

## **Federal Anti-Discrimination Agency**

Legal opinion on the question of

### **Rehabilitation of homosexual men convicted pursuant to Section 175 of the German Criminal Code: mandate, options and constitutional framework**

Produced on behalf of the Federal Anti-Discrimination Agency

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(Rehabilitierung der nach § 175 StGB verurteilten homosexuellen Männer)

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## Foreword

Dear readers,

Male homosexual acts were punishable by law until 1994, albeit with changes over the years to the scope and nature of offences that were criminalised.

The young Federal Republic of Germany adopted the stricter version of Section 175 of the Criminal Code (StGB), as amended by the National Socialists. As a consequence, many of the homosexual men liberated from concentration camps after the war were returned to prison in order to serve out the rest of their sentences. The repression of these men continued unchanged until the former Section 175 was relaxed in 1969. It was not until 1994 that the criminal provision was fully repealed by the German Bundestag.

With the legal situation as it was, between 1949 and 1969 there were some 50,000 convictions in the Federal Republic of Germany. The convictions had repercussions beyond the actual legal consequences. In many cases they destroyed relationships, livelihoods, entire lives. The risk of blackmail, the pressure to lead a double life, exclusion from society and the ruin of a career, fear and suicide were the appalling reality for many homosexual men.

In 2002, the German Bundestag set aside the convictions of homosexuals during the Nazi period. Homosexuals convicted up until 1945 were therefore rehabilitated.

However, victims of prosecution between 1945 and 1994, when the legislation was repealed, were not rehabilitated, and the convictions that criminalised them were not set aside. Even though the Bundestag expressed its regret in a unanimous resolution in 2000 that Section 175 had remained valid post-1945, it has not taken any action in consequence of this resolution.

This is an open wound in our rule of law. It is imperative that this is made good.

To this day, these men are living with the stigma of a conviction. Persecution and conviction have impacted on the men concerned to the very core of their human dignity. It is not by chance that Article 1 of our Basic Law declares that human dignity shall be inviolable. To respect and protect it – and to restore it in the event of violation – is the first duty of all state authority. If people have suffered violation to their human dignity through state authority, regrets and apologies are not enough. It is the mandate of the state to rehabilitate the victims, and to make amends.

The Federal Anti-Discrimination Agency wishes to contribute to rehabilitating the victims who were prosecuted and convicted under Section 175. We therefore commissioned Professor Martin Burgi, an expert in constitutional law, with the production of an expert opinion, the conclusion of which is clear: the legislator is obliged to take action and rehabilitate those wrongfully convicted.

I am delighted with this result for the people involved.

It is now up to the legislator to comply with this obligation and to set aside the

criminal convictions that were imposed after 1945.

The publication of this expert opinion serves to help overcome law-related concerns previously expressed on the issue, and to urge those politically responsible to finally take action before it is too late for many of the people involved.

(signed)

Christine Lüders

Head of Federal Antidiscrimination Agency

**This document is a translation of the legal opinion composed in German. The translation was not prepared by the authors, and therefore the German original remains the binding and authoritative version.**

Translator's notes:

*The term "rehabilitation" in this context is associated with rehabilitation of people who have been convicted under legal provisions that have later been shown to be unconstitutional. The translation uses the term "rehabilitation" in the sense intended by the German original.*

*The expression "lewd and lascivious acts" has been chosen to reflect the German expression "Unzucht treiben", used to denote the criminal offence under Section 175. This captures the broad interpretation of the elements of the offence particularly during the National Socialist era.*

*A list of abbreviations of German laws, sources cited in abbreviation, their German names and the English translations, is provided at the end of the document.*

*The bibliography itself (which contains predominantly German-only sources) has not been translated; the titles of sources referenced in footnotes have been left in the original German.*

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## Summary

1. According to the provisions of Section 175 of the Criminal Code (StGB), consensual sexual acts between adult men in the absence of aggravating circumstances were criminalised in the Federal Republic of Germany until 1969 and in the German Democratic Republic until 1968. Between 1945 and 1969 criminalisation in the Federal Republic alone led to 50,000 convictions. For the individuals in question, conviction and imprisonment meant loss of freedom, damage to body and soul, and major social impacts, including the loss of job and home, exclusion from large parts of society, loss of civic rights and place in society. This expert opinion, which is fundamentally a review of the constitutional framework, focuses on this period.
2. The Bundestag and Bundesrat (*the two houses that make up the German legislature at Federal level*) now consider the persistent criminal sanctions on consensual homosexuality in the absence of aggravating circumstances that remained in place between 1945 and 1969 to be a violation of the human dignity of the individuals concerned. The Bundestag has to date done no more than express its “regret”; the Bundesrat, by way of contrast, has called for legislation that would have as its priority the annulment of these convictions. The NS Annulment Act (NSAufhG), passed in 2002, set aside all the convictions imposed during the National Socialist era under Section 175 of the Reich Criminal Code (RStGB). Following the foundation of the Federal Republic of Germany, the stricter version of Section 175 as amended by the National Socialists was adopted into the Criminal Code.
3. This jurisprudential analysis shows there is a legitimisation within the constitutional framework for state rehabilitation measures for the benefit of those who suffered conviction. The analysis takes as its point of reference the persistent and still present stigma of conviction based on a criminal provision (Section 175) that is incompatible with higher-ranking law. This is in line with earlier judgements of the Federal Constitutional Court according to which the continued stigma of criminal conviction can in specific circumstances mandate rehabilitation measures. The State’s rehabilitation mandate derives from its duty to protect the fundamental rights of its citizens, the principle of the rule of law, and the principle of the social state. The existence of this rehabilitation mandate has an impact on how possible limits to individual measures are drawn. The rehabilitation mandate itself focuses on the overarching goal, and not on individual measures. However, in view of the continued stigma of conviction, the state is obliged to investigate whether this stigma is compatible with the standards of higher-ranking law and to re-evaluate its previous failure to take action.
4. The legislator has considerable discretionary scope for assessment, evaluation and action, both in its function as the primary addressee of the constitutionally enshrined rehabilitation mandate and also in deciding in favour of encroaching the principles of legal certainty and separation of powers.
5. The possible measures for collective rehabilitation include setting aside

(annulling) the pertinent criminal convictions by means of legislation and/or collective compensation in the form of a substantial sum of money for the purpose of awareness-raising projects, commemorative and educational events. By contrast, rehabilitation by defining new grounds in Section 359 of the Code of Criminal Procedure to enable the case to be re-opened for the convicted person's benefit, or by introducing a procedure to declare the individual judgements to be in breach of human rights, appear equally inappropriate as a way to successfully fulfil the rehabilitation mandate as measures to grant compensation on a case-by-case approach. Indeed, given the time that has elapsed, it can be assumed that the relevant case files will no longer be available in by far the majority of cases, and that the characterising requirement of individual rehabilitation measures – that decisions be taken on a case-by-case basis – would entail inconceivable effort in terms of administration not only for the men concerned but also for the courts and the relevant authorities.

6. Collective rehabilitation – the approach which is best suited to fulfilling the rehabilitation mandate and which entails annulling the relevant criminal convictions – would not be prevented by the existence of robust constitutional limits.

a) Of particular importance is that all the preconditions are given for encroaching the principle of legal certainty: the continuing stigma of a criminal conviction affects a clearly demarcatable group of individuals who have suffered serious personal impact through prosecution and conviction; and the convictions are based on a legal norm (Section 175 of the Criminal Code) that constitutes a serious violation of constitutional provisions. Section 175 of the Criminal Code constitutes an intervention in the inviolable core domain of a person's private life as covered by the fundamental right to free development of personality provided for in Article 2 (1) Basic Law, in conjunction with Article 1 (1) Basic Law; at all events, it constitutes a grossly disproportionate infringement of this fundamental right. These prerequisites for encroaching the principle of legal certainty in part grounded on encroachments already recognised in the case law of the Federal Constitutional Court. There are no reasons to assume that no further encroachment would be admissible in the future. It would fall short of the mark to infer that, because no annulment law has been enacted during the validity of the Basic Law (i.e. not occasioned by a complete change of legal and political system), any such law would inevitably be incompatible with the constitution.

b) The principle of separation of powers – in the words of the Federal Constitutional Court this separation is nowhere implemented in its pure form – can likewise be encroached in the present case: in this case, a criminal code provision (Section 175) constitutes a serious constitutional violation on the one hand, and has had collective, clearly definable impact on the other. Moreover, an annulment act would primarily be a consequence of the earlier responsibility of the legislator itself.

- c) Finally, the annulment of the criminal convictions under Section 175 of the Criminal Code would not constitute a breach of the general principle of equal treatment before the law provided for by Article 3 (1) of the Basic Law, even given that there are also convictions still on the records imposed for other offences that are no longer criminalised – such as procuring and adultery. In both of these cases, there is either no violation, or a clearly less serious violation of the constitution. These laws were also enforced far less strictly, and the impact on the people concerned was less severe. The stigmatisation and intense repression by and within society that was predominantly and typically suffered by individuals convicted under Section 175 StGB is in this regard unparalleled.
7. A rehabilitation measure consisting of collective compensation would similarly raise no constitutional concerns.

## Part 1: Introduction, development and approaches to date

### A. Terms of Reference, structure

In the last 15 years, the German Bundestag and Bundesrat (*the two houses that make up the German legislature at Federal level*) have each on several occasions engaged with the issue of criminal prosecutions of male individuals for reason of homosexual<sup>1</sup> acts, sanctions that were not fully rescinded until 1994. Following a unanimous resolution by the German Bundestag in 2000, in which the Bundestag expressed its regret that Section 175 of the Criminal Code (StGB) had remained on the post-war statute books of the Federal Republic until 1969, and acknowledged that the threat of prosecution, which continued in both German states beyond 1945, had violated the human dignity of the homosexual men concerned,<sup>2</sup> a debate arose on the legal and legislative issues surrounding the question of whether and how the individuals concerned could feasibly be rehabilitated. This debate is ongoing to the present day. In the legal history of the Federal Republic of Germany to date, no convictions under unjust laws governed by the present constitution have ever been overturned.<sup>3</sup> There is therefore a corresponding lack of fundamental legal research exploring the associated problems and challenges.

Part 1 explores how the criminal sanctions by which homosexual acts were a punishable offence evolved in legislature and established case law. The approaches to rehabilitation to date are also documented. Part 2 analyses potential options for legal rehabilitation measures, also outlining the key parameters. This is followed by an investigation of the constitutional legitimacy of a state rehabilitation policy. Part 3 then addresses the possible limits placed on rehabilitation measures by the constitution.

### B. How criminal sanctions on homosexual acts evolved in legislative history

In the Federal Republic of Germany, and previously in the German Reich, a “Section 175” existed for approximately 123 years. With various different versions of what actually constituted a punishable offence, and with different penalties, this Section 175 was the basis for prosecuting homosexual men.

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1 Homosexuality is hereinafter, primarily in terms of a behavioural definition, understood as “sexual behaviour between two persons of the same sex” (*Beckers, Homosexualität und Humanentwicklung*, p. 25). In research two other approaches are presently under discussion concerning the definition of the concept of homosexuality: an identity-based definition emphasizes the sexual self-perception of people in relation to their societal environment, whereas a definition on the basis of sexual desires and inclinations centres around individually perceived sexual attraction to the same sex (cf. for these definitions *Savon-Williams, Current Directions in Psychological Science* 15 (1) [2006], p.40 [41]). Since criminal sanctions on homosexuality primarily target homosexual behaviour, the first definition is the basis of this paper (likewise *Rinscheid, Zeitschrift für vergleichende Politikwissenschaft* 7 (3) [2013], p. 251 [253]).

2 BT-Drucks. 14/4894.

3 Cf. *Schöneburg/Lederer, Rehabilitierung und Entschädigung*, p. 1 et seq. The “Criminal Code, Rehabilitation Act (Strafrechtliches Rehabilitierungsgesetz, StrRehaG) as promulgated on 17 December 1999 (BGBl. I p. 2664), most recently amended by Article 1 of the law of 22 December 2014 (BGBl. I, p. 2408), and the Act to Annul Unjust Sentences Imposed during the National Socialist Administration of Criminal Justice (“Gesetz zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege”, NS-AufhG) of 25 August 1998 (BGBl. I, p. 2501), most recently amended by Article 1 of the law of 24 September 2009 (BGBl. I, p. 3150), concern convictions made on the basis of pre-constitutional laws.

## I. Development to 1933

Criminal sanctions on homosexual acts between men look back on a long tradition in Christian-influenced societies, and have their roots in Canonical Law.<sup>4</sup> In the aftermath of the French Revolution, the Enlightenment-era secularisation trend continued, leading in the German territorial states to a gradual transition from a fundamental religious legal system to one based on rationality and empiricism, natural philosophy and science. Not least due to the emerging scientific occupation with sexuality, “acts of lewdness and lasciviousness” were now no longer regarded primarily as sinful acts but rather as symptoms of a disease.<sup>5</sup> There was subsequently a departure from draconian biblical penalties, which were replaced by more “profane” imprisonment with hard labour.<sup>6</sup> For example, the 1794 General State Law for the Prussian States limited the penalties for unnatural sins to sentences of one or more years’ imprisonment with hard labour (Sections 1069 and 1070).<sup>7</sup> On April 14, 1851, Section 143 of the Prussian Criminal Code (PreußStGB)<sup>8</sup> came into force, which introduced the expression “lewdness and lasciviousness contrary to nature” (“*widernatürliche Unzucht*”) into legal terminology, restricting this to “male-male sexual acts and acts of humans with animals”. It also reversed the limitation of criminal sanctions to aggravated cases of lewdness and lasciviousness, which had been introduced by the liberal Bavarian Criminal Code of 1813 in Article 186 et seq. This provision remained valid until the adoption of a criminal code for the North German Confederation.<sup>9</sup> Section 143 of the Prussian Criminal Code was largely adopted into this codification, which was made possible by the foundation of the North German Confederation and the resulting responsibility of the Confederation Government for establishing a uniform federal criminal code.<sup>10</sup> The only change was to the maximum possible penalty, which in the new Section 175 of the Criminal Code of the North German Confederation was reduced to two years’ imprisonment. However, convicted individuals could now completely lose their civil and political rights as a “good citizen” – permanently and not just temporarily. Section 175 was later adopted unchanged into the Reich Criminal Code (RStGB) of 15 May 1871 under the same number – under which the Section is also known today beyond legal circles. Its wording:

*“Acts of lewdness and lasciviousness contrary to nature committed between persons of the male sex or by humans with beasts, is to be punished by imprisonment; a sentence of loss of civil rights may also be passed.”*

4 For full version cf. Schäfer, “Widernatürliche Unzucht”, p. 17ff.

5 Cf. Schäfer, “Widernatürliche Unzucht”, p. 23; Mildenerger, in: Gross/Buchli, p. 81.

6 Cf. Bleibtreu-Ehrenberg, Tabu Homosexualität, p. 311; Schäfer, “Widernatürliche Unzucht”, p. 23 ff. In the states of the Roman legal system, the natural law doctrine led to further secularisation of criminal law from the late 18th century onwards, and this also included decriminalisation of homosexuality by the “Code pénal”; Cf. Steinke, Forum Recht 2/2005, p. 60 (61); Graupner, in: Hey/Pallier/Roth, p. 198 (205 f.). Bavaria and the Rhineland, on whose territories the Code pénal had also been introduced during the Napoleonic occupation, had abolished penalties for sodomy in their criminal codes, but were unable to prevail against the other German states, in particular Westfalia and Prussia, when the Reich was founded and a unified Imperial Criminal Code was defined; Cf. Bleibtreu-Ehrenberg, in: Lautmann, p. 61 (90 f.).

7 Cf. Schäfer, “Widernatürliche Unzucht”, p. 25.

8 PreußGSammlung 1861, No. 10, p. 130.

9 For full version Cf. Schäfer, “Widernatürliche Unzucht”, p. 26.

10 Cf. Schäfer, “Widernatürliche Unzucht”, p. 28.

Shortly after the Reich Criminal Code came into force, the Reich Court (*Reichsgericht*) handed down a ruling concerning “lewdness and lasciviousness between men”: the court held that, according to the wording of the provision, it is not “lewdness” per se that is punishable, but rather “lewdness contrary to nature”.<sup>11</sup> The Reich Court did however not view every “lewd and lascivious act” of sexual intimacy as being contrary to nature. According to the court, only those acts were punishable which were “similar to sexual intercourse”, in which the sexual organ of one person is introduced into the body of the other, thereby imitating the heterosexual sex act.<sup>12</sup> Acts of masturbation of one man against the sex organ of another man were therefore not punishable under the terms of the law.<sup>13</sup> This restrictive interpretation of what constitutes a punishable offence was upheld by the courts for as long as Section 175 in the version of 15 May 1871 remained valid.<sup>14</sup>

## II. Development from 1933 to 1945

### 1. History of the Sixth Criminal Code Amendment Act

No liberal reform proposals were able to gain traction in either the 19<sup>th</sup> century or during the Weimar Republic.<sup>15</sup> After Hitler seized power in 1933, an “Official German Criminal Law Commission” under Minister of Justice *Franz Gürtner* was convened that same year with the purpose of composing a new National Socialist Criminal Code.<sup>16</sup> Even before consultations on the amended draft were formally complete, the scope of existing provisions in the Criminal Code concerning “unnatural lewdness” was substantially broadened by the Criminal Code Amendment Act of 28 June 1935, without waiting for the proposals of the Criminal Law Commission.<sup>17</sup> The halting of consultations and the rapid change in the law were officially justified by events in connection with the self-confessed homosexual leader of the SA, *Ernst Rohm*. One of the legislative objectives of the National Socialist leadership was for the change in the law to concentrate the procreative powers of men on “securing and preserving the health and vigour of the German people.”<sup>18</sup> In addition, by toughening Section 175 of the Reich Criminal Code (RStGB), the National Socialists would maintain the public perception that resolute action was being taken against all “immoral activities”. The creation of a heterosexual societal structure that would serve to stabilize the regime, and the fight against the moral decay of the German people, were further declared objectives of the amended sexual offence provisions, which now bore the

11 RGSt (Reich Criminal Code) 1, 395 (396); confirmed shortly afterwards in RGSt 2, 237 (238).

12 RGSt 1, 395 (396); see also RGSt 34, 246 and RGSt 64, 109.

13 Cf. RGSt 1, 663; 4, 493; 6, 211; 23, 289 (291).

14 For full version Cf. *Schäfer*, “Widernatürliche Unzucht”, p. 32; for sexual acts of men with young girls, Section 182 RStGB applied, which protected the virginity of the girl.

15 Cf. *Schäfer*, “Widernatürliche Unzucht”, p. 34 ff.

16 Cf. *Gruchmann*, *Justiz im Dritten Reich*, p. 753 ff. There was no majority on this commission for the Nazi-indoctrinated sanctioning of female homosexuality. However, the scope of the offence was amended in that the need for the act to be similar to sexual intercourse was abandoned. This was owing to the difficulties of proof and to serve the aim of combatting the “plague of homosexuality”.

