BUNDESRECHTSANWALTSKAMMER

Germany, a Country without Death Penalty

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for

Taiwan Alliance to End Death Penalty

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Introduction

The German Federal Bar (BRAK) is the umbrella organisation of the lawyers' self-administration. It represents the interests of the 28 Regional Bars and thus of the entire legal profession of the Federal Republic of Germany with around 166,000 lawyers vis-à-vis authorities, courts and organisations - at national, European and international levels.

The Taiwan Bar Association (TWBA) is an important partner organization of BRAK in the Asian region. To provide a framework for their cooperation, the TWBA and BRAK signed a Memorandum of Understanding (MoU) in 2015. The MoU was renewed in 2022 and is the basis for an intensive exchange of the legal profession of both jurisdictions on various legal topics.

In February 2024, the Taiwan Constitutional Court announced its decision to hear a petition challenging the constitutionality of the death penalty in April 2024. BRAK is providing this expert opinion with the Taiwan Alliance to End the Death Penalty (TAEDP) in response to its inquiry.

This expert opinion is issued by BRAK to share the experience of the Federal Republic of Germany in order to support the development and implementation of the rule of law worldwide. It is based on a report prepared by Prof. Dr. Weigend, a renowned expert for international criminal law and former criminal law professor at the University of Cologne.

Assurance by the Author

This expert opinion is submitted to share the experience of the Federal Republic of Germany. For the preparation of this expert opinion, I received publicly accessible information on the petition before the Taiwan Constitutional Court from BRAK. The report and the expert opinion have been formulated independently by myself, without collaboration with any other party.

Overview

The Federal Republic of Germany has been one of the first countries in the world to abolish, in 1949, the death penalty in the civil as well as the military contexts. Article 102 of the Basic Law (Constitution) of the Federal Republic of Germany reads: “The death penalty is abolished.”[1] In this expert opinion, I present the historic development of the death penalty in

[1] *Die Todesstrafe ist abgeschafft.*

Germany (I.) and the constitutional status of its abolition (II.). I then deal with alternative sanctions for most serious offenses (III.), the development of homicide rates in the absence of the death penalty (IV.), and opinions of the German public on the death penalty (V.). The result of my analysis (VI.) is that the death penalty runs counter to basic tenets of German constitutional law and that German society has for the last 75 years thrived without resorting to the death penalty.

I. History of the death penalty in Germany

Like most other countries, the German-speaking territories in central Europe provided for the death penalty for the most serious crimes throughout their history. There was some debate about abolishing the death penalty when a new Penal Code was introduced for the German Empire in 1871 but the conservative governments of the Empire and its member states opposed any such efforts.[2] Consequently, § 211 of the Imperial Penal Code of 1871 (*Reichsstrafgesetzbuch*) provided that premeditated killing (*Mord*) was to be punished by death. The National-Socialist regime, which came to power in 1933, changed the definition of murder in 1941 and at the same time created the option of imposing a sentence of life imprisonment rather than death if exceptional circumstances existed.[3] During the Second World War, the number of death sentences and executions grew exponentially, especially since the death penalty was introduced for a multitude of other offenses both in civilian and military contexts. According to an estimate, between 1940 and 1945 15,890 civilians were sentenced to death, and most of them were executed.[4]

After 1945, the Penal Code remained in force, and there were still several murderers executed every year by courts of the occupation forces as well as by German courts. In the course of the deliberations for the new Constitution of the Federal Republic of Germany (West Germany), a proposal was made to prohibit the imposition and execution of the death penalty. This proposal was controversial, with several members of the Parliamentary Council (*Parlamentarischer Rat*) arguing that the issue should be left to the Penal Code rather than be regulated in the Constitution.[5] But others declared that Germany should make a clear cut from the prior regime and its abuses and enshrine the abolition of the death penalty in the Constitution; they also argued that it was a "barbarian" punishment which the new German

[2] For a discussion of the debates in 1870, see *Geck*, Art. 102 Historische Einführung (pp. 5—6), in Bonner Kommentar zum Grundgesetz, 1967.
[3] § 211 subsec. 3 read: *Ist in Ausnahmefällen die Todesstrafe nicht angemessen, so ist die Strafe lebenslanges Zuchthaus*. German criminal law has since 1871 distinguished between *Mord* (§ 211 Penal Code, here translated as "murder") and *Totschlag* (§ 212 Penal Code, here translated as "manslaughter"). Both crimes require an intentional killing. Since 1941, *Mord* is distinguished from Totschalg by the existence of at least one aggravating circustance as listed in ths Code, for example, the offender's base motives or a special cruelty of the killing.
[4] *Geck*, Art. 102 Historische Einführung (p. 7), in Bonner Kommentar zum Grundgesetz, 1967. For further estimates of the number of executions in the years 1939-1945 see *Ebel and Kunig*, Jura 1998, 617, 620-621.
[5] See the citations from the debates of *Parlamentarischer Rat* in *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 9.

