

7.3 Life Imprisonment Case (1977)
45 BVerfGE 187

[A drug addict threatened to expose the defendant for selling forbidden drugs if he failed to deliver a certain drug already ordered and allegedly paid for. At an appointed time the defendant delivered the drug and then, as the addict was injecting himself with it, shot him in the back of the head three times at close range. The Criminal Code as revised in 1969 prescribed a mandatory penalty of life imprisonment for any person who killed another out of wanton cruelty or to cover up some other criminal activity. The defendant was charged under this statute. The Verden District Court, before which the defendant was to be tried, regarded the penalty as incompatible with the dignity clause of Article 1, whereupon it referred the question to the Constitutional Court. The trial court claimed that mental deterioration would result from the knowledge that one would never be able to return to society, and that the punishment thus conflicted with the legislature's obligation to respect the human dignity to which every human being, even a criminal, is entitled. The lower court argued that mandatory life imprisonment, offering no possibility of reentering society, would reduce the criminal to the state of a mere object.]

Judgment of the First Senate. . . .

A sentence of life imprisonment represents an extraordinarily severe infringement of a person's basic rights. Of all valid punishments in the catalogue of [criminal] penalties, this one is the most invasive of the inviolable right to personal freedom guaranteed by Article 2 (2). . . . In carrying out this penalty, the state not only limits the basic right secured by Article 2 (2), but it also — depending of course on the individual case — implicates numerous other rights guaranteed by the Basic Law. The question posed by this case is therefore of considerable gravity and importance.

Under Article 2 (2) of the Basic Law, the right of personal freedom may be limited by an act of parliament. But parliament's freedom to introduce legislation is limited by the constitution in a number of ways. In exercising its powers the legislature must take account of both the inviolability of human dignity (Article 1 [1]), which is the highest value of the constitutional order, as well as constitutional principles such as equality (Article 3 [1]), the rule of law [*Rechtsstaatlichkeit*], and the social state (Article 20 [1]). Since the freedom of the individual is already such an important legal interest that it may only be limited on grounds that are truly compelling, any lifetime deprivation requires special scrutiny by the standard of the principle of proportionality. . . .

C. I. 2. Life imprisonment has for ages been at the core of criminal sanctions. Its significance in modern times has decreased because the death penalty is now the

harshest penalty. The dispute over the death penalty has made life imprisonment an alternative the constitutionality of which has not generally been questioned. A substantial amount of older literature has examined in depth the effect and consequences of life imprisonment on the human personality. Advocates of the death penalty advance the argument that life imprisonment is a more cruel and inhuman punishment than the death penalty. It was not until the furor over the death penalty had subsided that scientists in the late 1960s began to concern themselves with the problems of life imprisonment. Since then, the discussion of this maximum penalty has not died down. In fact, the controversy has in recent years grown more intense in the scientific literature, while the courts have barely concerned themselves with the issue. The criminal courts have presumed that life imprisonment presents no constitutional problem. Only very recently did the First Senate of the Federal High Court of Justice with jurisdiction over criminal cases — probably spurred on by the Verden District Court's reference to us — venture to say: "That the threat of life imprisonment for murder is compatible with the Constitution conforms to the general legal outlook and to our existing jurisprudence; the senate sees no occasion now to depart from this view." [The Federal High Court] summarily declared the constitutional doubt raised on appeal in this case against section 211 of the Criminal Code to be unfounded. The court regarded the penalty of life imprisonment as wholly compatible with the Basic Law. . . .

[The Constitutional Court reviewed the arguments that led the framers of the Basic Law to abolish the death penalty. In their view, the court found, life imprisonment under some conditions would substitute for the death penalty. In the following extract the court employed sociological analysis while asserting the need for an "objective" approach to constitutional interpretation.]

This determination, however, does not clearly decide the constitutional issue before us. Neither original history nor the ideas and intentions of the framers are of decisive importance in interpreting particular provisions of the Basic Law. Since the adoption of the Basic Law, our understanding of the content, function, and effect of basic rights has deepened. Additionally, the medical, psychological, and sociological effects of life imprisonment have become better known. Current attitudes are important in assessing the constitutionality of life imprisonment. New insights can influence and even change the evaluation of this punishment in terms of human dignity and the principles of a constitutional state.