17 Third Criminal Code Amendment Act, 28 June 1935; Article 6, RGBl. I 1935, p. 839/841. The law came into force on 1 September 1935.

18 Cf. *Stümke/Finkler*, *Rosa Winkel, Rosa Listen*, p. 216.

stamp of the National Socialist regime.<sup>19</sup> Eugenic considerations also played a role.<sup>20</sup> In summary, it can therefore be stated that Sections 175, 175a RStGB in the version of the Criminal Code Amendment Act of 1935 were strongly dominated by ideology.<sup>21</sup>

## 2. New legal situation: Sections 175, 175a RStGB

When the Criminal Code Amendment Act of 28 June 1935 came into force, Sections 175 and 175a RStGB were worded as follows (*translation adapted from Warren Johannson and William Perry in "Homosexuals in Nazi Germany, Simon Wiesenthal Center Annual. Vol, 7 (1990)*)

### *"Section 175 RStGB*

*(1) A male who commits lewd and lascivious acts with another male, or permits himself to be so abused for lewd and lascivious acts, shall be punished by imprisonment.*

*(2) In a case of a participant under 21 years of age at the time of the commission of the act, the court may, in especially slight cases, refrain from punishment.*

### *Section 175a RStGB*

*Imprisonment with hard labour not to exceed ten years and, under extenuating circumstances, imprisonment of not less than three months shall be imposed:*

*1. Upon a male who, with force or with threat of imminent danger to life and limb, compels another male to commit lewd and lascivious acts with him or compels the other party to submit to abuse for lewd and lascivious acts;*

*2. Upon a male who, by abuse of a relationship of dependence upon him, in consequence of service, employment, or subordination, induces another male to commit lewd and lascivious acts with him or to submit to being abused for such acts;*

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19 Cf. Schäfer, "Widernatürliche Unzucht", p. 40; and the official reasoning for the Sixth Criminal Code Amendment Act of 28 June 1935 in the official gazette ("Sonderveröffentlichungen der Deutschen Justiz") 10, p. 39: "The new state, which strives for a morally healthy people, numerous and powerful, must resolutely counter all sexual activity that is contrary to nature. It must combat lewd and lascivious acts between men with especial tenacity, because experience has shown that such practices incline to plague-like propagation, and exert considerable influence on the entire way of thinking and sentiments in the circles affected."

20 See also Schäfer, "Widernatürliche Unzucht", p. 295. At the first reading of the draft of the Criminal Code of 1927, the later National Socialist Minister of the Interior *Wilhelm Frick* said: "Your party conference in Kiel (*the SPD Party Conference is meant*) believes it can contribute to the moral renewal of the German people by calling for the repeal of Section 175 and the abolition of the penalty for adultery. We however believe that these "Section 175 people" [...] should be prosecuted with the full force of the law, because such vices shall inevitably lead to the downfall of the German people. It is of course the Jews, Magnus Hirschfeld and those of his race who are once again spearheading such efforts, in the same way that Jewish morality in general is corrupting the German people." The "Völkische Beobachter" (National Socialist newspaper) on August 2, 1930, gave the clearest expression to the attitude of the Nazi party to homosexuality with regard to the planned reform of Section 175: "We congratulate Mr. Kahl and Mr. Hirschfeld on this success! But do not think for a moment that we Germans shall keep such laws valid even for one single day when we come to power." The "Völkische Beobachter" continued by stating that homosexuality was a receptacle for "all the evil urges of the Jewish soul", which would "shortly" have to be labelled for what they are: base aberrances of Syrians, the gravest of crimes, to be punished by hanging and expulsion." For full version see *Schöneburg/Lederer, Rehabilitierung und Entschädigung*, with further citations.

21 Cf. only Schäfer, "Widernatürliche Unzucht", p. 295.

*3. Upon a male who being over 21 years of age induces another male under 21 years of age to commit lewd and lascivious acts with him or to submit to being abused for such acts;*

*4. Upon a male who professionally engages in lewd and lascivious acts with other men, or submits to such abuse by other men, or offers himself for lewd and lascivious acts with other men."*

The National Socialist "legislator"<sup>22</sup> decided to replace "lewd and lascivious acts contrary to nature" by "engage in lewd and lascivious acts", with the result that from that time onwards any type of lewd and lascivious act – not just those "contrary to nature" would constitute a punishable offence. Individuals prosecuted under the law could be sentenced to imprisonment of up to five years (cf. Section 16 (1) RStGB), and a fine could only be imposed instead of imprisonment for sentences not exceeding three months (cf. Section 27b RStGB). In addition, the basic offence under the terms of the newly amended Section 175 RStGB was amended to include the aggravating circumstances specified in Section 175a RStGB, which concerned cases of "severe lewd and lascivious acts between men",<sup>23</sup> for which sentences of up to 10 years' imprisonment with hard labour could be imposed; in milder cases imprisonment of not under three months.<sup>24</sup> Acts of "lewdness and lasciviousness contrary to nature" between men, and acts with animals, were no longer categorized together in one and the same offence: "lewd and lascivious acts contrary to nature" with animals were incriminated separately in Section 175b RStGB. The tougher penalty resulted from this separation of the provisions, in combination with the aforementioned elimination of the expression "contrary to nature" in the amended version of Section 175 RStGB. Consequently, any "lewd and lascivious act" was punishable by law which "objectively, according to the healthy understanding of the German people and their sense of decency, would offend their sense of modesty in sexual relations, and which subjectively were carried out with lustful, libidinous intent."<sup>25</sup>

The Reich Court swiftly adopted the changes to the NS Criminal Code amendment, altering the nature of its rulings as soon as the law was announced, and before it actually came into force. Initially there was a formal (if not actual) requirement for an act similar to sexual intercourse to have taken place. Later the court completely abandoned the requirement for an intercourse-like act. Now, for an act to be deemed "lewd and lascivious" under the provisions of Sections 175, 175a RStGB, it was sufficient for the act to serve the arousal or gratification of the perpetrator, for it to be likely to undermine the general sense of modesty and morality within sexual relations, and for the perpetrator to use the body of the other man as a means to excite or to satisfy lust.<sup>26</sup> As a consequence of the changed direction of court judgements, even an embrace conducted with lustful intention<sup>27</sup> could constitute an offence of "lewd and lascivious acts" between men, likewise acts in

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22 The law was enacted on the basis of the "Enabling Act" (Law to Remedy the Distress of the People and the Reich) of 24 March 1933 (RGBl. I, p. 141), by the National Socialist government without consultation with the entities holding legislative powers.

23 Article 6, Section 175a 3. StrÄndG; RGBl. I 1935, 841.

24 See *Wasmuth*, in: FS Rehinder, p. 777 (778).

25 Official grounds given for the Criminal Code Amendment Act (RGBl. p. 839), p. 39.

26 Settled case law since RGSt 70, 224 (224 f.).

27 For details on casuistry of punishable acts cf. *Jäger*, *Homosexualität*, p. 40.

which there was no physical contact with the other person at all.<sup>28</sup> This ensured that masturbation of two men in the presence of each other could also be punished.<sup>29</sup>

“Qualified” (or aggravated) cases of homosexuality were considered to be homosexual acts that took place under use of force (Section 175a No. 1 RStGB), in a relationship of dependence (Section 175a No. 2 or Section 175 in coincidence with Section 174 RStGB), acts on minors under the age of 21 (Section 175a No. 3 or Section 175 in coincidence with Section 176 RStGB) or acts engaged in for professional purposes (Section 175a No. 4 RStGB).

### 3. Prosecution is intensified

In the early years after the National Socialists seized power, the police began by breaking up the most important institutions of homosexual subculture. Places where homosexuals would meet, particularly bars, were raided;<sup>30</sup> and leading representatives of the homosexual civil rights movement were arrested and sent to concentration camps.<sup>31</sup> As early as 22 February 1933 an injunction against prostitution came into force, followed the next day by a decree ordering the closure of all homosexual venues and hotels renting rooms out by the hour.<sup>32</sup> To make enforcement more effective, a special “homosexuality task force” was founded in Department II (the political police) at the State Police Agency in Berlin to serve as the central point for registering homosexuals. In 1936, as part of the reorganisation of the criminal investigation forces, the State Police Agency itself was merged into the newly founded “Central Reich Agency to Combat Homosexuality and Abortion” (Section B 3d).<sup>33</sup> This organisation was in charge of the central registration and classification by perpetrator group<sup>34</sup>, but was also tasked with planning the deportation of homosexuals to the concentration camps.<sup>35</sup> Concurrently with the legislative groundwork, the administrative foundations for state-led ostracizing and discrimination of homosexuals were therefore being laid. Severe persecution of homosexuals by the police began, with raids – notably in August 1936 – on known homosexual venues in all major German cities.<sup>36</sup> Between 1935, when the law was amended, and 1938, there was over a fourfold increase<sup>37</sup> in the number of people convicted under Sections 175 et seq. RStGB. Not only did the numbers increase: punishments were also tougher, with courts imposing more frequent sentences of imprisonment, or imprisonment with hard labour, rather than the formerly customary fines.<sup>38</sup> Furthermore, in

28 Expressly in RGSt 73, 78 (78).

29 Cf. of *Bulow*, *Umgang*, 2000, p. 190.

30 Cf. *Lautmann/Grikschat/Schmidt*, in: *Lautmann*, p. 325 (328).

31 Cf. *Stumke/Finkler*, *Rosa Winkel*, *Rosa Listen*, p. 234.

32 Cf. *Stumke/Finkler*, *Rosa Winkel*, *Rosa Listen*, p. 236.

33 Cf. *Stumke/Finkler*, *Rosa Winkel*, *Rosa Listen*, p. 239 and p. 243.

34 Cf. of *Bulow*, *Umgang*, p. 105.

35 Cf. *Stumke*, *Homosexuelle in Deutschland*, p. 111. The Central Reich Agency to Combat Homosexuality and Abortion was merged in September 1939 into the main Reich Security Agency, the authority where all the strands of the NSDAP police institutions converged; Cf. *Stumke/Finkler*, *Rosa Winkel*, *Rosa Listen*, p. 244.

36 Cf. *Lautmann*, *Kriminologisches Journal* 43 (2011), p. 268 (275).

37 In 1935 2,106 people were convicted with a final judgement; by 1938 the number had increased to 8,562; see *Grau* (publ.), *Homosexualität in der NS-Zeit*, p. 197. The severity of punishment ranged from a few months' imprisonment to sentences of years of hard labour, Cf. *von Bulow*, *Umgang*, p. 167.

38 For statistics cf. *Grau* (publ.), *Homosexualität in der NS-Zeit*, p. 197. From 15 November 1941 onwards, owing to the secret “decree of the Führer on the maintenance of purity in the SS and police”, homosexual acts by members of the SS and police could even be punished by the death penalty; Cf. *Stumke/Finkler*, *Rosa Winkel*,

many cases additional action was taken against homosexuals – beyond the legal framework – with some measures themselves even unlawful under the law as it was valid at the time. In particular, homosexuals were sent to concentration camps, sometimes as part of their normal custodial sentences, sometimes irrespective of their sentence and solely on account of their orientation, where they were required to wear the “pink triangle” to mark them out.<sup>39</sup> Recent research puts the number of homosexuals interned in concentration camps during the National Socialist era at between 5,000 and 15,000 people.<sup>40</sup>

### III. Development after 1949

#### 1. Development in the German Democratic Republic (East Germany)

In the Soviet Occupation Zone of Germany, there was initial uncertainty on whether NS laws would continue to be valid. However, a decision taken by the Criminal Division (*Strafsenat*) of the Supreme Court of the German Democratic Republic (OG) in 1949/1950 laid out the path for how the legal situation would develop in the country.<sup>41</sup> The court ruled that Section 175 would no longer be applicable in the stricter version of 1935, because the section had since then embodied typical National Socialist ideology.<sup>42</sup> However, this assessment did not necessarily mean the Supreme Court favoured decriminalising homosexual behaviour, and nor was there any intent to strike the amended version of Sections 175, 175a completely, because the court did not challenge the fundamental notion that male homosexual behaviour should be punishable by law.<sup>43</sup> Instead, the court ruled that Section 175 in the 1871 version should be applied, with the old case law, according to which only acts similar to sexual intercourse were punishable. In addition, the court upheld the validity of Section 175a to enable “healthy development of young people.”<sup>44</sup> The intensity of prosecutions in the German Democratic Republic pursuant to Section 175 of the Criminal Code of the German Democratic Republic (StGB-DDR) was five times lower than in the Federal Republic of Germany with its Section 175 StGB.<sup>45</sup>

The decriminalisation of homosexual acts was discussed as part of the drafts to reform criminal law in 1952 and 1957/58. The Criminal Code Amendment Act of 11 December 1957<sup>46</sup> did not formally include any such decriminalisation, but from this time on, an “exemption from criminal responsibility” could be applied under the provisions of Section 8 of the Criminal Code of the German Democratic

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Rosa Listen, p. 260; *Stumke*, *Homosexuelle in Deutschland*, p. 121.

39 Cf. *Stumke/Finkler*, *Rosa Winkel*, Rosa Listen, p. 268 ff.

40 Cf. *Lautmann/Grikschat/Schmidt*, in: Lautmann, p. 325 (333).

41 Judgement of 28 March 1950, OGSt 1, 190; see also and for following *Taylor*, *JoJZG* 8 (2014), p. 1 ff.

42 Cf. *Thinius*, in: Grimm, *Die Geschichte des § 175*, p. 145 (145 f.).

43 Cf. *Thinius*, in: Grimm, *Die Geschichte des § 175*, p. 145 (146).

44 Cf. *Grau*, *Lexikon der Homosexuellenverfolgung 1933-1945*, p. 154; *Thinius*, in: Grimm, *Die Geschichte des § 175*, p. 145 (146).

45 Cf. *Berndl/Kruber*, *Jahrbuch für die Geschichte der Homosexualitäten* 12 (2010), p. 58 (87 f.). The intensity of prosecution in this case means the number of convicted persons in relation to the male population of the age of criminal responsibility in the two German States, taking into account the different ages of majority at the time in each.

46 Section 9 of the Criminal Code Amendment Act (German Democratic Republic) of 11 December 1957, *GBl.-DDR*, p. 643 f.

Republic. In accordance with Section 8 (1) StGB-DDR, no criminal offence was considered to have been committed if “the act fulfils the elements of the crime punishable by law, but is not dangerous due to its low impact and lack of detrimental effect on the German Democratic Republic, the development of Socialist society, the interests of the Working People and of individual citizens.”<sup>47</sup> Consensual homosexuality between adults in the absence of aggravating circumstances were therefore no longer a criminal offence, but remained on the statute books in name only (hardly any prosecutions were sought).<sup>48</sup> According to a ruling by the Berlin Higher Regional Court (*Kammergericht*), broad use was to be made of this *de minimis* rule, with the result that Section 175 StGB-DDR was to all intents not enforced.<sup>49</sup>

The decriminalisation of male homosexual acts was implemented formally by the deletion of Section 175 StGB-DDR in 1968,<sup>50</sup> with the result that from 1 July 1968 consensual sexual acts between adult men were free of punishment for the first time in German legal history.<sup>51</sup> The protection of young people was transferred from Section 175a, which was struck, to Section 151 StGB-DDR, under which the penalty for the performing of sexual acts by an adult with a juvenile of the same sex was a term of imprisonment of up to three years. No minimum punishment was specified. The sexual age of consent, however, still remained higher for homosexual acts (18 years) than for heterosexual acts (in principle 16 years; cf. Sections 149, 150 StGB-DDR). Since the provisions of Sections 149-151 StGB-DDR were no longer formulated in terms of specific genders, they now also covered sexual acts performed by women with girls or boys, so that in this respect there was a broader scope of criminalisation than in the Federal Republic of Germany.<sup>52</sup>

The provisions concerning protection of young people in Sections 149-151 StGB-DDR (“Sexual abuse of juveniles”) were worded as follows:

*“Section 149*

*(1) An adult who abuses a young person of the opposite sex between fourteen and sixteen years of age, taking advantage of moral immaturity by gifts, promises of benefits or in similar ways, so as to perform sexual intercourse or acts similar to sexual intercourse, shall be punished by up to two years’ imprisonment or a suspended sentence.*

*(2) Prosecution is statute-barred after two years.*

*Section 150*

*(1) An adult who abuses his position to engage in sexual acts with a young person of the opposite sex between fourteen and sixteen years of age, who is entrusted to him for upbringing, education or care, shall be punished by up to three year’s imprisonment or a suspended sentence.*

*(2) An adult who under the same preconditions abuses a young person of the opposite sex between sixteen and eighteen years of age so as to perform sexual*

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47 Cf. *Thinius*, in: Grimm, Die Geschichte des § 175, p. 145 (149); of *Kowalski*, Homosexualität in der DDR, p. 19.

48 Cf. *Grau*, in: Landesstelle für Gleichbehandlung, Section 175 StGB, p. 44 (52).

49 Cf. *Rinscheid*, Zeitschrift für vergleichende Politikwissenschaft 7 (3) [2013], p. 251 (266).

50 GBl.-DDR I, p. 1 and p. 97.

51 Cf. *Grau*, Lexikon der Homosexuellenverfolgung 1933-1945, p. 154.

52 Cf. also statement by the official expert *Bruns* on the motions BT-Drucks. 17/10841 and 17/4042, p. 10.

*intercourse or acts similar to sexual intercourse shall be punished by up to three years' imprisonment or a suspended sentence.*

#### *Section 151*

*An adult who engages in sexual acts with a young person of the same sex shall be punished by three years' imprisonment or a suspended sentence."*

On 11 August 1987, the Supreme Court of the German Democratic Republic, citing Section 3 StGB-DDR (which generally ruled out an offence "if the act fulfils the elements of the crime punishable by law, but it has low impact on the rights and interests of citizens or society, and the perpetrator's degree of culpability for the deed is low"), decided that the special provision of Section 151 StGB-DDR was no longer applicable.<sup>53</sup> Accordingly, in the Fifth Criminal Code Amendment Act of 14 December 1988, Section 151 was repealed effective 1 July 1989 in favour of uniform provisions for juvenile protection (Sections 149, 150 StGB-DDR).<sup>54</sup> Under the amended provisions, the age of consent for sexual intercourse or acts similar to sexual intercourse was specified at sixteen years; for acts involving taking advantage of a position of dependency, the age of consent was eighteen years. In the case of acts involving the abuse of a position of dependency with young people under the age of sixteen, the punishable offences also included other sexual acts. This provision was also valid for women who engaged in sexual acts with girls or boys under the age of sixteen. The sections were worded as follows:

#### *"Section 149*

*An adult who abuses a young person between fourteen and sixteen years of age, taking advantage of moral immaturity by gifts, promises of benefits or in similar ways, so as to perform sexual intercourse or acts similar to sexual intercourse, shall be punished by up to two years' imprisonment or a suspended sentence.*

*(2) Prosecution is statute-barred after two years.*

#### *Section 150*

*(1) An adult who abuses his position to engage in sexual acts with a young person between fourteen and sixteen years of age, who is entrusted to him for upbringing, education or care, shall be punished by up to three year's imprisonment or a suspended sentence.*

*(2) An adult who under the same preconditions abuses a young person between sixteen and eighteen years of age so as to perform sexual intercourse or acts similar to sexual intercourse shall be punished by up to three years' imprisonment or a suspended sentence."*

## 2. Development in the Federal Republic of Germany (West Germany)

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<sup>53</sup> OG, NJ 1987, p. 467 f.; Cf. *Thinius*, in: Grimm, Die Geschichte des § 175, p. 145 (159); *Wasmuth*, in: Jellonek/Lautmann, p. 173 (178). The Supreme Court (OG) determined that homosexuals should be liable for prosecution only according to the provisions of Sections 149 f. StGB-DDR, which also applied to heterosexuals.

