the Criminal Chamber of the Higher Regional Courts. The appeal underlies further requirements: the decision must contribute to the general development of prison law or to national uniformity of prison law.[635]

Despite these inmate rights enshrined in the Prison Act, there are significant difficulties in enforcing the substantial rights of inmates in court. In particular, these problems arise from the administrative discretion of prison authorities to assess prisoners' rights and institutional obstacles, namely the lack of legal assistance and information for inmates.[636] While it is widely accepted that the court had strengthened the legal status of inmates under the Prison Act, the court's recognition of discretion and evaluative leeway in prison administration is under critique.[637] Critics argue the evaluative leeway undermined the reform goals of the Prison Act

[627] Section 108 II and 164 Prison Act.
[628] Section 108 I Prison Act.
[629] Section 108 III Prison Act.
[630] LAZARUS (2004), p. 96.
[631] Section 109 I 1 and 115 (2) sentence 2 Prison Act.
[632] Section 109 I 2 Prison Act.
[633] Section 109 I 2 Prison Act.
[634] Section 115 I Prison Act; Müller-Monning, in: Feest, Lesting, Lindemann, Strafvollzugsgesetze, Religionsausübung, at 16.
[635] Section 116 Prison Act.
[636] Liora Lazarus classifies the difficulties involved in the enforcement of the substantive rights of inmates into "two mutually reinforcing categories: a) problems inherent to the legal construction of the Prison Act and its interpretation; b) institutional obstacles to substantive rights enforcements, LAZARUS (2004), p. 96.
[637] Where a legal term is included in the legal consequences of a norm, and where this term gives rise to the possibility of an administrative decision being made (e.g. "may", "can") a measure of discretion, i.e. Ermessen

and endangered the de-legalization *(Verunrechtlichung)* of the prison administration.[638] Despite the standards set by the FCC, Prison Courts and Higher Regional Courts defined "evaluative freeway" too generously and were not sufficiently rigorous in their scrutiny of the factual basis upon which decisions are made.[639]

As shown, the complaints of inmates end up before the Prison Courts *(Strafvollzugskammern),* which were introduced in 1975 as a "fundamental element of prison reform".[640] They were intended to work in close but impartial co-operation with all elements of the prison institution, demonstrate criminological and penological expertise, and provide a constructive conflict resolution forum for prisoners and prison administration.[641] However, the courts have failed to meet the high expectations of the reformers.[642] The inmates' applications to the correctional courts are successful in only very few cases. The large majority of applications fail from the outset for purely formal reasons.[643]

The many formal shortcomings of the legal complaints show that there are weaknesses in prisoners' access to legal information and assistance. Under the Prison Act, prison officials must inform prisoners of their rights and duties.[644] The Celle Higher Regional Court has ruled that officials must at least make an oral statement and give the prisoner a copy of the Prison Act.[645] Nevertheless, it has been shown that prison officers often do not meet this minimum standard and that prisoners are often poorly informed.[646] These problems are exacerbated for prisoners who do not speak German as there are no translated texts of the prison law, and often no translators are present during interviews.[647] While prisoners have the right to receive visits from their lawyers at any time, their access to legal aid depends on the likely success of

arises. Where an intermediate legal term *(unbestimmter Rechtsbegriff)* is included in the statutory conditions for administrative action, generally a measure of "evaluative leeway" arises on the part of the administrator, cf. German law, id. at. 100 -101.

[638] Ulrich Kamann, Der Beurteilungsspielraum und sein Einfluß auf die Ver-un-rechtlichung des Strafvollzugs, ZRP 474 (1994).

[639] With further references, LAZARUS (2004), p. 104.

[640] Id. at 104.

[641] Id. at. 105.

[642] With further references, id.

[643] FEEST (1997), p. 41.

[644] Section 5 Prison Act [Procedure of Admission] (2) The prisoner shall be informed of his rights and obligations.

[645] OLG Celle (1987) NStZ 44, 107.

[646] LAZARUS (2004), p. 107.

[647] Id. at. 107.

their case.[648] This often affects the detainee's disadvantage in asserting a legal claim. In addition, it is commonly acknowledged that many German lawyers are uninterested in prison law work due to the low fees involved.[649] In summary, although the Prison Act provides for a variety of legal protection options, these are subject to considerable enforcement obstacles.

b. Fundamental Rights in the U.S. Prison Domain

Before the 1960s, prisoners were a legal caste whose status was poignantly captured in the expression "slaves of the state".[650] Like slaves, prisoners had no constitutional rights and no forum for presenting their grievances. But unlike slaves, prisoners were almost invisible in only exceptionally captured public attention. Until the Prisoners' Rights Movement contributed to the redefinition of the status of inmates, the federal adhered to a "hands-off" attitude toward prison cases out of concern for federalism and separation of powers and fear that judicial review of administrative decisions would undermine prison security and discipline.[651] A prisoner who complained about arbitrary, corrupt, brutal, or illegal treatment, as pointed out by Jacobs, "did so at his peril".[652]

Today, it is well established that also prisoners are protected under the U.S. Constitution and do not forfeit all constitutional protections because of their confinement.[653] However, the specific standards for determining violations of religious freedom and equality differ under the Free Exercise Clause, Establishment Clause, RFRA/ RLUIPA, and the Equal Protection Clauses, and they have evolved.

In 1987, the Supreme Court articulated for the first time a clear standard of review for inmate religious claims, extending considerable deference to correctional administrators. In *Turner v. Safley*,[654] the U.S. Supreme Court articulated the standard for reviewing a prison regulation challenged on constitutional grounds. Accordingly, it held: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to

[648] Section 114 et seq. Civil Procedure Code; Section 120 (2) Prison Act (mutatis mutandis Application of Other Provisions).
[649] LAZARUS (2004), p. 109 (with further references).
[650] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).
[651] Jacobs, CRIME AND JUSTICE (1980), p. 433.
[652] Id. at. 433.
[653] Bell v. Wolfish, 441 U.S. 520 (1979).
[654] Turner v. Safley, 482 U.S. 78 (1987)

legitimate penological interests."[655] While the Supreme Court has noted in *Turner* that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[656] it nevertheless acknowledged that "[s]ubjecting the day to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[657] This means, in the prison context, a government regulation is judged by a less stringent test than that ordinarily applied to alleged infringements of fundamental constitutional rights. The approach to limit the standard to rational-basis scrutiny is noteworthy, given that in other First Amendment cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review.[658]

For cases under the Free Exercise Clause, it was established that - even though inmates retained the right to the free exercise of religion[659] - religion is subject to reasonable restrictions and limitations imposed by prison officials.[660] In the same year of *Turner*, the Court applied the Turner test in the prison landmark case *O'Lone v. Estate of Shabazz* and established that prisons would have great deference in formulating policies to accommodate religious prisoners' requests.[661] *O'Lone* involved the constitutionality of prison regulations which made impossible for two Muslim inmates to attend to a religious ceremony.[662] Ahmad Uthman Shabazz and Sadr-Ud-Din Nafis Mateen were inmates in New Jersey's Leesburg State Prison. The prison classified inmates depending on the security risk each posed. Due to their classification, Shabazz and Mateen were assigned to a prison job outside of the main prison

[655] Id. at. 85.
[656] Id at. 87.
[657] Id at. 89.
[658] See, e.g., McCreary County v. American Civil Liberties Union of Ky., 545 U. S. 844 (2005) at 860–863; Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U. S. 440, (1969), 449–452; see also Colorado Christian Univ. v. Weaver, 534 F. 3d 1245, 1266 (CA10 2008) (McConnell, J.) (noting that, under Supreme Court precedent, laws "involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause", at 6.).
[659] Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); Levitan v. Ashcroft, 281 F.3d 1313, 1317 (D.C.Cir.2002).
[660] Bell v. Wolfish, 441 U.S. 520 (1979), at 549-50.
[661] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).
[662] Overview of the facts: "O'lone v. Estate Of Shabazz." Oyez, www.oyez.org/cases/1986/85-1722. *(last accessed 29 Aug. 2019.)*

building and were not allowed to return to the main prison building during the workday.[663] Because of these restrictions, neither men, both of whom were practicing Muslims, were able to attend Jumu'ah, a weekly religious service held on Fridays.[664]

Chief Justice William H. Rehnquist delivered the opinion for the 5-4 majority. The Court held that while prisoners do not forfeit their constitutional rights after being convicted of a crime, being incarcerated does place necessary limitations on those rights.[665] Because of the particular interests and dangers involved in prisons and the prison administration's everyday experience with the operation of a prison, courts should largely defer to prison administrators on questions of policy or regulation.[666] Therefore, even when an inmate alleges that a prison policy infringes on his or her constitutional rights, the policy is valid as long as it is reasonably related to a legitimate penological objective, as the policy in this case was. The Court also held that a prison is not required to adopt an alternative policy that may have "undesirable results," as determined by the prison.[667]

Justice William J. Brennan, Jr. wrote a dissent in which he argued that a prison must demonstrate that the restrictions imposed on inmates were necessary to further an important governmental interest.[668] He also argued that there should be a varying level of scrutiny depending on the nature of the right being asserted, rather than the general standard of deference in the majority opinion.[669] Because the prison policy in the case in question acts as a complete ban that prevents some Muslim prisoners from attending Jumu'ah, an obligatory and important religious ceremony, the prison should be required to show the policy was necessary and no less extreme measures could serve the same purpose.[670]

However, the O'Lone Standard in force today does not provide for this differentiation of varying levels of scrutiny. According to the O'Lone Standard, the factors relevant to a

[663] Id.
[664] Id.
[665] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).
[666] Id. at. 349.
[667] Id. at. 353.
[668] Id. at. 354 (Justice Brennan dissenting). (quoting from: www.oyez.org/cases/1986/85-1722 *(last accessed 29 Aug. 2019.)*
[669] Id at. 356 (Justice Brennan dissenting).
[670] Id at. 359 (Justice Brennan dissenting).

determination of the reasonableness of a prison regulation that impacts an inmate's religious practices are (1) whether the regulation has a logical connection to the legitimate government interest used to justify it; (2) whether the inmate has alternate means of exercising that right; and (3) the impact that the accommodation of Plaintiff's asserted right would have on other inmates, prison personnel, and the allocation of prison resources generally.[671]

To make an Establishment Clause claim, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.[672] Injury may be established in two ways. First, a plaintiff may have standing as a taxpayer.[673] Second, the plaintiff must establish an injury of "direct and unwelcome personal contact with the alleged establishment of religion."[674] Prisoners may establish an injury if they "allege they altered their behavior and had direct, offensive, and alienating contact with" a government-funded religious program.[675] Establishment Clause standards differ from Free Exercise Clause standards in important respects as Several courts have held that the Turner/O'Lone reasonable relationship standard does not govern Establishment Clause cases.

The Turner Standard still today applies for Free Exercise rights.[676] For a prisoner to prove a constitutional violation based on the free exercise of religion, he must show that a prison regulation substantially burdened his sincerely held religious beliefs.[677] If the plaintiff makes that showing, the prison authorities may identify legitimate penological interests which justify the impinging conduct. The burden then shifts back to the plaintiff to show that the articulated concerns were irrational. To evaluate reasonableness, the first Court examines whether the prison policy is rationally connected to a legitimate governmental interest advanced as its justification.[678] These may include deterring crime, rehabilitating prisoners, and ensuring the internal security of the correctional facility.[679] Second, the Court examines whether

[671] Id at. 350-52.
[672] Hein v. Freedom From Religion Found., Inc., 551 U.S. 127 S.Ct. 2553, 2562, 168 L.Ed.2d 424 (2007)
[673] Flast v. Cohen, 392 U.S. 83, 105-06, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).
[674] ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1029-30 (8th Cir. 2004).
[675] Patel v. U.S. Bureau of Prisons 515 F.3d (8th Cir. 2008).
[676] Beerheide v. Suthers, 286 F.3d 1179, 1184 (10th Cir.2002) (citing Turner v. Safley, 482 U.S. 78, 89 (1987).
[677] Nonetheless, federal appellate courts interpreting O'Lone are divided as to whether the substantial burden requirement applies in prisoner free exercise cases. See Ford v. McGinnis, 352 F.3d 582, 592 (2d Cir. 2003) ("[T]he Circuits apparently are split over whether prisoners must show a substantial burden on their religious exercise in order to maintain free exercise claims.").
[678] Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir.2001).
[679] See Pell v. Procunier, 417 U.S. 817, 822–23, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501–02 (1974) (finding

alternative means of exercising the right are available notwithstanding the policy or regulation. Thirdly, the Court examines what effect accommodating the exercise of the right would have on guards, other prisoners, and prison resources generally; and fourth, the Court examines whether ready, easy-to-implement alternatives would accommodate the prisoner's rights.

RFRA (and RLUIPA) supplement and expand First Amendment free exercise protection.[680] This is because it broadens the definition of religion[681] and heightens the review standard to strict scrutiny. To establish a prima facie RFRA claim, a prisoner must show that the federal government substantially burdened the prisoner's sincere exercise of religion.[682] In case prisoners allege these elements of a claim under the Free Exercise Clause in any circuit that requires a "substantial burden", he or she has also stated a claim under RFRA. Hence, the prisoner's complaint which contains facts demonstrating these elements has established a prima facie violation of both RFRA *and* the Free Exercise Clause in a majority of America's federal courts.[683] The burden then shifts to the defendants to show that application of the regulation (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest.[684] In contrast, under the First Amendment, defendants must only demonstrate that the regulation is reasonably related to legitimate penological interests.[685] Thus, the religious freedom of inmates has been considerably strengthened under RFRA/RLUIPA, although there are sometimes problems with the application. As shown by Brown, courts regularly create uncertainty when dealing with

deterrence of crime, rehabilitation of prisoners, and internal security within a correctional facility are legitimate prison goals); Procunier v. Martinez, 416 U.S. 396, 412, 94 S. Ct. 1800, 1810–11, 40 L. Ed. 2d 224, 239 (1974), (finding preservation of internal order and discipline, maintenance of institutional security against escape or unauthorized entry, and rehabilitation of prisoners are justifiable interests of the government overruled on other grounds by Thornburgh v. Abbott, 490 U.S. 401, 413–14, 109 S. Ct. 1874, 1881–82, 104 L. Ed. 2d 459, 473 (1989).

[680] However, the Tenth Circuit uses the same "substantial burden" test to evaluate RFRA and First Amendment free exercise prisoner claims. Wares, 524 F.Supp.2d at 1320, n. 9. A "substantial burden" is one that (1) significantly inhibits or constrains plaintiff's religious conduct or expression, (2) meaningfully curtails plaintiff's ability to express adherence to his faith, or (3) denies plaintiff reasonable opportunity to engage in fundamental religious activities. Id. at 1320. If plaintiff fails the "substantial burden" test, the inquiry ends.

[681] In Williams, the court stated that "it matters not whether the inmate's religious belief is shared by ten or tens of millions. All that matters is whether the inmate is sincere in his or her own views." Williams v. Bitner, 359 F.Supp.2d 370, 376 (M.D.Pa.2005) aff'd, 455 F.3d 186 (3d Cir.2006).

[682] Kikumura v. Hurley, 242 F.3d 950 (10th Cir.2001), at 960.

[683] Sarah E. Ricks & Evelyn M. Tenenbaum, Current Issues in Constitutional Litigation: A Context and Practice Casebook (Carolina Academic Press. 2015), p. 631-33.

[684] Id. at 961–62.

[685] Echtinaw v. Lappin, WL 604131 – Dist. Court, D. Kansas 2009.

prisoners alleging a violation of the right to free exercise and ignore the potential applicability of RFRA.[686]

A significant Supreme Court case interpreting the RLUIPA, *Holt v. Hobbs*, was decided in 2015. In *Holt*, the Court affirmed that the strict scrutiny analysis required by the statute is "exceptionally demanding" and that the protection it affords is "expansive".[687] The U.S. filed a brief in support of the petitioner in Holt, explaining the proper standard for analyzing RLUIPA claims.[688] The petitioner in Holt was a Muslim who challenged the Arkansas Department of Corrections (ADOC) grooming policy, which prohibited beards and provided no exceptions for requests on religions.[689] The Supreme Court found that the grooming policy violated RLUIPA because the ADOC failed to prove that prohibiting beards was the least restrictive means to further its interests in (1) preventing prisoners from hiding contraband and (2) quickly and reliably identifying prisoners.[690] The Court found that there were less restrictive means to further these interests. For example, the ADOC could search beards to limit contraband and take pictures of prisoners with and without beards to enable speedy identification.[691] Furthermore, the ADOC did not show why it must take a different course from the many other correctional facilities around the country that permit the plaintiff's requested beard exception.[692] Holt makes clear that courts should not accept prison administrators' broad statements about governmental interests as a basis for denying religious accommodations.[693]

The Equal Protection Clause mandates that prison officials cannot discriminate among different religions.[694] However, in evaluating distinctions between religious groups, they are usually also addressed under a „reasonableness standard". Under these rules, courts have usually sustained differences in the availability of religious personnel and in facilities or budgets provided to different religious groups. With regard to these equality requirements, which on the one hand stipulate that in principle all inmates are protected in their freedom of

[686] Brown, Ohio Northern University Law Review, (2014), p. 51 et seq.
[687] Holt v. Hobbs 8135 S. Ct. 854, 860, 864 (2015).
[688] The background of the case is explained by the U.S. Department of Justice (Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010 – 2016), 2016, p. 10-11.
[689] Id. At 860-61.
[690] Id. at. 863-65.
[691] Id.
[692] Id. at. 865-67.
[693] Id. at. 863-64.
[694] Cruz v. Beto, 405 U.S. 319, 321-22, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (per curiam).

religion, and on the other hand enable unequal treatment, two areas of conflict arise in particular. First, under which circumstances the concrete offers for different religions must be the same (for example, must all religions have the same time frame available for their religious practice, even if the requirements for prayer differ from religion to religion). Second, as to how specifically the offer must respond to the needs of the inmates (i.e. is it sufficient that there is an offer for all members of one faith or must there be specific services for concrete denominations). To state a valid equal protection claim, a prisoner must show: (1) that he has been treated differently from other "similarly situated" inmates and (2) that this discriminatory treatment is based upon a constitutionally impermissible basis, such as religion.[695] Additionally, a prisoner must demonstrate that the defendants were motivated by a discriminatory intent or purpose.[696]

Legal protection can be claimed by inmates in different ways. The U.S. Constitution guarantees prisoners the right of meaningful access to courts, and prison officials may not retaliate against prisoners who exercise their right of access. In *Bounds v. Smith*, the Supreme Court held that the right of access imposes an affirmative duty on prison officials to assist inmates in preparing and filing legal papers, either by establishing an adequate law library or by providing adequate assistance from persons trained in the law.[697] However, prison officials are not required to provide both, as long as access is "meaningful."[698] In order to successfully allege a constitutional deprivation, most courts require prisoners to demonstrate some actual injury resulting from a denial of access.[699]

The Prison Litigation Reform Act (PLRA) requires that prisoners exhaust available administrative remedies before bringing a federal action concerning prison conditions.[700] This means that a prisoner must "complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in

[695] Jones v. Ray, 279 F.3d 944, 946-47 (11th Cir. 2001) (per curiam).
[696] Parks v. City of Warner Robins, 43 F.3d 609, 616 (11th Cir. 1995) (requiring "proof of discriminatory intent or purpose" to show an Equal Protection Clause violation); Elston v. Talladeqa Cty. Bd. of Educ, 997 F.2d 1394, 1406 (11th Cir. 1993) (requiring a plaintiff to demonstrate that the challenged action was motivated by an intent to discriminate in order to establish an equal protection violation).
[697] Bounds v. Smith, 430 U.S. 817 (1977), at. 821-833.
[698] Id. at. 821-833.
[699] Id.
[700] Griffin v. Arpaio, 557 F.3d 1117, (9th Cir. 2009), at 1119.

federal court."[701] The BOP has a three-part administrative program which is designed to address inmate concerns regarding any aspect of confinement. The procedure is codified in 28 C.F.R. §§ 542.10–542.19. The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement. It applies to all inmates in institutions operated by the Bureau of Prisons.

In theory, the less stringent "rational relationship to a legitimate penological interest" test could still apply to a prisoner's religious freedom lawsuit if they fail to raise an explicit claim under either the RFRA (in the case of federal prisoners) or the RLUIPA (in the case of state prisoners). In such cases, prisoners might file a general First Amendment federal civil rights lawsuit under 42 U.S.C. Sec. 1983 or a direct constitutional claim, under the First Amendment and Bivens v. Six Unknown Federal Narcotics Agents[702], against individual federal correctional officials, while failing to rely on either of the statutes. Hence, Bivens actions generally refer to actions for damages when there has been a violation of the U.S. Constitution by federal officers acting in their capacity as federal authority.[703] Accordingly, inmate's Bivens claims only extend to the individual Bureau Defendants and not the BOP itself. The statutory claims and claims for injunctive relief, however, still apply to the BOP.

At least one federal appeals court, however, has ruled that in a pro se lawsuit filed by a prisoner over denial of access to a controversial religious text, the trial court should have, on its own, considered whether the prisoner had a claim under the RLUIPA, even though the prisoner did not refer to the statute in his complaint.[704] The appeals court noted that complaints filed by prisoners who were acting as their own attorneys at the time are to be "liberally" construed and that the courts should "apply the relevant law, regardless of whether the pro se litigant has identified it by name."[705]

[701] Marella v. Terhune, 568 F.3d 1024, (9th Cir. 2009), at 1027.
[702] Bivens v. Six Unknown Federal Narcotics Agents, 301, 403 U.S. 388 (1971).
[703] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001) ("The prisoner may not bring a Bivens claim against the officer's employer, the United States, or the BOP.").
[704] Carlos Antonio De Bourbon-Galdian, Quimbanda - a Religious Handbook of Afro-Brazilian Spiritualism for the Incarcerated, American Candomble Church, p.202.
[705] Smith v. Johnson, No. 03-2014, 2006 U.S. App. Lexis 27178 (3rd Cir.).

c. Comparative Conclusion

In both the German and U.S. prison domain, the legal status of inmates has been strengthened over the past decades. In Germany, the end of the *besondere Gewaltverhältnis* has been crucial for the improvement of the legal status of inmates. Since then it has been recognized that inmates are also protected under constitutional law. Nevertheless, the special circumstances of detention require that inmates have to accept far-reaching restrictions on their freedoms. In some cases, these are declared to be self-evident from the conditions of detention. The balancing of security and order considerations with the religious freedom of the inmates, often for the protection of third parties, permits restrictions.

In the U.S., religious freedom and equality have been strengthened in particular by RFRA and RLUIPA. Previously, the reasonableness standard allowed for more far-reaching restrictions on inmates' rights. However, the fact that the circumstances of detention entail restrictions on the freedom to practice religion and other freedoms is no different in the U.S. penal system than in Germany.

The legal protection system in Germany is firmly anchored in the Prison Act but is subject to serious enforcement obstacles. First of all, there are no positive rights to legal protection, but the relevant norms are subject to administrative leeway. In addition, legal protection is made more difficult by the common lack of legal advice and the lack of legal expertise provided to inmates. Against the background of the high numbers of case law coming from the U.S. prison domain, especially under RFRA und RLUIPA, there are better opportunities for legal protection in the U.S. than in Germany. Importantly, not only the legal framework is relevant for the legal protection of inmates. The relevant provisions are embedded into a culture in civil society and lawyers that pay attention to prisoners' rights.

Part 2: The Accommodation of Religious Needs and Practices in Prisons in Germany and the U.S.: An Analysis

This part is divided into four chapters. The first chapter discusses religious accommodation from a theoretical perspective and explains the normative vision of this thesis (I). The three chapters to follow are about the different religious needs and practices of inmates: chaplaincy in prisons (II), religious diet in prisons (III), and the use and possession of religious objects and literature in prisons (III).

I. Religious Accommodation: Theoretical Considerations and Normative Vision

The chapter explains the concept of religious accommodation.[706] The theoretical considerations (1), which include a typological classification of the religious needs and practices examined in the following three chapters, prepare for the explanation of the normative vision guiding the further analysis (2).

1. Theoretical Considerations to the Concept of Religious Accommodation

As already mentioned elsewhere in this thesis, the relationship between the state, religion, and law is controversial.[707] Less disputed is that the recognition of the religious needs and practices of individuals and communities requires the law.[708] This applies both to instances of jurisprudence and to instances of legal practice.[709] Reuter has elaborated on the mechanism of the *Verrechtlichung* of religion.[710] She shows that the law acts as a regulating and performative authority between state and religion.[711] Here, from a legal as well as religious perspective, law becomes an instrument of recognition in order to assert or fight for one's own position.[712] As will be explained in more detail below in connection with the concept of

[706] The concept of religious accommodation is also discussed in the first part of this thesis when the constitutional doctrine of religious freedom and equality in German and U.S law are discussed and compared. However, there, the examination foremost concerns how the concept is applied in U.S. Constitutionalism (cf. Part 1, chapter IV.2.b).
[707] See most importantly, Part 1, Chapter III, 1.a.
[708] JAHN, Götter hinter Gittern, Die Religionsfreiheit im Strafvollzug der Bundesrepublik Deutschland 2017, p. 379 et seq.
[709] Id. at. 379.
[710] Astrid Reuter, Religion in der verrechtlichten Gesellschaft : Rechtskonflikte und öffentliche Kontroversen um Religion als Grenzarbeiten am religiösen Feld (Vandenhoeck & Ruprecht 2014).
[711] Id. at. 292 - 304.
[712] JAHN, Götter hinter Gittern, Die Religionsfreiheit im Strafvollzug der Bundesrepublik Deutschland 2017, p. 380.

religious accommodation, this thesis follows the assumption that law is essential to strengthen the religious freedom and equality of religious minorities.

Nevertheless, this thesis recognizes the potential of religious freedom to be detrimental to religious minorities. Critical secularism scholarship has shown in various places that the law has the potential not to extend the freedom of religion of especially religious minorities, but rather to restrict it.[713] An example of the discriminating potential of the law are decisions of the European Court of Human Rights which contain a Christian bias by allowing Christian symbols but prohibiting Muslim symbols.[714] Furthermore, religious minorities are often considered as a threat to state security by the secular Western state and order, which can also lead to discrimination of religious minorities.[715] Consequently, the law offers the potential for both: to discriminate against religious minorities and to be "a weapon of the weak".

The concept of religious accommodation, originating from the Anglo-American legal tradition, pursues the aim to allow religious minorities to follow their religion in the environment they live in, despite the fact it is majoritarian made;[716] hence, it tries to compensate for the disadvantages caused by the majoritarian made law and customs. The concept is based on considerations of equality and justice between and amongst members of groups, both pivotal values in a legitimate, democratic order.[717] In the literature, the term religious accommodation is used for different scenarios.[718] It refers to changes in existing policies or

[713] Mahmood & Danchin, THE SOUTH ATLANTIC QUARTERLY (2014), p. 154; also see Part 1, Chapter III, 1.a.

[714] Moyn observes, "Already before 9/11 the European Court...treated Islam as a second-class religion not entitled to the same sort of consideration as the Christian faith. Since then, it has issued a series of decisions that grant European states wide latitude to ban Muslim symbols." Samuel Moyne, *From Communist to Muslim: European Human Rights, the Cold War, and Religious Liberty* 113 SOUTH ATLANTIC QUARTERLY 63 (2014), p. 65.

[715] Elsadig Elsheikh, Basima Sisemore, and Natalia Ramirez Lee, "Legalizing Othering: the United States of Islamophobia," (Berkeley, CA: Haas Institute for a Fair and Inclusive Society, University of California, 2017). In Germany, the headscarf controversy is a telling example: even in the 2015 ruling of the FCC on the headscarf ban for teachers, where the court calls general bans unconstitutional, the headscarf is still considered as a potential threat to the peace at school, BVerfGE 138, 296 (headscarf II).

[716] The concept of religious accommodation is embedded in the larger theory of reasonable accommodation. It is not only a matter of compensating for the structural disadvantages arising for religious persons, but also for disabled people and others. Hence, accommodations cannot only be religious, but also physical or academic etc.

[717] Mira Bachvarova, *Multicultural accommodation and the ideal of non-domination* 17 CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 652 (2014), p. 653.

[718] Robert Wintemute, *Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others*, 77 THE MODERN LAW REVIEW 223 (2014), p. 228-230; By some legal theorists, the concept of accommodation is not understood as an overarching concept but is distinguished from other forms of legal consideration of religion. See, e.g., Ayelet Schachar Ran Hirschl, *The Constitutional Boundaries of Religious Accommodation in* CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL (Michel Rosenfeld Susanna Mancini ed. 2014). They distinguish between "recognition, accommodation, and exemption" (p. 175) without further explaining the difference. Laborde,

elements of existing policies that address their differential effects on cultural and religious minorities. These can include exemptions from laws and regulations[719], recognition of traditional or religious law[720], or formal measures to enable participation on par with the majority.[721] In this thesis, the term is defined broadly so that it covers all different forms of the consideration of religious needs and practices of minorities in the legal and structural framework.

The concept of religious accommodation deals with the boundaries of cultural opposites which have different effects on the majority and cultural minorities. For Will Kymlicka and other liberal theorists of multiculturalism, the state with its dominant culture, creates disadvantages for minorities.[722] He argues, in culturally diverse societies, one can easily find patterns of state support for some cultural groups over others. Kymlicka and others have shown this based on language as a paradigmatic marker of culture: the state cannot avoid establishing one language for public schooling and other state services.[723] Importantly, these scholars have pointed out that linguistic and other advantages given to the majority also have symbolic meaning.[724] If, through its measures, the State symbolically recognizes certain groups, for example by declaring a language to be the official language or by taking into account certain holidays during the working week, these languages or holidays become the norm. This results in a hierarchy which shows that some groups are more valued than others.[725]

Also shown and widely discussed by liberal multiculturalists is the fact that, in addition to the state preference for majority culture, state laws may place constraints on some cultural groups over others. Clothing regulations are a prominent example here. The ban of religious dress in the judiciary in Germany, for example, burdens Muslim women wearing a headscarf

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considers exemption as a category of its own, see Cécile Laborde, *Religion and the Law: the Disaggregation Approach*, 34 LAW AND PHILOSOPHY 581 (2015), p. 585.

[719] For example, the exemption for Sikhs from motorcycle helmet laws or exemptions from animal slaughter regulations for kosher or halal meats etc.

[720] For example, family law arbitration or the recognition of religious polygamous marriages etc.

[721] For example, multilingual services, or special representation, or provisions to recognize various religious holidays.

[722] KYMLICKA (1995).

[723] Alan Patten, Will Kymlicka, *Language Rights and Political Theory* 23 ANNUAL REVIEW OF APPLIED LINGUISTICS 3 (2003).

[724] KYMLICKA (1995) p. 111.

[725] Song, Sarah, "Multiculturalism", The Stanford Encyclopedia of Philosophy (Spring 2017 Edition), Edward N. Zalta (ed.) https://plato.stanford.edu/entries/multiculturalism/

who pursue a career as state prosecutor or as a judge.[726] The allegedly neutral ban has very different effects on people in their differences and indirectly discriminates Muslim women and believers of other religions with a visible religious dress. The distinction between "intrinsic-" and "extrinsic burden" helps to better understand the disadvantaging mechanisms for minorities within the majority society.[727] An intrinsic burden for believers is that their religion may command to dress in specific ways. However, religion does not command that believers refrain from going to work. The extrinsic burden - not being able to work - arises from the intersection of the demands of religion and the demands of the state, not from the dictates of religion alone. Individuals must bear intrinsic burdens of the dictates of one's faiths themselves, such as prayer, worship, and fasting. When it comes to extrinsic burdens, however, liberal multiculturalists argue that justice requires assisting cultural minorities who bear the burdens of these unchosen disadvantages.[728] In this vein, Muslim women wearing headscarves or Sikhs with a turban who wanted to work as judges or state prosecutors could, for example, be given permission to work with headgear compatible with judge's or prosecutor's gowns.

Recently, much attention has been attracted by cases in which the demand for religious consideration calls into question the fundamental value of freedom in a society, i.e. claims that call into question the achievements of democratic societal progress. Examples for these "conscience wars" are the claims for permitting polygamy for religious minorities questioning women's rights, the claims of a Catholic baker who refuses to provide a wedding cake for a same-sex couple, questioning LGBTQI rights[729], and the much-noticed case *Hobby Lobby v. Burwell*[730] in which the for-profit organization managed to get an exemption for religious reasons from the Affordable Health Care Act (often referred to as *Obamacare*) by invoking religious reasons.[731] However, the religious accommodation claims analyzed and compared in

[726] A case of a legal trainee who was asked to take off her headscarf during her clerkship at the court is currently pending before the FCC. So far, the court has rejected the application for interim relief. The decision on the main action is expected this year, BVerfG, Beschluss der 1. Kammer des Zweiten Senats vom 27. Juni 2017 - 2 BvR 1333/17 - Rn. (1-55).

[727] Peter Jones, *Bearing the Consequences of Belief* 2THE JOURNAL OF POLITICAL PHILOSOPHY 24 (1994), p. 24-43.

[728] Song, Sarah, "Multiculturalism", The Stanford Encyclopedia of Philosophy (Spring 2017 Edition), Edward N. Zalta (ed.). https://plato.stanford.edu/entries/multiculturalism/

[729] Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. __(2018).

[730] Burwell v. Hobby Lobby, 573 U.S. __(2014).

[731] Doctrinally noteworthy in the latter two examples is the paradigm shift from majority religions to minority religions; Christians refer to the legal protection mechanisms created for minorities to compensate for their disadvantages, Eva Brems, *Objections to Antidiscrimination in the Name of Conscience or Religion*, *in* THE CONSCIENCE

this thesis are of a different nature. The needs and practices of religious inmates potentially accommodated in German and U.S. prisons do not give rise to any fundamental constitutional concerns in that they would "contradict the very essentials of the constitutional order".[732] In fact, the German and U.S. legislator protect the rights of all religious inmates in prison to meet with a religious advisor or to attend religious services. Also, all inmates have a right to follow a religious diet in prison. In principle, the right of inmates to possess and use religious objects and literature is protected. Thus, the religious needs and practices chosen for the comparison in this thesis are not questioned to be compatible with the order of the liberal democratic state. Instead, their accommodation raises questions about the lawful reasons used for the limitation of the inmate's religious freedom and equality rights. And it concerns the structural preconditions for the accommodation of the needs and practices of minorities in both countries.

Dealing with religious minorities represents a significant challenge in the modern secular democratic state. In both Germany and the U.S., social tensions are on the rise, and a rhetoric of exclusion is becoming more visible. The question of how to deal with the changing socio-religious demography of society has become a question of division. The mutual recognition of believers of different religions through the category of "religion" was shown to be widespread in the U.S. in the first part of this thesis.[733] The anti-Islam agenda under current President Donald Trump, which ties in with the post 9/11 politics under former President George W. Bush, calls this generic concept of religion into question. Hatred is spreading and attacks on religious minorities seem to be increasing. In Germany, too, the question of how to deal with religious minorities, especially the growing Muslim community, is timely. Here, too, liberal forces that are committed to a diverse Germany are opposed to conservative forces that are in favor of a homogeneous Germany and the preservation of the "Leitkultur".[734]

WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY (Michel Rosenfeld & Susanna Mancini eds., 2018).

[732] Siegel suggests that the accommodations should be based on whether harm for third parties arises in the process: Nejaime Douglas, Reva Siegel, *Conscience wars: complicity-based conscience claims in religion and politics*, 124 YALE LAW JOURNAL 2552 (2015).

[733] See most importantly, Part 1, chapter IV,2.b.bb.

[734] See Part 1, chapter III.1.a. where the textual meaning of religious diversity is discussed.

In prisons, the state has a special responsibility to resolve religious conflicts. Under the special circumstances of confinement, which still partly confronts the inmates as a total institution, the "intrinsic burdens"[735] of a religion become a means of exercising freedom.[736] Inmates cannot exercise their religion without the support or approval of the state. They cannot escape to the private sphere in order to exercise religion. Not all religions have the same demands; for example, only some have demanding dietary requirements or require inmates to pray several times a day. This contributes to the relevance of equality questions and it makes awareness of the needs and practices of religious minorities necessary. General bans or permissions, therefore, likely put different weight on different inmates and indirectly discriminate some religions.[737]

All of the three religious needs and practices analyzed and compared in the following, deal on some level with the limits of the financial and organizational expenditure of the state when accommodating religion. The question is either what additional financial costs can be expected from the state to be spent to accommodate religion (for example, when it comes to the accommodation of kosher and halal food in prison) or what additional structural effort can be expected from the state to guarantee religious freedom and equality (for example, finding suitable staff, changing kitchen facilities so that kosher and non-kosher food does not mix, etc., and increasing security controls).

Grounds for refusal are either linked to the public interest or the legal status of the inmate. In all cases, the state must keep the prison safe. Security interests involve, most importantly, the right of third parties who are potentially endangered by the religious practice of fellow inmates (for example, when inmates use a religious object that may get used as a weapon) or the orderly functioning of the institution (for example, when religious books can potentially get used to hiding contraband). Grounds for refusal linked to the legal position of the inmate differ in Germany and the U.S. In the U.S., the sincerity of the inmate's beliefs – a requirement under RFRA - is often questioned by courts. In Germany, religious accommodation is sometimes rejected on the grounds that the practice/diet/object is not part of the applicant's

[735] Jones, The Journal of Political Philospophy (1994).
[736] Also see Part I, chapter IV, 3.a. for the distinction between forum internum and forum externum and how it plays out in the prison domain.
[737] The recognition of indirect discrimination in religious constitutional law is discussed in detail in the first part and compared between Germany and the U.S.: part 1, chapter IV, 2.a.bb & 2.b.cc.

religion.[738] For the equality-based claims, the difficulty for courts of both legal orders is to decide whether different effects of norms on different religions may be justified. Under which circumstances, for example, is it justified to accommodate dietary laws that take into account the requirements of some religions but not of others?

According to the guidelines of the BOP, religious accommodations must be made for many different religions. The BOP operates with guidelines and lists for different religious needs and practices. These set a certain standard by ensuring that at least some religious objects, writings, religious menus, or activities are accommodated for each religion. In Germany, religious needs and practices of religious minorities have not yet been structurally anchored in general prison administration; their accommodation depends largely on the authorities of each prison. As it is clear from the complexity of reasons and interests, there is no uniform outcome of the required balancing processes in cases dealing with the accommodation of religion. As Grimm writes: "Sometimes freedom of religion will prevail; other times the good protected by the general law will prevail."[739] Therefore, also a typology of the different claims cannot determine the outcome in these cases. But a typology of the claims may be helpful for a better analytical understanding and might help to get "the balance correct".[740] The first relevant distinction for the typology is that claims of inmates are either freedom-centered or equality-centered.[741] This distinction does not mean that both types are mutually exclusive, only that either the principle of liberty or the principle of equality is emphasized.[742] Based on different types of religious freedom and equality claims, Grimm has created a helpful typology which shows how different claims may lead to different accommodations.[743] This typology is used for a classification of the three religious needs and practices analyzed and compared in this thesis.

[738] E.g. the prayer rug was questioned by some prisons to be necessary for the religious practice of Muslim inmates (reported by 8.33% of the prisons surveyed in this research project); The Highest Regional Court in Berlin questioned the religious nature of joss sticks for a Buddhist inmate: KG Berlin, 10. November 2006, 5 Ws 597/06 Vollz. (see Chapter IV of this part).
[739] Dieter Grimm, *Conflicts between general law and religious norms* 30 CARDOZO LAW REVIEW 2369 (2009), p. 2378.
[740] Id. at. 2376.
[741] Grimm did not develop his framework with a view to the prison domain. However, it equally applies there, Id. at. 2376.
[742] Id. at. 2376; as shown in chapter IV in Part 1, the relationship between religious freedom and equality in German constitutional doctrine misses clarity.
[743] Id. at. 2377 -2378.

Freedom claims (A):

Within the group of freedom claims, the demand is either to extend or to restrict the generally guaranteed freedom in the interest of freedom of religion.

- Type A.1: Extension of freedom

An extension of freedom of religion may allow members of a religious community to do something in pursuance of their religion that is generally prohibited.

- Type A.2: Enlargement of freedom

An enlargement of freedom may also be requested to allow believers not to do something that is generally required.

- Type A.3: Restriction of freedom

A restriction of the generally guaranteed freedom for members of a certain religious community is at stake if a religion forbids believers a certain behavior that is generally allowed (be it a total prohibition or a prohibition under certain circumstances).

Equality claims (B):

- Type B.1.: Equal protection

Equal protection of religious groups or individuals may justify to privilege the religious majority instead of granting all religious communities and individuals the same right.

- Type B.2.: Unequal treatment

Unequal treatment is demanded if equal treatment would prevent believers from fulfilling their religious duties or would amount to a de facto discrimination against the members of a certain religious community.

a. Religious Practice and Prison Chaplaincy

In prisons of both Germany and the U.S., inmates have the right to prison chaplaincy, alone and in groups. In accordance with the constitutional framework, chaplaincy services in Germany are institutionalized in cooperation with religious communities. In practice, however, only Christian chaplaincy is reliably available in German prisons. Chaplaincy for religious minorities is only accommodated in some institutions, often led by unpaid volunteers. In instances where prisons do not accommodate chaplaincy for religious minorities, there is a basis for equal protection claims (type B.1. – claim of religious group or individual raising the question whether all religious communities and individuals enjoy the

same right or whether the religious majority may be privileged). In case chaplaincy for religious minorities is accommodated in the prison but individual inmates may get excluded or expelled, claims may be based on freedom (type A.1 – claims for the extension of freedom of religion in order to attend chaplaincy services. The general prohibition may be to not leave the cell). The chaplaincy programs of the federal prison system of the U.S. operate under the supervision of the state alone but are supported by additional religious staff and volunteers sent by religious communities. Chaplains are responsible to take care of all religious inmates, irrespective of the religious background of their own. The concrete opportunities provided for inmates of different religions, however, may differ so that equality issues can arise too (type B.1.) In case individual inmates are denied attendance or get expelled from the existing services and offers of the chaplaincy program, their claims may rather be freedom-based (A.1.).

b. Religious Diet and Prison Meals

Religious dietary claims can also be of different types, depending on the existing accommodations and depending on the particular kind of diet that is demanded by an inmate for religious reasons. German prisons usually only accommodate a pork-free diet as an alternative religious diet but sometimes also a vegan diet option. The pork-free diet allows Muslim inmates to eat halal but not Jewish inmates to eat kosher. The U.S. federal prisons system accommodates more diverse diet options, but also there, some religious inmates find it difficult to choose from the available options. Doctrinally speaking, religious dietary requirements usually forbid believers a particular behavior that is generally allowed, i.e. to eat all kinds of foods. Claims to follow a religious diet usually involve a restriction of the generally guaranteed freedom for members of a certain religious community (A.3.). In both prison systems, it discriminates against inmates with special religious dietary requirements to formally treat them equally with the majority and hence to serve them the regular diet (type B.2). Often, dietary claims are, therefore, equality claims. In this context, it is essential to emphasize that the right to equality not only applies when the law treats different groups differently without justification but also when it treats different groups equally although the differences between them make necessary a differentiation. The issue in these instances is to decide about the importance of the religious commandments for the believer, on the one hand, and the burden for the state to provide the demanded facilities, on the other. If it is not an undue burden to provide a believer with the means to comply with his religious obligations

in a foreign environment, the state will generally be obligated to assist the person. Inmates not only base their claims to follow religious dietary guidelines on these quality considerations but also on their freedom of religion. In the German system, however, there is no claim against the state for religious food, which makes it difficult to enforce the law. When the right to follow religious guidelines encompasses to eat meat of slaughtered animals, which is commonly demanded for Muslims and Jews, their claim indirectly pursues an extension i.e. to be allowed something, because of religion, that is generally prohibited (type A.1) (Slaughter, unless for religious reasons, is a violation of animal protection). Sometimes, cases of this category can also concern an enlargement based on religious freedom, i.e. not to do something that is generally required because of religious reasons. This is, for example, the case if inmates claim to be allowed to take medicine during hours compatible with their religious fast, i.e. after sunset or before sunrise (A.2.).

c. The Use and Possession of Religious Objects and Writings in Prison

The right of inmates to use and possess religious objects and writings in Germany and the U.S. generally exceeds the general rights of inmates for personal possessions. Hence, respective claims also concern an extension of what is generally allowed due to religious freedom (type A.1.). The extension of the generally existing freedom to make the fulfillment of a religious duty possible is the typical case for balancing. It involves typically two preparatory steps. On the one hand, the importance of the religious commandment for the believers and the loss of religious freedom if they have to obey the general law are to be ascertained. On the other hand, the importance of the good that is protected by the general law and the danger it would face if freedom of religion prevailed are to be determined. In a third and final step, it must be answered what right or interest overweighs the other. Outside of prisons, in an environment of fewer restrictions, a dispensation from obeying the general laws is possible in many of these cases. An exemption will usually be possible if the general law does not protect third parties, society as a whole, or an important communal interest, but instead only protects the individual against themselves. In the prison environment, however, religious exemptions may be less likely because of the interest in security and order. If an object is objectively dangerous, no exemption will be granted for its use because of conflicting security interests. Depending on the options provided for the religious majority to use objects and literature, religious minorities in prisons can also base their claim on equality considerations. If, for example, one inmate is allowed to use and possess scripture, but an inmate of another religion is not, the

prison authorities must justify the unequal treatment (one reason could be the banned scripture is written in a language unknown to security staff so the content of the book cannot get checked).

This typology shows that the particular type of claim is influenced by the pre-existing accommodations of religious needs and practices in the prison institution. Determinations of courts and the prison administration generally involve the question whether, if granted at all, the accommodation should be extended on a neutral basis to the entire inmate population, or they evaluate whether the rule in question should be suspended for the particular inmate.[744] The first approach, "neutral-restrictive", rejects most requests for exemptions. The second approach, "neutral-permissive", creates general procedures that accommodate many religious needs but that may not be sufficiently nuanced to accommodate minority religions. The third approach, "targeted accommodations", considers and grants requests for religious accommodation on an individual basis.[745] In this vein, it is essential to note that – depending on the religious need or practice – only certain kinds of religious accommodation may be possible. For the accommodation of religious dietary requirements of inmates, for example, it is theoretically possible to institutionalize a menu that is simultaneously halal, vegetarian, and kosher, hence neutrally accommodating different religious diet options *(neutral-permissive accommodation)*. For religious objects and literature, this is already more difficult as the approval of an object or book cannot equally fulfill the religious needs of inmates of different religions. However, guidelines can list those religious objects and writings that are generally to be approved for inmates of different religions. Chaplaincy programs in the U.S. follow a neutral accommodation approach in that inmates of all religions generally join them (additionally, however, there are denominational services and activities conducted by the spiritual leader of each religion). In Germany, chaplaincy services are organized by the state in cooperation with the community and/or religious leader of each religion. Chaplaincy services are generally organized for one religion only.

[744] An extensive study about the practice of religion in prisons, conducted by the Harvard Law Review, developed this classification of general approaches for the accommodation of religion, HARVARD LAW REVIEW (2002), p.1844-1845.
[745] Id. at. 1844-1845.

2. Normative Vision: What Would be a Desirable Regulation of Religious Accommodation in Prisons?

This section does justice to the inherent normative dimension of comparative constitutional law. In Hirschl's words, comparative constitutional law is a kind of mirror of the "competing vision of who we are and who we wish to be as a political community".[746] The normative vision guiding this research is vested in the current theory of multiculturalism. It was shown that the idea of multiculturalism in contemporary political discourse and political philosophy is concerened with challenges of a culturally (and religiously) diverse society. It therefore provides a suitable framework for considering the challenges associated with religious accommodation: These are to promote equality within and between groups, and preventing the reinforcement of the cultural values of the majority.[747]

Multiculturalists base their theory on the existence of "culture". However, multiculturalism is not only a question of considering and recognizing the needs of cultural groups. Claims based on categories such as religion, race, and language are also taken into account as these are part of "culture". Culture – naturally a controversial concept - is thus widely understood or equated with these other categories.[748] What is decisive is that the idea of multiculturalism is not only to be understood descriptively; the concept is also to be understood prescriptively.[749] Put simply, it is about enabling the ideal that members of minorities can preserve their special identity as minorities against the majority.

The most influential theory of liberal multiculturalism was developed by Will Kymlicka.[750] He has linked the liberal values of autonomy and equality to a third value: the meaning of cultural belonging. According to Kymlicka's theory, culture is of elementary importance for the individual. He sees cultural belonging as an important prerequisite for personal autonomy. In his first book, he builds this argument within a Rawlsian framework and recognizes a "primary

[746] HIRSCHL (2014), p.139.
[747] Bachvarova, Critical Review of International Social and Political Philosophy (2014), p. 654.
[748] Sarah Song, The Subject of Multiculturalism: Culture, Religion, Language, Ethnicity, Nationality, and Race?, in NEW WAVES IN POLITICAL PHILOSOPHY (B. de Bruin C. Zurn ed. 2008).
[749] Song, Sarah, "Multiculturalism", The Stanford Encyclopedia of Philosophy (Spring 2017 Edition), Edward N. Zalta (ed.) https://plato.stanford.edu/entries/multiculturalism/
[750] Will Kymlicka, Liberalism, Community and Culture (Oxford University Press 1989); Kymlicka (1995); Will Kymlicka, Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship (Oxford University Press. 2001).

good" in cultural belonging.[751] Thus, a good that can be assumed to be wanted by every reasonable person since it is necessary for the pursuit of his or her goals.[752] Interestingly, Kymlicka drops the Rawlsian framework in his second book. [753] Instead, he invokes the theory of national self-determination developed by Margalit and Raz. Accordingly, a sufficient choice of options is an important prerequisite for autonomy.[754] Cultures offer the options needed; hence, theyserve as "contexts of choice"[755] that help people formulate and pursue their goals.[756]

For Kymlicka, cultural membership not only provides autonomy but is also crucial for people's own identity. Citing Margalit and Raz, cultural identity is understood as an "anchor for their self-identification and the safety of effortless secure belonging"[757]. This notion of the anchor is based on the idea that self-respect is closely linked to the respect one receives from the cultural community; only when the individual is respected within his or her community, is he or she capable of self-respect. But what is meant here, as also emphasized by Song, is not simply membership in any culture but in one's own culture: only then, does cultural membership serve as a meaningful context of choice and a basis of self-respect.[758] These arguments about the instrumental value of cultural membership are the basis for the claims that Kymlicka derives for minorities; because they are disadvantaged in terms of access to their "own culture", they are entitled to special protection.[759]

These considerations are made fruitful for the specific context of this thesis. Inmates who belong to a religious minority are likely disadvantaged in several ways: Firstly, because they belong to a religious minority, and secondly, because of their legal status as an inmate. Within the prison environment, vivid cultural membership is made considerably difficult. But also, therefore, the state bears the obligation to recognize religious minorities also with their religious identity. It must create spaces, especially for religious minorities, in which inmates

[751] KYMLICKA (1989) p. 163.
[752] JOHN RAWLS, A THEORY OF JUSTICE (Harvard University Press. 1971), p. 61.
[753] KYMLICKA (1995).
[754] Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 JOURNAL OF PHILOSOPHY 439 (1990), p. 439-461.
[755] KYMLICKA (1995), p. 82-84.
[756] Id. at. 89-93.
[757] Id. at. 89 (quoting Margalit & Raz, JOURNAL OF PHILOSOPHY (1990), p. 448).
[758] Song, Sarah, "Multiculturalism", The Stanford Encyclopedia of Philosophy (Spring 2017 Edition), Edward N. Zalta (ed.) https://plato.stanford.edu/entries/multiculturalism/
[759] KYMLICKA, Multicultural Citizenship: A Liberal Theory of Minority Rights (1995), p. 108-115.

feel a sense of belonging. The ideal of the prisoner's rehabilitation is also closely linked to the idea of self-respect.[760] The rehabilitation of inmates can only succeed if and to the extent that they pursue self-healing for which they need self-respect. Against this background, marrying the two ideas of rehabilitation and the multiculturalist protection of minorities provides a suitable normative basis for the argument that the religious needs and practices of minorities must get accommodated in prisons.

