Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls

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I. Major features of life sentences / life imprisonment and secure preventative detention

1. Life Sentences and Secure Preventative Detention: imposition and release

According to the German Penal Code („Strafgesetzbuch", StGB) *life sentences* can be imposed for nearly 20 offences. In contrast, however, life sentences are mostly used for the offence of murder (about 95 per cent).[1] Murder (article 211 StGB) carries a mandatory life sentence.

Life sentences belong to the *penal punishments*. They can be imposed to both offenders who are estimated by the court as penally full or diminished responsible. The minimum age of liability for a life sentence is *18 years*. However, usually young adults over 18 and under 21 years will not be punished with a life sentence. This is due to a judgement made by the Federal Supreme Court („Bundesgerichtshof", BGH) in 1988, that a young adult should be seen as mature as a juvenile (i.e. under the age of 18), if he is seen as having a remarkable potential for developing himself into a responsible young adult.[2]

Up to 1982 release by clemency *procedure* was available. Since the Federal Constitutional Court („Bundesverfassungsgericht") ruled in 1977 that clemency procedures were not sufficient with regard to the rule of law; moreover there should be a release procedure by law. Therefore in 1982 article 57a StGB came into force. This article sets mainly three conditions for release: (a) a minimum of 15 years has to be served, (b) the particular gravity of guilt (as shown in the seriousness of the offence) must not demand further imprisonment and (c) a favourable prognosis must be given, in particular as to dangerousness.

With regard to the particular gravity of guilt („besondere Schwere der Schuld") for example, it is up to the trial court to determine that there is a particular gravity of guilt, for example if the offender has killed not only one but two victims. Such a particular gravity of guilt would demand a „guilt tariff" („schuldschwereangemessene Vollstreckungsdauer") which is longer than the minimum term of 15 years. The trial court, however, does not set this tariff, but just determines that there exists a particular gravity of guilt. Years later, in good time to the minimum term of 15 years the Penal Execution Court („Strafvollstreckungskammer") decides which tariff is appropriate to the particular gravity of guilt, may be 19 or 20 years for two victims of murder. However, even when a lifer has served his guilt tariff he must not be released unless there is also a favourable prognosis, in particular a favourable prediction of dangerousness.

Nevertheless *release by clemency* is still up to representatives of the 16 federated states or the president of the Federal Republic.

Secure preventative detention („Sicherungsverwahrung") is by law not a penal punishment but belongs to the *measures* which shall protect the public and rehabilitate the offender („Maßregeln der Sicherung und Besserung"). This measure is always imposed in addition to a prison sentence. At first the prison sentence has to be served, followed by the secure preventative detention. The prison sentence has to be served for the compensation of guilt and the secure preventative detention has to be served just for the protection of the public. Secure preventative detention can be imposed both on offenders who are seen as penally fully responsibile and on offenders with diminished penal resonsibility. Three types of this measure are available:

1. Article 66 StGB provides *traditional*[3] secure preventative detention. This kind of detention will be imposed by the trial court, if the defendant is convicted of grave offences, if he has been sentenced before to a prison sentence and if he has served before a prison sentence. In certain cases of sexual and violent offences it is also possible to impose secure preventative detention without having previously served a prison sentence and without an upper limit of detention. Until 1998 the upper limit of detention was 10 years. Since then, it can exceed 10 years if there is the risk of serious offences.

2. *Reserved* secure preventative detention („vorbehaltene Sicherungsverwahrung") is laid down in article 66a StGB. This has been in forece since 2002 and covers convicted persons about which the trial court is unsure whether they are dangerous to the public. Such persons would be assessed before their earliest possible release from their prison sentence. If assessed then as dangerous by the court, the convicted person has to serve secure preventative detention.

3. Article 66 b StGB provides secure preventative detention ex post, i.e. in order to cover cases which are not included in article 66 or 66a StGB: (a) multiple offenders, (b) first offenders without previous conviction and (c) offenders who are accommodated in a hospital for mentally ill offenders when they recover towards penal responsibility.

In contrast to traditional secure preventative detention the reserved pattern as well as the ex post are also available for young adults (18 to 20 years).