<sup>54</sup> GBI-DDR I, No. 29, p. 335.

a) Situation between 1945 and 1969

aa) Legal situation

Immediately after the war, the Allied Military Government published “General Instructions for Judges” (Nos. 1 to 8b) that expressly prohibited the imposition of the tougher punishments introduced after January 1 1933. However, these instructions became void after the Allied Control Council Law No. 1 of 20 September 1945<sup>55</sup> and the Allied Control Council Laws No. 11 of 30 January 1946<sup>56</sup> and No. 55 of 20 June 1947<sup>57</sup> repealed all specifically National Socialist (criminal) provisions. Sections 175, 175a RStGB were however not mentioned in this list of laws, and as a result these provisions remained in force.<sup>58</sup> One consequence of this was that many of the homosexual men freed from concentration camps at the end of the war were returned to prison, because the custodial sentence imposed on them under Section 175 RStGB was regarded as not yet served.<sup>59</sup>

One draft of the Criminal Code produced by the Control Council did in fact only penalise homosexual acts in accordance with Section 175 RStGB in the version valid to 1935.<sup>60</sup> However, the draft provisions were not adopted, and Section 175 and Section 175a RStGB remained valid in the version amended by the National Socialists even after foundation of the Federal Republic of Germany on 24 May 1949. Article 123 (1) of Germany’s Basic Law confirms that laws in force before the constitution came into force are to remain valid, provided that they do not conflict with the Basic Law itself,<sup>61</sup> and Sections 175, 175a RStGB are included among these laws with continued applicability.<sup>62</sup>

In several decisions, the Federal High Court of Justice (the *Bundesgerichtshof*) upheld the unrestricted validity and constitutionality of Section 175 StGB.<sup>63</sup> In particular, the court saw no evidence that Sections 175, 175a in the 1935 version represented “a realisation of National Socialist goals or thinking.”<sup>64</sup> Post-war case law at the highest levels thereby elected not to return to the pre-National Socialist judgements of the Reich Court, which had restricted the scope of the offence by requiring the act constituting the offence to be similar to sexual intercourse.<sup>65</sup> In the broadest possible interpretation of what could constitute the criminal offence, the Federal High Court of Justice decided that any act was sufficient that violated the “general sense of modesty and morality in sexual terms and served to incite or

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55 Law No. 1 regarding the repeal of NS laws of 20 September 1945, *Amtsblatt KontrollR* No. 1 dated 29 October 1945, p. 6-8.

56 Law No. 11 regarding the repeal of individual elements of German criminal law, *Amtsblatt KontrollR* No. 11 dated 30 January 1946, p. 55.

57 Law No. 55 regarding the repeal of provisions in the field of criminal law, *Amtsblatt KontrollR* No. 55 dated 20 June 1947, p. 284.

58 Cf. *Blühm*, in: Landesstelle für Gleichbehandlung, § 175 StGB, p. 8; see also for discussion of the ultimately failed “denazification of criminal law against homosexuals” from that time *Pretzel*, *Gescheiterte Entnazifizierung*, in: *idem*, p. 71 (76 ff.).

59 Cf. *Steinke*, *Forum Recht* 2/2005, p. 60 (60); statement by official expert *Bruns* on the motions BT-Drucks. 17/10841 and 17/4042, p. 4.

60 Cf. *Etzel*, *Die Aufhebung von nationalsozialistischen Gesetzen*, 1992; *Wasmuth*, in: *FS Reh binder*, p. 777 (778).

61 For full version Cf. *Schäfer*, in: *Pretzel/Weift*, p. 189 (190).

62 The religious historian *Schoeps*, *Der Homosexuellen Nächste*, p. 86, accordingly stated in the early 1960s: “For homosexuals, the Third Reich is not yet over.”

63 BGHSt 1, 80 (81); BGH, NJW 1951, 810; BGH, NJW 1952, 796.

64 BGHSt 1, 80; Cf. *Stumke*, in: *Jellonek/Lautmann*, p. 329 (334).

65 *Firstly* RGSt 1, 395 (396).

satisfy one's own lust or that of another party.”<sup>66</sup> In a significant judgement of 10 May 1957, the Federal Constitutional Court – ruling on a constitutional complaint brought by two homosexuals convicted of same-sex “lewdness and lasciviousness” – confirmed that Section 175 StGB was compatible both with the principle of equality before the law resulting from Article 3 (1) 1 Basic Law and also with the right to free development of personality guaranteed in Article 2 (1) 1 Basic Law (now in conjunction with Article 1 (1) 1 Basic Law) (see also C I 1 for elaboration).<sup>67</sup>

Impetus from the world of legal scholarship to repeal or relax Section 175 of the Criminal Code, including the resolutions of the 39th German Jurists' Conference in 1951, had no impact on legislation until the mid-1960s.<sup>68</sup> The only entity to show itself receptive to the ideas on decriminalisation put forward in preliminary studies by judicial experts was the Bundestag Committee for Criminal Code Reform, which amended the original Bundestag draft as a consequence of the first reading in 1969. The recommendations adopted at the 47<sup>th</sup> German Jurists' Conference, and the alternative draft on the Special Section of the Criminal Code, can be regarded as particularly influential by proposing to the legislator a transition from moral law to a law based on safeguarding legally protected rights.<sup>69</sup>

#### bb) Practice of prosecution and situation of individuals concerned

After the Second World War, the number of prosecutions remained very high, and they were carried out in a manner that can be described as systematic.<sup>70</sup> Between 1945 and 1969, there were approximately 100,000 indictments and between 45,000 and 50,000 convictions pursuant to Section 175 – a similar number of criminal proceedings to during the National Socialist era. By way of contrast, in the Weimar Republic, there had “only” been 9,375 convictions.<sup>71</sup> Between 1952 and 1962 alone, approximately 3,000 homosexuals per year were sentenced by final judgement for offences contravening Section 175.<sup>72</sup>

As well as the risk of punishment, there were grave social risks associated with practised homosexuality. These risks derived to a significant extent – although not

<sup>66</sup> Settled case law since BGHSt 1, 293 (293 f.).

<sup>67</sup> BVerfGE 6, 389 ff.

<sup>68</sup> In 1951, the 39<sup>th</sup> German Jurists' Conference called for “non-aggravated” homosexuality to be decriminalised (39. DJT, Part C, p. 123); Cf. *Sommer*, Die Strafbarkeit der Homosexualität, p. 348. The proposals of the Grand Criminal Law Commission of 1958 and 1962, which ranged from complete decriminalisation to the establishment of an age of consent of 21 years, were initially not taken up by the legislature. Rather, the official grounds for the draft criminal code reform of 1960 attested to the “power of criminal law to build morals”, serving to curb the threat posed by homosexuality of “danger to the healthy and natural order of life among the people” and “degeneration of the people and the decline of its moral strength.”; Cf. *Schäfer*, in: Pretzel/Weifi, p. 189 (191 f.).

<sup>69</sup> Cf. *Schäfer*, “Widernatürliche Unzucht”, p. 300.

<sup>70</sup> Cf. oral contribution by legal expert *Bruns*, minutes of the public hearing of the Committee on Legal Affairs on 15 May 2013, p. 2, who points out that the police recorded everyone who had been in contact with anyone suspected pursuant to Section 175 StGB in so-called “pink lists” – a practice that in part continued until into the 1980s – and warned employers and public authorities of suspected individuals; for details see also *Bogen*, Der Bürger im Staat 65 (2015), p. 36 (36 f.).

<sup>71</sup> Cf. *Balser/Kamp/Müller/Gotzmann*, Himmel und Hölle, p. 138, and *Bruns*, in: Landesstelle für Gleichbehandlung, § 175 StGB, p. 26 (29), speak of “almost 45,000 people”, whereas *Bommarius*, AnwBl 8/9, 2004, M 258, Baumann, Paragraph 175, p. 64 f., and *Pretzel*, Gescheiterte Entnazifizierung, in: idem, p. 71 (78), specify 50,000 convicted individuals.

<sup>72</sup> Cf. *Baumann*, Paragraph 175, p. 63 ff. In 1959 the number of people convicted reached its peak at 3,500; see also *Bruns*, in: Landesstelle für Gleichbehandlung, § 175 StGB, p. 26 (28).

exclusively – from the law prohibiting homosexual practice. Homosexuals ran the risk of losing their place in society and any social standing. They could lose their jobs; the lease on their apartment could be terminated. Some commenced “heterosexualization” therapies or restricted their own sexual practice. There was considerable pressure to marry without subsequently sharing married life. Homosexuals were also ostracised from religious communities. In society as a whole, homosexuality was considered to be abnormal, pathological and asocial behaviour.<sup>73</sup> This led to institutional restrictions being placed on homosexual lifestyles – such as the banning of homosexual organisations.<sup>74</sup> In addition, homosexuals were frequently denied their basic rights of freedom of opinion and freedom of assembly, with the moral law being cited as justification.<sup>75</sup>

In summary, the period between 1945 and 1969 can be termed a period of legal continuity. There was no revisiting of the pre-1993 efforts to reform the provisions, and Sections 175, 175a StGB remained on the statute books in the tradition of National Socialist prescribed ideology.<sup>76</sup>

#### b) The 1969 criminal code reform, decriminalisation of consensual, “non-aggravated” homosexuality

The First Criminal Code Amendment Act of 25 June 1969 (1. StrRG),<sup>77</sup> which came into force on 1 September 1969, introduced the first legal modifications to these sanctions since 1935.<sup>78</sup>

#### aa) Legal situation

In the version of the First Criminal Code Amendment Act, Section 175 StGB was worded as follows (*translation adapted from Warren Johannson and William Perry in “Homosexuals in Nazi Germany, Simon Wiesenthal Center Annual. Vol, 7 (1990)*):

“(1) A term of imprisonment of up to five years shall be imposed on:

73 Particularly revealing in this context are various passages of the draft criminal code presented by the then Federal Government in 1962 (BT-Drucks. IV/650, p. 375 ff.): those involved in offences under Section 175 StGB are predominantly “people who do not act out of born inclination, but have fallen victim to the vice owing to seduction, habituation or sexual oversaturation, or make themselves available for same-sex intercourse for reasons of lucre.” The draft stated that, even if criminal law serves primarily to safeguard legally protected interests, this does not exclude the possibility of criminal sanctions for “certain cases which are particularly reprehensible in ethical terms and which general opinion considers to be disgraceful behaviour, even if no immediately determinable legal interests have been violated by individual acts.” The draft also indicated that the experience of history taught that where “homosexual lewd and lascivious acts have spread and attained a large scope, the result was degeneracy of the people and the decline of its moral strength.” cf. also *Wasmuth*, in: Jellonek/Lautmann, p. 173 (180).

74 Cf. *Lautmann*, *Invertito* 13 (2011), p. 173 (178 f.); *idem*, *Kriminologisches Journal* 43 (2011), p. 268 (276).

75 Cf. *Stumke*, *Homosexuelle in Deutschland*, p. 137; *Wasmuth*, in: Jellonek/Lautmann, p. 173 (176); *Bogen*, *Der Bürger im Staat* 65 (2015), p. 36 (37).

76 Cf. *Schäfer*, “Widernatürliche Unzucht” (§§175, 175a, 175b, 182 a. F. StGB). *Reformdiskussion und Gesetzgebung seit 1945*, 2006, p. 297; the partial commonalities and continuities in homosexual policy up until and following 1945 lead some authors to speak of a single generation; see *Lautmann*, *Invertito* 13 (2011), p. 173 (180) giving further references

77 First Criminal Code Amendment Act (1. StrRG) of 25 June 1969, BGBl. I 1969, No. 52, p. 645-682.

78 With its total ban until the end of the 1960s, Germany was late to liberalize laws in comparison with other countries; Cf. *Heichel/Rinscheid*, in: *Moralpolitik in Deutschland*, 2015, p. 127 (132).

*1. A male over eighteen years of age who commits lewd and lascivious acts with another male over twenty-one years of age, or permits himself to be so abused for lewd and lascivious acts,*

*2. A male who, by abuse of a relationship of dependence upon him, in consequence of service, employment, or subordination, induces another male to commit lewd and lascivious acts with him or to submit to being abused for such acts,*

*3. A male who professionally engages in lewd and lascivious acts with other men, or submits to such abuse by other men, or offers himself for lewd and lascivious acts with other men.*

*(2) In the cases of Paragraph 1 No 2. the attempt is punishable.*

*(3) For an involved party who at the time of the act had not yet reached the age of twenty-one years, the Court can refrain from punishment.*

The most significant new feature was the decriminalisation of homosexual practice as such between adults, i.e. homosexual acts without qualifying (aggravating) circumstances.<sup>79</sup> Specifically, the elements of the offence and qualifying circumstances pursuant to Section 175a StGB were merged into a unified offence of “lewdness and lasciviousness” between men in Section 175 StGB new version.<sup>80</sup> The previous provisions of Section 175a No. 3 StGB to protect young people were adopted into Section 175 (1) No. 1 StGB new version, with the difference that a double age of consent of 18 and 21 years now applied.

The amended Section 175 (1) No. 1 StGB also replaced the former basic offence definition in Section 175 (1) StGB, with the result that consensual acts of “lewdness and lasciviousness” between men over the age of 21 were decriminalised.<sup>81</sup> In addition, the abuse and dependency relationship variant of Section 175a No. 2 StGB, to date included as qualifying circumstances to the provisions, was integrated into the new Section 175 (1) StGB. Professional engagement in homosexual acts under Section 175a No. 4 StGB – previously dealt with in a qualifying provision – was now no longer considered as an aggravating circumstance and was punishable under Section 175 (1) No. 3 StGB new version. The use of force and threats in the sense of Section 175a No. 1 StGB was formulated without reference to a specific gender as per Section 176 (1) No. 1 StGB new version and punished as a felony (with at least one year’s imprisonment). The limited personal grounds for exemption from punishment for perpetrators who were still minors was retained in Section 175 (3) StGB new version, but without the restriction provided for in Section 175 (2) StGB to cases of a particularly slight nature. Owing to the changes to penal consequences introduced by the First Criminal Code Amendment Act, the act was no longer punishable by imprisonment (as opposed to imprisonment with hard labour) in accordance with Section 16 StGB, but by a new “unified” form of imprisonment of up to five years in accordance with Sections 14 et seq. StGB new version.<sup>82</sup> Where

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<sup>79</sup> The First Criminal Code Amendment act also eliminated further elements of the law against sexual offences, such as adultery, and obtaining non-marital sexual relationships by devious means.

<sup>80</sup> Section 175 StGB in the version of the First Criminal Code Amendment Act (BGBl. I 1969, No. 52, p. 653 f).

<sup>81</sup> The sexual age of consent of 21 years can be explained by the age of majority then valid as per Section 2 of the Civil Code; it was not until 1 January 1975 that the age of majority was reduced to 18 years (by a law of 31 July 1974 (BGBl. I 1974, p. 1713).

<sup>82</sup> The uniform sanctions, one of the impacts of which was to introduce more nuanced forms of imprisonment,

the earlier qualifications in accordance with Section 175a StGB were adopted into the new version of Section 175 StGB, the change to the potential sanctions – from imprisonment with hard labour to imprisonment – also changed the character of the acts in accordance with the then valid version of Section 1 StGB to a less serious crime, classifying it as a misdemeanour (“*Vergehen*”) rather than a felony (“*Verbrechen*”).<sup>83</sup> To safeguard dependency relationships from sexual influences, Section 175 (2) StGB new version therefore made the attempt punishable for the case of Section 175 (1) No. 2 StGB new version. The elements of the offence itself were neither restricted to acts similar to sexual intercourse, as had been proposed by most drafts of the major criminal code reform, nor to sexual acts of substantial materiality, as had been suggested by the alternative draft. Instead, the amended Section 175 StGB used the known expression “engage in lewd and lascivious acts” or “permit himself to be abused for lewd and lascivious acts.”<sup>84</sup>

#### bb) Origins and grounds for the amendment to the law

The reform of criminal sanctions on consensual homosexual acts was preceded by extensive parliamentary debate, which culminated in the deliberations of the “Special Committee for Criminal Code Reform”, set up in 1966 by the Bundestag owing to the scope of the reforms.<sup>85</sup> The committee engaged with the matter of “lewd and lascivious acts” between men at its 130<sup>th</sup> session on 16 January 1969, in which the introductory speaker, Bundestag Member *Müller-Emmert* of the Social Democratic Party of Germany (SPD) advocated following the conclusions of most of the legal and other expert assessments that consensual same-sex acts in the absence of aggravating circumstances should not be a prosecutable offence owing to the absence of detrimental impact on society.<sup>86</sup> With committee chairman *Gude* of the Christian Democratic Union/Christian Social Union (CDU/CSU) and the Ministry of Justice also advocating the repeal of Section 175 StGB, the committee members, with two abstentions, voted for this proposal.<sup>87</sup> With regard to Section 175a StGB, the discussion focused on the amendment of provisions for protecting young people. On the basis of various medical recommendations, the decision was initially taken to set the age limit for perpetrators to 18 years;<sup>88</sup> however, the final decision was in fact taken in favour of an age limit of 21.<sup>89</sup> This was owing to consideration of the German army, with fears that military order could be impaired, thereby compromising the army’s effectiveness.<sup>90</sup>

After the Special Committee at completed its consultations, it proposed a substantiated draft bill in the form of a report, introduced into the Bundestag on 23 April 1969 as a motion of the Special Committee for Criminal Code Reform.

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was introduced by Article 1 No. 4 1. StrRG, BGBl. I 1969, p. 646.

83 After section 1 StGB current version was divided into three parts, “crimes” were not only subdivided into *Verbrechen* (Paragraph 1) and *Vergehen* (Paragraph 2), but also into *Übertretungen* (infractions) (Abp. 3).