republic was to denounce.[6] One member of the Council declared that the state had not given life and therefore was precluded from taking it away;[7] other members argued that the state degraded itself by executing persons[8] and that the German judges from the National-Socialist era who were still in office should not be entrusted with applying the death penalty, which they might turn against democratic and progressive forces.[9] In the final vote there was a clear majority in favor of the constitutional prohibition of the death penalty.[10] As a corollary of the abolition of the death penalty, Germany statutory law provides that no person can be extradited to another country if he might be sentenced to death or executed there.[11]

Some of the German states, including Bavaria and Hesse, had regulations on the imposition of the death penalty in their state Constitutions,[12] which had been adopted before the Federal Constitution. Since Federal law preempts state law under Art. 31 of the Federal Constitution, however, these provisions of State Constitutions were inapplicable and were later formally abolished. In the State of Hesse, a proposed law deleting the constitutional clause on the availability of the death penalty was in 2018 subject to a popular ballot and was approved by 83% of the voters.[13]

The death penalty for murder was retained in the Eastern part of Germany, which was occupied by the Soviet army and in 1949 declared its sovereignty as the German Democratic Republic (GDR). The Socialist government of the GDR claimed that the death penalty was necessary due to the aggressive imperialism of the West, and the scope of the death penalty was even extended to several other crimes including offenses against state security.[14] Death

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[6] See the assessment by *Koch*, Recht und Politik 2005, 230: *Der neue Staat zog die Lehren aus der Vergangenheit und setzte sich mit einem nahezu vorbildlosen Schritt an die Spitze der weltweiten Abolitionsbewegung.*

[7] Rep. *Wagner* (Social Democratic Party) cited in *Geck*, Art. 102 Historische Einführung (p. 10), in Bonner Kommentar zum Grundgesetz, 1967.

[8] Rep. *Schmid* (Social Democratic Party), cited in *Geck*, Art. 102 Historische Einführung (p. 10), in Bonner Kommentar zum Grundgesetz, 1967.

[9] Rep. *Renner* (Communist Party), cited in *Geck*, Art. 102 Historische Einführung (p. 11), in Bonner Kommentar zum Grundgesetz, 1967.

[10] *Koch,* Recht und Politik 2005, 230, 233. Some commentators claimed that some proponents of abolition were mainly interested in saving National-Socialist war criminals from execution; *Evans*, Rituale der Vergeltung, 2001, 936, 939. But historical research has not given much support to this thesis. See *Koch,* Recht und Politik 2005, 230, 231, 234; *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 7.

[11] § 8 *Gesetz über die internationale Rechtshilfe in Strafsachen*: *Ist die Tat nach dem Recht des ersuchenden Staates mit der Todesstrafe bedroht, so ist die Auslieferung nur zulässig, wenn der ersuchende Staat zusichert, daß die Todesstrafe nicht verhängt oder nicht vollstreckt werden wird.*

[12] See Art. 21 subsec. 1 Constitution of the State of Hesse: *Ist jemand einer strafbaren Handlung für schuldig befunden worden, so können ihm auf Grund der Strafgesetze durch richterliches Urteil die Freiheit und die bürgerlichen Ehrenrechte entzogen oder beschränkt werden. Bei besonders schweren Verbrechen kann er zum Tode verurteilt werden.* Art. 47 subsec. 4 of the Constitution of the Free State of Bavaria presumed the existence of the death penalty and accorded the Prime Minister the right to pardon persons sentenced to death. This provision was abolished by popular ballot in 1998. For an extensive discussion of death penalty provisions in State constitutions, see *Wittreck*, Jahrbuch des öffentlichen Rechts der Gegenwart 49 (2001), 157 (arguing that these provisions were introduced to limit the application of the death penalty).

[13] *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 38.

[14] *Koch*, Juristenzeitung 2007, 719, 720-721.

sentences were imposed in the GDR until 1981, and it has been estimated that about 200 persons were executed.[15] It was only in 1987 that the death penalty was formally abolished in the GDR, in the hope that this step would be appreciated by foreign states and increase the reputation of the GDR.[16] Yet, three years later the GDR ceased to exist.

Throughout the 1950s, representatives of the conservative Christian Democratic Party repeatedly launched initiatives in the Federal Republic of Germany to re-introduce the death penalty for murder.[17] Such initiatives were mostly triggered by spectacular murders which were reported in the press and enraged the public. Since the abolition of the death penalty was enshrined in the Constitution, any return to this sanction would have required a two-thirds majority in both chambers of parliament (Art. 79 subsec. 2 of the Constitution). Proponents of a re-introduction of the death penalty never even got close to such a majority.[18] Today there is no discernible political support for the death penalty, especially since the international environment has changed. For example, Art. 2 subsec. 2 of the Charter of Basic Rights of the European Union, which is binding on the Federal Republic of Germany, declares that no one shall be condemned to death or executed.[19]

II. Constitutional status of the abolition of the death penalty

So far, the highest German courts have not had occasion to rule on a possible re-introduction of the death penalty, but they made clear statements as to the importance of its abolition by the authors of the Constitution. In a case involving extradition to a country that still applied the death penalty, the Federal Constitutional Court (*Bundesverfassungsgericht*) declared in 1964 that the abolition of the death penalty in the Federal Republic of Germany means more than just giving up one of several traditional penalties but that it was a decision of great political and legal importance. This decision, the Court explained, contains an affirmation of the principal value of human life and of a concept of the state which posits itself in clear contradistinction to the views of the prior political regime for which individual life had meant little and which therefore had abused without any limits its usurped right over its citizens' life and death.[20] The Federal Court of Justice (*Bundesgerichtshof*) declared in a judgment of 1995