Constitutionally speaking, the argument for religious accommodation relies on two further arguments: first, that there must be no identification by the state with the majority religion, and second, that all inmates belonging to a minority religion must have the equal freedom to practice their religion. The constitutions of both states require the equal treatment of religious minorities with the majority religion. However, it is contested whether and to what extent it is the task of the state to compensate for the disadvantages of the minority and hence to pursue not only formal but also substantive equality (as put by Kymlicka, "some minority rights eliminate, rather than create, inequalities"[761]). Moreover, the constitution alone does not offer an argument against any state identification with the majority religion. As shown by Rosenfeld, "religious material occurs in all intuitionally secular constitutional polities regardless of how strictly they impose a separation between the state and religion".[762] In his view, this return of religion can undermine institutional secularism and "circumvents mainstay liberal principles suffice".[763] To avoid further problems stemming from this return of religion, he suggests a pluralist constitutional approach. Following this approach, the question is whether or not religion "would be so significantly decisive as to hinder rather than promote the greater self-constraint and greater tolerance required to ensure the greatest accommodation of the greatest possible number of religious and non-religious conceptions of the good within the polity".[764]

[760] The concept of rehabilitation in both German and U.S. prison law is discussed and compared in Part 1, chapter I, 1.b & 2.b.
[761] KYMLICKA (1995), p. 109.
[762] Michel Rosenfeld, *Recasting Secularism as One Conception of the Good Among Many in a Post-Secular Constitutional Polity in* CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL (Michel Rosenfeld Susanna Mancini ed. 2014), p. 104.
[763] Id. at. 104.
[764] Id. at. 106.

The theoretical work of Laborde helps to vest the argument for a pluralist constitutional approach into a broader normative framework. Laborde's account of justificatory secularism gives an answer to the question of when and where religious reasons are (im)permissible in public discourse.[765] The essential idea of "justificatory secularism" is that official policy should never be justified by appeal to religious truth.[766] Hence, in parts it confirms the separation of state and church, emphasizing the limited sphere of influence of religious ideology as well as the limited competence of state institutions to comment on matters of religious belief.

As shown by Schuppert, Laborde's proposed concept of justificatory secularism sets interesting limits: "On the one hand, justificatory secularism is demanding with regard to the separation of state and church while, on the other hand, its approach to state neutrality is of a non-substantive nature, that is, it sees "neutrality" as a downstream commitment, restricted to a particular site."[767] This approach underpins the argument made here against the allegedly neutral German laws, which in fact, favor Christianity. For many German scholars and courts, it seems to have become self-evident that the headscarf of Muslim women is - at least potentially - a threat to public order and safety.[768] But whose point of view determines whether there is such legally relevant danger? Doctrinally, it is problematic that the assumption creeps in that the protection of fundamental rights depends on the approval of third parties; for example, that a teacher has to take off her headscarf if it causes conflicts or discomfort amongst colleagues and/or parents. It cannot be emphasized enough that the negative religious freedom of third parties is not infringed by the religious practice of other individuals. In fact, in most scenarios it is not even involved.[769]

Another helpful aspect of Laborde's theory for the comparison of religious accommodation in this thesis is her nuanced engagement with the concept of religion. As discussed, religion comes in various facets and this becomes particularly visible in the prison context.

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[765] Cecile Laborde, *Justifactory Secularism*, *in* RELIGION IN A LIBERAL STATE: CROSS-DISCIPLINARY REFLECTIONS (Malcom Evans Gavin D'Costa, Tariq Modood, Julian Rivers ed. 2013).; Fabian Schuppert, *Secular Republicanism? An analysis of the prospects and limits of Laborde's republican account of religion* 17 ETHNICITIES 172 (2017); LABORDE (2008).

[766] Laborde, Justifactory Secularism. 2013, p. 165.

[767] Schuppert, ETHNICITIES (2017), p. 3.

[768] Even in Headcarf II (BVerfGE 138, 296), the FCC considers the headscarf as a potential threat to the peace at school.

[769] This is only assumed by the FCC if a predicament exists, i.e. if the confrontation with the religious practice of others cannot be avoided ("Ein Eingriff in die negative Religionsfreiheit setzt damit das Vorliegen einer „religiösen Zwangslage" voraus, in welcher ein Ausweichen unmöglich ist, cf. BVerfGE 91, 1 (89).)

Disaggregating the concept helps for the analysis; the various dimensions and functions of religion include religion as the cultural, ethical, social, institutional, and justificatory.[770] Religion appears in all of these dimensions in the subsequent analysis. For now, it is important to highlight how these different dimensions are shaped out in Laborde's theory. One of the larger questions that arises in connection with Laborde's theory is whether religion is special in any sense or just one of many conceptions of "the good". Answering this question shows that there are differences between Laborde's republican theory and many standard liberal accounts which follow a Rawlsian public reason account, determining the boundaries of religious reasoning in the public and private sphere.[771] Rawls argues that public reasons are accessible to all society members because they are not based on people's comprehensive doctrines as these are potentially sectarian.[772] Rawls introduces the idea of a duty of civility. Accordingly, one should confine oneself to public reasons when it comes to justifying one's support for a particular position regarding a fundamental political issue [773] (however, there exists significant disagreement over whether Rawls's account of public reason is directed at all citizens or only at particular public officials[774]). What seems to be an important difference between Laborde's justificatory secularism and Rawls's idea of public reason though, is that according to Rawls, even elected officials can at times use religious reasons for justifying policies. This only requires them to also provide non-comprehensive political reasons in support of religious reasons.[775]

But in what way is religion special in Laborde's theory? Only in one way. As Laborde puts it, "religion is (minimally) special for purposes of non-establishment but not special for purposes of free exercise".[776] Hence, according to Laborde's theory, there are two dimensions of religion that require sensitivity.[777] First, sensitivity is required for the institutional dimension of religion, i.e. when religious interests lay claim to political power and rule. Second, sensitivity is required for the justificatory dimension, i.e. when religious reasons ground public policy. In

[770] Laborde, LAW AND PHILOSOPHY (2015), p. 581-600.
[771] Schuppert, ETHNICITIES (2017), p. 4.
[772] JOHN RAWLS, POLITICAL LIBERALISM (Columbia University Press. 1993), p. 216.
[773] RAWLS (1993), p. 217.
[774] Rawls's explanations of public reason and the duty of civility in Political Liberalism and The Idea of Public Reason Revisited differ significantly in this respect!
[775] RAWLS (1993), p. 217.
[776] Cecile Laborde, *Is Religion Special?*, *in* RELIGION, SECULARISM AND CONSTITUTIONAL DEMOCRACY (Cecile Laborde Jean Cohen ed. 2016), p.423.
[777] Laborde, Justifactory Secularism (2013), p. 173; Schuppert, ETHNICITIES (2017). p. 5.

Laborde's theory, religious reasons "are comprehensive in scope, controversial in content and alienating in form".[778] This makes them unsuitable for justifying political policy. According to Laborde, religious reasons are more likely to be divisive and alienating "because of a particular history of conflict whereby religious categories have acquired political and social, not only epistemic and ethical, salience. It is these two additional features of religion – the heritage of religious conflict and the persisting use of religion as a marker of discrimination and exclusion – which ultimately ground justificatory secularism."[779]

For critical republicans, the state must guarantee that all citizens relate to each other as equals and are treated as equals. At least in theory, all citizens must have the chance to relate to the state and its institutions in similar ways. This focus on alienation and the emphasis on symbolism used by the state in this context serve as a valuable ground for further analysis. As Laborde points out, "symbols do matter when the basic identification of citizens with their institutions is concerned", since symbolic recognition, or rather the absence of symbolic misrecognition and alienating practices and justifications seems crucial for allowing each and every citizen to be, feel, and act like an equal.[780] In her view, alienation should be understood as referring to people's identity and status as equal citizens being under threat.[781]

As pointed out by Schuppert, Laborde's argument that symbolic establishment of religion and political justifications qua religious reasons are alienating implies that alienation is normatively relevant.[782] But under which circumstances is there reason to object to a certain practice because it is alienating? Schuppert shows that standard concepts of alienation include a necessary yet, problematic, subjective dimension of alienation. Alienation not only consists of the expressions of practices, symbols, and structures, but also of the subjective feeling of alienation. This subjective feeling is necessary because it is an important component to give those alienated the power to determine their alienation. It prevents that others talk about the experiences of those alienated or determine how they (e.g. communities of religious minorities or Muslim women..) feel based on abstractions and "somewhat essentializing the

[778] Laborde, Justifactory Secularism (2013), p. 173.
[779] Id. at. 173.
[780] LABORDE (2008), p. 90.
[781] Id. at. 90.
[782] Schuppert, ETHNICITIES (2017), p. 8.

other's identity".[783] Following Young's emphasis on the relevance of the actual struggle of people, Laborde wants to preserve some part of the subjective dimension of alienation.[784]

But does this mean that all reasons that make a person individually feel alienated are normatively relevant? No, this question implies the problematic dimension of the required subjective element. It shows that further criteria to determine normatively relevant alienation under the critical republican framework are needed. Schuppert argues alienation is normatively relevant because it is epistemically useful: "complaints in terms of alienation help us to spot and identify injustices and practices of misrecognition."[785] In light of a republican understanding of social equality and democratic citizenship, the test question for determining a normatively relevant case of alienation should be: can the claimant show that existing practices of justification (and symbolic establishment) undermine his or her equal standing?[786]

Applying this approach to the prison context, there are two scenarios in which it is particularly likely that the prison's status quo undermines the equal standing of an inmate:

1. if the authorities decide that some religious practice or need that was demanded by an inmate is not protected under the law as it is not part of the inmate's religion (religious reason), and/or
2. if the authorities decide that the existing accommodation of religious needs and practices is sufficient to meet what is required under the inmate's religious freedom and equality despite that it favors the majority.

As shown, no typology or set of criteria can determine the outcome of individual cases. But, they can help to get the balancing of individual cases correct and to raise awareness for unequal treatment that is legally relevant. The religious freedom of the inmates in most cases collides with the security and economic interests of the state. In both legal systems, the German and the U.S., it may be permissible for the state to restrict the religious rights of inmates based on these interests. This has been confirmed by courts for different religious

[783] Id. at. 8.
[784] LABORDE (2008), p. 95 (citing Young IM (1990) Justice and the Politics of Difference. Princeton: Princeton University Press).
[785] Schuppert, ETHNICITIES (2017), p. 8.
[786] Speaking for society, Schuppert, id. at. 10.

needs and practices of both countries.[787] However, strict requirements apply to this balancing process; rising costs, as well as the need for increased security measures alone, do not justify restricting the religious freedom of inmates and to treat them differently than the majority of Christian inmates. At least in Germany, only if "the functioning of the institution" – an interest of constitutional rank - is questioned by the religious practice, the latter may get restricted. Moreover, the limitation of freedom of religion must be proportional, for which the circumstances of the individual case are decisive (existing accommodation of the prison, number of inmates belonging to the religious minority, the personality of the inmate …).

In the German prison system, however, there are structural obstacles for the accommodation of the needs and practices of religious minorities. For example, there is no diet program that institutionally anchors religious dietary needs of inmates. There are no procedures allowing inmates to request a religious diet (the pork-free menu is accommodated in the majority of German prisons as an expression of the authorities' discretion, not because inmates have a positive right for a religious diet). Similarly, chaplaincy is provided in some prisons for religious minorities but not within the framework of an organized program that institutionalizes the services and activities and respective processes. Muslim chaplaincy is still mainly offered by volunteers and differs greatly from prison to prison. Many of the Muslim chaplaincy programs have grown from grassroots level. There is uncertainty in the handling of religious objects and writings, which leads to different practices within the German penal system. Some prisons allow the prayer rug for Muslims, some do not.

Hence, German prisons do not accommodate religious needs and practices of religious minorities structurally. It must be assumed that in some instances inmates do not even know about their religious rights as envisaged under the Prison Acts and that the prison authorities have to accommodate their religious needs and practices. Their religious rights are not listed in the house rules or information sheets made accessible to inmates. There are very few complaints from inmates.[788] For an inmate, who also belongs to a religious minority, it can be particularly difficult to "be seen" in the routine of prison life. Social categories that are grounds for alienation, such as religion and class, are entangled; the inmate becomes an alienated

[787] See Part 1, Chapter IV, 3.
[788] See Part 1, Chapter IV, 3.a.

member of a religious minority but also a person with the status “inmate”. German prisons are comparably liberal, and inmates have relatively many freedoms. However, as will be shown, this freedom does not necessarily extend to the religious freedom of religious minorities.

Federal prisons in the U.S., to the contrary, structurally accommodate the religious needs and practices of many religious minorities. Religious diversity is anchored in the prison administration. This does not mean that the rights of religious minorities are not violated in a number of cases. But the existing accommodations make it easier for inmates to legally enforce their rights (as seen, unlike in Germany, prisoner’s rights cases in the U.S. are common[789]). Religious minorities have the opportunity to make their religious identity visible within the structures and to have it recognized. Together with Kymlicka and Laborde, it is argued that this symbolic recognition is an important tool against the alienation of minorities. In light of the limited agency of inmates, they are particularly dependent on structural accommodations of their needs and practices. The recognition of inmates within the community, also with respect to their religious identity, can thus become an essential means of rehabilitating inmate.

[789] See Part 1, chapter IV, 3.c.

II. Religious Practice and Prison Chaplaincy

Inmates have the right to chaplaincy in both German and U.S. federal prisons. Chaplaincy is used here as a superordinate term which describes both the various offers of chaplaincy programs in the U.S., such as meeting religious advisors and joining group services, and the different religious services in German prisons. Chaplaincy in prison is largely determined by the structural framework in which offers for individual inmates can occur.[790] Hence, the difference between organized and individual religious practice is crucial when analyzing and comparing chaplaincy; in German prisons, the organized prison religion[791], i.e. the cooperation between religious communities and the state, can be a precondition for religious services and religious activities for individual inmates. In the U.S., chaplaincy programs are run by the BOP. The program offers services to all inmates of the religiously diverse prison population. Regardless of their personal religious background, chaplains usually work with inmates of different religions.

This chapter examines chaplaincy in German and U.S. prisons and how it is accommodated for religious minorities. The aim is to gain a deeper understanding of the existing obstacles for religious minorities to join chaplaincy in German and U.S. federal prisons. The comparison clarifies the advantages and disadvantages of both systems. For this comparison, not only legislation is considered but also the relevant court decisions as well as empirical research results. The first part illuminates and discusses chaplaincy in German prisons (1); the second, chaplaincy in U.S. prisons (2). The last section summarizes the most important differences and similarities (3).

1. Germany

The introduction explains how chaplaincy is organized in German prisons and examines the legal guarantees for spiritual welfare and religious events under the constitutional framework and under the prison law.[792] It points to the existing obstacles standing in the way of an equal

[790] Jahn analyses multiple facets of organized religion and shows that prison chaplaincy is one of them, Jahn, JOURNAL OF RELIGION IN EUROPE (2016), p. 410.
[791] Id. at. 406 (Jahn uses the distinction between "organized religion" and "individual religion").
[792] The framework of the law for prisons is explained in the first chapter of the first part, cf. part 1, chapter I, 4.b.

accommodation of chaplaincy for religious minorities (a). The subsequent section explains the legal framework in more detail. The prison law encompasses both the right to individual pastoral care and the right to attend divine services and other religious services in groups. The relevant provisions in the federal Prison Act (section 53 I, 54 federal Prison Act) are exemplarily examined by scrutinizing the protective content and legal limits. (b). This step prepares for the critical analysis in the third section which analyzes and compares the practical opportunities for religious minorities, especially Muslims, to join chaplaincy programs based on the relevant case-law and available empirical data (c).

a. Introduction

Prison chaplaincy is an ancient Christian tradition that has its origin in the sermons of Jesus Christ.[793] Even the Apostles had their particular experience with imprisonment and pastoral care for those who were jailed because of their beliefs.[794] The legal basis for prison chaplaincy is composed of different sources. Besides the constitutional guarantee of individual inmates for prison chaplaincy under Art. 4 I, II BL, there are relevant norms in Church-state agreements.[795] In addition, administrative agreements between religions and the state Ministers of Justice and contractual agreements between religious communities and the state regulate religious services in prison. The right of religious communities to organize pastoral care (*Seelsorge*) and religious services (*Gottesdienst*) in public institutions, and hence in prisons, is constitutionally protected under Art. 140 BL in conjunction with Art. 141 WC.[796] As shown, prison chaplaincy falls within the common remit of the state and the religious communities and is exercised as a common task (*res mixta*).[797] Both the state as well as the religious community are partially supervising prison chaplaincy: the state re organizational matters and the religious communities with respect to the subject-specific supervision (*Fachaufsicht*).[798]

[793] Matthäus, Lutherbibel, 25,35.
[794] Balthasar Garreis, Seelsorge in Justizvollzugsanstalten. Begründung - Situation - Zukunftsperspektiven, 23 ESSENER GESPRÄCHE ZUM STAAT UND KIRCHE 58 (1989). p.58.
[795] Especially see: Article 28 Reichskonkordat: "hospitals, prisons, and other public institutions the Church is permitted to make pastoral visits and conduct services of worship, subject to the general rules of the institutions concerned. If regular pastoral care is provided for such institutions, and if pastors must be appointed as state or other public officials, such appointments will be made with the agreement of Church authorities".
[796] Article 141 WC "To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons, or in other public institutions, religious societies shall be permitted to provide them, but without compulsion of any kind."
[797] Art. 141 WC and the concept of res mixtae is further discussed in the first part (part 1, chapter IV, 1.a.bb).
[798] Korioth, in Maunz & Dürig, GG, Article 137 WC, at. 12 et seq.

The role of chaplains in prisons comes with various tasks: organizing the celebration of religious services and sacraments, offering individual and groups meetings, meeting inmates for confidential conversation, providing spiritual care and material support also for the convicts' family, collaborating with the prison management in the planning of the sentence program and reintegration after release, organizing leisure activities, giving their opinion about acts of grace and for an early release. Chaplains – called *Seelsorger* in German - of the Catholic and Protestant Church are present in prisons across the different German *Länder*.[799] However, it is organized separately for each RC diocese or Protestant Church by mutual agreements between the church and the state. Additionally, all *Seelsorger* of Christian denominations working in the prison domain are connected in associations.[800] Their salary is commonly covered by the state. The chaplain's position is signified by the tension of being both a state- and outside actor. Additionally, it's position requires a balancing of another tension: religion in prisons is paradoxically both a control mechanism of the authorities as well as a fundamental right of inmates. The (Christian) chaplain is the direct expression of this tension. He or she has extensive rights (access to the cells, the confidentiality of exchanges, possession of keys, right to secrecy) and is to some extent independent from the prison administration, but also belongs to the official staff of the prison.[801]

The legal framework and status quo of chaplaincy for Muslims and other minorities is increasingly under criticism.[802] As in other areas of common tasks between state and religious community, such as organizing religious instruction in public schools as stipulated under Art. 7 III BL, the cooperation between non-Christian religious communities and the state is cause for conflict.[803] For example, the requirements for the training of Muslim cooperation partners are still controversial. What constitutes a religious community is not specifically defined in the

[799] See data in appendix.

[800] Cf. Katholische Gefängnisseelsorge in Deutschland, online: http://www.kath-gefaengnisseelsorge.de/; Evangelische Konferenz für Gefängnisseelsorge in Deutschland, online: http:// www.gefaengnisseelsorge.de/

[801] EICK-WILDGANS (1993), p. 169 et seq.

[802] The criticism refers in particular to the missing accommodation of Muslim chaplaincy, Meyer, FORUM STRAFVOLLZUG, (2014); Julia Krekel, *Islamische Seelsorge in Haftanstalten* 2 AKADEMIE AKTUELL 46 (2018).

[803] The conflicts in the school domain are marked by other state interests than in the prison domain (at school, the interest concerns the protection of children from outside influences). However, the legal framework for the cooperation between state and religious community and the difficulties of Muslim communities to become cooperation partners, is comparable, MARTIN HECKEL, DER RECHTSSTATUS DES RELIGIONSUNTERRICHTS IM PLURALISTISCHEN VERFASSUNGSSYSTEM (Mohr Siebeck 2002).

Prison Act.[804] It is not required that the religious group has a particular public legal or another corporate status.[805] Hence, a religious community under the federal Prison Act is a group of humans who are "connected" by their common faith. The legislator regarded the Christian churches as a typical example of a religious community,[806] but also a group of Muslims whose beliefs differ from further Muslim faith groups is doctrinally a religious community under the law.[807]

The cooperation between state and Muslim communities has been a challenge for many years.[808] Despite the high number of Muslim inmates in German prisons, the framework for the cooperation between the state and Muslim communities is unsettled. However, as shown in the course of this chapter, some prisons have established local modes of cooperation with Imams from the nearby Mosque.[809] These modes could develop independently of the common framework under the Weimar Constitution because of the framing strategies of these grassroots actors, for example, as a supporter of the inmate's rehabilitation.[810] Moreover, the chapter shows that also chaplaincy for other religious minorities is not accommodated on a regular basis.

b. The Right to Spiritual Welfare under the Prison Law

The scope of the right to spiritual welfare under prison law is largely determined by Art. 141 WC.[811] It protects that religious communities have the right to provide for "religious services" (*Gottesdienst*) and "pastoral work" (*Seelsorge)* in prisons, in case there is "need" *(Bedürfnis).* How religious services and pastoral work are to be interpreted is controversial: Some argue the scope of protection is related to the particular ways of how Christians tend to exercise religion; others argue in favor of broadening the scope of protection to the extent that it encompasses, for example, Friday prayers for Muslims and holiday ceremonies for Jews.[812]

[804] It is largely agreed that religious community is the same as the religious society, which is used in the Weimar Constitution; see also BT-Drs. 7/3998, 24 et. seq.
[805] See Part 1, Chapter IV, 1.a.bb.
[806] BR-Drs. 71/73, 69.
[807] BVerfGE 104, 337.
[808] See Part 1, Chapter IV, 1.a.bb.
[809] Harms-Dalibon, Comparative Migration Studies (2017).
[810] Id. at. 6.
[811] Article 141 BL, To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons, or in other public institutions, religious societies shall be permitted to provide them, but without compulsion of any kind.
[812] FRÖHMCKE (2005), p. 227.

This section explores the implementation of the constitutional requirements of Art. 141 Weimar Constitution in Prison Law and the corresponding provisions of the federal Prisons Act, section 53 I and section 54. Prior to this, light is shed on the complex position of the chaplain under Prison Law.

The prison chaplains belong to the ordinary staff of the prison institution: section 155 II federal Prison Act.[813] Chaplains are listed alongside doctors, administrative staff, and psychologists. According to section 157 I Prison Act, the religious staff is employed by the state in agreement with the religious community.[814] Hence, the employment of the religious staff is based on contractual agreements between state and religious community or they are employed as civil servants (*Landebeamte, Angestellte der Justizministerien und Angestellte der Kirche*).[815] As is clear from the systematic link with the second paragraph, the requirement for full-time recruitment of chaplains applies only if the number of chaplains exceeds a certain threshold. Section 157 II federal Prison Act stipulates:

> (2) Where the small number of members belonging to a religious community does not justify such religious welfare as is laid down in subsection (1), religious welfare shall be permitted in some other way.

Reading from this sub-section, the state continues to bear an obligation to guarantee that chaplaincy is available for religious minorities. However, it is left to the discretion of the prison authorities how these alternatives may look like. It is not concretely defined what legally constitutes a "small number" and how "some other way(s)" may be shaped precisely. Also in the commentary literature, the potential "other way" of chaplaincy is only discussed in general terms; namely, the commentary literature suggests it may involve religious welfare by part-time or freelance chaplains, in a personal or written way. [816]

Practically, there are difficulties in implementing both paragraphs of section 157 federal Prison Act. With regard to section 157 I federal Prison Act, it can be seen that even where the group of inmates belonging to one religion is relatively big, like in the case of Muslim inmates,

[813] Section 155 federal Prison Act (2) According to its function, each institution shall have the necessary number of staff of the different categories, including in particular prison officers, administrative staff, trade instructors, *as well as chaplains,* medical officers, teachers, psychologists and social workers (emphasis added).
[814] Section 157 Prison Act (1) Chaplains shall be appointed on a full-time basis or engaged by contract in agreement with the respective religious community.
[815] Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann), at. 6.
[816] Huchting/Müller-Monning, in: Feest/Lesting, StVollzG, § 157, Rn. 12.

chaplains are not appointed full-time. Problematically, there is no legal specification on the interpretation of the "small-number" requirement. With regard to section 157 II federal Prison Act, there are no concepts of how these "alternative ways" may look like. Before these issues are examined more closely in section c, the scope of protection of the individual right of inmates for chaplaincy under the federal Prison Act is examined.

aa. Spiritual Welfare by a Chaplain

Section 53 federal Prison Act [Spiritual Welfare] stipulates:

> (1) The prisoner shall not be denied religious welfare by a chaplain of his religion. At his request, he shall receive assistance in establishing contact with a chaplain of his religion.[817]

The terminology used to determine the scope of protection under section 53 federal Prison Act requires further interpretation. This task is especially complicated because of the official English translations of the provision.[818] The German word *Gottesdienst* is used in Article 141 WC as well as in section 54 federal Prison Act, but translated with religious services (cf. Art. 141 WC) and divine services (section 54 I Prison Act). *Seelsorge* is also protected in Article 141 WC and section 53 I federal Prison Act and translated as pastoral work (cf. Art. 141 WC) as well as spiritual welfare (cf. heading of section 53 I federal Prison Act). The term "spiritual welfare" stands as a generic term for the diverse services of the religious community and pastor to its fellow believers, and hence for "religious services" (Article 140 Basic Law in conjunction with Article 141 WC) as well as "religious welfare" (text of section 53 federal Prison Act). In addition to divine services and other religious activities (section 54 federal Prison Act), the term includes pastoral work (Article 140 Basic Law in conjunction with Article 141 WC) in the narrow sense of the theological discipline, which primarily addresses the needs of individuals.

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[817] Section 53 federal Prison Act [in Ger.] (1) Dem Gefangenen darf religiöse Betreuung durch einen Seelsorger seiner Religionsgemeinschaft nicht versagt werden. Auf seinen Wunsch ist ihm zu helfen, mit einem Seelsorger seiner Religionsgemeinschaft in Verbindung zu treten.

[818] Article 141 WC protects "Gottedienst" and "Seesorge", which is translated in the official translation into "religious services" and "pastoral work".
Section 53 Prison Act protects in the heading "Seelsorge" and "religiöse Betreuung", which is officially translated into "Spiritual welfare" and "religious welfare".
Section 54 Prison Act protects "Religiöse Veranstaltungen und Gottesdient und andere religiöse Veranstaltung", which is translated into "religious activities and divine services and other religious activities".

Religious welfare *(religiöse Betreuung)* is to be understood as help, support of the individual inmate, and encouragement for religious matters, i.e. those matters which deal with ideas of the image of man and the origin, meaning, and purpose of the world.[819] General charitable and meditating activities have to be distinguished from religious welfare.[820] For this distinction, the self-understanding of the religious inmate must be taken into account.[821] The scope of protection, in particular, the concept of "spiritual welfare" *(Seelsorge*) arguably excludes religious minorities. The concept of the soul differs in different religions, inter alia, in Islam.[822] Some prisons, therefore, started using the term "Muslim religious care" *(Muslimische Religionsbetreuung)* instead of "Muslim spiritual welfare", internally.[823] However, the terminology in the Prison Acts of the Länder has not changed. All respective provisions in the Prison Acts of the Länder correspond to section 53 I of the federal Prison Act. Only in Hesse was a new provision introduced. Section 32 I 1 Hesse Prison Act stipulates:

> (1) Prisoners shall be provided with spiritual and religious care by their religious community.[824]

By protecting *seelsorgerische* and *religöse Bertreuung*, the scope of protection is broadened as compared to the version in the federal Prison Act and of other Länder. Fröhmcke, amongst others, argues that the scope of protection of section 53 federal Prison Act contains conceptual restrictions and that it is questionable whether Muslim chaplaincy was as equally protected under it as Christian chaplaincy.[825] This argument no longer applies in case the wording of the provision is changed, like in the Prison Act of Hesse.

As a prerequisite for the right of the chaplain to access the prison institution there must be a "need" *(Bedürfnis)* for his or her services amongst inmates.[826] This need is presumed once members of one religion are present inside the institution. That chaplaincy is not provided by state employees but by chaplains sent by the religious communities is – as pointed out earlier – commonly explained by the principle of state neutrality. Therefore, inmates cannot claim

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[819] Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann), at 8.
[820] Id. at. 8; (for a broader understanding) Arloth/Krä, StVollzG § 53 Rn 3.
[821] Anstötz, in BeckOK Strafvollzug, StVollzG § 53 Rn. 7.
[822] Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann), at. 8.
[823] For example in North Rhine-Westphalia (source: interview with Ministry of Justice).
[824] Section 32 [in Ger.] [Religionsausübung und Seelsorge] (1) Den Gefangenen ist eine seelsorgerische und religiöse Betreuung durch ihre Religionsgemeinschaft zu ermöglichen. Auf ihren Wunsch ist ihnen zu helfen, mit der Seelsorge ihrer Religionsgemeinschaft in Verbindung zu treten.
[825] FRÖHMCKE. 2005, p. 214-215.
[826] Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann), at. 4.

participation in religious events directly from the state, but they can only command for help by the state for establishing contact with chaplains of their religion.[827] According to section 53 I 1 Prison Act, – formulated negatively – the prisoner shall "not be denied religious welfare by a chaplain of his religion". Hence, the prisoner has no positive right to religious welfare. Rather, the inmate's right is at the discretion of the institution and may define the respective organizational structures such as time and place of the services.[828]

The prisoner is (positively) entitled under section 53 I 2 Prison Act "to receive assistance" for contacting a chaplain of his or her religious community.[829] Doctrinally, it is unsettled how much effort prisons must put into clarifying the interests amongst prisoners in establishing contact with a chaplain. German prisons do not work with records stating the religious affiliation of inmates. Therefore, prison authorities do now know the religion of all inmates. They themselves are not reliably informed about their right to assistance for contacting chaplains. It must therefore be assumed that this right is not exercised by inmates in some prisons. An orderly chaplaincy program in German prisons would be desirable to inform inmates of their rights and to provide them with practical support.

bb. Divine Service and other Religious Activities

Section 54 Prison Act stipulates the right of inmates to divine services and other religious activities:

> Section 54 Religious Activities
>
> (1) The prisoner shall have the right to attend Divine Service and other religious activities of his denomination.
>
> (2) The prisoner shall be admitted to Divine Service or to religious activities of another religious community if the chaplain of that religion agrees.
>
> (3) The prisoner may be excluded from attending Divine Service or other religious activities where this is required by overriding reasons of security or order; prior to this the chaplain shall be heard.

When defining the scope of the rights of inmates to attend divine services and other religious activities, as stipulated under section 54 I Prison Act, the basic right to the free practice of

[827] Id. at. 5.
[828] OLG Saarbrücken ZfStrVo 1983, ZFSTRVO 1983, p. 60.
[829] Anstötz, in BeckOK Strafvollzug, StVollzG § 53 Rn. 4-9.

religion must be taken into account.[830] The activities protected under section 54 I Prison Act must be exercised in a group and must have particular religious content.[831] This is the case if it serves religious edification, enables the believer to practice his or her faith in the traditional ritual forms of his or her confession, opens a spiritual or emotional connection to God, or contributes to the instruction of faith.[832] As the wording of section 54 I Prison Act indicates, divine services are considered the *typical* kind of religious activity. Other religious activities are, for example, sacramental celebrations, devotions, prayer and Bible studies, as well as ecclesiastical adult education in case they primarily focus on religious content.[833] When differentiating in individual cases whether indeed an activity is a religious activity, the self-image of the religious community and the proximity to the legally mentioned example of worship as a typical ritual act, have to be taken into consideration. Here, too, it can be seen that the anchored concepts of the practice of religion follow the Christian model. Can a group prayer of Muslims or Jews be described as a divine service?

It can be drawn from the regulatory context (in particular with regard to Article 141 WC and section 157 of the Prison Act) and the explanatory memorandum[834] that the right of inmates to participate in religious activities only concerns those taking place inside the institution. This is also the case if no option for religious activities exists inside of a prison[835] or if inmates are in open prison.[836] Another issue is whether it is required for inmates to be a member of the religious community in charge of the service. As regards this question, paragraph 1 and 2 of section 54 federal Prison Act differ from one another. Section 54 I federal Prison Act protects the right of the prisoner to attend religious services and other religious activities of "his denomination". Hence, membership is required.[837] Section 54 II federal Prison Act protects the right of inmates to attend services "of another religious community". Hence, membership is not required. [838] The requirements for proof of membership differ from prison to prison. Practically, Christian chaplaincy services operate with the help of Sunday Service lists.[839]

[830] BR-Drs. 71/73, 70.
[831] Anstötz, in BeckOK, StVollzG § 53 Rn. 4-9.
[832] OLG Koblenz NStZ 1988, NSTZ 1988 p. 47; OLG Koblenz NStZ 1987, p. 525.
[833] OLG Koblenz NStZ 1987, NSTZ 1987 p. 52.
[834] BR-Drs. 71/73, 70.
[835] OLG Stuttgart NStZ 1990, NSTZ 1990, p. 150.
[836] BVerfG NStZ 1988, NSTZ 1988 p. 573; aA OLG Koblenz NStZ 1987, NSTZ 1987 p. 525.
[837] Anstötz, in BeckOK, StVollzG § 53 Rn. 1-4.
[838] Id at. Rn. 3.
[839] By knowing who attends the service, prison officers can organize the event in a secure way. Should something

Inmates can sign into these list in case they want to join the religious activity. These lists help the prison management organize the activities accordingly and to keep track of the activities of the inmates.[840] It is not permissible for the institution to require inmates to formally prove their membership with a certificate from an outside source.[841]

The opportunity for inmates to attend religious activities, despite not being a member of the religious community who is organizing activities, is required under the constitutionally guaranteed freedom of religion under Article 4 I, II of the Basic Law. It encompasses those who, without belonging to a denomination, still seek the "right faith" for themselves.[842] Therefore, according to section 54 II Prison Act, a prisoner also has the right to participate in services and religious events of "another religious community" – provided that the chaplain agrees. It generally ensures freedom of religion for all inmates and means that they can participate in religious events without having to prove that they belong to a religion. Positively seen, religious minorities have at least the possibility to join those religious activities generally offered inside the institution, i.e. attend to religious deception by Christian pastors. More critically, the regulation overshadows the existing disadvantages for religious minorities. The right to be able to participate in religious events without proof of formal affiliation does not change the fact that religious activities tailored to the particular needs of Muslim inmates and other religions are sometimes missing in German prisons. As will be discussed in more detail under c, less than 45 % of the surveyed German prisons offer group prayers for Muslim inmates in spite of the high percentage of Muslims (approximately 24 %) in German prisons.[843]

As can be seen from the last paragraph of section 54 of the Prison Act, III, the inmate's right to attend religious services protected under section 54 I, II Prison Act may only be restricted under strict conditions. Only if "required by overriding reasons of security or order" and with

happen at the event, it can be traced to the participants, compare: Jahn, JOURNAL OF RELIGION IN EUROPE (2016), p. 412.

[840] Id. at. 412.

[841] "Die Anerkennung einer Religionszugehörigkeit darf nicht davon abhängig gemacht werden, daß sich der Strafgefangene an einen bestimmten Religionsbeauftragten wendet und dieser eine entsprechende Bescheinigung ausstellt." OLG Koblenz, 3 Ws 591/93 (08.12.1993*) In English* „The recognition of religious affiliation must not be made conditional on the prisoner turning to a particular religious commissioner and the latter issuing a certificate to that effect."

[842] Laubenthal in LNNV, StVollzG, Section I, at. 28.

[843] According to estimates from prison authorities, there are around 24 % Muslims living in German institutions (see data in appendix).

the chaplain consenting, the prisoner may be excluded from attending religious services.[844] The overriding reasons justifying the exclusion must lie in the personality of the inmate; hence, the decision must be based on the circumstances of the individual case. In examining whether overriding reasons exist, which justify excluding the prisoner from attending divine services and other religious activities, prison authorities have a margin of discretion.[845] The reasons must consist of a concrete danger that cannot be avoided or eliminated by milder means than the exclusion of the inmate.[846] Other reasons, such as simple disturbances, cannot justify the exclusion. In particular, the exclusion from chaplaincy is not permissible as a disciplinary measure.[847] If, for example, more careful supervision of the inmate can eliminate the danger to security and order, the exclusion of the inmate would be disproportionate. In the event of a permanent exclusion - which is only permissible in exceptional cases - the legitimacy of the authority's decision must be checked regularly.[848]

Under procedural law, according to the principles of legal hearing, the chaplain must be heard during the process.[849] This requirement can contribute to the clarification of the facts and furthermore acknowledges that the legal position of the religious community may be affected by the exclusion of the inmate (cf. Article 140 of the Basic Law, Article 141 of the Basic Law).[850] The hearing of the inmate is at the discretion of the authority, but it is designed as a rule from which deviations may only be made in exceptional circumstances, i.e in case of serious law violations [851] If, after the hearing, it turns out that the requirements for the exclusion are met, the ultimate decision rests with the enforcement authority *(Vollzugsbehörde).*[852]

cc. Corresponding Application of the Legal Framework for Ideological Communities

Under section 55 federal Prison Act, the provisions of section 53, 54 federal Prison Act apply mutatis mutandis to ideological confessions (*weltanschauliche Bekenntnisse*). Again, the officially used translation of the federal Prison Act is misleading. In the German version of

[844] OLG Celle ZfStrVo 1991, ZFSTRVO 1991, p. 247
[845] Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann), at. 9.
[846] OLG Hamm NStZ 1999, NSTZ 1999 p. 591.
[847] Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann), at. 9.
[848] Id. at. 10.
[849] Id.
[850] Id.
[851] OLG Koblenz NStZ 1987, NSTZ 1987, p. 525.
[852] Id.

section 55 federal Prison Act, only the heading refers to ideological communities, i.e. *Weltanschauungsgemeinschaften*).[853] In the text of the norm itself, reference is made to ideological confessions. In the English version, however, both the heading as well as the norm wording refer to ideological communities. As will be shown, this difference is relevant.

Whether or not the rights of inmates under section 53-54 federal Prison Act also apply to members of ideological communities was not made clear in the first draft of the law. However, it was later added under the reference to the comprehensive protection of ideological communities under Article 4 I, II BL.[854] In addition, Art. 140 GG in connection with Article 137 VII WRV states that religious communities are equal to associations which have set themselves the task of jointly cultivating a *Weltanschauung*. Practically, however, it seems complicated to transfer the legal provision to ideological communities as they have an apparent religious reference. It is not clear from the legal provisions what these "equivalent events" by *Weltanschauungsgemeinschaften* could be.

In the opinion of the Bamberg court, who decided the only case of an ideological community ever trying to invoke its rights under section 53-54 Prison Act in 2011, it was the legislator's intent that the respective provisions only applied to ideological communities under certain conditions.[855] It argued, by means of the choice of the word "ideological confession" in section 55 federal Prison Act, that the corresponding sections 53- 54 federal Prison Act only applied to ideological communities with "confession".[856] According to the court, this was expressed in "the statements or actions that are made from an overall view of the world or from a sufficiently consistent overall view of the world."[857]

On the question of how events of ideological confession would have to be structured in order to be covered by section 53-54 of the federal Prison Act, the court referred to Christian

[853] Section 55 Ideological Communities: Sections 53 and 54 shall apply mutatis mutandis to members of ideological communities.
[854] Cf. Deutscher Bundestag, Bericht und Antrag des Sonderausschusses für die Strafrechtsreform / Drucksache 7/ 3998 (Gesetzentwurf der Bundesregierung ed., 1975), at 24 -25.
[855] OLG Bamberg, 23. November 2011 – Ws 700/01 – juris.
[856] Id. at. 3.
[857] Id. (Quoting: von Mangoldt/Klein/Starck, GG 1, 4th ed. 1999, Art. 4 para. 1, 2, para. 31) "Es muss sich vielmehr um ein Bekenntnis handeln, wobei Letzteres in den Äußerungen bzw. Handlungen zum Ausdruck kommt, die aus einer Gesamtsicht der Welt oder aus einer hinreichend konsistenten Gesamthaltung zur Welt entspringen"

traditions: “The ideological community, which strives for a classification as ideological confession within the meaning of § 55 StVollzG and asserts rights to be derived from §§ 53 and 54 StVollzG, must […] explain whether it at all knows the ideology of a person comparable to a pastor and what value such a person has in the ideological community.”[858] Due to this limitation, it is difficult to come up with practical examples for the application of section 55 Prison Act. Also, the court of the case spoke out against the application of section 55 federal Prison Act. It also emphasized that the application of section 55 Prison Act was subject to the discretion of the prison institution. “Ultimately”, the court argued, “ it is […] always left to the concrete examination of the individual case to what extent there is room for a corresponding application of §§ 53 and 54 StVollzG, even if it is a matter of a confessional ideology”.[859]

Even though this case was not directly concerned with the application of the legal framework for religious minorities, it may illustrate the unquestioned reference that is made to the Christian roots of chaplaincy, dictating how chaplaincy must look like for the entire diverse prison population. The transfer of the scope of protection from section 53-54 federal Prison Act to ideological communities, furthermore, illustrates how crucial the underlying understanding of the scope of protection in section 53-54 of the federal Prison Act is. Thus, also for the application of these provisions to religious minorities, the extent to which the Christian model is invoked plays a decisive role.

c. Chaplaincy and Religious Minorities: Inclusion or Exclusion?

This section examines the accommodation of chaplaincy for religious minorities based on empirical data and case law. Due to its numerical relevance, special focus is put on Muslim chaplaincy. In prison chaplaincy, the exercise of religious group rights and individual rights are closely related. The legal structures provide that the practice of religion by the individual inmates presupposes functioning cooperation between the state and the religious

[858] Id. “Die eine Einordnung als weltanschauliches Bekenntnis i.S.d. § 55 StVollzG anstrebende und aus §§ 53 und 54 StVollzG herzuleitende Rechte geltend machende Weltanschauungsgemeinschaft hat deshalb darzulegen, ob sie überhaupt die Betreuung durch eine dem Seelsorger vergleichbare Person in ihrer Weltanschauung kennt und welcher Stellenwert der Betreuung durch eine derartige Person in der Weltanschauungsgemeinschaft zukommt.”
[859] Id. “Letztlich bleibt es somit dann immer der konkreten Einzelfallüberprüfung überlassen, inwieweit überhaupt Raum für eine entsprechende Anwendung der §§ 53 und 54 StVollzG besteht, selbst wenn es sich um eine bekennende Weltanschauung handeln sollte.“ (Citing Eick-Wildgans, Anstaltsseelsorge, 1993, p. 172; Rassow, in: Schwind/Böhm, Strafvollzugsgesetz, 3. Aufl. 1999, § 55 Rdn. 5).

community.[860] Today, however, many prisons have established chaplaincy for religious minorities detached from this structural framework. These new structures, which correspond to the local conditions, are referred to as "fragmented structures"[861].

For inmates belonging to a relatively small religious minority (i.e. *not* Christian or Muslim), it must be assumed that there are institutions with no denominational service at all.[862] Just under 30% of the institutions surveyed stated that, in addition to Christian and Muslim chaplains, chaplains from other religious communities were present.[863] Other prisons, with no *Seelsorger* of religious minorities, explained the lack with existing internal difficulties (5.55%), no demand among inmates (55.55%), and other reasons (11.11%).[864] Interestingly, none of the institutions surveyed stated that there were no *Seelsorger* for religious minorities because they could not find suitable staff. No reliable statements can be made about the actual need of religious minorities for chaplaincy in prisons today. It is certain, however, that there are inmates who belong to minority religions. According to estimates, 15.58 % of the prison population belong to a religion other than Christian or Muslim.[865]

Muslim chaplaincy is increasingly under attention and research is growing. The available data suggests that it became quite common that Muslim chaplains are present in prisons. Almost 67 % of all prisons have a Muslim chaplain coming to prison.[866] In only a few prisons, however, they are employed by the state (11,1 %) or receive payment (11,1 %). In the vast majority of prisons, Muslim chaplaincy work as volunteers (44,4 %). Some institutions stated they could not find suitable staff (5,5 %) or had internal difficulties (5,5 %) which stood in the way of the cooperation with a Muslim chaplain.[867] Almost 12 % of all prisons stated that there was no need for the accommodation of Muslim chaplaincy.[868] Only in some prisons with a Muslim chaplain regularly coming to the institution for religious care, inmates also have the

[860] See Part 1, Chapter IV, 1.a.bb.
[861] Harms-Dalibon uses the term "fragmented actor landscape without legal status" for Muslim life in Germany, as opposed to "well-connected and legally recognized [actors] as *Religionsgemeinschaften*", Harms-Dalibon, COMPARATIVE MIGRATION STUDIES (2017). p. 17.
[862] See data in appendix.
[863] See data in appendix.
[864] See data in appendix.
[865] See data in appendix.
[866] See data in appendix.
[867] See data in appendix.
[868] See data in appendix.

opportunity to join religious group activities, such as Friday prayers. This is only the case in 47 % of all prisons, with half of them only offering monthly services, not weekly ones.[869]

These data from the sample of prisons throughout Germany show that there is a variety of practices. Jahn, who researched Muslim chaplaincy in various institutions, concluded that "[…] there is still no general modus vivendi based on the law and administration principles for Muslim chaplaincy"[870]. In this vein, it should first be recapitulated though that it is a relatively new achievement, that the right to religious chaplaincy in prisons applies to all inmates. In 1990, the Highest Regional Court of Celle decided about a case of a Muslim inmate, who in his request for Muslim denominational services, was sent to participate in Christian Chaplaincy by the prison management.[871] The prison management was of the opinion that the inmate's rights for religious welfare (as stipulated under section 54 I Prison Act) was fulfilled because of the existing opportunity to join the Christian services - despite the fact the claimant was Muslim. In its judgment, the court reversed the decision.[872] The court emphasized that section 54 I Prison Act protected the right of inmates to religious welfare that is in accordance with their religion; not only the right to attend the existing offers for Christian chaplaincy.[873] Indeed, times have changed since 1990, and today, it is widely acknowledged that the accommodation of Christian chaplaincy alone potentially violates the (equality) rights of inmates belonging to another religion but Christianity.

Nevertheless, there are still obstacles to the widespread functioning of prison chaplaincy for religious minorities. Some of these obstacles result from the requirements of German church law, such as demanding criteria for the religious community status and the limited interpretation of the concept of "spiritual welfare". However, these requirements are not only to be understood formalistically. Rather, these requirements tend to reflect deeper conflicts about the recognition of the religious life of Muslims and other religious minorities. The recognition of a religious community is a matter of the individual Land. While the Länder

[869] See data in appendix.
[870] Jahn, Journal of Religion in Europe (2016), p. 413.
[871] OLG Celle, 1 Ws 225/90, 15.08.1990.
[872] Id.
[873] [Ger.] Die Verweisung auf den Gottesdienst eines anderen Bekenntnisses ist aber durch § 54 Abs. 1 StVollzG nicht gedeckt. Das Recht des Gefangenen auf Teilnahme an religiösen Veranstaltungen seines Bekenntnisses stellt eine Mindestgarantie dar; die auch aus vollzugsorganisatorischen Gründen nicht in ihrem Wesensbestand angetastet werden darf.

follow very similar formal requirements of legal recognition, the precise modalities of cooperation are regulated autonomously and therefore potentially vary from one Land to another.[874] The biggest challenge for this recognition process is that Muslim communities, like other minority religions, are not collectively organized in the same way the Christian communities are.[875] The absence of clearly established structure and leadership within the diverse landscape of Muslim communities is a severe challenge.[876] Today, there are several openings of the constitutional framework for the integration of Muslim organizations[877]; however, "the requirements still constitute deeply-rooted administrative "traditions" that dominate practices and thinking in the public sphere."[878] For religious minorities, the requirements cause an expectation in respect of the restructuring of the community and the adaptation to the preexisting legal organizational structures.[879]

Once a religious group has received legal status, the cooperation between the Land and the community is organized on the basis of contractual agreements.[880] Within this framework, recognized religious communities *(Religionsgemeinschaften)* are allowed to establish chaplaincy in prisons and other public institutions. Here again, religious communities of minorities face structural requirements, some of which are difficult to adapt to. The common chaplaincy model is profoundly entangled with the Christian community's structure and thinking, which as famously shown by Beckford, "influences the 'social forms' of minority chaplaincies".[881] Concerning the interpretation of the constitutional requirements of Article 141 WC, the dominance of the Christian model goes so far that it has been argued that Muslims are not in "need" of chaplaincy.

