

THE CASE OF DEATH PENALTY : A HYPOTHETICAL PERSPECTIVE FROM GERMAN CONSTITUTIONAL LAW*

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The Basic Law of the Federal Republic of Germany was properly put into force as constitution in 1949. It is well known that there has been no death penalty in Germany ever since. Less known is that it is Art.102 of this Basic Law of Germany (GG) that has abolished the death penalty in Germany. This was the result of then convincing considerations after the disaster of the former regime in Germany and its outrageous abuse not only of that sanction of criminal law.

Since presently in India there is a discussion if the state should use and apply the death penalty in future¹, it might be of interest what arguments would justify nowadays the absence of the death penalty in Germany under its present constitution. This does not relate to any debate of that kind in the country nor is there any motion in that direction, for instance with the intention to abolish Art. 102 GG by amendment and its replacement by inserting a positive clause in the opposite direction. If that ever was the case, the stand would be taken immediately that such an undertaking is not possible.

I

The Basic Law does not allow amendments which – as you would say in India – are inconsistent with its “basic structure”. That “basic structure” - intended to preserve the identity and continuity (Konrad Hesse) of that constitution

* This is an occasional paper, it was written on request in February 2007 in Kolkata, India, while I had almost no access to German literature or other sources. Hence, it states only views which are part of a common consensus of the profession in Germany.

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¹ Compare Mike Marquese, *The State And The Right To Life*, THE HINDU, February 11, 2007; Gunjan Mishra, *Death Penalty: Abolitionist vs. Retentionist Pradigms*, THE EDICT Jan. 2007 at 39 seqq. under the chapter “Law and Culture”. Nevertheless, the death penalty apparently is part of Indian Law, compare the news about respective cases in: THE HINDU, February 16, 2007 (referring to decisions of the Supreme Court of India and the compatibility of the death penalty in India with the International Covenant on Civil and Political rights of 1966 to which India acceded in 1979); See also THE HINDU February 17, 2007 (quoting from Supreme Court rulings which upheld the death sentence in an outrageous case of rape and murder.)

- is to be found in Art. 79 III GG.² It reads as follows:

“Amendments of this Basic Law affecting ...or the principles laid down in Articles 1 and 20 shall be inadmissible”

Art. 1 reads:

“The dignity of the human being shall be inviolable. To respect and to protect it shall be the duty of all state authority.

The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.”

The next Article says in its second section, Art. 2 II 1:

“Every person shall have the right to life and physical integrity. Freedom of person shall be inviolable. These rights may be interfered with only pursuant to a law.”

About such basic rights Art. 19 II GG states:

“In no case may the essence of a basic right be affected.”

And finally the relevant sections of Art. 20 GG, mentioned in Art. 79 III GG as quoted above pronounce:

“The federal republic of Germany is a democratic and social federal state.

All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.”

² Insofar I had access to COMMENTARY ON THE BASIC LAW (H. Dreier, ed., Vol. II, 2006) with comments of Horst Dreier on Art. 79 III GG; *See also*, ERHARD DENNINGER, COMMENTARY ON THE BASIC LAW (ALTERNATIVE -COMMENTARY) (2002), with comments on Art. 79 GG in all its parts by Cornelia Vismann.

II

So, the “basic structure”³ comprises at least - as far as it is relevant here – a reference to human dignity and the right to life, an explicit reference to Germany as a republic and democracy and a link to the rule of law including principles of fair proceedings, the presumption of innocence, the principle of proportionality and others as well as implicitly the idea of a secular state which does not take a stand in religious matters and never identifies with a religion or “Weltanschauung”. The latter is not excluded by the fact that the preamble of the Basic Law mentions “God”, since the preamble at least so far is not binding law at all as I have shown and documented elsewhere.⁴

This list of principles may be a guide through the jungle of arguments against death penalty from the view of a person teaching and writing mainly in German Constitutional Law. As I said already there is no reality to the proposition of reintroducing it, even though it is considerably popular – I may say – to be in favour of the reintroduction of death penalty on the basis of prejudice, especially each time shortly after horrifying crimes being presented in the media.

I do not want to refer to the obligations of Germany as a European state which under the law of the European Convention on Human Rights and Basic Liberties is obliged to abstain from such endeavours. Beyond that there are other international settlements which point in the same direction. Finally, the European Union does not accept applications for membership from states which uphold the practice of death penalty in peacetime. All the binding network of law which so far has been established may be put aside in the following considerations.

