Headnotes

to the Judgment of the First Senate of 21 June 1977

- 1 BvL 14/76 -

1. Life imprisonment for murder under specific aggravating circumstances (*Mord*; § 211(1) of the Criminal Code) is compatible with the Basic Law as set forth in the following headnotes.

2. Based on the information currently available, and in consideration of the current practice of granting pardons, it cannot be found that enforcement of life sentences in accordance with the provisions of the Prison Act necessarily results in irreparable psychological or physical harm that violates human dignity (Art. 1(1) of the Basic Law).

3. Among the prerequisites for a prison sentence that is compatible with human dignity is the requirement that, in principle, a person sentenced to life imprisonment must retain the chance of regaining liberty at some point in the future. The possibility of a pardon is not sufficient. Rather, the principle of the rule of law requires that the statutory law set out conditions under which the enforcement of a life sentence can be suspended and the applicable procedures in such cases.

4. The classification of the act of killing someone perfidiously or killing in order to cover up another offence as murder under specific aggravating circumstances pursuant to § 211(2) of the Criminal Code does not, under a narrow interpretation of such provision that corresponds with the constitutional principle of proportionality, violate the Basic Law.

FEDERAL CONSTITUTIONAL COURT
- 1 BvL 14/76 -

IN THE NAME OF THE PEOPLE
In the proceedings
for constitutional review

of § 211 of the Criminal Code as amended by the First Act to Reform the Criminal Law of 25 June 1969, newly promulgated on 2 January 1975 (Federal Law Gazette I p. 1),

- Order of Suspension and Referral from the Verden Regional Court, Ninth Grand Criminal Division, of 5 March 1976 (3 Ks 3/75) -

the Federal Constitutional Court – First Senate –
with the participation of Justices

President Benda
Haager
Rupp-v. Brünneck
Böhmer
Simon
Faller
Hesse
Katzenstein

held on the basis of the oral hearing of 22 and 23 March 1977:

Judgment:

§ 211 of the Criminal Code as amended by the First Act to Reform the Criminal Law of 25 June 1969, newly promulgated on 2 January 1975 (Federal Law Gazette I p. 1), is compatible with the Basic Law as set forth in the reasons to this judgment, insofar as persons who have committed murder under specific aggravating circumstances by killing someone perfidiously or in order to cover up another offence are sentenced to life imprisonment.

Reasons:

A.

The proceedings concern the question of whether life imprisonment for murder under specific aggravating circumstances (*Mord*), defined as the killing of a person perfidiously or in order to cover up another offence, is compatible with the Basic Law. 1

I.

1. § 211 of the Criminal Code (*Strafgesetzbuch* – StGB) as amended by the First Act to Reform the Criminal Law (*Erstes Gesetz zur Reform des Strafrechts* – 1. StrRG) of 25 June 1969, newly promulgated on 2 January 1975 ([…]) reads as follows: 2

§ 211 Murder under specific aggravating circumstances (*Mord*) 3

(1) Whoever commits murder under the conditions of this provision incurs a penalty of imprisonment for life. 4

(2) A murderer under this provision is someone who kills a person 5

out of a lust to kill, to obtain sexual gratification, out of greed or otherwise base motives, 6

perfidiously or cruelly or by means constituting a public danger or 7

to facilitate or cover up another offence. 8-9

§§ 212 and 213 of the Criminal Code are also relevant to the constitutional review of the challenged provision. These provisions, in the version published on 2 January 1975, read as follows ([…]): 10

§ 212 Murder (*Totschlag*) 11

(1) Whoever kills a person without being a murderer under the conditions of § 211 incurs a penalty of imprisonme22.nt for a term of at least five years. 12

(2) In especially serious cases, the penalty is imprisonment for life. 13

§ 213 Less serious case of murder 14

Whoever kills a person under the conditions of § 212 on account of being provoked to rage, without any fault on their own part, by ill-treatment of or serious insult to themselves or a relative by the person killed and being immediately carried away by that rage to commit the offence, or in the event of an otherwise less serious case, the penalty is imprisonment for a term of between six months and five years. 15

2. The original version of § 211 in the *Reich* Criminal Code (*Reichsstrafgesetzbuch*) of 15 May 1871 ([…]) read as follows: 16

Whoever intentionally kills a person, if the act was premeditated, incurs the death penalty for murder under specific aggravating circumstances. 17

[…] 18-19

§ 2 of the Act Amending the *Reich* Criminal Code of 4 September 1941 ([…]) revised the offence of murder under specific aggravating circumstances. The new version of § 211 of the Criminal Code was based on drafts from 1936 (§ 405) and 1939 (§ 411), which, in turn, were based on earlier drafts for a Swiss Criminal Code ([…]). 20

§ 211 now read as follows: 21

> § 211
>
> (1) Whoever commits murder incurs the death penalty. 22
>
> (2) A murderer under this provision is someone who kills a person 23
>
> out of a lust to kill, to obtain sexual gratification, out of greed or otherwise base motives, 24
>
> perfidiously or cruelly or by means constituting a public danger or 25
>
> to facilitate or cover up another offence. 26-27
>
> (3) If capital punishment is not appropriate in exceptional cases, the penalty is penal servitude for life. 28

Following the abolition of capital punishment through Art. 102 of the Basic Law (*Grundgesetz* – GG), Art. 1 no. 1 c of the Third Act Amending the Criminal Law (*Drittes Strafrechtsänderungsgesetz*) of 4 August 1953 ([…]) adjusted the penalty in § 211(1) of the Criminal Code accordingly and deleted its section (3). […] 29

II.

The Verden Regional Court (*Landgericht*) – Criminal Division (*Schwurgericht*) – suspended a criminal proceeding and, pursuant to Art. 100(1) of the Basic Law, submitted to the Federal Constitutional Court the question of whether § 211(1) of the Criminal Code is unconstitutional insofar as it provides that anyone who has committed murder under specific aggravating circumstances incurs a penalty of life imprisonment. 30

1. The bill of indictment and the decision to initiate proceedings in the initial proceedings accuse 31-year old Berlin police officer Detlev R. of murdering the 22-year old Günter L., who was addicted to drugs, in Nienburg/Weser on the night of 13 May 1973. According to the results of the proceedings held thus far, the Criminal 31

Division considers the accused to be guilty of murder under specific aggravating circumstances. The court established the following facts:

The accused had been dealing in narcotics for some time. He was sentenced to a term of imprisonment of five years and six months by final judgment of the Verden Regional Court of 5 March 1976 for drug trafficking and tax evasion, committed in a single crime (*Tateinheit*). 32

At the end of April 1973, the accused became acquainted with the drug addict Günter L. and sold him morphine base against cash payment. [He] gave Günter L. morphine base on commission. Günter L. was to pay DM 1,000 to the accused. However, during a police search of Günter L.'s flat, most of the narcotics were seized, so that Günter L. was without drugs. In order to force the accused to continue to provide narcotics to him […], L. called the accused in Berlin and threatened to report him to the police […]. Thereupon, the accused decided to drive to Nienburg and to shoot Günter L. in order to prevent Günter L. from reporting him to the police and continuing to blackmail him. He gave Günter L. a false sense of security by promising him on the phone to deliver morphine base to him. [He] handed over the promised morphine base to Günter L. in his flat. […] When Günter L. was sitting in the kitchen with his back to the door […], the accused approached Günter L., who had been distracted by [an] injection, from behind and fired three shots at his head from a distance of half a metre. All the shots hit the target. Günter L. was killed instantly. 33

The Criminal Court considered this as an act of killing someone perfidiously to cover up another offence, and thus as murder under specific aggravating circumstances under § 211 of the Criminal Code. 34

2. According to the Criminal Court, the accused must be sentenced to life imprisonment if § 211(1) of the Criminal Code is valid, whereas a fixed-term prison sentence of a maximum of 15 years (§ 38(2) of the Criminal Code) can be considered if the provision is invalid […]. 35

3. The Criminal Court considers the provision referred for judicial review to be incompatible with Art. 1, Art. 2(2) second sentence in conjunction with Art. 19(2) and with Art. 3(1) of the Basic Law. […] 36

[…] 37-46

III.