Moreover it must be emphasized that it is a measure which follows the characteristic German penal system which consists of two tracks, the penal punishment with its typical compensation of guilt and the measure which is directed towards protecting the public and is pretended to have nothing to do at all with a penal punishment. Other countries, in particular Anglo-Saxon countries differ remarkably with

[1] Between 1994 and 2003 there have been 962 persons sentenced to life imprisonment, of those 918 (95.4 per cent) for murder (article 211 StGB, including also attempted murder). Numbers according to Statistisches Bundesamt Wiesbaden (Ed.). Strafverfolgung: Vollständiger Nachweis der einzelnen Straftaten, 1995-2003. Statistisches Bundesamt Wiesbaden: Wiesbaden 1996-2004.

[2] BGH NStZ 1989, 574.

[3] *Kinzig*, NStZ 2004, 655-660 (656) uses the term „traditional", because this kind of detention is originally imposed by the trial court.

regard to this. England and Wales, for example, do not know this difference. In these countries, discretionary life sentences – belonging to the *penal* punishments – are available for offenders who are seen as a dangerous risk to the public. England and Wales, however, are much more in favour of utilitarian purposes of sentencing than Germany with its traditional retributive approach, as it can be observed in the compensation of guilt.

All the three types of secure preventative detention have in common, that their imposition depends very exclusively on an overall assessment whether the offender is *dangerous to the public* because of an *inclination („Hang") to serious offences* which result in grave mental/psychological or bodily harm for the victims or in serious economical damage. Reserved secure preventative detention and secure preventative detention ex post, however, focus on mental/ psychological and physical harm.

There are several possibilities of release, i.e. that the detention could be suspended. At first, before the end of the foregoing prison sentence, i.e. at the end of the term which is seen as necessary for the compensation of guilt, for the committed offences the court can suspend the measure if the purpose of the measure does not require its implementation. Secondly, at least every two years the court has to re-examine the convicted persons to assess whether they could be conditionally released. Thirdly, after having served 10 years the detainee will be released if there is *no danger* that he – because of his *inclination* to serious offences – will commit serious offences which result in grave mental/psychological or bodily harm for the victims.

a) Problems arising from imposing the two sanctions

Sentencing to life imprisonment relies to about 95 per cent on a conviction as a *murderer*, i.e. on a *personalised* definition. The provision defines the offender, not the offence:

article 211 StGB murder
(1) The murderer shall be sentenced with a life sentence.
(2) A murderer is a person who kills a person
for lust to kill, for satisfaction of sexual needs, for greed (property benefits, H.W.) or for other inferior motives,
maliciously or cruelly or using means dangerous to the public or
in order to facilitate or to conceal another offence.

As can be seen by this definition the elements of murder are mostly mere mental or normative elements. This brings about many problems as regards legal certainty. Such elements can hardly be in accord with the rule of law since they are open to huge discretion up to arbitrary acts.[4]

Imposing secure preventative detention depends on mere *assumptions* about future criminal acts: assessment as „dangerous" because of an *inclination* („Hang") to serious offences. Both terms refer to a *personal* disposition of the offender. However, the inclination has lack of original reasoning and is not empirically sound.[5]

The problems of both sanctions would be therefore that they rely on personalised concepts which make their imposition not calculable. Furthermore, such concepts are subject to a high degree of discretion up to arbitrariness. Additionally, secure preventative detention relies on mere assumptions which cannot fulfill any criterion of legal certainty.

b) Problems linked to provisions for release

Life imprisonment has *no upper limit*, neither by law nor by jurisdiction. In order to compensate the particular gravity of guilt (retribution) it could last until death[6] as well as in cases of persisting dangerousness[7]. Served times according to release by article 57a StGB reach from 15 years up to 50 years. The average time served is at least 21 years, nearly 20 per cent of lifers die in prison.[8]

Between 17 and 35 per cent of the lifers are released by *clemency procedures*.[9] Of those released by clemency one third is released before having served 15 years.[10] This indicates that the representatives of the federated states as well as the Federal President (who are responsible for clemency procedures) are not very much in accord with the legal provisions for release.

A further problem is that lifers are entitled to rehabilitation („Resozialisierung"). Rehabilitation shall also be guaranteed by article 10 para 3 of the Covenant on Civil and Political Rights (New York 1966). However, rehabilitation cannot reliably be organised without a defined end of imprisonment.[11]

The conclusion as to release provisions is that they make the time of imprisonment incalculable. This has a particular negative impact on the organisation of rehabilitation. Both the minimum time and the guilt tariff can be exceeded by additional time to be served for unfavourable prediction on grounds of mere assumptions.

