

‘The death penalty is abolished.’ – German views on Capital Punishment

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‘The death penalty is abolished.’ Why bother about Capital Punishment?

Dear organisers of the World Congress against the death penalty,

Dear Ndume, dear Marc, dear Scott,

Ladies and Gentlemen,

I have been asked to speak about German views on the death penalty. When you start talking about the DEATH PENALTY in Germany, often people are mildly interested or sometimes even vividly interested but will think that you talk about other countries, often they would think about the United States. But when you start talking about the death penalty IN Germany, for example with my law students, you might get the answer: The death penalty is abolished – this is in our constitution. This reaction implies that the discussion about the death penalty has nothing to do with us, or, in short: why bother?!

I will therefore briefly describe historic struggles and arguments about the abolition of the death penalty in this country and then discuss why I think we should bother – here, there and everywhere.

Historic struggles

Among European states, Germany was neither among the early nor among the late to abolish the death penalty unconditionally – France or the UK were

significantly later, but Sweden, for example, had abolished it in 1910 and never re-introduced it.

Other states were even earlier, like the Netherlands, Belgium or Denmark, where since the 19th century only very few persons were executed, and formal abolitions took place already in the 1860s. All three states, however, returned to the death sentence and to executions shortly after the second world war, to react to the atrocities committed under Nazi-Germany's occupation and during the war, and collaborators and war criminals were sentenced to death and executed.

In Denmark, for example, this meant quite a few executions. The debates regarding the reintroduction there were fierce and emotional, and a member of the Danish parliament, a social democrat, himself a lawyer, is quoted saying *“if somebody had told me six years ago that I would support a law that – even retroactively! – re-introduces the death penalty, I would have said he is crazy. But since then, we have seen barbarism and lawlessness and the state has been deeply violated and I rather feel obliged to the deeply wounded public consciousness than to normal principles. We have to deal with those criminals, not because we take pleasure in revenge but to be able to return to normality soon.”*¹ The death penalty was abolished again in 1950 and 1952 in those three states.

Paradoxically, the same atrocities were the reason for Germany to introduce the provision to German Constitution, the *Grundgesetz* or “Basic Law”, that came into force 23 May 1949: “The death penalty is abolished.”, Article 102, the shortest provision in the *Grundgesetz*.² The abolition decision is described by historians as one of the tough ones to take and as one of the most disputed: The *Grundgesetz* was prepared at the Constitutional Convention at Herrenchiemsee

¹ K.K. Steincke of the Social Democrats, (Morten Christian Andersen: Dødsstraf i Danmark : Retsopgøret efter 2. Verdenskrig, 2006 (in Danish)).

² Erklärbar ist die Tatsache, dass dennoch 1951 noch Menschen in der BRD, nämlich in Landsberg in Bayern, hingerichtet wurden, damit, dass dies nach alliierterem Recht (in der US-Besatzungszone) geschah; es handelte sich um verurteilte Kriegsverbrecher. Zwar wurden von den Alliierten wegen der Grundsatzentscheidung im GG auch Hinrichtungen ausgesetzt, aber bei Weitem nicht alle.

by a group of constitutional experts which we fondly call the fathers and mothers of the constitution, because we are – I dare to say – proud of our Basic Law. About the death penalty, however, no decision could be reached there. Historians assume that there was a tendency towards the abolition, at least it was recommended to the Parliamentary Counsel (*Parlamentarischer Rat*) that later had to adopt the new Basic Law, to “consider abolition”. The negotiations there, again, were tough. And while it could be argued that the German debate was against the post-war *Zeitgeist*, in reality it was not: Vocal abolitionists could be found among those who rejected death penalties for the war criminals for the atrocities just mentioned – the right-wing “*Deutsche Partei*”;³ while others found it particularly difficult to spare *them* from the ultimate penalty by introducing its abolition. Finally, the Social Democrats submitted the request to introduce the abolitionist provision into the Basic Law which received a majority.