Of the constitutional organs of the Federation and the *Länder* that were given the opportunity to submit statements pursuant to §§ 82(1) and 77 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), statements were submitted by the Federal Minister of Justice on behalf of the Federal Government, the Bavarian Minister-President on behalf of the Bavarian *Land* Government and the Hamburg Minister of Justice on behalf of the Government of the Free and Hanseatic City of Hamburg. 47

[…] 48-67

IV.

The President of the Federal Court of Justice (*Bundesgerichtshof*) submitted statements from its five criminal divisions pursuant to § 82(4) of the Federal Constitutional Court Act. Ultimately, all criminal divisions agree that there are no constitutional concerns regarding life imprisonment. 68

[…] 69-76

V.

The accused in the initial proceedings challenges the facts established in the order of referral and denies having killed Günter L. He also states that all prison sentences – and not just § 211(1) of the Criminal Code – are unconstitutional given that they completely deny liberty of the person. He argues that this is impermissible pursuant to Art. 19(2) of the Basic Law. 77

VI.

In two constitutional complaint proceedings (2 BvR 578/73 and 2 BvR 36/74) that have since been resolved, the Second Senate of the Federal Constitutional Court sent a detailed questionnaire to the *Land* governments. The replies yielded comprehensive information regarding the imposition, enforcement and effects of life imprisonment and the practice of granting pardons in the *Länder*. This information was also used in the present proceedings. The following information from this survey is relevant here: 78

1. From 8 May 1945 to 31 December 1975, 1915 persons in Germany have received a life sentence. About 90% of those were men. From 1972 to 1975, between 46 (in 1972) and 76 (in 1973) persons were sentenced to life imprisonment each year. 79

At the time the relevant offence was committed, 4.9% of those sentenced were under 21 years old, 49.5% were between 21 and 29 years old, 28.5% were between 30 and 39, 11.5% were between 40 and 49, 4.6% were between 50 and 59 and 1% were older than 60. 80

46% of offenders had no previous conviction, while 16.3% had been previously convicted once and 37.7% had been previously convicted twice or more. 81

As of 31 December 1975, there were 975 prisoners in the Federal Republic of Germany who had been sentenced to life imprisonment. Of those, only one person had been imprisoned for 30 years. None of these prisoners was convicted prior to 8 May 1945. 82

Of the 1915 persons sentenced to life imprisonment, 140 (7.3%) died in prison, 38 of them (2%) by suicide. 83

Of the 702 prisoners pardoned prior to 31 December 1975, about 5% of them reoffended; one committed murder under specific aggravating circumstances, three committed other homicide offences, the remainder committed other offences. 84

Due to the practice of granting pardons during the relevant period, relatively few prisoners (48) served fewer than 10 years or more than 30 years (27). The majority of pardons were granted between the 15th and 25th year of imprisonment. The average duration of the sentence served was about 20 years. 85

2. Only the Ministry of Justice of the Free and Hanseatic City of Hamburg raised constitutional concerns against life imprisonment. The Berlin Minister of Justice merely considers the application of the absolute penalty of life imprisonment in all cases of murder under specific aggravating circumstances to be questionable. The other *Länder* do not consider the law as it currently stands to be unconstitutional. […] 86

3. Regarding the impact of life sentences, the *Land* governments […] ultimately concurred that it could not be found that the enforcement of these sentences typically resulted in serious and permanent harm to the personality of the prisoners. They stated that there were individual differences in how the prisoners coped with detention. […] According to the *Länder*, given the more recent design of prison programmes, which include various incentives and the possibility of having external contacts, prisoners have sufficient possibilities of keeping mentally fit and preserving their individuality. […] [W]ith few exceptions, prisoners who had been pardoned after 20 or more years of 87

imprisonment were quite capable of coping with life and, after overcoming initial difficulties, could shape their lives quite actively and purposefully. […]

The Ministry of Justice of the Free and Hanseatic City of Hamburg […] focused more on the negative impacts of life imprisonment. […] It argued that prisoners generally felt like stigmatised outsiders. They tended to live in their phantasies and be out of touch with reality. Comparing themselves with severely damaged fellow prisoners, they often feared that they would suffer similar damage. Further, their capability of coping with life was curtailed, as they became accustomed to their passive role in prison. […] The Ministry added that violent reactions to the restrictive conditions of imprisonment were frequent, but that suicides and aggression did not occur more often than in other long-term prisoners. […] In some cases, the uncertain end of imprisonment and the varying practices of granting pardons of the *Länder* led to extreme psychological stress. […] 88

VII.

Experts […] were heard at the oral hearing. 89

1. [The experts] addressed the damaging effects of life imprisonment and the possibilities and prospects of counteracting those through suitable measures. 90

a) Professor Dr. Dr. Bresser [Head of the Department of Forensic Psychology and Psychiatry at the Institute for Forensic Medicine at the University of Cologne], who, as a member of an expert panel in the context of the pardon procedure in North Rhine-Westphalia, examined more than 100 prisoners serving a life sentence after a period of imprisonment of 19 to 20 years on average and followed their lives on the basis of the files, stated the following: 91

> The assessment of potential changes in prisoners' personality following imprisonment above all depends on the social skills of prisoners following their release. […] The personality of prisoners with life sentences is typically not harmed. […] In individual cases, the theory of the disintegration of a prisoner's personality appears to be confirmed. However, these are rare exceptions in which severe adjustment disorders already existed before imprisonment. […] There is also no evidence that imprisonment has damaging effects on health. […] 92

[…] 93-94

b) Dr. Einsele [former Director of the Women's Prison in Frankfurt] gave an account of the development of 20 women with life sentences who had been imprisoned for 12 to 24 years. She stated, inter alia: 95

> More recent studies have surprisingly shown that life imprisonment did not result in serious damaging effects on the personality of those affected; yet these outcomes might be based on methodological errors, the location of the respective researchers and their definition of damaging effects on someone's personality. However, under the system of values of the Basic Law, such damaging effects cannot be ruled out simply because a prisoner is able to work and does not reoffend. Rather, damaging effects on a person's personality can also be found if their individual life and their partnerships no longer mean anything to them and they isolate themselves as a result of imprisonment. Symptoms that are occasionally described as self-restraint and modesty should therefore be correctly interpreted as isolation, loss of a sense of reality, flexibility and the ability to socialise, fear of losing one's personality and becoming accustomed to passivity. […] 96

c) Dr. Stark [Director of the Prison Hamburg-Fuhlsbüttel], whose experiences and insights relate to 78 persons with life sentences from the *Länder* Hamburg, Bremen and Schleswig-Holstein, stated: 97

> Any institutional confinement results in hospitalism or deprivation syndrome. All in all, it can be said that, for persons with a life sentence, the world and their personal development appear to come to a halt. They are hopeless, helpless and perplexed. After a few years, prisoners calm down, but resignation then sets in. Prisoners adapt. Yet this adaptation is neither a reformation nor an improvement in the development of their personality. That said, in individual cases, very long sentences can lead to a positive new start and a restructuring. This does not alter the fact that a life sentence typically has damaging effects on all areas of a person's inner life. 98
>
> Many prisoners with life sentences appear to reach a stage where they become used to prison and start to resign themselves after five to seven years. No one can atone for their crimes for more than ten years. After that period, convicted persons lose sight of the crime they committed, which jeopardises the developmental work done during the prison sentence and leads to prisoners no longer willing to actively cooperate. […] Therefore, only dangerous offenders should serve a sentence for more than ten years. 99
>
> The longer they spend in prison, the harder it is to reintegrate offenders into society. […] 100

d) Professor Dr. Rasch [Director of the Institute of Forensic Psychiatry at the *Freie Universität Berlin*] examined 53 prisoners serving life sentences in the Berlin-Tegel Prison to prepare his expert opinion. He stated: 101

> […] When it comes to changes to prisoners' personality, it must be taken into account that, in general, this group is highly abnormal. Moreover, the offence that led to the conviction was typically committed at a low point of the development of personality, meaning that it can only be followed by an improvement. […] 102

> Various aspects can explain the deviation of his findings from the results of other studies: None of the prisoners included in the study was imprisoned for longer than 17 years. The composition of the group of murderers may have changed, or more ill persons were convicted in the past. Finally, prison conditions were markedly different in the past. Especially strict prison conditions can be severely damaging, whereas more relaxed conditions can have positive effects. 103