[15] *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 5.
[16] *Koch*, Juristenzeitung 2007, 719, 722.
[17] For a documentation of these initiatives see *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal notes 12-15.
[18] *Koch*, Recht und Politik 2005, 230, 233-234.
[19] Article 1 of Additional Protocol No. 6 to the European Convention on Human Rights (ECHR), entered into force in 1983 and ratified by the Federal Republic of Germany, likewise forbids the imposition and execution of the death penalty except in times of war. Additional Protocol No. 13 to the ECHR, entered into force in 2002, provides for the abolition of the death penalty under all circumstances. This protocol has been ratified by 45 of the 48 member states of the Council of Europe. One can say that the prohibition of the death penalty is now part of the regional customary law in Europe.
[20] Bundesverfassungsgericht, Beschluss vom 30.06.1964 - 1 BvR 93/64**,** Entscheidungen des Bundesverfassungsgerichts 18, 112, 117: *Die Abschaffung der Todesstrafe bedeutet allerdings für die Bundesrepublik Deutschland mehr als nur die rein positivrechtliche Beseitigung einer von mehreren Strafen des herkömmlichen Strafensystems. Sie ist eine Entscheidung von großem staatspolitischen und rechtspolitischen*

that no state can have the right to dispose of the lives of its citizens by means of the death penalty. The Court continued that the primacy of an absolute protection of human life requires that a society based on law (*Rechtsgemeinschaft*) dispense with the death penalty and thereby affirm the inviolability of life as the supreme value. Moreover, the Court explained, it is necessary to prevent the danger of an abuse of the death penalty by determining that it is impermissible without exception. Finally, the Court noted that the organisation of an execution by the state would be an intolerable undertaking. These considerations, the Court concluded, suggest that any re-introduction of the death penalty, even leaving Art. 102 of the Constitution aside, would be impermissible in view of Art. 1 subsec. 1 of the Constitution (human dignity) and the guarantee of the core essence (*Wesensgehalt*) of the right to life (Art. 2 subsec. 2 of the Constitution).[21] It should be noted, however, that these statements of the Federal Constitutional Court and the Federal Court of Justice must be classified as *dicta*; they were not directly relevant for the decisions at hand.

There has been some debate among legal scholars as to whether Art. 102 of the Constitution, which prohibits the death penalty, could – at least in theory – be restricted or even deleted. Although amendments of the Constitution can be enacted with a majority of two thirds of the votes in both chambers of parliament (Art. 79 subsec. 2 of the Constitution), Art. 79 subsection 3 of the Constitution declares that the Constitution cannot be amended in a way that infringes upon the principles laid down in its Articles 1 and 20.[22] Art. 1 of the Constitution declares human dignity to be "untouchable" (*unantastbar*) and obliges all powers of the state to respect and protect it.[23] Art. 20 subsec. 3 of the Constitution provides that the legislature shall comply with the constitutional order and that the executive and judicial branches shall comply with statutes and law.[24] This constitutional

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Gewicht. Sie enthält ein Bekenntnis zum grundsätzlichen Wert des Menschenlebens und zu einer Staatsauffassung, die sich in betonten Gegensatz zu den Anschauungen eines politischen Regimes stellt, dem das einzelne Leben wenig bedeutete und das deshalb mit dem angemaßten Recht über Leben und Tod des Bürgers schrankenlosen Mißbrauch trieb.

[21] Bundesgerichtshof, Urteil vom 16. 11. 1995 – 5 StR 747/94, Entscheidungen des Bundesgerichtshofes in Strafsachen 41, 317, 325: *Aus humanitären Gründen kann keinem Staat das Recht zustehen, durch diese Sanktion über das Leben seiner Bürger zu verfügen. Vielmehr erfordert es der Primat des absoluten Lebensschutzes, daß eine Rechtsgemeinschaft gerade durch den Verzicht auf die Todesstrafe die Unverletzlichkeit menschlichen Lebens als obersten Wert bekräftigt. Darüber hinaus erscheint es unbedingt geboten, der Gefahr eines Mißbrauchs der Todesstrafe durch Annahme ihrer ausnahmslos gegebenen Unzulässigkeit von vornherein zu wehren…. Die staatliche Organisation einer Vollstreckung der Todesstrafe ist schließlich, gemessen am Ideal der Menschenwürde, ein schlechterdings unzumutbares und unerträgliches Unterfangen. Diese Bedenken legen den Befund nahe, daß nach deutschem Verfassungsrecht jegliche Wiedereinführung der Todesstrafe – auch abgesehen von Art. 102 GG – vor Art. 1 Abs. 1 GG und der Wesensgehaltsgarantie des Grundrechts auf Leben (Art. 2 Abs. 2 Satz 1 i. V. m. Art. 19 Abs. 2 GG) keinen Bestand haben könnte.*

[22] Art. 79 subsec. 3 of the Constitution: *Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder… oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig.*

[23] Art. 1 subsec. 1 Grundgesetz: *Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.*

[24] Art. 20 subsec. 3 Grundgesetz: *Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.*

provision is understood to enshrine the concept of a state based on the rule of law (*Rechtsstaat*), which has several further legal implications. Under Art. 79 subsec. 3 of the Constitution, the principle of *Rechtsstaat* cannot be abandoned, not even by constitutional amendment.