III

The utmost change in Constitutional Law has taken place when the Basic Law of Germany established the idea of human dignity in 1949 to be the basis of any public authority. Dignity for the first time in a national constitution of Germany had been established as the first constitutional principle.

This happened apparently the year after the General Declaration of the Rights of Men has been established in the United Nations, which talks about “inherent dignity and... equal and inalienable rights”. To what extent the German

³ This term when speaking about Indian Constitutional law is used here only in that context. It remains open if the term as a term makes sense in the German context.

⁴ This was done in the process of the debate if a future European Constitution should refer to Christianity, God or should otherwise relate to occidental traditions, a context in which - from the German perspective - a lengthy essay was necessary to prove to the contrary, including an analysis of the Basic Law so far, compare H. Goerlich, *Der Gottesbezug in Verfassungen*, in H. GOERLICH, W. HUBER, K. LEHMANN, VERFASSUNG OHNE GOTTESBEZUG – ZU EINER AKTUELLEN EUROPÄISCHEN KONTROVERSE 9 – 43 (2004) (especially p. 18 seq. quoting Konrad Hesse, Hartmut Maurer and Peter Lerche, and finally, p. 43 seq., recommending to avoid any reference of that kind in a Treaty for a future Constitution of the European Union.

perception is owed to the international consensus creating that declaration does not matter so much here.⁵ However, there is no doubt that it makes a difference to find that dignity is supposed to be the footing of all other parts of the constitution. This dignity has to be respected and protected by all the authorities of the State.

Therefore dignity is said to be the utmost “value” in law. This idea of establishing “values” by and in law to some extent led to the assumption that there is an “order of values” deployed in law, which can be used to justify legal decisions.⁶ Notwithstanding that idea beyond the concept of dignity as the utmost value as such, no doubt the rank of dignity is on top in that constitution.

From this starting point, in situations when balancing dignity with other interests, the place dignity hold is relevant. For instance, such balancing is not allowed in situations where torture might be a means to safeguard others, even equivalent interests, as article (art.) 104 II 2 GG indicates saying that “persons in custody may not be subjected to mental or physical mistreatment”. This clause makes clear that balancing in this situation is outlawed. The same may be necessary to say as far as death penalty is concerned since it has been abolished by art.102 GG. Dignity as paramount value may outlaw it. This never was a major point to be dealt with since this article had abolished the death penalty. But it might be the result of this endeavour, as I initially mentioned, even if you take that article away, after almost sixty years of interpretation as well as implementation of the Basic Law and of administration of justice the result might not be different. Why?

IV

The purpose of punishment has to be seen in the light of the utmost value of the constitution. Deterrence as such does not suffice. The utmost value is “dignity” of a human being. So well established by the constitution, the question is what dignity does it imply. Is it the dignity of the victims? Or, is it the dignity of the person sentenced in court? Or is it both? And, what does dignity require to be complied with?

First it had to be clarified that the fact that the final phrase of Article 1 refers to “the following...” rights does not mean that there is no right to human dignity. That way the text “dignity of human being” was changed to be understood as containing a right to human dignity which meant that basic needs could be covered by a claim to dignity, not just as an element of the right to life, health and

⁵ Recently, this link has been emphasized, comp. TH. RENSMANN, WERTORDNUNG UND GRUNDGESETZ - DAS GRUNDGESETZ IM KONTEXT GRENZÜBERSCHREITENDER KONSTITUTIONALISIERUNG (2007) at 9 seqq. et passim.

⁶ That is the basic assumption of Rensmann, ; I showed long ago that even though there is no doubt that dignity is the top value in the Basic Law the assumption of an order of values does not help to justify decisions of law, compare H. GOERLICH, WERTORDNUNG UND GRUNDGESETZ, KRITIK EINER ARGUMENTATIONSFIGUR DES BUNDES-VER-FASSUNGSGERICHTS, BADEN-BADEN (1973); Rensmann does not deal with that line of argument.

so forth. The courts decided on those lines especially in the area of social welfare payments and only the Federal Constitutional Court made some reservations that legislature has to decide within the scope of such entitlements. However, administrative law courts abolished administrative discretion in the area of welfare payments to a large extent.