II. 1. The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself. This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but

rather [that] of a person related to and bound by the community. In the light of this community-boundedness it cannot be "in principle unlimited." The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual has to be protected. This means that [the state] must regard every individual within society with equal worth. It is contrary to human dignity to make persons the mere tools of the state. The principle that "each person must shape his own life" applies unreservedly to all areas of law; the intrinsic dignity of each person depends on his status as an independent personality. In the area of criminal sanctions, which demands the highest degree of justice, Article 1 (1) determines the nature of punishment and the relationship between guilt and atonement. The basic principle "*nulla poena sine culpa*" has the rank of a constitutional norm. Every punishment must justly relate to the severity of the offense and the guilt of the offender. Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect. [It] must preserve the underlying assumptions governing the individual and the social existence of the human person. Thus Article 1 (1) considered in tandem with the principle of the state based on social justice requires the state to guarantee that minimal existence—especially in the execution of criminal penalties—necessary for a life worthy of a human being. If human dignity is understood in this way, it would be intolerable for the state forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain this freedom.

We must never lose sight of the fact that human dignity is not dispensable. [We] cannot separate our recognition of the duty to respect human dignity from its historical development. The history of criminal law shows clearly that milder punishments have replaced those more cruel in character and that the wave of the future is toward more humane and differentiated forms of punishment. Thus any decision defining human dignity in concrete terms must be based on our present understanding of it, and not on any claim to a conception of timeless validity.

2. If these standards are used in assessing the nature and effect of life imprisonment, then there is no violation of Article 1 (1) . . .

(aa) A sentence of life imprisonment must be supplemented, as is constitutionally required, by meaningful treatment of the prisoner. Regarding those prisoners under life sentences, prisons also have the duty to strive toward their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and the destructive changes in personality that accompany imprisonment. This task finds its justification in the constitution itself; it can be inferred from the guarantee of the inviolability of human dignity within the meaning of Article 1 (1) of the Basic Law.

In enforcing this punishment in the Federal Republic, state officials are under a

duty not merely to incarcerate but also to rehabilitate the prisoner through appropriate treatment, a policy consistent with previous decisions of this court. The court on several occasions has maintained that rehabilitation is constitutionally required in any community that establishes human dignity as its centerpiece and commits itself to the principle of social justice. The [prisoner's] interest in rehabilitation flows from Article 2 (1) in tandem with Article 1. The condemned criminal must be given the chance, after atoning for his crime, to reenter society. The state is obligated within the realm of the possible to take all measures necessary for the achievement of this goal. . . .

III. 4. (a) An assessment of the constitutionality of life imprisonment from the vantage point of Article 1 (1) and the principle of the rule of law shows that a humane enforcement of life imprisonment is possible only when the prisoner is given a concrete and realistically attainable chance to regain his freedom at some later point in time; the state strikes at the very heart of human dignity if [it] treats the prisoner without regard to the development of his personality and strips him of all hope of ever earning his freedom. The legal provisions relating to the granting of pardons do not sufficiently guarantee this hope, which makes the sentence bearable in terms of human dignity. . . .

A new trend was evident in the Justice Ministry's 1974 draft of the fifteenth amendment to the Criminal Code. The draft provides that offenders sentenced to life imprisonment should have their records reviewed, with their consent, after they have served a certain length of time—the draft suggests at least twelve to fifteen years. A review board would then decide whether the prisoner is likely to commit more crimes after his release. An independent parole board would render this decision subject to the approval of a superior appellate court. The foreword to the draft states, of course, that under certain conditions life imprisonment would be enforced if necessary to protect the common good. If needed to protect the common good, [the state] should not only impose such sentences but also carry them out. Experience shows, however, that incarceration for life is not always necessary [to protect] the common good. With regard to murder, [the crime for which] a sentence of life imprisonment is most often imposed, we are dealing with a significant number of persons who in all probability will not repeat their crime. In these cases, where the social prognosis is positive, life imprisonment can hardly be justified. Moreover, the long, continuous lack of freedom is an extraordinary physical and psychological burden that could result in substantial detriment to the prisoner's personality, one good reason for introducing the possibility of release. A sentence of life imprisonment cannot be enforced humanely if the prisoner is denied *a priori* any and every possibility of returning to freedom. Indeed, it has hardly been the rule up to now to require the prisoner to serve out his life term. Yet an individual and case-by-case determination of whether a prisoner merits parole is not a satisfactory solution. Leading officials from the various states noted in their resolution of March 16, 1972,

that the situation would have to be corrected by a uniform and coordinated parole policy [throughout the Federal Republic]. . . .

IV. The legislature does not offend the constitutional requirement of sensible and appropriate punishment if it decides to impose life imprisonment for a murder of wanton cruelty. . . .

[The court next described various theories of punishment that inform the criminal law. Noting that current law adheres to the so-called unification theory, which tries to bring all the purposes of punishment — i.e., rehabilitation, retribution, atonement, and prevention of crime — into a balanced relationship, the court rejected the district court's contention that life imprisonment in and of itself effectively serves none of these purposes.]