The great majority of legal scholars claim that the abolition of the death penalty is intrinsically linked to the basic constitutional principles protected against change by Art. 79 subsec. 3 of the Constitution.[25] They regard the explicit prohibition in Art. 102 of the Constitution as a mere clarification of the reach of Art. 1 of the Constitution.[26] They argue, moreover, that the fact that Art. 102 of the Constitution is not expressly listed in Art. 79 subsec. 3 does not mean that an exemption from change cannot be based on other considerations.[27]

The majority position argues, firstly, that the execution of a person by the state would violate the essential core of the right to life, which is guaranteed in Art. 2 subsec. 2, 1st sentence of the Constitution.[28] The right to life is subject to "interference" only pursuant to statute.[29] As the law stands now, Art. 102 of the Constitution prohibits the passing of a law interfering with the right to life by providing for the death penalty.[30] One might argue that Art. 2 subsec. 2 of the Constitution still does not prevent parliament from enacting a statute establishing the death penalty. However, Art. 19 subsec. 2 of the Constitution declares that the "essence" (*Wesensgehalt*) of a basic right must not be infringed under any circumstances.[31] The intentional killing of a person by the state clearly impacts on the essence of that person's right to life. An exception can be made only for situations in which the killing is necessary to save the lives of others (for example, when the police shoot a person who has taken hostages and threatens to kill them), because in that situation the killing serves the purpose of *protecting* the lives of the victims.[32] But the execution of a murderer is not necessary to save another person's life.[33] The re-introduction of the death penalty would thus violate Art. 2

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[25] *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 33 with further references; *Jarass* in Jarass and Kment (eds.), Grundgesetz Kommentar, marginal number 1; *Wolff* in Hömig and Wolff (eds.), Grundgesetz Kommentar, Art. 102 marginal number 2. For an earlier argument in favor of an independent role of Art. 102 of the Constitution see *Tettinger*, Juristenzeitung 1978, 128.
[26] *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 23.
[27] *Epping*, in Epping and Hillgruber (eds.), Beck Online Kommentar Grundgesetz, Art. 102 marginal notes 4, 5.
[28] Art. 2 subsec. 2, 1st sent. Grundgesetz: *Jeder hat das Recht auf Leben und körperliche Unversehrtheit.*
[29] Art. 2 subsec. 2, 3rd sent. Grundgesetz: *In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden.*
[30] *Degenhart,* in Sachs (ed.), Grundgesetz Kommentar, Art. 102 marginal number 1a; *Epping*, in Epping and Hillgruber (eds.), Beck Online Kommentar Grundgesetz, Art. 102 marginal note 2; *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 26.
[31] Art. 19 subsec. 2 Grundgesetz: *In keinem Fall darf ein Grundrecht in seinem Wesensgehalt angetastet werden.*
[32] *Epping*, in Epping and Hillgruber (eds.), Beck Online Kommentar Grundgesetz, Art. 102 marginal note 3. But see *Geck*, Bonner Kommentar zum Grundgesetz, 1967, Art. 102 marginal number 3, arguing that this interpretation would preclude any legal limitation of the right to life. See also *Tettinger,* Juristenzeitung 1978, 128, 132.
[33] *Weides* and *Zimmermann*, DVBl. 1988, 461, 466.

sec. 2 of the Constitution. There remains the question, however, whether the right to life is absolutely protected even against constitutional amendment by Art. 79 sec. 3 of the Constitution. One strong argument in favor of that proposition is that a person cannot benefit from human dignity unless he or she is alive; that means that whoever destroys a person's life also destroys the basis of that person's human dignity.[34]

This leads to the second argument against the possibility of abolishing Art. 102 of the Constitution, namely, that any execution violates human dignity and thus is barred by Art. 79 subsec. 3 of the Constitution. Several aspects of human dignity have been mentioned in this context. First, the convicted person is treated as a mere object for achieving the state's purposes (for example, of deterrence or of avenging the death of the offender's victim), whereas human dignity requires that every person be treated as a subject, that is, an end in himself.[35] Second, according to the jurisprudence of the German Constitutional Court it violates human dignity to impose a sanction that leaves the offender no chance to ever enjoy freedom again.[36] Evidently, killing a person meets that definition.[37] Third, the process of anticipating one's killing and of going through the preparations for an execution violates dignity because it reduces the person to his animalistic fear of dying.[38] And finally, there is no dignified way of executing a person.[39] For these reasons, the re-introduction of the death penalty would violate human dignity, the foremost principle of German constitutional law, which is enshrined in Art. 1 subsec. 1 of the Constitution and has been exempted from any amendment by Art. 79 subsec. 3 of the Constitution.