This was based on the idea that dignity implies that the human being never is to be made a pure object of state action. When this, case by case, was spelled out it also referred to the Kantian idea that mankind should never be the pure object, but his or her dignity should always be part of the goals envisaged. While it is well known that the same Immanuel Kant also justified death penalty claiming that it restored the dignity not of the victim or the offender but of law. He thus confirmed the validity of law in the sense of reinstating the law and its dignity which was visualized by him not as the emanation of a single sovereign like a monarch but as the rule created by an ideal republic. Thus, he stated that a death sentence has to be executed even if the person sentenced is the only human being on a deserted island. This position was taken by Kant even though at the same time he was the most committed philosopher to promote autonomy and independence of the human personality. However, he saw it in the frame of general laws as did Jean Jacques Rousseau whom he had read widely. Therefore, obedience to the law as general law of an ideal republic had more weight than the value or dignity of a person as such. Such rigid concepts were not taken up later on in law as the perception nowadays collides with his assumptions at the very basis of his “foundations of metaphysics of manners”.

Instead post-war law took up the perspective of the right to dignity as an entitlement to live under minimum reasonable conditions – as created in the justification of the welfare cases. That meant that the offender of law always has an entitlement to remain part of society and is not expelled from it. Therefore, punishment had to centre its purpose around this idea, in favour of the offender. The claim of the victim had to be balanced that way that the entitlement of the offender would not be outbalanced completely. Sanctions - for instance life sentences - therefore were put under strict control.

This also had a footing in the fact that a minimum of the basic rights was seen as implied by the idea of dignity of the human being. Therefore, freedom, integrity of the person as such, life, liberty, as well as other rights, in their respective substance, have to be seen as partaking in the value of dignity. Thus, the offender even if not acquitted, but when becoming an inmate remains entitled to many rights on quite a high level. That led to considerable changes in the life of inmates while in that status. Initially, the legal basis of that status had to be changed, now it is not anymore regulations and outlines, but statutes of Parliament or the respective legislative bodies of the several States within the Federation. Apart from that in substance changes took place:

First the situation of the prisoner in prisons had to be enhanced in a way which gave them back some of their dignity. They had to be treated like members

of the society even while in prison. Further, they had to be furnished with such things as newspapers, radio and television since their entitlement to information and communication could not be cut back completely. This had its roots in freedom of information and speech as an inalienable human right. Also, if forced to work in prison that had to be stopped. In future, while working in prison they had to receive some reasonable wages and at least, for the same reason, some sort of social security payments and health insurance. They had to have the chance of training as craftsmen or similarly any type of training compatible with security, qualifications and abilities. This has considerable relevance, especially if the inmates are young and – as often – have not even completed primary education, but are drop outs in any sense.

There had to be some respect of their privacy, as far as their relationship to their family and spouses had to be taken into account. Also, in an early leading case protection of privacy was taken into account in the sense that their identity should not be released any-more by pictures, film or name-dropping in the media to the public if they were to be freed again soon, when their sentence expired or they were pardoned.

V

The respect of privacy and the development of the inmates' personality was based on the concept of dignity, besides the fact that several basic rights in the German constitution are human rights and can only be restricted up to the edges of their essence, as Article 19 II of the Basic Law – quoted above – indicates.

All this led to a “right to re-socialisation” as you may call it. This entitlement implies that a person has to be reintegrated into society after imprisonment or after the expiry of any other sanction. To a large extent this entitlement is also to be linked to the character of Germany as a “social welfare state as mentioned in art. 20 GG. This implies the assistance and solidarity as far as lower segments of society and outsiders are concerned. A lot of crime is based on poverty or isolation of the individual or on a whole group. Also, the sanctions of criminal law enhance alienation from society and hence there must be some relief through reintegration into society which has to be arranged by the state.

“Resocialisation” is a term which combines the purpose and the end of a term in prison with the aim of reintegrating the inmate in society as an equally accepted and acceptable person. It is considered to be one of those basic entitlements which are based on the right to dignity as found in art. 1 I GG. The whole concept of “resocialisation” presupposes that beyond the statement of guilt and sanction, the purpose of sanctions of criminal law is under limitations due to the offenders' rights. The balance between the victims' dignity and rights on one hand and the offenders' on the other hand goes in favour of the latter. This balance is determined by constitutional law, not by criminal law which is to be found in a code in the rank of a statute. The rights and entitlements of the victim do not justify a far reaching irrevocable sanction like the death penalty. This might

also be justified because the sanctions under civil law, especially torts and other tools of the like, suffice to meet the interests of the victims. This, of course, has to be seen in the light that major crimes are committed very often by poor persons, not to speak of organized crime and terrorist groups. However, the latter quite often know how to hide their possessions. Therefore, law enforcement suffers limitations, in the case of the poor offender because there are limitations to the enforcement of court decisions. Nevertheless criminal law and its sanctions cannot substitute enforcement in such situations and therefore this factual situation would be no justification for other sanctions – not to speak of the death penalty.