2. The experts [were also] heard regarding the question of whether life sentences for murder under specific aggravating circumstances […] serve prevention purposes. 104

a) Professor Dr. Müller-Dietz [Director of the Institute of Criminology at the University of Saarbrücken] took the view that the findings obtained so far in empirical research on prevention did not allow any definitive conclusions to be drawn. […] The probability of being punished and the consistency of penalties were more important than the severity of the sentence. […] The deterrent effect was dependent more on the subjective perception of the risk of being punished than on the objective probability and severity of punishment. Moreover, a considerable share of deliberate killings were committed in situations of conflict or on impulse. Such offenders can only be influenced by penalties to a limited extent. […] More effective law enforcement would therefore have a greater preventive effect than the severity of the punishment. […] 105

b) Professor Dr. Kaiser [Director of the Max Planck Institute for Foreign and International Criminal Law in Freiburg] summarised the current state of research […] as follows: The willingness to commit a crime is primarily determined by personal values, the subjective perception of the risk of being discovered and punished and the specific conditions of the potential crime situation. […] With regard to the most serious violent crimes, no measurable deterrent effect can be derived from certain penalties. What appears more important is the structure and strength of the entire system of prevention in a society. In adult prisoners, longer prison sentences do not lead to a lower rate of recidivism; however, it is unclear whether longer prison sentences have no preventive effect whatsoever or whether this effect is neutralised by the effects of imprisonment. 106

The expert added that in cases of murder under specific aggravating circumstances, no preventive effect of the possibility of life imprisonment for potential 107

perpetrators can be ascertained. However, that does not mean that no such preventive effect exists, only that there is no empirical confirmation […].

3. With regard to questions regarding the constituent elements of § 211 of the Criminal Code and the absolute penalties laid down therein, the Court heard from experts Professor Dr. Jescheck, Director of the Max Planck Institute for Foreign and International Criminal Law in Freiburg, and Professor Dr. Arzt, Director of the Institute of Criminal Law, Criminal Procedural Law and Criminology at the University of Erlangen-Nuremberg, and, due to their experience at criminal courts, the presiding judge at the Hamburg Regional Court, Mr Bertram, and *Leitender Ministerialrat* [high-ranking civil servant] from Stuttgart, Mr Staiger. 108

[…] 109-122

4. With regard to the advantages and disadvantages of the pardon procedure and a statutory framework regarding the suspension of life sentences, the Court heard from Dr. Triffterer, Professor for Criminal Law, Criminal Procedural Law and International Criminal Law at the University of Giessen, and Professor Dr. Müller-Dietz. 123

a) Professor Dr. Triffterer mainly highlighted the disadvantages of the current pardon procedure. Even with regard to the initiation of the procedure, the prisoner is largely dependent on the actions of the pardon authority, since initiatives brought by the prisoner involve the risk of rejection, which entails a de facto waiting period during which no new applications can be lodged. […] Another disadvantage is that political bodies decide whether a pardon is granted, with all the subjectivity that this entails. The expert added that decisions on whether to grant a pardon are often delayed. […] Moreover, decisions are usually given without any reasons, or insufficient ones, and are not subject to judicial review. The current pardon practice leads to uncertainties for prisoners that is harmful to their social reintegration. […] 124

b) Professor Dr. Müller-Dietz pointed out that pardon procedures are flexible […]. However, he considered it a disadvantage that this flexibility also entails considerable uncertainty for those affected. […] He added that decisions on whether to grant a pardon may be unduly influenced by public opinion. […] 125

[…] 126

[…] 127

B.

The referral is admissible. 128

[…] 129-134

C.

To the extent that it is under review here, § 211 of the Criminal Code is compatible with the Basic Law, when interpreted narrowly as set forth in the following reasons. 135

I.

1. Life imprisonment is a very serious interference with the fundamental rights of those affected. It is the harshest punishment in the catalogue of penalties of the applicable criminal law and constitutes a lasting deprivation of a person's liberty, which is declared inviolable under Art. 2(2) second sentence of the Basic Law. A sentence 'for life', in the strict sense of the word, involves the permanent exclusion of the offender from the society of free citizens. A life sentence does not just restrict the fundamental right under Art. 2(2) second sentence of the Basic Law, but also – depending on the individual case – affects several other fundamental rights guaranteed by the Constitution. This demonstrates the weight and significance of this question of constitutional law. 136

Interferences with the right to liberty of the person can be permissible under Art. 2(2) third sentence of the Basic Law, if they have a basis in statutory law. However, the Constitution imposes limits to the scope of such legislation in several respects. In exercising its power to make law, the legislator must respect the inviolability of human dignity (Art. 1(1) of the Basic Law) as the supreme principle of the constitutional order, as well as other constitutional provisions, in particular, the general guarantee of the right to equality (Art. 3(1) of the Basic Law) and the principles of the rule of law and of the social state (Art. 20(1) of the Basic Law). Liberty of the person is a legal interest of high standing, which may only be restricted for especially important reasons (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 22, 180 <219>); the deprivation of liberty for life therefore requires a particularly strict review on the basis of the principle of proportionality. 137

Within these limits, the legislator has latitude to shape the law. Given the role of criminal law in contemporary society, life imprisonment raises several questions in terms of legal and criminal policy. It is for the legislator to decide these questions. The legislator has so far opted to retain life imprisonment as punishment for the most serious crimes. In the context of the present referral, the Federal Constitutional Court only reviews whether this decision is compatible with constitutional law. 138

2. Life imprisonment has been imposed as a criminal punishment since time immemorial. In the past, however, it was less significant, because the death penalty was the most severe punishment in the criminal law catalogue. The controversy over the death penalty meant that imprisonment 'for life' was an alternative whose constitutionality was not in doubt. In the legal scholarship, there are some fairly significant older publications that address, in a relatively comprehensive manner, the effects of deprivation of liberty for life on human personality and its consequences (cf. M. Liepmann, Die Todesstrafe, Berlin 1912, Expert opinion for the 31st German Jurists' Convention). A favourite argument of supporters of capital punishment was that a life sentence was more cruel and inhumane than a death sentence ('Better a terrible end than unending terror'). Only once the controversy surrounding capital punishment had abated did academia start, at the end of the 1960s, to reconsider the problem of life imprisonment. Since then, there has been no let-up in the discussion about this most severe form of punishment. It is striking that the debate in academia has become increasingly lively in recent years, while the courts, on the other hand, have hardly engaged themselves with the issue until the submission of the Verden Regional Court. Until recently, the criminal courts simply assumed that life imprisonment is constitutional, without any further discussion. It was only most recently that the First Criminal Division of the Federal Court of Justice, likely prompted by the order of referral from the Verden Regional Court, used the following headnote in a judgment of 13 July 1976 ([…]): 'It is in line with the generally accepted legal view and established case-law that the penalty of life imprisonment for murder under specific aggravating circumstances is compatible with the Basic Law; the Court sees no reason to deviate from this view.' Without any further discussion, the Federal Court of Justice rejected as unfounded constitutional concerns regarding § 211 of the Criminal Code raised by the accused in the appeal on points of law (*Revision*). This corresponds to the legal view taken by all of the criminal divisions of the Federal Court of Justice asked to submit statements in the present proceedings; they all stated that they consider life imprisonment to be compatible with the Basic Law. 139

3. In the deliberations of the Parliamentary Council, no express declarations regarding the constitutionality of life imprisonment can be found. […] 140

[…] 141

[…] Despite all the differences of opinion on the issue, it was ultimately the abuse 142
of capital punishment during the Nazi regime that was decisive for inserting Art. 102 [abolition of capital punishment] into the Basic Law. It therefore cannot be inferred from the mere fact that capital punishment was abolished that the constitutional legislator considered life imprisonment to be compatible with the Basic Law. Nevertheless, another element of the original version of the Basic Law does raise an inference that the constitutional legislator assumed that life imprisonment was constitutional: […] [the Parliamentary Council decided] to insert a provision criminalising high treason and treason (Art. 143) into the Basic Law, providing for a penalty of penal servitude for life or not less than 10 years. This provision applied until the entry into force of the Act Amending the Criminal Law of 30 August 1951 ([…]). […] There can be no doubt that the legislator had in mind the traditional concept of life imprisonment.