It has also been argued that the imposition and execution of a death sentence cannot be reconciled with the principle of the rule of law (*Rechtsstaat*).[40] One argument in that regard is that the death penalty is irrevocable; any other false conviction can be reversed and the defendant be compensated, whereas a person that has been executed cannot be brought back to life. The death penalty is, moreover, not apt to serve any rational purpose of punishment and that it would therefore be a useless and disproportional imposition of suffering to execute a person. There is no scientific evidence that the availability of the death penalty measurably increases deterrence against murder.[41] And although § 46 of the German Penal Code explicitly recognizes that an offender's sentence should primarily depend on his guilt,[42] this does not mean that an intentional killing must necessarily be vindicated by the

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[34] See *Weides* and *Zimmermann*, DVBl. 1988, 461, 464; *Degenhart,* in Sachs (ed.), Grundgesetz Kommentar, Art. 102 marginal number 7.
[35] *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 21.
[36] Bundesverfassungsgericht, Urteil vom 21.06.1977 - 1 BvL 14/76, Entscheidungen des Bundesverfassungsgerichts 45, 187, 229.
[37] *Weides* and *Zimmermann*, DVBl. 1988, 461, 465.
[38] *Weides* and *Zimmermann*, DVBl. 1988, 461, 464-465.
[39] *Ebel* and *Kunig*, Jura 1998, 617, 621.
[40] *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 32.
[41] See IV. below.
[42] § 46 subsec. 1 Penal Code: *Die Schuld des Täters ist Grundlage für die Zumessung der Strafe*.

death of the offender. In earlier times, the talionic principle "A life for a life" may have been widely accepted, and the famous German philosopher *Immanuel Kant* held that a murderer must die because there is no surrogate for death to satisfy the demands of retributive justice.[43] However, *Kant's* view that "pure and strict justice" can only be satisfied by the *ius talionis*[44] was contested even in the 18th century when he wrote his philosophical treatise.[45] Today, civilization of man has progressed so that it is almost generally accepted that a loss of life or health can also be equalized by the offender's loss of freedom. Retributive justice does not demand, for example, that an offender who shot his enemy in the arm should himself be shot in the arm by a judicial officer; all that justice requires is that the most serious crimes are to be punished by the most severe sanctions available in the relevant legal system.[46] If the elected representatives of the people in parliament decide that imprisonment for life is the most severe sanction, then it would be excessive to go beyond this penalty even for the most serious crime.[47]

The fact that the death penalty has been prohibited in the European Union[48] provides a further argument against the possibility of a re-introduction. Since the German constitution must be interpreted in a way that comports with the state's obligations under international law,[49] the rejection of the death penalty in Europe provides support for the majority view which regards Art. 102 of the Constitution as an indispensable element of the Constitution.[50]

In sum, one can say that German constitutional law prohibits the re-introduction of the death penalty, even independently of the express abolition of that penalty in Art. 102 of the Constitution, because the death penalty would violate human dignity, the core essence of the right to life, and the rule flowing from the *Rechtsstaat* principle that the severity of punishment must not exceed its rational purpose.

III. Alternative sanctions

One reason for the ability of Germany to dispense with the death penalty is the existence of other penal sanctions for the most serious crimes and the most dangerous offenders.

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[43] *Kant,* Metaphysik der Sitten, 455: *Hat er aber gemordet, so muß er sterben. Es gibt hier kein Surrogat zur Befriedigung der Gerechtigkeit.*

[44] Kant, Metaphysik der Sitten, 454: *Nur das Wiedervergeltungsrecht (ius talionis) … kann die Qualität und Quantität der Strafe bestimmt angeben; alle anderen sind hin und her schwankend, und können, anderer sich einmischender Rücksichten wegen, keine Angemessenheit mit dem Spruch der reinen und strengen Gerechtigkeit enthalten.*

[45] See especially *Beccaria*, Über Verbrechen und Strafen, 1766, § XXVIII.

[46] See *Jescheck* and *Weigend*, 752.

[47] *Hörnle,* Tatproportionale Strafzumessung, 155-157; *von Hirsch,* Fairness, Verbrechen und Strafe, 139-147.

[48] See note 19 supra.

[49] See Bundesverfassungsgericht, Beschluss vom 14.10.2004 - 2 BvR 1481/04, Entscheidungen des Bundesverfassungsgerichts 111, 207, marginal number 32.

[50] See *Epping*, in Epping and Hillgruber (eds.), Beck Online Kommentar Grundgesetz, Art. 102 marginal note 6.