84 For full version Cf. *Schäfer*, in: Pretzel/Weifi, p. 189 (201 ff.).

85 Cf. Introduction, 1<sup>st</sup> report of special committee for criminal law, BT-Drucks. V/4094, p. 1 f.

86 Consultations of special committee for criminal code reform, fifth legislative period, 1969, 130<sup>th</sup> session, p. 2623 ff.; Cf. *Schäfer*, „Widernatürliche Unzucht“, p. 204.

87 Consultations of special committee for criminal code reform, fifth legislative period, 1969, 130<sup>th</sup> session, p. 2629.

88 Consultations of special committee for criminal code reform, fifth legislative period, 1969, 130<sup>th</sup> session, p. 2644.

89 Consultations of special committee for criminal code reform, fifth legislative period, 1969, 130<sup>th</sup> session, p. 2648.

90 For full version Cf. *Schäfer*, “Widernatürliche Unzucht”, p. 205 giving further references.

This was adopted unchanged by the Bundestag<sup>91</sup> on 9 May 1969, and by the Bundesrat on 30 May 1969. This report therefore also had the function of providing the official reasoning underpinning the First Criminal Code Amendment Act.<sup>92</sup> The report justifies making consensual same-sex “lewd and lascivious acts” without aggravating circumstances exempt from legal sanctions by citing the “unanimous advice from medical and psychological experts, the clear body of opinion in legal literature, and the model of most European criminal codes”.<sup>93</sup> The report also specified that another factor against Section 175 StGB in its then form was that “many men engaging in homosexual acts exhibited irreversible orientation”.<sup>94</sup>

In its report, the Special Committee also defended its proposal to raise the age of sexual consent from 18 to 21 years in Section 175 (1) No. 1 StGB new version, stating that this gave due consideration to the “length of time that young people need to attain general emotional majority and social orientation”,<sup>95</sup> but without mentioning the defence policy background of the provision. The committee justified keeping the abuse and dependency provisions in Section 175 (1) No. 2 StGB new version by saying that “same-sex violations regularly put the dependent individual in greater difficulties than impositions of normal sexuality”.<sup>96</sup> The committee stated that it was “imperative for public security” to continue to oppose homosexual prostitution by means of criminal law in the form of Section 175 (1) No. 3 StGB new version, since only in this way could “some control be guaranteed of the criminal underworld in which such acts take place”.<sup>97</sup>

The new version of Section 175 was accompanied by the repeal of Section 175b StGB (“lewd and lascivious acts with animals”). Section 182 StGB (seduction of chaste and honourable girls by men for purposes of sexual intercourse) remained unchanged.

### cc) Criticism; confirmation of the new legal situation by the Constitutional Court

The provision for protecting young people, introduced into Section 175 (1) No. 1 StGB new version in place of the former basic offence, came in for widespread criticism because it led to substantial contradictions in how circumstances were appraised.<sup>98</sup> In particular, it was not clear why homosexual encounters of young people between 18 and 21 years of age should per se be punishable, since there was no significant imbalance of power between such parties, and that in other case groups, individuals above 18 years of age were considered to rank among the group of persons deserving of protection, rather than among the perpetrators.<sup>99</sup>

91 BT-Drucks. V/4094.

92 Cf. Schäfer, “Widernatürliche Unzucht”, p. 206.

93 1<sup>st</sup> report of the special committee for criminal code reform, BT-Drucks. V/4094, p. 30.

94 1<sup>st</sup> report of the special committee for criminal code reform, BT-Drucks. V/4094, p. 30 f.

95 1<sup>st</sup> report of the special committee for criminal code reform, BT-Drucks. V/4094, p. 31.

96 1<sup>st</sup> report of the special committee for criminal code reform, BT-Drucks. V/4094, p. 31.

97 1<sup>st</sup> report of the special committee for criminal code reform. V/4094, p. 32; Cf. for summary of the reasoning of the special committee, also Schäfer, “Widernatürliche Unzucht”, p. 207 f.

98 Cf. Schulz, Paragraph 1975 (abgewickelt): Homosexualität and Strafrecht im Nachkriegsdeutschland, p. 40 giving further references

99 Cf. Schäfer, in: Pretzel/Weifi, p. 189 (204 f.), who points out that, owing to the political background – the urging of the German Army – the law was widely known as the “Bundeswehrparagraf” or “Lex Bundeswehr”, see also Bruns, in: Landesstelle für Gleichbehandlung, p. 26 (32).

Despite these reservations, the entire Section 175 StGB new version was confirmed by the Federal Constitutional Court in October 1973 as being consistent with the constitution (see also C I 2 below for elaboration).<sup>100</sup>

c) Criminal law reform of 1973 – abolition of graduated sexual age of consent, and move from “sexual offence” to “provision to protect young people”

Further decriminalisation took another four years, until the Fourth Criminal Code Amendment Act of 23 November 1973.<sup>101</sup> This was adopted in the Bundestag with the votes of the government parties SPD and FDP (Free Democratic Party), with the CDU/CSU voting against.<sup>102</sup> Section 175 StGB was now worded as follows (*translation adapted from Warren Johansson and William Perry in “Homosexuals in Nazi Germany, Simon Wiesenthal Center Annual. Vol, 7 (1990)*):

*“(1) A term of imprisonment of up to five years or a fine shall be imposed on:*

*1. A male over eighteen years of age who commits lewd and lascivious acts with another male under eighteen years of age, or permits himself to be so abused for lewd and lascivious acts,*

*2. The Court can refrain from punishment pursuant to this provision if*

*1. The perpetrator was less than twenty-one years of age at the time of the act;*

*2. Taking into consideration the conduct of the party against whom the act is performed, the wrong of the act is small.”*

The legislator continued to deem it necessary to retain Section 175 for the protection of young people, because the possibility could not be fully excluded that homosexual experiences by young people under 18 years of age could have decisive long-term impact.<sup>103</sup> However, the graduated sexual ages of consent were abandoned, and the age of consent for consensual sexual acts between males was set at a uniform 18 years. Section 182 StGB, which was modernised at the same time but which did not change in substance, specified a lower sexual age of consent, 16 years, for heterosexual acts of a man toward a “girl”. In addition, Section 175 now comprised one single offence. In formal terms, the Fourth Criminal Code Amendment Act replaced the morally and ethically charged description of the act of the offence – until that time “engage in lewd and lascivious acts” – by the neutral term “sexual acts”, marking a departure also in semantic terms from sex offences to offences concerning a violation of the protection of young people.<sup>104</sup> A further change was the addition of a discretionary

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<sup>100</sup> BVerfGE 34, 41 ff. The court made reference to its reasoning of its 1957 judgement and reconfirmed the “qualitative incomparability of male and female homosexuality, particularly with regard to endangerment of young people.”

<sup>101</sup> Fourth criminal code law reform act (4. StrRG) of 23 November 1973 (BGBl. I 1973, p. 1725).

<sup>102</sup> Cf. *Heichel/Rinscheid*, in: *Moralpolitik in Deutschland*, 2015, p. 127 (135).

<sup>103</sup> Cf. reasoning of Federal Government on the draft of the Fourth Criminal Code Amendment Act, BT-Drucks. 7/514, p. 6; Cf. also *Bruns*, in: *Grimm*, p. 165 (166).

<sup>104</sup> Cf. *Schäfer*, “Widernatürliche Unzucht”, p. 216 f.; *Morale*, in: *Duttge/Engel/Zoll*, p. 69 (70).

provision for exemption from punishment on personal grounds to Section 175 (2) StGB. In future the decision on the severity of punishment would take into account not just the age of the perpetrator (Section 175 (1) No. 1 StGB new version), but also the fault of the victim, i.e. the willingness of the young person concerned to engage in the act (Section 175 (2) No. 2 StGB new version). The former provision for sanctions in Section 175a No. 1 StGB, adopted as a gender-neutral provision into Section 176 (1) No. 1 StGB as part of the First Criminal Law Amendment Act as “coercion to lewd and lascivious acts”, remained punishable as sexual coercion according to Section 178 (1) StGB new version.<sup>105</sup>

Subsequently, the provisions of Section 175 had little practical significance, and there was a sharp decrease in the number of prosecutions. Between 1969 and 1994, there were a further 3,500 convictions, with approximately 100 convictions per year in the final years of this period.<sup>106</sup> The criminal prosecutions came in for growing public criticism, also due to the in part undignified pursuance and surveillance measures to which homosexuals were subject.<sup>107</sup> Despite intense debate on reforms in the 1980s<sup>108</sup> and high-profile decisions of the European Court of Human Rights (ECtHR) of 1981 and 1988, in which criminal sanctions on consensual homosexuality without any further aggravating circumstances were deemed incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (see also C II),<sup>109</sup> there were no further amendments by the legislator until 1994.<sup>110</sup>

#### d) The 1994 criminal law reform – abolition of different treatment of homosexuality under the criminal code

The reform debate did not step up again<sup>111</sup> until after reunification, owing to the different punishments for same-sex acts in the two parts of Germany. Section 175 of the Criminal Code of the Federal Republic was not extended to all of Germany. Instead, Sections 149, 150 of the German Democratic Republic’s Criminal Code remained in force for the time being within the territory of the former German Democratic Republic.<sup>112</sup> Consequently, consensual sexual acts of men with young males over 16 were not a criminal offence in East Berlin; whereas in West Berlin they were.<sup>113</sup> The unity of law within Germany was finally re-established with the

105 For full version Cf. *Schäfer*, “Widernatürliche Unzucht”, p. 216 f.

106 Cf. reasoning of Federal government on the draft of a Criminal Code Amendment Act Sections 175, 182 StGB, BT-Drucks. 12/4584, p. 6. The number of 3,545 convictions is often mentioned in the literature.

107 The “Hamburger Morgenpost” newspaper, for example, published an article on 4 July 1980 titled “Das darf doch wohl nicht sein: Polizisten beobachten Homosexuelle heimlich auf öffentlichen WCs!” (No way! Police secretly observed homosexuals in public toilets”) after it had become public that Hamburg police had been monitoring homosexuals by one-way mirrors in public toilets; Cf. *Stumke/Finkler*, Rosa Winkel, Rosa Listen, p. 372 f.

108 Cf. collection in the reasoning of the Federal Government on the draft of a Criminal Code Amendment Act Sections 175, 182 StGB, BT-Drucks. 12/4584, p. 5.

109 Notably ECHR, judgement of 22 October 1981, Dudgeon, EuGRZ 1983, p. 488 ff.; Judgement of 26 October 1988, Norris, EuGRZ 1992, p. 477 ff., Cf. also C II.

110 Cf. *Schäfer*, in: Pretzel/Weifi, p. 189 (206).

111 The FDP, in its 1980 manifesto, was the first Bundestag party to call for the repeal of Section 175 StGB. The first motion to fully repeal Section 175 StGB was tabled in the Bundestag in 1985 by Germany’s Green Party (Bündnis 90/Die Grünen); Cf. *Dworek*, in: FS Bruns, p. 46 (52).

112 Article 9 (2) of the unification treaty of 31 August 1990 in conjunction with Annex II Chapter III Subject Matter C Section 1 No. 1 and Article 1 of the law of 23 September 1990, BGBl. II 1990, 885, 1168, valid from 29 September 1990.

113 This was confirmed by the *Bundesgerichtshof* in its order of 8 April 1992, NSTz 1992, 383, despite the concerns on the constitutionality that had been voiced (cf. Landgericht (regional court) Essen, NSTz 1992, p. 38), because

29<sup>th</sup> Criminal Code Amendment Act of 31 May 1994, which came into force on 11 June 1994.<sup>114</sup> Section 175 StGB, and the Section 149 StGB-DDR valid in the German Democratic Republic, were both repealed, and replaced by a gender-neutral provision to protect young people in the newly written Section 182 StGB.<sup>115</sup> With the 29<sup>th</sup> Criminal Code Amendment Act, Section 182 StGB was introduced in the version valid to the present day, and the provisions concerning consensual homosexual acts received their final modification.<sup>116</sup> After 123 years, with the repeal of Section 175, the distinct treatment of homosexuality in criminal law in Germany was finally at an end.<sup>117</sup>

### 3. Summary

With regard to criminal sanctions on consensual homosexuality in the absence of aggravating circumstances, it can be ascertained that criminalisation was not abolished in the Federal Republic of Germany until 1 September 1969. In the German Democratic Republic, equivalent homosexual acts were no longer subject to criminal prosecution effective 1 July 1968. Following these legislative reforms, there were different ages of consent in both East and West Germany for homosexual and heterosexual acts. However, this unequal treatment of homosexuals compared to heterosexuals was eliminated by the introduction of uniform provisions for protection of young people. These provisions came into force in the German Democratic Republic on 1 July 1989; in the Federal Republic of Germany not until 11 June 1994.

#### C. Criminal sanctions on homosexual acts as reflected in case law

##### I. Federal Constitutional Court (Bundesverfassungsgericht)

As already noted, the various versions of Section 175 were qualified as being consistent with the constitution initially by the Federal High Court of Justice (*Bundesgerichtshof*), and later, in 1957 and 1973, by the Federal Constitutional Court (*Bundesverfassungsgericht*). These decisions shall now be examined in greater detail.

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the legislator must have “the opportunity within an appropriate period of time” to reconcile the different provisions of Section 175 StGB-BRD and Section 149 StGB-DDR with one another; Cf. *Bruns*, in: *Landesstelle für Gleichbehandlung*, p. 26 (34).

114 29<sup>th</sup> Criminal Code Amendment Act Sections 175, 182 StGB (29. StrÄndG) of 31 May 1994, BGBl. I 1994, No. 33, p. 1168-1169; opposing voices, such as that of the official expert *Herbert Tröndle*, who criticised that “young males are being left exposed to the activities of homosexual adults” (minutes on the 9<sup>th</sup> session of the Committee for Women and Young People of 4 March 1992, FJ 1100-0 No. 10/92, p. 254), were unable to prevail in the consultations.

115 BGBl. I 1994, p. 1168 (1168); Cf. *Grau*, *Lexikon*, p. 157.

116 Cf. *Schäfer*, in: *Pretzel/Weift*, p. 189 (207).

117 As in *Heichel/Rinscheid*, in: *Moralpolitik in Deutschland*, 2015, p. 127 (137); *Schäfer*, “Widernatürliche Unzucht” p. 283, aptly points out that alongside the extensive decriminalisation of male homosexuals, this amendment to the criminal code for the first time also criminalised female heterosexual and homosexual acts, because the new version of Section 182 StGB for the first time imposed Federal criminal sanctions for sexual acts of adult women with girls and boys under the age of 16.

## 1. Judgement of 10 May 1957

1957 was the first time that the Federal Constitutional Court engaged with the issue of constitutionality of the criminalisation of homosexual acts, owing to a constitutional complaint brought by two men who had been convicted pursuant to Section 175 StGB.<sup>118</sup> In the proceedings, it was argued that only homosexual acts of men were punishable by law, but not those of lesbian women, and that this breached the principle of equality before the law (Article 3 (1) Basic Law; and the principle of equality of the sexes under Article 3 (2) of the Basic Law. On the basis of expert opinions, the Federal Constitutional Court dismissed this criticism with a biology-determined line of reasoning. “The principle of equality of the sexes cannot be a measure of how the legislator treats male and female homosexuality”, because “also in the field of homosexuality, the biological differences justify different treatment of the sexes. [...] The physical form of the sex organs alone points to a more penetrative and demanding function for the man, and for the woman a more accepting function and willingness to receive.” The court stated that – in contrast to the man – the woman would instinctively be reminded merely by her body that sexual activity is associated with a burden, which is above all reflected in the circumstance that “for the woman, physical desire (sex drive) and the ability to feel tender emotions (eroticism) are nearly always converged, whereas for the man, particularly the homosexual man, the two components in many cases remain separate.” Specifically concerning lesbians, “the organism of the woman, designed as it is for motherhood, invariably points to a female and maternal role [...] albeit in a transferred social sense, even when the woman is biologically not a mother.”<sup>119</sup>

The Federal Constitutional Court also ruled there was no violation of the basic right to free development of personality (Article 2 (1) Basic Law), since homosexual activity violated moral law and it was impossible to determine unambiguously that there was no public interest whatsoever in seeing such activity punished. In its reasoning, the Federal Constitutional Court specified: “Same-sex activity clearly violates moral law. In sexual life also, society requires its members to comply with certain rules; violations of these rules are perceived as being immoral and are frowned upon. However, there are difficulties determining the scope of validity of a moral law. The personal moral perception of the judge cannot be the measure to define this; and nor is the opinion of individual sections of the public sufficient. Of greater weight is the fact that public religious communities, in particular the two great Christian denominations, from whose teaching large parts of the population derive their standards of moral conduct, condemn same-sex “lewdness and lasciviousness” as immoral. The appellant considers the condemnation of homosexuality by the teachings of Christian theology to be immaterial, arguing that it derives from the Old Testament rules of the Jewish religion, rules that originate in interim measures to ensure population growth following the return from Babylonian captivity. Without considering whether this interpretation genuinely reflects historical facts: the question is not which historical experience led to a particular moral value judgement, but only

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<sup>118</sup> BVerfGE 6, 389.

<sup>119</sup> BVerfGE 6, 389 (425 ff.).

whether this value judgement is generally recognised and valid as a moral law”.<sup>120</sup>

## 2. Order of 2 October 1973

With its Order of 2 October 1973, the Federal Constitutional Court again upheld the constitutionality of Section 175 StGB in the version amended in 1969, thereby confirming that the continued existence of a special provision against male homosexuality was consistent with the Basic Law.<sup>121</sup> In its reference, the Juvenile Lay Assessor Court (*Jugendschöffengericht*) of Eutin Local Court (*Amtsgericht*) had recognised a violation of Article 3 (1) Basic Law on the one hand by the arbitrary nature of the double age of consent limit of Section 175 (1) No. 1 StGB, on the other hand owing to the lack of a corresponding criminal provision both for heterosexual relationships with young females over 16 and for sexual acts between women.<sup>122</sup> Taking a different line, the Federal Constitutional Court justified the constitutionality of Section 175 primarily by referencing the legal reasoning on Article 3 (1) Basic Law in its judgement of 10 May 1957, reiterating that this reasoning explained in detail the incomparability in terms of quality between female and male homosexuality on the one hand, and between homosexuality and heterosexuality on the other, a view that had received scientific confirmation by several expert opinions.<sup>123</sup> The Federal Constitutional Court also stated that the double age of consent limit was by no means arbitrary, the reason being that Section 175 (1) No. 1 StGB served to protect young males from detrimental impact on their sexual development, and as such raised no constitutional concerns.<sup>124</sup>

## II. European Court of Human Rights

In the 1950s and 1960s, the ECtHR also (tacitly) expressed its acceptance of Sections 175, 175a StGB by dismissing individual complaints as clearly unfounded.<sup>125</sup> By way of contrast, beginning in the early 1980s, it ruled on numerous occasions that laws criminalising consensual homosexual acts between adults – specific cases concerned legal norms in the United Kingdom, Ireland and Cyprus – breached the right to respect of private life guaranteed under Article 8 ECHR.<sup>126</sup> From 2003 onwards, in numerous judgements concerning the legal situation in Austria, the Strasbourg court ruled that criminal sanctions that stipulated a higher age of consent for consensual sexual acts of men with boys than for consensual sexual acts of men with girls, were also in breach of Article 8 ECHR, since there was no objective or reasonable justification for maintaining a higher age of consent for homosexual acts.<sup>127</sup> The same would also apply in

<sup>120</sup> BVerfGE 6, 389 (434 f.).