4. These findings do not settle the constitutional question under review here. The 143
legislative history or the notions and motives of the constitutional legislator are not necessarily decisive for the interpretation of individual provisions of the Basic Law. Moreover, the understanding of the substance, function and effects of fundamental rights has deepened since the entry into force of the Basic Law. Medical, psychological and sociological knowledge regarding the effects of long prison sentences has also expanded. Essential factors for examining the constitutionality of life imprisonment are, to a not inconsiderable extent, determined by the times. New insights can influence and even change the appraisal of this punishment, in particular in light of human dignity and the principle of the rule of law.

II.

1. Respect and protection of human dignity are among the constitutive principles 144
of the Basic Law. Free human personality and its human dignity are the highest legal value within the constitutional order (cf. BVerfGE 6, 32 <41>; 27, 1 <6>; 30, 173 <193>; 32, 98 <108>). State authority in all its manifestations must respect and protect human dignity.

This obligation is based on the idea of human beings as intellectual-moral beings 145
with the inherent aspiration to be free to determine their own being and to develop. The Basic Law understands this freedom not as the freedom of an isolated and selfish individual, but as the freedom of an individual connected to and bound by the community (cf. BVerfGE 33, 303 <334> with further references). Given this bond, the

freedom cannot be ‘generally unlimited’. The individual must accept those restrictions of their constitutionally protected freedom that the legislator, within the limits of what is generally reasonable (*zumutbar*) in the relevant circumstances, imposes for the purposes of maintaining and fostering social co-existence; however, the autonomy of the individual must be upheld (BVerfGE 30,1 <20> – *Wiretapping* judgment). This means that the individual has a right to be respected, in principle, as a member of society with equal rights and with intrinsic value. Treating a person as a mere object of the state would be contrary to human dignity (cf. BVerfGE 27, 1 <6> with further references). The phrase ‘the person must always be respected for their own sake’ applies without restriction to all areas of law, since inalienable human dignity requires that any human being be recognised as an individual with personal autonomy.

146 In the criminal justice system, which must meet stringent requirements of justice, Art. 1(1) of the Basic Law informs the conception of the essence of punishment and the relationship between guilt and atonement. The principle of *nulla poena sine culpa* has the status of a constitutional guarantee (BVerfGE 20, 323 <331>). Any punishment must be in adequate proportion to the severity of the crime and the culpability of the offender (BVerfGE 6, 389 <439>; 9, 167 <169>; 20, 323 <331>; 25, 269 <285 f.>). The requirement to respect human dignity means that cruel, inhumane or degrading punishment is prohibited (BVerfGE 1, 332 <348>; 6, 389 <439>). A criminal offender may not be turned into a mere object in the fight against crime, in violation of their constitutionally protected right to be valued and respected as a person in society (*sozialer Wert- und Achtungsanspruch;* BVerfGE 28, 389 <391>). The basic conditions for individual and social existence of the person must be preserved. Therefore, the state has an obligation – which applies to imprisonment in particular – to guarantee the minimum standard of living required to live one’s life in accordance with human dignity, derived from Art. 1(1) of the Basic Law in conjunction with the principle of the social state. It would be incompatible with this notion of human dignity for the state to forcibly deprive someone of their liberty without giving them a chance of regaining liberty at some point in the future.

147 With regard to all the foregoing, it must be kept in mind that human dignity is inviolable. What is necessary to fulfil the requirement to respect human dignity cannot be separated from historical developments. The history of the administration of criminal justice clearly shows that the harshest punishments have gradually been replaced by milder punishments. While progress from cruel to more humane punishment and from simpler to more differentiated forms of punishment has continued, it is clear that there is still a long way to go. The assessment of what is in accordance with human dignity can only be based on current knowledge and is not valid indefinitely.

2. Based on these standards, life imprisonment, when judged in terms of its substance and effects, does not amount to a violation of Art. 1(1) of the Basic Law. 148

a) The reasons provided by the Regional Court for its finding of a violation of human dignity primarily refer to academic surveys regarding changes in prisoners' personality and the experience that long prison sentences have harmful effects on personality development […]. 149

The Regional Court did not itself investigate these matters. When reviewing the publications in legal scholarship quoted by the court and the other relevant legal scholarship, considerable doubts arise as to whether the evidence cited for the asserted harmful effects of life imprisonment is methodologically and substantively sound enough to derive constitutional conclusions for the assessment of the legislative decision therefrom. […] Many of the assertions can ultimately be traced back to […] M. Liepmann's expert opinion for the 31st German Jurists' Convention in 1912. 150

According to Liepmann ([…]), persons sentenced to life imprisonment pass through three stages ('three-stage theory'). 151

Liepmann postulates that in the first stage, a state of high agitation alternates with deep depression. […] With the right treatment, however, affected persons will become calm in one to two years at the latest. 152

This is followed by the 'second stage, in which self-preservation often prevails over the destructive forces of prison' ([…]). […] According to Liepmann, all affected persons hope to regain liberty at some point. This hope helps them keep their composure and avoid total adaptation, protecting them from collapse. […] 153

Regarding the third stage, Liepmann states ([…]): 154

> After 20 years of imprisonment, the third stage – the gloomiest one – typically begins. It starts with a 'waning of positive emotions': hopefulness is replaced by dull resignation; the disappointment probably also damages the nervous system, hypochondriac fears take over, with possible real harm to health, prisoners begin to perceive the continued prison sentence as a futile hardship, they feel that they are facing a slow death sentence; mistrust, bitterness and hatred of society replace the former trust. […] This leads ... to the cruel destruction of their inner life by the numbing effects of imprisonment. […] Prisoners begin to languish in prison, and this sentiment ultimately prevails. They become numb and emotionless, ultimately turn into machines and then ruins. This is the breeding ground for the development of mental disorders. 155

The results presented by Liepmann are based on comprehensive studies and the analysis of information of more than 2,000 life prisoners from different European countries and on preparatory work by other researchers. The expert opinion thus constitutes a thorough analysis of the effects of life imprisonment. However, it must be taken into account that penal servitude at the start of this century cannot be compared with today's conditions in the correctional facilities of the Federal Republic of Germany. Even if the building stock of many prisons may still date from that time, it is the way prisoners are treated in the daily life of the correctional facilities that is crucial. In this respect particularly, fundamental changes have occurred as a result of the transition from mere custodial sentences to actual treatment in prison, even if many aspects may still need to be improved. […] 156

The views expressed in recent scholarship regarding the effects of life imprisonment vary greatly. They range from claims of serious changes to prisoners' personality due to life imprisonment to descriptions of the successful social reintegration of most of those prisoners who are pardoned and released from prison. 157

[…] 158-166

b) The taking of evidence in the present proceedings was also inconclusive. […] 167

[…] 168-173

It is not for the Federal Constitutional Court to ascertain how such divergent assessments have come about. […] 174

[…] In any event, in consideration of all of the circumstances, it cannot be completely ruled out that after a certain amount of time in prison, which cannot be definitively determined based on the information available, there is reason to fear that distorting changes to prisoners' personality will occur in some cases. 175

c) In light of these uncertainties, the Federal Constitutional Court must conduct its review with restraint (cf. BVerfGE 37, 104 <118>; 43, 291 <347> with further references). It is true that the Federal Constitutional Court's role is to protect fundamental rights vis-à-vis the legislator. In reviewing [legislative decisions], the Court is therefore not bound by the legislator's legal view. Yet insofar as the values embraced and the assessments of facts undertaken by the legislator are relevant, the Court can in principle only set them aside if they can be rebutted. It seems nevertheless dubious that, even where serious interferences with fundamental rights are at issue, 176

uncertainties in the assessment of facts should be resolved to the detriment of fundamental rights holders. If the Federal Constitutional Court did not find a violation of inviolable human dignity guaranteed by Art. 1(1) of the Basic Law on the grounds of potentially damaging effects of imprisonment, the following reasons were primarily decisive:

aa) Constitutional law mandates that life imprisonment must be accompanied by adequate treatment programmes. Prisons are obliged to work towards the social reintegration of prisoners, even those sentenced to life imprisonment, in order to maintain prisoners' ability to cope with life and to counteract the damaging effects of imprisonment, and therefore, above all, counteracting distorting changes to their personality. These prison tasks are rooted in constitutional law, as they are derived from the guaranteed inviolability of human dignity in Art. 1(1) of the Basic Law. When prisons perform these tasks to the required degree, they make an essential contribution to counteracting such personality changes in prisoners. 177