Secure preventative detention provides also no determinate end of detention. However, there is an important difference compared with life imprisonment, i.e. that the question of quilt is irrelevant for their release. The release is dependant only from the risk posed to society: that they will commit serious offences causing mental or bodily harm as a result of their inclination („Hang").

[4] A striking argument is that the elements of murder vary enormously amongst the Federated States of Germany, cf. *Weber*, in: Shinichi Ishizuka (Ed.), Life Imprisonment from International Perspectives – An 'Alternative' for the Death Penalty?, Tokyo 2003, 28-44.

[5] *Kinzig*, Die Sicherungsverwahrung auf dem Prüfstand, 1996, 377.

[6] BVerfGE 64, 261 (272).

[7] BVerfGE 45, 187 (242).

[8] *Weber*, Die Abschaffung der lebenslangen Freiheitsstrafe: Für eine Durchsetzung des Verfassungsanspruchs, 1999, 60, 54.

[9] *ibid.,* 55, 57. Differences due to different sources.

[10] *ibid.*

[11] For a more detailed discussion of the argument see *Weber* (Fn. 8), 186.

However, if the inclination has lack of original reasoning and is not empirically sound, then the problem becomes clear: inclination is not protected against discretion up to arbitrary acts.

The problem with the provisions for release is rather similar to that of the provisions for the imposition of the two sanctions. They make the time of detention incalculable. This has a particular negative impact on the organisation of rehabilitation.

2. Major historical roots of the two sanctions

The Dutch humanist *Dirk Volckertszoon Coornheert* (1587) invented life imprisonment in 1587 as a life long labour slavery, which should deter more than ten cruel executions. The German *Franz v. List* (1882) demanded life imprisonment as severe penal slavery (severe forced labour, corporal punishment) for habitual, incorrigible offenders, even for pickpockets.

Secure preventative detention was introduced into German law by the Nazi government in 1933 (article 42e RStGB, „Reichsstrafgesetzbuch", i.e. the then penal code) for the „dangerous habitual offender" („gefährlicher Gewohnheitsverbrecher", article 20a RStGB), if such detention was seen as necessary for the public security. Its duration was provided as an 'open end': as long as necessary for the public security. Imposition and release depended on the personality of the offender and his criminal inclination – a normative ascription implying huge judicial discretion up to arbitrariness. Such detention was excessively used in Nazi times. Since 1941 article 1 RStGB provided also capital punishment for the „dangerous habitual offender" and the „sexual offender".

In 1941 the Nazi government changed the definition of „murder" (killing with premeditation) to a definition of the „murderer", i.e. a person which fulfils at least one of the mental or normative elements of murder, eg. lust to kill or inferior motives, see section I.1.a). One of these elements, if fulfilled, carried mandatory capital punishment and in exceptional cases mitigated to life imprisonment.

The ascription of an element of murder depended on the assessment of the personality of the offender, eg. it was not ascribed in cases when the murderer was a 'good Nazi fellow'. The „healthy mind of the people" („gesundes Volksempfinden") became in those times decisive for ascribing an element of murder. In national socialist penal theory both the „dangerous habitual offender" and the „murderer" were justified by constructing the „normative type of offender".[12]

Since capital punishment has been abolished in 1949 by article 102 GG („Grundgesetz", Basic Law, ie. the Constitution), life imprisonment became the ultimate penalty. The elements of murder, however, remained the same as in Nazi times – they are still in force until today.

The term „dangerous habitual offender" (article 20a RStGB), on the other hand, survived until 1970. The secure preventative detention became more restrictive as to its preconditions (previous convictions and previous times served). Also the duration of detention became limited when the first detention (limit of 10 years) came into force. To a certain extent the reform of 1970 was committed to a liberal-democratic meaning of the state. It resulted in a very low figure of the detained.

It can be concluded that the two sanctions have been invented for inhuman and degrading penal slavery. Furthermore, the provisions themselves are highly normative and can be exploited by discretion and arbitrariness – they offer themselves to states which are out of the rule of law.