Even if one would reintroduce death penalty it would not be enforceable under such conditions. It could only be by means of linking death penalty an act of pardon or clemency the regular transformation to a life sentence. Though, even life sentences in Germany regularly mean under the concept of “resocialisation” that normally the sentence is changed into a 15 year sentence if there is not an extreme case which implies the strict probability that the offender will return to his unlawful behaviour. In some cases, the offender is found to be mentally or psychologically ill to such an extent that he or she has to be sent by court decision to a closed psychiatric clinic which is not allowed to release him. However, even that court decision has to be reviewed by frequent visits of a judge to the clinic, and in such matters of course, there can occur errors in judgements as in regular criminal proceedings, too. In that case such a person might be released and could commit similarly horrifying crimes again. This happened by accident even more so during the unification process of Germany because the new judges did not trust the former ones, the files were not kept properly or the psychiatrists involved made other mistakes because of insufficient communication.

Another more recent development is terrorism, tough it still does not change the picture. The Basic Law looks at people in no different way if they commit crimes based on ideological or political doctrines which totally disregard the life and integrity of other persons or the given social, legal and political order. Political or ideological terrorism and its crimes are not such a new phenomenon that law should react to quickly by changes of its content. In Germany nevertheless several changes in law have been enacted which do not solve the problem nor will do so in near future. However, there was never any hint that a reintroduction of the death penalty could be part of such changes. So while there might be popular sentiments in that direction there is no major political force advocating it. Even the right wing does not talk about it in public. It is simply no issue in the political arena. So, back to the point:

VI

Regarding death penalty a further assumption is that it is incompatible with the essence of life as a basic right guaranteed in its substance by art. 19 II GG, and, its connection to human dignity. What but not the end of the death penalty can be the result of the consideration that in substance or essence the right to life

is not to be affected? While the request of the state to serve in its army does not imply a taking of life by that state but only the risk to lose it, death penalty in any case if applied affects the very substance of life, i.e. the life itself.

At the same time, it cuts off the chance of the individual to enter into society as an equally free person enjoying all its rights again because it is irrevocable. Finally, it clearly subdues the individual to a sanction which makes this person a pure object of state action which is incompatible with the right to dignity in general.

Also, as already shown, since human dignity is part of the “basic structure” of the Basic Law it is impossible to introduce the death penalty by amendment to that constitution. This is the case because art. 79 III GG does not allow amendments which contradict the basic structure. Thus, even if one takes away art. 102 GG which abolishes death penalty it cannot be reintroduced by law.

Moreover, even if one does not appreciate this broad interpretation of human dignity which is more or less general consensus in Germany nowadays,⁷ the result might not be different: art. 19 II GG grants that the essence or very substance of any basic right shall not be affected by restrictions and art. 2 II 1 GG contains the right to life. Both clauses combined will result in another limitation on infringements by means of sanctions of criminal law and in the case of death penalty this would mean its ban because it takes away the very essence of life itself. Thus, not taking into account art 1 GG, its broad interpretation and the concept of basic structure which implies some continuity not to be traded away, one would end up at least with the requirement of an amendment if one plans to

⁷ This position would mean that art. 1 I and II GG do not imply entitlements as to be found in the following articles which contain basic rights. This concept would consider art. 1 I GG as the “Grundnorm” (basic norm) under which all law has to operate, but would restrict its practicable meaning to a mere statement of a principle without concrete binding force. Its weakness can be perceived if one looks at the obligations of the branches of government it contains. These obligations, especially those to respect and to protect dignity suggest to imply binding force. Therefore, even if dignity does not imply entitlements to the individual it nevertheless is related to strict obligations by law which have to be obeyed to by government. However, one could also argue, in a very traditional way of German doctrine, that this respect and this protection has to be spelled out in legislation by statute to gain a sufficiently clear and concrete shape, thus becoming binding. Before enacting such a statute one could argue that this clause is not binding, because it is not sufficiently specific. Thus, art. 1 I and II GG would have no specified effect under art. 79 III GG. This type of chain of arguments is possible in Germany because there is a traditional concept of law as containing possible only an obligation on the state to comply with it, but without giving at the same time an entitlement of that content to the citizens or residents. The chain from obligation to remedy via a right is not there. The assumption, that where there is law there has to be a right and where there is a right there must be a remedy is not established in civil law countries. However, this traditional concept since 1949 is under some fire since it does not match a constitution which says that rights are directly binding, as art. 1 III GG does. Besides, all the entitlements linked to dignity could be linked to specific basic rights such as life, liberty, health, housing, education and so forth as to be found in the “following basic rights”, being strictly binding and directly applicable, as art. 1 III GG says.