1. Life imprisonment

The most severe punishment under German law is imprisonment for life (§ 38 subsec. 1 Penal Code). This penalty is mandatory for murder (§ 211 Penal Code). It is also available for some other serious offenses, for example, manslaughter (intentional killing without aggravating circumstances, § 212) as well as rape, robbery, or arson, if the offender caused the victim's death (§§ 178, 251, 306c Penal Code), and for certain crimes against international law such as genocide and crimes against humanity (§§ 6, 7 Code of offenses against international law, *Völkerstrafgesetzbuch*).[51] Life imprisonment means, in principle, that the convict is kept in prison for the remainder of his natural life. Art. 102 of the Constitution obviously does not prohibit life imprisonment; but the application of this penalty must respect human dignity as well as the prisoner's right to life and bodily integrity (Arts. 1, 2 subsec. 2 of the Constitution).[52] In 1977, the Federal Constitutional Court decided that it violates the protection of human dignity to lock a person away for the remainder of his life without leaving any hope for release even if the prisoner is no longer prone to commit crimes.[53] The legislature reacted to this judgment by introducing the possibility of early release for life prisoners (§ 57a Penal Code). According to that provision, a life prisoner can be released, with his consent, if

- he has served at least 15 years of his sentence,
- his release can responsibly be granted considering the interests of public security, and
- the trial court did not find a special gravity of the culpability (*besondere Schwere der Schuld*) of the offender.[54]

If the trial court ruled that the offender's act displayed a special gravity of culpability (for example, because he killed more than one person), the judge overseeing the enforcement of prison sentences determines the actual time the convict will have to spend in prison, normally between 17 and 20 years, unless the prisoner is still dangerous.[55]

German courts do not make excessive use of life imprisonment. Since 1949, this penalty was imposed in 50 to 150 cases per year, with recent figures being mostly between 90 and 100 cases per year.[56] In 2022, 1,776 persons (thereof 105 women) served life sentences in

[51] It should be noted, however, that life imprisonmen cannot be imposed for drug offenses, even if a drug dealer recklessly caused the death of another person; see § 30 subsec. 1 Betäubungsmittelgesetz (Drug Law). The maximum punishment for this offense is 15 years imprisonment.

[52] *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 67.

[53] Bundesverfassungsgericht, Urteil vom 21.06.1977 - 1 BvL 14/76, Entscheidungen des Bundesverfassungsgerichts 45, 187, 229.

[54] § 57a Strafgesetzbuch: *Das Gericht setzt die Vollstreckung des Restes einer lebenslangen Freiheitsstrafe zur Bewährung aus, wenn 1. fünfzehn Jahre der Strafe verbüßt sind, 2. nicht die besondere Schwere der Schuld des Verurteilten die weitere Vollstreckung gebietet und 3. die Voraussetzungen des § 57 Abs. 1 Satz 1 Nr. 2 und 3 vorliegen.* § 57 Strafgesetzbuch: *Das Gericht setzt die Vollstreckung … zur Bewährung aus, wenn… 2. dies unter Berücksichtigung der Sicherheitsinteressen der Allgemeinheit verantwortet werden kann, und 3. die verurteilte Person einwilligt.*

[55] For details see *Kinzig* in Schönke and Schröder, Strafgesetzbuch Kommentar, § 57a marginal note 7.

[56] See *Gomille* and *Dessecker*, 2020, 12-13.

German prisons.[57] More than two thirds of all life prisoners whose imprisonment ended in 2018 were conditionally released according to § 257a Penal Code; the remainder died in prison or were repatriated from Germany to their home countries.[58] Even if life imprisonment does not normally mean that the offender will die in prison, it has great symbolic value and provides the option of detaining offenders for a very long time if they remain dangerous to others.

2. Security detention

Another sanction that applies to highly dangerous offenders is security detention (*Sicherungsverwahrung*, §§ 66-66c Penal Code). Security detention is not a retributive punishment for an offense committed but a measure of rehabilitation and security (*Maßregel der Besserung und Sicherung*). These measures were introduced into the Penal Code in 1933, based on lengthy debates in the preceding decades.[59] Their purpose is to prevent the commission of further offenses by persons who have committed unlawful acts. Measures of rehabilitation and security include detention in a secure psychiatric hospital (§ 63 Penal Code) or an institution for addicts (§ 64 Penal Code), the (temporary or permanent) prohibition of driving a motor vehicle (§ 69 Penal Code), and the prohibition of practicing a particular profession (§ 70 Penal Code). Typically, these measures can be ordered even if the defendant was without moral blame in committing a criminal act, for example because he suffered from a mental disease. This shows the special character of these measures: they are not meant to punish a person for blameworthy conduct but only to avert special risks emanating from him for the legally protected interests of others. Since the commitment to a psychiatric institution under § 63 Penal Code can be extended, without a definite temporal limit, for as long as the detainee's dangerousness persists, measures of rehabilitation and security can effectively protect public and private safety even beyond the reach of criminal punishment.

Security detention is also listed among the measures of rehabilitation and security, but its character differs from the measures presented above. Security detention is meant to address continuing risks emanating from dangerous multiple recidivists. Therefore, it can be ordered by the court only if the defendant culpably committed a serious crime as listed in § 66 of the Penal Code and had been convicted and sentenced to imprisonment for a similar crime at least twice before the present offense. If the offender committed two serious sexual offenses, he can receive a sentence of security detention even without a prior conviction (§ 66 subsec. 3, 2nd sent. Penal Code). Security detention is to be served after the offender has completed the sentence of imprisonment for the offense he committed. The purpose of

[57] Statistisches Bundesamt, 2022, 10.
[58] *Gomille* and *Dessecker*, 2020, 26-27.
[59] For overviews see *Weigend* in Cirener et al. (eds.), Strafgesetzbuch. Leipziger Kommentar, vol. 1, 13th ed. 2020, Einleitung, marginal numbers 73-79; *Kinzig*, in Hilgendorf, Kudlich and Valerius (eds.), Handbuch des Strafrechts, vol. 3, 959.

security detention is to protect the public from offenders who are deemed dangerous even after having served their prison sentence. The imposition of security detention therefore is conditioned on a finding that the offender is dangerous to the public because of a disposition to commit serious offenses, especially crimes that cause serious mental or bodily harm to the victims.[60] If it is likely but cannot be proved at the time of the trial that such a disposition exists, the court can make a conditional order of security detention. The court can then observe how the offender conducts himself while in prison and can make a final order of security detention if he proves to be dangerous (§ 66a Penal Code).