3. Life sentences/life imprisonment: major changes in legislation and jurisdiction

In 1977 the Federal Constitutional Court acknowledged lifer's entitlement to rehabilitation and decided that life sentences were in accordance with the constitution if mainly three conditions were fulfilled: (a) implementation of life imprisonment in accordance with rehabilitation (b) introduction of a legal procedure for release and (c) restrictive interpretation of certain elements of murder.[13]

In 1982 article 57a StGB came into force. Since then the jurisdiction was mostly concerned with re-defining certain elements of murder and with defining the particular gravity of guilt in article 57 a StGB (no release, if the particular gravity of guilt required further imprisonment).

As to the elements of murder, however, there was – from my point of view – not really progress as to restrictive interpretation.[14] With regard to the gravity of guilt the main result of my analysis was that the limiting function of guilt cannot work if there is no upper limit of time to be served for compensation of guilt.[15]

4. Secure preventative detention: major changes in legislation and jurisdiction

In 1998 the time limit for the first detention (10 years) was given up by an amendment of the law.[16] In 2004 the Constitutional Court decided that giving up this limit also for the 'old cases' (imposed before 1998) was no infringement of the prohibition to sentence ex post (article 103 para 2 GG).[17]

In 2002 a *reserved* secure preventative detention became federal penal law (article 66a StGB), a provision for cases where the risk for society posed by the dangerousness of the offender was not yet clear at the time of the judgement. At the latest six months before the earliest possible release from the foregoing prison sentence the court could then decide about imposing secure preventative detention.

In 2004 secure preventative detention *ex post* became federal penal law (article 66b StGB). It is provided for grave cases of violent offences and for sexual offences (also for

[12] *Dahm*, Leipziger Rechtswissenschaftliche Studien, 1941, 183-246.

[13] Cf. note 7.

[14] Weber (Fn. 8), 123.

[15] *ibid*., 236.

[16] Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten vom 26.1.1998.

[17] BVerfGE 109, 133.

first offenders and offenders released from a psychiatric hospital because they became penally responsible again) if there is given evidence before the prison sentence expires that the convicted will commit after his release offences which result in grave psychological or physical harm.

Interestingly – as to figures of recorded crime – there was no empirical reason for all these amendments. As to the abolition of the time limit of 10 years the Federal Government made a statement before the Constitutional Court, saying that in none of the cases which have been of concern for the public the offender has served before a secure preventative detention, may it be before or after expiring the time limit of 10 years.[18] However, it was not of concern for the Constitutional Court whether these restrictive amendments were arranged as a consequence of an objective increase of violent crime or of an increased fear of crime of the public, because it would be up to the legislators' prerogative to decide about the measures to be taken as regards public interest. Apparently, massive moral panics about violent sexual crime have been the background of the new legislation, moral panics which have been created by the mass media since the Dutroux case became public in 1996.[19]

The problem which emerges as to all these restrictive amendments of secure preventative detention is that especially this sanction, combined with moral panics created by the mass media, seems to be a kind of „special offer" for many politicians/members of Parliament to demonstrate their ability to act in front of the public.

5. Lifers and detainees: figures of the last decades

The figures do not look as indicating a development towards harsher penal severity.

However, it must be taken into account that between 1995 and 2004 the absolute number of sentenced prisoners increased from 46.516 to 63.677 (+ 36.9 per cent). This has been interpreted as a trend towards harsher sentencing. In the same time the number of lifers increased from 1.314 to 1.794 (+ 36.5 per cent), the number of detainees from 183 to 304 (+ 66.1 per cent).[20] The increase of detainees, however, was disproportionately higher than the general increase. This may be due to the respective legislation and jurisdiction.

6. Secure preventative detention: just a different label for imprisonment?

Secure preventative detention shall not be a penal punishment, but a measure. However, article 130 of the Prison Act („Strafvollzugsgesetz", StVollzG) determines that article 3 to 126 StVollzG have to be applied also to detainees. They are usually accommodated in prison establishments, but in separated units. It may be that they have some petty privileges (eg. as to the decoration of their cells or their clothing), but there are hardly differences between imprisonment and such detention. Therefore it is argued very often that secure preventative detention is just a different label for imprisonment („Etikettenschwindel"[21]).