reintroduce death penalty. So it would not suffice to cancel art. 102 GG by amendment but additionally would require to add the explicit reintroduction not on the level of criminal law by a bill gaining a simple majority in both chambers of the legislature but by a two third majority in these houses, as art. 79 II GG states. Further, it would need an explicit change of the text of the constitution, which is required by art. 79 I 1 GG, such as a clarifying statement that death penalty does not touch the essence of the right to life. This procedure would link the problem to the right to life debate and therefore would make such an amendment rather difficult to push through both houses.

Finally, if one follows a generally accepted view that the basic rights through a minimum of essential set of content partake in human dignity, the result to re-establish death penalty is again difficult to achieve: This doctrine uses art. 1 III GG which refers to the following rights in the sense that the protection of art. 79 III GG comprises some fundamental human rights structures, even if one assumes that dignity as respected and protected does not lead to entitlements. Then clearly the classical set of “life, liberty, equality etc.” will be granted as an unchangeable core of such rights. Since at least an essential minimum of such fundamental rights is explicitly protected one could conclude that death penalty can not be re-established by amendment because that would collide with art. 79 III, 1 III GG.⁸ If one implies the concept of rule of law that some basic rights have to be granted, then one reaches similar results by applying art. 20 GG, in combination with art. 79 III GG. To go into that might appear a bit touchy in the German tradition with its basis of the “rule of law” in the “Rechtsstaat”. However, another approach to the rule of law which is relevant in the present context has to be taken.

VII

The story therefore is not yet over: Since the “Rechtsstaat” i.e. a version of the rule of law is part of the, “basic structure” of the Basic Law of Germany there is no way to re-establish death penalty if it collides with this concept inherent to art. 79 III GG, by its reference to art. 20 GG. The Rechtsstaat in fact is not directly mentioned within the language of the “basic structure”. It is implied by art. 20 GG, but one finds it used as a term in art. 28 I 1 GG where the republican form of government, democracy and the “soziale Rechtsstaat” is prescribed to be the compulsory basic structure of the States within the Federation of Germany.⁹

⁸ Under the assumption that the concept of rule of law also leads to the protection of some core minimum of basic rights, including the right to life, one might end up at the same result since the rule of law is comprised by the “basic structure” as granted in art. 79 III GG and made unchangeable. However, this is not taken up here, especially since the German version of the rule of law, i.e. “Rechtsstaat”, is not as much oriented towards “basic rights” as in the Anglo-saxon tradition of constitutional law. Moreover, there is a slow process of adapting and assimilating such traditions.

⁹ As to the concept of the Rechtsstaat see MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 11 (2001)

Thus, the rule of law and its traditional content are part of the “basic structure” which cannot be changed by amendments of the constitution. Also, if the rule of law in our perception does not allow death penalty it precludes not only amendments establishing it but would also be contrary to its introduction by statute. Apart from a general idea of fairness and natural justice the two main tools of the rule of law one has to talk about here are the pre-sumption of innocence and the principle of proportionality.

1. The presumption of innocence normally is only relevant up to the point that there is a final verdict of a court of justice. In Germany, astonishingly enough, for major crimes we have only one court going into the facts, on appeal in these cases there is no means to reassess them. One has the impression that countries like Turkey applying for access to the European Union are asked by Brussels to offer more to the accused if they want to gain accession. This shows that the limitation to the underlying ideas of such a presumption up to the time of the final verdict establishing guilt and responsibility may appear somewhat irrational.

Famous cases of error in fact have proved that questions in the sense of such ideas have to be taken into account when serving the sanction which resulted out of the proceedings as there might still be some relevance to the basic idea of the presumption of innocence. The case can be taken to court again if certain new facts are established or other basic irregularities can be proved. This, on the factual side of the situation, is easily possible in the case of a sentence to serve in prison. Though, it will not be possible if death penalty is applied and has been executed. Then, irrevocably, life is taken and the reaction of the state can only be to compensate, for instance, if there is a family and an income would have been possible, apart from the immaterial damage caused.