Prisons in Germany no longer merely serve to hold people in custody, but aim to provide treatment programmes to work towards the social reintegration of prisoners. This is also in line with the previous case-law of the Federal Constitutional Court regarding the enforcement of prison sentences. The Court has repeatedly emphasised that under constitutional law, the principle of social reintegration reflects the self-perception of a community with human dignity at the centre of its system of values that is committed to the principle of the social state. For criminal offenders, this interest in social reintegration follows from Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. Convicted offenders must be given the opportunity to reintegrate into the community after serving their sentences (BVerfGE 35, 202 <235 f.> – *Lebach*; 36, 174 <188>). It falls to the state to adopt suitable and necessary legislative measures – within the limits of what is reasonable – to achieve this objective of imprisonment. 178

If it is assumed that persons sentenced to life imprisonment must in principle retain a chance of regaining liberty at some point in the future, so must they also have a right to social reintegration, even if it is only after a long sentence that they first have the prospect of adjusting to life in liberty (cf. in this regard BVerfGE 40, 276 <284>, which concerned a murderer sentenced to life imprisonment). In such cases, too, the way in which the prison sentence is served can create the conditions for later release and make it easier for the prisoner to reintegrate into society. 179

The Prison Act (*Strafvollzugsgesetz* – StVollzG) of 16 March 1976 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 581) gives effect to these constitutional 180

requirements for imprisonment. […] Prisoners should remain sufficiently capable of coping with life to allow them to readjust to normal life when they are released from prison ([…]). Apart from the provision on prison leave in § 13(3), the Prison Act does not contain any special rules which would exclude persons with life sentences from statutory claims or obligations of the prison authorities.

With the Prison Act, the position of prisoners has improved considerably compared to their situation under the previously applicable Prison Service and Enforcement Code (*Dienst- und Vollzugsordnung*). The statutory reform of the prison system and the determination of objectives of imprisonment must be considered a significant contribution to realising a prison system that is compatible with human dignity. It is especially important in this respect that persons sentenced to life imprisonment are only subject to special rules with regard to prison leave; they otherwise participate fully in the treatment programmes offered to all prisoners. Insofar as prisoners might be faced with changes to their personality given the special circumstances [of life imprisonment], it falls to the prisons, under § 3(2) of the Prison Act, to counteract such serious harm through suitable additional measures. The experts ultimately concurred that this is in principle possible. […] 181

bb) [In addition,] prisoners serving a life sentence in full are a rare exception. Apart from the very few cases in which the social prognosis is unfavourable and the continuing enforcement of the sentence is required for public security reasons, persons sentenced to life imprisonment are pardoned and released early. This further limits the risk of serious changes to prisoners' personality to a considerable extent. The practice of the *Länder* over the course of 30 years in regard to granting pardons shows that of the 702 prisoners pardoned, only a few (48) were released before having served 10 years, while even fewer (27) were released after an extreme term of imprisonment of up to 30 years. The majority of pardons are granted between the 15th and 25th year of imprisonment. On average, persons sentenced to life imprisonment serve approximately 20 years ([…]). 182

Finally, the Federal Minister of Justice makes reference in his statement to the fact that in recent years, almost all *Länder* have started to review on their own accord whether a pardon can be granted after a certain term of imprisonment. He attributes this to increasing criticism of the pardon procedure for life sentences, as well as the way pardons are handled in other Western European countries. 183

Thus, the practice of granting pardons has changed significantly over the last few years, to the benefit of persons sentenced to life imprisonment. […] 184

d) No violation of human dignity can be found in cases where continued enforcement of the sentence is necessary due to the prisoner posing an ongoing danger which precludes a pardon. The state and society are not prevented from protecting themselves against criminal offenders who are dangerous to the public by depriving them of their liberty. In this respect, it is irrelevant under constitutional law whether the deprivation of liberty is imposed and enforced for security reasons or as punishment. That the principle of proportionality must be observed when assessing whether an offender is dangerous, and that, even in such exceptional cases, compliance with the provisions of the Prison Act is required, does not require any further discussion. 185

III.

The order of referral points out that the bodies authorised to grant pardons make such decisions at their discretion, that there is no statutory framework specifying the requirements for being pardoned and no right to a pardon, and that, according to the case-law of the Federal Constitutional Court, the decision on whether to grant a pardon is not subject to judicial review (BVerfGE 25, 352 – no justiciability of pardon decisions; different assessment for revoking a pardon decision: BVerfGE 30, 111; […]). 186

It is true that the law as it currently stands – allowing the suspension of or release from life imprisonment only by way of a pardon – gives rise to concerns as regards the rule of law. The principle of the rule of law requires that release from prison be governed by the statutory law. 187

1. […] 188

2. Professors Dr. Triffterer and Dr. Müller-Dietz convincingly laid out the disadvantages of the pardon procedure in the oral hearing […]. 189

[…] 190

3. […] 191-192

4. a) With regard to constitutional review of life imprisonment, it has been shown, especially in light of Art. 1(1) of the Basic Law and the principle of the rule of law, that life imprisonment that is compatible with human dignity can only be ensured if the convicted has a specific and, in principle, viable chance of regaining liberty at some point in the future; the core of human dignity is affected if the convicted should lose 193

any hope of regaining liberty, regardless of their personality development. Such hope, which in view of the concept of human dignity is the very thing that makes the enforcement of a life sentence acceptable, must be ensured in accordance with the constitutional requirements; the possibility of being pardoned is not sufficient in this respect.

Expert Müller-Dietz is correct in pointing out that pardon decisions have for the most part turned into prognosis-oriented decisions regarding the danger posed by the offender. They thus serve a purpose that cannot be left to the discretion of the bodies authorised to grant pardons. […] It is true that the practice of granting pardons in the *Länder* shows that pardon decisions are prepared thoroughly. However, there are considerable differences with regard to the procedures used and the determination of the time of release, and the underlying reasons for these differences are not amenable to review. 194

The principle of the rule of law forms part of the guiding principles that directly bind the legislator; this follows from an overall assessment of Art. 20(3) of the Basic Law, which sets out the binding effect on the three branches of government, and of Arts. 1(3), 19(4), and 28(1) first sentence of the Basic Law, as well as from the Basic Law's overall concept. It is true that, according to the case-law of the Federal Constitutional Court (cf. BVerfGE 7, 89 <92 f.>; 25, 269 <290>; 28, 264 <272>; 35, 41 <47>; […]), this principle does not contain requirements or prohibitions that have constitutional status which can be clearly determined for all circumstances and in all detail. Rather, this constitutional principle must be given specific shape in accordance with the circumstances of the individual case, while safeguarding essential elements of the rule of law. In the present case, which concerns a serious issue that is of existential importance for the persons concerned, both the principle of legal certainty and the requirement of substantive justice mandate that the conditions under which a life sentence can be suspended and the procedures used are set out in the law. That said, within the limits set by constitutional law, the detailed design must be left to the legislator. 195

b) By contrast, the concerns raised regarding statutory provisions setting out the conditional suspension of the remainder of life sentences are ultimately without merit. […] 196

[…] 197-206

One key concern could […] be a potential weakening of the deterrent effect. In this respect, however, Dreher ([…]) and, in the oral hearing, Müller-Dietz have pointed out that the current practice of granting pardons has already led the general public to widely believe that a life sentence was for life in name only […]. Such statutory provisions would therefore not so much result in an ‘erosion of punishment’, but rather an open confirmation of the general factual situation as it exists already. 207

[…] 208

5. It follows from the aforementioned consideration that the legislator has a constitutional duty to enact statutory provisions in this regard. According to the case-law of the Federal Constitutional Court, the legislator must be granted a reasonable period of time in which to gather experience as to complex matters that are in the process of developing, which includes the issue of life imprisonment and its enforcement. Where a statutory framework is deficient, the Federal Constitutional Court only intervenes in those cases where the legislator fails to subsequently review and improve the existing framework despite sufficient findings in favour of a more adequate solution (cf. BVerfGE 43, 291 <321>). Such latitude must also be granted to the legislator in the present case. 209

IV.