Fröhmcke holds that the Christian model of *Seelsorge* ("religious welfare") i.e. individual counseling by the chaplain, is foreign to Islam.[882] He argues that the "need"- requirement of

[874] Harms-Dalibon, COMPARATIVE MIGRATION STUDIES (2017). p. 7.
[875] Id. at. 6.
[876] Id. at. 3.
[877] Id. (with further references).
[878] Id.
[879] Id.
[880] Id. at. 7.
[881] James Beckford, *Religious Diversity and Rehabilitation in Prisons: Management, Models, and Mutations*, *in* RELIGIOUS DIVERSITY IN EUROPEAN PRISONS: CHALLENGES AND IMPLICATIONS FOR REHABILITATION (Irene Becci & Olivier Roy eds., 2015). p. 22.
[882] FRÖHMCKE. 2005. p. 220; [...]ist auch festzuhalten, dass dem Islam ein Seelsorgebegriff fremd ist, wie ihn die Regelung des Grundgesetzes voraussetzt. Es gibt keine individuelle Seelsorge im eigentlichen Sinne, wie sie bei

Article 141 WC was only fulfilled in case inmates relied on the presence of a religious leader for the practice of their religion. If, however, religious practice could also be exercised alone, there was no "need" for the presence of the religious leader inside of prison and hence no right of the religious community to enter the prison institution.[883] Therefore, Fröhmcke makes a distinction between daily prayers and Friday prayers of Muslims.[884] He argues, only the latter were generally collectively exercised and could, therefore, lead to the right of a Muslim community to organize chaplaincy and to the employment of a Muslim chaplain.[885] Interestingly, he backs up his argument with the principle of state neutrality. He emphasizes that neutrality means for the state to not "impose" specific religious content and behavior.[886] For the state, however, to also institutionalize religious services for Muslims meant to "impose" a particular practice. In the line of this argumentation, also the principle of parity is not violated by not providing for any other religious services but Christian ones: the state had to treat religions similarly but not irrespectively of their essential differences (*Wesensunterschiede*). That *Seelsorge* was not part of Islam constituted such crucial difference and therefore spoke against an equal right of Muslims to chaplaincy.[887]

The attempt to justify the unequal treatment of Christians and Muslims with the intra-religious differences between Christianity and Islam must fail for two reasons. First, the argument is built on a "block vision" of "the Islam", simplifying the various strands of Muslim life, and secondly, it assumes that the state has the competence to generally decide on the appropriateness of religious practice for individual religions.[888] With respect to the first concern, it cannot simply be ignored that there are Muslim communities, educated Imams, and Muslim inmates, all favoring the accommodation of Muslim chaplaincy in prisons.[889] Seen

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den christlichen Kirchen vorzufinden ist. Da die Insassen in Anstalten aber aufgrund der ihnen nach Artikel 4 GG zustehenden Religionsfreiheit gesetzliche Rechte auf religiöse Betreuung haben (z. B. § 36 Soldatengesetz, §§ 53 bis 55 Strafvollzugsgesetz), besteht die Notwendigkeit, den Bedürfnissen muslimischer Insassen besser gerecht zu werden.

[883] Id. at. 223-224.

[884] Id.

[885] Id. at. 228.

[886] Id. at. 220.

[887] Id. at. 221.

[888] The "block view" with which the Islam is looked at and perceived is problematized, most importantly, by Charles Taylor: Charles Taylor, *Block Thinking* (2007), *available at* https://www.project-syndicate.org/commentary/block-thinking *(last accessed 30.08.2019).*

[889] That there is an interest for more religious opportunities and denominational services on both an organizational as well as an individual level, is not only visible in various sources of the media, but also reported by the German Islam Conference (DIK), *9. Arbeitsausschuss Muslimische Seelsorge* (2016), *available at* http://www.deutsche-

from this perspective, it is not clear what "supreme" understanding of Islam, Fröhmcke is referring to when stating that *Seelsorge* is generally foreign to the religion of Islam.

Furthermore, this argument suggests it can be decided by the state, and not by the religious community themselves, whether religious needs and practices are part of one religion.[890] Religious communities are protected under the right to self-determination (Article 137 III WC).[891] Accordingly, "every religious community regulates and administers its own affairs independently within the framework of the general law that applies to all".[892] To let the state not only decide about the criteria for cooperation between state and religious community, but also about the religious practice of the community and its members, de facto levers out the right of Article 141 WC; it would no longer equally apply to all religious communities.[893] Indeed, the last binding word about the interpretation of conduct under religious freedom must be spoken by the law enforcement authorities.[894] However, as stipulated under Art. 4 I, II BL, the self-image of the religious person is decisive here. He or she must present in a comprehensible and plausible manner that the religious rule of conduct is subjectively perceived as binding.

Therefore, Fröhmcke is right to emphasize the responsibility of Muslim communities for developing concepts of Muslim chaplaincy.[895] The state must support these efforts without interfering too much with the religious content of chaplaincy. In 2017, for example, the *Deutsche Islam Konferenz* commissioned a working group joined by all Länder to develop

islam-konferenz.de/DIK/DE/DIK/1UeberDIK/Arbeitsausschuss/9Arbeitsausschuss/9-arbeitsausschuss-node.html. *(last accessed 30.08.2019).*

[890] Arguing in favor of the power of the state, to define Muslim religious content: Campenhausen, at 7; Arguing against it: BVerfGE 24, 236 (247); BVerfGE 108, 282 (298 f); EICK-WILDGANS (1993), p. 111; NINA NESTLER, STRAFVOLLZUGSGESETZE, § 54, at. 2; Isak, Das Selbstverständnis der Kirchen und Religionsgemeinschaften und seine Bedeutung für die Auslegung staatlichen Rechts 1994; Morlok, Selbstverständnis als Rechtskriterium 1993; Borowski, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, 2006, p. 251.

[891] Korioth, in Maunz & Dürig, GG, Article 137 WC, at 23 et seq.

[892] Article 137 III WC [Ger.] Jede Religionsgesellschaft ordnet und verwaltet ihre Angelegenheiten selbständig innerhalb der Schranken des für alle geltenden Gesetzes. Sie verleiht ihre Ämter ohne Mitwirkung des Staates oder der bürgerlichen Gemeinde.

[893] Laborde's theory of justificatory secularism demands the separation between state and religion and requests that religion should not be used to justify official policy; If here the Christian model has limiting effects for the rights of other religious communities, because the state adopts the Christian example that other religious communities have to comply with, this is an example for the exclusionary effects of such reasoning for religious minorities. (Part 1, Chapter I, 2.).

[894] See Part 1, Chapter IV,2.a.aa.

[895] FRÖHMCKE (2005), p. 222.

solutions for the concrete challenges when implementing Muslim chaplaincy in prison (i.e. find suitable staff, find a structure that fits the needs of Muslim inmates, find suitable religious writings).[896] This is the problematic demarcation, actually necessary against the background of state neutrality. The principle of state neutrality does not prohibit the expansion of chaplaincy to religious minorities. To the contrary, it would be a violation of the principle of state neutrality to interfere so deeply in the affairs of religious minorities with decisions of their religious practices and to only accommodate chaplaincy for Christians. An understanding of neutrality that in fact leads to a restriction of equality rights and does not contribute to their enforceability must be viewed critically.[897]

The state has a legitimate interest in setting out the conditions for well-functioning cooperation between state and religious communities. The challenge here lies in the task to draw the line between legitimate expectations directed at Muslim and other religious communities to adapt to the preexisting framework which can secure well-functioning cooperation, and an adaptation pressure, which violates equal rights because it directly or indirectly discriminates against religious minorities. This problem is a facet of the multiculturalism debate that has not yet gained much attention. Focus is often put on the issue of how minorities within the majority of society can receive assistance by being exempt from rules otherwise binding on the majority but not on how minorities can comply with the structures of the majority society for the benefit of privileges.

As shown, in a democratic secular state which, like Germany, also cultivates and protects cooperation with religious communities, it is a challenge to determine under what circumstances minorities may participate in these cooperation-structures. In other words, it is no longer a question of the state's obligation to exempt religious minorities from general duties because of their religious or cultural ideas that deviate from the societal mainstream. Rather, the challenge concerns the conditions under which the state may include or exclude them from participation in the public mainstream. This task naturally requires adjustments on both sides and does not get along without compromises and concessions. [898] In this context,

[896] German Islam Conference (DIK), 9. Arbeitsausschuss Muslimische Seelsorge (2016).

[897] Laborde's theory serves to back up the argument normatively; she sees neutrality as a downstream commitment restricted to a particular side, See Part 1, Chapter I, 2.

[898] The requirement of compromise between state and Muslim communities is discussed along the example of Seelsorge in hospitals, see: Tabbara, ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR), (2009).

it must be warned against the recurring mechanism of turning the religious significance of Christian rites and habitus into culture, thus eliminating the comparative basis for religious equality issues.[899] In the prison domain, this observation is given meaning by the common perception of Christian organizations as not being merely religious, but above all a social institution.[900] Even if the secularization processes trigger such reinterpretation of originally Christian content, caution is advised to use this as an argument for any principles of the Christian churches, i.e. that Christian chaplaincy services should now be privileged compared to other religious chaplaincy services.

Harms-Dalibon has compared Muslim prison chaplaincy in different German Länder and has identified different framing strategies on which actors rely on in the "public struggles for recognition". Relying on Jahn's research[901], she argues religious communities can mobilize the prison's interest in security and rehabilitation and enter as "rehabilitation actor".[902] In fact, they argue that the interest in rehabilitation may "overrule" the legal criteria of corporatist church law.[903] While Jehovah's Witnesses, for example, despite having the status of a PLC, are not allowed to enter the prison institution, Muslim actors are present in the institutions despite not being legally recognized as cooperation partner; Jahn argues this is because they are perceived as an important rehabilitation actor who can prevent radicalization of inmates while the Jehovah's witnesses are rather perceived as potentially dangerous.[904]

Most importantly, Harms-Dalibon expands the research in two ways. First, she identified another pathway leading to the accommodation of Muslim Chaplaincy rather than entering as "rehabilitation actor, that is a rising power of the individual rights discourse which created new opportunities for Muslims "acting at the grassroots level" to accommodate religion in prisons from below.[905] Furthermore, she argues that there is a strategic element of how

[899] In the first headscarf decision from 2003, the FCC created the notion of the "Christlich-abendländische Tradition". This notion was invented, or at least used, to justify the preferential treatment of Christian symbols over other religious symbols as it was possible to argue that the habit, worn by a nun, not only represents religious content, but is a cultural expression, See BVerfGE 108, 282 (340) (headscarf I).
[900] Jahn, Journal of Religion in Europe (2016), p. 410.
[901] See Jahn, Institutional logic and legal practice: Modes of regulation of religious organizations in German prisons. 2015, p. 82 et seq.
[902] Harms-Dalibon, COMPARATIVE MIGRATION STUDIES (2017), p. 6.
[903] Id. at. 6.
[904] Jahn, Institutional logic and legal practice: Modes of regulation of religious organizations in German prisons. 2015, p.86
[905] Harms-Dalibon, COMPARATIVE MIGRATION STUDIES (2017), p. 6; Berlin, according to Harms-Dalibon, this is in

religious actors try to become recognized as a cooperation partner of the state which has yet been largely overlooked in studies on chaplaincy and diversity governance.[906] In her view, depending on the actor's position as either recognized religious communities *(Religionsgemeinschaft)* or "fragmented actor" without legal status, it chooses different strategies to "negotiate their place in the public sphere"; she speaks of "verifying geometries" that are strategically constructed.[907] Her research shows that there is both: imams willing to work as prison chaplains as well as Muslim inmates who are interested in prison chaplaincy.

Based on these considerations, the security interest of prisons that became entangled with an interest in the prevention of radicalization is also noteworthy. The latter became an important perspective under which especially Muslim chaplaincy is examined.[908] This state interest certainly has the potential to change current structures. This can be seen, for example, in the selection of chaplains. Within the framework of the DIK, a concession has recently been made to the Muslim communities to allow them to train their imams. From the state's point of view, this should prevent more - allegedly radical - imams from abroad from coming to Germany.[909]

This development is remarkable, as it is otherwise common for chaplains to go through state training structures. The origins of the Christian theological faculties training chaplains go back to the fourteenth century; the beginning of the public university system in Germany.[910] Still today, theological faculties belong to the *res mixtae* between state and church.[911] The relevant legal requirements result from the constitution, general law and a large number of differently

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contrast compared to the developments in Lower-Saxony with respect to the framing process: Rather than legally framed top-down group "equalization", one can observe a bottom-up process with an individual rights claim emerging from the prison itself and leading to a project-centered approach. The claim of getting access to an imam advanced by individual prisoners in Berlin has been channeled via representatives of detainees to the Expert Council on Integration and Migration and to the media, (p. 10).

[906] Id. at. 8 et seq.

[907] Id. at. 17.

[908] Id. at. 4.; Julia Schaaf, Ein Imam für den Knast, FAZ, 2018, *available at*: https://www.faz.net/aktuell/gesellschaft/kriminalitaet/muslimische-gefaengnisseelsorger-ein-imam-fuer-den-knast-15789632.html; Johannes Stuhrmann, Gefährliche Antworten, CHRISMON, 2019, *available at*: https://chrismon.evangelisch.de/artikel/2019/43000/muslimische-gefaengnisseelsorge; Kaum Gefängnis-Seelsorger für Muslime, WDR 2019, available at https://www1.wdr.de/nachrichten/wenig-imame-seelsorge-haftanstalt-100.html) *(last accessed 30.08.2019).*

[909] German Islam Conference (DIK), 9. Arbeitsausschuss Muslimische Seelsorge (2016).

[910] Hans-Michael Heinig, Theologie an staatlichen Universitäten. Verfassungsrechtliche Vorgaben, verfassungsrechtliche Spielräume, in EVANGELISCHE THEOLOGIE IM 21. JAHRHUNDERT (S. Alkier H. G. Heimbrock ed. 2011).

[911] CLASSEN (2006); Hans-Michael Heinig, Wie das Grundgesetz (vor) Theologie an staatlichen Hochschulen schützt. Eine Erwiderung auf Carsten Bäcker, 48 DER STAAT 615 (2009).

fashioned state-church agreements.[912] This gives the churches a strong influence on the curriculum and the selection of university staff. Still, there are only a few Institutes of Islamic Theology at German universities, where students can be trained as Muslim chaplains.[913] Therefore the question of how Muslim chaplains are trained is a question of practical relevance.[914] Today, moreover, the increased security checks on candidates by the Office for the Protection of the Constitution *(Verfassungsschutz)* are causing conflicts. As a result of the refusal of an imam to pass the safety test, the number of imams in North Rhine-Westphalia has dropped from 115 to 12 in recent years.[915]

Even though various prisons accommodated Muslim chaplaincy, today, the existing offer cannot fulfill the right of Muslim inmates.[916] This is also not changed by the fact that some Muslim inmates turn to the Christian Chaplains for advice. It may well work for general psychological support and care[917], but is difficult to reconcile with the inmate's right for denominational religious care as envisaged under prison law.[918] Due to the special role of chaplains as persons of trust for inmates and the privileges associated with their work, it makes a difference to inmates what status their "caregiver" has.[919] Only recognized clergymen

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[912] Hans-Michael Heinig, Hochschulbildung: Theologische Fakultäten, Institute, Lehrstühle an staatlichen Hochschulen und kirchliche Hochschulen, in HANDBUCH DES EVANGELISCHEN KIRCHENRECHTSTAGS (H. U. Anke/ H. de Wall/ H. M. Heinig ed. 2016).

[913] In 2011, based on the recommendations of the German Council of Science and Humanities, the establishment of Islamic centers was accelerated. The five centers in Tubingen, Frankfurt, Munster, Osnabruck, and Erlangen-Nuremberg were positively evaluated in 2015 and will be funded for another five years, Hans-Michael Heinig, *Islamische Theologie an staatlichen Hochschulen*, 56 ZEVKR 238 (2011).

[914] Kaum Gefängnis-Seelsorger für Muslime, WDR 2019.

[915] 24 muslimische Gefängnisseelsorger im Einsatz, Islam iQ, 2014, available at: http://www.islamiq.de/2017/05/12/24-muslimische-gefaengnisseelsorger-im-einsatz/ (*last accessed 30.08.2019).*

[916] The insufficient number of Imams in German prisons is, for example, criticized by Parliament Member Georg Rosenthal (Deutsche Presse Agentur, *Mehr Imame als Gefängnis-Seelsorger*, MERKUR 2015), Kaum noch muslimische Gefägnisseelsorger in Deutschland, MiGAZIN, 2018, available at: www.migazin.de/amp/2018/02/16/mangelnder-nachwuchs-kaum-gefaengnisseelsorger-deutschland/ *(last accessed 30.08.2019).*

[917] According to the German protestant church, the Seelsorge is open to non-Christians as well: Das Kirchengesetz zum Schutz des Seelsorgegeheimnisses vom 28.10.2009 definiert: Seelsorge im Sinne dieses Gesetzes ist aus dem christlichen Glauben motiviert und vollzogene Zuwendung. Sie gilt dem einzelnen Menschen, der Rat, Beistand und Trost in Lebens- und Glaubensfragen in Anspruch nimmt, unabhägnig von dessen Religions bzw. Konfessionszugehörigkeit (Section 2, I SeelGG). For a critical assessment of the general question, whether Christian Seelsorger can take care of Muslim inmates, see: Altintas, BEWÄHRUNGSHILFE – SOZIALES, STRAFRECHT, KRIMINALPOLITIK, (2008).

[918] Immam Husammudin Meyer discussed the critique from side of the Christian Seelsorger: Meyer, FORUM STRAFVOLLZUG, (2014), at 20.

[919] See, with further sources, Tabbara, ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR), (2009), at 256 et seq.; The role of pastoral workers was discussed in KG Berlin, 04.10.1985, 5 –Vollz (Ws) 327/85. The court underlines that pastoral workers do belong to the official prison staff, but due to the further tasks of worship

have the right to secrecy, but not social workers.[920] The right to refuse testimony on professional grounds is codified in section 53 I 1 of the Code of Criminal Procedure, where "clergymen" may refuse to testify "concerning the information that was entrusted to them or became known to them in their capacity as spiritual advisers".[921] This form of protection for inmates does not extend to information shared during sessions of psychological counseling or during casual conversations.[922] Because of the right to religious secrecy of chaplains, inmates can, for example, share stories about earlier committed crimes with the chaplain without having to fear additional criminal persecution.

Also, the architecture and institutional design for chaplaincy services in German prisons generally do not reflect the religious diversity of inmates. Commonly, a Christian chapel provides space for the religious practice of inmates. Some prisons, however, have started to find more diversity-friendly architectural solutions and, for example, built an additional prayer room for Muslims. Some institutions have multi-purpose rooms that can also be used for religious practices, which is the preferable solution in view of the greater possibilities for religious minorities.

Seen holistically, these new cooperation structures that have now emerged between Muslim representatives and the state improve the equality rights of religious minorities. From the perspective of Muslim inmates, in particular, these new structures have significantly improved the chances to attend chaplaincy services. In this vein, the contract between Lower Saxony and a local Muslim community can serve as an example. It takes seriously the needs of Muslim

services, have a special role.

[920] For an in-depth discussion of the secrecy for Seelsorge, see Thomas Petri, Zur schleichenden Entwertung des Zeugnisverweigerungsrechts nach § 53 StPO durch staatliche Überwachungsbefugnisse, KIRCHE UND RECHT 217 (2008).; Heinrich de Wall, Der Schutz des Seelsorgegeheimnisses (nicht nur) im Strafverfahren, NEUE JURISTISCHE WOCHENSCHRIFT 1856 (2007); BGH, Beschluss vom 15. November 2006 – StB 15/06 –, BGHSt 51, 140-144 Zeugnisverweigerungsrecht im Strafverfahren: Einordnung eines Anstaltsseelsorgers als Geistlicher.

[921] Section 53 of the German Code of Criminal Procedure (StPO)in the version published on 7 April 1987 [Right to Refuse Testimony on Professional Grounds] (Federal Law Gazette [Bundesgesetzblatt] Part I p. 1074, 1319), as most recently amended by Article 3 of the Act of 23 April 2014 (Federal Law Gazette Part I p. 410) [Ger.] I. Zur Verweigerung des Zeugnisses sind ferner berechtigt 1. Geistliche über das, was ihnen in ihrer Eigenschaft als Seelsorger anvertraut worden oder bekanntgeworden ist.; As confimed by the FCC in 1972, a person cannot be forced to a testimony under oath if making a deposition is against his or her belief: BVerfG, Beschl. v. 11.04.1972 2BvR 75/71, at. 23-42.

[922] The limitations of the right to refuse testimony are problematized by Ulrich Haag Dieter Wever, *Evangelische Seelsorge in Deutschland*, BEWÄHRUNGSHILFE – SOZIALES, STRAFRECHT, KRIMINALPOLITIK 3 (2008), at 6; Heinz-Bernd Wolters Ulli Schönrock, *Zuwendung zu den Schuldiggewordenen und Gescheiterten*, 1/2014 FORUM STRAFVOLLZUG 14 (2014), at 15.

inmates who – based on the contract – have the chance to join weekly group prayers and individual counseling sessions. In ten sections, the contract between the Land and the Muslim community determines the conditions under which state and Muslim community cooperate. It is made clear that the regional association of Muslims share wide responsibilities, and the contract authorizes religious staff to hold services in accordance with their beliefs.

This issue shows that it is critical to observe within which framework cooperation structures with minority religions arise. It is a positive development when Muslim chaplains start cooperating with prison institutions. However, it must not be overlooked that these "fragmented cooperation structures" may bring deficits that are detrimental to minorities. Still, there is no Muslim chaplain appointed in the main office. If these "fragmented" structures of Muslim chaplaincy are in fact an expression of an – by some actors, intentional - unequal treatment of religious minorities as compared to Christian communities, these fragmented structures could perpetuate inequality and thus stand in the way of more comprehensive recognition of Muslim life in Germany.

Against this background, traditional state church law should adapt further to the religiously diverse society.[923] With a view to chaplaincy services in prisons, it must therefore be asked which concrete preconditions must be fulfilled for the concrete task of chaplaincy services on the part of the cooperation partners. With regard to the "comprehensive fulfillment of tasks" *(ganzheitliche Aufgabenerfüllung),* considerable reductions could be made in the traditional requirements. There is nothing to prevent the state from cooperating with a Muslim organization that is specifically dedicated to chaplaincy services in prisons and other institutions.

2. United States

Chaplaincy programs in U.S. federal prisons offer chaplaincy for various religions. Unlike in Germany, where religious communities organize activities for their members in cooperation with the state, chaplaincy programs in the U.S. operate to support inmates of all religions. Although the concept of religious diversity is firmly anchored in the structural and legal

[923] Tabbara, Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR) (2009), p. 259.

framework in chaplaincy programs, religious minorities, especially Muslims, sometimes face disadvantages compared to the Christian majority.

The following examines chaplaincy programs in the U.S. federal prison system under special consideration of the religious needs and practices of religious minorities. The introduction explains how chaplaincy programs are generally organized and introduce the relevant legal framework and applicable guidelines of the BOP (a). Subsequently, the legal framework for chaplaincy programs is examined in more detail under consideration of the limits of the RFRA (b). In the last section, the equality dimension of chaplaincy programs is addressed, and based on the respective case law and empirical data, how U.S. chaplaincy programs accommodate the religious needs and practices of religious minorities is analyzed (c).

a. Introduction

Chaplaincy programs in federal prisons in the U.S. run under the Chaplaincy Services Branch, supervised by the BOP.[924] That the state is widely involved in the organization of chaplaincy programs leads to issues with the non-establishment principle under the First Amendment of the U.S. Constitution. [925] The Free Exercise Clause, however, protects the inmate's personal rights to religious freedom. Because of the extensive state control in prisons, inmates rely on the state to "freely" exercise their religion. Hence, the state accommodates the religious needs and practices of inmates through chaplaincy programs under the Free Exercise Clause. Thus, chaplaincy programs are an illustrative example of the vivid tension between the Establishment Clause and the Free Exercise Clause.[926]

The chaplaincy programs in U.S. federal prisons are also influenced by state interests, such as the interest in the inmate's rehabilitation and security inside the institution. This tension causes a "dilemma of divided loyalties"[927] for chaplains. Chaplains face the practical demands

[924] The Federal Bureau of Prisons (BOP) (https://www.bop.gov/) is commonly described as a federal law enforcement agency. It is a subdivision of the U.S Department of Justice and generally responsible for the administration of the federal prison system. See also, John Roberts, *The Federal Bureau of Prisons: Its Mission, Its History, and Its Partnership with Probation and Pretrial Services*, 61 FEDERAL PROBATION 53 (1997).
[925] See Part 1, Chapter IV, 1.b.bb.
[926] The complex relationship between both causes of the First Amendment of the U.S. Constitution, in as far as chaplaincy programs are concerned, is addressed by Barbara Knight, see: Knight, JOURNAL OF CHURCH AND STATE, (1984). See most importantly, at 445 et seq.
[927] Hansen discusses the loyalty issue with regard to military chaplains: KIM PHILIP HANSEN, MILITARY CHAPLAINS AND RELIGIOUS DIVERSITY (Palgrave Macmillan 1. ed. ed. 2012), p. 1 et seq.

of two different systems and hierarchies.[928] They are part of the regular staff of the prison institutions and must service the Ministry of Justice, and they are also spiritual representatives of a religion, who must serve the individual inmate.[929] This tension can be shaped in different ways and is influenced by the country's current political climate. The conditions in prison and the role of its staff reflect the broader political circumstances. Shortly after Donald Trump became the 45th President of the U.S., the BOP made it mandatory for chaplains to carry O.C spray in despite the BOP's earlier exemption for chaplains from this security measure.[930] From the point of view of chaplains, inmates perceive them differently when they carry pepper spray and perceive them as part of the security personnel: "carrying pepper spray[…][is] going to undermine [the chaplain's] credibility with the prisoners, who will say "look he's one of them, not one of us."[931]

This shows that the role of prison chaplains is demanding in light of the various tasks it encompasses.[932] He or she has numerous administrative duties as well as responsibilities for pastoral care. Like other staff involved in the fields of counseling, chaplains must provide sustenance and support to the prison population without compromising security. They must also take care of their budget. They are responsible for praying for the services of contract ministers, for making liaisons with religious volunteers, and for organizing institutional events, including ceremonial dinners. Because of the ethnic and religious diversity of the U.S. prison population, all federal prison chaplains must be able to provide interfaith services.

Religious diversity is the third great challenge next to the Establishment Clause concerns and the difficult "multi-dimensional" function of chaplains within the institutional structure. Not only the prison population, but also the chaplains themselves make up a diverse corps within the institution.[933] To be able to minister to a multi-faith congregation, prison chaplains must participate in training sessions to learn about other religions.[934] In the federal prison system,

[928] Id. at. 14.
[929] Id.
[930] The obligation to wear pepper spray was first introduced when Congress passed the Eric Williams Correctional Offices Protection Act of 2015, Justin George, A Chaplains Conscience vs. the Bureau of Prisons, The Marshall Project, 2017, available at: https://www.themarshallproject.org/2017/09/25/a-chaplain-s-conscience-vs-the-bureau-of-prisons *(last accessed 30.08.2019).*
[931] Id.
[932] BOP Technical Reference Manual, Ministry of BOP Chaplains (2004).
[933] HANSEN (2012), p. 1.
[934] BOP Technical Reference Manual, Ministry of BOP Chaplains (2004), p. 20-21.

the BOP regularly produces documents describing key elements of many different religious beliefs. Because of the great variety of religious groups in U.S. prisons, no one group may have priority over another. Thus, chaplains have to equally take care of inmates of all faiths, and in case support is required, hire additional religious staff and volunteers.[935]

The right of inmates to exercise religion in prison and to join chaplaincy programs is protected under the Free Exercise Clause and under the RFRA (and under RLUIPA in the state prison system). The BOP uses different Technical Reference Manuals and Program Statements as best practices guides, which explain in detail how chaplaincy may get organized and how chaplaincy programs concretely accommodate the diverse needs and practices of inmates.[936] The legal framework will be examined in more detail in the following section.

b. The Right to Chaplaincy Programs under the RFRA and the Guidelines of the BOP

There have long been fundamental doubts as to the constitutionality of chaplaincy programs in prisons and their compatibility with the limits drawn by the Establishment Clause.[937] Already in 1963, in *Abington v. Schempp*, Justice William Brennan addressed the Establishment Clause concerns arising from chaplaincy programs in his concurring opinion.[938] In his view, although arguably violative of the Establishment Clause, chaplaincy programs may nevertheless be sustained on constitutional grounds as necessary to secure for prisoners their guaranteed free exercise.[939] In his words, "There are certain practices conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberty also protected by the First Amendment."[940]

Years later, in 2005, the question of the constitutionality of chaplaincy programs was raised again in the landmark prisoner case, *Cutter v. Wilkinson*.[941] The U.S. Supreme Court, however, confirmed the constitutionality of prison chaplaincy. *Cutter* proved what already became

[935] Id. at. 25.
[936] Id.; BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002), BOP Program Statement: Religious Beliefs and Practices (2004).
[937] U.S Constitution, Amendment I, Congress shall make no law respecting an establishment of religion […].
[938] Abington v. Schempp, 374 U.S. 203 (1963).
[939] Id. at. 288.
[940] Id. at. 296.
[941] Cutter et al. v. Wilkinson et al. 544 U.S. 709 (2005); According to the courts holding, Section § 2000cc-1 of the Religious Land Use and Institutionalized Persons Act was not facially unconstitutional but was instead a permissible accommodation of religion under the First Amendment (See Part 1, Chapter IV, 1.b.bb.).

apparent in *Schempp*: The separation between state and religion cannot apply without restrictions in prison if inmates are to be allowed to practice their religion.[942] A line is drawn where the state directly advocates certain forms of religious practice, for example, by funding faith-based rehabilitation programs. In *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, the 8th Circuit Court decided that a Christ-centered rehabilitation program, run by two non-profit organizations under a contract with the Iowa Department of Corrections, violated the Establishment Clause.[943]

Hence, it makes a decisive difference with a view to possible Establishment Clause infringements, if the activity is open to all religions and sensitive to inter-religious equality or - like faith-based programs - based on one particular denomination.[944] Concerns still exist with chaplaincy programs because they favor religion over non-religion. Some refer to the long tradition of chaplaincy programs to justify their existence today.[945] Legally, their historical relevance alone cannot appease equality concerns related to the axis of religious and non-religious. As illustrated for the German prison context, which doctrinally transfers the right for chaplaincy to "ideological communities" *(Weltanschauungsgemeinschaften)*, it is unresolved how non-religious chaplaincy could even look like in practice.[946] At least non-religious inmates need to be offered an alternative program, such as reading or sports activities, so that they can spend at least the same amount of time outside the cell.

As already shown elsewhere in this thesis, RFRA (and RLUIPA) is more protective than the *Turner/O-Lone Standard* for chaplaincy and other kinds of religious exercise. First, this is because of its broad definition of religious exercise that protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." [947] Second, a prisoner bringing a claim under RFRA avoids the deferential "reasonableness" standard employed in the First Amendment context.[948] RFRA (and RLUIPA) balance the prisoner's rights to religious

[942] See Part 1, Chapter IV, 1.b.bb.
[943] *Ams. United for Separation of Church & State v. Prison Fellowship Ministries,* 432 F. Supp. 2d 862, 933 (8th Cir. 2006), (See Part 1, Chapter IV, 1.b.bb.)
[944] Winnfried Sullivan has extensively published on faith-based organization in the U.S., see: Sullivan, Die neuen Gesetze von "Charitable Choice" und die Regelung von Faith-based Organisationen in den USA. 2005; SULLIVAN, Prison Religion: Faith-Based Reform and the Constitution 2009; Sullivan, HISTORY OF RELIGIONS (2008).
[945] Cutter et al. v. Wilkinson et al. 544 U.S. 709 (2005) I.A.
[946] See under 1.c. of this chapter.
[947] 42 U.S.C. § 2000cc-5(7)(A) (2004).
[948] Id.

practice against the government's interest. As summarized by the ACLU, the general balancing test is that the government may not impose a substantial burden on a prisoner's exercise of religious beliefs unless that burden (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest. [949]

According to the BOP, the described mission of chaplaincy programs is:

> to accommodate the free exercise of religion by providing pastoral care to all Federal inmates and facilitate the opportunity to pursue individual religious beliefs and practices in accordance with the law, Federal regulations and Bureau of Prisons policy. [950]

In the Program statement on the practice of religion, it is further specified that the pursued aim is to provide inmates of all faith groups with reasonable and equitable opportunities to pursue religious beliefs and practices, "within the constraints of budgetary limitations and consistent with the security and orderly running the institution".[951] Structurally, the federal prison system is divided into six different regional systems, each with a regional director of chaplaincy.[952] All federal prisons employ at least one, and up to five, full-time chaplains as regular employees. The positions for chaplains are allocated by the governor of the state, and the employment costs are covered by tax money.

As shown, chaplains have various tasks. They are not only employed to lead religious worship services but also to provide professional spiritual direction, support, and crisis intervention for individual inmates. Moreover, they are responsible for organizational matters, such as organizing religious events and contacting religious contractors and volunteers.[953] The aim is to accommodate various religious services and events for inmates. In case they choose to practice their religion in the privacy of their cell, they face very few restrictions. While the BOP may place significant restrictions on the property and cell decor, those who practice their religion in their cell, are usually left to do so. In many institutions, for example, Muslim inmates are permitted to perform daily prayers wherever they choose. Practice in the common areas in prison, like the recreation yard, are also permitted. However, unauthorized groups will

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[949] ACLU National Prison Project, Know Your Rights Freedom of Religion, available at: https://www.aclu.org/files/assets/know_your_rights_--_religion_november_2012_0.pdf *(last accessed 30.08.2019).*

[950] BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002), p. i.

[951] BOP Program Statement: Religious Beliefs and Practices (2004), p. 1.

[952] Id. at. 9.

[953] Id. at. 7.

usually be ordered to disperse. Especially for Muslim inmates, independent group prayers are forbidden for security reasons; as argued by the BOP, it would cause a danger of radicalization.[954]

According to the BOP, chaplains are "manager[s] of religious and cultural diversity".[955] Their task is to identify and affirm cultural differences, "to foster the recognition that diversity, far from being detrimental, is acceptable, even preferable."[956] In order to ensure impartial religious leadership and to meet the diversity of faith groups, involving supervising programs, managing resources, and collaborative teamwork, chaplains of the BOP, regardless of their own faith backgrounds, are expected to be "pastors to all who live and work in the institution".[957] Such role of chaplains can even theoretically only work if the chaplain surrenders some aspects of their religious identity. According to the U.S Departments of Justice, impartiality means that there are no Protestant, Muslim, Jewish, Catholic, etc. chaplains, but only staff chaplains who happen to be Protestant, Muslim, Jewish, (or) Catholic.[958] Thereby, the department wants to make sure that the denominational identity of chaplains does not stand in the way of a healthy interfaith approach to correctional ministry.[959]

One of the key resources for chaplains is the "American Correctional Association" (ACA) – a large organization with about fifty smaller affiliated bodies.[960] One such body is the "American Correctional Chaplains Association" (ACCA), which again has ad hoc groups of denominational and different faith chaplains within it.[961] ACCA is one of the key Federal Bureau organizations for chaplains, but most states also have their own separate groups. The ACCA sponsors workshops and conferences for chaplains on relevant themes of their professional life, including legal changes, the RFRA, and common personal challenges for inmates. There is also the National Association of Muslim Chaplains and the informal sub-groups of Jews within the

[954] https://www.prisonerresource.com/prison-life/first-day-in-prison/religion/
[955] BOP Technical Reference Manual, Ministry of BOP Chaplains (2004), at. introduction.
[956] Id.
[957] Id.
[958] Id.
[959] Id.
[960] A.C.A. (http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Home/ACA_Member/Home.aspx); Beckford & Giliat discuss the organization of Chaplaincy in the U.S., Beckford & Giliat (2005), chapter 7 (Prison chaplaincy in the U.S), (p. 195-196).
[961] American Correctional Chaplain Association (https://www.correctionalchaplains.org/), Id. at. 195-196.

ACCA.[962] Prior to fulltime correctional ministry, chaplains undergo training and respective certification. For federal prison chaplains, a certain level of general education is required (a Bachelors or a Master's Degree).[963] Additionally, they need some kind of formal ecclesiastical consecration/ordination, at least two years of autonomous satirical experience and some sort of current denominational endorsement.

Support staff, such as additional clergy and spiritual advisors, assists chaplains in supervising the institution's religious activities and administrative duties.[964] There are two scenarios for the recruitment of contractors. In the first scenario, contractors are hired to support the full-time staff chaplain because of the large group of inmates belonging to one religion. In the second scenario, they are hired because there are no full-time chaplains who could meet the needs of inmates of a certain religion. Most federal prisons without an Imam on the full-time staff, for example, have a contract Imam.[965] Hence, most major faith groups with a significant number of inmates in the institution will be represented by a contractor.

Prisons appoint contractors through a formal procedure. [966] Candidates must be qualified as religious professionals, teachers, or leaders within their own tradition, and they will receive remuneration for their services. Contractors may furthermore enlist the help of volunteers to support them in their ministry. Volunteers are there to add variety and to complement the ministry of staff chaplains. To recruit a contractor or a volunteer depends on the demands of the inmates and an assessment as to whether the faith group is significantly "major" or not.[967] Contractors and volunteers are carefully screened in terms of their motives for wishing to work in prison.[968] The head of religious programs, the most senior chaplain, undertakes the recruitments of contractors and volunteers together with the assistance of other staff.

c. Chaplaincy Programs: One Service for All?

This section examines the equality dimension of chaplaincy programs. It discusses how the needs and practices of religious minorities are accommodated and the employment structures

[962] Beckford & Giliat (2005), p. 196.
[963] Id. at. 196.
[964] BOP Program Statement: Religious Beliefs and Practices (2004), p. 10 (5).
[965] BECKFORD & GILIAT (2005), p. 181.
[966] Id. at. 181.
[967] BECKFORD & GILIAT (2005).p. 183.
[968] Id. at. 182 (description of the procedures under reference of the BOP).

of chaplains and volunteers based on case-law examples and available empirical data. Among all other types of personal enhancement programs offered in prions, religious activities attracted most participation: 32 % of inmates reported involvement in religious activities such as Bible studies and church services.[969] Also, the request to meet with leaders is common amongst inmates. According to the study of the Pew Research Forum, 71 % of these requests are approved, 26 % are sometimes approved/sometimes denied, and only 3 % are usually denied.[970] The study of the Pew Forum does not show the religion of the inmates. However, the data stresses the importance of chaplaincy in prisons and shows that it is common across the prison population.

Despite the multi-denominational status of chaplains in U.S. federal prisons, the specific requirements for becoming prison chaplains differ for members of different religions. As Beckford and Gilliat show, applicants for becoming chaplains from Muslim traditions are faced with varying standards of entry from their Christian counterparts.[971] Muslims have to attend twelve courses in general Judeo-Christian theology outside their other formal training in the study of Islam.[972] According to an Assistant Chaplaincy Administrator for the BOP, this is done in order to make sure "that they have enough theological background to be able to provide ministry for that faith [the Christian faith] […]".[973] Christian applicants, however, are not required to study the particular needs of traditions of other faith groups. As demonstrated by Beckford and Gilliat, there are problematic assumptions beneath these different formal requirements;[974] that is, it is assumed that Muslim applicants will not have enough knowledge, based upon their own experience of Islamic theology, to understand Judeo-Christian tradition. Whereas in the case of Christian applicants, it is assumed that their training is adequate preparation for ministry in a multi-faith environment.

These differences in the formal requirements faced by Muslims and applicants of other religions is not the only equality issue that concerns the hiring practice for chaplains. The BOP has put a freeze on the hiring of Muslim chaplains since 2001, i.e. the year of the terrorist

[969] Michael Hallett, Byron Johnson, The Resurgence of Religion in America's Prisons, Religions 2014, 5, 663–683.
[970] Pew Research Center, Religion in Prisons, p. 24.
[971] BECKFORD & GILIAT (2005), p. 196 -197.
[972] Id. at. 196.
[973] Id. at. 197.
[974] Id.

attack on the World Trade Center in New York City.[975] For the last decade, out of some 230 full-time civil service prison chaplains, there have been roughly 10 Muslim chaplains overseeing the sizable federal Muslim population.[976] There are no official comments on this practice from the BOP.[977] However, the timing suggests that there may be political motives behind this freeze and that – conscious or not - anti-Islam sentiments of recent years played into this development.

Equality concerns also arise concerning the concrete design of chaplaincy programs. It has been legally established that prisons must accommodate chaplaincy for religious minorities, but also that their opportunities must not be identical to those of the majority. In *Cruz v. Beto*, it was decided that the rights of inmates to practice religion cannot depend on the question whether their beliefs were considered a part of mainstream or "traditional" religions.[978] In this case, the Supreme Court rejected the federal district court's decision that a complaint involving freedom of religion should be legit, to the "sound discretion of prison administration". In essence, the Court said that freedom of religion in prisons applies to all religions and not just those with many adherents in American society.[979] However, the Supreme Court also made clear that different treatment may be justified when stating, "We do not suggest… that every religious sect or group within a prison - however few in member - must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size, nor must a chaplain, priest, or minister be provided without regard to extent of the demand".[980]

Generally, all of the major religious groups have at least one worship service per week, as do lesser-known traditions where inmates request such group access.[981] For example, practitioners of Santeria, Buddhism, and Hinduism are less common in the Federal prison system; therefore, worship time for such groups is dependent on local demand.[982] When

[975] SpearIT, Religion in Prison, p. 1169, in: Religion and American Cultures: Tradition, Diversity and Popular Expression, edited by Gary Laderman, Louis León, Vol. 1, Second Edition, ABC-CLIO, Santa Barbara.
[976] Id. at. 1169.
[977] Id.
[978] Cruz v. Beto, 405 U.S. 319 (1972)
[979] Id. at. 321.
[980] Id. at. 322; *Religious Freedom in Prison Chapter 27*, 9 JAILHOUSE LAWYER'S MANUAL (2011).
[981] The BOP lists the need for worhsip and religious services common for each religion ("Required weekly observances"), Technical Reference Manual, Inmate Religious Beliefs and Practices (2002).
[982] Pew Research Center, Religion in Prisons, (Appendic C).

space and staff permit, many BOP facilities also allow groups to meet for religious study periods. For example, some institutions will enable each group to a one-hour study period and then offer "open prayer" sessions that are effectively religious services for a single group. Upon written request, also inmates in solitary confinement, i.e. Special Housing Units (SHU), may have access to recognized representatives of their faith groups.[983] Such group offer for open prayers is, at least in theory, required to be parceled out in "equal" fashion. However, looking at the case-law, this seems to create difficulties in implementation.

In *Woods v. Evatt*[984]*,* Muslim prisoners alleged violation of their right to freely exercise their religion under the RFRA on the basis that, inter alia, the plaintiffs were not allowed to use the visitation room for their weekly worship service, as Christians were allowed to do. Instead, they were assigned space in a multipurpose building for their weekly congregational prayer service, and the weekly service was not open to the general inmate population.[985] Moreover, they complained that there was no Muslim chaplain available to them. The court found that the assignment to another building for the Muslim weekly service did not discriminate against inmates. It argued that since the Muslim services had to be held on Friday afternoons when visitation room hours also had to take place, the Muslim service in the visitation room would have prevented visitation for approximately 90% of the prison population.[986] This potentially resulted in tension and conflict between Muslim and non-Muslim inmates. Christians, however, held their services on Sunday mornings, which did not interfere with visitation.[987]

The court also determined that requiring inmates to register as Muslims before they could attend Friday services did not impose a substantial burden since the timing of many Muslim events was different from that of other religious faith groups.[988] Therefore, the registration of inmates' religious preferences allowed prison officials to know which inmates were entitled to special accommodations made for Muslim inmates. While noting that there was no prison chaplain to oversee Muslim study groups and worship services or to act as a sponsor for their group activities, the court also observed that there was an open chaplain position which a

[983] BOP Program Statement: Religious Beliefs and Practices (2004), p. 21.
[984] Woods v. Evatt, 876 F. Supp. 756 (DSC 1995)
[985] Id. at. 763-764.
[986] Id. at. 764.
[987] Id..
[988] Id.

statewide full-time Muslim chaplain was attempting to fill, and the statewide chaplain was visiting the prison until a solution was found.[989] The court also took note of the fact that two inmates had been approved to visit Muslim inmates in administrative segregation to provide additional worship opportunities, which established that prison officials were attempting to provide spiritual guidance to Muslim inmates. Finally, the court found that the Muslim population was a minority within the prison and the surrounding area, which gave rise to the apparent disparity in treatment between Muslims and Christians in prison.[990]

There is large agreement that - even though chaplaincy programs are commonly agreed to be constitutional - it may violate the Establishment Clause if particular religious sects are favored by prison authorities over others.[991] Therefore, the BOP also has to provide chaplains from particular denominations in proportion to the religions represented in their ranks.[992] However, there is no binding ratio that the BOP must follow here. It does not have a duty to provide chaplains for every denomination or faith; less "mainstream" religions will likely not be represented. Hence, prison officials are obliged to treat religions in an even-handed manner, but absolute equality of treatment is not required.[993]

A powerful example of the unequal treatment of Muslim inmates in Alabama state prison was recently shown in a case before the Supreme Court. In *Dunn v. Ray*[994] from 2019, an Alabama death row inmate had wanted his imam by his side during his execution. The request, however, was denied. According to the Alabama Department of Corrections policy, only the prison's Christian chaplain is allowed to be present during the execution of inmates. The Eleventh Circuit Court of Appeals argued that this "Christian-clergy-only rule" [995] seemed to violate the Establishment Clause, that is, favored one religious denomination over another. In a 5-4 vote, the Supreme Court allowed the execution of the inmate without his imam being

[989] Id. at. 765.
[990] Id.
[991] Cutter et al. v. Wilkinson et al. 544 U.S. 709 (2005); at 724-25 (Singling out a particular religious sect for special treatment" violates the Established Clause).
[992] Id.
[993] DANIEL MANVILLE JOHN BOSTON, PRISONERS' SELF-HELP LITIGATION MANUAL (Oxford University Press 4th ed. 1995), p. 275 (quoting Cruz v. Beto, 405 U.S. 319 (1972)).
[994] Dunn v. Ray, 586 U.S. ___ (2019).
[995] Adam Liptak, Justices Allow Execution of Muslim death Row Inmate Who Sought Imam, The New York Times, 2019, available at: https://www.nytimes.com/2019/02/07/us/politics/supreme-court-domineque-ray.html *(last accessed 30.08.2019).*

present. The majority offered little reasoning and made no mention of the apparent constitutional problem. Justice Elene Keagan, writing for the dissenters, wrote "that treatment goes against the Establishment Clause's core principle of denominational neutrality".[996] Quoting *Larson v. Valente*, she added: "The clearest command of the Establishment Clause", the Supreme Court has held, "is that one religious denomination cannot be officially preferred over another".[997] To justify such religious discrimination, she argues, the state needed to show that "its policy is narrowly tailored to a compelling interest".[998] Even though prison security was an interest of that kind, the state has failed to show that "its wholesale prohibition on outside spiritual advisers is necessary to achieve this goal".[999]

Less obvious, yet complex equality conflicts also arise from the daily routine in the federal prison system and the question of how it accommodates the different needs and practices of religions. In *Abdur-Rahman v Michigan Dep't of Corrections*[1000], a Muslim inmate alleged that a prison policy unconstitutionally infringed upon his right to exercise his religion by not permitting him to be released from his work to attend religious services. The evidence established that the prison denied the plaintiff release from his work assignment for security reasons and that there were two Muslim services a week.[1001] Furthermore, the Muslim chaplain of the institutions testified that Muslims were legitimately excused from Friday services for reasons such as sickness and work activities.[1002] The prison authorities, therefore, argued that the policy did not affect an essential tenet of the inmate's religious beliefs and hence that he was not substantially burdened in his religious practices. Therefore, the RFRA was not applicable in this case: "Reasonable time, place or manner restrictions upon communal religious gatherings do not necessitate the identification of a compelling state interest".[1003]

[996] Dunn v. Ray, 586 U.S. ___ (2019), (Justice Keagen dissenting), p.2.
[997] Id.
[998] Id.
[999] Id.
[1000] Abdur-Rahman v Michigan Dep't of Corrections, (1995, CA6 Mich) 65 F3d 489.
[1001] Id.
[1002] Id.
[1003] Id.

As these examples show, it is a disadvantage for Muslim inmates that their prayer takes place on Fridays. The Christian services on Sundays do not collide with other obligations of the inmate, such as working and visitation hours. But the Muslim prayers on Fridays do. In some cases, religious groups with common elements are merged for worship services, and prisons are not required to provide services for all religions represented in the institution.[1004] Were it otherwise, administrators argue, institutions would be unable to meet the time and space requirements of a multiplicity of groups.[1005] Hence, prisons are not required to provide a full program of services for religious groups with only a few members.[1006]

In *Crosley-El v Berge*[1007], the court decided on a violation under the RFRA that provided only general Muslim services for all Muslim inmates, rather than providing separate Moorish services.[1008] The court concluded that the inmate failed to show that prison officials placed a substantial burden on the exercise of his Moorish religion since he failed to identify any practice or instrument of the Moorish religion which the general Muslim service did not accommodate or provide. The court further observed that the inmate submitted no evidence supporting his bare conclusory statement that attending general Muslim service was prohibited by his Moorish religion.[1009]

Also in *Weir v Nix*[1010], the court decided that it did not violate the inmate's rights under the RFRA that no religious service beyond the already existing chaplaincy services was made to him. The plaintiff was fundamentalist Christian and held that it violated his rights under the RFRA that he was only allowed to attend group services with the Protestant chaplain of the institution. The court noted that the exercise of religion commonly involves group worship.[1011]

[1004] Smith v. Kyler, 295 Fed.Appx. 479, 481-83 (3d Cir. 2008) (First Amendment and RLUIPA not violated by prison policy that only provided a chaplain to lead services in the largest faith groups and prohibited group worship in the absence of an approved, volunteer faith group leader); Murphy v. Missouri Dept. of Correction, 372 F.3d 979, 983-84 (8th Cir. 2004) (safety and security interests justified denial of group worship rights to religions that promoted racial segregation).

[1005] Developments in the Law – In the Belly of the Whale: Religious Practice in Prison. Harvard Law Review,115, 2002, 1891-1913, at 1905.

[1006] Spies v. Voinovich, 173 F.3d 398, 404-05 (6th Cir. 1999) upholding the rule that religious groups must have at least five members to be recognized, hold services, etc.). Tart v. Young, 68 F: Supp, 2d 590, 594 (W.D.Va 2001) upholding rule allowing group religious meetings only when there is more than one member of each pod).

[1007] *Crosley-El v Berge*, 896 F Supp 885 (ED WIS. 1995).

[1008] Id.

[1009] Id.

[1010] *Weir v Nix*, 890 F Supp 769 (1995, SD Iowa).

[1011] Id. at. 778.