<sup>121</sup> BVerfGE 36, 41 ff.

<sup>122</sup> Cf. BVerfGE 36, 41 (42 f.).

<sup>123</sup> BVerfGE 36, 41 (45).

<sup>124</sup> BVerfGE 36, 41 (45 f.); Cf. for full version *Schäfer*, “Widernatürliche Unzucht”, p. 231 f.

<sup>125</sup> See in detail *Johnson*, Homosexuality, p. 19 ff.

<sup>126</sup> ECHR, judgement of 22 October 1981, *Dudgeon vs. United Kingdom*, EuGRZ 1983, p. 488 ff.; judgement of 26 October 1988, *Norris vs. Ireland*, EuGRZ 1992, p. 477 ff.; judgement of 22 April 1993, *Modinos vs. Cyprus*.

<sup>127</sup> Judgement of 9 January 2003, *L. and V. vs. Austria*, OJZ 2003, p. 394; Judgement of 9 January 2003, *S. L. vs. Austria*, OJZ 2003, p. 395; Judgement of 21 October 2004, *Woditschka and Wilfling vs. Austria*, OJZ 2005, p. 396; Judgement of 3 February 2005, *Ladner vs. Austria*, OJZ 2005, p. 725; Judgement of 26 May 2005,

substance to the provisions of Sections 175 and 175a No. 3 and No. 4 StGB in the version of 1945 to 1969, Section 175 No. 1 and No. 3 StGB in the version valid from 1 September 1969, and Section 175 StGB in the version valid from 27 November 1973, and Section 151 StGB-DDR.<sup>128</sup>

However, there has never been a ruling against the Federal Republic of Germany that Sections 175, 175a StGB violate Article 8 ECHR, because the relevant law reform in the then West Germany took place as early as 1969, and the first decision of the ECHR did not come until 15 years later.<sup>129</sup> For this reason, according to the German Code of Criminal Procedure, there can be no revision (re-opening) of the former proceedings on the grounds of (changed) ECtHR rulings on questions of criminal sanctions on homosexual acts. Section 359 No. 6 of the Code of Criminal Procedure (StPO)<sup>130</sup>, added by the Revision of Criminal Proceedings Amendment Act of 9 July 1998, would permit a re-opening of proceedings if the ECtHR were to determine a violation of the EHRC or its protocols, and the judgement is based on this violation. However, this must have happened in a specific case.<sup>131</sup> A further motion proposed by the Green Party (Bündnis 90/Die Grünen) aimed at enabling criminal proceedings to be re-opened “when the violation of a convention is determined of a German legal norm or of a legal norm with corresponding provisions of another signatory state to the European Convention to Protect Human Rights and Fundamental Freedoms”. This was rejected in 1998 by a majority of the Bundestag Committee on Legal Affairs, with the reason that rulings of the ECtHR only have effect *inter partes*, and moreover that the criminalised individuals were free, following the repeal of the German legal provisions that contravene the convention, to appeal to the ECtHR.<sup>132</sup> However, simply owing to the expiry of the six-month exclusion period that begins with the final decision of the national court (Article 35 (1) EHRC), individuals convicted under Sections 175, 175a StGB are no longer able to obtain a decision of this nature from the ECtHR. Complaints that are submitted despite this limitation have been dismissed as inadmissible by the ECtHR pursuant to Article 34 (3) EHRC. At present, the substance of Section 359 No. 6 StPO for the revision of proceedings concerning criminal prosecutions under Sections 175, 175a StGB overall is without impact.<sup>133</sup>

### III. United Nations Committee on Human Rights

In 1994, the UN Committee on Human Rights decided that Australia’s total ban on homosexual relations violated the International Covenant on Civil and Political Rights of 19 December 1966. The committee not only identified a violation of the right to private life (Article 17), but also of the right to equality of treatment (Article 26), since unequal treatment owing to sexual orientation also always

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Wolfmeyer vs. Austria; Judgement of 2 September 2005, H. G. and G. B. vs. Austria; Judgement of 19 January 2006, R.H. vs. Austria.

128 Also *Bruns*, in: Landesstelle für Gleichbehandlung, p. 26 (36).

129 Statement of official expert *Löhnig* on the motions BT-Drucks. 17/10841 and 17/4042, p. 5.

130 This was effected by the “act to reform the law on re-opening criminal proceedings” of 9 July 1998, BGBl. I, p. 1802.

131 *Meyer-Goßner*, in: idem/Schmitt, StPO, Section 359, para. 52.

132 Resolution recommendation and report of Committee on Legal Affairs concerning the draft of an act to reform the law on re-opening criminal proceedings, BT-Drucks. 13/10333, p. 3 f.

133 See also statement by official expert *Löhnig* on the motions BT-Drucks. 17/10841 and 17/4042, p. 5.; Cf. *Wasmuth*, in: FS Reh binder, p. 777 (786 f.).

constitutes unequal treatment on grounds of gender.<sup>134</sup>

#### D. Approaches to date to introduce rehabilitation legislation

In the last two decades, the German Bundestag has on several occasions engaged with the issue of rehabilitation and compensation for men convicted on the grounds of consensual homosexual acts. Part I of the following investigates the rehabilitation attempts with respect to convictions imposed during the Third Reich – these are not the focus of this opinion, but are of considerable value as a means to illuminate the question under investigation. Part II of the section presents the Bundestag and Bundesrat initiatives concerning rehabilitation of homosexual men convicted after 1945.

#### I. Rehabilitation of men convicted during the Third Reich of consensual homosexual acts

##### 1. Discussion on reparation in the “old” Federal Republic

The idea of reparation for homosexual men criminalised during the National Socialist era was for many years rejected in the Federal Republic.<sup>135</sup> Literature concerning the Federal Compensation Act justified this treatment by arguing that the legal prohibitions were in place merely on the grounds of expediency<sup>136</sup> or security,<sup>137</sup> and had nothing to do with genuine political opposition.<sup>138</sup> Accordingly, a report of the Federal Government on reparation for NS injustice<sup>139</sup> considered that “punishment of homosexual practice in criminal proceedings conducted under the provisions of the criminal code [...] constituted neither NS injustice nor a breach of the rule of law”. These punishments could therefore not be compensated for as a loss of liberty.<sup>140</sup>

##### 2. Rehabilitation by the NS Annulment Act of homosexuals convicted during the Third Reich

After the Second World War, laws were enacted in the countries of the Western<sup>141</sup> occupation zones that aimed to rehabilitate victims by providing the remedy of a retrial (re-opening of proceedings). These laws in part remained in force in the Federal Republic as part of Federal law. However, for various reasons<sup>142</sup> there

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134 Toonen vs. Commonwealth of Australia, CCPR/C50/D/488/1992, views of 31.03.1994; Cf. *Graupner*, in: Hey/Pallier/Roth, p. 198 (212).

135 Cf. overview in *Stumke*, in: Jellonek/Lautmann, p. 329 ff.

136 See *Ehring*, in: Blessin/Ehring/Wilden, Bundesentschädigungsgesetz, Section 1 para. 12.

137 See *Gießler*, in: Schwarz/Bundesministerium der Finanzen, Das Bundesentschädigungsgesetz, Section 1, p. 13 f.

138 See *Pretzel*, Strafrechtliche Rehabilitierungsansprüche, in: idem, p. 83 (95 ff.).

139 BT-Drucks. 19/6287, p. 40.

140 For full text see *Wasmuth*, in: FS Manfred Rehbinder, p. 777 (783 f.).

141 In the Soviet Occupation Zone, the Commander in Chief of the Military Administration even declared the NS verdicts to be void in 1946.

142 Just some of these reasons were: the need to submit a special application, the lack of awareness among many victims (particularly among people living abroad) that they could submit such an application, and the often

were significant differences in the legislation between the various states (*Länder*) of the Federal Republic, and also in terms of how many of the individuals convicted during the NS era made use of the possibilities. As a result, many of the victims of National Socialist criminal prosecutions were not rehabilitated. Given the lack of success of such attempts to effectively rehabilitate victims of NS criminal justice through individual proceedings, the legislator decided in 1998 – with its act to annul unjust sentences imposed during the National Socialist administration of criminal justice (NS Annulment Act; NS-AufhG) of 26 August 1998<sup>143</sup> – on a blanket annulment of all unjust NS criminal judgements without case-by-case reviews.

Specifically, the law determined (in Section 1) that decisions of criminal courts after 30 January 1933 in breach of elementary perceptions of justice which imposed convictions as a means to enforce or uphold the National Socialist regime of injustice for political, military, racist, religious or ideological reasons were to be annulled, and the charges underlying these rulings were to be dismissed. Decisions of this nature specifically included rulings of the People’s Court (*Volksgeschichtshof*), decisions of drumhead court-martials that were based on the directive of 15 February 1945 on the establishment of drumhead court-martials,<sup>144</sup> and decisions based on the legal provisions named in the appendix (Section 2). No. 26 of the appendix did not however list Sections 175, 175a RStGB. This was changed by the “Act to Amend the Law to Annul Unjust Sentences Imposed during the National Socialist Administration of Criminal Justice”, passed on 17 May 2002 against the votes of CDU/CSU and FDP, and announced in the Federal Law Gazette on 23 July 2002.<sup>145</sup> Section 175 and Section 175a No. 4 RStGB were now included in No. 26 of the appendix. The consequence of this legislative addition was the annulment of all judgements imposed under these provisions during the NS era.

On 1 September 2004, there was a change to Federal government directives on hardship payments to victims of wrongful National Socialist measures, pursuant to the General Consequences of War Act (AKG) of 7 March 1988. The amended version gave victims of Sections 175 and 175a No. 4 RStGB from the Nationalist Socialist era a claim to compensation for the first time. Previously, only imprisonment in concentration camps could be compensated, but not penal sentences imposed under Sections 175 and 175a RStGB.<sup>146</sup>

## II. Initiatives to annul post-1945 convictions

### 1. 1995 (13th legislative period of the German Bundestag)

In 1995, shortly after the repeal of Section 175 in the Criminal Code, the first parliamentary considerations began with a view to rehabilitating individuals convicted post-1945 under Section 175 and Section 175a StGB. The Greens

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unsuccessful search for case files that had been destroyed; Cf. *Rudolph*, NJW 1999, p. 102 (103).

<sup>143</sup> Act to annul unjust sentences imposed during the National Socialist administration of criminal justice and of sterilisation decisions of the former hereditary health courts, BGBl. I, p. 2501.

<sup>144</sup> RGBl. I, p. 30.

<sup>145</sup> BGBl. I, p. 2714.

<sup>146</sup> Cf. Bündnis 90/Die Grünen, rehabilitation and compensation of individuals convicted in Germany of homosexual acts after 1945 BT-Drucks. 16/11440 of 17 December 2008 and 17/4042, p. 4.

(Bündnis 90/Die Grünen) tabled a minor interpellation concerning the obligation of the Federal Government to rehabilitate the convicted men. The government reply was that such an obligation could be derived neither (directly) from the ECHR nor from case law of the ECtHR.<sup>147</sup>

## 2. 2000 (14th legislative period of the German Bundestag)

On 27 January 2000 the PDS (Party of Democratic Socialism) in the German Bundestag tabled a motion calling for the Bundestag to express its regret for the prosecution of homosexuals in the Federal Republic of Germany and in the German Democratic Republic, and for the Federal Government to propose a draft bill to strike previous criminal convictions still on the records for consensual sexual acts between consenting adults, and to pay lump-sum compensation to the individuals convicted of the pertinent offences.<sup>148</sup> This motion was debated in the Bundestag in a first reading on 21 March 2000, together with a similar motion of 21 March 2000 tabled by the SPD and Bündnis 90/Die Grünen, which at that time formed the government.<sup>149</sup> The SPD and Greens omitted the rehabilitation and compensation components of the PDS motion, but did adopt the “regret” aspect. They then moved for an apology from the German Bundestag “for the criminal prosecutions until 1969 of homosexual citizens who, owing to the legal prohibitions, suffered substantial violation to their human dignity, and infringement of their opportunities for development and quality of life.” After initial reserves on the part of the CDU/CSU,<sup>150</sup> a cross-party resolution was adopted to make an apology and declare the PDS motion settled.<sup>151</sup> On 7 July 2000, the German Bundestag unanimously adopted the following resolution:<sup>152</sup>

*“The German Bundestag expresses its regret that Section 175 in its stricter National Socialist version remained in force unamended in the Criminal Code of the Federal Republic of Germany until 1969. In both parts of Germany, there was a refusal to engage with the fate of homosexuals persecuted under this law. This also is true of the German Democratic Republic, even though the stricter Section 175 introduced during the National Socialist era was already repealed in 1950. Having regard to the historical evaluation of Section 175 StGB, articulated in the full parliamentary debate on the occasion of its final repeal from the Criminal Code in 1994, the German Bundestag recognizes that the threat of criminal punishment that continued after 1945 violated the human dignity of homosexual citizens.”*

The German Bundestag, in its unanimous resolution, held that the threat of criminal sanctions that existed against homosexual men until 1994 had in fact violated the human dignity of these men. However, it held back from legislative

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147 BT-Drucks 13/2101.

148 BT-Drucks. 14/2620.

149 BT-Drucks. 14/2984 (new).

150 In the first reading (minutes of plenary proceedings 14/96 of 24 March 2000, p. 8965D-8966A), Bundestag member *Gehb* (CDU/CSU) said: “But if we were to express regret and apologise for everything that the legislator in retroactive consideration has recognised as now being unjust, this to me is reminiscent – I have to say, ladies and gentlemen – of coquetry. The annulment of the law and striking the convictions certainly did not happen expressly without regret or apology. For this reason, I must tell you honestly: I could also live with it if the German Bundestag did not expressly apologise again here, for there are also many other convictions that are based on legal norms that have since been eliminated over the course of criminal code reform.”

151 See BT-Drucks. 14/4894 of 6 December 2000, p. 6.

152 Minutes of plenary BT proceedings 14/140 of 7 December 2000, item 10, p. 1378D to 13775B in connection with the recommended resolution of the Committee on Legal Affairs BT-Drucks. 14/4894, letter a, p. 4.

measures to rehabilitate those prosecuted and convicted by the Federal German criminal justice system. The reasons for this decision are summarised in the speech of Bundestag member *Gehb* (CDU/CSU).<sup>153</sup> According to his view, one should not condemn out of hand the predecessors in democratic Germany. The criminal prosecutions were at that time expression of a widespread conviction, common across party boundaries. *Gehb* stated that it was the normal course of events in a democracy that laws would be amended and abolished in line with changing views and changing political majorities. In addition, respect was due from the German Bundestag for the Federal Constitutional Court, and also for the binding effect of the court's decisions – accorded it by Section 31 BVerfGG – that Sections 175, 175a StGB were constitutional. *Gehb* also noted that the Federal Republic was not the only country in Europe that had subjected homosexuals to criminal prosecution. Countries such as the United Kingdom and Ireland had not repealed the relevant provisions until obliged by the ECtHR. Moreover, *Gehb* added, it was impossible to say how the ECtHR would have ruled in the 1950s and 1960s. Bundestag member *van Essen* (FDP)<sup>154</sup> explained the unequal treatment of prosecutions before and after 8 May 1945 with the consideration that rehabilitating the people convicted under Sections 175, 175a StGB in post-war Germany would not deliver any real justice, because there were numerous areas after 1945 in which the criminal justice system had imposed unjust verdicts without adequate distance to the NS era.<sup>155</sup>

### 3. 2008-2009 (16th legislative period of the German Bundestag)

In the 16<sup>th</sup> legislative period there were two motions by the opposition parliamentary groups<sup>156</sup> to rehabilitate and compensate individuals convicted in the Federal Republic of Germany and the German Democratic Republic. Both motions called for the Federal government to propose a draft bill to this effect. The motion by the party DIE LINKE (The Left) concerned convictions in the Federal Republic of Germany under Section 175 StGB in the version of 28 August 1935, and in the German Democratic Republic between 1950 and 1968 under Section 175 StGB-DDR. The motion by Bündnis 90/Die Grünen concerned “individuals that were convicted in Germany after 1945 under a Criminal Code provision criminalising homosexual acts that, according to the case law of the European Court of Human Rights, can be considered in breach of human rights.” According to the motion, “alongside convictions in the Federal Republic of Germany to 1969 and in the German Democratic Republic to 1968 under Sections 175 and 175a No. 4 StGB [...], the annulment should also encompass convictions under Section 175 StGB and Section 151 StGB of the German Democratic Republic that were imposed on the basis of discriminatory sexual ages of consent.” According to the Bündnis 90/Die Grünen motion, the compensation should be “at least that provided for by

153 Speech in the Bundestag session on 7 December 2000, BT minutes of plenary proceedings, 14<sup>th</sup> legislative period, 140<sup>th</sup> session day, p. 13740 ff.

154 Speech in the Bundestag session on 7 December 2000, BT minutes of plenary proceedings, 14<sup>th</sup> legislative period, 140<sup>th</sup> session day, p. 13743 ff.

155 As summarised in *Wasmuth*, in: FS Reh binder, p. 777 (788).

156 DIE LINKE, rehabilitation for persecution and suppression of same-sex consensual acts in the Federal Republic of Germany and the German Democratic Republic, and compensation of those convicted – BT-Drucks. 16/10944 of 13 November 2008, and Bündnis 90/Die Grünen, rehabilitation and compensation of individuals convicted after 1945 in Germany of homosexual acts BT-Drucks. 16/11440 of 17 December 2008 and 17/4042.

the law concerning damages caused by unjustified criminal convictions.”