Insofar as the legislator considers life imprisonment to be a necessary and appropriate punishment for the most serious homicide offences, this does not violate the constitutional requirement that all punishment be adequate and measured (cf. BVerfGE 28, 386 <391>). 210

1. The Federal Constitutional Court has repeatedly engaged itself with the spirit and purpose of punishment by the state without taking a position on the various general theories on punishment that exist in academia. The present case likewise does not provide grounds for discussing the different theories on punishment; it is not incumbent upon the Federal Constitutional Court to decide the dispute over different theories in criminal law scholarship on a constitutional law basis. In its reforms of the criminal law enacted since 1969, the legislator also did not want to adopt a final view on the purposes of criminal punishment; it limited itself to a somewhat open framework, which was intended to not rule out the further development of any of the recognised theories ([…]). The applicable criminal law and jurisprudence of German courts follow, for the most part, the so-called unified theory (*Vereinigungstheorie*), which attempts to strike a balance, albeit with differing priorities, between the various purposes of punishment. 211

This is within the constitutional leeway afforded to the legislator to acknowledge different purposes of punishment, weigh them against one another and coordinate them with one another. Accordingly, the Federal Constitutional Court has not only emphasised the principle of culpability in its case-law, it has also recognised other purposes of punishment. The Federal Constitutional Court has held that it is the general role of criminal law to protect the fundamental values of the community. Restitution, prevention, social rehabilitation, atonement and retribution are recognised aspects of appropriate criminal punishment (cf. BVerfGE 32, 98 <109>; 28, 264 <278>).

2. The referring court asserts that life imprisonment is not justified on the basis of the purposes of punishment recognised by the Federal Constitutional Court. The referring court claims that life sentences do not have the deterrent effect assumed by the legislator, are not necessary to protect society against potential re-offenders and contradict the right to social rehabilitation that follows from constitutional law. According to the court, life sentences are not suitable for ensuring atonement and retribution. 212

This view cannot be endorsed. A review of life imprisonment on the basis of the purposes of punishment that are essentially in accordance with the prevailing unified theory – a theory recognised by the Federal Constitutional Court – must conclude that life imprisonment as punishment for the most serious homicide offences in order to protect the exceptionally significant legal interest of human life serves an important function, is in line with the current values held by the population and, at the same time, makes the condemnation of such offences clear. Life imprisonment does not preclude the subsequent social reintegration of murderers who are not at risk of recidivism and gives effect to the penal functions of restitution and atonement. In sum, a life sentence for murder under specific aggravating circumstances is not a pointless punishment. 213

a) If the highest goal of criminal punishment is to protect society from socially harmful conduct and to safeguard the key values of the community (‘general prevention’), then in conducting the necessary overall assessment, the value of the legal interest that has been violated and the degree of harm caused by the act in question, including in comparison with other punishable acts, must be appraised first. The life of each individual is one of the highest legal interests. The state’s duty to protect life directly derives from Art. 2(1) first sentence of the Basic Law. It also follows from the express provision of Art. 1(1) second sentence of the Basic Law. If the legislator imposes the most severe punishment available for especially reprehensible violations of this legal interest of the highest order, which are summarised under the 214

term ‘murder under specific aggravating circumstances’, this is, at least with regard to the basic premise, not objectionable under constitutional law.

Nevertheless, the assessments of the general preventive effect of life imprisonment for murder under specific aggravating circumstances vary considerably ([…]). […] 215

aa) The negative aspects can generally be summarised under the category of deterrence of others who are at risk of committing similar criminal offences (‘specific general prevention’ – cf. Decisions of the Federal Court of Justice in Criminal Matters, *Entscheidungen des Bundesgerichtshofes in Strafsachen* – BGHSt 24, 40 <44>). The experts concurred that a deterrent effect of life imprisonment for murder under specific aggravating circumstances could not be established for potential perpetrators. However, specific studies on this matter are largely lacking. […] 216

[…] 217

bb) Preserving and reinforcing trust in the strength and finality of the legal order can generally be considered as the positive aspect of general prevention ([…]). One of the functions of punishment is to enforce the law against the wrong committed by the offender in order to prove the inviolability of the legal order before the legal community and thus to affirm the importance of abiding by the law. While no reliable studies on its effectiveness in this area have been conducted, it is likely that, for the most serious homicide offences, a reduction in crime cannot be measurably proven to result from a specific penalty or punishment practice. By contrast, there are sufficiently reliable indications that the threat and imposition of life imprisonment do have significance for the value that society attaches to human life in its general legal understanding. 218

The legislator expresses its condemnation of the punishable offence through the severity of the penalty. This condemnation significantly contributes to raising societal awareness of the issue. […] This awareness generally increases the inhibition to endanger human life, and especially to deliberately destroy it, in the population in general. 219

Therefore, the objection that life imprisonment is not necessary for general prevention purposes cannot be endorsed. […] Based on current criminological research […], it is unclear whether a 30-year, 25-year, or even a 20-year sentence would have sufficient general prevention effects. In light of this, the legislator is within its latitude in not limiting itself to the negative aspects of general prevention ([…]), but 220

also according significance to the effects that life imprisonment has on the general legal understanding, as set out above, which would not result from a penalty of fixed-term imprisonment.

b) Protection against an individual offender as a negative specific prevention purpose can be fully achieved by keeping the offender in custody for life. However, whether the lifelong enforcement of a life sentence is necessary for security reasons depends on the risk of recidivism. As the survey of the *Länder* has shown, the risk of recidivism is low for murderers (approximately 5%), whereas the usual recidivism rate for other crimes is 50 to 80%. Therefore, the consideration put forward by the Regional Court, according to which the purpose of providing protection from the offender alone does not justify the imposition of life imprisonment for murder under specific aggravating circumstances in every case, appears tenable. 221

[…] 222

c) In considering the existing practice of granting pardons and the requirement that the suspension of life sentences be governed by law, the imposition of life imprisonment does not run counter to the notion of social reintegration (positive specific prevention) that is rooted in constitutional law. Murderers sentenced to life imprisonment retain in principle a chance of regaining liberty after having served a certain portion of their sentence. And the goal of social reintegration enshrined in the Prison Act also has positive effects on them. It serves to ensure that they will be capable of coping with life and of being reintegrated. It is only for those offenders who remain dangerous to the general public that the goal of social reintegration cannot come into play. Yet this is not a consequence of being sentenced to life imprisonment, but rather of the specific personal circumstances of the convicted person that preclude successful social reintegration on a lasting basis. 223

d) Finally, when it comes to the purposes of restitution and atonement, it is consistent with the existing system of criminal sanctions that murder under specific aggravating circumstances, due to the extreme wrong committed and the culpability involved, is punished with an extraordinarily high penalty. This punishment is also in line with general expectations of justice. […] 224

It is true that atonement as a purpose of punishment is highly controversial, at a time where the notion of ‘social defence’ has been increasingly brought to the fore. If the legislator still considers restitution to be a legitimate purpose of punishment, it may be guided by this consideration […]. 225

References to other countries that have supposedly taken a different direction are not instructive. Most countries that have abolished the death penalty continue to have life imprisonment as punishment for the most serious offences. In a decision of 7/22 November 1974 ([…]), the Italian Constitutional Court expressly confirmed the compatibility of life imprisonment with Art. 27(3) of the Italian Constitution. It held that the goal and purpose of the punishment was not only the reintegration of the offender, but that deterrence, prevention and protection of society were permissible grounds for punishment in the same way as rehabilitation. 226

V.