7. Major justifications of life sentences and secure preventative detention

With regard to *life sentences* the Federal Constitutional Court has been always in favour of a combination theory of the purposes of sentencing. There have been three steps in the development of this theory.[22]

In 1977 the Court decided that all purposes of sentencing could be seen as aspects of an appropriate penal sanction. However, the focus was on incapacitation and positive general prevention, followed by rehabilitation, retribution (compensation of guilt) and expiation.

In 1983 the focus was on retribution. The court justified that in single cases lifers could serve their imprisonment until death in order to compensate the particular gravity of guilt as shown in the seriousness of the offence. Fitting into this scheme the Court emphasized an authoritarian version of positive general prevention as demonstrative enforcement of the legal order.

In 1992 negative special prevention (protection of the public, incapacitation) became the predominant purpose of life imprisonment (imprisonment until death in cases of persistent dangerousness).

The predominant purpose of *secure preventative detention* is the protection of the public/incapacitation. However, according to the Federal Constitutional Court the detention shall also contribute to the rehabilitation of the detainee.[23]

8. Life imprisonment: the retribution/incapacitation complex

The major justifications of retribution and incapacitation lead to several questions. The question is concerned with the main problem of *incapacitation*, the prediction of dangerousness.

The prediction of dangerousness is always based on assumptions about future criminal acts of rather the same quality. A lifer, for example, can be imprisoned additionally to his guilt tariff if he is predicted as dangerous. Since reconviction with dangerous offences are very rare – in particular reconvictions with homicide – predictions cannot be accurate, they result in a high number of persons falsely predicted as dangerous. This can be shown by empirical research on the false positives of lifers in Germany[24] as well as the natural experiments in the United States (release of the „most dangerous

[18] BT-Drs. 13/7559, 18, quoted from BVerfGE 109, 133.

[19] Cf. *Weber/Narr*, Blätter für deutsche und internationale Politik, 1996, 313-322.

[20] Figures calculated from Statistisches BundesamtWiesbaden (Ed.). Rechtspflege, Fachserie 10, Reihe 4.1. Strafvollzug – Demographische und kriminologische Merkmale zum Stichtag 31.3.2004. Statistisches Bundesamt Wiesbaden, 2005.

[21] *Kinzig*, (Fn.5), 117.

[22] For a more detailed discussion see *Weber* (Fn. 8), 265.

[23] BVerfGE 109, 133 (151).

[24] A rather conservative estimation on grounds of reliable data revealed that in order to protect society from one reoffender with a homicide offence (including attempts) at least 38 further lifers must be kept in prison, *Weber*, (Fn. 8), 177.

patients" from maximum security institutions for mentally ill offenders) have shown.[25]

The second of these questions is related to *retribution*. According to empirical findings the legal biography of the offender and the description of the offence are the less invalid criteria for a prediction of dangerousness. At the same time, just these criteria are decisive for those the experts or the judges who assess dangerousness. On the other hand, just these criteria usually indicate the amount of guilt which is in German law the most important parameter in order to mete out the sentence. Since retribution, however, is based on the compensation of guilt, the determinants of dangerousness and retribution (compensation of guilt) are very similar, i.e. that dangerousness would then be rather an artefact. Additionally, there is an important advantage of the concept of guilt compared with the concept of dangerousness. Of course, the compensation of guilt is based on assumptions, too. But these assumptions refer to the past, to committed crime, rather than to the future and not yet committed crime. Therefore the retrospective concept of guilt is much more valid than the prospective concept of dangerousness.[26]

Thirdly, with regard to life imprisonment, in cases of particular gravity of guilt the tariff appropriate to the guilt will be laid down by the Penal Execution Court („Strafvollstreckungskammer") in good time before the minimum term of 15 years expires. Lifers, however, who are assessed as „dangerous", could serve terms which exceed the „guilt tariff" considerably.

As a conclusion of these thre arguments a crucial problem becomes clear. To keep a lifer in prison for reasons of dangerousness (just for assumed future offences) after he has served the guilt tariff can be seen as sentencing twice for the same offence(s).

9. Secure preventative Detention: the retribution/ incapacitation complex

The above findings apply for secure preventative detention, too, because there are two terms to serve: at first the prison sentence according to the amount of guilt (retribution) and then additionally the indeterminate term of secure preventative detention – for assumed future criminal acts.