Hence, it may amount to a substantial burden of the practice of religion when the only option for group services available for a prisoner was under the guidance of someone whose beliefs were significantly different from or obnoxious to his or hers. Then, as the court cautioned, the prisoner was effectively denied an opportunity for group worship.[1012] However, the court concluded that the inmate had not shown that the opportunity to attend group worship led by the prisons chaplain violated his rights and that the chaplain's beliefs were significantly different from his own.[1013] The fact that the plaintiff could not attend group worship services on Sunday was also found not to infringe upon, or substantially burden, the exercise of his religion where services for protective custody inmates were held on Friday, and the evidence did not show that fundamentalist Christianity mandated group religious worship on Sunday or any other day.[1014]

For smaller religious minorities, it is difficult to prove that it substantially burdens their religious practice that there is no service solely for their own sect, in case there is a chaplaincy service for a similar faith group available. Important for religious minorities are not only chaplains but also volunteers and contractors. Non-Christian faiths have the greatest need for volunteers. For the support of Muslim inmates, however, there are reportedly not enough volunteers. This was confirmed by 55 % chaplains who emphasized that especially the Moorish Science Temple of America (7%) and the Nation of Islam (6 %) needed more volunteers.[1015]

Institutions unable to secure volunteers to meet religious needs may request a written waiver from the Regional Director.[1016] Under these circumstances, inmates may request the introduction of new or unfamiliar religious components into the Chaplaincy Services program.[1017] When information is required regarding a specific new practice, the chaplain may ask the inmate to provide additional information which would be considered when deciding to include or exclude the practice from the Chaplaincy Services program.[1018] When a decision cannot be reached locally, a chaplain at the Central Office, appointed by the Assistant Director,

[1012] Id.
[1013] Id.
[1014] Id. at. 779.
[1015] Pew Research Center, Religion in Prisons, p. 25.
[1016] BOP Program Statement: Religious Beliefs and Practices (2004), p. 10.
[1017] Id. at. 12.
[1018] Id.

Correctional Programs Division (CPD), will review the inmate's requests for introducing new religious components into the overall religious program.[1019]

The hiring of Muslim staff, chaplains as well as volunteers, is also relevant in light of the radicalization debate (as shown in the chapter on chaplaincy in German prisons, the prevention of radicalization became an important perspective under which Muslim chaplaincy is examined). Some argue the hiring freeze of Muslim chaplains makes it more likely for inmates to lead their own unsupervised religious services. These allow an inmate to deliver radical messages undetected by prison officials.[1020] Therefore, officials have been allowed to ban inmate led services. Unfortunately, it did not lead to the employment of more Muslim staff. It can be concluded that inmates in federal prison with different religious backgrounds do not have equal religious rights. However, the discussed cases illustrate that the federal prisons system structurally accommodated the needs and practices of a variety of different religions.

Also, the institutional design in federal prisons reflects the different needs of the religiously diverse prison population. The principle of non-establishment requires that tax money is not used to build separate facilities for different religions in public institutions; especially suitable premises for individual religious communities would hardly be feasible for all religions in an equal manner and would result in preference or disadvantage for some religions (for example, decisions are divided as to whether prisons must provide sweat lodges for Native American religious practice). Religious spaces in federal prisons are therefore shared between all faith groups. The multi-faith spaces, called "auditorium", ideally caters equally portable icons or implements used in services of all religions and allows that they can be stored separately.[1021] This neutrality presumes – as stated by the U.S. Department of Justice - that all religious groups feel comfortable and not affronted by symbols of other faith groups.[1022]

[1019] Id. at. 8.
[1020] SpearIT, Religion in Prison, p. 1169, in: Religion and American Cultures: Tradition, Diversity and Popular Expression, edited by Gary Laderman, Louis León, Vol. 1, Second Edition, ABC-CLIO, Santa Barbara.
[1021] BECKFORD & GILIAT (2005), p. 184.
[1022] Id. at. 184 (with further references of the Department of Justice).

3. Summary

The comparative summary on chaplaincy in German and U.S. prisons has shown that there are fundamental differences between the two systems. In the federal prison system of the U.S., the chaplaincy program under the supervision of the BOP is responsible for taking care of inmates of all religions. In contrast, chaplaincy for inmates of the diverse prison population in Germany is not organized in one program. Instead, the German constitution gives religious communities the right to organize chaplaincy in prisons in cooperation with the state for their fellow believers. In practice, this cooperation seems to function only between state and Christian communities.

The right of all inmates to chaplaincy is recognized in both U.S. and German prison law. As envisaged under the RFRA, the inmate's right to chaplaincy is only protected in case he or she has sincerely held beliefs. Inmates must make their religiousness credible. Within the framework of a procedure provided for this purpose, they must answer questions about their religion and explain their religious motives for religious practice. Thus, the state controls the inmate's access to chaplaincy programs. For chaplaincy in the German prison system, there are no procedures to test the sincerity of the inmate's belief. Section 54 I federal Prison Act stipulates that the chaplaincy services protected under its scope are only available to inmates who belong to the religion of the respective service. However, the religious affiliation is not questioned by the authorities, nor are inmates asked to prove their religiosity in tests or by submitting any certificate. Section 54 II federal Prison Act protects the right of inmates to join chaplaincy services even though they have another religion or no religion.

The fact that inmates in Germany do not have to demonstrate that their beliefs are sincerely held is commonly explained with the protection of the negative freedom of religion. Accordingly, inmates should not have to declare their religion to the state as a prerequisite for practicing their religion. If inmates wish to practice their religion only quietly in their cell, it is convincing that they should not be obliged to communicate their religion to the state. The religion of an inmate should also not be visible to all inmates in prison. Beyond that, however, it is practically impossible to offer inmates the opportunity to practice their religion without them disclosing their religious beliefs to the prison authorities. Because inmates depend on the state for their religious practice, it is also questionable whether this "protection" really

benefits religious minorities. Prison administration has large discretion when applying prison law. The lack of a clear set of guidelines and an organizational framework for the handling of the religious needs and practices of inmates, therefore, contributes to the risk of violations of their freedom of religion and equality. A comparative view of the U.S. shows that the religious diversity of the inmates and the respective religious needs and practices of religious minorities are deeply anchored in the legal and structural framework. The guidelines of the BOP explicitly address the requirements arising from a religiously diverse prison population and address the specific needs of each religion.

Institutional logic determines religious accommodation. Therefore, religious diversity needs to be addressed and structurally anchored in German prison administration too (as seen, the DIK is currently working on a new policy for Muslim chaplaincy). A chaplaincy program monitoring the needs of all inmates could help to strengthen the rights of religious minorities in German prisons. Such a chaplaincy program would have a symbolic effect too; it expresses that the religious diversity of inmates is recognized. If religion is to be used as a means of supporting inmates and their rehabilitation, there must be more activities and services available for inmates of different religions, especially Muslims. Chaplains play a key role in the accommodation of religious diversity as becomes clear from the U.S. context.

The function of the chaplain in German prisons today is marked by changes in the socio-religious composition of the prison population. Although this was not originally intended, the full-time employed Christian chaplains today also sometimes take care of inmates of other religions and have a pastoral function for the entire prison population. However, as shown, they are not trained for this task, especially not for denominational religious support for inmates who are not Christian. Therefore, to secure the rights of religious minorities and to relieve Christian pastors, more chaplains of other religions, above all Muslims, must be hired in German prisons.

In federal prisons in the U.S., the role of the Chaplain is different. Here, too, their function is marked by the tension of the two roles as being part of the state security staff on the one hand, and caretaker of the inmate, on the other. However, they are not solely representative of one religion. Moreover, they are not only responsible for the services and activities of

chaplaincy programs. They are also managing the accommodation of religious dietary requirements and religious objects and writings; tasks which are carried out by prison authorities in German prisons.

A significant advantage of the U.S. federal prison system's chaplaincy program compared to the prison chaplaincy in Germany is that religious minorities have an established contact person for their religious concerns. Hence, in the U.S, the disputes are not about the question *whether* chaplaincy has to be accommodated for religious minorities; they are about *how* it gets accommodated, that is, the extent to which chaplaincy programs must accommodate the more specific and individual needs of religious inmates. Like with the accommodation of other religious needs and practices, however, chaplaincy poses a challenge as to the extent to which the different demands of different religions should be taken into account by the prison. The problem that substantive equality is difficult to establish is also present in the U.S. Here, too, costs and organizational effort can justify unequal treatment. The case law shows that also the U.S. prison framework results in differences for the inmates of different religions. Courts have advocated merging services for inmates of some religions. Also, they have not equally considered the needs of the different religions within the broader prison procedures (for example, Friday prayers may clash with visiting hours). The hiring stop of Muslim chaplains also shows that discrimination finds its way in.

In Germany, it is still disputed how chaplaincy for religious minorities should be anchored in the provisions of the Prison Act and whether the prison even has to accommodate equivalent religious care for non-Christian inmates. The empirical data shows that the existing modi for Muslim chaplaincy largely differ from prison to prison, and Muslim chaplaincy is only accommodated fragmentarily. Many prisons have established Muslim chaplaincy based on local cooperation with Muslim communities. Overall, the Muslim communities seem to be making progress in establishing themselves within the public legal structures. Here, the research by Harms-Dalibon offers a promising starting point: it illustrates the strategic approach of Muslim communities to enter the prison and the relevance of the cooperation of prisons and Imams which grow from a grassroots level. This shows that local projects partly compensate for the lack of state involvement by local projects. The precise motives of the prison authorities for and against the accommodation of Muslim chaplaincy seem to differ

(i.e. to support the rehabilitation of inmates? to prevent terrorism? recognition of the right to equality?). More research would be needed here. The unclear training structures for Muslim chaplains still represent a major obstacle. Here, state support for the establishment of further institutes for Islamic theology at German universities is in demand, as well as for the development of alternative forms of cooperation with Imams.

Also smaller religious minorities have the right to meet representatives of their religious community. It is not established that they have a right for religious group services, like under U.S. prison law, but only to meet a religious advisor for individual counseling. The empirical data suggests that religious staff for smaller religious minorities is present in some prisons. In many others, prison authorities claimed that there was no need from the side of the inmates. In the absence of the accommodated chaplaincy for religious minorities, however, this statement must be viewed critically. It cannot be assumed that inmates will always be asked about their interest in religious activities and counseling.

A largely unsolved problem is the unequal treatment between religion and non-religion as manifested through chaplaincy programs.[1023] The equal treatment between religious communities and ideological communities, which is constitutionally required in Germany, was indeed taken into account in the federal Prison Act when the latter were granted equal rights. In practice, however, this regulation does not get applied. In the U.S., this equality problem cannot be solved either. Reference is only made to the long-standing tradition of chaplaincy programs, to justify their existence. The constitutionality of chaplaincy programs under the U.S. Constitution is problematic in light of the Establishment Clause, but interestingly, have developed in spite of the doctrine of state/religion separation. Emphasis is put on the importance of the Free Exercise Clause. In Germany, the constitutionality of chaplaincy programs is set by Art. 141 Weimar Constitution, that is fully effective as incorporated into the current Basic Law by Article 140 BL.

[1023] The critique that the existing law of religious freedom privileges religion over non-religion unfairly is widespread and argued both from normative and critical standpoints. Laborde has suggested, in her disaggregation strategy, to not treat religion specially. In that, she argues, her strategy „is not unfair to non-religious citizens, because it respects their meaning-giving commitments, whether they are conventionally religious, cultural, or philosophical. The disaggregation approach, in a word, is religion blind without being religion-insensitive, because it sees religion, not as a specialized and self-contained area of human belief and activity, but as a richly diverse expression of life itself." Laborde, LAW AND PHILOSOPHY, (2015), p. 15.

III. Religious Diet and Prison Meals

Many religions have dietary requirements that can make it difficult to participate in a standard prison meal for religious inmates. According to Jewish dietary laws (kashrut), for example, many Jews eat kosher foods,[1024] Muslims follow a halal diet[1025], and many Buddhists wish to follow vegetarianism[1026]. To follow religious guidelines is an essential element of religious practice, and also inmates have to continue their dietary habits. The differences of the religious dietary requirements for different inmates makes it likely that the regular diet options in prisons discriminate against some religions or denominations. Inmates having a religion with demanding dietary requirements are at a disadvantage compared to inmates with no or few religious diet laws. Often, even for one religion, there are different schools which require different religious dietary restrictions. Hence, the equal accommodation of religious diet laws in prison meal plans is challenging. Because a wider choice of food often leads to an increase of financial and organizational costs, institutions are interested in keeping options of the prison menu at a minimum.

As will be shown in more detail below, German and U.S. prisons accommodate religious dietary requirements to a different degree. The food programs in federal prisons in the U.S. generally offer a variety of different menus, and inmates have a right to a diet that fulfills religious dietary requirements. The obstacle for inmates there is to get on the menu as it requires inmates to demonstrate that their beliefs are sincerely held. Under German prison law, inmates have no positive right against the state to be provided with a religious menu. They can only request help to buy products that they need to follow a religious diet. The costs for these products they must cover themselves. Today, however, most German prisons accommodate a pork-free diet option to inmates "for free".

This chapter discusses the different ways of how, if at all, the religious diet requirements of the diverse prison populations are accommodated in German and U.S. prisons, and critically compares them. Through comparison, the obstacles of religious minorities in both systems

[1024] Julius H. Greenstone Solomon Schechter, Emil G. Hirsch, Kaufmann Kohler, *Dietary Laws*, *available at* http://www.jewishencyclopedia.com/articles/5191-dietary-laws (with further sources).
[1025] Amir Zaidan, *Halal - was ist das?* , *available at* http://www.halal.de/indexwas.htm.
[1026] *Dharma Data: Vegetarianism*, *available at* http://www.buddhanet.net/e-learning/dharmadata/fdd21.htm. (with further sources).

are identified and critically discussed under considerations of the relevant case law and empirical data. The chapter shows which problems arise from the different accommodation approaches in each prison system to religious minorities. The first section is dedicated to the German context (1), the second to the religious diet options in prisons of the U.S. (2). The last and third section summarizes the most important differences and similarities (3).

1. Germany

The first section, the introduction, explains how food programs in German prisons are organized. It highlights the concrete challenges occurring for religious minorities in prisons (a). The second section examines the legal framework for religious diet options for inmates. Most importantly, section 21 of the feral Prison Act is discussed under consideration of its legal limits and the guiding principles of detention under prison law (b). The last section analyzes the relevant case law and empirical data and focuses on the accommodation of the dietary requirements of religious minorities, most importantly Muslim inmates (c).

a. Introduction

The saying "you are what you eat" also holds true in the context of prisons. Food promotes identity, be it for particular groups or individuals.[1027] For many religions, religious dietary rules are an essential part of the practice of religion. For inmates, it is therefore important to follow a religious diet during the time in prison. Additionally, meal plans play a vital role in the administrative structure of the prison, and mealtimes "become a clock" in everyday life in prison.[1028] In German prisons, meals are usually prepared locally in the prison kitchen.[1029] This is done jointly by an employed chef and a group of inmates.[1030] German inmates generally eat alone in their cells. There, they have a refrigerated compartment so that they can store the ingredients for dinner and breakfast themselves.[1031] In Berlin prisons, for example, every 14

[1027] See ERIKA CAMPLIN, PRISON FOOD IN AMERICA (Rowman & Littlefield Publishers, Incorporated. 2016). Most importantly, under Chapter 5, 71 et seq.
[1028] Id. at. 10
[1029] Juliane Reichert „Wenn es sein muss, lebenslänglich", DIE ZEIT, 2016, *available at:* https://www.zeit.de/zeit-magazin/essen-trinken/2016-08/gefaengnisessen-stammheim-jva-kantine-koch-johannes-guggenberger *(last accessed 30.08.2019)*
[1030] Id.
[1031] Katrin Bischoff, Hinter Gittern: So funktioniert eine Küche im Gefängnis, Berliner Zeitung, 2016, available at: https://www.berliner-zeitung.de/berlin/hinter-gittern-so-funktioniert-eine-kueche-im-gefaengnis-24110178 *(last accessed 30.08.2019).*

days the inmates receive a glass of jam, every ten days 500 g margarine.[1032] Lunch is served together with other ingredients for dinner and the breakfast of the next day.[1033] Thereby, food is only served once a day. The quality of food differs regionally but is generally reported to be good in German prisons.[1034] In Berlin prisons, 15 % of the products processed must come from organic farming and the responsible chefs are well trained.[1035] Inmates have a right to a healthy[1036], full board from the institution (around 2500 calories daily).[1037]

The right of inmates to follow a religious diet is protected under Art. 4 I, II BL and further defined under prison law. The federal Prison Act protects the right of inmates to follow a religious diet in section 21 3 federal Prison Act. It is not clear from the statutory provisions how far the inmates' rights extend and under which circumstances the institution must cover the additional costs for a religious diet. On their costs, inmates can purchase products for the religious diet through the prison's self-shopping system *(Selbsteinkauf)*. However, the suppliers of the prisons do not reliably offer a large variety of religious diet products in their assortment. It can, therefore, be difficult for smaller religious minorities, in particular, to buy religious diet products even through the *Selbsteinkauf* (hereafter: "self-supply").

Today, it seems to have become established that pork-free diet options are accommodated in German prisons. Some religious inmates can thus follow a religious diet without having to pay for it. Pork-free meals in many prisons are accommodated for Muslim inmates. It is therefore often called *Muslimische Kost* (Muko). Additional religious diet options are still rare. The conditions under which inmates can select the religious diet options differ from prison to prison. It is illegal for prisons, however, to request formal proof of inmates for the membership of a religion. Nevertheless, in some prisons, the pork-free diet option is only offered to Muslim inmates or in case it is necessary for medical reasons.

[1032] Id.
[1033] Id.
[1034] Arloth considers the lack of complaints from inmates as a sign of sufficient quality (Arloth, in Krä/Arloth, StVollzG, *§ 21* at. 1); Keppler is critical in this respect and also reports about regional differences (with further references): Keppler, in Böhm et al, StVollzG, § 21, at 5.).
[1035] Katrin Bischoff, Hinter Gittern: So funktioniert eine Küche im Gefängnis, Berliner Zeitung, 2016.
[1036] For an overview of the respective provisions of the Prison Acts of the Länder, Knauer, in: Lesting et al, *Speisevorschriften von Religionsgemeinschaften,* at. 6.
[1037] Arloth, in Krä/Arloth, StVollzG, *§ 21* at. 1.

b. The Right to Follow a Religious Diet under the Prison Law

Pursuant to section 21 federal Prison Act, prison authorities have to be concerned with a sufficient and balanced diet of inmates.[1038] This means that inmates have a right to receive full food supply during their time in detention.[1039] The third sentence of 21 federal Prison Act protects the right of inmates to follow religious dietary requirements:

> The possibility is to be provided for a prisoner to obey religious instructions with regard to the consumption of food

In the common understanding, section 21 III federal Prison Act gives all inmates the right to follow the dietary guidelines of their religion.[1040] However, commonly understood, prisons are not under the obligation to accommodate religious dietary instructions into the ordinary meal plan of the institutions and to take the financial burden of additional diet options.[1041] Hence, according to the common interpretation of section 21 III federal Prison Act, inmates have to cover the additional costs for their religious diet themselves. As will be shown in the next section, however, many institutions accommodate a pork-free diet option as a result of their regulatory discretion.

It is also common sense that the organization of food programs in prisons has to correspond with the guiding principles of the prisons administration.[1042] According to the approximation principle as laid out in section 3 I federal Prison Act, "life in penal institutions should be approximated as far as possible to general living conditions".[1043] In light of this principle, Köhne argues, inmates should have more responsibility for their own food supply than is

[1038] Section 21 1,2 Prison Act: [Food in the Institution] The composition and nutritional value of the food in the institution shall be monitored by medical officers. Special food shall be provided on orders from a medical officer. (…); A comparison of the regulations of the state laws with the federal Prison Act and the draft model shows several differences. With regard to the specific requirements for a healthy diet, there are also differences in content, although it is not clear whether, and if so, how these have an effect on daily life in prisons: See the differences in the overview: Knauer, in: Lesting et al, *Speisevorschriften von Religionsgemeinschaften,* at. 6.

[1039] OLG Zweibrücken ZfStrVo 1994, 52 = StV 1993, 488; id. at. 4.; also compare the legislative proposal for the Prison Act, written by the federal government (*Bundesregierung*) Bundesregierung, Entwurf einen Gesetzes über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung - Strafvollzug - (StVollzG) / Drucksache 7/918 (Bundesregierung ed., 1973), p 12.

[1040] E.g. Keppler, in Böhm et al, StVollzG, § 21, at 5.

[1041] The restrictive approach is stipulated in the legislative proposal of section 21 3 PA (compare Bundestag. 1975. At 13) and confirmed in several court decisions (OLG Koblenz, 3 Ws 286/93, 02.12.1993; OLG Hamm, 7 Vollz (Ws) 140/83, 14.12.1983; OLG Stuttgart, 4 VAs 23/96, 27.01.1997).

[1042] This already follows from the fact that the administration of the catering in prisons in under the responsibility of the correctional institution, LAUBENTHAL (2015), at 633.

[1043] Section 3 I Prison Act [Ger.]: Das Leben soll im Vollzug den allgemeinen Lebensverhältnissen soweit als möglich angeglichen warden; Also see under Part 1, Chapter I.1.c.

currently the case.[1044] He suggests to expand opportunities for inmates to shop from outside the institution, protected under section 22 Prison Act[1045], and to make inmates more responsible for the preparation of meals.[1046]

In Köhne's view, it is incompatible with the approximation principle to take away the task of food preparation from inmates because it is an important part of an orderly everyday life. According to the principle of inclusion *(Eingliederungsgrundsatz)*, prison authorities are required to design imprisonment "to help the prisoner to reintegrate himself into life at liberty" (Section 3 III).[1047] According to Köhne, the opportunity of inmates to take care of their own diet and, thus, to shop and prepare their meals was a crucial part of the preparation of inmates for the time following their release.[1048] He argues that the prison's obligation to share the responsibility for sufficient nutrition directly with prisoners was moreover stipulated under the "co-responsibility principle" (Section 160 Prison Act), which holds that inmates "should be given an opportunity to share in the responsibility for matters of joint interest".[1049]

The arguments of Köhne well illustrate that diet in prison is indeed more than a question of sufficient nutrition of the inmates. The organizational structures of the food program shape the autonomy of inmates. Hence, they shape and reveal the status of the prisoner. Food can be a controlling tool of the authorities. An extreme example of such control are meals of bad quality which are served to inmates as a form of punishment.[1050] Such practice is no longer

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[1044] Köhne, NEUE ZEITSCHRIFT FÜR STRAFRECHT (2004), p. 607 et seq.

[1045] Section 22 Prison Act [Purchases] (1) The prisoner shall be allowed to buy food and luxuries, as well as cosmetics, from his house money (Section 47) or from his pocket money (Section 46), selecting from among an assortment offered through the mediation of the institution. The institution should provide an assortment which takes account of the prisoners' wishes and needs.

[1046] Köhne, Neue Zeitschrift für Strafrecht (2004), p. 607.

[1047] Section 3 III Prison Act [Prison Regime] Imprisonment shall be so designed as to help the prisoner to reintegrate himself into life at liberty.; For the general meaning of the principle of inclusion in the penal system, see under: Part 1, Chapter .1.c.

[1048] Köhne, Neue Zeitschrift für Strafrecht (2004), p. 607.

[1049] Id. at. 607; Section 106 Prison Act [Prisoners' Co-Responsibility] The prisoners and detainees should be given an opportunity to share in the responsibility for matters of joint interest which, depending on the type and function of the institution, are suited for their participation (see also under Part 1, Chapter .1.c.).

[1050] Historically, the poor quality of the food belonged to the detention facility and reflected its punitive character (see also under Part 1, Chapter II.1.a.); In the U.S., this issue is a little more controversial, and in some prisons, the so-called nutraloaf is still served to inmates as disciplinary action: Nutraloaf, or disciplinary loaf, is similar to meatloaf in texture but has a wider variety of ingredients. It is usually bland or unpleasant but generally provides enough nutrition in terms of calories. The practice of serving inmates nutraloaf was mentioned by the U.S. Supreme Court in *Hutto v. Finney*, 437 U.S. 678 (1978), while ruling that conditions in the Arkansas penal system constituted cruel and unusual punishment.

allowed in German prisons.[1051] Yet, Köhne's liberal approach is controversial. In a response, senior government official, Schriever, strongly disagrees with the proposal to structurally and comprehensively involve inmates in the preparation of meals.[1052] In his view, it would cause unjustifiably high costs and would constitute a severe risk for the safety and order of the prison institution.[1053] He argues that there is no legal obligation to change the existing diet program for inmates in German prisons. Section 22 Prison Act [Purchases] implies that the prisoner "shall be allowed to buy food […] from his house money (section 47)[1054] or from his pocket money (section 46)[1055]".[1056] This right, as he points out, was intended to supplement, not to replace the existing diet programs monitored by the prison management [1057] The prison management was responsible for the board of prisoners; their right to purchase their own diet products was not intended to supersede this general supply system.[1058] The right of inmates to personal shop food products fell under the discretion of the institution[1059]:"he [the prisoner] shall be allowed to buy food"[1060].

The controversy over the design of the food programs stems, inter alia, from the controversial status of inmates. The goal to strengthen the autonomy of inmates to the extent possible conflicts with security concerns. The disputed status of inmates also influences the accommodation of religious meals. Those who argue in favor of the state's responsibility to enlarge the freedom of inmates to the greatest extent possible will likely argue for the state's responsibility to expand the religious food supply and to bear the costs for it.

[1051] OLG Zweibrücken ZfStrVo 1994, 52 = StV 1993, 488 (with further references, Knauer (2017), at 5).
[1052] Wolfgang Schriever, *Essen als Strafe?*, NEUE ZEITSCHRIFT FÜR STRAFRECHT 195 (2005).
[1053] Id. at. 196 et seq.
[1054] Section 47 PA [House Money] (1) The prisoner shall be permitted to spend three-sevenths per month of his earnings regulated in this Act (house money) and of the pocket money (Section 46) on purchases (Section 22 (1)), or to use it for other purposes.
[1055] Section 46 PA [Pocket Money] Where a prisoner, through no fault of his own, receives no remuneration for work and no trainee's grant, he shall be paid a reasonable amount of pocket money if he is in need.
[1056] Section 22 PA [Ger.] (1) Der Gefangene kann sich von seinem Hausgeld (§ 47) oder von seinem Taschengeld (§ 46) aus einem von der Anstalt vermittelten Angebot Nahrungs- und Genußmittel sowie Mittel zur Körperpflege kaufen.
[1057] Schriever, Neue Zeitschrift für Strafrecht, (2005), p. 196.
[1058] Laubenthal argues in the same direction, see KLAUS LAUBENTHAL, STRAFVOLLZUGSGESETZ - BUND UND LÄNDER : KOMMENTAR (de Gruyter 6., neu bearb. Aufl. ed. 2013). Section 21, at 13.
[1059] Keppler (2009), at 8.; Knauer (2017), at 10.
[1060] Knauer (2017), at. 11.

The legislative history of section 21 III federal Prison Act shows that the particular scope of the right for a religious diet of inmates has been a disputed issue from the start. The legislative draft of section federal 21 III Prison Act from 1973, submitted by the German government (*Bundesregierung*), is similar to the adopted version of today. In an earlier version of section 21 3 federal Prison Act, however, as proposed by the German Federal Council (*Bundesrat*), inmates were only given the *right to obey* the dietary guidelines of their religion *generally*, but *not a positive right to follow* the religious dietary recommendations of their religion.[1061] The Federal Council wanted to emphasize the fact that inmates were not entitled to demand certain meals from state authorities. The Grand Commission for Penal Reform, which was set up by the Minister of Justice in the early 1970s, composed of scholars as well as judges, practitioners, and parliamentarians, ultimately decided for a compromise of both versions. It took on the proposed version of the *Bundesregierung* but also pointed out clearly in the official justification of the law that inmates cannot directly claim from the state for any religious meals.[1062]

In only one decision in the jurisprudential history of section 21 III federal Prison Act, from its enactment until today, did a German court discuss the scope of section 21 III federal Prison Act against the background of the constitutional protection of religious freedom under Art. 4 I II BL. In this case, decided by the Highest Regional Court Hamm in 1983, the court had to decide about the request of a Buddhist inmate for a vegan diet.[1063] The prison management had only granted the inmate's request in as far as he received permission to procure vegan products at his own expenses. The applicants requested, however, that the institution cover the costs. The court acknowledged that following a vegan diet is part of the inmate's religious practice but confirmed that it does not imply any obligation on the part of the state to provide the religious diet directly.[1064] The court emphasized that the fundamental right to freedom of religion was first and foremost a defense right of the individual against the state.[1065] Therefore, as argued by the court, Article 4 I, II BL, respectively section 21 III federal Prison

[1061] See the statement of the Federal Council about the legislative draft of section 21 PA, Bundesregierung, Entwurf einen Gesetzes über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung - Strafvollzug - (StVollzG) / Drucksache 7/918. 1973. 113.
[1062] Compare Bundestag. 1975. At 13; For more about the Grand Commission for Penal Reform and the broader circumstances under which it was set up, see Eser, AMERICAN JOURNAL OF COMPARATIVE LAW (1973).
[1063] Highest Regional Court Hamm, 7 Vollz (Ws) 140/83, 1983 = NStZ 1984, 4, 190-191.
[1064] Id. at. 190.
[1065] Id. at. 191.

Act, comprised no obligation of the state to accommodate religious dietary needs into the ordinary diet plan and to cover the costs for a religious diet.[1066]

Also the majority of academic voices argue against an obligation of the state to offer religious meals to religious inmates on public expenses. [1067] As far as can be seen, only Rüther[1068] and Fröhmcke interpret section 21 III federal Prison Act more extensively. Fröhmcke builds his main argument in favor of a more absolute right of inmates to follow a religious diet on the fact that soldiers have a respective right according to the Law on Soldiers.[1069] Section 36 I Act on Soldiers protects the right to religious worship and "undisturbed practice of religion".[1070] This right also comprises, as confirmed by the Federal Administrative Court, the right of soldiers to be supplied with religious meals without this being to their disadvantage in any way.[1071] Because both the soldier and the inmate stand in the same close relationship to the state *(Nähebeziehung),* Fröhmcke argues their religious rights also have to get equally protected; public authorities must therefore also provide religious diet options to inmates without making inmates pay for the additional costs.[1072]

Since the doctrine of the *besondere Gewaltverhältnis*, the state has treated soldiers and inmates similarly with respect to their legal status.[1073] Therefore, unequal treatment of both groups requires justification. What both groups have in common is the proximity to the state. The state largely controls the lives of soldiers and inmates. Members of both groups cannot autonomously make decisions about their way of living. On closer inspection, however, there are differences between inmates and soldiers that are arguably relevant to the right to religious food. Soldiers are, unlike inmates, on a mission, which is a major logistical obstacle

[1066] Id. at. 191.; See Part 1, Chapter IV, Chapter IV, 3.a. for a discussion of constitutional rights as positive rights.
[1067] See, amongst others, Callies, in Calliess/Müller-Dietz, StVollzG, § 21, at 5.; Kellermann, in AK-StVollzG, § 21, at 4; Eick-Wildgans. 1993. At 162 et seq.
[1068] Klaus Rüther is generally in favor of a comprehensive right of religious inmates for a religious diet but does not further explain the doctrinal foundation of his argument, see KLAUS RÜTHER, STRAFVERTEIDIGUNG VON AUSLÄNDERN: [PRAXISHANDBUCH ZU DEN BESONDERHEITEN VON STRAFPROZEß UND STRAFVOLLZUG] (Luchterhand. 1999), at 128-146.
[1069] FRÖHMCKE (2005), p. 143.
[1070] [Ger.] Gesetz über die Rechtsstellung der Soldaten (SG), [§ 36 Seelsorge] Der Soldat hat einen Anspruch auf Seelsorge und ungestörte Religionsausübung (…).
[1071] BVerwG, VII C 215.57, 05.12.1958.
[1072] FRÖHMCKE (2005), p.142-143.
[1073] Under the doctrine of special status relationship, soldiers and inmates were treated equally in their relationship to the state. For a comprehensive discussion of the special status relationship, see SEBASTIAN GRAF VON KIELMANSEGG, GRUNDRECHTE IM NÄHEVERHÄLTNIS: EINE UNTERSUCHUNG ZUR DOGMATIK DES SONDERSTATUSVERHÄLTNISSES (Mohr Siebeck 2012); Part 1, Chapter IV, 3.a.).

to self-sufficiency. [1074] Although inmates are also limited in this respect by the institution's operating mode, ordering food to the institution is practically possible, at least with practical support of the prison management. Moreover, for professional soldiers, the burden of organizational matters may have more weight because they are occupied with their tasks as soldiers.[1075] Therefore, a more extensive right of the inmate for a religious diet does not necessarily result from the comparison with soldiers.

In light of the approximation principle in German prison law, together with freedom of religion which must also be fully guaranteed in the prison domain, the state bears the responsibility for ensuring that inmates are able to obey religious dietary rules. Vegan, halal, and kosher menus should, therefore, be available to inmates without having to pay for it. Some prisons claim that there is no need for religious food.[1076] This assertion can neither be fully confirmed nor fully refuted because comprehensive data is missing. In the following, the available case-law as well as the empirical data are compiled.

c. Religious Diet in Prisons: Only Neutral for the Majority?

As shown, according to the common interpretation of section 21 III federal Prison Act, inmates have no positive rights against the state for the accommodation of a religious diet and have to cover additional costs themselves. However, as an expression of their discretion, most German prisons offer a pork-free menu today; so-called MuKo is available in almost 90 % of the institutions surveyed.[1077] In some other institutions, the costs must be borne by the inmates themselves[1078], and almost 6 % of the institutions stated that the institutional expenditure was too high for MuKo to be offered.[1079] Roughly 20 % of all institutions confirmed that not only MuKo but also additional religious diet options are available.[1080] More than 55 % of the institutions stated that additional religious diet options were not accommodated as there was no need on the part of the prisoners. Some institutions (ca. 8 %)

[1074] Fröhmcke (2005) p. 142 (Also see: Kent Greenawalt, Religion and the constitution: Vol. 2: Establishment and fairness (Princeton University Press. 2009), p. 208 et seq.
[1075] FRÖHMCKE (2005) p. 142.
[1076] See data in appendix.
[1077] See data in appendix.
[1078] See data in appendix.
[1079] See data in appendix.
[1080] See data in appendix.

stated it was not necessary for the practice of religion and some (11 %) stated the intuitional expenditure was too high.[1081]

Isolated studies and reports show that, for example, Jewish prisoners have long participated in the meal plan for Muslim prisoners, even though these menus were not kosher. [1082] In Berlin prisons, Jewish prisoners may be able to obtain kosher products from outside prison. In some instances, Jewish inmates are liberated from the obligation to follow a kosher diet from the Rabbi due to the missing availability of a kosher diet.[1083] This information suggests that there are many inmates belonging to a religious minority who see themselves under the obligation to follow a religious diet and therefore need respective accommodations.

One of the arguments against the accommodation of a variety of religious diets is that it would be in breach of the principle of neutrality.[1084] According to this view, it violates state neutrality if the state gets involved in religious matters. This interpretation, however, contradicts the principle's interpretation by the FCC. It has clearly spoken out in favor of an open plural understanding of neutrality.[1085] Hence, it would correspond with the FCC's interpretation of the neutrality principle to accommodate a variety of religious diets as long as no religion is favored. The negative understanding of neutrality also ignores the fact that inmates – because of the conditions of detention – rely on the support of the state to practice their religion. The enforcement of a clear separation between state and religion in the prison domain would have the consequence that inmates would need to refrain from religious practice. Moreover, negative neutrality fails to recognize that unequal treatment does indeed occur if religious diets are not accommodated at all. [1086] In fact, it is a widespread misconception that it would satisfy equality requirements if all religion was banned from a certain context.

However, this approach overlooks relevant discriminatory effects. It is not only the formal equality of legal provisions that matters but also their *de facto* effect. The apparently neutral

[1081] See data in appendix.
[1082] Compare Michael Wuliger, *Koscher im Knast* (2015), *available at* http://www.juedische-allgemeine.de/article/view/id/22268.
[1083] Katrin Bischoff, Hinter Gittern: So funktioniert eine Küche im Gefängnis, Berliner Zeitung, 2016.
[1084] EICK-WILDGANS (1993), p. 144.
[1085] BVerfGE 138, 296 (339); See Part 1, Chapter 2.a.cc.
[1086] See Part 1, Chapter IV, 2.bb.

regulation of a general ban on the consideration of religious food laws is ultimately at the expense of members of those religions who, in their view, demand compliance with religious food laws. Jewish or Muslim inmates are thus affected differently by such bans than Christian inmates, for whom there are usually no obligatory food laws.[1087] Secondly, in some institutions religious eating traditions of Christianity are partly taken into account, for example, eating fish on Fridays.[1088] This additionally calls into question the neutrality of regulations which, according to their appearance, generally do not take religious dietary requirements into account but are influenced by Christianity. The religious imperative behind these eating habits may no longer be in the foreground because it has meanwhile become "culture".[1089] But for equality questions in the area of religion, there can be a thin line between a country's predominant religion and it's cultural traditions, which needs critical examination.[1090]

In a case from 2018, the Highest Regional Court of Karlsruhe ruled on the legality of the signs used by prisons to declare the diet option chosen by inmates at their cell door. The cell door of the claimant was marked with an "M".[1091] He argued this sign violated his negative religious freedom and section 47 of the Prison Act of Baden Württemberg.[1092] Accordingly, it is forbidden for the prison management to make information about the inmates' religious or ideological confession generally identifiable. This is the case when personal data is disclosed in such a way that it can be perceived by an indefinite number of persons.[1093] Even though it

[1087] That there are usually no religious dietary requirements for Christians was also at issue in a Munich case from 2014, OLG München, 4 Ws 36/13, 28. Januar 2014 = KirchE, 112-113 (2014), In this case, decided by the Highest Regional Court, a Catholic inmate wanted to get on the pork-free diet program; the prison management, however, denied the request by arguing that the diet option exists only for Muslim prisoners or if medically necessary. The court supported the prisons decisions and decided against the plaintiff.

[1088] Fröhmcke has studied the menus of prisons and found out that not only fish was exclusively served on Fridays, but also that it was more likely that the prison authorities would serve fish on Fridays, than meat, FRÖHMCKE (2005), 138 et seq.

[1089] Compare: Grimm, CARDOZO LAW REVIEW (2009), p. 2374.

[1090] Grimm argues in favor of a clear distinction between the protection of religion and of "values, traditions and customs": "preferential treatment of a religion as such must be distinguished from protection of the values, traditions, and customs that, although originally rooted in a country's predominant religion, have lost their religious connotations and are no longer viewed as specific expressions of a religion but rather have become a part of the country's general culture that includes believers and non-believers." Id. at. 2374.

[1091] OLG Karlsruhe, 2 Ws 1/18, 15.02.2018, at. 4.

[1092] (id. at. 2); Section 47 Prison Act of Baden Württemberg [Schutz besonderer Daten] I, 1 "Personenbezogene Daten, die anlässlich ärztlicher Untersuchungen erhoben worden sind, sowie die freiwillig offenbarten Angaben zum religiösen oder weltanschaulichen Bekenntnis von Gefangenen dürfen in der Justizvollzugsanstalt nicht allgemein kenntlich gemacht werden." (own translation).

[1093] Id. at. 2; Eine allgemeine Kenntlichmachung liegt vor, wenn personenbezogene Daten so offenbart werden, dass sie von einer unbestimmten Vielzahl von Personen wahrgenommen werden können, wie dies durch eine Haftraumbeschilderung erfolgen kann (BW/Müller/Preisser, in BeckOK, JVollzGB I, § 47 Rn. 2).

was obvious that the M-sign was used under the reference of "Muslim food" (Moslem Kost), the court argued the abbreviation cannot be deciphered without further ado.[1094] Also Jewish, Seventh-day Adventists, and Rastafarians were avoiding pork in their diet. Some would also choose the Moslem Kost for health reasons. Therefore, it could not be concluded from the "M-sign" that the inmate belonged to a particular religion. Hence, in view of the court, it did not violate the inmate's right.[1095]

The data protection dimension of the case is not discussed here. But this case is interesting because it illustrates how ambiguous the handling of religious diversity in the prison institutions is. Today, most German prisons offer two different kinds of menus: a "regular menu" and - as shown above - a pork-free menu.[1096] Some institutions also accommodate vegan meals. In some prisons, all diet options are neutrally accommodated and can be chosen by an inmate of the institution. Other institutions have decided for a rather targeted accommodation approach, and the pork-free and vegan menus are only available to Muslim inmates or in case it was prescribed for medical reasons.[1097]

As these differences and the dispute about the labeling of the different dietary options show, it is unclear as to how explicit the religious reference of menus can be under the current legal standard. As shown, this question arises both against the background of the principle of neutrality and – like in this case – with regard to the protection of the negative religious freedom of the inmate.

From the Karlsruhe appellate court's point of view, it was preferable if the dietary options were marked in such a way that there was not even indirect reference to a religious group.[1098] In Baden-Württemberg, the halal option which was previously called Muslim diet (*Moslemkost*) is now called "normal menu without pork" *(Normalkost ohne*

[1094] Id. at. 14; "Für einen Außenstehenden ist die Abkürzung indes nicht ohne Weiteres entschlüsselbar".
[1095] Id. at. at. „guiding principle".
[1096] See data in appendix.
[1097] OLG München, 4 Ws 36/13, 28. Januar 2014 = KirchE, 112-113 (2014).
[1098] OLG Karlsruhe, 2 Ws 1/18, 15.02.2018, at. 17. [Es] wäre es zur Vermeidung allfälliger Irritationen vorzugswürdig, wenn die Justizvollzugsanstalt Y ihre Kennzeichnung der Verpflegungsarten - soweit nicht schon geschehen - so gestalten würde, dass keinerlei auch nur mittelbarer Bezug zu einer Religionsgruppe vorhanden ist.

Schweinefleisch).[1099] If this diet option was available to all inmates equally, it could be argued that the reference to Muslim inmates would be misleading. If, however, in fact, almost exclusively Muslim inmates would choose this diet option, the question arises why this religious need is "covered" with a secular terminology.

From an equality law perspective - no matter what labels are used – it needs to be justified that most German prisons accommodate pork-free meals, suitable to fulfill dietary requirements of Muslims, but not necessarily religious dietary options for other religious minorities, such as Jews and Buddhists.[1100] It is irrelevant in this context that meals without pork are provided as a consequence of the discretion granted to the authorities under section 21 III federal Prison Act. State actions must not be a privilege of just one religious group. Otherwise, the respective policy potentially violates Art. 4 I, II and Art. 3 I, II BL.[1101] It is therefore required that the difference in treatment can be justified on the basis of objective criteria and that it is proportionate.[1102] The following two cases illustrate that the requirements for this justification are unsettled. In the first case, reference is made to the inherent differences between religions; in the second case to the structural factors, i.e. the number of religious members and the different costs arising through different kinds of accommodations.

In 2014, the Highest Appellate Court Munich decided on the case of a Catholic prisoner who challenged the prison's policy to provide the pork-free diet option to Muslim inmates, but not to him as a Christian inmate.[1103] The court justified the unequal treatment with the fact that the Catholic-Roman confession was not subject to any special religious food regulations.[1104] The inherent differences between Islam and Christianity constituted an objective reason for the differentiation from the court' perspective.[1105] Hence, it argued that the unequal

[1099] Id. at. 17.
[1100] See data in appendix.
[1101] The relationship between Art. 4 and 3 BL with a view to equality demands is discussed under Part 1, Chapter IV.2.a.cc.
[1102] Part 1, Chapter IV, 2.a.
[1103] OLG München, 4 Ws 36/13, 28. Januar 2014 = KirchE, 112-113 (2014).
[1104] Id. at. 19; [In Ger.] "Der Antragsteller ist römisch-katholisch und unterliegt in seinem Bekenntnis keinen besonderen religiös bedingten Speisevorschriften."
[1105] Id. at. 19; [In Ger.] " Werden etwa Mohammedaner wegen der nach Art. 4 Abs. 1 GG beachtlichen religiösen Speisevorschriften im Vollzug anders behandelt als Strafgefangene, die religiösen Speisevorschriften nicht unterliegen, kann hierin keine Benachteiligung etwa im Sinne eines Verstoßes gegen den allgemeinen Gleichheitsgrundsatz nach Art. 3 Abs. 1 GG erkannt werden. Denn ein solcher Verstoß wäre nur dann anzunehmen,

treatment did not violate the general principle of equal treatment under Art. 3 I of the Basic Law.[1106] Indeed, the beliefs of most Christians do not make necessary further religious dietary accommodations; doctrinally, however, it is problematic that the state interprets the content of one religion in such general manner and uses its interpretation to justify the limitations of religious freedom without taking into account the individual's conviction.[1107]

The freedom to express religious and ideological beliefs under Art. 4 I, II BL protects "the right of the individual to orient his or her entire conduct to the teachings of his or her faith and to act in accordance with his or her inner convictions".[1108] In assessing what is to be regarded as the practice of religion in an individual case, the self-image of the religious community concerned is to be taken into account. The state must speak the final binding word on the interpretation of conduct under religious freedom. But in doing the assessment, they must take the presented self-understanding of the rights-holder into account. This principle has not been respected in the present case. The case does not contain any discussion of the religious beliefs of the applicant. Also, the court did not sufficiently examine equality rights. Only a brief reference is made to Art. 3 I BL, without it being explained in detail whether the unequal treatment can also stand up to considerations of proportionality. The court did not examine Art. 3 III BL.

In the second case, decided by the Higher Regional Court of Hamm in 1983, the commandments of religious freedom and equality were at issue in the context of a Buddhist inmate.[1109] The applicant requested the accommodation of a macrobiotic vegan diet.[1110] The

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wenn die unterschiedliche Behandlung willkürlich wäre. In Anbetracht der Verschiedenheit der nach Art. 4 Abs. 1 GG im Strafvollzug zu beachtenden religiösen Bekenntnisse folgt der objektive Differenzierungsgrund zwischen diesen und den anderen Strafgefangenen eben hieraus." *In own translation:*
If, for example, Muhammadans are treated differently in prison than prisoners who are not subject to religious dietary regulations because of the considerable religious dietary regulations pursuant to Article 4.1 of the Basic Law, no disadvantage, for example in the sense of a violation of the general principle of equality pursuant to Article 3.1 of the Basic Law, can be recognized here. Such an infringement could only be assumed if the difference in treatment were arbitrary. In view of the differences in the religious confessions to be observed in the penal system under Article 4.1 of the Basic Law, the objective reason for differentiation between these and the other prisoners follows precisely from this.

[1106] Id. at. 19.

[1107] According to Laborde's critical republicanism account, the state has limited competence to comment on matters of religious belief, see Part 2, Chapter 1, 2.

[1108] Lastly, BVerfG NJW 2015, 1359 Rn. 85.; The scope of Art. 4 I, II BL is discussed in detail under Part 1, Chapter IV, 1.a.aa.

[1109] OLG Hamm, 7 Vollz (Ws) 140/83, 14.12.1983 = NStZ 1984, 190-191.

[1110] Id. at. 191.

prison authorities denied the request.[1111] It argued that the Ministry of Justice had not approved for this type of diet in prisons and that prisoners could buy macrobiotic food from the supply system of the prison at their expenses.[1112] Interestingly, the first instance court argued in favor of the applicant and held that section 21 III federal Prison Act should be interpreted as meaning that the inmate is entitled to the macrobiotic diet and that it must be covered by public expenses.[1113] In constitutional interpretation, considering the demands of Art. 4 I, II or Art. 3 I, III of the Basic Law, it had to be taken into account that Muslims were offered a religious diet, as emphasized by the court.[1114] Hence, for reasons of the demanded equal treatment of all prisoners under the law, a vegan diet must also be given to the Zen Buddhist claimant.[1115] However, the Higher Regional Court of Hamm overruled the lower court's judgment.[1116]

The Higher Regional Court of Hamm emphasized that section 21 III federal Prison Act did not imply any obligation on the part of the prison administration to accommodate the specific religious diet for the inmate.[1117] As indicated earlier, it based its argument on the nature of constitutional rights as a defense right: "Article 4 of the Basic Law […] is a right of defense of the individual against the state; the latter is not obliged in principle to provide the individual with the de facto possibility of practicing religion - which also includes the observance of religious food regulations. It follows from this that the applicant is not entitled to vegan food instead of the usual institutional food; however, the possibility of the procurement of food for the preparation of this food is granted to him by the institutional management. That's all he can ask for."[1118]

[1111] Id.

[1112] Id. at. 191.; [in Ger.] "Auf diese Forderung braucht sich die Justizverwaltung im Hinblick auf den damit verbundenen finanziellen und personellen Mehraufwand nicht einzulassen. Sie kann vielmehr, wie es das Strafvollzugsgesetz in § 21 S. 3 vorsieht, den Betroffenen darauf verweisen, sich - auf eigene Kosten - die seinen weltanschaulich-ethischen Speisevorstellungen entsprechende Nahrungsmittel selbst zu beschaffen". *In own translation:*
The administration of justice need not accept this claim (*i.e. the claim for a macrobiotic diet*) in view of the additional financial and personnel costs involved. Rather, it may, as provided for in section 21, sentence 3 of the Prison Act, refer to the right of inmates to procure for themselves the food corresponding to their religious convictions at their own expenses.

[1113] LG Kleve, Vollz 23/83 G, 18. Juli 1983.

[1114] OLG Hamm, 7 Vollz (Ws) 140/83, 14.12.1983 = NStZ 1984, 190-191.

[1115] Id. at. 191.

[1116] Id.

[1117] With reference to: LG Staubing, ZfStrVO 1979, 124, Calliess/Müller-Dietz, StVollzG, § 21, at 5.

[1118] OLG Hamm 7 Vollz (Ws) 140/83. = NStZ 1984, 191; [In Ger.] Der Anspruch auf Achtung der Gewissensfreiheit nach Art. 4 GG ist nämlich […] ein Abwehrrecht des einzelnen gegenüber dem Staat; dieser ist dem Grundsatz nach

Later on, however, also the Higher Court of Hamm admitted that it had to be taken into account that Muslims were guaranteed a religious diet: no one may be favored or disadvantaged because of his faith and religious beliefs (Art. 3 III BL).[1119] Therefore, if the state decided to accommodate religious needs and practices of one religion, it was obliged to equally support all other religions under its discretion.[1120] This spoke in favor of providing the macrobiotic food to the Buddhist inmate.[1121] Ultimately, however, the court was of the opinion that the unequal treatment was justified "by reasonable factual reasons."[1122] It argued that the difference of treatment between Muslim and Buddhist inmates was justified because the plaintiff was the only Buddhist of the institution whereas Muslim inmates formed a larger group.[1123] The court also pointed out that the institution would relatively easily satisfy Islamic dietary requirements by blanking out pork.[1124] Providing a macrobiotic diet would be unequally difficult and more expensive.[1125] Therefore it was justified that the prison authorities only gave the plaintiff the right to purchase the macrobiotic diet at his costs.[1126]

The considerations made about the proportionality of the unequal treatment of the Buddhist inmate compared to other religious inmates are plausible; it is an established argument to

nicht verpflichtet, dem einzelnen die faktische Möglichkeit der Religionsausübung – wozu auch die Befolgung religiöser Speisevorschriften gehört – zu verschaffen. Hieraus folgt, daß dem Antragsteller der geltend gemachte Anspruch auf Verabreichung vegetarischer Kost anstelle der üblichen Anstaltskost nicht zusteht; die Möglichkeit der Beschaffung von Lebensmitteln zur Zubereitung dieser Kost wird ihm jedoch von der Anstaltsleitung zugestanden. Mehr kann er nicht verlangen."