1. According to the principle of culpability, which follows from Art. 1(1) and Art. 2(1) of the Basic Law (human dignity and autonomy) and from the principle of the rule of law, the constituent elements of an offence and its legal consequences must be adequately aligned based on the idea of justice (cf. BVerfGE 20, 323 <331>; 25, 269 <286>; 27, 18 <29>). The penalty must be in fair proportion to the severity of the offence and the degree of culpability of the offender; the punishment imposed may not go further than the offender's culpability. Where the degrees of culpability and severity of an offence may differ, the judge must in principle retain the possibility of adapting the punishment accordingly ([…]). A criminal law that is in breach of the constitutional principle of proportionality cannot be part of the constitutional order (BVerfGE 6, 389 <439>). 227

2. In this context, the question arises of whether it is compatible with the principle of proportionality that every case involving perfidious killing or killing to cover up another offence carries the penalty of life imprisonment without exception. This question must be raised given that the legislator – aside from cases of murder under specific aggravating circumstances (§ 211 Criminal Code) and genocide (§ 220a(1) no. 1 Criminal Code) – generally provides for a range of punishment within which the court determines the appropriate punishment in the individual case on the basis of the sentencing principles set out in § 46 of the Criminal Code. The referring court calls for a range of punishment to also be established for murder under specific aggravating circumstances, so as to permit judges to adapt the punishment in individual cases to the degree of wrong committed and the offender's culpability and not compel them to impose a punishment that they consider to be inappropriately severe ([…]). 228

Here, however, it must be taken into account that an absolute penalty contributes to legal certainty and to the consistent punishment of offenders. Experience has shown that in the absence of absolute penalties, the sentences imposed vary considerably 229

from court to court even if the conditions are similar. Judges are generally more lenient than the legislator and tend to avoid the most severe punishment even in cases where the legislator intended it to be imposed. The more severe the statutory sentence, the more pronounced this tendency becomes ([…]). Especially with regard to a very serious crime such as murder under specific aggravating circumstances, the interest in administering punishment as uniformly as possible is justified by the principle of substantive justice. Admittedly, the application of a rigid penalty can lead to unsatisfactory results in the individual case due to its inflexibility. An absolute penalty of such severity is only unobjectionable under constitutional law if the law grants the judge the possibility of imposing a punishment that is compatible with the constitutional principle of proportionality when the law is applied to a specific case. This is, as was shown in the oral hearing, in fact possible when the provisions of the General Part of the Criminal Code are taken into consideration and § 211 of the Criminal Code is interpreted narrowly and in conformity with the Constitution, especially with regard to the constituent elements of killing 'perfidiously' and 'to cover up another offence'.

a) As applied in practice, the penalty of life imprisonment for cases falling under § 211(2) of the Criminal Code is less absolute than it might appear at first glance. In enacting general criminal provisions, the legislator created possible ways to take the specific circumstances of the offender or offence in question into account. Among these are §§ 20 and 21 of the Criminal Code, which rule out punishment for persons exempt from criminal responsibility and provide for more lenient punishment for persons with diminished criminal responsibility; furthermore, mitigation is provided for in § 23(2) in conjunction with § 49 of the Criminal Code for attempted murder under specific aggravating circumstances or for aiding in the commission of murder pursuant to § 27(2) second sentence of the Criminal Code as well as pursuant to the provisions of the Youth Courts Act (*Jugendgerichtsgesetz* – JGG), in particular § 106(1). 230

Of particular significance in this respect is the possibility of mitigating a sentence on the grounds of diminished criminal responsibility pursuant to § 21 of the Criminal Code, especially in cases of murder as the result of a conflict ([…]). Following the case-law of the *Reich* Court (*Reichsgericht*) regarding § 51 of the Criminal Code (old version), the Federal Court of Justice developed a 'legal concept of illness', which is set out in detail in its decision in BGHSt 14, 30 <32> and forms the basis of the established case-law. According to this concept, the term 'pathological mental disturbance' not only includes mental illness in the clinical and psychiatric sense, but 'all other types of disturbances of human reasoning as well as those of human will, emotions and urges which impair the ideas and drives that are present in a normal and mentally mature person and enable them to form their will' (this also includes deviant 231

sexual urges – cf. BGHSt 23, 176). While the description of mental disturbances in § 20 of the Criminal Code (new version) differs from the one in § 51 (old version), the case-law has essentially remained the same. According to Kreuzer ([…]), every third adult convicted of murder under specific aggravating circumstances in 1974 was considered to have diminished criminal responsibility.

b) The constituent elements of killing ‘perfidiously’ and ‘to cover up another offence’ have always been interpreted narrowly by the courts. 232

aa) The courts largely follow legal scholarship, understanding ‘perfidiously’ to mean – insofar as the objective aspect of the crime is concerned – taking advantage of an unsuspecting and defenceless victim. 233

([…]) 234

The Federal Court of Justice made it expressly clear in its decision in BGHSt 19, 321 <322> that it is not sufficient for a finding that a killing was carried out perfidiously that the offender takes advantage of an unsuspecting *or* defenceless victim ([…]), but that both conditions (unsuspecting *and* defenceless) must be met. 235

The constituent elements are further narrowed in that an unsuspecting victim can only be considered to have been taken advantage of if the victim could have resisted the attack on their life, either on their own or with the help of another, if the victim or the person willing to help had not been lulled into a false sense of security by the offender ([…]). 236

With regard to the subjective aspect of the offence, the courts require that the offender not only knows of the circumstances based on which they can take advantage of the unsuspecting and defenceless victim, but is also aware of their significance for the victim’s lack of suspicion and defences and for the execution of the crime ([…]). In the individual case, this condition need not be met for a finding that a killing was carried out perfidiously if, for example, strong emotions prevent the offender from identifying and recognising the fact that the victim is unsuspecting and defenceless and becoming aware of the significance of that fact ([…]). 237

Another important restriction imposed by the constituent element of a ‘perfidious’ killing is that the offender must, in addition to taking advantage of an unsuspecting and defenceless victim, also have hostile intentions when attacking the victim ([…]). Accordingly, a person committing suicide who wants to put their unsuspecting and 238

defenceless family members to death in order to spare them supposed dishonour or economic hardship does not act perfidiously ([…]). Likewise, a doctor who administers a lethal overdose of a drug to a terminally ill patient in order to relieve their agony does not act perfidiously within the meaning of § 211(2) of the Criminal Code ([…]). The referring court uses the example of a doctor providing assistance in dying to a terminally ill patient to support its view that the element of a 'perfidious' killing is unsuitable for distinguishing between murder under specific aggravating circumstances and murder; however, this example is not relevant.

In a subsequent decision ([…]), the Federal Court of Justice restricted the element of a 'perfidious' killing even further by requiring that the perpetrator's hostile intentions must be secret. If, by contrast, the perpetrator is openly hostile towards the victim, they do not kill perfidiously, even if the victim does not expect an attack on their life. This applies unless the attacker ambushes the victim based on a deliberate plan with the intention to kill, thus creating favourable conditions for killing the victim that persist until the crime is carried out ([…]). 239

bb) When it comes to the constituent element of killing to cover up another offence, the legislator assumes that the purpose pursued by the perpetrator is especially reprehensible. Some typical examples are: killing a witness in order to remain undetected; killing the investigating police officer in order to escape without being identified ([...]); killing the victim of a crime so that others are not alerted by their screams. 240

Following the abolition of transgressions (*Übertretung*), the only offences that can meet the constituent element of killing to cover up another offence are crimes and misdemeanours. The offence to be covered up need not have been committed by the murderer; this constituent element can also be met by an offence committed by someone else ([…]). 241

Moreover, the perpetrator must have acted *for the purpose of* covering up another offence. The killing must be the means used to cover up the other offence; it may not just be an [unintended] consequence of a homicide committed for other purposes. Thus, the intention to cover up an offence is lacking if the perpetrator merely wants to escape their pursuers. For example, hit-and-run after an accident is in itself not an act covering up an offence; if the death of the victim is merely foreseen and tolerated, it does not meet the constituent element of § 211 of the Criminal Code ([…]). 242

When someone kills to cover up another offence, they are in a situation of conflict. It could be argued that such conduct should be assessed more leniently, under the principle of *nemo tentatur se ipsum accusare* (*Selbstbegünstigung*). On the other hand, it must be considered that the perpetrator's conduct does not just reflect particularly base motives, but also a high degree of dangerousness. The crime is characterised by the fact that the killing of a person is used as a means to prevent another crime from being solved or to obtain the proceeds of a crime, i.e. to achieve a goal that is already disapproved of by the legal order. Such conduct reflects a particularly reprehensible attitude of the perpetrator. They are not deterred by sacrificing human lives if these are in the way of the perpetrator's criminal goals. The purpose pursued by the crime is what sets the crime apart from the usual cases of murder (*Totschlag*) and justifies a harsher punishment as murder under specific aggravating circumstances. The attitude of such perpetrators reflects a particularly extreme egotistical ambition. Moreover, such perpetrators are extraordinarily dangerous due to their high level of criminal motivation. This applies all the more if the offence being covered up is relatively minor ([…]), because in these cases, the disregard for human life shown in the pursuit of one's own interests becomes especially clear. 243

c) It is true that the application of § 211 of the Criminal Code interpreted in this manner may lead to disproportionate hardships in a few borderline cases. The Federal Constitutional Court is of the opinion, however, that the act of killing established in the order of referral is not one of these borderline cases. That said, other cases may not meet the criterion of 'especially reprehensible', which makes life imprisonment appear proportionate. 244