What were the arguments? At least from what we know from official documents, not the classic ones – about deterrence, cruelty, human dignity. The argument was political, and the main point was to clearly show the disruption or the discontinuity with the practice of the Third Reich. The Social Democrats had substantiated their proposal by saying that the rejection of the death penalty would be necessary to prove that there was a “*new legal consciousness among Germans*” and a “*renunciation of NS-Barbarism*”. Indeed, death sentences could be seen as one of the paradigmatic practices of NS-Criminal Justice – while 1932 the death penalty was possible for 3 offences, in 1943 it was possible for 46

³ Wikipedia: „Die DP war eine im nationalkonservativen Bereich des politischen Spektrums angesiedelte Partei. Sie sah sich in welfischer Tradition und vertrat einen protestantischen Konservatismus. In den 1940er und 1950er Jahren setzte sich die DP vor allem gegen Kommunismus sowie Sozialismus, Mitbestimmung, Planwirtschaft und Bodenreform ein und engagierte sich überwiegend für ehemalige Wehrmatsangehörige und Vertriebene. Den Sozialwissenschaftlern Manfred Rowold und Stefan Immerfall zufolge vertrat die DP „bürgerliche Wähler aus den konservativen Randzonen an der Schwelle zum Rechtsextremismus“.

offences and in 1944 alone the *Volksgerichtshof* - the people's court - sentenced about 2000 persons to death,⁴ during the Third Reich taken all together 16.500.⁵

Whether this rejection of the death penalty really had sunken in or represented the German people's stance at that point of time, is highly questionable; I can even imagine that this was not something post-war Germans were interested in very much. In any case, already three years after the formal abolition, there was a serious attempt to re-introduce it: In October 1952 the members of the Bundestag, the parliamentarians fought bitterly about the death penalty, referring to heinous crimes, for example a series of killings and attempted killings using explosives and other brutal murders committed in the post-war turmoil.

NOW, the *Deutsche Partei* wanted to have it re-introduced, simply requesting to delete Art. 102. Others wanted to retain the article but to make exemptions for murder and kidnapping.⁶ This time, all the usual arguments were exchanged: While most of the speakers had to admit that their parties were not united in their stance towards the death penalty, the major arguments for a re-introduction were that it was absolutely necessary to deter, because life sentences were not able to achieve that deterrence, and that the population – the voters – requested it.

In the crucial debate, it seems that the then Minister of Justice, a Liberal, won over the critical number of votes⁷ with a passionate speech, as later even political opponents acknowledged: He spoke long, argued very thoroughly, and included historical developments, going back to the Middle Ages, denouncing the brutal

⁴ Gribbohm: Nationalsozialismus und Strafrechtspraxis – Versuch einer Bilanz. NJW 1988, S. 2842.

⁵ JM Dehler, 1952, <https://www.bundestag.de/dokumente/textarchiv/2022/kw40-kalenderblatt-todesstrafe-209552>

⁶ A.a.O.: Die Fraktion der an der Regierung beteiligten Deutschen Partei (DP) forderte die Aufhebung des Artikels: „Der Artikel 102 des Grundgesetzes für die Bundesrepublik Deutschland wird aufgehoben“, lautete ihr Antrag (1/3679). Einige Abgeordnete der Bayernpartei sowie der CSU gingen mit ihrem Antrag differenzierter vor. Sie wollten dem bestehenden Artikel 102 als Absatz 2 ergänzend anfügen: „Dies gilt nicht für die Verbrechen des Mordes und des Menschenraubes. Das Nähere regelt ein Bundesgesetz“ (1/3702). In der Debatte sprach sich keine Fraktion geschlossen für die Todesstrafe aus. Selbst in der DP sowie der CDU/CSU fanden sich Gegner. Bei den Freien Demokraten gingen die Meinungen völlig auseinander.

⁷ 175 gegen 134 Stimmen bei 14 Enthaltungen für den differenzierten Antrag von CDU/CSU.

practices of executions and describing the abolition of the death penalty as an achievement of civilization. His main arguments were:

- The death penalty has no deterring potential.
- The idea of greater safety for citizens cannot outweigh the worth of human life and dignity.
- Wrongful convictions cannot be excluded.

Never, to my knowledge, the German Bundestag saw another serious attempt to re-introduce the death penalty.

We must note that what I have said so far, referred to the situation in the Federal Republic of Germany in its shape until 1990. In the German Democratic Republic, the situation was different, and the last person was executed in 1981 as a spy. For most crimes the death penalty, however, had been abolished already in 1972.