Seen as a whole, life imprisonment for murder is not a senseless or disproportionate punishment. . . .

(c) The imposition of a life sentence does not contradict the constitutionally based concept of rehabilitation (positive special prevention) in the light of the practice of granting pardons and current legislation governing the criminal process. The murderer sentenced to life usually does have a chance to be released after serving a certain length of time. . . . But for the criminal who remains a threat to society, the goal of rehabilitation may never be fulfilled. It is the particular personal circumstances of the criminal which may rule out successful rehabilitation rather than the sentence of life imprisonment itself. . . .

V. 1. Article 1 (1) and Article 2 (1) (the dignity and responsibility of persons) together with the principle of the rule of law require that guilt be assessed in accord with the idea of justice. [The state] must therefore tailor the threatened punishment to the severity of the crime and the culpability of the offender. . . .

2. The issue here is whether the principle of proportionality requires a penalty other than life imprisonment for "murders of wanton cruelty" or for cases of murder "to conceal another crime." The question is particularly relevant here because, with the exception of murder and genocide, the courts are regularly granted a range of punishment within which the applicable court may ascertain, in accordance with those considerations pertaining to the award of punishment named in section 46 of the Penal Code, the extent of punishment in a concrete case. In the present case the referring court also demands a similar discretion so as not to be forced to impose the mandatory sentence of life imprisonment.

. . . In a serious crime such as murder, substantive justice may warrant the effort to impose a uniform system of punishment. But clearly, the application of a rigid system of punishment may lead to unsatisfactory results in individual cases. The prescription of such harsh sentences would be free of constitutional doubt only when the judge retains some discretion in imposing a penalty that conforms to the constitutional principle of proportionality. But as oral argument before this court

has shown, when section 211 of the Penal Code — particularly the wanton cruelty and to conceal another crime provisions — is read in the light of the general section of the Penal Code, these provisions can be interpreted in a constitutionally permissible way. . . .

(c) . . . Thus a literal interpretation of section 211 and its constituent elements is not mandatory. Narrower interpretations permitting proportionate sentences are permissible. Expert testimony and the aforementioned brief support [this approach]. It is ultimately the task of the responsible courts to adjudicate the tension between the principle of proportionality and the punitive sanction [of the law]. . . . This approach is compatible with section 211 (2) and the general purpose [behind the statute]; the constitutionality of the decision is thus affirmed. . . .

NOTE: LIFE IMPRISONMENT AND ITS AFTERMATH. *Life Imprisonment* was not the first case to address the question of prisoners' rights. Already in the *Prison Correspondence I* case (1972), the court noted that prisoners would have to be treated in accordance with constitutional principles and that any limitation on this basic right would require an act of parliament.¹⁶ The decision in *Life Imprisonment* did not invalidate life imprisonment for murder as such. What the court said is that a person may not be kept in prison for life as a matter of course. Rather, the state is obligated to consider the particular situation of each prisoner in terms of his or her capacity for rehabilitation and resocialization and in the light of the principles of human dignity, the rule of law, and the social state. (See the *Lebach* case [no. 8.10] for another example of the court's application of these principles.)

Soon after the decision in *Life Imprisonment*, parliament amended the Criminal Code by authorizing courts to suspend a life sentence when the situation warranted the offender's release from prison. Under the revised statute, courts may release an offender for a probationary period of five years if he has served fifteen years of his punishment and if "the gravity of the offender's guilt does not necessitate that he continue to serve his sentence." In determining whether or not to release a person sentenced to life imprisonment, courts must consider the personality of the offender, his behavior in prison, the circumstances of his crime, and his capacity to lead a normal life outside prison.¹⁷

The *War Criminal* case (1986) raised the issue of whether an offender could be required to serve his life sentence merely because of the gravity of his crime.¹⁸ *War Criminal* involved a former member of the SS sentenced to life imprisonment in 1962 at the age of sixty-six for sending fifty persons, including children and pregnant women, to their deaths in the gas chambers of Auschwitz and Birkenau. Prison officials approved his petition for release in 1982, when he was eighty-eight years old, but the Frankfurt Superior Court disallowed the release because of the gravity of the offender's crime. The Constitutional Court sustained the court's judgment because in the circumstances of 1985, when it had decided the case, the superior

court had properly weighed the factors bearing upon a decision to release in the light of the value of human dignity. Yet the court gave a new and liberal twist to *Life Imprisonment* by emphasizing that a judicial balancing of these factors may not place too heavy an emphasis on the gravity of the crime as opposed to the personality, state of mind, and age of the offender.