The presumption of innocence therefore has to have some effect even beyond the final verdict as to possible content of such a judgement. One should only be able to choose sanctions which are revocable even if complied with. This is not so in the case of death penalty. If executed as intended life is irrevocably taken. There are several famous cases of error in the history of criminal justice. They are to be found in any system of criminal procedure and criminal law. They have not diminished in numbers in modern times. Human ability and human knowledge are limited. Law is a matter of experience and application and it is man made. Therefore its results are never perfect. The response to imperfection therefore can only be to abstain from means which require more or less action without ever making mistakes. This would mean to set goals and ends which are only feasible in a perfect world.

2. The principle of proportionality implies that any infringement of a right by state action in the sphere of liberty of mankind has to serve legitimate ends and has to use the least intrusive tool to reach the intended legitimate end. In this sense

there necessity has to prevail to use a given tool of interference into the sphere of liberty of the individual.¹⁰ Otherwise the restriction of rights implied by such interference is not justified and therefore not lawful.

On the one hand proportionality has to be preserved if a given sanction of criminal law is applied to a particular case. So, as to be seen in India, death penalty if established there by constitutional text, can only be applied in the most outrageous cases of individual guilt of the offender and of circumstances which make the case one of the rarest of rare cases.

However, on the other hand, sanctions themselves have to obey the principle of proportionality. That means that any sanction which is not necessary in a very strict sense to reach legitimate ends cannot be upheld before the law. If one looks at death penalty this way there are considerable doubts whether it can be justified under the rule of law.

Firstly, there is always the alternative of a life sentence. Life sentence can be used in cases where the offender seems to be of that quality as to repeat his or her behaviour and the circumstances of guilt and facts need to be sanctioned in the most rigid manner. Since taking personal liberty for ever is an extreme sanction more is not indicated. Secondly, there is no possible end of criminal law under the German Basic Law which justifies irrevocable sanctions. Thirdly, the possibility of error excludes to use in such a case that sanction since such errors which are not as seldom as one likes to assume otherwise can not be corrected. Finally, the ends of human government do not include the tool to take life in a way which aims at the individual as a person. In legitimate war the state does not aim at the individual soldier of the other side. It aims not at the death of an individual, but at the destruction of the force of the enemy as such. Therefore, Germany, being governed by a Basic Law which upholds human life to the utmost - as art. 26 GG shows, banning any type of aggression beyond war - can use force in an international conflict. Moreover, it can not use death penalty as a legitimate mean to a legitimate end. To wipe out an individual as such is not within the frame of thought of that constitution.

It might happen sometimes like in cases of abortion, but then the taking of prenatal life is not justified by law but only excused by the individual decision not of the state but an individual person like a pregnant lady. She commits an unlawful act which might not be accompanied by guilt which would require to use a sanction of criminal law or there might be some other legally relevant justification, excuse or exemption of law. Justifying circumstances are defined by law and might relate to the own survival of the pregnant lady or to other circumstances defined by statute.

3. After all considerations under the assumption of innocence and the principle of proportionality as emanations of the rule of law and as presently

¹⁰ *Id.* at 160.

perceived in Germany, the rule of law as to be found in the Basic Law of Germany does not allow to go back to death penalty under this aspect of its “basic structure” which excludes not only a statute but even such an amendment of this constitution, as art. 79 III GG indicates. If this hurdle would not be there death penalty would require a change in constitutional law by amending its text and at the same time would mean that the rule of law as perceived up to now would be modified as well.

VIII

The Basic Law of the Federal Republic of Germany establishes a secular state. This is based upon the respect and protection of human rights, the establishment of religious and intellectual liberties, the abolishment of the identification of the state with a specific believe, “Weltanschauung” or church, the rule of law as implicitly granting neutrality and impartiality of the state established by it and several other elements of that constitution. There are exceptions to this secular and open structure of constitutional law. These exceptions do not include any clue as to criminal law or criminal procedure. They refer to schools, the presence of religion if requested by soldiers, patients or inmates in the military, the hospitals and the prisons. There are several other reservations in favour of religion. Also, religion is not taken out of public perception. By its adherents it may be made visible even on state occasions but all this does not refer to an idea of an inherent or otherwise justifiable link between religion and state authority. The state is contingent; it has now power beyond this world and does not use means which imply another basis of its powers. As a purely contingent affair the state does not pretend to be able to make final decisions which need a higher legitimacy than its powers contain.