Both motions were rejected on 6 May 2009 by the CDU, SPD and FDP on the recommendation of the Committee on Legal Affairs.<sup>157</sup> The reason given was that laws that intervened retroactively in the legal force of court judgements violate the principle of the separation of powers.<sup>158</sup> It was also argued that annulling the convictions would be highly questionable in terms of legal policy. Referencing the act to annul unjust sentences imposed during the National Socialist administration of criminal justice, opponents to rehabilitation emphasised that there was a fundamental difference between annulling judgements imposed by independent courts in a democratic constitutional state, and annulling those imposed during an unjust regime. If the motion were to be adopted, it would also be necessary to annul all other court judgements based on substantive law that has since been repealed.<sup>159</sup>

#### 4. 2010-2013 (17th legislative period of the German Bundestag)

In the 17<sup>th</sup> legislative period of the Bundestag, the Bündnis 90/Die Grünen again tabled a motion to rehabilitate and compensate the convicted homosexuals.<sup>160</sup> At the first reading on 12 May 2011, during which it was decided to transfer the matter to the Committee on Legal Affairs, the familiar arguments were exchanged, with the rehabilitation opponents now emphasising even more serious concerns with regard to constitutionality.<sup>161</sup> The motion was repeatedly postponed in the Committee for Legal Affairs, with the result that on 26 September 2012 a further motion was tabled in the Bundestag – this time by the party DIE LINKE – which again demanded “rehabilitation and compensation of persecuted lesbians and gay men in both German states.”<sup>162</sup> On 7 November 2012 came a second motion from the Bündnis 90/Die Grünen concerning rehabilitation.<sup>163</sup> This was debated by the Bundestag on 18 October 2012 and also referred to the Committee on Legal Affairs. The committee debated these parliamentary papers in its 98<sup>th</sup> session on 24 October 2012, and 112<sup>th</sup> session on 16 January 2013, and decided to conduct a public hearing. This took place in the 132<sup>nd</sup> session of the Committee on Legal Affairs on 15 May 2013. At this hearing, the jurists *Prof. Dr. Klaus F. Garditz* (University of Bonn) and *Prof. Dr. Kyrill-Alexander Schwarz* (University of Würzburg) and Notary Public *Prof. Dr. Dr. Grziwotz* (Regensburg) spoke against legislative annulment of the judgements; Federal Public Prosecutor (not in active

157 Minutes of plenary BT proceedings 16/219 of 6 May 2009, p. 23916D-23917D.

158 Cf. *Dressel* (SPD), minutes of plenary BT proceedings 16/199 of 21 January 2009, p. 21535B.

159 Cf. *Gehb* (CDU/CSU), minutes of plenary BT proceedings 16/219 of 6 May 2009, p. 23959B; *Dressel* (SPD), minutes of plenary BT proceedings 16/219 of 6 May 2009, p. 23960C; *van Essen* (FDP), minutes of plenary BT proceedings 16/219 of 6 May 2009, p. 23961A-C.

160 Bündnis 90/Die Grünen, rehabilitation and compensation of individuals convicted in Germany after 1945 of homosexual acts BT-Drucks. 17/4042 of 1 December 2010, p. 4 f.

161 The Bundestag Member *Heveling* (CDU/CSU), minutes of plenary BT proceedings 17/108 of 12 May 2011, p. 12459C-D for instance stated: “at the heart of the matter, one can say: you are demanding the lifting of the separation of powers principle founded in our Basic Law – the obligation of each state power to recognise acts of state of the other powers as being final in law. By doing this, you are accepting a momentous departure from our legal certainty. [...] From today’s perspective, it of course appears incompatible with the constitution to place criminal sanctions on consensual sexual acts. And of course our legal order must accommodate developments that take place within our society. However, changes cannot and must not by any means lead to a blanket evaluation of decisions taken by our courts and the democratic rule of law as being unjust. This would withdraw all justification underpinning our order of rule of law.”

162 BT-Drucks. 17/10841.

163 BT-Drucks. 17/11379.

service) *Manfred Bruns* (Karlsruhe), historian (retired) *Dr. Gunther Grau* (Berlin), administrative law judge *Ulrich Keßler* (Berlin) and Professor Emeritus of Sociology *Prof. Dr. Dr. Lautmann* spoke in favour of a general cassation, i.e. for an annulment of the judgements directly by legal act.<sup>164</sup> In its 135<sup>th</sup> session on 5 June 2013, its 139<sup>th</sup> session on 12 June 2013 and its 142<sup>nd</sup> session on 26 June 2013, the Committee on Legal Affairs postponed consultations on the parliamentary papers in question (*BT-Drucksache* 17/10841 and 17/4042), with the CDU/CSU and FDP voting for the postponement and the SPD, DIE LINKE and Bündnis 90/Die Grünen voting against. Making use of the right under Section 2 (2) of the Rules of Procedure of the German Bundestag, the DIE LINKE and Bündnis 90/Die Grünen then demanded a report from the Committee on Legal Affairs on the status of consultations. This report was submitted by the chair of the committee on 26 June 2013.<sup>165</sup> In the consultations on the report, Bundestag member *Ansgar Heveling*, a representative of the CDU/CSU, indicated that the hearing of experts had “not presented a uniform picture” and to date had “not provided the key” to resolving the challenging issue of appraising whether correcting court judgements that would today no longer be considered lawful would in fact justify calling into question the independence of the judiciary by legislative interventions. To date, stated *Heveling*, no final opinion had been reached.<sup>166</sup>

While this was happening in the Bundestag, the state of Berlin tabled a motion in the Bundesrat on 27 April 2012 requesting a “resolution of the Bundesrat on measures to rehabilitate and support individuals convicted for consensual homosexual acts after 1945 in both German states”.<sup>167</sup> The state of Hamburg then joined Berlin in the motion, and the item was referred to the Committee on Legal Affairs on 11 May 2012.<sup>168</sup> The states of North Rhine Westphalia and Brandenburg then also joined as movers of the motion. The resolution, which essentially comprised a request to the Federal government to propose measures for rehabilitation and support, was adopted with a majority of the members of the Bundesrat on 12 October 2012.<sup>169</sup> However, it was declared for the record for the states of Saarland, Lower Saxony and Rhineland Palatinate by the Premier of Saarland, *Kramp-Karrenbauer* (CDU), and by the Hesse Minister of State *Hahn* (CDU) that they opposed legislative annulment of judgements handed down since the Basic Law had been valid, because an annulment of this nature would be a breach of the “constitutionally enshrined principles of separation of powers, legal certainty and the independence of the judiciary”.<sup>170</sup>

The Bundestag was dissolved in autumn 2013 owing to the forthcoming Federal elections, and no resolution had been adopted by that time. After the election a new Bundestag was constituted. In line with the “principle of discontinuation” – meaning that all pending motions and bills lapse with a Bundestag’s dissolution – the motions in the Bundestag were dropped.

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164 Cf. statements of official experts on the motions *BT-Drucks.* 17/10841 and 17/4042 and the minutes of the 132<sup>nd</sup> session of the Committee on Legal Affairs on 15 May 2013.

165 Cf. report of the Committee on Legal Affairs (6<sup>th</sup> committee) pursuant to Section 62 (2) of the rules of procedure, *BT-Drucks.* 17/14196 of 26 June 2013.

166 *Heveling* (CDU/CSU), minutes of plenary *BT* proceedings 17/250 of 27 June 2013, p. 32289B-C.

167 *BR-Drucks.* 241/12 of 27 April 2012.

168 Minutes of plenary *BR* proceedings of the 896<sup>th</sup> session of 11 May 2012, p. 224B.

169 *BR-Drucks.* 241/12 (order) of 12 October 2012; Minutes of plenary *BT* proceedings of the 896<sup>th</sup> session of 12 October 2012, p. 445C.

170 Minutes of plenary *BR* proceedings of the 896<sup>th</sup> session of 12 October 2012, p. 461B-462C.

## 5. 2015 (18th legislative period of the German Bundestag)

The rehabilitation question is not addressed in the coalition agreement between CDU/CSU and SPD, and there were therefore no parliamentary initiatives at the start of the legislative period. A minor interpellation by the Bündnis 90/Die Grünen on the current position of the Federal government concerning rehabilitation of the victims of Section 175 StGB and Section 151 DDR-StGB was answered as follows by the government:

*“The Federal government expressly shares the view of the year 2000 of the German Bundestag that the continued criminal sanctions against homosexual citizens after 1945 constituted a violation of their human dignity. [...]*

*It is a highly contentious question – as was also shown by the public hearing of the Committee on Legal Affairs of the German Bundestag in May 2013 – whether retroactive annulment of post-constitutional judgements would be in accordance with the constitution. There are substantial concerns expressed with regard to the constitutional principles of the separation of powers and rule of law. In view of this, and also considering that legislative measures such as this would be the first-ever intervention of this nature in post-constitutional case law, the question can only be decided after careful consideration. The requisite investigations are still ongoing. It is not yet foreseeable when they can be concluded and with what outcome.”<sup>171</sup>*

On 28 April 2015, the state of Berlin in the Bundesrat again moved for a resolution of the Bundesrat for measures to rehabilitate men convicted after 1945 in both German states under Sections 175, 175a No. 3 and No. 4 of the Criminal Code and Section 151 of the Criminal Code of the German Democratic Republic.<sup>172</sup> The spring conference of the Ministers of Justice of the *Länder* on 17/18 June 2015<sup>173</sup> adopted a resolution which held that the ban on consensual same-sex acts between adults, and in particular the continued criminal prosecution after 1945, had violated the human dignity of the individuals concerned.<sup>174</sup> The resolution also stated that the Ministers of Justice consider it necessary for the individuals concerned to be rehabilitated and compensated, and timely federal legislation would be required to ensure this.

In its 935<sup>th</sup> session on 10 July 2015, the Bundesrat adopted a corresponding resolution by majority vote.<sup>175</sup> The resolution re-iterated that the encroachments

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171 Bündnis 90/Die Grünen, state of affairs on equality and antidiscrimination policy BT-Drucks. 18/3778 of 20 January 2015, p. 3.

172 BR-Drucks. 189/15.

173 The reporting *Länder* were Lower Saxony, Brandenburg, Saarland, North Rhine Westphalia, Hamburg, Schleswig-Holstein, Saxony-Anhalt, Thuringia, Baden-Württemberg, Bremen and Hesse.

174 Shortly after this, on 30 June 2015, this demand was also articulated by the Hesse Minister of Justice *Kühne-Hörmann* (CDU) and by the chairman of the Hesse Green Party *Klose* in a guest article in the “Frankfurter Rundschau”; see *Kühne-Hörmann/Klose, Verurteilte Homosexuelle rehabilitieren (rehabilitate convicted homosexuals)*, FR of 30 June 2015, available (in German) at: <http://www.fr-online.de/gastbeitraege/gastbeitrag-verurteilte-homosexuelle-rehabilitieren,29976308,31078626.html>.

175 BR-Drucks. 189/15 of 10 July 2015, resolution of the Bundesrat for measures to rehabilitate and compensate men convicted after 1945 in the two German states under Sections 175, 175a No. 3 and 4 of the Criminal Code, and under Section 151 of the Criminal Code of the German Democratic Republic.

associated with the convictions were a violation of human dignity as protected by Article 1 (1) Basic Law (p. 1). The resolution called for the rehabilitation of the convicted individuals, and outlined two alternatives. The primary proposal was to annul the convictions by specific legislation (p. 3). The secondary proposal was to introduce legal provisions that would create grounds for re-opening the legal proceedings, either at the request of the convicted individual or *ex officio* (p. 4). In addition, in the approaches for rehabilitation outlined, the legislation should also include provisions for eradicating the consequences of the earlier convictions from record, e.g. by striking the convictions from the Federal Criminal Record Register. Provision should also be made for compensation, the amount of which could be based on the law for compensation owing to wrongful prosecution (p. 5).

The minutes of this session of the Bundesrat make clear that the Free State of Bavaria, owing to its concerns on constitutionality, spoke against the general cassation and – primarily for practical reasons – against the establishment of new grounds to have legal proceedings re-opened.<sup>176</sup> Saarland also expressed concerns on the constitutionality of legislation introduced to repeal the judgements.<sup>177</sup>

## 6. Conclusion

The Bundestag (2000) and Bundesrat (2015) consider that the criminal sanctions on consensual homosexuality in the absence of aggravating circumstances that remained in place between 1945 and 1969 did indeed violate the human dignity of the individuals concerned. The Bundestag has to date done no more than express its “regret”; the Bundesrat, by way of contrast, has called for legislation that would have as its priority the annulment of these convictions. The Bundesrat also indicates that the question of compensation should be investigated. The Federal government (2015) considers that a violation of human dignity has taken place, but considers further investigation to be necessary.

### Part 2: Legislative rehabilitation options and constitutional legitimacy

#### A. Focus on treatment of consensual homosexuality without aggravating factors

##### I. Federal Republic of Germany and German Democratic Republic

The following investigation focuses on the criminalisation of consensual homosexuality in the absence of qualifying (“aggravating”) circumstances between the time the Basic Law came into force (24 May 1949) and the voiding of the then-valid versions of Section 175 StGB on 31 August 1969 and the striking of Section 175 StGB-DDR on 30 June 1968. Even though in the German Democratic Republic there was a less strong continuation of the NS-era status, and the extent and vehemence with which cases were pursued was less marked than in the Federal Republic of Germany (see Part 1 B III 1), there should be no differentiation within the 1949-1969 period because it would run contrary to the spirit of the now

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<sup>176</sup> Bausback, minutes of plenary BR proceedings of the 935<sup>th</sup> session of 10 July 2015, p. 282D-283D.

<sup>177</sup> Bouillon, minutes of plenary BR proceedings of the 935<sup>th</sup> session of 10 July 2015, p. 283D-284A.

unified legal order.<sup>178</sup> The end of the German Democratic Republic brought about a complete change of legal and political system, with the result that legal certainty – one line taken in counterarguments expressing concerns on constitutionality (to be elaborated in Part 3 (B)) – is not impacted to the same extent. This eases the justification for rehabilitation measures by annulment of convictions with regard to the legal situation under StGB-DDR. The same is true with regard to convictions between 1945 and 1949, i.e. during the period of occupation before the entry into force of the Basic Law; annulment could also be justified *a maiore ad minus*, if it should successfully be shown that there are no constitutional barriers to an annulment of convictions imposed by courts of the Federal Republic.

## II. Acts criminalised by Section 175

The investigation also focuses on the criminal sanctions in place for sexual acts between men over the age of 21 pursuant to Section 175 StGB in its then-valid version, i.e. concerning consensual homosexuality without aggravating circumstances (cf. Part 1 B III 1). This is where the legislation has had the evidently greatest impact, and is the subject of the decades-long political debate. In contrast to the qualifying (aggravating) circumstances of Section 175a StGB, the offence in its basic form had far less overlap with other offences. This makes it easier to exercise collective rehabilitation measures and also obviates the need to engage with the potential complexity of competing issues of criminal law.<sup>179</sup>

What can be excluded from the outset are rehabilitation measures with respect to prosecutions owing to the use of force or threat (Section 175a No. 1 StGB in the version to 1969) and owing to abuse of a dependency relationship or subordinate relationship (Section 175a No. 2 StGB in the version to 1969 and Section 175 (1) No. 2 StGB in the version to 1969 to 1973).<sup>180</sup> It would be possible to consider including the (aggravated) criminal offence of “professionally engaging in lewd and lascivious acts” (Section 175a No. 4 StGB in the version to 1969 and Section 175 (1) No. 3 StGB in the version to 1973), likewise sanctions owing to a violation of the sexual age of consent – which was higher than for heterosexual acts (Section 175a No. 3 StGB in the version to 1969, Section 175 (1) No. 1 StGB in the version of 1969 to 1973 and Section 175 (1) StGB in the version from 1973 to 1994).<sup>181</sup> In structural terms, the inclusion of the offence “professionally engaging in lewd and lascivious acts” would be consistent with the spirit of the NS Annulment Act with respect to convictions imposed during the NS era. Political initiatives to include the provisions that put discriminatory ages of consent on the statute books can cite judgements of the ECtHR in justification. The ECtHR has ruled that different ages of consent for heterosexual and homosexual acts are incompatible with the EHRC (cf. Part 1 C II). Against this backdrop, the rehabilitation measure of annulling convictions, and certainly the rehabilitation measure of collective compensation (cf. Part 2 B III and IV), would appear arguable.

<sup>178</sup> Likewise *Mengel*, *Strafrechtliche Verfolgung*, p. 18. Re. justification would then be easier, cf. *Krieg/Wieckhorst*, *Der Staat* 54 (2015), p. 556 f.

<sup>179</sup> Solutions along this line are offered by the statement of the official expert *Keßler* concerning the motions BT-Drucks. 17/10841 and 17/4042, p. 5.

<sup>180</sup> Likewise *Wasmuth*, in: FS Rehlinger, p. 777 (802 f.).

<sup>181</sup> The resolution of the Bundesrat of July 2015 was also substantially in favour of this (BR-Drucks. 189/15).

## B. Overall panorama of possible state rehabilitation measures

### I. Rehabilitation

In the present context, “rehabilitation” means restoring the social standing of the convicted individuals within the community of law, so as to go at least some way to compensating for unjustly suffered imprisonment, damage to body and soul, discrimination in society, disadvantages at work, and the loss of assets and opportunities in life.<sup>182</sup> A distinction can be drawn between individual and collective rehabilitation measures. Whereas collective rehabilitation measures are targeted at a specific group identifiable by common attributes, individual measures directly benefit the individual concerned.

### II. Political and legal measures

The characteristic of legislative rehabilitation measures is that they constitute interventions with specific legal consequences (for example, granting of compensation, or overturning of convictions). In contrast, purely political measures do not have any specific legal consequences. One example of a rehabilitation measure of this nature is the moral censure expressed unanimously by the German Bundestag in 2000 of the criminal prosecution of homosexuals.<sup>183</sup> The following analysis focuses on rehabilitation measures of a legislative nature.

### III. Collective rehabilitation by annulling the pertinent criminal convictions

#### 1. Key points

One option that has long been under debate – and designated the “primary” option by the Bundesrat in its resolution of 2015 (see Part 1 D II 5) – is for the legislator to annul all the pertinent criminal convictions. An intervention of this nature, sometimes also known as “general cassation”,<sup>184</sup> has to date been enacted only once in the history of the Federal Republic, in the form of the NS Annulment Act NS-AufhG (see Part 1 D I 2). Annuling all pertinent criminal convictions has the effect of expunging them from records, and closing (dropping) the criminal proceedings on which the decisions were based (see Section 1 NS-AufhG). There would be no need for the courts to be involved. The relevant legal provisions could be oriented in structure and language to the wording of the NS Annulment Act NS-AufhG. Section 1 of this law states: “This law annuls decisions on criminal convictions imposed by criminal courts. [...]. The legal proceedings on which the

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182 Formulation as per *Dreier*, in: *Badura/Dreier*, FS 50 Jahre BVerfG, p. 159 (177). Using comparable terminology, one could also speak of “reparations”.

183 BT-Drucks. 14/4894 in connection with minutes of plenary BT proceedings 14/140 of 7 December 2000, p. 13745. In his statement on the motions BT-Drucks. 17/10841 and 17/4042 (p. 2 f.) *Garditz* expressed doubt on the political viability of “symbolic rehabilitation of this nature” and saw no reason to repeat this, so as “not to reduce declarations such as this to a regular ritual, thereby devaluing their significance as communication within society.”