[1119] Id. at. 191. [In Ger.] "Allerdings besteht für den Staat und seine Organe in Angelegenheiten der Religion und der Weltanschauung ein striktes Unparteilichkeits- und Gleichbehandlungsgebot. Niemand darf, wie Art. 3 III GG ausdrücklich hervorhebt, wegen seines Glaubens und seiner religiösen Anschauungen bevorzugt oder benachteiligt werden.

[1120] Id.

[1121] Id. [In Ger.] Wenn sich der Staat aber aufgrund freier Ermessensentscheidung einmal dazu herbeiläßt, [sic!] Individuen, Gruppen oder Kirchen eines bestimmten Bekenntnisses zu unterstützen, so verpflichtet ihn Art 3 III GG – und ebenso auch der heute allgemein anerkannte Grundsatz der staatskirchenrechtlichen Parität – dazu, alle anderen vergleichbaren Gruppen oder einzelnen in gleicher Weise zu unterstützen" (under reference of: Herzog: in Maunz-Dürig, GG, Art. 4, at 110).

[1122] Id. [In Ger.] „durch vernünftige, sachliche Gründe".

[1123] Id.

[1124] Id. [In Ger.] Es kommt noch die Besonderheit hinzu, daß den überliefert feststehenden islamischen Speisevorschriften auf verhältnismäßig einfache Weise Rechnung getragen werden kann, indem nämlich Schweinefleisch und Schweinefett gegen gängige andere tierische Substanzen ausgetauscht werden. Die wirtschaftliche und technisch-organisatorische Belastung der Justizverwaltung hält sich also in Grenzen."

[1125] Id. [In Ger.].

[1126] Id. [In Ger.] Bei dem Ast. handelt es sich jedoch um eine Einzelperson. Er wünscht im Hinblick auf sein Bekenntnis eine -wie sich aus der Darstellung des Sachverhalts ergibt - von der Anstaltskost völlig abweichende Ernährung.

relate the number of persons affected to the effort of the state. However, it should not be overlooked that the protection of minorities is intended to protect a numerically underrepresented group. If the circumstance of numerical underrepresentation alone can justify the unequal treatment, this essentially undermines the protection of minorities. In addition, the question of whether inmates are informed of their existing rights must again be raised here. Perhaps the number of those inmates who see the observance of religious food laws as necessary for themselves is higher than is known in some institutions.[1127]

In principle, inmates in German prisons have no obligation to demonstrate that they belong to a religious community to be entitled to follow the pork-free diet. The requirements for following a religious diet at personal costs are also low. In a case from the early 90s, a Muslim inmate was expected to prove his religiosity by showing a certain certificate to prison authorities, issued by his Muslim community, before he received the permission to buy halal products from outside the prison. [1128] According to the court, however, such requirement was a violation of the religious freedom of the inmate and constituted an unjustified burden to his right to the free exercise of religion.[1129]

The question of the requirements to prove one's religiosity raises the general question of whether section 21 III Prison Act can also get applied to non-religious inmates. In 2014, a vegan inmate from Stendal in Saxony-Anhalt requested two liters of soymilk daily and based his request on his ideological beliefs. [1130] The plaintiff of the case did not only seek permission to buy soy milk from outside the prison institution but requested that the prison institution was directly providing for the soymilk. According to the court, it was justified for the prison authorities to deny the inmate's request. The court argued that even if section 21 III Prison Act was applied by way of analogy, the inmate - like religious inmates -had to buy vegan products at own costs. [1131] A year after, an inmate sought permission to purchase all kinds of

[1127] Interview with prison director in Hamburg.
[1128] OLG Koblenz, 3 Ws 591/93, 08.12.1993.
[1129] Id. at. the key statement of the ruling.
[1130] LG Stendahl, 509 StVK 259/14, 18.06.2014.
[1131] Id. at. 10; Es kann vorliegend dahinstehen, ob der Veganismus analog der Religionsgemeinschaften dem Schutzbereich des Art. 4 GG, auf den diese Vorschrift abzielt, unterfällt. Selbst wenn man annehmen sollte, dass der Veganismus analog der Religionsgemeinschaften zu bewerten sei, so würde hieraus keine Verpflichtung der Antragsgegnerin erwachsen, dem Antragsteller Sojamilch über die Anstaltsverpflegung zur Verfügung zu stellen."

food products, neither based on religious, ideological, or medical grounds.[1132] The Highest Regional Court Koblenz pointed out that this right was not explicitly regulated under the prison law but argued that the inmate had a right for a correct discretionary decision of the authorities.[1133] Ultimately, the court did not decide about the limits of the inmate's right to purchase diet products at own costs, but argued in rather practical terms: The plaintiff of the case was in open prisons and was, therefore - as argued by the court - able to buy the products during his gangway.[1134]

It has been argued by the Highest Regional Court of Koblenz that the right of inmates to self-purchase diet products to follow a religious diet lapsed in case the prison accommodated the religious diet.[1135] If this was the case, however, non-religious inmates hardly ever had the right to buy food products from outside the penal institution. As seen, today a pork-free diet is accommodated in most prisons.[1136] Following the argument of the Koblenz court, Muslim inmates had no right to buy halal products at own costs. There is not sufficient data on the extent to which inmates self-purchase products. If, however, religious inmates were only allowed to buy food products in case the prison did not accommodate religious food, such rule would likely discriminate against religious inmates. After all, all other inmates have the right - regardless of the available diet options - to self-purchase food products of their choice.

As illustrated in a case from 2011, decided by the Higher Regional Court in Berlin, it may happen that the product line available to inmates for their self-purchases does not provide religious diet products.[1137] In the given case, a Muslim inmate could only select diet products from the official contractor of the prison institution, the well-known German supermarket chain "Kaisers Tengelmann".[1138] This contractor, however, did not have halal products in line.[1139] This problem was acknowledged by the Court of Appeals of Berlin when it decided

[1132] OLG Koblenz, 2 Ws 550/14 Vollz, 04.02.2015.
[1133] Id. at.11.
[1134] Id.
[1135] Also the Highest Regional Court of Berlin decided in that direction, see KG Berlin, 2 Ws 326/111 Vollz, 29.08.2011 = KirchE 58, 115-122; Critical of this view is Kellermann/Köhne in: Kellermann, StVollzG, § 21, at 3.
[1136] See data in appendix.
[1137] KG Berlin, 2 Ws 326/111 Vollz, 29.08.2011 = KirchE 58, 115-122.
[1138] Id. at. 4.
[1139] Id. at. 23; [Es] erweist sich die Beschränkung auf einen Lieferanten, der keinerlei Halal-Produkte anbietet, im Hinblick auf § 21 Satz 3 StVollzG als ermessensfehlerhaft. Wenn der Antragsgegner lediglich Lieferungen eines einzigen Unternehmens zulässt, so hat er bei der Auswahl des konkreten Anbieters darauf zu achten, dass dessen Lebensmittelangebot auch Halal-Produkte enthält."

that these circumstances constituted a violation of the religious freedom of the inmate protected under Art. 4 I, II BL and that the prison institution had to choose another contractor.[1140] Since the individual contractors of prisons are not published, it is not possible to check in detail which meals are accessible to inmates.

2. United States

The first of the following sections explains how the diet programs in U.S. federal prisons are organized and points at the different approaches for the accommodation of religious dietary needs (a). The next section examines the inmate's right to follow a religious diet in prison in light of the legal framework and under consideration of the guidelines of the BOP (b). The last section examines the relevant case law under the review of the empirical data; it discusses the practical challenges for inmates to get accepted for the religious diet program and to follow the specific dietary requirements of their religion (c).

a. Introduction

Correctional institutions must not deprive prisoners of the "basic necessities of life", and sufficient nutrition is one of these necessities.[1141] However, food programs well illustrate the tension between the aim of the rehabilitation of the inmate, to which prison authorities are committed, and the punitive character closely associated with the institution of prison.[1142] According to Brayan Finoki, "food more or less becomes a biopolitical digestive tract through which power is contested and transmitted, both as a weapon in the disciplinary tactics of the jailer, and as a currency on the black market within prison culture".[1143]

Also, economic interests of the state play an important role. In the private state prison sector, the administration of prison food became an important business.[1144] The aim here is to

[1140] Id.

[1141] *Prisoner Diet Legal Issues* 7 AELE MONTHLY LAW JOURNAL, JOURNAL & PRISONER LAW SECTION 301 (2007), p. 301 et seq. (with further sources and cases).

[1142] In state prisons, for example, inmates receive nutraloaf in case they misbehave. It is unpleasant to eat and only provides inmates with the most essential nutrients, See, for example, id. at. at 311 et seq.

[1143] Bryan Finoki, *Food for Thinkers: WANTED! Prison Food Writers* GOOD, 2011. More generally, the omni-disciplinary character of prisons is persuasively explained by Foucault, FOUCAULT. 1995.

[1144] The U.S. spends more than $ 80 billion a year on its criminal justice system. For years, the incarceration rate of the U.S. is the highest in the world, and U.S. prisons house around 22 percent of the world's prisoners. The economical dimension of the U.S. prison system became increasingly relevant under President Reagan and his administration. Caused by the war on drugs, the number of inmates grew drastically, which eventually led to the birth of the for-profit prison industry (also see: ALLISON CAMPBELL ANDREW COYLE, RODNEY NEUFELD CAPITALIST

maintain prisons profitably and thus to keep costs as low as possible, hence maximizing profit and minimizing costs. As a result, the quality of prison diets became horrendous. This development has sparked solemn protest amongst prisoners.[1145] In the federal prison sector, the quality of the prison menu is reportedly better. According to the BOP's foodservice manual, which stipulates guidelines for the prison diet, federal prisons across the county serve a regular menu.[1146] Most importantly, the program follows the objective to provide inmates with nutritionally adequate meals which are "prepared and served in a manner that meets established government health and safety codes".[1147]

The issue of food quality also has impact on the demands for religious meals by inmates. Because religious meals become an attractive alternative to the regular diet program, it is an important issue what requirements prisons place on acceptance of inmates for religious diet programs. These are, as will be shown in the course of this chapter, relatively high in federal prisons of the U.S. The inmate's right to follow a religious diet is protected under the Free Exercise Clause and the RFRA (and RLUIPA). One of the chapters of the Food Service Manual of the BOP concretely regulates the Religious Diet Program. Furthermore, the BOP uses the guidelines of the Technical Reference Manual on the practice of religion as well as the Program Statement on religious exercise in prison.[1148]

Despite the accommodation of a variety of religious diets, there are a number of difficult issues in the concrete implementation. These arise from the fact that the religious food requirements of different religions are unequally demanding for prisons to accommodate. In addition, inmates can only participate in the religious food program if they register for it. The registration requires - in accordance with today's standard under the RFRA- "sincerely held beliefs". The question of permissible ways of testing sincerity, however, is cause for legal disputes.[1149] Many prisons defined religion in an all-or-nothing way and, for example, removed

PUNISHMENT. PRISON PRIVATISATION & HUMAN RIGHTS. (Clarity Press. 2003).

[1145] See, for example, Kamala Kelkar, Prison strike organizers to protest food giant Aramark, PBS NEWSHOUR, 2017; Tom Perkins, Why 1.200 Michigan Inmates are Protesting Their Prison's Food MUNCHIES 2016.

[1146] BOP Food Service Manual, p. 16.

[1147] Id. at. 2.

[1148] BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002); BOP Program Statement: Religious Beliefs and Practices (2004)

[1149] Moustafa argues that after the passage of RFRA and RLUIPA, prisons feared that the heightened protections for religious exercise under the new legislation would result in a "flood of frivolous claims for religious accommodations" and therefore interpreted sincerity in such demanding ways, see: Noha Moustafa, *The Right to*

inmates from the religious diet program after finding that the prisoners ate non-religious food from the commissary.[1150] As put by Sigal Samuel, however, religion is not exercised in this all or nothing way: "you can identify as culturally Jewish – someone who loves "Annie Hall", but have no interested in observing Shabbat – and still be dead-set on keeping kosher".[1151]

b. The Right to a Religious Diet under the RFRA and the Guidelines of the BOP

Before RFRA was passed, courts solely applied the Turner-test for decisions under the Free Exercise Clause. The protection of religious practice has improved with the adoption of the RFRA standard.[1152] Under today's RFRA standards, inmates requests for special diet provisions are ordinarily judged according to (1) the sincerity of the religious beliefs of the petitioning inmates, (2) the amount of economic burden or institutional disruption that is likely to result if a request is granted, and (3) the tendency for the privilege sought to subvert security, order, or discipline among the inmates.[1153]

Before Congress defined the "exercise of religion" in the RLUIPA and gave it it's broad meaning of today, courts tried to limit the inmate's right to a religious diet based on the argument that the religious diet was not mandatory for the religious practice of the inmate. In *Spies v. Voinovic*[1154] from 1999, the Sixth Circuit Court held that the plaintiff had no right to a vegan diet because it was not required by Zen Buddhism to follow a strictly vegan diet. The court argued that the vegetarian diet, which was already available at the prison, sufficed. In 2000, however, the Third Circuit Court of Appeals in *DeHart v. Horn*[1155], the court argued that the judiciary is ill-equipped to determine the truth and significance of religious beliefs and practices and is therefore not able to judge whether a religion requires certain diet

Free Excercise of Religion in Prisons: How Courts Should Determine Sincerety of Religious Belief under RLUIPA 20 UNIVERSITY OF MICHIGAN LAW SCHOOL SCHOLARSHIP 213 (2014), p. 215.

[1150] Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 781 (5th Cir. 2012).

[1151] Sigal Samuel, Prison's Great Kosher Debate Hits 'Orange is the Black', FOWARD 2015.

[1152] See under chapter 1, 2b. of this Part (chapter on chaplaincy programs), where the Turner-test and the improvement of inmate's religious rights under the RFRA is explained in detail.

[1153] Knight, JOURNAL OF CHURCH AND STATE, (1984), p. 442.; Part 1, Chapter IV, b.bb.

[1154] Spies v. Voinovich, 173 F.3d 398, 407 (6th Cir. 1999).

[1155] DeHart v. Horn, 227 F.3d 47, 56-57 n.6, (3rd Cir. 2000); The Court was balancing the Turner factors and holding that although there is a legitimate penological interest in an efficient food system and avoiding prisoner jealousy, accommodating the Buddhist prisoner's request for a cup of soy milk with each meal was not administratively prohibitive and not unreasonable in light of these penological interests, but that on remand, the district court was required to examine whether there were other means available to the prisoner for expressing his religious beliefs.

requirements.[1156] In *McEachin v. McGuinnis*[1157], the court finally questioned the requirement that a certain practice must be a dominant part of the practice of one religion, altogether. The court stressed that "a religious practice [need not] be mandated by a religion" to receive First Amendment protection.[1158]

The various guidelines of the BOP regulate and clarify the procedures for the religious diet program. According to the BOP, the religious diet program provides "reasonable and equitable opportunity to observe their religious dietary practice within the constraints of budget limitations and the security and orderly running of the institution".[1159] As will be shown in the course of this chapter, the right to religious freedom and equality of religious minorities are sometimes violated by the limited food options (c). But the program can guarantee that a large number of inmates belonging to a religious minority can follow a religious diet.

In the program statement on the practice of religion, the observance of religious food laws is protected as part of the practice of religion.[1160] As for other religious activities, the chaplains are responsible for organizing the religious diet options.[1161] Apart from ministry, administrative duties became an important part of their work. The religious diet program of the BOP is further specified in a Technical Reference Manual on the practice of religion, which describes the religious dietary requirements of the various religions.[1162] According to the manual, the requirements must be read in conjunction with the Program Statement on Religious Beliefs and Practices.[1163]

The manual acknowledges a variety of religious dietary requirements of different religions: Buddhism, Eastern Rite Catholicism, Hinduism, Islam, Judaism, Moorish Science Temple of America, Nation of Islam, Native American, Odinism/Asatru, Protestant Christianity, Rastafari,

[1156] Id. at. 55.
[1157] McEachin v. McGuinnis, 357 F.3d 197, 203 (2nd Cir. 2004). In McEachin, a Catholic prisoner was held not to be entitled to preliminary injunctive relief concerning his request for kosher meals because this was a request for a religious practice not usually associated with the Catholic faith. He failed to show that he was likely to succeed on the merits of his claim that denial of kosher meals violated his rights to religious freedom.
[1158] Id. at. 209.
[1159] BOP Program Statement: Religious Beliefs and Practices (2004), p. 17.
[1160] Id. at. 17.
[1161] Id. at. 6 et seq.
[1162] BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002).
[1163] Id. at. i.

Roman Catholic Christianity, Sikh Dharma, and Wicca. The manual also regulates the operation of annual ceremonial meals and religious fasts, such as Ramadan and Passover.[1164]

The religious diet program of the BOP[1165], called the Alternative Diet Program[1166], consists of two distinct components: one component provides for religious dietary needs through self-selection from the mainline, which includes a no-flesh option and access to the salad/hot bar (in institutions where meals are served in prepared trays, local procedures will be established for providing the no-flesh component). The other component accommodates dietary needs through nationally recognized, religiously certified processed foods. The latter is offered to any inmate who requests to have a different menu on religious grounds. The aim of this program is to fulfill the needs of all religious inmates and to simplify organizational matters.[1167] This program serves foods that largely require no preparation, contain no pork or pork derivatives, do not mix meat or dairy products in the service of food items, and are served with utensils that have not come in contact with pork or pork derivatives.[1168] Hence, the menus are certified by a nationally accepted Orthodox Kashrut supervision service. To the extent practicable, this diet contains approximately three hot meat entrées a week to accommodate the religious dietary needs of religious inmates.

Religious inmates in the federal prison system, wishing to participate in the religious diet program, have to "provide a written statement articulating the religious motivation for participation in the diet program".[1169] This request must be submitted to the chaplains of the

[1164] Another big issue is to what extent religious diet habits are accommodated, which do not concern the ingredients of a meal, but rather the time at which the meals get served. During Ramadan, for example, Muslims commonly only eat before sunrise and after sunset. In most prisons, this practice is respected, often by serving a bag breakfast. Inmates who undertake fast, whether religious or not, have to sign a form that he or she is fully aware that during participation in the fast, he or she is exceeding the 14 hour limit between meal times ordinarily required by policy (and) that the inmate is aware that, since he or she is fasting, he or she will not necessarily be getting the number of calories the normal menus provided. Thereby the BOP gets relieved from any liabilities. Jews who wish to observe Passover are required to submit an application to the chaplain three weeks in advance for food that meets the "kosher-for-Passover" standard. It is supplied to all Jews who make a request regardless of whether they normally participate in the alternative food program.

[1165] For more information on the alternative diet program of the BOP, see BOP Program Statement: Religious Beliefs and Practices (2004), 17 et seq.

[1166] Other terms which are interchangeably used to identify the religious menu provided by the BOP are Common Fare and Certified Menu.

[1167] HARVARD LAW REVIEW (2002), p 1908 et seq.

[1168] BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002), p. 7.

[1169] BOP Program Statement: Religious Beliefs and Practices (2004), p. 17.

institution.[1170] After they have received the form, chaplains will ordinarily conduct an oral interview with the inmate within two working days.[1171] When the interview is completed, the chaplaincy team will review the request to determine how to accommodate the inmate's stated religious dietary needs.[1172] The inmate's interview responses will determine which components of the religious diet program best accommodate his or her religious dietary needs and are saved in the so-called SENTRY record[1173]. Food Service will begin serving those approved for the certified processed food line normally within two days of SENTRY notification.[1174]

Depending on the security level of the prison and the type of housing of the inmates, they eat either in their cell or together in a larger dining room ("chow hall"). The food is prepared by some of the prisoners who are assigned to the Food Service. In addition to the ordered meals offered by the institution, prisoners can also purchase products from the prison commissary.[1175] The prerequisite for this is that they have deposited their own money in the trust fund account. The commissary offers a wide range of food products and not only snacks but also packaged, healthy meals.[1176]

The exact composition and preparation of the available religious diet option is a cause for conflict, as will be shown in the subsequent section. Conflicts arise from the formal prerequisites for religious believers to participate in the religious diet program and from the requirements associated with participation, such as avoiding all kind of "regular food". According to the manual, inmates can complete a "New or Unfamiliar Religious Components Questionnaire[1177] in case none of the already accommodated diet options can fulfill the inmate's needs. This request is subsequently forwarded for review to the appropriate advisory officials, i.e. a regional unit, or BOP's Central Office's Religious Issues Committee (RIC). They advise the prison warden on whether the accommodation is appropriate and leave it to him

[1170] Id. at. 18.
[1171] Id.
[1172] Id.
[1173] Id. at. 18 (6).
[1174] Id. at. 18.
[1175] BOP Program Statement: Religious Beliefs and Practices (2004), p. 18.
[1176] BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002), p. 42, 54.
[1177] U.S. Department of Justice, Federal Bureau of Prisons, "New or Unfamiliar Religious Components questionnaire," BP-S822.053, October 2004, p. 148.

or her to implement the new practice.[1178]As a result of the increased number of specific requests from Muslims, Rastafarians, and Seventh Day Adventists for a diet in accordance with their religious guidelines, the range of dishes was further expanded in the course of the previous years.[1179]

c. Religious Menus and the Challenge of Equality

As the empirical data from the Pew Forum shows, around half of the requests of religious inmates for the accommodation of a special religious diet usually get approved, another 40 percent sometimes get approved and sometimes not.[1180] This data indicates that inmates generally have good chances with their diet requests. However, this data does not more specifically show what kind of requests of inmates are usually successful and what kind of requests are not. For example, inmates who are already on the religious fare menu sometimes request more specific diet options that are not accommodated.

One of the first cases addressing the right for a religious diet of inmates is *Barnett v. Rodgers*[1181] from the late 1960s. *Barnett* concerned the Muslim inmate's right to eat halal in prison. The U.S. Court of Appeals of the District of Columbia held that the right of Muslim inmates for a diet following religious dietary rules, protected under the Free Exercise Clause, can only be limited in cases where such limitation is justified by "a compelling state interest".[1182] Hence, the test for the constitutionality of restrictions on religious activities was set forth as a balancing of state versus individual interest. As argued by the court, the state interests in restraint, internal institutional order, and the minimization of administrative costs were possible legal bases for limitations of the right of inmates to follow a religious diet.[1183] *Barnett* further specified, quoting from *Sherbert v. Verner*, that "[O]nly the gravest abuses [of

[1178] The RIC is contacted when a decision cannot be reached locally. The committee is appointed by the assistant director of the prison and the Correctional Programs Division (CPD), and reviews inmates' requests for introducing new religious components into the overall religious program. Periodically, the RIC issues summary reports and recommendations to all Chief Executive Officers. The RIC's review processes are well established and began in 1994.
[1179] BECKFORD & GILIAT (2005). p. 188.
[1180] Pew Research Center, Religion in Prisons, p. 24.
[1181] Barnett v. Rogers 410 F.2.d 995, 1002 (D.C. Cir. 1969).
[1182] Id. it. 1002.
[1183] Sherbert v. Verner, 374 U.S. 398 (1963), at 1000.

religious activity], endangering paramount interests"[1184] can engender permissible limitations on free exercise.[1185]

Further setting the trend in cases dealing with meal requests of inmates was *Kahane v. Carlson*[1186] from 1975, when the prisoner's rights movement was reaching its peak.[1187] In *Kahane*, the Second Circuit Court of Appeals ruled that the plaintiff, an Orthodox Jewish Rabbi, was entitled to a kosher diet in prison. Because Jewish dietary laws "are an important, integral part of the covenant between the Jewish people and the God of Israel,"[1188] the prison was required not to "unnecessarily prevent *Kahane's* observation of his dietary obligation."[1189] Based on the arguments that approximately only a dozen Orthodox Jews were in the prison and that other prisons in the area managed to accommodate kosher diets too, the court held that the administrative difficulties associated with providing *Kahane* with a kosher diet were "surmountable."[1190] However, the court emphasized that it was under the prison's discretion to decide how to implement the special dietary needs of Jewish inmates, provided it was "sufficient to sustain the prisoner in good health without violating the Jewish dietary laws".[1191]

Today, cause for legal controversy are the requirements for inmates to fulfill to get on the religious diet program. They must demonstrate to sincerely believe in religion by filling out a form. In *Resnick v. Adams,*[1192] an Orthodox Jewish inmate in federal detention alleged violations of his First Amendment rights and under RFRA due to the prison requirement to fill out forms in order to receive kosher meals. According to the Ninth Circuit Court of Appeals, the requirement that inmates have to fill out a standard prison form in order to receive kosher food was not an unconstitutional infringement of their right to free exercise of religion. [1193] The court emphasized that even "clearly established" rights, such as following religious dietary restrictions, are subject to reasonable limitations in the prison context.[1194] In the court's view,

[1184] Id. at 406.
[1185] Barnett v. Rogers 410 F.2.d 995, 1002 (D.C. Cir. 1969).
[1186] Kahane v. Carlson, 527 F.2d 492, (2nd Cir. 1975). See also: Ford v. McGinnis, 352 F.3d 582, (2nd Cir. 2002) and Lomholt v. Holder, 287 F.3d 683 (8th Cir. 2002).
[1187] See Part 1.I.2.b.
[1188] Kahane v. Carlson, 527 F.2d 492 (2nd Cir. 1975), at 495.
[1189] Id. at. 495.
[1190] Id. at. 494.
[1191] Id. at. 495.
[1192] Resnick v. Adams, 348 F.3d 763, (9th Cir. 2003).
[1193] Id. at. 768.
[1194] Id.

the case is not about Resnick's "right to a kosher diet, but rather of his right to a kosher diet without having to file the standard application."[1195] In fact, as argued by the Ninth Circuit Court, the application procedure is designed to facilitate the accommodation of the religious dietary needs, not to avoid it.[1196] Therefore, "it would be a strange result" if it was to be concluded that this procedure is in violation of the inmate's First Amendment rights.[1197]

What was still clearly decided in *Resnick* for the prison domain became a disputed issue again a few years later: The question to what extent filling out forms constituted a substantial burden under the RFRA was also relevant in the context of religious exemptions for nonprofit religious entities under the Affordable Care Act (ACA, also called "Obamacare").[1198] Under the ACA, all health insurance plans are required to provide coverage for birth control drugs and procedures. If providing such coverage is morally objectionable according to their faith, churches themselves and other institutions that primarily employ and serve members of the churches are exempt.[1199] Nonprofit religious entities, such as social services agencies, are not directly exempt in the plans but may file a form to notify the authorities that they will not participate for religious reasons. [1200] Hence, they may request a religious exemption from the obligation to provide contraceptives. Some of these organizations sued, arguing that the act of filling out the form and the required notification are a substantial burden on the free exercise of religion, in violation of the RFRA.

In *Zubik v. Burwell*[1201], which consolidates several of these appeals, the U.S. Supreme Court held that "the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates the challenger's religious exercise while at the same time ensuring that women covered by the challenger's health plans receive full and equal health

[1195] Id. at. 770.
[1196] Id.
[1197] Id. at. 772.
[1198] American Constitution Society, Is Sending in a Form Too Big of a Complicity Burden to Bear?, 2015, available at:https://www.acslaw.org/expertforum/is-sending-in-a-form-too-big-a-complicity-burden-to-bear/?utm_content=buffer846ea&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer *(last accessed 30.08.2019).*
[1199] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,889 (July 2, 2013); Kara Loewentheil, *When Free Exercise is a Burden: Protecting „Third Parties" in Religious Accommodation Law* 62 DRAKE LAW REVIEW 433 (2014), p. 446.
[1200] Id. at. 447.
[1201] *Zubik v. Burwell*, 578 U.S. __(2016).

coverage, including contraceptive coverage".[1202] In other words, the Supreme Court vacated the decision of the Circuit Court of Appeals and remanded the cases to those courts for reconsideration. Because the Supreme Court's decision expresses no view on the merits of the case, but gives the Courts of Appeals the task to decide on the particular content of the RFRA and the substantial burden pillar, it is yet to be seen whether, in the future, filling out forms in order to "make use" of the accommodation is considered as a substantial burden. In *Little Sisters of the Poor v. Burwell* [1203], in contrast to the Eight Circuit, the Tenth Circuit determined that because the accommodation relieves the plaintiff's responsibility to provide contraceptive coverage, filling out forms was not a substantial burden.[1204]

Both cases, *Zubik* and *Resnick*, are similar in that the objectors have attacked the religious accommodation itself as a substantial burden on religious liberty. In *Resnick*, the legal accommodation consists of service on the part of the state (i.e. to provide kosher meals). In *Zubik*, the religious accommodation allows the religious objector to opt-out of their legal obligation (i.e. to provide for contraceptives), with the result that this obligation transfers to the third-party health plan insurer.[1205] In other words, one seeks an exemption from an otherwise binding duty; the other seeks a service from the state. In both cases, however, the accommodation ultimately results in higher public costs. In both scenarios, it is reasonable for the persons concerned to fill in the relevant applications. And as long as inmates have to fill in the relevant applications, this must first and foremost apply to religious organizations.

Also in *Crowder v. Lariva*[1206], the court had to decide about the requirements for inmates to get on the BOP's Religious Diet Program. More specifically, it was an issue whether the plaintiff, who had previously converted to Judaism, was entitled not only to the component which provided for religious dietary needs through self-selection from the main line, but also to the religiously certified processed foods.[1207] Apart from the application forms, the BOP's

[1202] Id.
[1203] Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, (10th Cir. 2015).
[1204] Id. at. 1187.
[1205] The system of how the costs for contraceptives are shifted in case employers get exempted from the obligation to provide contraceptives, is explained by Gedicks and Tassell, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARVARD CIVIL RIGHTS - CIVIL LIBERTIES LAW REVIEW 343 (2014), p. 352.
[1206] Crowder v. Lariva, Case No. 2:14-cv-00202-JMS-MJD (S.D. Ind. Sep. 12, 2016).
[1207] Id. at. 4.

procedure foresees a Religious Diet Interview consisting of six-standard questions.[1208] Based on Crowder's responses to the Religious Diet Interview questions, he was only provided the option to self-select foods from the mainline component of the Religious Diet Program, but he was not provided the certified processed component. The prison management argued this decision was "not motivated by any desire to discriminate against him, but was based solely upon his interview responses and discretionary judgments made following BOP policy."[1209] However, the prison management's decision was not further explained and justified; from the plaintiff's answers, it was obvious that he wanted processed kosher food.[1210]Hence, the District Court decided that the plaintiff was right when he alleged that his RFRA right to receive a diet that satisfied the requirements of his religion was violated.[1211]

In several cases, courts decided about the lawfulness of the conditions under which prisons remove inmates from the Religious Diet Program. Generally, inmates who have chosen to participate in the religious food program are no longer allowed to choose from the main food line. In case, they nevertheless do so, or violate the integrity of the alternative food program in any other way, for example, by taking food out of the dining hall, inmates can ultimately get removed from the alternative diet program. In the federal prison system, this only happens permanently, after inmates violate the rules of the diet program for the third time. Before, they only get removed for shorter time-periods.[1212] However, the requirements prisoners have to fulfill in order to stay on a religious diet program differ in state prisons and sometimes go so far as to the duty of prisoners to participate in all kinds of religious services to prove the sincerity of their beliefs[1213] (in South Carolina, for example, an inmate must attend three-fourths of the Muslim Jema'ah services to be allowed to participate in the no-pork diet).[1214]

[1208] The questions are: What are your religious dietary needs? What are the religious reasons for your dietary needs? What does the term "certified processed foods" mean to you? If you believe you need to be on the certified processed food line, how do you understand "kosher" or "halal"? Why can't your religious dietary needs be met by self-selecting from the mainline and the salad/hot bar (where the salad/hot bar is part of the Food Service Program)? Do you understand that you may only purchase and/or consume foods in compliance with your religious dietary laws from the commissary, if you are approved for the certified religious line?
[1209] Crowder v. Lariva, Case No. 2:14-cv-00202-JMS-MJD (S.D. Ind. Sep. 12, 2016), at. 10.
[1210] Id. at. 6.
[1211] Id. at. 26.
[1212] There is a sliding scale of punishments for violations of the religious diet program: after the first and second violations of the food program, inmates are only temporarily removed. See BECKFORD & GILIAT (2005). 189.
[1213] Association, HARVARD LAW REVIEW, (2002). See at 1839 et seq.
[1214] Id. at. 1839.

In *Daly v. Davis*[1215], decided by the U.S. District Court from Illinois, the plaintiff was on the religious diet program to receive a kosher diet. Hence, he was no longer allowed to eat, purchase, or possess uncertified food.[1216] As seen, violating the terms and conditions of the program can result in the removal of the program. According to the BOP, these removal provisions are intended to be evaluative rather than punitive.[1217] The prison argued that strict adherence to the religious diet program is necessary to prevent tensions from rising between sincere and insincere inmates. This was "extremely important at higher security facilities, where inmates are more prone to violence."[1218] The plaintiff, however, did eat and buy non-kosher foods on various occasions and was removed from the religious diet program three times.[1219] The plaintiff was of the opinion that the removal violated his First Amendment and RFRA rights.[1220] He argued there was a misunderstanding about the kosher nature of the food he ate and that he had bought non-kosher food, but not for himself. However, the court was of the opinion that the plaintiff was not able to prove that he had suffered a substantial burden to his religious exercise due to the removal from the program and that there was a rational basis for the removal provision of the Religious Diet Program.[1221] Because Kosher meals cost the prison substantially more (i.e., 90 % more than regular meals[1222]), there was a rational basis for limiting participation only to those whom it would violate their religious beliefs to eat non-Kosher foods, as argued by the court.[1223]

In *Jean-Pierre v. United States Bureau of Prisons* [1224], the Rastafarian plaintiff was removed from the certified religious diet program after taking out food from the dining hall.[1225] After a thirty day waiting period, the plaintiff request to be reinstated to the Certified Religious Diet Program. This request was denied with the explanation that also the alternative diet was sufficient for Rastafarian inmates.[1226] The plaintiff, however, argued being on the mainline is a violation of his First Amendment rights and RFRA; in the main line, pork is regularly served,

[1215] Daly v. Davis, No. 3:05-cv-276-DRH (S.D. Ill. Mar. 27, 2008).
[1216] Id. at. 2.
[1217] Id.
[1218] Id.
[1219] Id. at. 2.
[1220] Id. at. 1.
[1221] Id. at. 2.
[1222] Id.
[1223] Id. at. 10.
[1224] Jean-Pierre v. Bureau of Prisons, U.S. D.C. W.D. Pennsylvania (2010) WL 3852338 (Westlaw citation).
[1225] Id. at. 2.
[1226] Id. at. 3.

and therefore, kitchen products may be contaminated with pork. The plaintiff followed the request to provide appropriate evidence that for religious reasons it was not acceptable for him to participate in the main line and that, indeed, the religious diet program was required because of his Rastafarian faith.[1227] According to the responsible chaplain though, the plaintiff lacked an understanding of certified processed food, and his request was denied.[1228] Also, in view of the court, the plaintiff's Free Exercise rights and RFRA were not violated.[1229]

These cases show that it can be difficult for inmates to meet the procedural requirements for getting on the religious diet program and that the prison management has discretion when making its decisions. As seen, for the removal, it is sufficient that inmates choose products from the main line or eat any products which do not comply with their religious dietary restrictions from the commissary. Especially in view of the high costs involved in preparing kosher dishes, it is understandable that there is a governmental interest in controlling access to the religious diet program. However, this strict approach entails the risk that state control over the occupant will have a very far-reaching effect. The question also arises as to how precisely the prison must meet the religious food needs of the inmates. Is it enough for the inmate to be able to eat without violating his or her religious commandments? Or is there a claim for inmates that the religious dietary needs are accommodated more specifically?

In 2008, in *Patel v. United States Bureau of Prisons*,[1230] a federal prisoner who recently converted to Islam filed his complaint about lack of strict compliance with a halal diet provided to him in detention. The plaintiff argued that none of the BOP's meal options met his religious requirements.[1231] The main line option, he alleged, contained no halal foods because even the vegetarian meals were cross-contaminated with bacon due to other inmates who touched haram products before they came in contact with the vegetarian meals.[1232] Patel claimed that also the Common Fare option was unsuitable "because it usually contain[ed] kosher meat entrées, not halal meat entrées."[1233] Indeed, the BOP decided to serve kosher meals in the

[1227] Id.
[1228] Id.
[1229] Id. at. 6.
[1230] Patel v. United States Bureau of Prisons, No. 06-3819 (8d Cir. 2008).
[1231] Id. at. 3.
[1232] Id.
[1233] Id.

Common Fare plan after concluding that kosher meals complied with the strictest diet and hence subsumed all other religious dietary needs.[1234]

Patel filed a complaint that the available diet options violated his rights. He brought a Bivens claim[1235] based on an alleged violation of the Free Exercise Clause and his rights under RFRA.[1236] His halal diet did not allow him to consume any meat unless it has been slaughtered during a prayer to Allah. Therefore, he was not able to eat the kosher meat, which according to some schools of Muslim thought is permitted (an interpretation of Sura 5:5 ("The food of those who have received the Scripture is lawful for you, and your food is lawful for them.").[1237] Further, he asserted violation under the Establishment Clause, arguing that providing kosher meals in prison amounted to a practice respecting the establishment of the Jewish religion.[1238] Additionally, he brought a Bivens claim under the equal protection component of the Due Process Clause of the Fifth Amendment, asserting that the BOP's decision to implement a meal plan that accommodated a kosher diet, but not his halal diet, was discriminatory.[1239]

The court did not agree that the diet options provided to Patel substantially burdened his free exercise of religion.[1240] In view of the court, Muslims had various ways to practice their religion including a vegetarian diet. Furthermore, in the view of the court, it was not shown that Patel had exhausted alternative means of accommodating his religious dietary needs.[1241] For example, the court suggested he could have asked to be first in line for the vegetarian diet to avoid that other prisoners cross-contaminated the vegetarian meals.[1242]In the court's view, it was also relevant that Patel had the option of purchasing halal vegetarian entrées from the commissary which he could have used to substitute for the kosher entrées on days meat is served at dinner.[1243]

[1234] Id. at. 2.
[1235] See Part 1, Chapter IV 3.b.
[1236] Id. at. 4.
[1237] Patel v. United States Bureau of Prisons, No. 06-3819 (8d Cir. 2008)
[1238] Id. at. 1.
[1239] Id. at. 4.
[1240] Id. at. 9.
[1241] Id.
[1242] Id.
[1243] Id.

The Establishment Clause claim of the case was formally rejected with the argument that Patel did not have standing to bring this claim.[1244] Patel's complaint alleged that the Bureau Defendants "singled out the Jewish faith as the only faith to whom a religious diet was to be provided".[1245] In view of the court, however, the accommodation of Jewish religious beliefs in prison did not alter the behavior of Patel, nor did he have "direct, offensive and alienating contact" with this diet option.[1246] To the contrary, as emphasized by the court, the plaintiff himself sought the accommodation of his religious beliefs. A successful Establishment Clause would have struck down any accommodation of religious beliefs in the prison's meal plans, which would effectively eviscerate the remedy Patel sought in his complain, in view of the court.[1247]

The equal protection claim was based on the argument that it was discriminatory that the BOP implemented a meal plan that accommodated a kosher diet but not his required halal diet.[1248] As for this claim, as argued by the court, the plaintiff must show that the decisions to serve kosher entrees, but not halal entrees, were motivated by intentional or purposeful discrimination.[1249] Such evidence, as argued by the court, was not presented by the plaintiff: even assuming that Patel has been treated differently from similarly-situated inmates, Patel has not presented any evidence suggesting that the Bureau Defendants acted with a discriminatory purpose.[1250] To the contrary, the undisputed evidence shows that the BOP consulted with religious leaders, including Muslims, and reasonably believed that it had accommodated the needs of a halal diet. If anything, the evidence supports only one conclusion: "that the Bureau Defendants" intention was to accommodate all religious beliefs, not to discriminate against certain beliefs.[1251]

As these cases show, even under the current and comprehensive standard of protection of all religious behavior under RFRA, courts are cautious in deciding that the existing dietary options

[1244] Id. at. 11. ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" Hein v. Freedom From Religion Found., Inc., 551 U.S., 127 S.Ct. 2553, 2562, 168 L.Ed.2d 424 (2007).
[1245] Id. at. 11.
[1246] Id.
[1247] Id. at. 11.
[1248] Id. at. 10.
[1249] Id.
[1250] Id.
[1251] Id.

for religious inmates constituted a substantial burden for their religious practice. All the above cases have been decided after 2000 when the standard of protection under the RFRA was intensified.[1252] The case law suggests that it is difficult for inmates to assert a violation of their religious rights when an alternative religious diet is accommodated which does not fulfill the more specific dietary needs of the inmate. Hence, it is questionable whether the more extensive protection of all religious behavior under RFRA today leads to more nuanced accommodations of religious dietary needs.

Also in cases in which inmates reprimanded a violation of their rights as they would have to resort in part to food from the main line because of the specific composition of the religious diet option, courts have not seen any infringement of rights. In *Barner v. Marberry*, e.g. the concrete composition of the so-called Unitized Tray Pilot Program was at issue.[1253] The plaintiff claimed that he was not able "to practice his preferred religious practice(s) of eating a Kosher diet because he is unable to receive adequate nutrition on the presently being served Unitized Tray Pilot Program."[1254] In particular, the plaintiff complained that under the Pilot Program, fresh vegetables were omitted from the kosher food trays, thus forcing him to obtain fresh vegetables from the non-kosher salad bar in violation of his religious beliefs.[1255] The court decided against a rights violation of the inmate.

In *Kadamova v. Lockett*, the plaintiff asserted that his religious rights were burdened because the religious diet option was unavailable as he was forced to decline that diet program due to its nutritional inadequacy.[1256] It is recognized that prisoners can bring free exercise claims where they are "put to an improper choice between adequate nutrition and observance of the tenets of his faith".[1257] However, the court did not see any proof that Kadamova's rights were violated by the diet options provided to him. It argued the plaintiff has failed to meet the burden of proof that the food on the religious diet imposed a substantial burden on the free exercise of his religion.[1258] Kadamova was housed in the Special Confinement Unit where

[1252] See Part 1, Chapter IV, 2.b.bb. (With the adoption of RLUIPA, Congress redefined "exercise of religion" also in RFRA to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief.")
[1253] Barner v. Marberry, U.S. D.C. W.D. Pennsylvani (2008), WL 3891264 (Westlaw citation).
[1254] Id. at. 4.
[1255] Id.
[1256] Kadamova v. Lockett, U.S. S.D. Indiana (2013), WL 5487359 (Westlaw citation).
[1257] Kadamova citing Hunafa v. Murphy, 907 F.2d 46, 47 (7th Cir. 1990) (at 7.).
[1258] Id. at. 7.

meals were served in prepared trays as well. He asserted that the food he received while on the religious diet option was nutritionally inadequate and insufficient in variety or quantities[1259]; he claimed to have suffered injury from food-borne spoliation or contamination and blamed budget reductions to be responsible for the protracted shortages.[1260]

With the decision that there is no substantial burden for the exercise of the religious inmates, the requirements to balance the religious freedom of the inmate with other conflicting interests well decrease. This must be kept in mind when analyzing which state interests have been recognized by courts as compelling; if the policy or action is not understood to be a substantial burden of the inmate's religious practice, it does not require to further a compelling governmental interest. Under the RLUIPA, which applies in state prisons but is supposed to guarantee similar protection as RFRA in the federal system[1261], no appellate court has, for example, ever found the orderly administration of a prison dietary system[1262] to be compelling.[1263]

Within the RLUIPA jurisdiction, cost considerations of the state alone are not sufficient to justify a limitation of the rights of inmates. Courts have decided that correctional facilities in the U.S are not able to pass on to the religious prisoner the purported additional expense of providing and preparing special religious menus.[1264] In *Thompson v. Vilsack*[1265], a court in Iowa in 2004 found that the intention of correctional officials to charge a co-payment for kosher meals provided to Orthodox Jewish inmates had no reasonable relationship to any legitimate penological interest in maintaining a fixed budget for food or teaching "financial responsibility" to prisoners. Accordingly, the plaintiff prisoner was entitled to summary judgment on the co-payment issue.[1266] Also in *Beerheide v. Suthers*[1267] , the 10th Circuit Court

[1259] Id. at. 1.
[1260] Id. at. 7.
[1261] See Part 1, Chapter IV, b.bb.
[1262] Generally, the orderly functioning was considered to be relevant as conflicting interest, see, amongst other cases, Resnick v. Adams, 348 F.3d 763, (9th Cir. 2003). The legitimate governmental interest at stake in Resnick is the orderly administration of a program that allows federal prisons to accommodate the religious dietary needs of thousands of prisoners.
[1263] Compare: Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008). ("[N]o appellate court has ever found these [legitimate concerns for orderly administration of a prison dietary system] to be compelling interests.").
[1264] *Prisoner Diet Legal Issues* 7 AELE MONTHLY LAW JOURNAL, JOURNAL & PRISONER LAW SECTION 301 (2007), p. 306-309.
[1265] Thompson v. Vilsack, 328 F. Supp. 2d 974, (U.S Dis. S.D. Iowa, 2004).
[1266] Id. at. 974.
[1267] Beerheide v. Suthers, 286 F.3d 1179 (10th Cir. 2002).

of Appeals ruled that Orthodox Jewish inmates in Colorado correctional facilities were entitled to be supplied kosher meals free of charge. A suggested 25% co-payment requirement was ruled to be an impermissible burden on the exercise of religion.[1268]

3. Summary

This chapter has shown that the accommodation of religious dietary requirements of religious minorities in the prison systems of Germany and the U.S. differ. A central difference is that the U.S. federal prison system has an organized program for the accommodation of religious diets options. The program takes into account a variety of religious dietary requirements, but it also requires inmates to follow demanding procedures for getting on the religious diet. In order for inmates to join a religious diet and to have their preference saved in the institution's SENTRY record, they must demonstrate the sincerity of their beliefs in an interview. In German prisons, to the contrary, inmates do not have to follow strict procedures in order to get on the religious menu.

However, in only some prisons in Germany today it has become common practice to accommodate three diet options for inmates: pork-free, vegan, and a "regular" diet. Once accommodated, they are generally available to all inmates of the institution. This rather "permissive-neutral accommodation approach" allows the vast majority of religious inmates to eat without violating the dietary rules of their religion. It also places no further procedural burdens on inmates. But even this approach cannot satisfy all diverse religious dietary needs of inmates. A meal plan from which inmates can choose freely also likely burdens inmates who have more demanding dietary requirements than already accommodated. This results from the inherent differences between religions. It is the task of the state to compensate for these disadvantages as much as possible.

Interestingly, in both prison systems, the procedural and visible consequences of the religious accommodation are attacked. In federal prisons of the U.S., we have seen that there is controversy about whether it substantially burdens the religious freedom under RFRA when inmates have the duty to fill out forms to be placed on a religious diet. In German prisons, it

[1268] Id. at. A.II.

is a controversial issue whether it violates the negative religious freedom of inmates when their beliefs are known to the state or made visible on the inmate's door. This difference reveals how different the struggles over the recognition of religion are in each country. The dispute in the U.S. about the obligation to fill out forms in order to practice religion revolves around the extent to which religious freedom is naturally provided in state-controlled spaces. In Germany, the conflict is different. Here it is not about the recognition of religion as such, but about the visibility of religious diversity in prison administration and beyond.

A positive feature of the U.S. system is that the burden of the higher costs for a religious diet is not shifted to the inmates. This is not necessarily the case in Germany. From the provisions of the prison law, most importantly section 21 3 federal Prison Act, inmates have no positive rights for a religious diet. He or she, therefore, depends on the prisons making use of their discretion and accommodating religious diet options. Given the great importance of a religious diet, the right to a religious diet should be protected more comprehensively. The reliable accommodation of vegan meals could at least guarantee a minimum standard which allows inmates of various religions to eat without violating religious dietary laws. In the U.S., it is well-established that the practice of following a religious diet is a protected right of inmates under the Free Exercise Clause and RFRA. The guidelines of the BOP consider a large variety of religious dietary needs and accommodate it in the ordinary organization of prisons. Any deviations from these accommodations, however, seem difficult for inmates to successfully demand. In these instances, in which inmates argued their rights have been violated because of the existing dietary options of one institution and have claimed for specific changes of the dietary plan, courts were reluctant to decide there that the current practice substantially burdened their religion.

The advantage of the U.S. system is therefore that a minimum standard of available religious diet options is reliably provided, without this causing any further costs on the side of the inmate. The disadvantage of this is that it is relatively easy for prison authorities and courts to argue that the available options are sufficient to satisfy the religious needs of prisoners, which can easily have negative effects on religious minorities who are only represented by a small number of inmates.

Taking into account the further living conditions that inmates must bear inside of prisons, such as the isolation, bad air quality, and limited physical activity, good nutrition could, in fact, be an important contribution to the well-being of prisoners in both systems.[1269] It would foster the inmate's rehabilitation. It was shown that good nutrition not only has a positive impact on the inmate's health but also on their behavior.[1270] With a view to other domains, such as schools and hospitals, where the link between the well-being of people and their nutrition is taken seriously today, it is striking that this connection is mostly ignored in prisons. To spend more on the nutrition of inmates would also help the accommodation of religious diets of minorities.

[1269] Jiler argues in favor of making use of diet for rehabilitation purposes, see James Jiler, *Digging Out from Prisons: A Pathway to Rehabilitation* SOLUTIONS - FOR A SUSTAINABLE AND DESIRABLE FUTURE (THE LEADING POPULAR, ACADEMIC JOURNAL) 2013.

[1270] See, Willow Lawson, *Fighting Crime with Nutrition* PSYCHOLOGY TODAY, 2003; See also Food systems in correctional settings (Report by the World Health Organization) (2015).

IV. The Use and Possession of Religious Objects and Writings in Prisons

In the highly controlled prison environment, prisoners are only allowed to possess and use personal items and literature after approval of the prison authorities. This general requirement of previous approval also applies to religious objects and literature. Religious items and accessories are frequently used in the practice of religions to symbolize a person's belief or to carry out certain rituals. Religious writings can be necessary for prayers and can teach believers more about their faith. Consequently, observant prisoners usually seek to continue using religious articles and literature during imprisonment. In the restrictive environment of U.S. prisons, religious objects and writings can be the only personal items permitted. In German prisons, inmates are generally more free to use and possess personal objects and writings. Doctrinally, under consideration of the constitutional protection of the freedom of religion, the requirements to ban a religious object or writing must be higher than for a non-religious object or book. Hence, lawmakers, courts, and prison authorities have to determine what makes an object a religious object and what makes literature, religious literature.