Risks

As I said – until now, that means for about seventy years there was no political attempt to re-introduce the death penalty that could be taken seriously. Of course, everything is possible if democracy fails. But - independently from international obligations such as the 6th Additional Protocol to the European Convention on Human Rights and the European Union's Charter of Fundamental Rights which prohibit the death penalty⁸ - as long as we have the Basic Law in Germany, it would be impossible to re-introduce the death penalty: this, at least meanwhile, is the dominant legal opinion in Germany (and my own): In principle, provisions in the German Basic Law can be changed with a two-third majority (Article 79 II), and this is frequently done. Some articles, however, cannot be changed at all (Article 79 III) - this is Article 1: Respect for

⁸ 6. Zusatzprotokoll zur Europäischen Menschenrechtskonvention von 1983/1985 verbietet Todesstrafe in Friedenszeiten; 13. ZP auch in Kriegszeiten; Art. 2 Abs. 2 der EU-Grundrechtecharta verbietet Verhängung und Vollstreckung der Todesstrafe (in Kraft seit Lissabon-Vertrag, 1.12.2009)

human dignity and Article 20, enshrining the rule of law. Among scholars, but also according to leading jurisprudence,⁹ it is argued that those two provisions taken together are the core of the provision to abolish the death penalty, that Article 102 only makes explicit what implicitly is already included in the unconditional respect for human dignity: **that a state is not allowed to take the life of any citizen, any person, under no circumstances.** This is also the reason why nobody can be extradited from Germany if the death penalty is looming in the state that requests extradition.

I would go as far as to say that politically, it is a taboo to request the re-introduction of the death penalty. Not that it is not done: supporters of the extreme right, the National Democratic Party of Germany, not represented in the German parliament, regularly can be seen with flags and posters saying “*Death penalty for child abusers.*” But when a member of the right-wing party Alternative for Germany (*Alternative für Deutschland* or AfD), that IS represented in the parliament, recently tweeted that “deterrence must be possible, changing Article 102 may not be a taboo in those cases” – of course he aimed at a foreign suspect, from another continent – the party leadership was quick to reject this argument;¹⁰ that it was a single opinion and that they had no intention whatsoever to question the abolitionist stance. Of course, we cannot be sure how quickly this would change, once it would be seen as

How about public debate? Regularly, a death penalty question is part of opinion polls, in many States across the world, also in Germany. The validity of these poll results is debatable, as criminologists and socio-legal scholars know that the approval rate often depends on how the question is posed – as an abstract possibility or a concrete reaction to certain crimes – but it is interesting to see

⁹ Urteil des Bundesgerichtshofes: BGH 5 StR 747/94 - Urteil vom 16. November 1995 (LG Berlin) = BGHSt 41, 317; Tatbestand der Rechtsbeugung bei Mitwirkung eines DDR-Strafrichters an Todesurteilen (Fallgruppen der durch Willkür gekennzeichneten offensichtlichen schweren Menschenrechtsverletzungen).

¹⁰ Artikel LTO, Auseinandersetzung Schellenberg mit Vors. Rechtsausschuss, <https://www.lto.de/recht/hintergruende/h/dav-anwaltverein-schellenberg-brandner-todesstrafe-nationalsozialismus/>.

you the answer develops over the years. Many people answer in the affirmative when asked if the death penalty should be part of the sentencing spectrum, often influenced by serious murder cases or terrorist attacks.

In Germany, I could not find anything more up-to-date than February 2016.¹¹ At that time, a general fear of crime had increased. In the telephone survey, the respondents were asked to say if they were for or against a number of measures to be taken against crime: While the overwhelming majority were for more police, better police equipment, more surveillance and easier expulsion of criminal foreigners, only 17% supported “the death penalty for the most serious crimes.” Other surveys from between 1992 and 2009 continuously found that roughly 25% of the respondents were supportive for a re-introduction of the death penalty.

We have to acknowledge that among law students, for which we have regular surveys in a few universities, the support for the death penalty was higher, some of us found that about one third of those responding thought the death penalty should be available. A few years ago, I have spoken at an event of “Cities for life” - the worldwide event against the death penalty organized by cities for their communities - and, to my surprise, the (many) older people in the audience were obviously all abolitionists. Not so a group of young women, students of the local high school, who argued bitterly with me why a person who has killed should be spared death, mainly referring to Immanuel Kant who they seem to have discussed in their philosophy class.

So, obviously there is work to do and the rejection of the death penalty in Germany is certainly not set in stone. This brings me to my very last point and conclusion: Education and events like this one are important to reiterate why it

¹¹ Allensbacher Archiv, IfD-Umfrage 11052, February 2016.

matters to us, why the death penalty is cruel and unusual and may never be an option, here, there and everywhere.

Thank you very much for your attention!