II. Pitfalls of life sentences/life imprisonment and secure preventative detention: infringements of human rights

The infringements of human rights which I have enumerated in the following are seen as infringements from my point of view. They do not represent, for example, the view of the Federal Constitutional Court. Nevertheless the enumeration could make clear the pitfalls of the two sanctions with regard to human rights.

1. Infringements of human rights at the national level

Sentencing to life imprisonment is not in accord with the *prohibition of arbitrariness* (article 3 para 1 GG). This may be seen by the mental or mere normative elements of murder which result in sentencing to life as well as the provisions for release with regard to the prediction of dangerousness. Secure preventative detention is widely open to arbitrariness by its provision which defines „dangerous to the public" as a result of an inclination („Hang") to serious, in particular violent and sexual offences. The invalid prediction of dangerousness becomes significant both in imposing this measure and in releasing from it. The indeterminacy of the two sanctions is proliferating such arbitrariness, of course.

Life sentences are also not in accordance with the *requirement of legal certainty* (article 103 para 2 GG) because the law (see the elements of murder) is not clear and not calculable. The provisions for conditional release – in particular the prediction of dangerousness – serve incalculability, too. As to secure preventative detention once again the inclination and the dangerousness which provide further detention just on grounds of assumptions about not yet committed crime infringe legal certainty, too. Furthermore, secure preventative detention ex post is an infringement of the *prohibition to sentence retrospective* (article 103 para 2 GG).

With regard to the *prohibition of multiple punishment for the same offence* (article 103 para 3 GG) the term which exceeds the „guilt tariff" of lifers for reasons of assumed dangerousness can be seen as infringing this prohibition. For secure preventative detention the infringement is rather obvious, after the guilt has been compensated by imprisonment a second – indeterminate – term must be served for just assumed offences

Rehabilitation ("resocialisation") and reintegration – which are guaranteed as constitutional rights – can be seen as an expression of self-determination. If, however, they cannot be reliably planned because of the indeterminacy of both life imprisonment and secure preventative detention the *right to free personal development* (article 2 para 1 GG) is also violated.

In a classical view human rights have the function to limit the power of the state, to defend the citizen against the state. All the foregoing infringements have in common that the state intrudes into the human rights of its citizens, the state violates their self-determination.

According to article 1 para 1 GG all state power is obliged to respect and to protect human dignity. If, however, human dignity is characterised in its core by self-determination, then the *inviolability of human dignity* (article 1 para 1 GG) is infringed, too.

2. Infringements of human rights: European level

The European Convention on Human Rights shall protect from infringements as depicted above. Therefore the two extraordinary sanctions imply infringements of the Convention, too.

[25] Cf. the „Baxstrom" patients (*Steadman/Cocozza*, Careers of The Criminally Insane, 1974) and the „Dixon" patients (*Thornberry/Jacoby*, The Criminally Insane, 1979).

[26] For a further discussion of the relationship between guilt and dangerousness as well as empirical research which supports this view see *Weber*, in Weber/Scheerer (Eds.), Leben ohne Lebenslänglich, 1988, 85-123 (112).

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Moreover, article 5 para 1 of the Convention enumerates the cases for lawful deprivation of liberty. However, secure preventative detention ex post is not covered by these cases.

Furthermore according to the European Commission for Human Rights (1969) „inhumane" punishment or treatment consists of intentionally applied psychological or physical harm which cannot be justified by the relevant situation.[27] This may be of importance for life imprisonment. Here the relevant situation was examined by comparative empirical research which revealed that states with life imprisonment are not better off with regard to intentional homicide figures than states which provide maximum determinate imprisonment as the ultimate penal sanction.[28]

„Degrading" punishment or treatment means that such a practice evokes feelings of trepidation, of oppressiveness or inferiority and if such punishment is appropriate to humiliate people, to make them contemptible or to break their psychological or physical resistance.[29] This definition meets my view of life imprisonment as a degrading punishment and its performance as a degrading treatment.

Since secure preventative detention implies an additional indeterminate term just for assumed dangerousness the sanction itself may be questioned as inhumane and its performance as degrading.