The special circumstances of the prison require that security considerations are taken seriously; if the sacred item is objectively dangerous to third parties it must be banned. With objects that are not objectively dangerous, the proportionality of the ban is more difficult to determine. For bans of religious writings, it depends on their content. If they are written in Arabic, for example, prisons sometimes argue to not find suitable staff for the text's review, which leads to the ban. Despite the relatively liberal regulation for personal possessions in German prisons, religious objects and writings for religious minorities are often not approved or get banned. For example, Muslims are not allowed to possess or use a prayer rug or Quran in Arabic in various institutions. In federal prisons of the U.S., there is a more settled practice in dealing with religious objects and literature. Prisons use lists which contain items to be approved in principle for members each religion.

This chapter compares how the German and U.S. prison system accommodate the right of inmates, especially religious minorities, to possess and use religious articles and literature. It is researched why the otherwise liberal treatment of German prisoners with personal

possessions does not necessarily extend to religious objects and writings of religious minorities. By way of comparison, it is clarified how prisons fairly accommodate the objects and literature of minorities. The chapter offers a comparative account of German (1) and U.S. law (2) on the two main issues, religious objects and religious writings, and summarizes with the most important differences and similarities (3).

1. Germany

First, the introduction gives an overview of the right of inmates to personal possessions and religious articles and literature in the German prison system (a). Second, the legal framework, most importantly Section 53 federal Prison Act, is explained under consideration of its scope and its limitations (b). The third and last section analyzes the relevant case law for the right of religious minorities to use and possess religious objects and writings together with the available empirical data (c).

a. Introduction

As seen in previous chapters, German prisons are comparatively liberal. In light of the execution goal, the rehabilitation of the inmate (cf. section 2 federal Prison Act), and the approximation principle, according to which prison conditions are to mirror life outside of prison to the greatest extent feasible (section 3 II federal Prison Act), the rights of inmates to personal possessions are relatively far-reaching.[1271] Not only can inmates request a variety of personal items, but they also stay in individually furnished cells.[1272] The prisoner's cell is supposed to provide some rare privacy for the inmate.[1273] In all German prisons, the inmates' right to possess and use personal items requires prior approval and ultimately rests with the prison authorities.[1274] Hence, it is also prohibited for inmates to take on any possessions of

[1271] See under Part 1, Chapter I.1.c. for an overview of the guiding principles of the German prison system.

[1272] The Ministry of Justice and the management of the institutions have a wide scope for the concrete design of the premises. Section 144 I 1 of the Prison Act merely stipulates that the rooms have sufficient air content and that they are adequately equipped with heating, ventilation, floor and window surfaces for a healthy lifestyle. The objective of section 144 Prison Act was to provide accommodation without the detention circumstances themselves constituting an additional punishment (Bundesregierung, Entwurf einen Gesetzes über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung - Strafvollzug - (StVollzG) / Drucksache 7/918. 1973., p. 93). Detention areas in German prisons may differ in their concrete form but must all observe the principle of approximation in section 3 Prison Act. Also the protection of human dignity in Article 1 Basic Law must be taken into account. (See under Part 1, Chapter 1, 1.). The prisoners themselves, however, have no right to a certain furnishing of the premises: OLG Zweibrücken, 1 Vollz (Ws) 78/81, 17. Februar 1982; OLG Hamburg, 3 Vollz (Ws) 47/90, 09. November 1990).

[1273] OLG Celle, 1 Ws 75/93, 12. Mai 1993; OLG Saarbrücken, Vollz (Ws) 3/92, 01. Dezember 1992).

[1274] The requirement of prior approval for the possessions of inmates is stipulated in section 83 I 1 Prison Act: 'The

other inmates, even temporarily as a loan.[1275] Prison law, as will be shown in the subsequent section, stipulates that personal objects and writings can only get withdrawn from inmates under strict conditions. Only in instances where inmates disobey instructions may prison authorities be permitted to suspend the privilege of inmates to use and possess personal objects as disciplinary sanction.[1276]

The comprehensive constitutional protection of religious freedom must be fully protected in prison.[1277] Religious objects and writings can only be banned if they are objectively dangerous or a threat to the functioning of the institution. The threshold for security risks, which can justify the ban of religious objects and literature, rises if prison cells are equipped with other potentially dangerous non-religious objects, such as cutlery. Doctrinally, religious objects and writings are better protected than non-religious personal possessions. As will be shown in this chapter, however, this hierarchy in the constitutional doctrine of the law is not expressed in the administrative procedures of German prisons. Some prisons have stricter requirements for the use and possession of religious objects and writings than for non-religious objects and writings.

The constitutional framework and the provisions of the Prison Act are further concretized in house rules (*Hausordnungen*). The areas that are specified in the house regulations by the prison management can differ from Land to Land.[1278] Some of these house rules do not refer to the right of inmates to use religious objects and writings as an expression of their religious freedom. The house rules for prisons in Hamburg and Berlin, for example, only inform inmates

prisoner shall be allowed to retain in his possession or accept only those articles which are given to him by the prison authority or with the latter's consent.' An exception to this rule may only apply with respect to articles of small value, as is pointed out in sentence 2 of the same provision: 'Without such consent he shall be allowed to accept articles of minor value from another prisoner; however, the prison authority may make acceptance and possession of such articles subject to their consent.'

[1275] Arloth, in Krä/Arloth, StVollzG, *§ 83,* at 4.

[1276] Section 104 V 3 Prison Act stipulates that disciplinary action exceeds to the privileges given to inmates for personal possessions: 'Subject to orders to the contrary, the prisoner's privileges under Sections 19, 20, 22, 37, 38 and 68 to 70 shall be suspended.'; for the system of disciplinary action more generally, see: LAUBENTHAL (2015), at 728 et seq.

[1277] The freedom of religion in Article 4 I, II Basic Law can only be restricted by conflicting constitutional law (see under Part 2. IV.2.a). In the case of simple legal concretizations of religious freedom, such as section 53 Prison Act, this requirement must also be taken into account (see: Laubenthal, in Laubenthal et al, StVollzG, "*Religion",* at 20.

[1278] For an overview of the system of house regulations of prisons in the different German states, see: LAUBENTHAL. (2015), at. 266-267.

about their general right to personal possessions[1279] and give practical guidance by informing about the prison library and the possibility to loan books.[1280] In Bavaria, an information sheet (*Hinweise für Gefangene*) is handed out which informs inmates about their right to use and possess religious objects and writings. However, none of these documents explains under which conditions religious items may be used and which religious objects and writings are typically approved in prisons. [1281] Thus, inmates in German prisons, especially when belonging to a religious minority, probably do not know of their right to own and use religious objects and writings.

As will be shown in the further course of this chapter, prison authorities have wide discretion for deciding whether religious objects and writings can be used and possessed by inmates. This approach of deciding on a case-by-case basis is generally to be welcomed in the area of religious freedom. It offers the possibility to take the special circumstances of each case into account. Since, however, there is a lack of an established practice in dealing with religious objects and writings, these discretionary decisions bear the danger that the rights of inmates will not be enforced and that the decisions fall short of the actual valid standard of protection.

b. The Right to Religious Personal Possessions under the Prison Law

This section examines the right of inmates to possess and use religious objects and writings. The FCC has not yet decided about the prisoner's right to retain religious objects. However, the right to religious possessions is indirectly shaped by the FCC's jurisprudence on the general prisoner's right for personal possessions.[1282] It has stated that although it is constitutionally acceptable to decline permission to retain "objectively dangerous objects" without consideration of the prisoner's individual circumstances, discretion as regards other objects remains subject to the constitutional principles of proportionality and equality before the

[1279] In the house regulations for the prison Fuhlsbüttel in Hamburg, the rules for personal possessions - such as watches, jewelry, and electronic devices - are explained to inmates, and it is pointed out that prior approval by the authorities is necessary. (Hausordnung JVA Fuhlsbüttel, gem. § 110 HmbStVollzG, 03.01.2011). In the house regulations for the prison Tegel in Berlin (Hausordnung der JVA Tegel, 02.04.2015), inmates are also given detailed instructions for the procedures for personal possessions.

[1280] Every German prison has a prison library where inmates can loan books. Furthermore, inmates can purchase books through the vendors of the prisons (see under 1.b.bb. of this chapter).

[1281] [in Ger.] 14.2. Hinweise für Gefangene (Stand: 1. April 2013) 'Sie dürfen grundlegende religöse Schriften besitzen, die Ihnen nur bei grobem Missbrauch entzogen werden dürfen. Ferner dürfen Sie Gegenstände des religiösen Gebrauchs in angemessenem Umfang besitzen.' (p.11).

[1282] See also LAZARUS (2004), p. 119-120.

law.[1283] Thus, the FCC struck down a decision refusing an electronic keyboard to a prisoner on the grounds that the decision-maker failed to balance its importance for the prisoner's further education and potential resocialization against a "relatively limited danger of the object" to the security order of the prison.[1284]

Under the federal Prison Act, the right of inmates to possess and use religious objects and writings is enshrined in section 53 II, III federal Prison Act. Before its scope of protection and limitations are scrutinized, light is shed on the more general legal framework for the right of inmates to personal possessions. Most importantly, section 19 I federal Prison Act stipulates the right of inmates to furnish the cell, and section 70 I federal Prison Act permits prisoners to possess books and personal articles for the purpose of further education or for recreational purposes.[1285]

According to Section 19 I 1 federal Prison Act [Furnishing of Cell by the Prisoner and his Personal Effects], "the prisoner shall be allowed to furnish his or her cell with articles of his own to a reasonable extent".[1286] The prison cell is, according to section 18 I 1 federal Prison Act, generally the inmate's individual private space and is provided furnished by the prison authorities.[1287] The detention room must be equipped with basic furnishings required for living, e.g. wardrobe, bed, chair, and table.[1288] In addition, the prisoner can equip the cell with his or her own belongings, provided it does not violate security and order. Previously approved objects contributing to a better living comfort are, for example, reading lamps[1289] and electric

[1283] BVerfG Beschl. 28.02.1994 - 2 BvR 2731/93 = NStZ (1994), 453.
[1284] Id.at.
[1285] Apart from section 19 and 70 Prison Act, section 20 II 2 Prison Act allows inmates to possess their own clothing, and according to section 69 Prison Act, inmates can use radio and TV in the prison cell.
[1286] Section 19 I 1 Prison Act.
[1287] According to section 18 I Prison Act [Accommodation at Night], individual accommodation is the rule, and joint accommodation the exception: 'During the night the prisoners shall be lodged alone in their cells. Joint accommodation shall be admissible where a prisoner is in need of assistance, or where there is danger to a prisoner's life or health.' See: Michael Köhne, *Mehrfachbelegung von Hafträumen in Neubauten von Strafvollzugsanstalten*, BEWHI 270 (2007).; Joachim Kretschmer, *Die Mehrfachbelegung von Hafträumen im Strafvollzug in ihrer tatsächlichen und rechtlichen Problematik*, NSTZ 251 (2005).
Also see: Section 144 [Size and Lay-out of Rooms] (1) Rooms in which prisoners spend the night and their leisure time, as well as common rooms and visiting rooms, shall be comfortable or otherwise equipped in a manner meeting their purpose. They shall have a sufficient cubic content of air and, for reasons of health, shall have sufficient heating and ventilation, floor space and size of windows.
[1288] Arloth, in Krä/Arloth, StVollzG, *§ 19,* at 4.
[1289] OLG Celle, 3 Ws 329/82, 04. Oktober 1982 = NStZ 1981, 238.

coffee makers[1290].[1291] Whether the furnishing is "reasonable" under section 19 I 1 federal Prison Act is decided on a case-by-case basis.[1292] The respective judicial review takes into account the size and general set up of the cell (overfilling it must be avoided).[1293] Also, the sentence of the inmate is taken into account: the longer the inmate is staying in prison, the more likely it is to be considered reasonable to furnish it personally.[1294] The second sentence of section 19 I federal Prison Act stipulates that prisoners "shall be permitted to keep photographs of closely-related persons or friends and souvenirs of personal value".[1295] Inmates can hence bring pictures not only of their relatives but also of other people that are important to them.[1296]

The limits of section 19 federal Prison Act are stipulated under the second paragraph, which states that "devices and articles which make it impossible to keep the cell under supervision or which jeopardize security or order in the institution in any other way can be excluded".[1297] The prison management, most importantly the warden, has discretion in deciding whether objects are to be excluded from the institution.[1298] Objects can be denied simply because of the abstract dangerousness inherent in them.[1299] In principle, however, the dangerousness of the object for safety and order must be related to the means of control available in the institution.[1300] Also, the personality of the prisoner must be taken into account,[1301] as well as the value of the object.[1302] The different protected elements of section 19 II federal Prison Act

[1290] OLG Hamm, 1 Vollz (Ws) 173/89, 07. November 1989 = ZfStrVO 1990, 304.
[1291] For a comprehensive overview of case law dealing with different objects that were denied and approved, see: LAUBENTHAL (2015), p. 620.
[1292] Id. at. 617.
[1293] I Vollz (Ws) 20/03, (OLG Rostock 23. Juni 2004). = ZfStr 2005, 117.
[1294] Böhm/Laubenthal, in Schwind et al, StVollzG, *§ 19,* at 4.
[1295] Section 19 I 2 Prison Act
[1296] Arloth, in Krä/Arloth, StVollzG, *§ 19,* at 4.
[1297] Section 19 II Prison Act.; As a general rule for the notion of security and order in the institution, it is stipulated under section 81 II Prison Act that 'The duties and restrictions imposed on the prisoner in order to maintain security and order in the institution shall be chosen in such a manner that they are in a reasonable proportion to their purpose and do not affect the prisoner more and longer than necessary.'
[1298] Arloth, in Krä/Arloth, StVollzG, *§ 19,* at 7 (with further references).
[1299] BVerfG, 2 BvR 2731/93, 28. Februar 1994 (No violation of fundamental rights by deprivation of a prisoner for training or leisure activities) = ZfStrVo 1994, p. 396; BVerfG, 2 BvR 222/96, 24. März 1996) (No violation of fundamental rights by revocation of the owner's permission of an object previously given to a prisoner for further training or leisure activities) = NStZ-RR 1996, p. 1996; Consenting: Arloth, in Krä/Arloth, StVollzG, *§ 70,* at 5; Different view: Michael Köhne, *Die Gefährlichkeit von Gegenständen im Strafvollzug*, ZFSTRVO 280 (2005), p. 280.
[1300] LAUBENTHAL (2015), at 620.
[1301] Id. at. 620.
[1302] For watches, for example, the value limit is 150 €; OLG München, BlStV 4-5/1990, 13; Arloth, in Krä/Arloth, StVollzG, *§ 19,* at 10.

– security and order and the clear arrangements of the prison cell – are not clearly distinguished from each other.[1303] Courts have discussed the required clarity inside the cell under the criterion of the potential threats for security and order.[1304] However, the element of the clarity inside the prison cell has independent meaning against the background of required searches of the prisoner cell.[1305] In case inmates have furnished their cell with objects which make searches difficult and thus time-consuming, authorities can deny the right of inmates to bring additional objects to their cell.[1306] Sometimes they have the option to exchange objects.[1307]

The relevant case law shows that prisons interpret the rights of prisoners to personal possessions broadly; even computers and game consoles have been approved in case they have no internet connection.[1308] According to the courts, prisons have the responsibility to carry out the necessary security checks for each item. Although permissions are granted on a case-by-case basis, it is taken into account whether the desired item has been previously authorized for other inmates.[1309]

"Within reason", Section 70 federal Prison Act gives inmates further rights to possess private books and objects.[1310] Unlike section 19 federal Prison Act which stipulates a right of inmates to personal possessions in the improvement of general living conditions, section 70 federal Prison Act concerns possessions which serve "recreational purposes" or "further education".[1311] These include, for example, books, writing material, or music instruments.[1312] In principle, books must be ordered from the suppliers of the prison institution.[1313] The rights of inmates according to section 70 I federal Prison Act are "within reason" depending on the size and clarity, and hence the searchability, of the prison cells (also see section 19 I federal

[1303] Böhm/Laubenthal, in Schwind et al, StVollzG, *§ 19,* at 6.
[1304] Id. at. 6 (with further references).
[1305] Id..
[1306] Id. at. 7.; Also see: Arloth, in Krä/Arloth, StVollzG, *§ 19,* at 8.
[1307] OLG Zweibrücken, 1 Ws 605/00, 19. Dezember 2000).= ZfStrVo 2001, 308-309.; Böhm/Laubenthal, in Schwind et al, StVollzG, *§ 19,* at 6.
[1308] Id.
[1309] Id.
[1310] Section 70 [Possession of Articles for Recreational Purposes] Prison Act (1) The prisoner shall, within reason, be permitted to be in possession of books and other articles on further education or for recreational purposes.
[1311] Schwind, in Schwind et at, StVollzG, § 70, at 15.
[1312] Id. at. 5
[1313] OLG Koblenz, NStZ 1999, 446 M.

Prison Act).[1314] Private objects and books of the inmates may not make the cell inspection too laborious.[1315] An attempt to objectify the procedure for prison room inspections is the so-called REFA procedure, invented in Rhineland-Palatinate.[1316] In a REFA time value study, the time required for a check was determined for each object common in detention areas and set in a point value (10 points for 1-minute check effort). The sum of the points determined for the objects in an adhesive space must not exceed 2400, i.e. four hours of inspection. By including an object on the list, the institution guarantees that this object per se does not endanger the security or order of the institution. With regard to the value of the object, a reasonable limit must also be kept; the avoidance of too blatantly visible social differences within the institution serves to avoid subcultural activities, such as bartering and extortion.[1317]

Section 70 II federal Prison Act more concretely regulates the limits of the inmate's right to personal possessions and stipulates which items are excluded from the institution. Accordingly, the right "shall not apply where the possession, surrender or use of such article would be subject to a criminal sentence or an administrative fine or would jeopardize the objective of treatment, security or order in the institution". Section 70 III federal Prison Act authorizes the warden to suspend the permission where the prerequisites of section II are met.[1318] Like in the context of section 19 Prison Act, it is disputed whether the danger to order and safety must be concrete or abstract.[1319] Certainly, the circumstances of the specific correctional facility and the personality of the prisoner must be taken into account.[1320] Hence, objects which, on the basis of a personality-related prognosis (*persönlichkeitsbezogene Prognose*)[1321], pose a concrete danger to the rehabilitation of the prisoner concerned cannot be permitted. These include, for example, writings with right-wing extremist content for prisoners with right-wing extremist backgrounds or attitudes or anti-imprisonment literature promoting hateful opposition to democracy and the rule of law.[1322]

[1314] Arloth, in Krä/Arloth, StVollzG, *§ 70,* at 2.
[1315] Id. at. 2.
[1316] According to OLG Zweibrücken, ZfStrVo 2001, 308 a suitable method for determining the clarity and searchability of a prison room.
[1317] Nuremberg Higher Regional Court, NStZ 2008, 347 = FS 2009, 40; Hamm Higher Regional Court, NStZ 1988, 200; Knauss, in BeckOK, StVollzG, § 70, at. 10.
[1318] Section 70 [Possession of Articles for Recreational Purposes]III: Permission may be suspended where the prerequisites of subsection (2) are met.
[1319] Schwind, in Schwind et at, StVollzG, § 70, at 7.
[1320] BGH NStZ 2000, 222.
[1321] LAUBENTHAL (2015), 620.; Arloth, in Krä/Arloth, StVollzG, *§ 70,* at 7.
[1322] Knauss, in BeckOK, StVollzG, § 70, at. 19.

These provisions show that the guiding principles of the institution, most importantly the rehabilitation of the inmate, significantly shape the scope of the rights to personal possessions. The emotional well-being of the inmate is taken into account in section 19 I 2 federal Prison Act, which stipulates the inmate's right to keep photographs and souvenirs of personal value. Based on section 70 II 2 federal Prison Act, possessions which "jeopardize the objective of treatment", i.e. the rehabilitation of the inmate, should be removed from the institution. Whether resocialization aspects take precedence over safety and order or vice versa is decided on a case-by-case basis.[1323]

This generally applicable legal framework for the possession of personal items in prison must be taken into account for those protected by the freedom of religion too.[1324]As seen, institutions are legally obliged to give precise reasons if they do not approve personal possessions for inmates. This is particularly the case when the danger arising from the object itself is relatively low. However, some institutions, for example, refuse that Muslim inmates can use and possess prayer rugs and Arabic translations of the Quran despite the relatively low-security risk caused by these items. Therefore, in the following two sections, the scope of protection of religious objects and writings under the prison law is scrutinized under consideration of its doctrinal limits.

aa. Religious Objects

Section 53 III federal Prison Act gives prisoners the right to retain religious objects: [1325]

> (3) The prisoner shall be permitted, to a reasonable extent, to retain **articles for religious use**.

The wording of the law makes no reference to the inmate's religious affiliation when just generally referring to "articles for religious use". According to Fröhmcke, inmates only have a right to use and possess objects of their own religion.[1326] In view of the broad scope of protection of Art. 4 I, II BL, which also protects the right to seek a new religion, the right under

[1323] LAUBENTHAL (2015), p. 620.; Arloth argues that security and order generally prevail over rehabilitation interest, Arloth, in Krä/Arloth, StVollzG, *§ 70,* at 5.
[1324] Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann), at. 14-15.
[1325] The first paragraph of section 53 Prison Act, stipulates the inmates right to religious welfare: (1) The prisoner shall not be denied religious welfare by a chaplain of his religion. At his request, he shall receive assistance in establishing contact with a chaplain of his religion. (See under chapter 1 of Part 2.).
[1326] FRÖHMCKE (2005), p. 192.

section 53 III federal Prison Act cannot be linked solely to the existing religious affiliation of an inmate. Whether the religious objects have to belong to the institution or to the inmate him- or herself is not clear from the text of the law.[1327] Practically, religious objects, are not provided by the prison authorities but are owned by the inmate personally (this is different with religious books, which can also belong to the prison library) [1328].

Fröhmcke argues that prison should allow objects depending on their common relevance for a religion.[1329] He refers to an Islam lexicon when arguing that, for Muslims, a prayer rug and a Muslim rosary must be permitted due to the relevance of these items for the religious practice of Muslims.[1330] Because of the aniconism in Islam, i.e. the proscription against the creation of images of sentient beings, he argues that religious paintings are not permitted under section 53 III federal Prison Act (pictures not covered under the aniconism may be protected under section 19 Prison Act instead, as he argues[1331]). Against the background of a lack of an established minimum standard, which at least ensures the accommodation of some objects typically used by members of religion, this is a promising approach even if it entails risks.

The advantage of this approach is that it potentially strengthens the accommodation of religious objects typically used by religious minorities. It underlines that certain objects are typically important for the religious practice of Muslims, Jews, Buddhists, etc. That this is relevant is shown in the commentary literature where hardly any religious objects of religious minorities are referred to when discussing the scope of section 53 III federal Prison Act. Commonly, it only lists Christian objects, such as the Christian Cross and Holy Rosaries.[1332] The argument to include objects typically used by religion within the scope of protection could in practice be supported by the use of lists. In practice, these lists – stating religious objects

[1327] The wording of the original version of the provision was: *Own objects of religious use must be left to a reasonable extent (*Own translation from German: Eigene Gegenstände des religösen Gebrauchs sind in angemessenem Umfang zu belassen. Bundesregierung, Entwurf einen Gesetzes über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung - Strafvollzug - (StVollzG) / Drucksache 7/918. 1973. p. 17.) It was later changed after an objection by the Federal Council which argued that the amendment was made for reasons of clarification (Bundesregierung, Entwurf eines Gesetzes über den Vollzug der Freheitsstrafe un der freiheitsentziehnden Maßregeln der Besserung und Sicherung - StVollzG - § Drucksache 7/918 (Deutscher Bundestag ed.,1973), p.71). The concrete impact of the amendment, however, remains uncertain; also see: FRÖHMCKE (2005), p. 190.

[1328] Books can either be on loan from the prison library or personally owned by the inmate, See under section bb.

[1329] FRÖHMCKE (2005), p. 192.

[1330] Id. at. 192

[1331] Also see: Kellermann, in: Feest (Edt.), AK-StVollzG, § 19 at.2.

[1332] See, for example, Rassow/Schäfer, in Schwind et al, StVollzG, *§ 53*, at 17.

commonly permitted – need to become part of the house rules which are distributed to the inmates so that they are informed about their rights. [1333]

The danger of this approach, however, is that the standard of protection is limited to the use and possession of objects on the lists. This would be in breach of freedom of religion, which protects the right of individuals to practice religion according to their own convictions. Moreover, this approach raises difficult questions about the power of definition: who is entitled to categorize objects as either common or uncommon for the practice of one religion? In practice, however, these questions also have the potential to fuel the discourse on strengthening the rights of religious minorities in the German penal system; that this is necessary will be shown in the next section. Still, some institutions argue, concerning the prayer rug, that it is not necessary for the practice of religion.

According to the wording of section 53 III federal Prison Act, the right of inmates to retain articles for religious use exists only "to a reasonable extent". Namely, it is acknowledged that the measures that are necessary to enforce the prison sentence also reduce the temporal and spatial possibilities to freely exercise one's religion.[1334] When using their discretion, prisons must take into account the specific circumstances of the individual case and must follow a proportionality test. Thus, large agreement exists that an increase of necessary control efforts alone cannot justify a denial of the inmate's right to retain religious objects.[1335]

bb. Religious Writing

Section 53 II federal Prison Act further specifies the inmates right to religious writings and stipulates:

> (2) The prisoner shall be permitted to have **fundamental religious writings** in his possession. He may be deprived of them only in the event of gross abuse.

An earlier legislative proposal only protected the inmate's right to fundamental religious writings of his or her "own confession".[1336] This was changed in the later adopted version of

[1333] As pointed out, some institutions use lists with objects that are approved in the institution, which complement the prison's house regulations (for example, JVA Fuhlsbüttel in Hamburg). These lists of German prisons do not distinguish between religious and other objects.
[1334] LG Zweibrücken, 1 Vollz 41/84, 28. August 1984 = NStZ 1985, 142-142.
[1335] Id. at.; Arloth, in Krä/Arloth, StVollzG, *§ 53,* at. 5.
[1336] [In Ger.]: Dem Gefangenen sind grundlegende Schriften *seines Bekenntnisses* zu überlassen, see: Bundesregierung, Entwurf eines Gesetzes über den Vollzug der Freiheitsstrafe und der freiheitsentziehnden

the law.[1337] This change puts emphasis on the broad scope of protection of section 53 II federal Prison Act; the fact that the legislator consciously changed the wording of the law and got rid of the addition of the "own confession" builds up to an e contrario argument that such requirement is no longer in place. Fundamental religious writings are not only fundamental sources of revelation such as the Bible, Tora, and the Quran, but also include comprehensive descriptions for understanding the basic statements of the community and the practice of faith-serving songs, prayers, and prayer books.[1338]

Despite the value-creating importance of freedom of religion, the requirement of the "fundamental" relevance of the religious writings in question must certainly be taken into account when interpreting the scope of protection. If all kinds of writings with religious references and content would be covered under the scope of protection of section 53 II Prison Act, the provision would, in fact, lose its distinct scope of protection and its necessary limits. For example, for religious books with historical references, it can be challenging to decide if they fall under the privilege of section 53 II federal Prison Act or possibly under section 70 federal Prison Act. Because the education about the historical past of one's religion is important to many believers, historical writings cannot *prima facie* be excluded from protection under section 53 II Prison Act.[1339] Because of the constitutional importance of religious writings, the legislature has moreover not limited the right of inmates to possess religious writings to a certain number.[1340]

An issue of increasing relevance with respect to section 53 II Prison Act is the language in which the religious books are written. As far as can be asserted, this question is not discussed by courts or the commentary literature, despite its practical relevance, especially with respect to Arabic translations of the Quran for Muslim inmates. Fröhmcke, in his dissertation from

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Maßregeln der Besserung und Sicherung - StVollzG – 1973, p. 17.

[1337] Id. at. 117.

[1338] Schäfer, in Schwind et al, StVollzG, § 53, at 15; Generally arguing for a narrow interpretation of fundamental religious writings: Arloth, in Krä/Arloth, StVollzG, *§ 53,* at. 4.; Arguing for a comprehensive scope of protection of section 53 II Prison Act: Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann), at. 11.

[1339] The issue of historical religious writings is not at issue in the commentary literature in as far as can be seen. However, a District Court of Marburg decided in 2016, about the right of a Muslim inmate to possess books about the history of Islam, which contained violence. According to the court, the historical relevance contributing to a religious relevance was not sufficient to grant protection under section 53 II Prison Act (LG Marburg, Beschluss v. 20.05.2016 - 4a StVK 222/15, (LG Marburg).; See under section c.bb. of this section.

[1340] Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann), at. 14.

2005, argues that section 53 II Prison Act gives inmates a right to religious writings in a language he or she understands.[1341] Cases in which inmates are multi-lingual and, for example, also "understand" a German copy of the Quran for their prayers are complicated. Based on the consideration that increasing control efforts alone do not constitute sufficient ground for the ban of religious objects, also religious writings in Arabic cannot prima facie be banned. The language of scripture is paramount for prayers so that a general ban of scripture in other languages seems disproportionate.[1342] In the future, more institutions will have to find suitable staff with Arabic- and other language skills to provide for the required security checks of religious scripture.

Inmates can also loan books from the prison library of the institution. For example, in the house regulations of a Hamburg prison, it stipulates:

> "You can borrow books and CDs free of charge from the institutional library. The institutional library also lends various legal texts, in particular the HmbStVollzG. Borrowing is done by written applications, as you cannot choose personally from the library"[1343]

The catalog from the various prison libraries of German prisons is not reliably documented and publicly available. The available religious writings are often received as donations from churches and religious communities.[1344] Some prisons offer an inter-library loan for their inmates, which provides access to further religious (and legal[1345]) writings.[1346] Interlibrary loan is free of charge for prisoners. According to the experiences of the responsible association, it is a challenge to ensure that the prisoners know about the interlibrary loan. In some cases, there is a lack of support from the prisons.[1347]

[1341] FRÖHMCKE (2005), p. 179-181.
[1342] Id. at. 180.
[1343] House regulations of the institution in Hamburg Fuhlsbüttel (JVA Fuhlsbüttel) [in Ger.]: Sie können kostenlos Bücher und CDs über die Anstaltsbücherei ausleihen. Die Anstaltsbücherei verleiht auch verschiedene Gesetzestexte, insbesondere das HmbStVollzG. Die Ausleihe erfolgt über schriftliche Anträge, da Sie nicht persönlich in der Bücherei auswählen können.
[1344] Interview with prison management from Hamburg.
[1345] Legal literature is also available in the library, which informs inmates about their rights and explains which legal steps they can take. It is generally difficult for inmates in German prisons to assert rights infringements, see Part 1, Chapter IV, 3.a.
[1346] The 'art and literature association for prisoners' (*Kunst- und Literaturverein für Gefangene e.V.*) cooperates with various German prisons. It offers inmates books for various purposes, for example, for further education, the preparation of legal complaints, entertainment, and also religious activities. Fees are generally covered by the association. http://www.kunst-und-literaturverein.de/Verein-2016.html
[1347] Interview with the Kunst- und Literaturverein für Gefangene e.V.

Religious writings, often not used by inmates as a loan but personally owned, may only be withdrawn from the prisoner in case of gross abuse.[1348] According to the explanatory memorandum of the law, the increased requirements for any lawful limitations were inserted because of the particular relevance of freedom of religion.[1349] Hence, the demands for lawful limitations of religious writings must be higher than for other personal possessions of inmates; only interests of constitutional rank can limit the inmate's rights to religious writings and they can only get withdrawn after prior hearing of the pastor[1350]. It is settled that gross abuse within the meaning of section 53 II 2 Prison Act is only satisfied in the case of serious violations. However, it is not further concretized by courts and academic voices how the concept is further defined and under which circumstances inmate's behavior qualifies as "gross abuse".[1351] The commentary literature often only repeats the wording of the legislation without further clarification of the concept.[1352] Fröhmcke explores various abusive practices, such as hiding contraband in the books, in light of section 53 II 2 Prison Act and discusses the concept in more detail.[1353] He agrees that serious misconduct must be committed in order to justify the withdrawal.

c. Religious Minorities and the Right to Religious Articles and Writings

The following two subsections examine how the right to religious articles and writings in German prisons is shaped for religious minorities, especially Muslims. Under consideration of the relevant case law as well as the available empirical data, it is shown how – if at all – the religious needs of religious minorities are accommodated.

aa. Religious Objects

The data about the handling of religious objects in prisons shows that it may differ from prison to prison if certain objects are allowed. The Christian rosary and cross were only denied in very few institutions.[1354] The prayer rug for Muslim inmates, even though it is not objectively dangerous, was denied in more prisons and also safety checks were carried out more often

[1348] Section 53 II Prison Act 'The prisoner shall be permitted to have fundamental religious writings in his possession. He may be deprived of them only in the event of gross abuse.'
[1349] BT. Drs. 918, p. 72.
[1350] Müller-Monning, *Religionsausübung in* STRAFVOLLZUGSGESETZE KOMMENTAR (Feest/Lesting/Lindemann), at. 14.
[1351] FRÖHMCKE (2005), p. 184.
[1352] Arloth, in Krä/Arloth, StVollzG, § 53, at 4 (referring to hiding contraband as an example of 'gross abuse'); Rassow/Schäfer, in Schwind et al, StVollzG, *§ 53*, at 15 (also referring to the missing clarity of the concept).
[1353] FRÖHMCKE (2005), p. 183 - 189.
[1354] See data in appendix.

than in the case of Christian objects.[1355] Jahn shows that prisons denied the prayer rug because it was not dictated in the Quran or prisons were unsure if the prayer rug could be justified for safety reasons so that it was sometimes denied and sometimes approved.[1356]

Jahns research shows that there is no settled practice for religious objects in prisons across Germany. Furthermore, the lack of legal protection and the very few cases prevent a more comprehensive scope of protection for the religious rights of minorities from being accommodated.[1357] In a case from 2014, the Higher Regional Court of Hamm dismissed an appeal of a Muslim inmate who requested to bring his prayer rug to work in the prison institution.[1358] According to the court, the complaint was inadmissible because it did not meet the requirements of sections 116 I, 119 III Prison Act.[1359] In view of the court, it was not required to review the contested decision in order to further develop the law or to ensure uniform jurisdiction.[1360] In spite of this, the court considered it necessary to add an addendum to the inadmissibility decision. It added that the increased control effort required for a prayer rug due to its structure and workmanship could be reduced by giving the person concerned the opportunity to use a cloth or piece of cloth that has no elaborate seams and consists of thin and very smooth material.[1361]

The addendum in the given case shows that the legal situation in the treatment of the prayer rug is far from settled. It is not established what kind of prayer rugs are permitted, nor if a prayer rug is permissible in German prisons at all.[1362] The fact that the application was dismissed as inadmissible is therefore incomprehensible. Furthermore, the court applied section 70 Prison Act, instead of section 53 III Prison Act, without further explanation.

[1355] See data in appendix.
[1356] Jahn, Österreichische Zeitschrift für Soziologie (2017), p. 273
[1357] See Part 1, Chapter IV, 3.a.; Discussing legal and political claims in order to tackle the problem: Chapter V, 199-206.
[1358] OLG Hamm, Vollz (Ws) 425/14 = FS SH 2016, 74.
[1359] Id. at. (tenor).
[1360] Id.
[1361] Id. at. (reasons) [In Ger]: 'Nach Auffassung des Senats könnte der bei einem Gebetsteppich aufgrund dessen Struktur und Verarbeitung erhöhte Kontrollaufwand dadurch verringert werden, dass dem Betroffenen die Möglichkeit eingeräumt wird, für die Verrichtung seiner Gebete ein Tuch oder Stoffstück zu seinem Arbeitsplatzmitzunehmen oder dort zu deponieren, dass keine bzw. keine aufwändigen Nähte aufweist und aus einem dünnen und sehr glatten Stoff besteht.'
[1362] As far as can be seen, there is no one in the commentary literature arguing in favor of a general ban of prayer rugs in prisons. Sometimes, the prayer rug for Muslims is listed as one example of the approved religious objects, without this being backed up with sources.

Courts have frequently left open whether an object requested by an inmate was a religious article under prison law, arguing that overriding security interests would prevail anyway. In a case decided by the Berlin Appellate Court in 2005, it was at issue whether a Christmas tree is an "article for religious use" and hence protected under section 53 III federal Prison Act. [1363] The court pointed out that – because of the broad scope of Art.4 I, II BL – the concept "religious article" has to be interpreted widely.[1364] Yet, in view of the court, putting up a Christmas tree generally lacks a religious reference.[1365] The court emphasized that even in churches, the Christmas tree does not necessarily serve religious purposes.[1366] Ultimately, however, it was left open whether indeed the Christmas tree was an "article of religious use" in the concrete case. Even if it was, as the court argued, the inmate had no right to put it up because of security concerns.[1367]

The court pointed out that, unlike section 19 II Prison Act, section 53 III Prison Act does not refer to the danger to safety and order as a ground for limitation.[1368] However, it emphasizes that also the religious practice "finds its limits where it calls into question the functions of the institution necessary for the execution of prison sentences such as safe and orderly accommodation and is associated with serious dangers for third parties."[1369] According to the court, this barrier inherent in the exercise of fundamental rights is exceeded by the possession of Christmas trees in the detention rooms.[1370] From a constitutional point of view, this brief statement, which largely dispenses with an analysis of the actual dangers to the functioning of the institution and which is lacking a proportionality assessment, is not sufficient.

[1363] KG Berlin, 5 Ws 654/04 Vollz, 20. Januar 2005. = KirchE 47, 5-8 (2005).

[1364] Id. at. 9, referring to BVerfGE 24, 236, 246. [in Ger.] '(…) ist der Begriff des religiösen Gebrauchs wie derjenige der Religionsausübung unter Beachtung der verfassungsrechtlichen Bedeutung des Grundrechts der Religionsfreiheit extensiv auszulegen'.

[1365] Id. [in Ger.] 'Andererseits fehlt in den meisten Fällen dem Aufstellen von Weihnachtsbäumen offenkundig jeder religiöse Bezug'.

[1366] Id.

[1367] Id. at. 10 [in Ger.] Die Frage bedarf jedoch keiner weitergehenden Erörterung, da der Antrag des Gefangenen auch dann erfolglos bleiben muß, wenn man einen Weihnachtsbaum als Gegenstand des religiösen Gebrauchs ansieht.

[1368] Id. [in Ger.] Anders als § 19 Abs. 2 StVollzG nennt § 53 Abs. 3 StVollzG zwar nicht als Ausschlußgrund die Gefährdung von Sicherheit oder Ordnung der Anstalt.

[1369] Id. at. 10, [in Ger.] 'Auch die Religionsausübung findet aber dort ihre Grenze, wo sie die für den Vollzug der Freiheitsstrafen notwendigen Funktionen der Anstalt wie sichere und geordnete Unterbringung in Frage stellt und mit schwerwiegenden Gefahren für Dritte verbunden ist.'

[1370] Id. [in Ger.] Diese der Grundrechtsausübung immanente Schranke überschreitet der Besitz von Weihnachtsbäumen in den Hafträumen.

The court took a slightly more detailed view of the fact that the inmate of the case had had the approval to put up a Christmas tree in his cell in previous years. This, according to the court, raised legally relevant expectations of the inmate in light of the principle of legitimate expectation. In Germany, this principle is derived from the Rechtsstaatsprinzip and Article 2 I of the Basic Law (freedom of personality).[1371] It stipulates that where citizens have been placed in a legal position by a decision-maker and rely thereupon, they have a legitimate expectation which must receive full consideration in the authorities' subsequent decisions.[1372] In such cases, the official decision-maker must balance the citizen's right to have his or her legitimate expectations protected and the need for administrators to pursue changing policies.[1373] According to the FCC, prisoners' legitimate expectations are also underpinned by the resocialization principle. The FCC stated: "The withdrawal of an object already granted to the prisoner, without clear evidence that the prisoner has himself created the reasons for such a course of action, is regularly experienced by prisoners as highly invasive and unjust and runs counter to the aim of prison administration namely the resocialization or socialization of the prisoner." [1374] As a result, the FCC holds that where the prison administration wishes to withdraw objects for which prisoners have already obtained permission, there must be clear and concrete factors or changes in the circumstances in the individual case justifying the decision and outweighing prisoners' legitimate expectations in this regard.[1375]

Nevertheless, the court ruled that the fact that the inmate had a Christmas tree in his cell in previous years alone does not guarantee the inmate's right to put up a Christmas tree again in the current year.[1376] Despite the earlier approval, the prison institution had the right to call the court for clarification.[1377] The Appellate Court was of the opinion that the prison execution division was wrong when deciding that the inmate had the right to put up the Christmas tree based on his right to "furnish his cell with articles of his own" (cf. section 19 I 1 Prison Act).[1378]

[1371] LAZARUS (2004), p. 119.
[1372] See BVerfGE 59, 128, 164; also see: Fritz Ossenbühl, *Vertrauensschutz im sozialen Rechtsstaat* DÖV 25 (1972), p. 25.
[1373] ROBERT THOMAS, LEGITIMATE EXPECTATIONS AND PROPORTIONALITY IN ADMINISTRATIVE LAW (Hart Publishing 2000), p. 42 et sew. Particularly for the prison context: LAZARUS (2004), p. 119 et seq.
[1374] BVerfG, 2 BvR 902/95, 28. September 1995) = StV 1996, 48-49.
[1375] Id. at. 13.
[1376] KG Berlin, 5 Ws 654/04 Vollz, 20. Januar 2005. = KirchE 47, 5-8 (2005).
[1377] Id. at. 2.
[1378] Id. at. 4.

Instead, it agreed with the prison authorities' claim that the Christmas tree was incompatible with the security requirements as laid out in section 19 II Prison Act[1379] and argued that the previous court's assessment of security concerns was inaccurate and incomplete in overseeing that there is the possibility to hide contraband in the tree, the possibility to hide behind the tree, and an increase of the risk of fire.[1380] Unlike demanded by the FCC, the court did not apply strict standards to the policy change. It held that there was "no clear evidence that the prisoner has himself created the reasons" for the change. In fact, the court did not base its judgment on any changes of the personal circumstances of the prisoner and only referred to an increased administration control effort which would be necessary in case more inmates would request a Christmas tree.[1381]

A year later, in 2006, the Berlin Appellate Court decided about the right of a Buddhist inmate to use joss sticks for religious reasons.[1382] The court based its assessment on section 53 III federal Prison Act by arguing that there were severe doubts that joss sticks are articles of religious use, but ultimately this question can be left open because even if this was the case, the inmate had no right to use them.[1383] The court argued that the experience with joss sticks in the hand of the inmate had shown that the smell of them impedes with drug controls and that they, therefore, had to be banned.[1384] The mere fact that the inmate had been allowed to use them in the past did not entitle him to do so today, as emphasized by the court.[1385] Here, the court did examine the individual circumstances of the case when changing its policy. It pointed out that the applicant of the case had recently been abusing drugs in prison and that, therefore, it was justified that the prison changed its decision.[1386]

[1379] Section 19 II Prison Act 'Devices and articles which make it impossible to keep the cell under supervision or which jeopardize security or order in the institution in any other way can be excluded.'

[1380] KG Berlin, 5 Ws 654/04 Vollz, 20. Januar 2005. = KirchE 47, 5-8 (2005), at 7.

[1381] Id. at. 5.

[1382] KG Berlin, 10. November 2006, 5 Ws 597/06 Vollz. = KirchE 48, 442-444 (2006).

[1383] Id. at. 8; [in Ger.] (Es) fehlt in den meisten Fällen des Abbrennens von Räucherstäbchen offenkundig jegliche religiöse Verbindung. Denn diese finden im alltäglichen Leben verbreitet Anwendung, um eine angenehme Atmosphäre zu verbreiten, ohne daß eine religiöse Beziehung besteht. Die Frage bedarf aber keiner abschließenden Erörterung, da der Antrag des Gefangenen auch dann erfolglos bleiben muß, wenn man Räucherstäbchen – was eher fernliegend ist – als Gegenstand religiösen Gebrauchs ansehen würde.

[1384] Id. at. 9.

[1385] Id. at. 10; [in Ger.] Der Gefangene kann auch kein Recht auf Aushändigung von Räucherstäbchen daraus herleiten, daß ihm diese in der Vergangenheit mehrmals ausgehändigt wurden.

[1386] Id. at. 10. [in Ger.] 'Denn der Besitz von Räucherstäbchen kann untersagt werden, wenn sich herausstellt, daß deren starker Duft die Kontrollen in Bezug auf Drogen und Alkohol behindern. Dies hat für den Beschwerdeführer auch einen konkreten Grund, denn er mußte bereits wegen Cannabismißbrauchs auf der Abschirmstation für Dealer untergebracht werden. Mithin sind effektive, nicht durch andere Gerüche erschwerte, Drogenkontrollen

Although in this case the prisoner could have found reasons for the change of policy in his own behavior, i.e. the abuse of drugs, it also relies on the argument that even if joss sticks were a religious object within the meaning of section 53 III federal Prison Act – which the court said it doubted – security concerns prevailed and justified the ban. By referring to Buddhist doctrine, the court argued that joss sticks were not necessarily required for meditative prayers.[1387] However, section 53 II federal Prison Act does not protect only those objects which are – in view of the authorities - absolutely necessary for the practice of religion. This standard would undermine the inmates' rights to religious practice. This case shows that it is a problem that prisons and courts can fundamentally question the religious identity of an object. If, at least within the framework of administrative regulations, some objects were to be listed as generally to be approved for religious use, this practice would be hampered.

In addition, the case illustrates the carelessness with which the proportionality of the decision is examined. The court pointed out that freedom of religion had to be limited in those instances in which it questions the "functioning of the institution, i.e. the safe and orderly accommodation of the inmate entrusted to the institution and where it poses serious risks to third parties."[1388] What is missing at this stage is a justification of how these interests are enshrined constitutionally and an analysis of how these interests are violated precisely by the usage of joss sticks.[1389] The court only specified: "[the] barrier inherent in the exercise of fundamental rights is exceeded by the possession of joss sticks in the detention areas, since these are particularly suitable for covering up the odors of drugs, such as hashish."[1390] It is obvious that drug abuse must be prevented in prison, especially where other inmates may get harmed. However, taking into consideration the strict requirements for limitations of Art. 4 I, II BL, it is questionable whether the use of joss sticks impairs the functioning of the institution to the extent that the risk cannot be countered by means that are equally effective but less

gerade bei diesen Gefangenen unerläßlich.

[1387] Id. at. 8 [in Ger.] '(…) für das buddhistische Gebet erforderliche meditative Versenkung, bei der Räucherstäbchen im Buddhismus Verwendung finden, kann der Gefangene auch ohne Benutzung dieser Stäbchen erlernen'.

[1388] Id. at. 9 [in Ger.]

[1389] The penal system as a fundamental right barrier is discussed in Part 1, Chapter IV, 3.a.

[1390] KG Berlin, 10. November 2006, 5 Ws 597/06 Vollz., at 10; Diese der Grundrechtsausübung immanente Schranke überschreitet den Besitz von Räucherstäbchen in den Hafträumen, da diese vor allem dazu geeignet sind, die Gerüche von Drogen, wie z. B. Haschisch, zu überdecken.

invasive for the religious inmate. For example, it would have been less invasive to increase drug controls and limit the use of joss sticks to once a week or month.

In a case from 1984, the balancing of religious freedom with the interests of the institution was fundamentally different. The district court Zweibrücken decided about the right of a Jewish inmate who requested the use of a candle for his religious practice.[1391] The court granted the application. It argued that a candle can be an article of religious use and that it is obvious it supports religious meditation.[1392] In this case, the fact that the object *supported* the exercise of religion was sufficient for protection under section 53 III federal Prison Act, and hence, the approval. Any additional threshold, i.e. a central relevance of the object for the religious practice, was not required. In view of the court, it was also not sufficient to allow the possession of candles only temporarily, for example, during Advent and Easter. A candle had "general meaning" for the religious practice of Jews and Christians, according to the court.[1393] The mere fact that security and order were potentially threatened by an increased risk of fire was not sufficient for a total ban of the candle.[1394] Unlike in the joss sticks case, the court did not find conflicting constitutional law weighty enough to limit the freedom of religion of the inmate.

The different outcomes of these cases demonstrate the room for different interpretations of the criterion "articles for religious use". In the candle-case, it was established that the object is – besides its common non-religious use –used for the practice of religion in the given case. This *prima facie* evidence was sufficient to obtain protection under section 53 III federal Prison Act. In the joss-stick case, however, the court applied higher standards to the necessity of the object for the practice of religion. It banned joss sticks because – in view of the court - they were not necessarily required for meditative prayers of a Buddhist.

[1391] LG Zweibrücken, 1 Vollz 41/84, 28.08.1984 = NStZ 1985, 142.

[1392] Id. [in Ger.] 'Es liegt auf der Hand, daß insb. Für den gläubigen Strafgefangenen eine Kerze eine Mediationshilfe bei der persönlichen Andacht im Haftraum darstellen kann'

[1393] Id. [in Ger.] 'Es ist vielmehr davon auszugehen (…) daß der Kerze im religiösen Leben des Christen wie des Juden eine allg. Bedeutung beizumessen ist.'

[1394] Id. [in Ger.] Die von der Anstalt aufgeführte Brandgefahr reicht bei Abwägung der dadurch bedingten abstrakten Risiken für die Grundrechte der Mitgefangenen und des Anstaltspersonals auf körperliche Unversehrtheit nicht aus, die in der konkreten Form der Andacht unter Verwendung einer Kerze gewünschte Religionsausübung zu unterbinden.'

The case-law examples illustrate the importance of the sovereignty of decision over the religious nature of an object. In the light of freedom of religion, inmates must be able to determine for themselves what objects they need to practice their religion. But the state must have the last word on the admission. In order to prevent that they exercise their decision without any further control, editable lists of objects that are generally permitted for religious purposes should be used by the prison administration. The appropriate threshold in § 53 III Prison Act makes it possible to take into account the specific circumstances of each institution and a personal prognosis for the rehabilitation of the prisoner.

bb. Religious Writings

The handling of religious writings also does not follow a settled approach in German prisons. In the first of the three prison institutions which Jahn researched, it is never allowed for inmates to use their own copy of an Arabic Quran nor any other book in a foreign language because of security reasons.[1395] In the second one, it is allowed for inmates to own a Quran in Arabic language, but only after careful security checks. In the third institution, inmates can request approval to bring their own Quran in Arabic language, and security checks are not necessarily part of the procedure.[1396] Some of the personally investigated prisons also banned Qurans in the Arabic language altogether.[1397] Bibles and Qurans in German, on the other hand, are less frequently forbidden for security reasons. Bibles are permitted in almost 30% of all cases after a security check has been carried out. In almost 70% of all cases, they are also approved without a security check. This is only the case for 55.5% of Qurans in the German language. In just under 40% of cases, a safety check is carried out. Qurans in the Arabic language are admitted without a safety check in around 40% of the institutions, and in almost 50% after a safety check has been carried out.[1398]

In some prisons, also the prison libraries have scripture, such as the Bible, Quran, and Tora in their catalog. Hence, inmates can make respective loans from the library or purchase scripture from the vendors of the institution.[1399]

[1395] Jahn, Österreichische Zeitschrift für Soziologie (2017), p. 272.
[1396] Id. at, 272 -273 (Jahn also explains the procedures in different prisons for which, in different states, different bodies are responsible, i.e. prisons management or state executive service).
[1397] See data in appendix.
[1398] See data in appendix.
[1399] See under section 1.b.aa. of this chapter.