Security detention is ordered for an indefinite time. But the court is obliged to examine at least once every year whether the preconditions for detention still exist; if the detained person appears no longer to be dangerous to others, he must be conditionally released (§ 67d subsec. 2, 1st sent., § 67e subsec. 2 Penal Code). In the past, the conditions of security detention resembled those of a (potentially life-long) prison sentence: detainees were just kept in their cells in a special section of a prison. This practice was found to be unconstitutional by the Federal Constitutional Court in 2011.[61] The Court demanded that the law and practice of security detention must differ significantly from a prison sentence, with an emphasis on the rehabilitation of the offender and the creation of the conditions enabling his release.[62] In response to this judgment, the Penal Code was amended to provide for a list of rehabilitative measures that are meant to reduce the detainee's dangerousness and to speed up his release; these measures include the provision of psychological and psychiatric services as well as the detainee's temporary release from detention to test his ability to conduct himself properly outside the institution (§ 66c Penal Code). It is hoped that these measures reduce the overall number of persons who must give up their freedom even though they have already served the penalty for the offenses they committed. On March 31, 2022, overall 604 persons were kept in security detention. Their number has remained fairly stable since 2010 (536 persons).[63]

Although the number of persons actually serving a sentence of life imprisonment until their natural death and the number of security detainees is small in a country of more than 80 million inhabitants, the availability of these sanctions contributes to making the death penalty unnecessary, because the public can rely on these measures to keep seriously

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[60] § 66 subsec. 1 no. 4 Strafgesetzbuch: *Das Gericht ordnet neben der Strafe die Sicherungsverwahrung an, wenn … 4. die Gesamtwürdigung des Täters und seiner Taten ergibt, dass er infolge eines Hanges zu erheblichen Straftaten, namentlich zu solchen, durch welche die Opfer seelisch oder körperlich schwer geschädigt werden, zum Zeitpunkt der Verurteilung für die Allgemeinheit gefährlich ist.* This definition of the triggering offenses is meant to exclude the imposition of security detention for mere property crimes.

[61] Bundesverfassungsgericht, Urteil vom 4.5.2011 – 2 BvR 2333/08, Entscheidungen des Bundesverfassungsgerichts 128, 326. For details see *Peglau* in Cirener et al., Strafgesetzbuch. Leipziger Kommentar, § 66 marginal notes 17-19, § 66c marginal note 4.

[62] Bundesverfassungsgericht, Urteil vom 4.5.2011 – 2 BvR 2333/08, Entscheidungen des Bundesverfassungsgerichts 128, 326, 386-387.

[63] Statistisches Bundesamt, 2022, 10.

dangerous murderers and repeat offenders off the streets as long as their dangerousness persists.

IV. Rates of serious crime, deterrent effects

The development over time of numbers and rates of serious offenses, especially murder, that become known to the police are good indicators of the functioning of a criminal justice system. The number of completed intentional killings (murder and manslaughter) known to the police rose from 1953 (325 cases) till 1993 (1468 cases, including killings committed in Eastern Germany). Since 1993, this figure has declined steadily and has reached a low of 565 cases in 2015.[64] According to another police statistic, murder cases (including attempts) went down from 970 in 1987 to 662 in 2022.[65] Although the different ways of counting do not permit an integration of these statistics, they both show that the incidence of murders has declined in recent decades even in the absence of the death penalty. These figures for Germany coincide with findings of studies in and across other jurisdictions, which almost uniformly fail to show a significant increase in homicide rates in the years after the abolition of the death penalty.[66]

For German criminologists, it is not surprising that the abolition of the death penalty did not lead to a surge of violent crime. Raising the severity of statutory sentence ranges has generally been shown to have very little if any impact on rates of serious crime.[67] This applies in particular to crimes like murder, which are often committed without prior planning and/or by persons who act irrationally (for example, mentally disturbed individuals or religious fanatics). Such persons do not conduct a rational calculus of the risks and benefits of their acts and hence do not make decisions on the basis of the penalty provided in the Penal Code. For that reason, the re-introduction of the death penalty in Germany would be very unlikely to have a measurable impact on the murder rate.