Contrary to the prevailing opinion in legal scholarship and to previous case-law ([…]), the Federal Court of Justice did not allow an additional examination as to whether the overall assessment of the crime, especially the motives of the perpetrator, made the crime appear 'especially reprehensible'. The Federal Court of Justice considers such an unwritten constituent element to be unsuitable, given that it jeopardises the clear distinction of murder under specific aggravating circumstances, and thus the special legal protection that society owes to the lives of its members as its highest legal interest. 245

This argument is countered by the contention that omitting such examination leads to a definition of murder under specific aggravating circumstances that is too broad ([…]). For example, a killing can be considered to constitute murder under specific aggravating circumstances even if the perpetrator was driven to commit the crime by an excusable strong emotion that was caused by serious insults ([…]) or if the 246

perpetrator got carried away and killed their victim while carrying out a criminal offence or immediately after, even though in such cases the thought of killing often occurs without premeditation. It also seems concerning that the Federal Court of Justice ([…]) bases the presumption that a killing was carried out perfidiously on the question of whether a mother who kills her child with sleeping pills administers these pills to the child directly or adds it to their food.

247 However, this interpretation of § 211 of the Criminal Code and its individual constituent elements is not binding. The wording and meaning of the provision allow for an even narrower interpretation that ensures that no disproportionately harsh punishment must be imposed in such borderline cases. Experts Prof. Dr. Jescheck, Prof. Dr. Dr. Bresser and Dr. Stark extensively explained this in the oral hearing. It is also confirmed by the legal scholarship cited above. The approach that should be adopted in the individual case depends on the interpretation of ordinary law and therefore falls to the competent criminal courts. It is for the Federal Court of Justice, which is ultimately competent for the interpretation of criminal law provisions, to decide whether the constituent elements of killing ‘perfidiously’ and ‘to cover up another offence’ is to be even more narrowly interpreted, such that the former requires a reprehensible betrayal of trust and the latter can only be presumed to meet the criterion of ‘intention to cover up’ if the crime was premeditated, or whether the general criterion of ‘especially reprehensible crime’ is to be reintroduced, or whether an altogether different interpretation that is compatible with the principle of proportionality with regard to the constituent elements and the absolute penalty is to be found. If § 211(2) of the Criminal Code is interpreted in a way that is compatible with its wording and that gives the provision a reasonable meaning that does not run counter to its purpose, the provision is constitutional.

VI.

248 Contrary to the view of the referring court, the provision in question also does not violate Art. 3(1) of the Basic Law.

249 1. In general, it is primarily for the legislator to decide how the different degrees of wrongfulness and culpability associated with different types of killing are to be taken into account in the design of the substantive criminal provisions. In this context, the legislator is only bound by Art. 3(1) of the Basic Law insofar as the constituent elements and penalty chosen must be based on sufficient factual reasons and must not be arbitrary. It typically falls to the legislator to decide which factual elements are so important that such differentiated circumstances justify unequal treatment. Legislative

latitude only finds its limits where an unequal treatment of the matters addressed in the law is no longer compatible with an approach that is based on the idea of justice, that is, where there are no plausible grounds for statutory differentiation.

2. It is clear from the considerations set out so far that murder under specific aggravating circumstances is capable of justifying harsher punishment than other acts of killing. It is true that there is a considerable gap between the penalty for murder under specific aggravating circumstances set out in § 211(1) of the Criminal Code, and the penalty for murder set out in § 212(1) of the Criminal Code. The former imposes an absolute penalty of life imprisonment, while the latter only imposes a prison sentence of five to fifteen years, with potential possibilities of mitigating the sentence pursuant to § 213 of the Criminal Code. Likewise, when looking at the actual times served, there is an enormous difference between twenty years served on average [for murder under specific aggravating circumstances] and a maximum of ten years served [for murder]. The provision for murder in especially serious cases (§ 212(2) Criminal Code) does not reduce this difference in practice, given that this provision is applied only in rare cases, as was shown in the survey of the *Länder* and confirmed in the oral hearing. However, when interpreting the referred provision narrowly, as is required by the principle of proportionality (cf. C V above), the constituent elements for murder under specific aggravating circumstances – killing perfidiously and intention to cover up another offence – differ so substantially from other deliberate killings with regard to the severity of the offence and culpability of the offender that the considerable differences in the penalties imposed appear to be justified. 250

As set out in detail above, the constituent element of killing perfidiously can be specified and narrowed down to such a degree that it only applies to especially reprehensible killings. […] 251

In terms of typology alone, there can be no doubt that killing to cover up another offence is a serious crime that shows a particularly antisocial attitude on the part of the offender. […] 252

3. Despite all of the foregoing, it is not denied that the distinction between murder under specific aggravating circumstances and murder has remained a problem even after the amendment of § 211 of the Criminal Code by the Act of 4 September 1941, as comprehensively set out by Professor Dr. Arzt in the oral hearing. It is also true that § 211 of the Criminal Code in its current version is based on the outdated doctrine of the ‘normative offender typology’. According to Maurach ([…]), the amendment was an attempt to see how courts would respond to this doctrine. Nevertheless, the division of 253

deliberate killings into two different types is very old. For a very long time, murder under specific aggravating circumstances (*Mord*) has been categorised as an especially serious form of murder (*Totschlag*), which is the more typical form of deliberate killing. As old as this division is, the forms of distinction have been fluent and changing. In some periods (e.g. as early as the Middle Ages), the focus was – as it is today – on the special reprehensibility and dangerousness, while at other times, the psychological criterion of premeditation was more important. The method of distinction has always led to great difficulties. A fully satisfactory solution has not been found. […] Given the various problems involved, it will be difficult for the legislator to create a new legal provision that is satisfactory for all sides.

VII.

Finally, Art. 19(2) of the Basic Law (guarantee of the essence of the fundamental right to liberty of the person in particular) does not preclude life imprisonment. 254

In this respect, it is irrelevant what is meant by ‘the essence’ of a fundamental right being ‘affected’ within the meaning of Art. 19(2) of the Basic Law (cf. BVerfGE 2, 266 <285>; 22, 180 <219 f.>; 27, 344 <350 ff.>). Rather, the following consideration is decisive: The Parliamentary Council was aware of the criminal law restrictions on personal liberty in its deliberations. Life imprisonment formed part of the traditional punishments that existed before the constitutional legislator took up its work. Following the abolition of capital punishment (Art. 102 of the Basic Law), life imprisonment became the harshest punishment in the catalogue of penalties. Neither the legislative history of Art. 2(2) second sentence ([…]) in conjunction with Art. 102 of the Basic Law ([…]) and Art. 104 of the Basic Law, nor the legislative history of Art. 19(2) of the Basic Law ([…]) provide the slightest indication that this traditional punishment should be called into question. In objective terms, this was reflected in the original version of Art. 143 of the Basic Law. While it is true that it cannot be inferred therefrom, as set out above (C I 4), that life imprisonment was generally approved under constitutional law, it does follow that life imprisonment is compatible with Art. 2(2) second sentence and Art. 19(2) of the Basic Law. This ultimately corresponds to the view held by almost all legal scholars, even if the underlying reasons may differ ([…]). 255

VIII.

Insofar as the enforcement of a life sentence might violate other fundamental rights in the individual case, it is incumbent upon affected persons to challenge such violations through the existing legal avenues. The case-law of the Federal 256

Constitutional Court provides many examples of prisoners who, when necessary, have enforced their rights by constitutional complaint ([…])

Benda Haager

Justice Rupp-v. Brünneck was unable to sign.

Böhmer Simon Faller

Hesse Katzenstein