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

# Freedom to Practice One's Religion Undisturbed (Art. 4 para. 2 of the Basic Law) and Its Limitation in Prison I: No Active Procurement of Halal Food

## Question(s) at stake:

Whether there is an obligation of the state to actively provide halal food to Muslim prisoners.

## Outcome of the ruling:

The state is obliged to offer Muslim prisoners the opportunity to get *halal* food, but it is not obliged to actively procure it for them.

## Topic(s):

- Deprivation of Liberty and Detention Centres

## Keywords:

- Halal
- Prisoners
- Prisons
- Dietary regimes

## Tag(s):

- Right to selfcatering
- halal

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**Country:**

Germany

**Official citation:**

Higher Regional Court Berlin, 2nd Criminal Division, Order of 14 July 2011 , 2 Ws 248/11 Vollz (Kammergericht, Beschluss vom 14. Juli 2011, 2 Ws 248/11 Vollz)

**Link to the decision:**

https://gesetze.berlin.de/bsbe/document/KORE200012013

**ECLI:**

ECLI:DE:KG:2011:0714.2WS248.11VOLLZ.0A

**Date:**

14 April 2011

**Jurisdiction / Court / Chamber:**

Higher Regional Court Berlin (Kammergericht)

**Remedy / Procedural stage:**

Appeal (final)

**Previous stages:**

- Regional Court Berlin, 13 May 2011

**Subsequent stages:**

None

**Branches / Areas of law:**

Criminal Law, Prison Law

**Facts:**

After the prison administration had rejected the application by a preventive detainee in Tegel Prison to provide him with *halal* food, the complainant applied

to the Berlin Regional Court's Criminal Division with Jurisdiction over Execution of Sentences to oblige the prison to provide him with food in accordance with his religious convictions, or alternatively to pay him the money intended for his food. The court rejected the complaint. The complainant filed an appeal against this rejection with the Berlin Higher Regional Court.

## Ruling:

The Higher Regional Court declared the appeal inadmissible because the order of the Regional Court did not contain any legal questions that needed to be clarified. Pursuant to section 21 sentence 3 of the Prison Act, the prison must enable the prisoner to follow the dietary rules of his religious community. The case law of the higher courts has clarified that this provision only provides for a right to self-catering if the prisoner belongs to a religious community with special dietary requirements that cannot be taken into account in prison catering. However, there is no obligation on the part of the prison to actively procure such food for the prisoner. The right guaranteed in Article 4 of the Basic Law to respect for freedom of faith, conscience, and confession is a right of defence against the state; it does not confer any entitlement to a benefit. Therefore, the state has no obligation to provide individuals with the actual possibility to practise their religion, i.e. also with regard to their dietary rules.

## Main quotations on cultural or religious diversity:

- "According to section 21 sentence 3 Prison Act, the prison must enable the prisoner (or detainee, section 130 Prison Act) to follow the dietary rules of his religious community. It has been clarified by the higher courts that section 21 sentence 3 Prison Act only provides for a right to self-catering if a prisoner belongs to a religious community with special dietary requirements and these are not taken into account within the framework of the prison catering; on the other hand, the provision does not contain an obligation on the part of the prison to also procure corresponding food for the prisoner [...]. There are no well-founded constitutional objections to the provision of

section 21 sentence 3 Prison Act. The right to respect for freedom of faith, conscience, and confession under Article 4 of the Basic Law is, as Article 136 of the Weimar constitution (*Reichsverfassung*), which continues to apply under Article 140 of the Basic Law as an integral part of the Basic Law, points out, a right of defence of the individual against the state; in principle, the state is not obliged to actively provide the individual with the *de facto* possibility of practising his or her religion -- which also includes following religious dietary rules". (para. 7)

- "On the contrary, the criminal division with jurisdiction over the execution of sentences rightly considered it sufficient that Tegel Prison -- in accordance with the provision in no. 1 (3) of the administrative regulation to section 21 of the Prison Act -- offers a so-called 'Muslim diet' in which all pork products are replaced by other types of meat, dairy products are selected without gelatine and sauces are made without using pork stock, and vegetarian food is made available. In this way, the prison has taken into account the complainant's right to respect for his freedom of faith, conscience, and confession even beyond the requirements of section 21 sentence 3 Prison Act. In addition, the complainant has the opportunity to purchase foodstuffs -- in particular various types of meat and sausages -- that are '*halal*' (permitted) according to Islamic rules from two suppliers who specialize in Muslim dietary habits and offer a wide range of products." (para. 9)

## Main legal texts quoted in the decision:

- Section 21 s. 3 Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung (Strafvollzugsgesetz) (Act on the execution of prison sentences and measures of reform and prevention involving deprivation of liberty (Prison Act))
- Art. 4 Basic Law

## Cases cited in the decision:

- OLG Koblenz ZfStrVo 1995, 111
- OLG Hamm NStZ 1984, 190
- OLG Karlsruhe Justiz 1979, 108
- OLG Stuttgart order of 27 January 1997, 4 Vas 23/97 -- juris.

## Commentary

### Freedom to Practice One's Religion Undisturbed (Art. 4 para. 2 of the Basic Law) and Its Limitation in Prison I: No Active Procurement of Halal Food

The freedom to practise one's religion undisturbed (Art. 4 para. 2 of the Basic Law) also applies in the prison system, and issues relating to the religious practice of Muslims are of considerable practical importance in everyday prison life today. One of these questions concerns the observance of Muslim dietary regulations. According to section 21 sentence 3, 130 of the (federal) Prison Act (essentially the same in the prison laws of the individual German federal states), the prison must enable prisoners and those in preventive detention to follow the dietary rules of their religious community. However, according to the prevailing opinion in literature and case law, this does not mean that the penal institution is obliged to actively provide the Muslim prisoner with religiously permissible food (but see Fröhmcke, 133--146). This follows from the very nature of the fundamental right to the free exercise of religion (Article 4 (2) of the Basic Law) as a right of defence against the state and not as a right to obtain benefits ( *Teilhaberecht*). The prison must only offer the prisoner the opportunity to obtain such food. However, the law does not stipulate how this is to be done. It may be realized, e.g., by offering regular shopping or ordering options. But if the prisoner does not have enough money of his or her own for such purchases, the prison is not obliged to provide him or her with the means to buy such food. In practice, many prisons nowadays do more than what they are obliged to do and offer a so-called "Muslim diet", which does not include pork, sauces made from pork stock, or products that use gelatine, but cannot take into account all Muslim dietary regulations (e.g. ritually slaughtered meat). Therefore, there have been cases in recent decades in which Muslim prisoners have lodged complaints about the food in prison, and finally the courts have had to decide. However, case law has been

consistent in this area for many years, and the present order also confirms this line.

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

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


- Arloth, Frank and Horst Kräh. 2021. *Strafvollzugsgesetze von Bund und Ländern: Kommentar*, 5th ed. München: C.H. Beck.
- Feest, Johannes, Wolfgang Lesting, and Michael Lindemann. 2022. *Strafvollzugsgesetze Bundes-und Landesrecht: Kommentar*, 8th ed. Köln: Carl Heymanns Verlag.
- Fröhmcke, Vigor. 2005. *Muslime im Strafvollzug -- Die Rechtsstellung von Strafgefangenen muslimischer Religionszugehörigkeit in Deutschland*. Berlin: wvb Wissenschaftlicher Verlag Berlin.



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