All this was different before 1918, when state and church were not separate in Germany. Then the judge was acting under a law which had its final justification not in an act of parliament and a constitution but under a law sanctioned by enactment of a monarch who claimed to act by the grace of God in the sense of the monarchic principle as established in the 19th century in Europe as an alternative to a constitutional government. This god had no secular and symbolic connotations within it but was meant to be the God of Christia-nity. The relationship between monarchy and church allowed state decisions which could reach beyond repeal without any remaining effect. Grace of god could repair it and even the city states within the German Empire of “the Kaiser’s times” like Hamburg, Bremen and Lübeck, did not separate state and church; therefore the city courts in such a republic applied law with consequences alike. Presently this does not exist. One of the results of the revolution of 1918 is that there really is a secular republic. Godly monarchy was destroyed in the very first attempt in a revolution which had to stabilize the situation by establishing a new constitution. This republic was revived so far under the same concept after 1945. While most of constitutional law has been redrafted at the time, the clauses relating to the relationship of religion and the state have not chan-ged much in text. In the meantime, they have been interpreted even in a more open minded way, guided by a society which now, especially after unification, widely is nonreligious and secular.

One may ask why the Weimar Republic then did not abolish death penalty. One can clearly answer that question: firstly, it was still heavily influenced by the remains of the former regime. Secondly, it was dominated by one religious tradition which had accepted death penalty like many other institutions of Roman law when it had taken over the state in the time of the Roman emperor Constantine in the fourth century. Thirdly, it did not have the experience of extreme abuse as the society after Hitler's regime had. Fourthly, it did not see the consequences of basic and underlying concepts of those human rights it accepted, as almost all societies did in 1918. Even in 1949 when the new constitution included the abolishment of death penalty, this was not yet widely seen as a consequence of human rights. Moreover, the wording used in the new Basic Law promoted the development of law in this direction. The concept of dignity led to such interpretations. Therefore, death penalty was not only abolished, it was even petrified by interpretation to be an inherent part of the very basic structure and identity of this constitution. Recently it got clear that this is a necessity if one has built a secular state. Such a state is run with limited knowledge and powers and therefore has to avoid irrevocable decisions.

All this is not without consequences for the permissibility of death penalty in all future. It cannot be a means or sanction in such a secular state, which can only repair and correct its mistakes within its worldly endeavour which limits the reach of powers as well.

IX

Finally, democracy does not allow death penalty in that frame of constitutional law as we have in Germany. In democracy, only such powers can be transferred to the authority which the people have. People do not have other knowledge but one which is limited, not free of mistakes, errors, and abuse, even if they act at the best of their ability. Especially people in a democratic sense cannot refer to religion, beliefs or other metaphysical ideas if they act as people of a democratic society. Therefore power transferred to the authority within the framework of such assumptions cannot include decision-making which goes beyond the knowledge and ability of its sole basis. This is one of the basic reasons why in a democracy all power has to be limited as to content and time. There has to be the chance of correcting errors, of a change in substance and a new beginning. This is impossible if decisions made are irrevocable. In as much the branches of government and their staff should not be free or obliged to make decisions beyond that frame. There is no difference as to decisions of the judiciary, even though judges are merely bound to obey the law. Since in a democratic society which does not allow irrevocable decisions sanctions applied by the bench can always be corrected by pardoning by statute or by act of clemency of the head of state. If this were differently further reaching decisions would be possible and such a democracy would claim means which are not allowed by its ends. Also, it would request power beyond the power transferred to it by the people to those whom it governs.

Therefore, the identity and the continuity of the Basic Law of Germany as establishing a democratic form of government does not allow the reestablishment of death penalty even if art. 102 GG of that constitution would be cancelled. Art. 79 III GG so states and whatever changes in society occur this is to be accepted as paramount law of the country.

X

I wanted to show that the Basic Law of the Federal Republic of Germany implies by its very basic structure necessarily the lasting end of the death penalty apart from obligations of the country by European or International Law. There is no possibility to re-establish it in that country. This does not mean that other societies might not act another way. Apparently most societies - as in India - perceive death penalty as a sanction possible in the rare of rarest cases. This indicates an overall common consciousness of the limited knowledge and ability of mankind to establish justice and law which should be used in an always or mostly revocable manner.