184 This term was for instance, used by the Federal Constitutional Court in its order of 8 March 2006 on the NS Annulment Act (NS-AufhG), 2 BvR 486/05 (juris), para. 75.

judicial decisions were based are dropped.” “Decisions” in the sense of this provision are those based on the statutory provisions specified in the appendix to the act. This appendix also names Section 175 RStGB. In alignment with Section 7 NS-AufhG, the annulment of these convictions would also comprise “all ancillary penalties and ancillary consequences”. In the event that a decision was based on violation of several provisions of the criminal code and the requirements for annulment are met only with respect to one part of the ruling, Section 3 (1) with Section 4 (1) NS-AufhG provide for a partial annulment; insofar as the part of the decision that fulfils the requirements for annulment is not of subordinate importance. The partial annulment of the conviction (in our case under Section 175 StGB) is only possible on application, pursuant to Section 4 (1). In this situation, legal proceedings would be required.

## 2. Evaluation

Provided there were corresponding political majorities in the legislature at Federal level,<sup>185</sup> the collective rehabilitation measure of annulling the pertinent criminal convictions could achieve the intended rehabilitation effect *uno actu*. In normal circumstances there would be no further proceedings needed on either administrative or judicial level, and nor would the individuals concerned need to take action themselves. Moreover, collective rehabilitation would fully capture all of the individuals criminalised during the period in question by the sanctions in force at the time. As far as recognisable, these benefits of the collective measure of annulling the pertinent convictions are not in dispute. The arguments that are brought against this course of action directly concern constitutional law or related political considerations, but all substantially reference certain constitutional determinants. These issues shall therefore be dealt with in detail in Part 3 of this investigation.

## 3. Section 31 (1) BVerfGG as an obstacle?

One reason cited against rehabilitation by introducing legislation to annul the convictions is that Section 175 StGB was confirmed as constitutional by the Federal Constitutional Court in 1957.<sup>186</sup> With respect to Section 31 (1) of the Law on the Federal Constitutional Court (BVerfGG), those raising this objection state that it is not a course of action open to the legislator to rehabilitate individuals convicted under statutory provisions that in an earlier time were confirmed as constitutional. According to Section 31 (1) BVerfGG, decisions of the Federal Constitutional Court are binding on the “constitutional bodies at Federal and State (*Länder*) level, and on all courts and public administration authorities.”<sup>187</sup> The

<sup>185</sup> For legislative competence of the Federal Government deriving from Article 74 Paragraph 1. No. 1 GG, see *Krieg/Wieckhorst*, *Der Staat* 54 (2015), p. 549 f.

<sup>186</sup> Cf. above Part 1 C I 1.

<sup>187</sup> There is however no need for an examination of Section 31 (2) BVerfGG in the present context, because this law merely serves to accord general binding effect to a decision that is essentially effective only *inter partes*. This is relevant for private individuals, but given the existence of Section 31 (1) BVerfGG, not of relevance for constitutional entities (see also *Benda/Klein/Klein*, *Verfassungsprozessrecht*, Section 40 para. 1440). Moreover, the requirements of the here solely applicable Section 31 (2) second sentence BVerfGG are not given, because the court in 1957 merely dismissed the constitutional complaint in its operative part, without also declaring the

first time the Bundestag engaged with the question of rehabilitation, Bundestag member *Gehb* (CDU) commented, “I do not wish to make a legal exegesis at this time, but the legal doctrine of the question make it imperative to say – that the Bundestag is not the right entity to deal with this issue. [...] [T]his decision [of the Federal Constitutional Court of 1957] has a binding effect [according to Section 31 BVerfGG]. [...] There is no way around this.”<sup>188</sup> This question must unquestionably be addressed, but also not without noting that it would indeed be possible to amend Section 31 BVerfGG (which is a Federal law ranking below the Basic Law and can therefore be amended more easily) in the context of a law to annul the Section 175 convictions. However, this will not be necessary in the context under discussion.

#### a) Tacit departure from the Federal Constitutional Court decisions of 1957 and 1973

In its judgement of 1957, the Federal Constitutional Court declared that Section 175 StGB did not violate the basic right to free development of personality provided for by Article 2 (1) Basic Law, because homosexual practice was in breach of moral law. Subsequent to this decision, and also up until 1973, the court never altered the nature of its rulings on the constitutionality of Section 175 StGB – even though it indeed had the opportunity to do so – and maintained its view until the law was repealed by the legislator. Even if the Federal Constitutional Court has never corrected the judgements handed down specifically concerning Section 175 StGB, it has since taken various decisions that tacitly and in one case expressly distance the court from its 1957 judgement.

Firstly, the court has in several decisions tacitly rejected a central condition for the constitutionality of criminal sanctions for same-sex sexual practice.<sup>189</sup> In 1957, it was still the view of the court that there could be no violation of the basic right to free development of personality, since homosexual practice was a violation of moral law, and it was impossible to determine unambiguously that there was no public interest whatsoever in seeing such activity punished.<sup>190</sup> In its present judgements, by way of contrast, the Federal Constitutional Court emphasises that same-sex partnerships, and therefore also practised homosexuality, are covered by the right to free development of personality expressed in Article 2 (1) in conjunction with Article 1 (1) Basic Law.<sup>191</sup> Since 1957, the constitutional understanding of the term “moral law” has undergone substantial change within the Federal Constitutional Court, and the court now no longer even makes mention of a violation against moral law in connection with same-sex partnerships.<sup>192</sup> In its first transsexual judgement in 1978, the court determined: “It might be the case that marriage between a male transsexual and a man is

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constitutionality of Sections 175, 175a StGB in the operative part. According to Section 31 (2) second sentence BVerfGG, the mere “proclamation of dismissal” does not attain force of law (BVerfGE 85, 117 [131]); see also *Brox*, in: FS Willi Geiger, p. 809 (824 f.); *Bethge*, in: Maunz, BVerfGG, Section 31, para. 280 and 283.

188 Minutes of plenary BT proceedings 14/96 of 24 March 2000, p. 8964D-8965A.

189 As stated by *Bruns*, in: Landesstelle für Gleichbehandlung, p. 26 (37 and 39), who drew the conclusion that the Federal Constitutional Court would have had to grant the constitutional complaints against Section 175 and Section 175a StGB if it had applied present-day jurisprudence.

190 Cf. Part 1 C I 1.

191 Cf. for example BVerfG, NJW 1993, p. 3058; BVerfGE 104, 51 (59); 105, 313 (346); 124, 199 (224 ff.); 133, 59.

192 For following *Bryde*, in: FS Bruns, p. 14 (16); Cf. also *Kahl*, in: FS Merten, p. 57 (63 f.).

discountenanced among the population in general owing to the subconscious notion that this is something to morally disapprove of. However, opinions in the absence of rational grounds cannot serve as a reason to preclude a marriage.” The consequence of a correction to the legal gender – that the appellant, now as a woman, is entitled to marry a member of his former gender – does not constitute a breach of moral law.<sup>193</sup> Owing to this changed understanding of the significance of moral law, and the fact that judgements on cases concerning homosexuality did not even make mention of moral law in terms of it being a ground of justification for limiting the right to free development of personality, it can be assumed that the court (tacitly) has abandoned the fundamental legal assumptions causing criminal sanctions on homosexual practice to be regarded as constitutional.

In its recent decision on successive adoption (*where one civil partner adopts a child previously adopted by his/her civil partner*), the Federal Constitutional Court even expressly distanced itself from its 1957 decision.<sup>194</sup> In reviewing the historical idea of what is understood by “parents” in the sense of Article 6 (2) second sentence Basic Law, the court elaborated on criminal sanctions for homosexual acts and the fact that homosexuality was “socially unacceptable” at the time the Basic Law was drafted. The court emphasised that since the Basic Law came into effect, it is not only the law in respect of same-sex couples that has changed considerably, but also society’s attitude. The court outlined that criminal provisions concerning homosexual acts had been modified several times and ultimately revoked altogether, and that the legislator had accorded homosexual people largely equal rights with heterosexuals. The Federal Constitutional Court then also elaborated on the changes to its own rulings on questions of homosexuality: “A corresponding development is also apparent in [...] the case law of the Federal Constitutional Court (*see BVerfGE 6, 389 and BVerfGE 105, 313; 124,199*) [...].” The court expressly contrasted its decision from the sixth volume, i.e. the 1957 decision named above, with its current case law, thereby indicating that its position on homosexuality has since changed, and that it would no longer reach a decision such as that in the sixth volume. Given that the offences under Sections 175, 175a StGB no longer exist, the Federal Constitutional Court could not be any clearer in distancing itself from its 1957 judgement and expressing that this line of case law has long since been abandoned.

Since according to the view taken here, the decisions from 1957 and 1973 no longer have any binding effect, the further review of Section 31 (1) BVerfGG shall be necessary only in the event of non-consensus with the above findings.

#### b) [Alternative: no binding effect on the legislator](#)

There would from the outset be no binding effect with regard to the annulment act under discussion here, because the judgement in its time did not deal with an annulment act. However, the present-day legislator could be barred from taking the annulment route insofar as a central contingency for annulment is that the criminal sanctions in force at the time represent a violation of higher-ranking law. In this case, the Federal Constitutional Court, particularly in its decision of 1957,

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<sup>193</sup> BVerfGE 49, 286 (299 f.).

<sup>194</sup> For following Cf. BVerfGE 133, 59 (79 f.).

determined the then constitutionality of Section 175 StGB.

The subject of the binding effect pursuant to Section 31 (1) BVerfGG is the specific decision on the matter in dispute.<sup>195</sup> According to settled case law of the Federal Constitutional Court it is not only the operative part of the judgement (the tenor) that has a binding effect; the reasons underlying the decision have this effect also.<sup>196</sup> Constitutional “deficiencies” of the law that go unrecognised are not covered by the binding effect, i.e. even a judgement that confirms the norm in its grounds does not serve to accord universal legitimacy to the norm as such.<sup>197</sup>

Whereas the 1957 Senate decision merely stated “The constitutional complaint of [...] is hereby dismissed” in its operative part, the grounds for the decision indicate that the court has examined and confirmed the compatibility of Sections 175, 175a StGB with Article 2 (1) and with Article 3 (1) Basic Law. By way of contrast, there are no statements on compatibility with the guarantee of human dignity deriving from Article 1 (1) Basic Law. Consequently, the binding effect of Section 31 (1) BVerfGG could from the outset not embrace the constitutionality concerning this question.<sup>198</sup>

Even though Section 31 (1) BVerfGG references the “Federal Constitutional Bodies” without differentiating between them, the case law of the Federal Constitutional Court and also the overriding opinion in literature<sup>199</sup> indicate that the BVerfGG does not in fact prevent the legislator from deciding new provisions with the same or similar substance in the event a legal norm is *overruled* by the Federal Constitutional Court. Legislative power – unlike the other two powers – is bound only by the constitutional order, and not by lower-ranking law. Exempting the democratically legitimised legislator from the binding effect of Section 31 (1) BVerfGG prevents the development of law from essentially becoming ossified – which would be incompatible with the principle of democracy.<sup>200</sup> Even though the issue under consideration here does not concern a legal norm being *overruled*, but rather a case in which a legal norm was incidentally *confirmed*, these considerations are also applicable. In the same way that legal norms can become constitutional by means of new insights in law or in fact, such developments can also render them unconstitutional – and the opportunity to respond to such changes should not be barred to the legislator for all time. Of course, with regard to the unwritten principle of mutual respect between constitutional bodies, there would need to be particular reasons to make such an amendment, insofar as this constitutional principle prohibits the legislator from “snubbing” the Federal Constitutional Court and calling its authority into question.<sup>201</sup> Reasons of this nature could derive from substantial changes to conditions in law or in fact by which constitutionality is judged, or similar major changes to underlying views and beliefs.<sup>202</sup> In the context under discussion, there can be no doubt that such

195 Cf. *Heusch*, in: Umbach/Clemens/Dollinger, BVerfGG, Section 31 para. 57.

196 BVerfGE 1, 14 (37); 19, 377 (392); 96, 375 (404); 104, 151 (197).

197 Cf. *Bethge*, in: Maunz, BVerfGG, Section 31 para. 289.

198 Likewise *Wasmuth*, in: FS Reh binder, p. 777 (813).

199 Cf. only *Benda/Klein/Klein*, Verfassungsprozessrecht, Section 40 para. 1471 giving further references

200 BVerfGE 77, 84 (103 f.); Cf. *Heusch*, in: Umbach/Clemens/Dollinger, BVerfGG, Section 31 para. 64; *Hesse*, JZ 1995, p. 265 (268), and fundamentally *Kischel*, AöR 131 (2005), p. 219 (288 ff.).

201 *Schlaich/Korioth*, Das Bundesverfassungsgericht, para. 484; *Schulze-Fielitz*, in: Badura/ Dreier, p. 385 (392 f.); Cf. also *Sachs*, in: FS Kriele, p. 431 (455), who also correctly points out that the legislator must take the judicial understanding of the Federal Constitutional Court adequately seriously and must engage with it in detail.

202 Cf. BVerfGE 96, 260 (263); *Heusch*, in: Umbach/Clemens/Dollinger, BVerfGG, Section 31 para. 64.

major changes have in fact taken place.

Finally the binding effect pursuant to Section 31 (1) BVerfGG, which also encompasses the grounds for the decision, is subject to a further limitation, characterised by substantial changes to life circumstances.<sup>203</sup> The binding effect is countered particularly by facts that emerge subsequent to a decision of the Federal Constitutional Court: these facts also include changes to life circumstances, values and beliefs, namely when they have led to a change in the majority-determined construction of constitutional norms.<sup>204</sup> In the following context, the viewpoint that was central to the decision of the Federal Constitutional Court at the time – that the majority of the population judged homosexual acts to be immoral – can no longer be regarded as valid. Moreover, in the present day it is no longer possible to claim “moral law” as a legal barrier limiting the general right to development of personality.<sup>205</sup> Lastly, the intensive engagement in scientific research with sexual orientation and its development since 1957 has led to quite different insights than those on which the conclusions were based at the time. Specifically, the “need to protect against homosexual seduction”, as the Federal Constitutional Court once reasoned to justify Section 175 StGB, can no longer exist today.<sup>206</sup>

### c) Conclusion

Section 31 (1) BVerfGG cannot be regarded as a barrier for annulling the pertinent criminal convictions first and foremost because the Federal Constitutional Court has abandoned the views it represented in its decisions of 1957 and 1973. Yet even without this reason, there would not be any binding effect to the detriment of the legislator and not in the light of the changed circumstances.

## IV. Collective compensation

### 1. Key points

Collective compensation would entail allocating a substantial sum of money – either a one-off or annual payment – for the purpose of awareness-raising projects, commemorative events, education on historical development and the social impact, particularly throughout the education system. To manage the relevant funds and carry out the projects (those named above serve as examples only), monies would have to be allocated in the form of a dedicated fund to either an existing state agency or entity, or a new agency or entity established for this purpose. Alternatively, it would also be feasible to commission a private-sector entity, possibly with the participation of other private-sector institutions. The most evident approach would be to assign task and budget responsibility to the “Federal Magnus Hirschfeld Foundation”. This foundation was established by the Federal Republic of Germany in October 2011. Its mission includes the promotion

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203 See also *Bethge*, in: Maunz, BVerfGG, Section 31 para. 100, with reference to BVerfGE 33, 199 (203 f.); 82, 198 (205).

204 BVerfGE 39, 169 (181 ff.); 70, 242 (249).

205 Cf. here only *Wasmuth*, in: FS Reh binder, p. 77 (813 f.); *Krieg/Wieckhorst*, *Der Staat* 54 (2015), p. 544 f.

206 Likewise *Wasmuth*, in: FS Reh binder, p. 777 (814).

and encouragement of educational and research projects, and the undertaking of efforts to combat societal discrimination of lesbians, gay men, bisexuals, transsexuals, intersex and queer persons in Germany. In constitutional terms, the foundation is part of the Federal administration as provided for in Article 86 Basic Law.<sup>207</sup> In an interview with “Spiegel Online” on 3 June 2014, the former Federal Minister of Justice *Leutheusser-Schnarrenberger* proposed tasking the Federal Magnus Hirschfeld Foundation with the implementation of compensation policies.

In terms of finances, this would mean a significant increase to the foundation capital.<sup>208</sup> In addition, annual funding would also be granted for basic resources and for individual projects.

## 2. Evaluation

Introducing a compensation concept of this nature as collective rehabilitation would spare the individuals concerned from having to take action themselves with state agencies or entities (which would in any case have to be specially commissioned with the duty), and having to produce documentation that in many cases may no longer exist. The collective approach would avoid many of the practical problems. The projects carried out using the funds would ensure proactive and visible impact into the future. Of course, collective compensation could only mean a substantial contribution to rehabilitation from the political perspective if the sum set aside was a significant amount. From the legal viewpoint (determining the amount of the compensation sum is primarily a political responsibility), it would appear feasible to orient the compensation sums to those provided for by the Act to Compensate for Criminal Prosecution (StrEG) with respect to immaterial damage. In accordance with Section 7 (2) StrEG, the compensation is 25 € for each full or part-day of confinement.

## V. Concentration on measures of collective rehabilitation

### 1. View of individual rehabilitation measures

#### a) Re-opening of proceedings (retrial)

The law on re-opening criminal proceedings is determined in Section 359 StPO. With respect to this law, one consideration would be to introduce new grounds for re-opening proceedings that would give people convicted under Section 175 StGB the opportunity to obtain a new hearing. The convicted individuals themselves are required to submit a request for proceedings to be re-opened, and the request is decided on by a court pursuant to Section 367 (1) StPO and in accordance with the Courts Constitution Act (GVG). In order for the request to be successful, it would be necessary to submit the original judgement and possibly also other evidence.

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<sup>207</sup> For the details Cf. *Burgi*, in: von Mangoldt/Klein/Starck, GG, Article 86 Para. 52.

<sup>208</sup> As stated explicitly by the official expert *Bruns*, minutes of hearing of Committee on Legal Affairs of 15 May 2013, minutes no. 132, p. 39 f.

## b) Re-opening of proceedings on grounds of human rights violation

Another feasible approach is that taken in 1992 with the Criminal Prosecution Rehabilitation Act (StrRehaG) with respect to criminal prosecutions in the former German Democratic Republic that are contrary to the rule of law. Section 1 of this law provides that a criminal conviction imposed by a court of the German Democratic Republic can “on request be declared contrary to the rule of law and can be annulled insofar as it is incompatible with fundamental principles of the democratic order”. In such a case there is no new hearing, and the judgements imposed at the time are declared to be contrary to the rule of law (this also has the effect of expunging the public social and ethical condemnation that weighs on the convicted individuals).<sup>209</sup> In the context under investigation here, the decisions may not have to be declared “contrary to the rule of law”, but more precisely “in violation of fundamental rights and human rights”.