Generally, deterrent effects can be brought about by strict law enforcement and a high detection rate; persons who rationally consider committing crimes refrain from doing so when they expect to get caught.[68] Another factor that can influence persons' readiness to commit crimes is their acceptance of the relevant rule of conduct: if someone generally does not respect, for example, other people's right to sexual autonomy or to property, he is more likely to commit rape or theft.[69] One of the main functions of criminal sanctioning therefore

[64] *Antholz,* Die Kriminalpolizei 2017, 1.
[65] Bundeskriminalamt, Polizeiliche Kriminalstatistik Zeitreihen, Grundtabelle.
[66] See, e.g., for the United States *Archer, Gartner* and *Beittel,* Journal of Ciminal Law and Criminology 74 (1983), 991, 1007-1013; *Kovandzic, Vieraitis* and *Boots,* Criminology and Public Policy 8 (2009), 803. For a thorough analysis of the multiple methodological problems confronted by attempts to measure deterrent effects of the death penalty see *Donohue, III* and *Wolfers*, American Law and Economics Review 11 (2009), 249.
[67] *Eisenberg* and *Kölbel,* Kriminologie, 214-215.
[68] *Schöch*, in Vogler (ed.), Festschrift für Hans-Heinrich Jescheck, 1081, 1098-1103; *Bönitz*, Strafgesetze und Verhaltenssteuerung, 284 et seq.
[69] *Meier*, Strafrechtliche Sanktionen, 28-29; *Streng,* Strafrechtliche Sanktionen, 32-33.

is to strengthen the acceptance and practical validity of social rules by demonstrating that society is ready to enforce them. For that purpose, it is not necessary to impose very strict punishment, and certainly not to execute offenders.

V. Public opinion

When Germany abolished the death penalty in 1949, that decision was not altogether popular. In public opinion polls conducted at that time, most people expressed their approval of the death penalty,[70] and leading politicians of the Federal Republic of Germany, including its first chancellor *Konrad Adenauer*, publicly declared their support for the death penalty.[71] It took until 1971 for the tide to change; in that year, opinion polls for the first time found a small plurality (46% vs. 43%) against the death penalty.[72] But today, contrary to the situation in the 1950s, most Germans are opposed to the death penalty. In a representative poll conducted in 2014, 81% of the persons asked opposed the death penalty, and only 15% preferred to have it re-introduced.[73] Closer analysis of such opinion polls has shown that responses very much depend on the type of question asked; more people favor the death penalty if the poll expressly mentions murder as the triggering crime rather than asking about the person's general attitude toward the death penalty.[74] Moreover, it is bound to make a difference whether a poll is conducted in a state which still retains the death penalty or in a jurisdiction which has abolished it, since many respondents are just happy with the status quo but would also accept their government's decision to change the law. It would hence make sense in death penalty states to ask respondents whether they would oppose a new law abolishing the death penalty.[75] In Germany, the main objections to the death penalty are the risk of executing factually innocent persons and the lack of an additional deterrent effect in comparison with life imprisonment.[76]

With regard to Germany, one can well say that the courageous step of abolishing the death penalty in 1949 has in the long run changed the attitude of the population.[77] Germans realized that public safety did not suffer when the death penalty is no longer an option, and

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[70] In 1950, 55% of persons polled ("Are you in principle for or against the death penalty?") were in favor of the death penalty, only 33% were opposed.

[71] *Koch,* Recht und Politik 2005, 230, 234.

[72] *Reuband*, Kölner Zeitschrift für Soziologie und Sozialpsychologie 1980, 535, 541. After several terrorist attacks in the 1970s, the percentage of persons favoring a re-introduction of the death penalty again rose temporarily to 50%; *Kersten* in Dürig, Herzog and Scholz (eds.), Grundgesetz, Art. 102 marginal note 16. Similar changes in public opinion have been found in temporal connection with other spectacular crimes; *Kreuzer* in Safferling et al. (eds.), Festschrift für Franz Streng, 359, 361.

[73] *Reuband,* in Haverkamp et al. (eds.), Unterwegs in Kriminologie und Strafrecht, 725, 730. In a different poll conducted in 2016, 66% of respondents rejected the death penalty; *Köcher*, Frankfurter Allgemeine Zeitung 17.2.2016, Tables A6 and A9.

[74] See *Hood*, in Haverkamp et al. (eds.), Unterwegs in Kriminologie und Strafrecht, 708-711.

[75] *Hood*, in Haverkamp et al. (eds.), Unterwegs in Kriminologie und Strafrecht, 709.

[76] For a list of arguments mentioned by people polled in 1964 see *Reuband* in Haverkamp et al. (eds.), Unterwegs in Kriminologie und Strafrecht, 725, 734.

[77] *Kreuzer,* Zeitschrift für internationale Strafrechtsdogmatik 2006, 320.

most of them now welcome the fact that the German criminal justice system can well manage without the death penalty.

VI. Conclusion

Summing up, the German experience is a strong argument in favor of the proposition that the death penalty is not a necessary sanctioning tool. Although Germany had a long history of applying the death penalty, its sudden abolition in 1949 did not lead to any lasting problems such as an exploding rate of serious crime or great dissatisfaction among the population. At present, German jurists agree that a re-introduction of the death penalty would violate basic values protected by the Constitution such as the right to life and human dignity. Other severe but more humane sanctions such as life imprisonment and security detention for chronically dangerous individuals have been able to take over the functions of the death penalty.

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