As shown above, inmates can own books for non-religious purposes. The admission of religious writings, however, is determined under separate legal regulations, i.e. under section 53 II federal Prison Act. Therefore, the protection of religious writings under the law depends on whether it can be established that it is "religious". In a case from 2016, the District Court Marburg decided about the right of an inmate to keep three books that he had previously ordered at the Cordoba Verlag, a publisher specialized in books about Islam and the Muslim faith.[1400] The plaintiff of the case was a converted Muslim who wanted to learn more about his religion. He ordered three books, all of which had been first approved by the prison authorities and shortly after handed out to him.[1401] Two months later, the prison authorities confiscated all three books from the plaintiff.[1402] According to the Hessian state office of criminal investigations, the content of the book was inappropriate for inmates.

Two of the books, "The Conquest of Persia" (*Die Eroberung Persiens*) and "The Lions of Islam" (*Löwen des Islams*), focused on early Muslim conquests and – according to the investigations of the state office – glorify war and violence. The third book, "The Book of the Universe" (*Das Buch des Universums*), was written by the author Abdul Majid al-Zindani, who is a founding member of 'al Islah', an organization associated with the Salafists. Therefore, as argued by the state office, all three books had to be banned from prisons.[1403] According to the applicant, the first two books were historian books dealing with war and violence, which - as he argued - was a common threat in the history of all religions. [1404] The applicant claimed it was also allowed to read about Napoleon or the Crusaders, in other words Christian history. In his view, he was constantly discriminated against because of his religion; although he was not radical or extreme in any way and distanced himself from militant groups, such as the Islamic State, he could not freely exercise his religion, like inmates of other religions.[1405]

[1400] LG Marburg, 4a StVK 222/15, Beschluss v. 20.05.2016 = FS 2017, 73.
[1401] Id. at. 4.
[1402] Id. at. 3.
[1403] Id. at. 2.
[1404] Id. at. 4 [in Ger.] ‚Es gebe auch keine Nation, kein Volk oder keine Religion, bei der nicht der Krieg Teil der Geschichte gewesen sei.
[1405] Id., The court quoted the applicants argument in the decision: [in Ger.] 'Es sei schließlich auch kein Problem, wenn er Bücher über Napoleon oder die Kreuzritter lesen wolle. Er werde ständig wegen seiner Religion diskriminiert, obwohl er in keinster Weise radikalen oder extremistischen Gedanken verhaftet sei und sich von Gruppierungen wie dem Islamischen Staat (IS) distanziere.'

From the court's point of view, however, it was necessary under the Hessian prison law to withdraw the permit the applicant had received earlier. The court was of the opinion that all three books were not protected under section 32 II 3 Hessian Prison Act, which, equivalent to section 53 II federal Prison Act, protects the possession of "fundamental religious writings". With the court's decision that the three books are not "fundamental religious writings", also the heightened standard for the withdrawal of personal possessions did not apply.[1406] The provision stipulates that fundamental religious writings may only be withdrawn from the prisoner in the event of gross abuse.[1407] The court argued that these three books are not essential for the practice of religion in contrast to prayer chains, prayer rugs, icons, images of saints, crosses or rosaries.[1408] Instead, the court referred to the provision applicable to general personal property in section 20 Hessian Prison Act. According to section 20 I 3 and 4 Hessian Act[1409], the institution has discretion to revoke a possession permit if the object endangers the resocialization of the inmate or the security and order of the institution (see section 19 II Hessian Prison Act[1410]). [1411]

The court acknowledged, in exercising discretion, that the institution must pay particular attention to the principle of the protection of legitimate expectations.[1412] In substance, this means that revocation of a once (unconditionally) granted approval cannot be based solely on the abstract danger of the object, but must be based on a concrete danger and must be precisely tailored to the individual case. According to the court, the reasons for the revocation must lie with the applicant inmate.[1413] These conditions, as argued by the court, were met

[1406] Id. at. 28, [in Ger.] 'Die Druckwerke „Die Eroberung Persiens", „Die Löwen des Islams" und „Das Buch des Universums" stellen auch keine grundlegenden religiösen Schriften im Sinne von § 32 Abs. 2 S. 3 HStVollzG dar, wie dies etwa für die fundamentalen Offenbarungsquellen der verschiedenen Religionen wie die Bibel und den Koran, aber auch für umfassende Darstellungen zum Verständnis der Grundaussagen einer Religionsgemeinschaft und die zur Praktizierung des Glaubens dienenden Gesang-, Gebets- und Andachtsbücher anzunehmen ist (vgl. dazu Arloth, StVollzG, 3. Auflage 2011, § 53, Rn. 4).

[1407] The wording of section 32 II 3 HStrVollzG is similar to the threshold of gross abuse in section 53 II 2 Prison Act: [in Ger.] Grundlegende religiöse Schriften dürfen ihnen nur bei grobem Missbrauch entzogen werden.

[1408] LG Marburg, Beschluss v. 20.05.2016 - 4a StVK 222/15, at 28.

[1409] Section 20 I 3, 4 HStrVollzG: [in Ger.] […] § 19 Abs. 2 gilt entsprechend. Die Erlaubnis kann unter den Voraussetzungen des § 19 Abs. 1 Satz 2 und Abs. 2 widerrufen werden.

[1410] Section 19 II HStrVollzG [in Ger.] […] Gegenstände, deren Besitz, Überlassung oder Benutzung mit Strafe oder Geldbuße bedroht ist oder die geeignet sind, die Eingliederung oder die Sicherheit oder die Ordnung der Anstalt zu gefährden, sind ausgeschlossen; the requirements for the exclusion of objects under the Hessian Prison Act are similar to those under Prison Act.

[1411] Kunze in BeckOK, Strafvollzug Hessen, § 20, Rn. 7.

[1412] BVerfG, NStZ 1996, 252; OLG Celle, NStZ 2002, 111 (112).

[1413] Feest/Lesting, StVollzG, § 70, at 27.

with regard to the three books which were confiscated after they had been approved and handed out to the inmate.[1414] All three books, according to the court, did legitimize or even glorify violence and expansionist aspirations in the name of religion. Therefore, by taking into account the inmates personality and his propensity to violence, the books posed a danger to the resocialization of the inmate and had to be banned.[1415]

Because of the different standards that apply to the withdrawal of non-religious writings and religious writings, it is relevant how it is determined whether the respective book is a religious book. Only "gross abuse" can justify the withdrawal of religious writings, which would have been difficult to prove on the part of the inmate in the Marburg case. Except for scripture and writings directly needed for prayer, it is questionable whether religious references of a book are sufficient to protect it as religious writing under prison law. In the Marburg case, the inmate argued, he needed the books for his religious exercise because, especially as a convert, he needed to further educate himself about his religion.[1416] This example shows that the line between religious writings and non-religious writings is difficult to draw with writings serving religious education. In the view of the court, only those objects or writings which were necessary for religious practice were protected under the privileged standard of religious writings. At least indirectly, however, also religious literature that educates adherents about their religion is used for the practice of religion. Hence, the assessment of whether certain writings are fundamental religious writings in the sense of the Prison Act will strongly depend on the viewer.

Moreover, there is great scope for interpretation with regard to the determination of the dangers justifying the deprivation. In light of the violence also occurring in scripture and prayer books, the mere depiction of violence cannot be sufficient for denial. The general grounds for refusal concern threats to the rehabilitation of prisoners and to security and order. In the Marburg case, the rehabilitation of the plaintiff was argued to be under threat due to the possession of the three books without any detailed explanation of how this threat would be caused. It would be useful to institutionalize lists with at least some religious writings that inmates of different religions are typically allowed to use and possess. In addition, the scope

[1414] LG Marburg, 4a StVK 222/15., Beschluss v. 20.05.2016, at 20.
[1415] Id. at. 21/22.
[1416] Id. at. 1.

of protection for religious writings should be broadly interpreted. In ambiguous cases, it might be preferable to grant prisoners access to the requested writings and to seek dialogue instead of strict bans. A prisoner susceptible to radicalization will not be deterred in case his desired writings are refused by the prison authorities.[1417] Here, above all, caution is required on the part of the prison management to not apply unequal standards for the use and possession of religious writings of different religions.

2. United States

This section examines the right of inmates in the U.S. to use and possess religious objects and writings during their time in detention. The introduction provides an overview of the right of inmates to personal possessions and religious articles and literature in the U.S. federal prison system (a). Subsequently, the relevant legal framework of the federal prison system of the U.S. is explained (b). The last and third section assesses the relevant case law and empirical data from prisoners in U.S. federal prisons (c).

a. Introduction

Inmates in the U.S. federal system live under restrictive conditions for personal possessions.[1418] The degree to which the inmate's right to personal possessions is limited depends on the type of facility. In Maximum Control Facilities, inmates face severe restrictions. They live in small cells that lighten for 24 hours a day, and they can only possess a few items. All belongings must be kept in a box so that inmates can be moved from one prison to another at any time. Most inmates are allowed to keep a couple of books, a radio, a few personal hygiene items, and a few items of personal clothing in their cells.[1419] In Federal Correctional Institutions (Low or Medium security FCI), inmates can keep a few more items. Upon arrival, voluntary surrenders are permitted to keep plain wedding bands, earrings (value of less than 100 U.S. Dollar and for females only), legal documents, prescribed glasses, cash or United States Postal Money Order for the inmate's commissioned account, and religious

[1417] The reasons for the radicalization of inmates are also discussed in the context of the U.S. (cf. 2.c.bb.).
[1418] The organization, legal framework, and guiding principles of the federal prison system are discussed under Part 1, Chapter I.2.a-c.
[1419] Kristine Gunsaulus-Musick, David Musick, American Prisons: Their Past, Present and Future (Routledge 2017), Chapter IV.

items.[1420] All other personal property is rejected, including the clothes worn by the inmates upon arrival, and may be mailed back to the inmate's family.[1421]

Unlike in Germany, where the institutional approach foresees creating personal space for inmates, and they can – at least to some extent – decorate their prison cell in accordance with their own preferences, the U.S. prison system believes in uniformity. Prison cells within one institution look similar to each other. Federal Prison Camps (FPC), which have minimum security standards, have dormitory-style housing with no cells and normally no locked doors.[1422] Inmates share cubicles which contain a bunk bed, two lockers 2' by 3' each, two chairs, and a small shelving area.[1423] The cubical itself is often less than 7' by 7' of total space.[1424] If the space permits, some FPCs do have a small desk area. In a Federal Correctional Institution (Low or Medium security FCI), there is usually no dormitory sleeping.[1425] Inmates are assigned to cells which houses between two and five inmates.[1426] Typically, the cell is equipped with one double or triple bunk as well as a steel toilet/sink combination, and it generally has a small window and steel doors.[1427]

Also, the possession and use of religious objects and writings in the institution is highly regulated. Constitutionally speaking, the right to use and possess religious objects is, like all other religious rights of inmates, protected under the Free Exercise Clause and RFRA (and RLUIPA).[1428] A set of guidelines of the BOP, consisting of program statements and technical references, further stipulates which objects and writings are approved in the institution for the adherents of each religion.[1429] Hence, these guidelines concretize the constitutional framework in the particular case of religious objects and writings for inmates. The chapter explores the different levels of the relevant legal framework under section b. Thereafter, it

[1420] BOP Program Statement: Inmate Personal Property (2002), p. 15.
[1421] Id. at. 15.
[1422] Michael Frantz, Jail Time, What you need to know before you go to federal prison (Dog Ear Publications 2009), p. 171.
[1423] Id. at. 171.
[1424] Id.
[1425] Id.
[1426] Id.
[1427] Id.
[1428] The Free Exercise Clause refers to the section of the First Amendment italicized here: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. See: Part 1, Chapter VI, 2.b.aa.
[1429] BOP Program Statement: Inmate Personal Property (2002); BOP Program Statement: Religious Beliefs and Practices (2004); BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002).

examines the relevant case law and empirical data for the accommodation of the right of religious minorities to use and possess religious objects and writings in prison (c).

b. The Right to Religious Personal Possessions under the RFRA and the Guidelines of the BOP

Under the *Turner/O'Lone* First Amendment standard[1430], prison officials can ban religious objects if they present security problems, or only allow them under certain circumstances, for example, in ceremonies and meetings.[1431] Today, the RFRA provides more favorable results for prisoners than the previous legal framework under the Free Exercise Clause.[1432]

The RFRA requires it to be shown that 1) an item is one genuinely needed for the practice of religion, 2) the religious article does not have physical properties that are inherently threatening to prison security, and 3) the reasons offered for not permitting the inmate to use the item lack a compelling governmental justification.[1433] If this is shown, the item should be permitted by the institution. A compelling governmental interest for banning an item needed to practice religion alone is not sufficient; the policy chosen must be the least restrictive means available to prison officials to serve that interest. Otherwise, the inmate must be permitted to retain the item. By the same token, if the three-prong test is not met, the article should be banned. Still, however, restrictions are applied inconsistently, which is why courts frequently question official's judgments.[1434]

[1430] Turner v. Safley, 482 U.S. 78 (1987), See Part 1, chapter IV, 3.b.

[1431] DANIEL MANVILLE JOHN BOSTON, PRISONERS' SELF-HELP LITIGATION MANUAL (Oxford University Press 4th ed. 1995). (under 2.e.Religious objects).

[1432] See Part 1, chapter IV, 3.b. for the doctrinal discussion of the more favorable standard of legal protection. See also id. at. 2.e.Religious objects. The prisoners' self-help litigation manual lists a number of cases to show that standards have improved for inmates. Apart from the cases further analyzed in this chapter, these cases are: Craddick v. Duckworth, 113 F.3d 83, 85 (7th Cir. 1997)- probation of Native Americans medicine bags violated RFRA); Ramirez v. Coughlin, 919 F. Supp. 617, 622 (N.D.N.Y 1996) denying summary judgements to defendants under the RFRA as to their denial to Satanist plaintiff of a three-inch metal bell for ceremonies); Alameen v. Coughlin, 892 F. Supp. 440, 449-50 (E.D.N.Y 1995) granting injunction under RFRA against prohibition of display of Sufi Muslim dhikr beads; concern about them being used as gang symbols was addressed by permitting black beads only). But see: Hyde v. Fisher, 146 Idaho 782, 800-01, 203 P.3d 712 (App. 2009) upholding uniform property limits under RLUIPA even though these restricted Native American religious practice). Cf. Shaheed-Muhammad v. DiPaolo, 393 F. Supp. 2d 80, 93-94 (D.Mass.2005) Deprivation of a religious medal accompanied by threats stated a claim under the Massachusetts Civil Rights Act).

[1433] 42 U.S.C. §§ 2000bb-(1)(a)–(b) (2006).

[1434] cf. JOHN BOSTON (1995), p. 275.

Most importantly, there are two documents used by the BOP in order to regulate the internal processes concerning religious objects and literature: the Program Statement for Religious Beliefs and Practices[1435] and the more concrete Technical Reference with Practical Guidelines for Administration of Inmate Religious Beliefs and Practices.[1436] Each document contains provisions concerning both religious objects and religious writings. The Program Statement for religious practice in prisons follows the objective to protect the religious rights of inmates of all faiths.[1437] It lists a number of permitted objects, such as rosaries, prayer beads, oils, and prayer rugs, but points out that further objects, i.e. those which are not on the list, may be approved upon request.[1438] If necessary, the religious significance of an object shall be verified by the chaplain prior to the warden's approval.[1439] For further instructions, the Program Statement refers to the Technical Reference Manual for "Inmate Religious Beliefs and Practices".[1440]

The comprehensive Technical Reference Manual, consisting of almost 350 pages, has been written to assist Chaplains and administrative personnel to appropriately facilitate the religious beliefs and practices of inmates within a correctional environment.[1441] The suggested recommendations to the issues raised in each chapter serve as a "best practice" guide. However, it is emphasized that final decisions rest with the Warden of the prison institution.[1442] This is also the case for religious property.[1443] The manual starts with lists of personal religious items and congregates religious items for each religion. The manual clarifies which items are considered to be a necessary part of the practice of the respective religion under the BOP's policy and which items are never to be authorized or to be authorized on a case by case basis.[1444]

[1435] BOP Program Statement: Religious Beliefs and Practices (2004).
[1436] BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002).
[1437] BOP Program Statement: Religious Beliefs and Practices (2004).
[1438] Id. at. 11.
[1439] Id.
[1440] Id. at. 4.
[1441] BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002): see also the chapter on chaplaincy in prisons (Part 2, Chapter I).
[1442] Id. at. intro ii.
[1443] Id. at. 1
[1444] Id. at. 1-14.

The legal framework for religious writings follows the same system. In the Program Statement for Religious Beliefs and Practices, it is stipulated that inmates have a right to religious writings which is further specified in the Technical Reference Manual.[1445] Also for sacred writings, the manual points out those writings which shall be generally approved for the adherents of every religion and those which may be disapproved. The fact that inmates generally have a right to religious books, magazines, and periodicals is also pointed out in the program statement.[1446] Writings are either owned by inmates or they are part of the catalog of the prison library. In any case, religious literature distributed to inmates is contingent upon the chaplain's approval.[1447]

Also, the limits of the inmate's personal religious property rights are further specified by the program statements and Technical References Manual. According to the purpose and scope of the program statement on religious practice, the opportunities of inmates to pursue religious beliefs and practices only exist within "the constraints of budgetary limitations and consistent with the security and orderly running of the institution and the Bureau of Prisons."[1448] Further it is pointed out that '[When considered necessary for the security or good order of the institution, the warden may limit attendance at or discontinue a religious activity'.[1449] More specifically, for the limits of religious property (items as well as literature), the program statement on religious practice refers to the program statement on inmate's personal property.[1450]

The program statement on personal property shall "contribute to the management of inmate personal property in the institution, and contribute to a safe environment for staff and inmates by reducing fire hazards, security risks, and sanitation problems which relate to inmate personal property".[1451] It applies whenever the program statement on religious practice does not contain own rules. As a consequence, numerical limitations, as laid down in

[1445] Id. at. the different outline for religious faith groups; each outline lists scripture and other religious writings that are commonly used by adherents of a religious faith group.
[1446] BOP Program Statement: Religious Beliefs and Practices (2004), p. 14.
[1447] Id. at. 14.
[1448] Id. at. 1.
[1449] Id. at. 3.
[1450] Id. at. 15.
[1451] BOP Program Statement: Inmate Personal Property (2002), p 1.

the personal property regulations also apply to religious property.[1452] The restrictions are made under the discretion of the authorities, and sometimes prison institutions apply strict limits, such as a five-book per inmate limit.[1453] Limitations can also be based on the available storage space. Inmates have to have a locker or other securable area in which the inmate is to store authorized personal property.[1454] However, "staff may not allow an inmate to accumulate materials to the point where the materials become a fire, sanitation, security, or housekeeping hazard".[1455]

c. Religious Minorities and the Right to Religious Objects and Writings

Following an overview of the constitutional framework, the RFRA, and the applicable guidelines of the BOP for the right of inmates to use and possess religious objects and literature, the following sections examine the relevant case law as well as the relevant empirical data for the right of religious inmates to religious objects (aa) and religious writings (bb).

aa. Religious Objects

The array of objects that are requested by inmates is broad, ranging from prayer oils, tarot cards, eagle feathers, and crystals to religious headgear. The fact that an inmate can lawfully possess a religious item does not mean that the prison has an affirmative obligation to supply it to the inmate; it only means that the inmate is permitted to purchase it.[1456] Especially when the requested object is not part of the catalog of approved objects as laid down in the Technical Reference Manual for religious beliefs and practices and is denied by the prison authorities, courts have to resolve these claims. A primary consideration for courts is the physical characteristics of the accessory itself.[1457] If the object is inherently threatening to security, the case law suggests it can be banned.[1458]

[1452] Id. at. 2.
[1453] See, e.g. Garraway v. Lappin, 490 Fed. Appx. 440, (3rd Cir. 2012), (cf. section c.bb. of this chapter).
[1454] BOP Program Statement: Inmate Personal Property (2002), p 2.
[1455] Id. at. 2.
[1456] Michael B. Mushlin, Rights of Prisoners (Thomson Reuters 2017).
[1457] Id. at. § 7:35.
[1458] Hall v. Bellmon, 935 F.2d 1106, 1113, 19 Fed. R. Serv. 3d 1217 (10th Cir. 1991).

The more complicated question is whether religious items that are not obviously dangerous can be barred from a prison environment. In *Friend v. Kolodzieczak*[1459], which was decided in 1992, the Ninth Circuit held they can – the case involved a jail that banned Catholic detainees from possessing rosary beads. The jail operated with a rigid rule that prevented detainees from having any property not supplied to them by the facility.[1460] Consequently, inmates were only allowed to use religious items during religious services but not at any other times. The court held that this policy was designed to prevent the possession of drugs and weapons in the jail and that inmates could practice their faith in other ways within the prison.[1461] Also, the court was of the opinion that giving Catholics the right to have their religious materials would create "an impression of favoritism toward Roman Catholic prisoners, thereby generating resentment, envy and intimidation".[1462]

From the current perspective, the ruling is not good law for at least two reasons. First, it is not based on a close examination of the relationship between the security and the institution and the religious rights of inmates; it applies the property rules irrespective of the religious nature of the objects.[1463] Second, the ruling accepts, without any factual support or analysis, the defendants' argument that to grant the plaintiff's request would cause other inmates to feel resentment toward Catholic detainees.[1464] If inmates of other religions could obtain religious objects too, this needs by no means to be the case. Under the Free Exercise standard of today and the RFRA, courts have to be more careful with the denial of the inmates right to personal possessions in prisons.

In *Sasnett v. Sullivan*, the court found that an absolute ban on crucifixes worn by inmates violates RFRA.[1465] According to the prison's internal management procedure, inmates were prohibited from wearing crucifixes, despite the fact that crosses were displayed in prison

[1459] Friend v. Kolodzieczak, 923 F.2d 126 (9th Cir. 1991).
[1460] Id.
[1461] Id.
[1462] Id.
[1463] MUSHLIN (2017), at § 7:35.
[1464] Id. at. § 7:35.
[1465] Sasnett v. Sullivan, 91 F.3d 1018, (7th Cir. 1996). The ban on crosses was initially struck down by the district court at 891 F. Supp. 1305 and 908 F. Supp. 1429. The court held the policy violated the First Amendment and the RFRA. The state appealed and the injunction was affirmed. The Supreme Court vacated and remanded the case after it held the RFRA was unconstitutional. See: City of Boerne v. Flores 521 U.S. 507 (U.S Supreme Court). On remand, the district court upheld the ban on religious jewelry. The court of appeals reversed.

chapels and the fact that crucifixes were acknowledged as a religious item.[1466] The prison authorities emphasized that it was a problem that inmates wore jewelry, i.e. rings, earrings, pins, crosses, crucifixes, and medallions to show particular gang affiliations. In their view, there was no way to distinguish readily between jewelry worn as a symbol of religious belief and jewelry worn to signify gang affiliation. To avoid discriminating against any particular religion that used a symbol similar or identical to a symbol used as gang identification, it decided to disallow all jewelry. Although three-inch crucifixes had been allowed under previous policies, the prison authorities later decided to ban them as allowed property because wearing them was not known to be required by any religious faith.[1467] The RFRA standard, however, protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief". [1468] Hence, the court held the ban substantially burdened the prisoners' exercise of religion because wearing the cross helped inmates to advance their faith and to feel closer to God.[1469] The court stated that the ban was not the least restrictive means of achieving compelling government interests in prohibiting prisoners from possessing property known to be used for gang insignia and reducing inmate possession of valuable property used for barter and possibly leading to strong-arming.[1470]

A more nuanced discussion of the ban of religious items is shown in *Jefferson v. Gonzales*[1471],where the court had to decide about the policy of the BOP regarding religious headwear and garments.[1472] The plaintiff brought action alleging that the policy violated his First Amendment rights, the RFRA, and the Equal Protection Clause of the First Amendment.[1473] The plaintiff, an Orthodox Muslim, requested to the prison's supervisory chaplain that he be allowed to wear a turban.[1474] The chaplain denied the request on the ground that the BOP prohibited Muslim inmates from wearing turbans. According to the BOP's

[1466] Sasnett v. Sullivan, 91 F.3d 1018, (7th Cir. 1996).
[1467] Id at.
[1468] 42 U.S.C. § 2000cc-5(7)(A) (2004).
[1469] Sasnett v. Sullivan, 91 F.3d 1018, (7th Cir. 1996).
[1470] Id. at. 1023.; that a general ban of religious symbols is incompatible with the demands of the RFRA was also confirmed in Rouser v. White, 944 F. Supp. 1447 (E.D. Cal. 1996) (the plaintiff, an adherent of Wicca, claimed that his freedom of religion was violated by officials' preventing his use of candles, incense, and tarot cards.).
[1471] Jefferson v. Gonzales, Not Reported in F.Supp.2d, (U.S. District Court, District of Columbia) 2006.
[1472] According to the BOP Program Statement: Religious Beliefs and Practices (2004), inmates of one religion are authorized to wear a specific headwear in prison; this way, the BOP wants to achieve uniformity (p. 12-13).
[1473] Jefferson v. Gonzales, Not Reported in F.Supp.2d.
[1474] Id. at. 1; furthermore, it was at issue whether the rules on ceremonial clothing, which prescribed that inmates are not allowed to wear pants above the ankle, violated the inmate's rights. (id. at. 2).

Program Statement on Religious Practice, which sets forth inmate regulations on the type and use of religious headwear and religious garments, Muslim inmates are permitted to wear a Kufi, which is a black or white crochet cap.[1475] Inmates who are members of the Sikh religion are permitted to wear a turban.[1476]

The plaintiff argued that the BOP's regulation on religious headwear and clothing violated the Free Exercise Clause of the First Amendment and the RFRA. The prison authorities did not challenge the Plaintiff's claim that his religious practices had been substantially burdened by the BOP's regulations on religious headwear and clothing restrictions.[1477] At issue was, however, whether the policy was indeed the least restrictive means of achieving a compelling interest.[1478] The BOP asserted that the restrictions on the clothing and wearing of turbans served the penological interest of maintaining security of prison, rehabilitating inmates, and deterring prison gang activity.[1479] As argued by the BOP, the alteration of clothing could be used as an identifier of affiliation with a certain gang or groups, and to promote violence amongst inmates. Therefore, it was necessary to mandate uniformity in dress and to avoid that an individual stands out as a member of a specific group.[1480] Considering the fact that it was shown that Sikhs were permitted to wear a turban, the BOP was under the burden of justifying not only that the ban was the least restrictive means to achieve the compelling interest of maintaining security and order but also that these risks could differ in the case of Muslim inmates wearing turbans.

In general terms, the BOP argued that the security risk could be caused by a turban as it enabled inmates to conceal weapons and drugs.[1481] In order to maintain security, searches of turbans were necessary on a regular basis which had an effect on other duties of correctional staff, and hence compromises the security of an institution. These arguments theoretically were valid to turbans worn by Muslims and Sikhs. As pointed out by the BOP, however, there were only 54 Sikhs and over 10.000 Muslim inmates in federal correctional institutions.[1482]

[1475] BOP Program Statement: Religious Beliefs and Practices (2004), p. 12.
[1476] Id. at. 13.
[1477] Jefferson v. Gonzales, Not Reported in F.Supp.2d. at 2.
[1478] Id. at. 2.
[1479] Id. at. 3.
[1480] Id.
[1481] Id. at. 4.
[1482] Id.

The small number of Sikhs in the custody of the BOP meant that the time required to search them was minimal compared to the prison resources that were needed to search all Muslim inmates wearing turbans.[1483] Another argument put forward by the BOP against the approval of turbans for Muslim inmates was that the wearing of turbans by Muslims was associated with the Taliban and therefore constituted a security risk.[1484] This way, a generalization[1485], and hence discriminatory ascription, were used as a legal argument in favor of the ban.

The court, in evaluating the plaintiff's claim under the RFRA, was of the opinion that the BOP had met its burden of demonstrating that its policy was the least restrictive means of advancing its compelling interest, i.e. security, and that the BOP's policy did not violate the plaintiff's right to equal protection.[1486] The court relied on the arguments by the BOP which concerned the inner-religious differences between Sikhs and Muslims. In defense of the disparate treatment between Muslims and Sikhs, the BOP pointed out that only for the Sikh religion was the turban a central tenet and an extension of the body.[1487] Second, the Sikh religion, unlike the Islamic faith, did not allow any substitute for a turban.[1488] The BOP argued to have consulted a variety of Islamic scholars, prior to instituting its turban policy, who uniformly stated that the Kufi was an appropriate head covering for Muslim inmates.[1489] Under the tight-fitting Kufi, it was difficult to conceal contraband, and the time required to search it was much less than if the inmate wore a turban.[1490] Indeed, approval of the turban also for Muslim inmates would have made necessary significantly higher control efforts. A total ban of the turban for Muslims, however, is not the least restrictive means.

[1483] Id.

[1484] Id.

[1485] Charles Taylor, *Block Thinking* (2007).

[1486] Jefferson v. Gonzales, Not Reported in F.Supp.2d. 4, 'The Court finds that the Defendants have demonstrated a compelling interest for its policy on Muslim religious headwear and clothing and have adopted the least restrictive means of furthering that interest. Therefore, Defendants have not violated RFRA or the Plaintiff's First Amendment rights.'

[1487] Id. at. 4.

[1488] Id.

[1489] Id.; Moreover, the court refers to case law in which Muslim inmates have claimed that wearing a Kufi is required by their religion. Hence, the BOP policy would be in accordance with Muslim customs (at. 3.); Muslim inmates bringing a RFRA lawsuit have claimed, contrary to Plaintiff's assertion here, that wearing a Kufi is required by their religion. See Ali v. Szabo, 81 F.Supp.2d 447, 468 (S.D.N.Y.2000); Abdul-Akbar v. Dep't of Corrections, 910 F.Supp. 986, 1007 (D.Del.1995), aff'd 111 F.3d 125 (3 rd Cir.), cert. denied, 522 U.S. 852, 118 S.Ct. 144, 139 L.Ed.2d 91 (1997); Muslim v. Frame, 897 F.Supp. 215, 217 (E.D.Pa.1995).

[1490] Id. at. 3.

The court did not make a detailed assessment of the conflicting interests to determine which interest – the BOP's security interests and the religious freedom of Muslim inmates - outweighed the other; in other words, an assessment was missing whether the restriction was the least restrictive alternative to furthering the compelling governmental interest which is demanded under the RFRA.[1491] However, it can be assumed that not all Muslim inmates detained in the federal prison system had decided to wear a turban so that it is not certain how much more demanding security efforts would have become. Moreover, it would have been less invasive to allow certain types of turbans under which it is comparably difficult to hide contraband and for which security checks are less demanding.

Furthermore, courts often have to decide whether inmates have the right to bring religious items from an outside source instead of purchasing it from the prison's approved vendors. In *Davila v. Gladden*, the applicant of the case was a Santeria priest who requested to obtain his personal bread and shell necklace from an outside source.[1492] The institution denied the request which – in view of the court - did not violate the First Amendment nor RFRA rights of the inmate.[1493] First of all, the court established that the right to obtain religious items outside the approved vendor catalog and the right to wear approved vendor religious items were two separate and distinctive rights.[1494] Against the background of this difference, the court argued the restriction of the prison to items of the catalog was rationally connected to legitimate government interest in prison safety and resource allocation.[1495] Also in *Fernandez-Torres v. Watts*,[1496] a Santeria practitioner sought to have Santeria bead necklaces sent to him by outside sources rather than through the prison's vendor catalog. The inmates stated that his religion requires him to wear beads that had been infused by a special ceremony with the

[1491] According to the 10th Circuit court, the requirement of the least restrictive alternative is what distinguishes the requirements for a review of prison restrictions under the RFRA standard from the First Amendment standard: 'Our review of a prison restriction under the First Amendment is different from our review of that same restriction under RFRA. While the First Amendment requires only that prison restrictions be reasonably related to legitimate penological interests, RFRA requires restrictions to be the least restrictive alternatives to furthering compelling governmental interests.', Davila v. Gladden, 777 F.3d 1198, (11th Cir. 2015), at 1213.

[1492] Id.

[1493] Id. at. 1204 ('After careful review of the record in the light most favorable to Mr. Davila, we conclude that the District Court erred in granting summary judgment on Mr. Davila's RFRA claim for injunctive relief.'); 1208 ('On this record, the District Court erred in granting the Defendants' summary judgment motion on Mr. Davila's RFRA claim for injunctive relief.'); 1209 ('On this record, the District Court erred in granting the Defendants' summary judgment motion on Mr. Davila's RFRA claim for injunctive relief.').

[1494] Id. at. 1214.

[1495] Id.

[1496] Fernandez-Torres v. Watts, WL 1173923, - Dist. Court, S.D. Georgia 2017.

spiritual force, Ache, and that beads sold by the prison's approved vendors were not guaranteed to have undergone this ceremony.[1497]

In his complaint, the inmate claimed the violation of his First Amendment's Free Exercise rights, the RFRA, and the Equal Protection Clause.[1498] Other religious faith groups – including Muslim, Catholic, and Jewish adherents – were allowed to practice their sincerely held beliefs by wearing their religious items "without restrictions whatsoever", whereas Santerian practitioners were prevented from doing the same, he alleged.[1499] The court was of the opinion, however, that the inmate had failed to allege that similarly situated prisoners received more favorable treatment. It held that the inmate's equal protection claims failed because he had inappropriately analogized other religious faith groups' ability to wear properly acquired religious items with Santerian practitioners' alleged inability to wear or procure religious items outside of the prison's approved vendor catalog.[1500] As argued by the court, the inmate's claims were not based on any contention that the prison institution prevented him from wearing Santerian items obtained through the approved vendor catalog. Instead, the inmate's complaint centered on his inability to procure such items outside of the prison's approved vendor catalog. He did not allege that other religious groups were allowed to obtain religious items outside of the approved vendor catalog. Instead, the plaintiff had based his equal protection arguments on the ability of other religious groups to wear their approved vendor religious items "without restriction."[1501]

These two cases of Santerian inmates illustrate the complexity of equality questions which can arise due to the inherent differences between the religions. Considering the relevance of the power of Ache for Santerian practitioners', it may be the case that for them the restrictions to receive items from an outside source are more burdensome than for inmates of other religions and other religious needs. At the same time, it raises the difficult question of how much additional institutional effort can be expected from the prison institution, for example, due to rising costs for required screenings for outside sources.[1502] So far, it is not established

[1497] Id. at. 1.
[1498] Id. at. 2.
[1499] Id.
[1500] Id. at. 2.
[1501] Id.
[1502] Davila v. Gladden, 777 F.3d 1198. At. 1206.

that a prisoner can get religious property from outside sources when the religious items available through authorized means are not sufficient to meet the prisoner's religious needs.[1503] This seems, however, to be a necessary step to fully protect the rights of religious minorities. Otherwise, there is little possibility for inmates to defend themselves against insufficient offers of the institution. The proportional payment of the increased costs by the inmates themselves could indeed improve the possibilities of inmates, but co-payment requirements for inmates would favor wealthy inmates over poor inmates.

In *Echtinaw v. Lappin*[1504], the court also had to deal with the problems of commissary religious items. The plaintiff of the case was granted access to the commissary prayer oil he requested, but it was expensive and of poor quality which he saw as a violation of his free exercise and RFRA rights in the prisons' policy.[1505] The prison authorities admitted that there had been issues and that over the past few years they had worked with Muslim inmates to resolve their concerns about prayer oils fragrance, quality, and cost.[1506] In view of the court though, the plaintiff failed to demonstrate how the lack of access to "adequate" prayer oil substantially burdened his ability to practice his faith.[1507] The court did acknowledge that RFRA "supplements and expands First Amendment free exercise protection"[1508]. Nevertheless, the Tenth Circuit Court of Appeals used the same "substantial burden" test to evaluate RFRA and First Amendment free exercise prisoner claims.[1509] Because "policies which restrict prayer oil ownership and possession are generally permissible under the First Amendment",[1510] it is unlikely for inmates to be able to demonstrate they have been substantially burdened.[1511] The court finally decided against the plaintiff and saw no rights violation in the prison policy.

[1503] Id. at. 1212.
[1504] Echtinaw v. Lappin, WL 604131 – Dist. Court, D. Kansas 2009.
[1505] Id. at. 4.
[1506] Id. at. 12.
[1507] Id.
[1508] Id. at. 11.
[1509] Id.(a"substantial burden" is one that (1) significantly inhibits or constrains plaintiff's religious conduct or expression, (2) meaningfully curtails plaintiff's ability to express adherence to his faith or (3) denies plaintiff reasonable opportunity to engage in fundamental religious activities).
[1510] Also see: Hammons, 348 F .3d at 1255 (in-cell ban on prayer oils is permissible under the First Amendment even when the prisoner complains his religious experience is 'significantly lessened'); Crocker, 159 F.Supp.2d at 1275 (D.Kan.2001) (the prison's rejection of a package containing prayer oil did not violate the First Amendment when prayer oil is available from other sources, such as the commissary).Id. at.
[1511] Id. at. 12.

Compared to other religious accommodation requests, for example, for religious texts and for meetings with spiritual leaders of one's faith, the approval rate for religious items and clothing is low.[1512] According to the Pew Research Forum, 51 % of all requests for religious clothing or crucifixes, eagle feathers, and turbans, etc. are positively granted. [1513] Another 46 % of the requests for religious items and clothing are sometimes approved and sometimes denied, and 3 % usually get denied.[1514] However, these numbers do not differentiate between different requests by inmates. From reading the relevant case-law, one gets the impression that the federal prison system commonly accommodates the religious objects listed in the technical references.[1515]

bb. Religious Writings

Historically, Muslims belonging to the Nation of Islam (NOI) played an important role for the right of inmates to religious literature.[1516] Initially, their suits sought to access the Quran – Islam's Holy Book. Access to the Quran is core to the practice of Islam and hence a prerequisite for incarcerated Muslims of all schools who aspire to continue observance in detention.[1517] The successful claims for accessing the Quran emboldened NOI Muslim inmates to request the accommodation of additional religious needs and practices. In addition to the claims for the Quran, Muslim inmates started to request other NOI-specific literature. A series of suits, beginning with *Cooper v. Pate*[1518] in the Seventh Circuit, ordered a prison to make Elijah Muhammad's "A Message to the Blackman in American" and the NOI's official newspaper "Muhammad Speaks" available to NOI Muslim inmates. These decisions overturned earlier rulings that deemed this literature, particular "Muhammad Speaks", threatening to prison safety.[1519]

[1512] Pew Research Center, Religion in Prisons (2012), p. 24.
[1513] Id.
[1514] Id.
[1515] Cf., most importantly, the outlines for religious faith groups in the BOP Technical Reference Manual, Inmate Religious Beliefs and Practices (2002).
[1516] See Part 1, Chapter II, 2.b (The Prisoner's Rights Movement in the 1970s and 1980s); Beydoun, UNIVERSITY OF CINCINNATI LAW REVIEW, (2016), (with comprehensive historical analysis).
[1517] Id. at. 145.
[1518] Cooper v. Pate 378 U.S. 546 (1964), (See also Part 1, Chapter II, 2.b).
[1519] Beydoun, University of Cincinnati Law Review (2016), p. 145.

Censorship of religious publications is not just a "right to read" issue but can also be challenged as a violation of the right to free exercise of religion.[1520] The denial of religious material which "provide[s] religious instruction and without which [inmates] could not practice their religion generally" was held to violate the free exercise rights under the Turner/O'Lone standard.[1521] Under the legal standard of RFRA (and RLUIPA), it was also clearly established that reading religious literature is a protected religious practice, even if not compelled by or central to the plaintiff's belief system.[1522] Indeed, according to the study about religious accommodation requests in federal and state prisons conducted by the Pew Research Forum, inmates' requests for the accommodation of religious books or texts are generally successful. Accordingly, 82 % of the requests usually get approved, and 17 % sometimes get approved and sometimes denied.[1523]

Inmates are generally allowed to have the primary literature of their religion. The specific and further allowances of this right of inmates, however, are controversial. Prison officials tend to have wide latitude in censoring religious publications and it can be difficult for inmates to show how the disapproval of certain publications constitutes a substantial burden on their ability to practice their religion.[1524] As the case law discussed below illustrates, the two most important issues for courts to decide are which reading material qualifies for protection under the religious freedom framework and which numerical limits of books and other material sufficiently accommodate the inmates' right to exercise their religion.

In *Echtinaw v. Lappin*,[1525] a Muslim inmate complained that Islamic literature and pamphlets were not available in the prison chapel to the same degree as other religious literature. For the inmate, it was difficult to show how the alleged lack of pamphlets constituted a substantial

[1520] JOHN BOSTON (1995), p. 201.
[1521] See, e.g. Sutton v. Rasheed, 323 F.3d 236, 252-54 (3d Cir. 2003); the court held that members of the NOI did not have any alternatives when deprived of the respective religious books.
[1522] See Rowe v. Davis, 373 F. Supp. 2d 822, 825-26 (N.D.Ind.2005); here, the court held: 'The plaintiff Mr. Rowe argues, reading religious literature may not be compelled by or central to his system of religious beliefs, but is a part of his exercise of religion. That is to say that reading religious literature is part of the way Mr. Rowe practices and expresses his religious beliefs. Therefore, reading religious literature is a religious exercise. Taking his religious literature was directly, primarily, and fundamentally responsible for rendering that religious exercise effectively impracticable. Therefore, taking his religious literature was a substantial burden on his religious exercise of reading religious literature.'
[1523] Pew Research Center, Religion in Prisons (2012), p. 24. (The figures do not add to 100 % due to rounding.).
[1524] JOHN BOSTON. 1995. P. 203.
[1525] Echtinaw v. Lappin, WL 604131 – Dist. Court, D. Kansas 2009.

burden on his ability to practice his religion. The prison had "approximately four library shelves"[1526] with Muslim faith-based literature, CDs, and video cassette tapes. In the view of the court, this fact was not rebutted by the Muslim inmate, nor did he show how the particular volume of religious literature substantially burdened his ability to practice his religion.[1527] The fact that literature of different religions was not available to the same degree in prisons was, as argued by the court, not the responsibility of the institution.[1528] The Chaplain department did not purchase religious pamphlets or seek donations of pamphlets from particular groups. Therefore, it had no control over who would send donations for prisoners and it only made donated pamphlets available to inmates. The institution showed that, to the extent that the prison received donations for Muslim inmates, they were made available in the same manner as donations for other religious groups.[1529] The court, therefore, saw no violation of the RFRA rights of the Muslim inmates.

In *Ramadan v. BOP*[1530], the plaintiff contended that his "Fifth Amendment right to equal protection under the law was violated in that Muslim inmates were banned from bringing their personally owned Qurans into the chapel while no other similarly situated group ever faced such ban."[1531] The plaintiff was permitted to purchase the Quran which is why he argued he must also be allowed to use it. The BOP admitted that, for a short time, there was some confusion over allowing the Noble Quran in the chapel. The issue with this particular translation of the Quran, also called the Hilly-Khan translation, was that "many believe" that it contains "radical notes and parentheticals associated with the Jihad"[1532]. Therefore, it was not purchased for the chapel, nor stocked in the chapel library, and for a few weeks, prisoners could not bring their own copies of this translation to the chapel. The court emphasized, however, that the plaintiff's copy of the Noble Quran was neither taken nor confiscated from him.

[1526] Id. at. 3.
[1527] Id. at. 12.
[1528] Id. at. 3; the court points out 'Per prison policy, the Chaplain department does not purchase religious pamphlets but makes donated pamphlets available to inmates. The Chaplain department does not seek donations from particular religious groups and has no control over who sends donations for prisoners. Various religious organizations donate pamphlets or other religious materials to the prison.'
[1529] Id. at. 3, 'The Chaplain department makes all appropriate pamphlets and materials available to inmates. To the extent the prison receives donations for Muslim inmates, they are made available in the same manner as donations for other religious groups.'
[1530] Ramadan v. FBOP, not reported in F. Supp. 3d, (United States District Court, S.D. West Virginia 2015).
[1531] Id. at. 4.
[1532] Id.

Additionally, it made clear that the institution was under no obligation to make that specific translation available in the chapel: "An inmate has no right under the First Amendment or RFRA to a preferred translation of the Quran"[1533]. The Court argued the plaintiff's inability to bring his copy of the Noble Quran into the chapel for a few weeks did not prohibit him from practicing his religion, "especially given that other copies of the Quran are available in the chapel"[1534]. As clarified by the court, even if the plaintiff were to somehow establish that he has a constitutional right to have his copy of the Nobel Quran in the chapel – which the Court concludes he had not – the brief interruption of the practice did not amount to First Amendment or RFRA violations. The court cited a number of cases, all of which dealt with possible violations of an inmate's religious freedom due to occasional[1535] or situational[1536] restrictions on religious exercise. In all of them, courts decided that the plaintiff's religious freedom had not been violated.[1537]

In order for the institution to justify the suppression of religious literature, it must demonstrate that the material is inflammatory and will cause disruptions and breaches in security.[1538] This is more difficult to show with literature than with religious objects where, at least in some cases, it is fairly obvious that an object is dangerous. As the case-law shows, however, inmates find it difficult to demonstrate that the absence of a particular book and publication constitutes a burden to their religious exercise, especially when other religious publications are available in the prison institution. In these instances, institutions can quite easily ban additional religious writings and also limit the available writings for inmates to a certain number.[1539]

[1533] Id. at. 5.

[1534] Id.

[1535] See e.g. 'A prisoner's constitutional right to freedom of religion is not violated by the occasional inability to attend services' Williams v. Bragg, 537 Fed.Appx.468, (Fifth Circuit Court of Appeals 2013).

[1536] See e.g. 'Removal of prisoner from Ramadan participation list, which resulted in him missing two Ramadan meal bags, did not constitute a substantial burden of prisoner's free exercise of religion because there was 'no evidence that the brief interruption forced him to abandon one of the precepts of his religion or that he felt a substantial pressure to modify his beliefs.' Thompson v. Holm No. 13-CV-930, (United States District Court for the Eastern District of Wisconsin 2015).

[1537] For further references, see Ramadan v. FBOP, not reported in F. Supp. 3d. at 5 et seq.

[1538] JOHN BOSTON. 1995. P. 203 et seq.

[1539] Under the BOP's program statement on personal property, numerical imitations can be placed on inmate's personal property, cf Program Statement: Inmate Personal Property (5580.08). 2002. P, 2.; § 553.11 Limitations on inmate personal property. (a) 'Numerical limitations. Authorized personal property may be subject to numerical limitations.'

In *Garraway v. Lappin*[1540], the Muslim plaintiff claimed that the BOP's policy to limit the number of books an inmate may have as personal property in his cell substantially burdened his ability to exercise his religion. The institution instituted a limit of five books per inmate, regardless of topic. According to the BOP, the Program Statement on inmate property sets the limit on personally-owned items because – at any time – inmates may be transferred from one institution to another;[1541] hence, the five-book limit. According to the court in *Lappin*, the numerical limit was justified for security reasons. It facilitates staff obligations, such as proper cell searches, and limits the places where inmates may store contraband.[1542] Books are, as pointed out by the court, a place where contraband is frequently found, put in the bindings, and in "hollowed-out" pages.[1543] By applying the Turner factors, the District Court held that the BOP regulation did not impermissibly impinge on Garraway's free exercise of his religion. [1544]

Because inmates may be transferred at some point, the five-book limit applies to all inmates irrespective of their individual situation and, for example, their need for education material.[1545] Especially, with a numerical limitation of just five books, inmates are likely to be forced to make religious sacrifices in case they may need other reading material, such as textbooks or literature for rehabilitation. In case religious reading material is not distinctively protected, numerical limitations need to be more liberal for comprehensive protection of religious freedom.

In *Sasnett v. Sullivan*[1546], the institution's numerical limit for personal items was not as restrictive as in *Garraway v. Lappin*. In this case, the court granted summary judgment in favor of the prison in an action by inmates under the RFRA, challenging the prison's internal management procedures of restricting the ownership of publications by the prisoners to 25 items. In ruling that the regulation restricting prisoners' ownership of publications did not

[1540] Garraway v. Lappin, 490 Fed.Appx. 440. (3d. Cir. 2012).
[1541] BOP Program Statement: Inmate Personal Property (2002).
[1542] Garraway v. Lappin, 490 Fed.Appx. 440. (3d. Cir. 2012).
[1543] Id. at. 444.
[1544] Id. at. 1, [Holdings 6 & 7] 'five-books-per-inmate limit did not impermissibly impinge on inmate's free exercise of his religion; and five-book limit did not violate inmate's RFRA rights.
[1545] Id. at. 444.
[1546] Sasnett v. Sullivan, 91 F.3d 1018. (7th Cir. 1996),

violate RFRA, the court noted that prisoners had not been forced to give up specific books, but could select which books to keep within that limit instead.[1547] Moreover, they had the option of donating the remaining books they owned to prison libraries and chapels with the possibility of checking them out at a later date.[1548] As, in principle, inmates continued to have access to the books they surrendered, it was difficult for them to demonstrate a violation of their rights. At the same time, this argument requires a great deal of trust in the penitentiary.