III. Pitfalls related to the quality of the state which provides such ultimate penal sanctions

„All penal theory is closely linked … to … ideas about the meaning of the state".[30]

The meaning of this statement has a significant impact on interpreting the pitfalls of the two ultimate penal sanction within a broader framework, i.e. the quality of the state to which such sanctions may fit. Therefore the *major justifications* of these sanctions can be estimated as *very meaningful for the states' quality of power*. As to retribution it may be of some interest that after the abolition of the death penalty during the unsuccessful German revolution in 1848/49 both the retention and the re-introduction of death penalty were a matter of demonstrating the absolute power of the sovereigns.[31]

In general, however, it can be observed that *concepts of ultimate sentences are very at risk to being politically exploited*. Franz von Liszt, for example, was in his times very in accord with the property-owning bourgeoisie since he identified the „incorrigible habitual offenders" („unverbesserliche Gewohnheitsverbrecher") mostly as belonging to the proletariat.[32] In Nazi times, for example, a special offender-directed retribution („Tätervergeltung") was applied, not the offence was decisive but the way of thinking („Gesinnung") of the offender. It was combined with expiation as the purification of the so called peoples' community („Volksgemeinschaft") from the criminal and with incapacitation of the offender in order to protect the „Volksgemeinschaft".[33] It resulted in thousands of dead, killed in order to protect the state and its ideology. Interestingly, *v. Liszt*'s approach has been exploited from the Nazi regime, too, if we take into account that the roots of secure preventative detention which was introduced in 1934 go back to *v. Liszt* and have been instrumentalised for purposes of Nazism in order to protect the state and its ideology (358).

However, *democracy is not per se a guarantee for refraining from exploitation of retribution and incapacita-tion*. A striking example are the United States with their politics of capital punishment and incapacitation which has led to the largest mass incarceration, accompanied by the development to replace welfare policy by penal policy. Just life sentences and life imprisonment are significant for the development in the United States.[34] Life sentences are available for drug offenders and also for juveniles. Life imprisonment without parole became a favourite punishment as well as the „three strikes and you are out" laws providing life sentences. Moreover, there has been a trend towards *cruel sentencing* in the jurisdiction which may be illustrated by a further two examples. In 1983 the Supreme Court decided in *Solem v Helm*, that discretionary life imprisonment for seven minor offences was cruel, extraordinary, grossly disproportionate and therefore not in accord with the Constitution. In 1991, however, the Supreme Court decided in *Harmelin v Michigan*, that mandatory life imprisonment without parole for a first offender possessing a big amount of drugs was in accord with the Constitution. Already in 1999 lifers made up 10.7 per cent (105.692) of all sentenced prisoners in the United States, 24 per cent of these lifers (25.554) were serving life imprisonment without parole. England and Wales are following this example. In 1999 their number of lifers was 4.206 (8.4 per cent of all sentenced prisoners).

Ultimate penalties as sympathetic to the quality of the state

States which exclude their citizens by imposing ultimate penalties like life imprisonment or secure preventative detention cannot fulfil the requirements of democracy, because they deprive the excluded people of their status as citizens. Furthermore the citizens are seen by such states as in need of such coercive education as it is implied in the justifications of ultimate penalties. Such an utmost asymmetric power rela-

[27] YB 12 (1969, 186), quoted from *Seidel*, Handbuch der Grund- und Menschenrechte auf staatlicher, europäischer und universeller Ebene, 1996, 11.

[28] *Weber*, Läßt sich die lebenslange Freiheitsstrafe ohne Sicherheitseinbußen abschaffen? Rechtsvergleichendes Gutachten für den Justizminister des Landes Schleswig-Holstein, 1996.

[29] Abdulaziz et al. vs. Great Britain, ECHR verdict of 28 May 1985, quoted from *Seidel* (Fn. 27), 11.

[30] *Mitteis/Lieberich*, Deutsche Rechtsgeschichte, 1992, 471.

[31] See the section „Die Todesstrafe als Demonstration staatlicher Macht im Deutschen Bund und nach der Reichsgründung" in *Weber* (Fn. 8), 346-349.

[32] *v. Liszt*, Der Zweckgedanke im Strafrecht, 1882 (Reprint 1968), 32-33.

[33] Cf. *Weber* (Fn. 8), 350, 355.