In *War Criminal* the court made clear, as it did in the seminal case, that life imprisonment as such, assuming guilt and a punishment that fits the crime, is constitutionally unobjectionable. The offender, however, cannot be denied all hope for release, for the ultimate aim of any punishment, including life imprisonment, is the rehabilitation and "resocialization" of the offender. Citing the *Prison Furlough* case (1983), decided three years before *War Criminal*, the court observed: "The right to human dignity may not be denied to an offender, notwithstanding the gravity and barbarity of his crime, if we are to protect the value order of the Constitution."¹⁹ Indeed, the Second Senate concluded its unanimous opinion by noting that in any subsequent proceeding involving the release of the offender in the instant case after he has reached the age of eighty-nine, the court would be obligated to weigh much more heavily than before the personality, age, and prison record of the offender. With this decision the Second Senate established the principle that every offender sentenced to life imprisonment, whatever the nature of his crime, must be allowed to live in the realistic hope of regaining his freedom.

NOTE: HUMAN DIGNITY AS A CONSTITUTIONAL VALUE. Both the court and commentators have characterized human dignity as an objective and subjective right: objective in the sense of imposing an affirmative obligation on the state to establish conditions necessary for the realization of dignity; subjective in the sense of barring the state from any direct interference with the negative freedom of individuals.²⁰ The court has tended to define the concept of human dignity in personalistic and communal terms; that is, in terms of a personhood that is not merely a projection of the autonomous self but is also oriented to communication with other persons and which reveals itself in the experience of the community. As a working concept of German constitutionalism, however, the meaning of human dignity is best understood in the light of its application to concrete situations. What the court appears to be saying in the cases reprinted above—and in several of those reprinted below—is that everyone, including the state, must respect the rationality and humanity of individual persons, although what is rational and humane may often depend on an interpreter's intuitive understanding of what is right and wrong in particular situations.

At this juncture it is important to note that the concept of human dignity is controversial among the justices and constitutional scholars. The controversy surrounding its meaning and application in Germany is similar to the American debate over the meaning and application of the substantive due-process-of-law clause. In Germany, unlike the United States, "dignitarian" jurisprudence often functions to limit or circumscribe specified rights in the Constitution. *Mephisto*, in which the

value of human dignity trumped freedom of the press, is a classic example of this. Another example is the *Tobacco Atheist* case (1960),²¹ in which the value of human rationality trumped a claim based on the free exercise of religion. In this case the Constitutional Court sustained a decision of prison officials to deny parole to an inmate (an unreconstructed Nazi) who had persuaded fellow inmates to abandon their Christian beliefs in exchange for tobacco and other gifts. The inmate's behavior, said the court, conflicted with the "general order of values" under the Basic Law. "A person who exploits the special circumstances of penal servitude and promises and rewards someone with luxury goods in order to make him renounce his beliefs does not enjoy the benefit of the protection of Article 4 (1) of the Basic Law." The court added: "It follows from the Basic Law's order of values, especially from the dignity of the human being, that a misuse [of a freedom] is especially apparent whenever the dignity of another person is violated."²²

Justice Wolfgang Zeidler, a former president of the Federal Constitutional Court, was most resistant to what he had always regarded as the essential subjectivity involved in this process of interpretation. As *Tobacco Atheist* shows, dignitarian jurisprudence has evolved out of the Basic Law's "general order of values," an order of values which in Zeidler's view is presupposed, not substantiated. Phrases equivalent to "general order of values" that turn up repeatedly in constitutional cases involving the application of the principle of human dignity include "supreme basic values," "basic decisions of the Basic Law," and "unwritten elementary constitutional principles." Zeidler and other critics see these broad terms and phrases as a kind of "scaffold" superimposed on the structure of the Constitution, a scaffold that permits interpreters to wash the structure in religious and ideological solvents of their own choosing. In Zeidler's view, the ritual incantation of these broad—and indeterminate—standards of review too often leads to the triumph of general values over positive rights and liberties. "Whoever controls the [meaning of the] order of values," he once remarked, "controls the Constitution."²³

THE RIGHT TO PERSONALITY

NOTE: THE PERSONALITY CLAUSE. The *Life Imprisonment* case shows that the human dignity clause of Article 1 and the general personality clause of Article 2 (1) are interlinked. The Constitutional Court rarely speaks of the right to personality without referring to human dignity.²⁴ Unlike the human dignity clause, however, the general right to personality is not a shorthand expression of other guaranteed rights.²⁵ The personality right is so broad in its phrasing that almost any content could be poured into it, and it could easily function as the first and last resort of constitutional arguments. Recognizing this, the Constitutional Court has sought to confine its reach. As a general rule, the personality clause is subordinate to those positive rights of liberty expressly mentioned in the Basic Law.²⁶ A complainant may