In September 2007, The New York Times reported that in federal prisons, large segments of religious books and materials were purged from chapel libraries.[1549] Prison chaplains were directed by the BOP to clear the shelves of any books, tapes, CDs, and videos that were not on a list of approved resources. As argued by the BOP, the purge was a response to a 2004 report by the Office of Inspector General in the Justice Department. The report recommended steps that prisons should take, in light of the September 11 attacks, to avoid becoming recruiting grounds for militant Islamic and other religious groups. Thus, the so-called Standardized Chapel Library Project (SCLP) took place to limit access to materials that could "discriminate, disparage, advocate violence or radicalize";[1550] in other words, in the name of preventing terrorism.[1551] The BOP's original intention for the list was to create an inventory of all materials in chapel libraries to determine which resources might be confiscated for that manner.[1552] Because the lists grew to too many copies, the project became unmanageable, and the BOP decided to change its policy. Instead, it created a shorter list of approved materials.[1553] To create the list, the BOP relied on undisclosed religious experts (it is reported they include chaplains and scholars in seminaries and at the American Academy of Religion).[1554] They produced lists of up to 150 book titles and 150 multimedia resources for each religion or religious category.[1555] When instituted, the project had sweeping effect. In some libraries, as shown by Varner, only few books were left after the library had been checked according to the list.[1556] Especially literature for Muslim inmates was reduced, and in

[1547] Id. at. 1445
[1548] Id. at. 1446.
[1549] Laurie Goodstein, Prisons Purging Books on Faith From Libraries THE NEW YORK TIMES 2007.
[1550] Id. (quoting Traci Billingsley, spokeswoman for the BOP).
[1551] Id.
[1552] Neela Banerjee, *Prisons to Restore Purged Religious Books*, THE NEW YORK TIMES, 2007.
[1553] Id.
[1554] Goodstein, The New York Times 2007.
[1555] Id.
[1556] Joanna E. Verner, Battle of the Lists: The use of Approved versus Restricted Religious Book Lists in Prisons 40

some prisons, only the Quran and two other titles were still available, with important prayer guides, such as the Hadith, missing.[1557]

Outrage over the BOP's decision to limit inmates to a religious reading list determined by the government came from both conservatives and liberals.[1558] The issue sparked a public debate, and inmates started to file lawsuits.[1559] In Brown v. Lindsay,[1560] the plaintiff Abdullah Robert Brown, filed a motion for preliminary injunctive relief. In his motion, Brown stated that officials at the prison institution violated his right to religious freedom by "removing all religious books from the Sunni Muslim libraries (…) from Dar-Us-Salam Publications"[1561]. As relief, inmate Brown asked for his access to those publications at FCI-BIG Spring to be reinstated. The procedural prerequisite for the issuance of a preliminary injunction is a demonstration that "if it is not granted, the applicant is likely to suffer irreparable harm before the decision on the merits can be rendered".[1562] Indeed, the prison institution acknowledged that during Spring 2007, the BOP instructed certain publications to be pulled from chapel libraries at federal correctional facilities. However, as pointed out by the court, the BOP reversed its policy in September 2007 and instructed prison chaplains to return "all religious books including the Dar-Us-Salam publications on the chapel library shelves".[1563] Therefore, the plaintiff's motion was subject to dismissal on the basis of mootness and was hence denied.[1564]

Indeed, probably due to the pressure from religious groups, civil libertarians, and members of Congress, the federal BOP decided to return religious materials that had been purged from prison chapel libraries because they were not on the bureau's list of approved resources.[1565] However, this was with the exception of "any publications that have been found to be inappropriate, such as the material that could be radicalizing or incite violence."[1566] Hence,

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MCGEROGE LAW REVIEW 803 (2009), p. 806.
[1557] Id.
[1558] Laurie Goodstein, *Critics Right and Left Protest Book Removals* THE NEW YORK TIMES, 2007.
[1559] Id.; Also see: Verner, MCGEROGE LAW REVIEW, (2009). P. 806.
[1560] Brown v. Lindsay, Not Reported in F. Supp.2d, (United States District Court, M.D. Pennsylvania Aug 1, 2008).
[1561] Id. at. 2.
[1562] Id. at. 1
[1563] Id. at. 2.
[1564] Id.
[1565] Verner, MCGEROGE LAW REVIEW (2009), p. 806.
[1566] Banerjee, THE NEW YORK TIMES, 2007 (quoting a spokesman of the BOP, having explained this policy to the New York Times in an email).

the BOP stuck to the core idea that radicalization could be prevented by the careful selection of literature, although it is not evident how the removal of texts will reduce radicalism. As studies have shown, radicalism in prisons spreads predominantly through other inmates, not books of chaplains.[1567] It is questionable whether suppressing radical literature in libraries keeps radical literature out of prison or whether prisoners themselves will simply create more.[1568] Whether inmates indeed turn radical in their religious viewpoints seems to be a complex development, influenced by a variety of factors. If reading inflammatory, militant, and revolutionary stories involving murder and holy war would be directly leading to radicalization, the primary scriptures such as the Bible, New Testament, and Quran would need to be banned too.[1569] Disallowing some books, while allowing scripture in whatever version, overlooks the fact that it is these texts that give rise to the material that will later be censored.[1570]

In fundamental terms, censoring of works is at odds with deeply held notions of free speech and beliefs in the marketplace of ideas where more ideas, not fewer, are considered better. From the prisoners' perspective, a ban of requested readings is a threat to the little autonomy they have. Whether such a paternalistic approach can indeed protect from radicalization or, to the contrary, possibly trigger a stronger focus of the inmates "to the forbidden" is difficult to answer. According to some observers, the bias towards some religions of the lists of the BOP could push Muslim inmates into the role of radical extremists.[1571] Furthermore, it is possible that such literature might actually have the effect of minimizing radicalism by repulsing Muslims in prisons; the way Muslims on the outside are repulsed by groups like Al-Qaeda. In other words, censorship might forsake a normalizing effect it could have on other Muslims.[1572]

[1567] SpearIt, *Religion in Prison in* RELIGION IN AMERICAN CULTURES: TRADITION, DIVERSITY, AND POPULAR EXPRESSION (Luis León, Gary Ladman ed. 2014), p. 1169.
[1568] Id.
[1569] Id. at. 1169.
[1570] Id. at. 1170. But see: Supporting the BOP's position, one report has advocated that Saudi-sponsored English editions which interpolations be prohibited: Under no circumstances should these editions of the Quaran be certified for use in American corrections institutions. They have the undeniable effect of conveying to the reader that Islam is fundamentally hostile to Jews and Christians, that this hostility is intrinsic to its scripture, indeed is mandated by its scripture. (Center for Islamic Pluralism 2008, 23).
[1571] Goodstein, The New York Times 2007.
[1572] SpearIt, *Religion in Prison* (2014), p. 1169.

3. Summary

The first significant difference between the two legal systems in the handling of religious objects and writings is caused by the more general legal framework for personal possessions. In Germany, inmates have comparably great freedom to decorate their cell and to use and possess personal items, whereas religious objects and writings for inmates in the U.S. are often the only personal possessions. The chapter shows that the liberal understanding that characterizes the German prison system and the right for personal possessions does not necessarily extend to the right to own religious objects and writings. Instead, there is no settled practice in the handling of religious objects so that prisons produce different outcomes. It is striking, in comparison to U.S. prison law, that there it is not regulated whether the object or writing must be of particular significance for the practice of religion. Although it is generally acknowledged that the freedom of religion under Art. 4 I, II BL protects those religious practices which are only regarded as obligatory by the individual, it has not yet been established by the courts or by the legislature whether this interpretation also applies to the right for religious objects and writings in the prison domain.

Considering that the right for religious objects and writings in prison quickly converts from a defense right against the state to a positive right vis-à-vis the state, one could argue that further limitations may be justified. In most cases, the accommodation of religious objects and writings comes with increased costs or increased administrative effort. The protection of religious freedom must not be limited solely because of the effort required by the state for the accommodation of religion. Only where the exercise of religious freedom calls into question the functioning of the institution, i.e. the safe and orderly placement of inmates, or collides with other interests or rights of constitutional rank (such as the bodily integrity of third parties), can it be limited.[1573] This principle was violated in the judgments in which the court argued that it could not see how the desired object or writing was of relevance for the inmate's religious practice, such as in the joss-stick case.

As shown in this chapter, it is no longer required under the RFRA that the respective religious need or practice of the inmate is "mandated" by his or her religion or is a "central tenet" of

[1573] The doctrine of the *besondere Gewaltverhätlnis* is explained and discussed in the first part of this chapter in chapter IV, 3.a.

belief. Instead, under today's RFRA standard, basically every religious practice and need is considered worthy of protection in the federal prison system. Doctrinally, this broad definition of religious practice reinforces the protection of the inmate's right to religious objects and writings. However, it was also shown that there are still far-reaching possibilities to restrict the right of inmates to religious objects and writings. First, like with the protection of all other forms of religious practice, inmates must show that his or her religious beliefs are sincerely held. Only when the sincerity of religious beliefs can be shown, is the inmate's religion entered into the SENTRY-record, a requirement for religious practice in the federal prison system.

Second, for an inmate's claim under RFRA, it must be demonstrated that the prison's practice of banning a religious object and writing substantially burdens the religious practice of the inmate. Despite the broad definition of the religious freedom of RFRA, this is difficult for inmates to show, especially if the religious inmate is already in possession of religious objects and/or writings. The lists used in the U.S. federal prison system, which determine which relevant objects and writings are to be approved in principle for inmates of each religion, can pose a challenge for inmates in this regard. In case prisons refuse or ban the use and possession of objects and writings not on the list, it is difficult for inmates to demonstrate that the ban or refusal substantially burdened their religious practice cases because of other available religious objects and books.

A potential disadvantage of these lists is that the accommodation of objects and literature not on the list is fairly unlikely. As a consequence, the BOP decides which version of the Quran and which type of prayer rug Muslim prisoners use and which rosary is used by Christian inmates. Those objects and writings selected for the lists used by the BOP can be insensitive to the different needs of members of one religion. However, the use of structurally anchored lists for religious objects and literature has decisive advantages which outweigh the disadvantages. Lists establish a minimum standard for the accommodation of religious objects and writings and ensure that religious inmates, even belonging to a smaller religious minority, have access to religious objects and writings. Within the German system, it can be seen that the religious objects and writings of religious minorities are "invisible" in the procedures of prison life. Inmates are not reliably informed about their respective rights, nor are there

corresponding court decisions that secure the rights of inmates in this regard. Even for the large number of Muslim inmates in German prisons, it has not yet been established that they have the right to use a prayer rug. Lists would also have a symbolic meaning as they would record the religious needs of minorities and make them visible in the course of everyday prison life.

But even the use of lists cannot prevent unequal treatment between religions. Some rights, such as the wearing of turbans, are allowed to Sikhs, but not to Muslims in the U.S. federal prison system. This practice was justified by the court, not only with the inherent differences between both religions (the courts argued Muslim inmates could also wear a Kufi), but also with the administrative effort that would have been caused if Muslim inmates would also wear turbans because they made up for a large number of the prison population. However, the unequal treatment, as this example shows, is not caused by the use of lists – they only mirror the unequal treatment. To combat inequality, it can certainly be helpful if lists make discrimination visible. Importantly, lists must not be understood as closed lists but as extendable lists.

The constant struggle of keeping security and financial efforts low triggers difficult legal questions in the U.S. as well as in Germany for the practice of religion: how much control effort can be expected by the prison institution in order to compensate for increased risks that religious objects and writings may cause? How freely should inmates be allowed to choose their religious personal possessions? These questions concern the balancing of rights. In Germany, as seen, only objects and writings which collide with the “functioning of the penal system” can be banned; increased control efforts alone are not sufficient to limit the religious liberty of inmates. However, this interest of constitutional rank still lacks concrete shaping by the courts for the context of religious objects and writings. Here, also the procedural hurdles are a decisive problem when it gets impossible for inmates to make important claims, such as the request for bringing his prayer rug to work. In the federal prison system of the U.S., under the RFRA standard, most importantly security interests of the prison get balanced with the inmate’s religious freedom.

Overall, the RFRA provides more favorable results for prisoners than the *Turner/O'Lone* standard under the Free Exercise Clause. It remains a problem though that the legal standards are being applied inconsistently, as illustrated in *Sasnett v. Sullivan*. The few cases from the German prison system give the impression that the scope of protection of freedom of religion has been restricted together with the increasing religious diversity of inmates. Whereas in earlier cases a broad understanding of religious freedom was established, in the latter cases a different trend emerged. This development must be critically observed in the future.

The notion of Islam as a security threat plays a role for the arguments used by courts in Germany and the U.S. The fact that the turban worn by Muslims is likely to give the impression that there are ties to the Taliban is one of the considerations for the court to prohibit the turban for Muslim inmates. If violence and war are depicted in books about Islam, this is the reason to prohibit these works, both in the German and American context. The reasons for the further justification of the denial, however, differ. According to the rules of the German Prison Act, it must be demonstrated that the object or writing causes a threat to the rehabilitation of the prisoner and/or endangers the functioning of the institution. In the federal system of the U.S., it is only referred to as the maintenance of safety and order (and budgetary considerations). In particular, the BOP's Standardized Chapel Library Project, which comprised a comprehensive book purge from chapel libraries, reveals that little is ultimately known about the dangers that can be caused by the content of certain reading material and the mechanisms of radicalization. The rational of the BOP's project is that the banning of certain materials that glorify violence could prevent inmates from becoming violent or radical. Indeed, there are good reasons for controlling the access of inmates to books in which violence and war occur or are glorified. However, serious radicalization processes are way more complex and difficult: the existing but often exaggerated danger of the radicalization of (Muslim) inmates is not controllable by the banning of certain books.

Part 3: Comparative Conclusion

This thesis set out to explain the accommodation of religious needs and practices in prisons in Germany and the U.S. In doing so, it hoped to provoke a reflection on the relationship between Christianity and minority religions and to identify the broader institutional, historical, socio-religious, and constitutional dynamics which have shaped the accommodation of religious needs and practices in prisons. In the first step, this conclusion recapitulates the different degrees of accommodation for religious minorities in prisons in Germany and the U.S. (1). In the second step, it outlines the factors that explain the differences in religious accommodation in German and U.S prisons under the reference of the a priori identified variables (2). Thirdly, this comparative conclusion addresses what lessons can be learned from the transatlantic comparison for future projects investigating similar questions and demonstrates that the Christian bias requires further research in other modern secular states (3).

1. Different Degrees of Accommodation in Prisons in Germany and the U.S. and the Issue of the Christian Bias

The comparison of the religious practices of majority and minority religions in German and the U.S. prisons showed that religious practice is easier for Christian inmates in both systems when compared to minority religions. By revisiting the accommodation of chaplaincy, religious diet, and religious objects and literature in prisons in Germany and the U.S., the Christian advantages are briefly illustrated.

Depending on the specific religious practice or need, and the circumstances in the individual case, the prison's status quo may directly or indirectly discriminate against religious minorities. In other cases, the unequal treatment may be justified, for example, because the accommodation endangers third parties in prison, or it is disproportionately expensive.

a. Chaplaincy

The chaplaincy programs in U.S. federal prisons structurally accommodate the diverse needs and practices of religious inmates. As shown, it is not questioned whether it is (legally) necessary to accommodate religious services for inmates of all different religions represented in the prison institution. According to the BOP's guidelines, all inmates must have equal opportunities to attend services of their religion, and inmates must be informed about their

religious rights. One chaplaincy program operates all different denominational services, and organizing religious diversity is one of its main tasks. Because of the existing differences between different religions, this approach cannot eliminate all equality concerns though. For example, Native Americans have common community rites that cannot be practiced in prison because they involve the consumption of banned substances or because they require presence in nature. Common Christian rituals are comparably easy to practice; individual prayers do not generally require objectively dangerous attire, and the communal Sunday prayer can be practiced relatively easily in the premises of the prison. U.S. federal prisons, as envisaged under the guidelines of the BOP, employ chaplains of different religions. Accordingly, they serve as chaplains of all inmates irrespective of their religion. However, the hiring freeze of Muslim chaplains in the last decade is likely an example of Muslims being depicted as a threat to public order by the authorities. In German prisons, the content and structure of religious services are so strongly oriented towards Christianity that the religions that deviate from this model, such as Islam, have difficulties getting incorporated. Some prisons accommodate chaplaincy for minority religions. However, there is no firmly institutionalized chaplaincy program for religious minorities, and it falls mostly under the discretion of the authorities to accommodate the chaplaincy of religious minorities. So far, there are no permanently employed, full-time non-Christian chaplains working in German prison institutions.

b. Religious Diet

The privilege of Christianity expresses itself differently when it comes to a religious diet in prisons. Here, in particular, the inherent differences between the religions come to bear. Christianity knows hardly any binding dietary rules for its adherent so that it is relatively easy for prisons to fulfill the dietary requirements of Christian inmates. This is different in, for example, Islam, Judaism, and Buddhism, which have more demanding dietary requirements. The federal prison system in the U.S. largely accommodates the dietary requirements of minority religions. The case law and empirical data show, however, that there are several cases in which inmates belonging to a religious minority are denied access to religious food. A frequent point of contention is the prerequisite for inmates to go through a procedure to get onto the religious diet. Financial interests certainly play a role here, too, since alternative religious diets usually cause higher costs. In Germany, there is no positive right for inmates for a diet congruent with religious dietary laws. Many institutions now offer an alternative menu

for Muslim inmates regularly, but inmates still rely on the discretion of the authorities. Moreover, it has not yet been established what this menu is called *(Muko? Normalkost ohne Schweinefleisch?)* and who is an eligible candidate for the menu *(only Muslim inmates? All inmates?) Inmates with health issues?)*. These terminological ambiguities also result from the structural uncertainty as to how prisons should deal with the diverse needs and practices of inmates and how much additional effort and costs the state must bear.

c. Religious Objects and Writings

In the case of religious objects and writings, prison law formalistically in both the German and the U.S. prison system stipulates the right of inmates of all religions to use and possess religious objects and writings. In practical terms, however, German prisons, in particular, do not reliably provide the objects and writings typically used by Muslims. Although the German prison system is known for its otherwise liberal treatment of personal belongings, even religious objects that are not objectively dangerous, such as the prayer rug for Muslims, are only approved in some prisons, but not in others. In the federal prison system in the U.S., the BOP uses lists to determine which objects and literature are to be allowed in principle for inmates of each religion, which ensures a certain standard of religious freedom and equality. As shown, inmates are not often successful with more individualized claims for religious objects and writings and to demand objects and writings not accommodated structurally through the lists.

2. Which Legal and Extra-legal Variables Account for the Differences in Religious Accommodation?

As the short summary above illustrates, the different factors causing the advantages of Christian inmates as compared to minority religions in prisons are not mutually exclusive but overlap and complement each other. One explanatory dimension, which accounts for the differences in religious accommodation, are the inherent differences that exist between religions. The examinations in the previous chapters have shown that the accommodation of needs and practices of religious minorities is often associated with higher administrative effort and costs than is caused by the religious practice of Christians. The dietary requirements of many religions, for example, Islam, Judaism, and Buddhism, are more demanding than those

of Christianity. The same applies, for instance, to prayer times that in the case of Christianity can be integrated more flexibly into the strictly clocked daily schedule of prisons than in case of some other religions (many Muslims, for example, pray several times a day). Because the higher administrative and financial demands for the accommodation of religious minorities play into the balancing between freedom of religion and the state interests in security and order, religious minorities can be more likely affected by restrictions on their freedom of religion. Although disproportionately high costs can indeed justify not to accommodate minority religions, this unequal treatment raises equality concerns. When the structural preconditions may unequally facilitate the practice of Christian religion compared to other religions, this can discriminate against minority religions indirectly.[1574]

The following explains, in the light of the variables a priori identified in the Introduction, the differences in religious accommodation. The first section discusses the differences emerging from the institutional and regulatory differences in the prison domain of the two countries (a). The second section scrutinizes the differences and similarities in the constitutional traditions of each country, which account for the differences in religious accommodation (b). The third section shortly discusses the relevance of societal religious differences for religious accommodation in prisons (c).

a. Institutional and Regulatory Differences of the Prison Systems in Germany and the U.S.

As shown in this thesis, the German prison system is generally more liberal than the U.S. federal prison system. The permissive environment in German prisons has a bearing on the religious freedom of inmates. For example, German inmates generally have private prison cells and, therefore, have plenty of opportunity to engage in individual religious activities, such as prayers. This is different in U.S. federal prisons where inmates are usually boarded with other inmates in one cell and, hence, private space is minimal. However, as has been shown for the religious needs and practices specifically studied in this thesis, the liberal climate of the German prison system by no means extends to all religious needs and practices of religious minorities in prison. Although German inmates are relatively free to possess private property, religious items, especially those belonging to Muslims, are banned without them causing obvious security risks. Paradoxically, as the example of the U.S. federal prison system shows,

[1574] This argument is explained further under Part 1, Chapter IV, 2.bb.i.

the restrictive environment which provides explicit religious freedom through religious accommodation may, in some instances, lead to a better standard of religious freedom for religious minorities than the overall liberal German prison system.

The lack of structural safeguards for religious freedom and equality of religious minorities in German prisons results not least from the current administrative regulations. As has been shown in the course of this thesis, the administrative framework is highly relevant for religious practice in prisons. Jahn, therefore, speaks of the administrative juridification *(Verwaltrechtlichung)* of religion.[1575] With the artificial word "Verwaltrechtlichung", she refers to two arguments. First, it signifies the process of the administration of religion through law. Second, it describes that not only constitutional law, but also administrative law, must be taken into account when determining the relationship between religion and law.[1576] In this light, the administrative framework is of particular importance for the religious practice of minority religions in prisons. While detailed regulations characterize the U.S. federal prison system, the prison authorities in German prisons have considerable discretionary power according to the administrative framework. As shown in the course of this thesis, this difference has historical roots.

Prisoners' rights in Germany were formed in a political and legal culture shaped by constitutional rights. As shown, the prison reforms of the 70s were the direct result of the horrors of the Nazi-Regime and importantly linked to the effort to expand and protect the rule of law.[1577] Since then, the prison system has been shaped by the ideal of the comprehensive protection of fundamental rights, which should also apply to inmates after the abolition of the special relationship of subordination between inmates and the state. These reforms introduced humane prison conditions and improved the fundamental rights status of inmates. Indeed, an important argument for these constitutional justice reforms was the ideal that all people should be equal before the law. However, this requirement was influenced less by the goal of meeting the specific needs of a diverse prison population than by the abstract ideal of the rule of law. In this light, it is not surprising that equality was understood as formal equality

[1575] JAHN, Götter hinter Gittern, Die Religionsfreiheit im Strafvollzug der Bundesrepublik Deutschland 2017, p. 380-385.
[1576] Id. at. 381.
[1577] See Part 1, Chapter II, 1.b.

and that the existing differences between people (e.g., because of their gender, religion, origin, etc.) were hardly recognized in the ideals of the reforms at that time.

In respect of the rule of law, part of the reforms was also to give power to the new post-war prison administration. Part of this power manifested itself in the independent application of administrative prison law. However, the administrative regulations did not address the challenges that can arise from the needs and practices of a diverse prison population. In other words, the reforms did not establish a regulatory framework to deal with (religious) diversity of inmates, like for example, the chaplaincy programs in the federal prisons in the U.S. which aim to manage the religious diversity of the prison population. Against the backdrop of the reasonably homogenous prison population at the time, the focus on religious diversity may not have seemed necessary. However, such an administrative framework to monitor and manage the diverse needs and practices of a plural prison population is lacking today. It has long been evident that dealing with equality issues requires structural measures.[1578]

In the regulatory guidelines of the BOP, the religious diversity of inmates plays an important role. This may also result from the fact that the protests of religious minority inmates sparked the significant prison reforms in the 1970s in the U.S. Influenced by the Civil Rights Movement, they raised their voices and demanded better prison conditions and the strengthening of their individual and group rights. Unlike in Germany, the protest was not driven by arguments of the legal academy to strengthen the rule of law but was intended to improve the status quo inside the prison institution and the individual living situation. The protests did not revolutionize prison conditions to the same extent as the fundamental reforms in post-war Germany. Rather, the fundamental rights status of inmates was gradually improved. As the protests were conducted in no small measure by Black Muslims, their claims were explicitly concerned with religious equality and discrimination. Even though the U.S. Supreme Court – like equivalently the FCC in Germany – played a crucial role in improving the fundamental rights status of inmates, the prison system was importantly reformed from the inside. The protest of inmates caused immediate changes in the daily prison administration and institutional climate.

[1578] The equality doctrine is discussed in more detail under Part 1, Chapter IV, 2.

The numerous technical references and guidelines of the BOP comprise very detailed provisions, especially for the religious freedom and equality of inmates. Although the accommodations provided according to the guidelines cannot guarantee enforcement of religious freedom and equality in all individual cases, it contributes to equal rights of religious minorities. As has been shown, the federal prison system of the U.S. structurally anchors religious diversity. Prisons provide a point of contact to inmates where they can communicate their religious needs and practices and make respective requests - regardless of their religious affiliation. The state largely recognizes that the prison system must enforce the religious freedom and equality of inmates. Religion is not understood as an interest of the inmates that recedes behind the status as an inmate but instead as a constitutionally protected part of the identity of inmates, which requires accommodation. According to German prison law, inmates do not officially register under their religion because it violated the negative religious freedom of inmates. This argument, which is comprehensible at first sight, fails to recognize that it is practically impossible to exercise religion without state participation. Instead, the lack of structurally visible anchoring of religious diversity in the prison's everyday life prevents the enforcement of religious freedom and equality of inmates.

The relevant provisions for chaplaincy, religious diet, and the use and possession of religious objects and writings under German prison law all underlie the discretion of the prison administration. More generally, under German administrative law, discretion can arise in two forms: either as discretion *(Ermessen)* or as "evaluative leeway" *(Beurteilungsspielraum)*.[1579] Where a legal term is included in the legal consequences of a norm and where this term gives rise to the possibility of an administrative decision being made (e.g., "may", "can"), a measure of discretion, i.e., Ermessen arises.[1580] Where an intermediate legal term *(unbestimmter Rechtsbegriff)*[1581] is included in the statutory conditions for administrative action, generally, a measure of "evaluative leeway" arises on the part of the administrator.[1582]

A significant number of Prison Act provisions contain indeterminate legal terms which form part of the conditions for administrative action. These either qualify prisoners' rights or make

[1579] LAZARUS (2004), p. 100.
[1580] H. Maurer, Allgemeines Verwaltungsrecht (11th edn, Beck, Munich, 1997) p. 146 ff.
[1581] For example "fundamental religious writings" (cf. Section 53 II federal Prison Act); religious objects are to be provided "to a reasonable extent" (cf. 53 III federal Prison Act).
[1582] H. Maurer, Allgemeines Verwaltungsrecht (11th edn, Beck, Munich, 1997), p. 129 - 139.

their enforcement conditional. As the example of the access of inmates to legal recourse clearly shows, this discretion of the administration carries the risk that the rights of inmates are not enforced despite them being stipulated under the constitution.[1583] As elaborated in the course of this thesis, this is also the case with religious freedom and equality: despite the fact that the constitutional framework protects the fundamental rights of inmates, the discretion of the administration may prevent the enforcement of inmates' rights.[1584] In other words, the high discretionary power of the prison administration bears the risk of producing a void between the status of fundamental rights and the legal reality inside prisons. Clear guidelines for prison administration, such as lists for religious objects and literature that are to be accommodated, would be an important tool to contribute to religious equality and freedom of minorities. The structural anchoring of the religious needs and practices of minority religions would be a visible recognition of their rights.

b. Constitutional Traditions: State-Religion Relationship & the Notion of Religious Equality and Fairness

One of the constitutional differences initially identified between Germany and the U.S. is the different relationship between state and religion in both countries. While the German constitution stipulates the cooperation between the state and religious communities, the U.S. non-establishment principle under the First Amendment demands the separation between state and religion. But how does this difference account for the differences in religious accommodation in prisons? In the prison domain, state-religion relations follow their own logic: Since inmates cannot practice their religion without state assistance, prison authorities in the U.S. are also directly involved in the organization of chaplaincy programs. The resulting breach with the lines of the Establishment Clause cannot be resolved. For the German prison system and its chaplaincy, the cooperation between religious communities and the state is constitutionally stipulated. With regard to the consideration of the religious needs and practices of minority religions, however, it was shown that it is difficult for communities of religious minorities to establish themselves in the German constitutional cooperation model. It is not the constitutional requirement of cooperation between state and religious communities that leads to chaplaincy programs for religious minorities. Instead, local modes

[1583] See Part 1, Chapter IV, 3.a.

[1584] Jahn also argues the institutional logic is decisive for the accommodation of religion, JAHN, Götter hinter Gittern, Die Religionsfreiheit im Strafvollzug der Bundesrepublik Deutschland 2017, p. 382.

of cooperation between individual prisons and chaplains from religious minorities may lead to the accommodation of chaplaincy for minorities.

A crucial component for the status quo of religious minorities in prisons in Germany and the U.S. is the constitutional doctrine of religious freedom and equality. As described above, the general question arises to what extent the constitutional requirement for the fundamental rights status of inmates within prisons is taken into account. Equally important is the more specific issue of the doctrine of religious freedom and equality, which has generally developed within each countries' constitutionalism. Indeed, religion in prison is special due to the totalitarian character of the prison institution, its specific historical development, and the relevance of security interests. At the same time, however, the broader constitutional context affects the prison domain. The doctrine of religious freedom and equality that was shaped over time in the specific context of each country's history is also reflected inside the prison institution.

It was stated in the Introduction that both the German as well as the U.S. constitutional systems protect the religious freedom and religious equality of the people. But as this thesis has shown, the religious freedom and equality doctrine of each country shows important differences, especially when it comes to the recognition of religious minorities. Against this background, the differences between the accommodation of religious diversity in prisons in Germany and the U.S. are, to some extent, explained by the different notions of religious equality and fairness in each countries' constitutionalism.

German *Religionsverfassungsrecht* has not yet developed an equality oriented approach to religion that can capture the complexity of equality questions and that sensitively deals with the differences between different groups of society. As shown, one explanatory ground for this underdeveloped equality doctrine in the context of religion is the empirically religious homogeneous society that has shaped Germany in the mid-20th century. It was not in post-war Germany's DNA to be an immigration country; hence there is no historically developed legal culture, language, and legal toolbox to address religious equality questions and to tackle religious discrimination.[1585]

[1585] This observation refers to the developments after the adoption of the Basic Law and the social changes which

As a consequence of the horrors of the Nazi-Regime, there was a need to create a society of equals. Jews and further groups who were killed or had to fear death during the Nazi era should no longer be seen as "different", but "the same" as the majority. Human dignity became the highest constitutional value of the new German Basic Law. However, the climate of reconciliation did not change the fact that resentment and rejection towards certain groups of society continued to exist. Based on the example of racial discrimination, others have shown in light of Germany's history that there is no German constitutional culture of naming racial differences in legally relevant terms.[1586] Hence, the FCC has not yet developed a critical legal framework to address the full range of legal issues arising from racial, religious, or other differences between people.

Not naming religious differences bears the risk of not tackling the disadvantages they may cause for minorities but merely making them invisible. Not naming the differences within a suitable legal framework likely serves the male, white, and economically privileged majority society that does not experience discrimination.[1587] In the case of conflicts triggered by religious needs and practices that are difficult to reconcile with the majoritarian made structures (e.g. the requirement of prayers during the day, religious headgear, etc.,), it is a common argument that "others" must adapt.[1588] Instead, cultural diversity policy requires to ensure that citizens can live together in their differences. The religious freedom and equality doctrine must adapt to the increasing religious diversity in that it becomes more functional to capture new equality conflicts and to protect religious minorities from indirect discrimination. One way to ensure this is to take into account the concept of reasonable accommodation.

In the U.S., unlike in Germany, it is part of the constitutional tradition to refer to common grounds for discrimination and to develop compensatory mechanisms, such as affirmative

followed. It is seen that Germany emerged from multicultural and multilingual principalities and that, in this sense, Germany has not only become plural through the migration of the 20th and 21st centuries, cf. Naika Foroutan, "Wer Deutschland bewohnt, ist Deutscher", Berliner Zeitung, 2019 *(available at* https://www.berliner-zeitung.de/politik-gesellschaft/wer-deutschland-bewohnt-ist-deutscher-li.2792*, last accessed 30.08.2019).*

[1586] Ursula Moffitt, et al., "We don't do that in Germany!" A critical race theory examination of Turkish heritage young adults' school experiences, ETHNICITIES (2018).

[1587] Mathias Moschel, Law, lawyers and race: critical race theory from the United States to Europe, EUI Thesis, Law Department 2014, Introduction.

[1588] Verena Benoit, Yasemin El-Menouar, Mar Helbling, Zusammenleben in kultureller Vielfalt, Vorstellungen und Präferenzen in Deutschland, Bertelsmann Stiftung, 2018, p. 21- 34.

action and religious accommodation. The historical origin of the U.S. as a country of immigration has contributed to a notion of religious equality and fairness that is aware of the pitfalls of a merely formalistic understanding of equality. Religion is important in U.S. constitutionalism and a constituent of American individualism. The idea that all must equally have the chance to strive for their religious identity is deeply rooted in U.S. constitutionalism. That said, societal cohesion is once more under threat in current times. Under the Presidency of Donald Trump, terrorist attacks against Muslims and Jews are on the rise, and hatred is spreading across the country.[1589] It remains to be hoped that the protests against the attacks and the commitment of those who promote an inclusive and peaceful society in the U.S. can prevail.

c. Societal religious differences

Historically, Germany has not only become plural through an increase in immigration over the last century; Germany emerged from a multitude of principalities, and in this sense, has always been multicultural, multilingual, and multsireligious.[1590] The promises of the German Basic Law of 1949 also build on the image of a plural society; it guaranteed equality and freedom of religion. Nevertheless, the socio-religious composition of society in Germany has changed considerably over the last decades, and – as shown – the constitutional doctrine capable of dealing with this new multiculturalism was and is underdeveloped. In the U.S., the narrative of a homogeneous society is absent from the outset. Instead, the identity of U.S. American society is essentially built on the idea of a multicultural society. There is no history of any comprehensive legal and cultural privileging of a single religious tradition which shows in the notion of religious equality and fairness.

3. What do we Learn for Future Projects Investigating Religious Freedom and Equality in the Modern Secular State?

The exploration in this thesis is best viewed as "explanatory rather than conclusory"[1591]. It ends as it began, with the suspicion that there is more to discover in the broad constitutional

[1589] Sam Levin, Police thwarted at least seven mass shootings and white supremacist attacks since El Paso, The Guardian, 2019, available at: https://www.theguardian.com/world/2019/aug/20/el-paso-shooting-plot-white-supremacist-attacks *(last accessed 30.08.2019).*
[1590] Foroutan, "Wer Deutschland bewohnt, ist Deutscher", Berliner Zeitung, 2019.
[1591] LAZARUS (2004), p. 248.

conceptions of religion. In this sense, this thesis can be viewed as a preliminary to questions about the conception of religion in other countries and domains: how are religious diversity and the constitutional notion of religion modeled in constitutional orders other than Germany and the U.S.? Are these notions detrimental to religious minorities – and if yes – how and why?

One of the conclusive findings of the transatlantic comparison in this thesis is that the differences in dealing with religious minorities cannot be explained by the law alone. One must look for explanatory variables that go beyond the law.

a. The Relevance of the Domain in which the Law gets Applied

As was shown in the course of this thesis, the institutional and regulatory differences in history and today of the prison domain in Germany and the U.S. have a complex effect on the consideration of the needs and practices of religious minorities. Contrary to what might have been assumed initially, the liberal climate of the German prison system does not translate into an accommodation-friendly approach. Because of the administrative regulations, which give the prison authorities much discretion when deciding about the needs and practices of religious minorities, the negotiation processes for religious minorities about accommodations are subject to a variety of restricting mechanisms. In the U.S. federal prison system, which is generally more restrictive, religious needs and practices of minority religions are given relatively high priority. As shown, the accommodation approach in U.S. prisons leads to a more minority-friendly environment. However, also in the U.S., the prison institution is linked to specifically Christian thought.

As shown, both in the U.S. and in Germany, there is a close historical familiarity between Christianity and the prison institution. The belief in the "man's improvement", i.e., the rehabilitation or resocialization of inmates, originates from Christian thought.[1592] It is, therefore, no surprise that Christian pastoral care is closely linked to the institution of prison in Germany as well as the U.S. This close institutional connection between Christianity and religion can cause structural disadvantages for minority religions. In German prisons, the Christian chaplain belongs to the ordinary staff ever since, not so the counterparts of minority

[1592] BRANDNER (2009), p. 56 et seq.

religions. Although U.S. chaplaincy programs are structurally organized in a non-denominational manner, the connection between prison and Christianity is evident in rehabilitation programs, some of which are supported by the state and follow Christian beliefs.[1593] The status quo created by the majority in the prisons of both countries thus tends - albeit with varying intensity - to make the practice of religion more difficult for religious minorities than for the Christian majority.

The interests of security and order of the state that have to get balanced with the religious freedom of inmates in all cases of religious accommodation have paradoxical effects. On the one hand, they have a restrictive potential for religious minorities since their religious needs and practices may be perceived as particularly dangerous. On the other hand, the security concerns about the radicalization of especially Muslim inmates also trigger the accommodation of Muslim chaplaincy in order to prevent inmates from "radicalizing themselves".

b. The Modern Secular State and the Risk of the Christian-Bias

Constitutions are living instruments, and context is crucial for the development of constitutional doctrine. Political and socio-cultural changes also affect the application of constitutional law as it must be applied in the light of current social conditions. Therefore, our understanding of majority and minority religion is changing in light of the broader societal changes. Here lie both, risks as well as opportunities.

As emphasized in the course of this thesis, the growing body of critical secularism scholarship shows that the Western secular state produces a notion of religion that favors Christianity over minority religions.[1594] Also, German and U.S. constitutionalism – although to a different extent – have incorporated various Christian ideas, values, and symbols in the religious freedom doctrine.[1595] This incorporation challenges the demand to treat all religions equally under the First Amendment of the U.S. Constitution and despite the principle of parity and neutrality in German constitutionalism according to which all religions must be treated

[1593] SULLIVAN, Prison Religion: Faith-Based Reform and the Constitution. 2009.; Sullivan, HISTORY OF RELIGIONS (2008).
[1594] Most importantly, see under Part 1, Chapter I, 1.
[1595] For the U.S., see: Rosenfeld. 2014. P. 105 (citing Greenawalt, CARDOZO LAW REVIEW, (2009) p. 2383/ For Germany: Yurdakul, SOCIAL INCLUSION (2016)).

equally. Especially in Germany, there is a risk for religious minorities being discriminated against under religious freedom doctrine.[1596] As the comparison in this thesis shows, however, the law is also a valuable tool to strengthen the religious freedom of minority religions. The concept of religious accommodation, originating from U.S. constitutionalism, protects religious minorities and tries to compensate for the disadvantages arising for minorities as compared to the majority. Whether religious freedom as a whole is more detrimental or advantageous for religious minorities cannot be concluded here. This thesis, as previously shown, understands the law as an essential instrument to enlarge freedom for minority religions by simultaneously recognizing that the state generates a notion of religion that discriminates religious minorities, for example, by depicting Muslims or Jews as threats to public order and safety.

The risk of a Christian bias in the religious freedom doctrine as compared to the needs and practices of minority religions also exists with a view to the religious freedom doctrine in other modern secular states. In order to analyze religious accommodation in light of this risk and to explain the disadvantages of religious minorities under the law whenever they occur, more research is needed. As shown above, such research must look for explanations behind the surface of the law.

Increasing migration, which is predicted to occur due to climate change, food shortages, and wars, will likely lead to increasing diversity in the societies of many countries of the Global North.[1597] This underlines the importance of the question of how the modern secular state deals with the increasing religious diversity of society and what answers the law finds as a steering mechanism to deal with potential conflicts. A widespread misunderstanding seems to be that questions about rights, positions, and privileges not only concern religious minorities and migrants; these questions equally affect other groups, such as women and workers. Therefore, the aim must be to look at society as a whole and to move away from binary coding into "the migrants" and "the natives". It is a dangerous, obsessive notion that

[1596] As shown in several places in this thesis, the religious freedom doctrine in Germany is influenced by Christianity and reflects this influence. See, inter alia, Tabbara, ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR), (2009).

[1597] Hildegard Bedarff, Cord Jakobeit, Klimawandel, Migration und Vertreibung, Studie im Auftrag von Greenpeace Deutschland, 2017, p. 3, 33-35.

the central conflicts in our societies are widely caused by migration and "brought to us".[1598] Germany, the U.S., and other countries would still face problems of social inequality, crime, and infrastructure with no migrants. Ultimately, it is a matter of dynamic negotiation processes of society in which (religious) minorities quite rightly demand the same rights as the established.

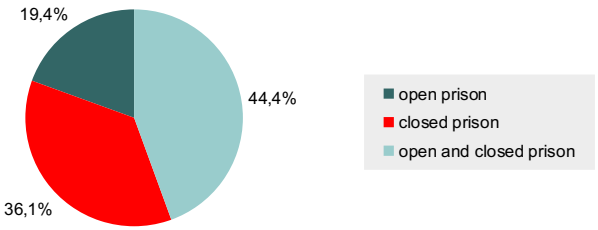
In the modern secular state, the negotiations about rights and status play a pivotal role. The promise is that all have equal rights, not that one side tells the other how to behave. This also applies to the constitutional doctrine of religious freedom. As can be seen above all in the example of the German religious freedom doctrine, we are still far from deciding with the same self-evidence about the religious needs of Muslim Germans as compared to the needs of Christian Germans. In the last headscarf verdict of the FCC, celebrated as progressive, it is still assumed that a danger to school peace could arise from the headscarf and that the teacher must remove it if this danger arises.[1599] In this way, the law manifests the idea that Islam represents a security risk, instead of guaranteeing that the freedom of religion of Muslim teachers in Germany indeed enjoys equal protection under the Basic Law. Granting religious minorities the same freedom of religion as the majority requires in some cases, as the U.S. religious freedom doctrine shows, to grant exemptions to generally applicable law. Further research on the development of religious freedom and equality in the modern secular state should critically examine the risk of Christian bias in light of religious accommodation and religious exemptions.

[1598] Foroutan, "Wer Deutschland bewohnt, ist Deutscher", Berliner Zeitung, 2019.
[1599] BVerfGE 138, 296 (headscarf II).

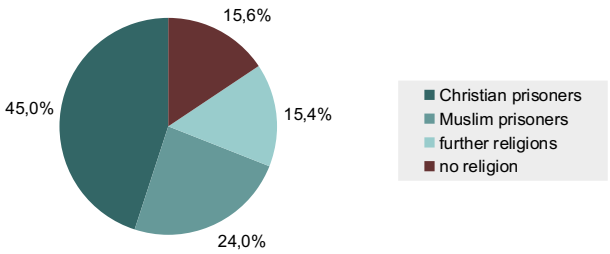
Appendix: Questionnaire “Religious practice in prison”

The questionnaire was sent to the prison authorities *(Anstaltsleitungen)* of German prisons in all German Länder. A total of 36 institutions answered the questionnaire *(question 8 was not answered by one institution).*

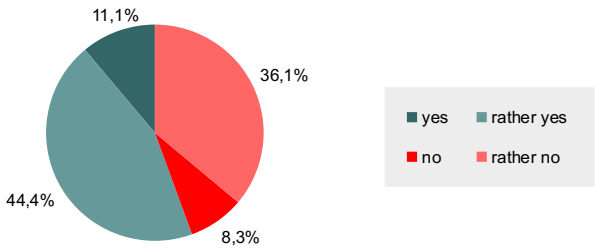
1. Is it an open or closed prison?



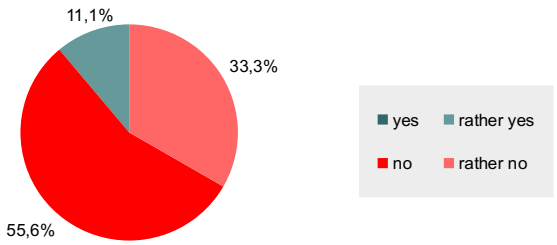
2. Estimates on the religious affiliation of prisoners by the prison management



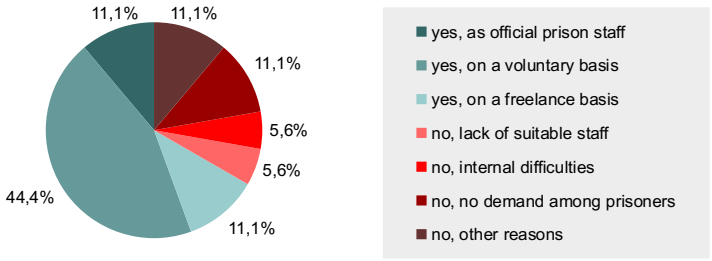
3. Has the topic of religious practice gained in importance in the institution as a whole in recent years?



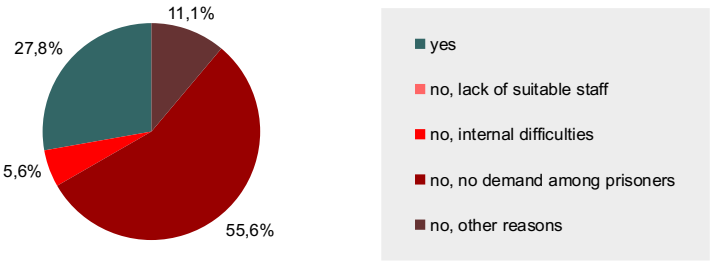
4. Does religion cause conflicts between the prisoners and the prison management?



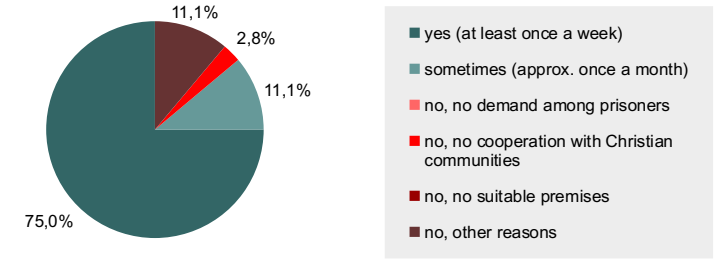
5. Are there any Muslim chaplains working in the institution?



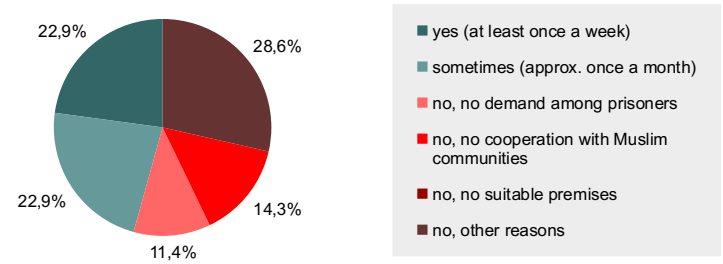
6. Are there chaplains of other religious communities (besides Christian or Muslim) working in the institution?



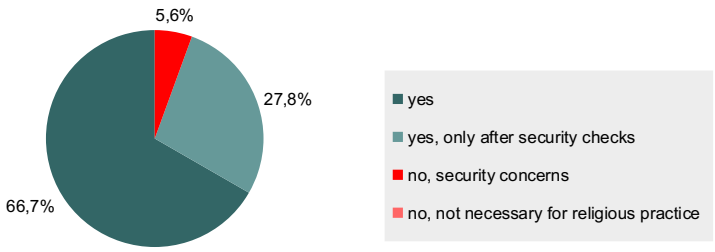
7. Do regular Christian worship services take place that enable communal prayer?



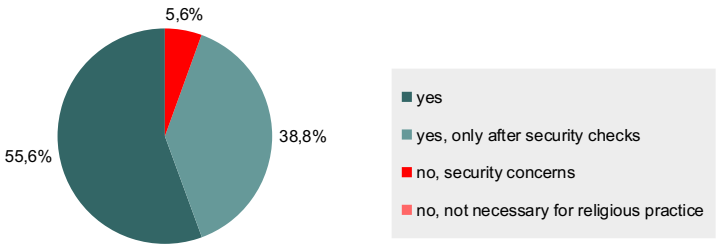
8. Do organized Friday prayers or other community prayers for Muslim prisoners take place?



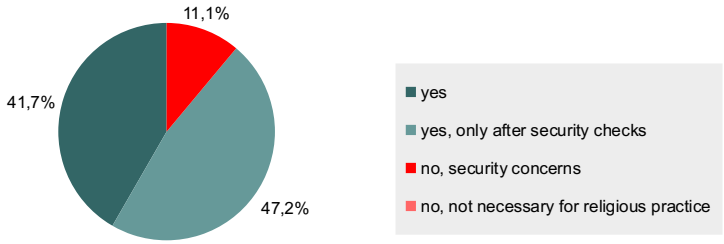
9. Are prisoners allowed to possess a Bible?



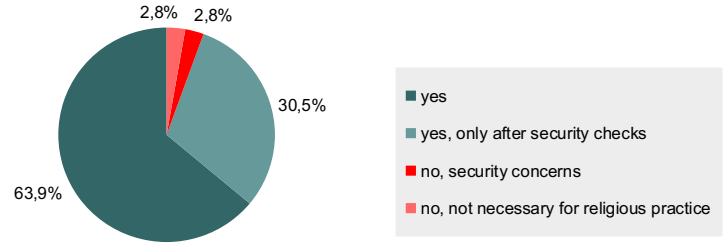
10. Are prisoners allowed to possess a Quran in German translations?



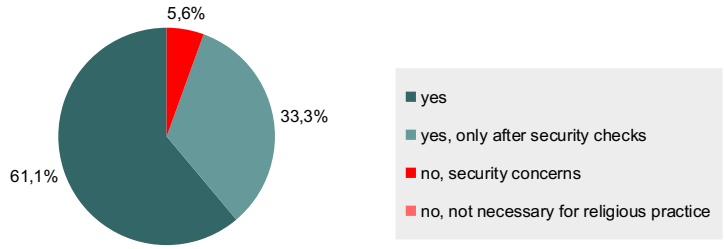
11. Are prisoners allowed to possess a Quran in Arabic?



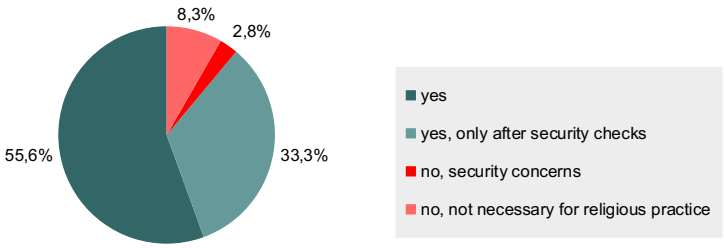
12. Are prisoners allowed to possess a Christian cross?



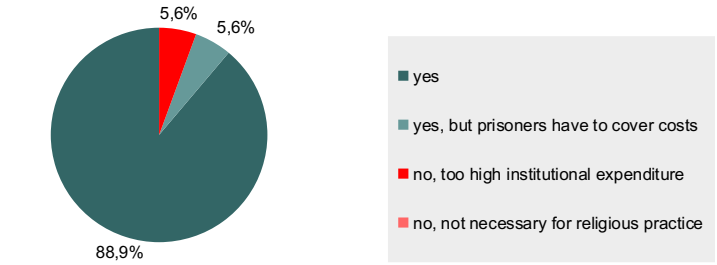
13. Are prisoners allowed to possess a rosary?



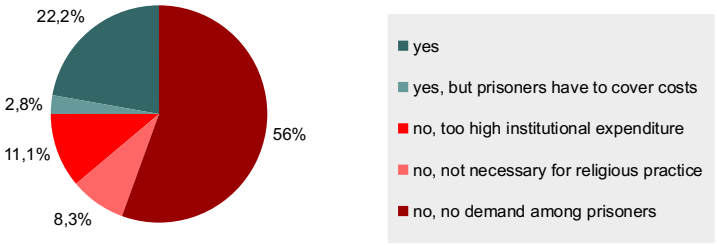
14. Are prisoners allowed to own a prayer rug?



15. Is a halal diet (MukO) available for prisoners?



16. Are further religious diet options available for prisoners?



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