[34] The following arguments and figures are taken from *van Zyl Smit*, Taking Life Imprisonment Seriously, 2002, 65, 197.

tionship cannot be in accord with democracy which constitutes itself through the citizens as the sovereign.

Moreover, states which pretend to be in accord with the rule of law („Rechtsstaat") must be based on the liberty of their citizen. The rule of law can only be implemented if all state power is clearly calculable. Calculability belongs closely to the free self-determination of the citizen.

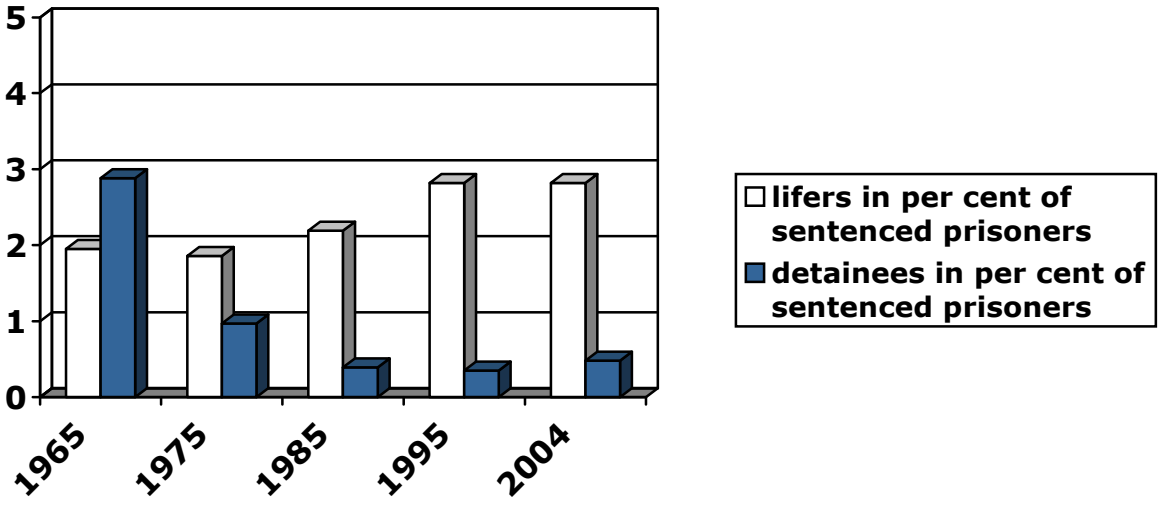
The exclusion of citizens is also not in accord with the principle of welfare, since welfare relies on mutual support, not on exclusion.

The United States are not the only example for replacing welfare policy by penal policy devoted to incarceration. This is a world wide trend since there is evidence by comparative research that increasing incarceration is depending on augmenting social and economical inequality.[35] This trend to use increasingly ultimate penalties on the background of moral panics about crime proliferates the development towards qualities of states' power sympathetic to the justifications of ultimate penalties. Moral panics themselves have the function to make the public willing to support a harsher penal policy of the state, a kind of compensation for the citizen's suffering from rising social and economic inequality.

IV. Conclusion

The analysis of the problems and pitfalls of life sentences/life imprisonment and secure preventative detention in Germany gives evidence that the decision for or against life imprisonment and secure preventative detention can be seen as a decision for or against qualities of the state as depicted in section III of this contribution.

[35] *Weiss/South*, in: Robert Weiss/Nigel South (Eds.), Comparing Prison Systems: Toward a Comparative and International Penology. International Studies in Global Change, Vol 8, 1998, 427-481, found on the base of comprehensive comparative research that there is a development towards a new world (dis)order under the framework of globalization and economical neoliberalism. In countries where the lower classes and the welfare system deteriorate the political leaders were in favour of exploiting popular feelings of resentment against those who are dependent on welfare benefits and against lenient sentencing and imprisonment. The authors argue that unemployment and economical inequality (and not the crime rates!) had the most stable relationship to incarceration rates in capitalist industrial nations whose goverments justify increasing social exclusion by an augmented fear of crime in the public. They see this development as an expression of a „great transformation" at the beginning of the new millenium.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4
3
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1
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1965
1975
1985
1995
2004
lifers in per cent of sentenced prisoners
detainees in per cent of sentenced prisoners