The annulment proceedings provided for in Sections 7 et seq. of the Criminal Prosecution Rehabilitation Act (StrRehaG) do not entail a new main hearing, in contrast to the procedures in place for re-opening proceedings. When proceedings are re-opened, the two-stage preliminary proceedings are principle followed by a main hearing, whereas a court taking a decision pursuant to Section 11 (3) StrRehaG usually does so “without oral debate”. Moreover, StrRehaG also makes provisions for preferential treatment to be accorded to rehabilitation petitions before the courts responsible (Section 11 (1) StrRehaG). The outcome is that the rehabilitation procedure is more favourable for the individuals in question than seeking redress by means of re-opening proceedings.

## c) Compensation of individual cases

Compensation according to statutory provisions concerning compensation for criminal prosecution (StrEG) can be ruled out in the context under investigation, because the requirements set out in the act are not met: namely that the flawed nature of the previous criminal proceedings should be determined in new, formal criminal proceedings. If the legislator were to pursue the “re-opening of proceedings” approach to rehabilitation outlined above (B V 1 a), this would open the way to compensation as per the Act to Compensate for Criminal Prosecution (StrEG), insofar as Section 1 and other sections are predicated on the striking of the previous conviction in a new proceeding. If the legislator were to decide on collective rehabilitation by annulling the pertinent criminal convictions, it would be able to reference the legal consequences in accordance with StrEG in the pertinent legislation, consequences that entail compensation both for material and non-material damages. A third option would be to introduce a separate action for compensation, in addition to introducing new grounds permitting the re-opening of proceedings or enacting a law to annul convictions. This would take the form of a type of voluntary “social payment”. With regard to the nature and level of the compensation, one possible approach would be to orient the decision to the “capital-sum compensation” provided for in Section 17 StrRehaG (there in

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<sup>209</sup> Cf. BVerfGE 101, 275 (289).

connection with criminal convictions in Federal Republic of Germany found to be contrary to the rule of law). Section 17 (1) StrRehaG specifies a capital sum compensation of 306.78 € for each full or part calendar month of detention.

## 2. Evaluation

All the individual rehabilitation measures described above would be easier to justify in terms of constitutional law than collective rehabilitation by annulment of the pertinent criminal convictions, because they would have considerably less intense impact on legal certainty. In addition, because judicial decisions are a prerequisite for individual rehabilitation measures, there would from the outset be no uncertainty regarding a potential encroachment of the separation of powers principle (for elaboration on this point see Part 3 C). In particular, the granting of individual compensation is not likely to meet with insurmountable constitutional barriers: compensation would either be granted following a new hearing or pursuant to an annulment act, and would be *a maiore ad minus* encompassed by their constitutional justification;<sup>210</sup> or the individual compensation payment could take the form of a voluntary social payment, and in this case also, there would be no constitutional objections because (in the words of the legal expert *Garditz*, who is critical of the annulment of pertinent criminal convictions)<sup>211</sup> “the scope for choice in the nature [...] of a voluntary social payment is far wider than in formal-procedural cassation”.<sup>212</sup> As shall be explained in detail in Part 3 D, there is no breach of the principle of equality before the law with respect to other groups convicted under criminal provisions that are incompatible with high-ranking law.

The measures for individual rehabilitation shall however not be further elaborated in the following legal analysis, because owing to various practical circumstances they do not (or no longer) appear appropriate as a means to genuinely contribute to the political goal of rehabilitation. Indeed, considering the time that has elapsed (even the most recent convictions now date back almost 50 years), it can be assumed that the relevant case files will no longer be available in by far the majority of cases, and that those concerned will no longer have the relevant documentation available.<sup>213</sup> The state of Berlin, for example, had all judgement documentation dating back to the period from 1949 to 1969 shredded in accordance with state archival procedure. The same is true of the states of Rhineland Palatinate and Saxony.

Even if case files were still available in individual cases, given the approximately 50,000 convictions under Section 175 StGB, the courts commissioned with the cases would need to rule on each individual case for individual rehabilitation, and this would entail inconceivable administration overhead. As a consequence, there would be further delay in annulling the judgements, and the rehabilitation goal would not be achieved. In this regard, the situation corresponds to that which the

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210 For elaboration on admissibility of individual compensation payments see *Schoneburg/ Lederer*, expert opinion, no. 4.

211 Minutes of the 132<sup>nd</sup> session of the Committee on Legal Affairs on 15 May 2013, p. 36 f.

212 The official expert *Keßler* also indicated this view at this hearing (minutes of the 132<sup>nd</sup> session on 15 May 2013, p. 32).

213 This stems from the statement of the historian *Grau* at the public hearing by the Committee on Legal Affairs on 15 May 2013 (minutes of the 132<sup>nd</sup> session on 15 May 2013, p. 33); similar estimation by *Gerlach*, in: Pretzel, p. 133 (153).

Federal Constitutional Court encountered in its judgement on the NS Annulment Act NS-AufhG (from which it concluded that an annulment act could be enacted regardless of the fact that the legal means of re-opening proceedings would have less impact on legal certainty; see also Part 3 C III).<sup>214</sup> It must also be considered that, owing to their advanced age, the convicted men can hardly be expected to appear in court in a new hearing to have their particular conviction annulled, with a case assessment that could in some circumstances be highly detailed.<sup>215</sup> The same would apply with regard to claims for compensation, and the need to provide evidence of material or non-material damage. Even if the compensation were to take the form of a voluntary social payment, there would need to be an administrative procedure, with rules on the need to provide evidence.<sup>216</sup> Finally, the surviving individuals cannot be expected to once again turn to the prosecution authorities in order to be confronted once more with their one-time conviction in a new hearing, and suffer the associated humiliating violation of privacy.<sup>217</sup> For these reasons, the “simplified annulment procedure” proposed by *Krieg/Wieckhorst*<sup>218</sup> is ultimately a convincing option to pursue as a means to fulfil the state obligation to rehabilitate the victims.

### C. Constitutional legitimacy for collective rehabilitation measures in association with Section 175 StGB

A study to determine the constitutional framework within which the democratically legitimised legislator can take or initiate rehabilitation measures should not merely probe the potential limitations that stand in the way of such an undertaking. Rather, the entire discussion should be essentially turned on its head, beginning by researching for any constitutional “pointers” that could provide the legislator with greater legitimation. In my view, the debate to date on rehabilitation measures in connection with Section 175 StGB is marred by its perception of principles (e.g. the rule of law principle) exclusively in terms of limitations (for example as a barrier to annulling the pertinent criminal convictions) without at least considering whether the correction of recognised violations of the law may not in itself be constitutionally legitimised.

Nevertheless, the first approaches describing potential constitutional legitimacy reasons are now appearing in the relevant literature.<sup>219</sup> The official expert *Garditz* – who is largely critical of an act to annul the pertinent criminal convictions – stated the following at a hearing held by the Committee on Legal Affairs of the German Bundestag in May 2013:

214 BVerfG, order of 8 March 2006, 2 BvR 486/05 (juris), para. 100-103.

215 As also determined in BT-Drucks. 13/353, p. 13; 13/9747, p. 2.

216 The official expert *Bruns* (minutes of the 132<sup>nd</sup> session of the Committee on Legal Affairs on 15 May 2013, p. 39) explicitly states: “as I see it, individual compensation is out of the question, because there are now only a few people left who would make themselves known, and it would mean another individual case.”

217 These were also the considerations voiced at the consultations on the NS Annulment Act (NS-AufhG); see *Pretzel*, *Strafrechtliche Rehabilitierungsansprüche*, in: idem, p. 83 (117 f.).

218 *Der Staat* 54 (2015), p. 569 f.

219 *Wasmuth*, in: FS Rehinder, p. 815, deduces from the Basic Law an “obligation” for the legislator to “make improvements”, mandating action on the part of the legislator if the criminal courts dealing with the re-opening of proceedings provisions of Section 79 (1) BVerfGG were to fail to recognise the “constitutional claim to protection” (elaborated in C II) proclaimed by that author. *Krieg/Wieckhorst*, *Der Staat* 54 (2015), p. 541 ff., advocate a constitutionally substantiated review by the state on the question of rehabilitation, albeit with brief grounds.

*“Since a major objective reason is the rehabilitation of convicted individuals who indisputably could not be convicted for the same offences according to modern-day constitutional standards, it is principally possible to annul the convictions within the bounds of the constitutional framework.”*

However, the “major objective reasons” are not elaborated on. The literature discussing rehabilitation measures owing to a change of societal order (particularly with regard to National Socialist and East German injustice) makes explicit mention of a “duty to re-evaluate” (*Pieroth*).<sup>220</sup> *Bernhard Schlink* has found that the “the law can ensure that the past is not permitted to continue its impact unimpeded; the law can also make certain the impact of the past continues. It can ensure that convicted citizens are rehabilitated, suffered penalties are compensated, destroyed careers are repaired [...] and likewise it can ensure that past convictions, punishments [...] and careers persist”.<sup>221</sup>

I. Relevant situation: continued stigma of conviction under criminal provisions that are incompatible with higher-ranking law

The following considerations relate solely to the situation following a conviction under a criminal provision. This is therefore only a comparatively small part of the entire legal system. The men convicted under Section 175 StGB are forced to live with the stigma of conviction to the present day, i.e. in the knowledge that the state of the Federal Republic of Germany has expressed its social and ethical condemnation of them. The associated “criminalisation”<sup>222</sup> persists, even though the expungement of records in the Federal Central Register means that these convictions can no longer be held against the individuals concerned in legal relations.

The Federal Constitutional Court has repeatedly identified the “continued stigma of conviction” as a state of affairs that can fundamentally justify rehabilitation measures.<sup>223</sup> This persistent state is the point of reference for the following considerations on the legitimation, character and limits of rehabilitation measures in connection with Section 175 StGB.

Irrespective of the legal force of the convictions, before potential state responses to the continued stigma of conviction can (or possibly must) be considered, the requirement is for the criminal sanction to constitute a violation of higher-ranking statutory provisions.<sup>224</sup> There is no need to explore here which provisions of higher-ranking law are violated by criminal sanctions for homosexual acts, because it is now indisputable that penalties of this nature would be compatible neither with the Basic Law nor with the ECHR (for elaboration see Part 3 B IV 2).

The persistent and still present stigma of conviction based on criminal provisions that are incompatible with higher-ranking law is thereby the reference point for constitutional legitimation of state rehabilitation measures; it also serves as the

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220 VVDStRL 51 (1992), p. 91 (99 ff.); taking up this idea *Dreier*, in: FS 50 Jahre BVerfG, p. 160 with footnote 6.

221 *Schlink*, in: König et al., *Vergangenheitsbewältigung*, p. 433 (434).

222 *Benda/Klein/Klein*, *Verfassungsprozessrecht*, para. 1381.

223 BVerfGE 101, 275 (288); BVerfG, order of 8 March 2006, 2 BvR 486/05 (juris), para. 83.

224 BVerfGE, *ibid.*

“activator” of a potential state duty of protection vis-à-vis the individuals involved.

The issue here is not to retrospectively evaluate the conformity of Section 175 StGB with the German Basic Law or the ECHR between 1949 and 1969.<sup>225</sup> Nor is it about justifying the annulment of convictions owing to a change in moral attitudes, or on a mere change of political majorities in the Bundestag.<sup>226</sup> The continued lack of action by the present-day legislator forms the primary constitutional issue under examination, not any wrongful conduct of the legislator in the years between 1949 and 1969, and certainly not the courts who were enacting judgements on the basis of the statutory provisions of the era.

II. Duty to protect – enshrined in fundamental rights, rule of law and social state – as the foundation for the rehabilitation mandate

### 1. Basics

The case law of the Federal Constitutional Court, beginning with the 1975 judgement on the terminations of pregnancy,<sup>227</sup> brought to light a further function of the fundamental rights enshrined in the Basic Law, since then designated as a “duty to protect”, or also as a constitutional mandate to protect. The associated conclusion, that the state is mandated by the constitution to pursue specific protection objectives to the benefit of the holders of fundamental rights, has since been confirmed, expanded and made more specific in numerous later decisions. It now forms an undisputed part of the valid constitutional law.<sup>228</sup> It gives expression to the concept that the provisions concerning fundamental rights can in some circumstances mandate positive action on the part of the state to safeguard these rights. This “duty to protect” is part of the objective and legal substance of provisions governing fundamental rights. It is not about defence against state interventions, but rather about positive action to be taken by the state to safeguard legal interests, i.e. to achieve certain objectives in terms of protection: here to fulfil a rehabilitation mandate.

In the present context, the requirements are met for there to be a state duty to protect the fundamental rights of individuals marked by the continued stigma of criminal conviction, even though the convictions themselves resulted from state intervention (the criminal sanctions imposed by Section 175 StGB, and the resulting convictions). The impact of the state’s interventions ended with the enforcement of judgements and, at the latest, with the expungement of the convictions in the Federal Central Register, with the result that the state is no longer involved in its capacity as the originator of the interventions (and as an addressee of fundamental rights in terms of rights of defence against the state).

<sup>225</sup> The considerations of *Garditz* on the “time-limited nature of case law” also point in this direction (statement at the hearing in the Committee on Legal Affairs in May 2013), p. 8 f.; *Lautmann* also argues strongly retrospectively RuP 2015, p. 13 f.

<sup>226</sup> Also the declaration of Saarland Premier *Kramp-Karrenbauer* on 12 October 2012 in the Bundesrat, StenBer, 901<sup>st</sup> session, minutes of BR plenary session 901, Appendix 7, p. 461.

<sup>227</sup> BVerfGE 39, 1 (41 f.); for elaboration *Isensee*, *Das Grundrecht auf Sicherheit*, p. 27 f.

<sup>228</sup> With numerous references to case law, the development is recorded et al. in *Stern*, *Staatsrecht*, Bd. III/1, p. 931 ff.; *Jarass*, in: *Handbuch der Grundrechte*, Bd. II, Section 38 para. 28 ff.; *Sachs*, in: *idem*, *GG*, Article 1 para. 39 ff.

Instead, the state's obligation is constituted solely in its mandate to protect.

In both its decisions on the significance of laws to rehabilitate injustice of the German Democratic Republic (StrRehaG)<sup>229</sup> and of the National Socialist era (NS-AufhG),<sup>230</sup> the Federal Constitutional Court made explicit reference to this structural aspect: the court held that the convicted individuals are not obliged to accept the "continued stigma resulting from a conviction" that had violated certain principles of higher-ranking law. However, the legislator, "for reasons of legal certainty and practicability, can leave in place decisions that run counter to the rule of law when they are of low significance." In both decisions, it was attested to the legislator that it had not violated any existing duty to protect by not considering certain offences. The literature that discusses treatment of the consequences of convictions pursuant to Section 175 StGB in part makes reference to this.<sup>231</sup> In the context of fundamental rights, the normative foundations of the duty to rehabilitate – seen as a goal of state policy – would be those constitutional provisions that are impinged upon by a continued stigma of conviction. In this context, this concerns particularly the general right to development of personality in accordance with Article 2 (1) in connection with Article 1 (1) Basic Law (for further elaboration see Part 3 B IV 2 b).

Flanking this, the principles of rule of law and social state serve as further normative foundations reinforcing the state rehabilitation mandate. As already noted, the rule of law principle is not only (as a counterargument, as it were) affected in the shape of legal certainty (elaborated in Part 3 B). Rather, this gives rise to the requirement for material justice that underpins the re-opening of proceedings provisions in Section 359 StPO, and by means of which the encroachment of the legal certainty principle is made possible.<sup>232</sup> In an apt commentary on the Basic Law, it is stated that the rule of law also means "recognising the relativity of legal decisions".<sup>233</sup> In the words of *Gustav Radbruch*, justice – along with legal certainty – is the "second major task of the law".<sup>234</sup> This includes the ability of the constitutional state to correct itself (always within certain specific limits, to be investigated in the following part of this opinion).<sup>235</sup>

Finally the social state principle provided for by Article 20 (1) Basic Law is also recognised as a basis for various norms of the so-called social compensation law, which were defined in consequence of the Third Reich explicitly to provide reparation for National Socialist injustice, again hand-in-hand with the principle of rule of law.<sup>236</sup> With regard to laws concerning the consequences of war, the Federal Constitutional Court has determined that pursuant to Article 20 (1) Basic Law the legislator is obliged to provide "internal equalisation of burdens". The court specifically names the principles of rule of law and the social state as the "roots" for reparation for earlier injustice.<sup>237</sup>

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229 BVerfGE 101, 275, para. 104.

230 Order of 8 March 2006, 2 BvR 486/05 (juris), para. 89.

231 Though without more elaborate reasoning; Cf. for example *Bruns*, in: Landesstelle für Gleichbehandlung, p. 26 (41); *Wasmuth*, in: FS Reh binder, p. 791 (albeit with unclear origin and on further-reaching demands, also grounds for subjective right of the person concerned p. 808 ff.); different view (without more detailed grounds) *Mengel*, in: Landesstelle für Gleichbehandlung, p. 63.

232 BVerfGE 22, 322 (329); *Frister*, in: Wolter (publ.), SK-StPO, preliminary remarks on Section 359, para. 1

233 *Garditz*, in: Berliner Kommentar zum GG, Band 2, 31. Lieferung, C Article 20 (6<sup>th</sup> part), para. 17.

234 Aphorismen zur Rechtsweisheit, 1963, p. 23, No. 77.

235 *Straßmeier/Ullerich*, ZRP 2013, p. 79, draw attention to this.

236 See also *Zacher*, in: HdbStR II, 2004, Section 28 para. 45.

237 BVerfG, NJW 1991, p. 1597 (1600).

## 2. Consequences

The above-described mandate of the state in rehabilitation policy – grounded on the duty to protect the fundamental rights of its citizens, the rule of law and also on the principle of the social state – focuses on the overarching goal, and not on individual measures. Normally, the duty of the state as interpreted in the constitutional framework merely stakes out an imperative to take action in the prescribed direction. The interpretation does not specify an obligation to take certain specific actions. The first addressee of the “duty to protect” is therefore the legislator, who has considerable discretionary scope for assessment, evaluation and the choice of action to take in order to fulfil this mandate.<sup>238</sup> The state can only be considered to have failed in its duty to protect “when public authorities have either not adopted any protections at all; or when the provisions and measures adopted are entirely unsuitable or completely inadequate to achieve the requisite goal of protection or fall considerably short of the goal.”<sup>239</sup>

Accordingly, it does not follow from the rehabilitation mandate that an explicit course of action must be taken, be this a collective rehabilitation by annulment of the pertinent convictions and/or collective compensation. However, in view of the continued stigma of conviction, the state is obliged to investigate whether this stigma is compatible with the standards of higher-ranking law and – in light of the following elaborations on the potential limits of rehabilitation measures – to re-evaluate its previous failure to take action. If the conclusion should be reached in the following section that on the one hand there is a particularly serious violation of higher-ranking constitutional norms, and on the other hand that a measure such as rehabilitation by collective compensation does not come up against any constitutional limits, it will arguably be difficult to justify why this measure has not yet been enacted, despite both Bundestag and Bundesrat having deemed the human dignity of the affected individuals to be violated by criminal sanctions on consensual homosexuality. It should be re-emphasised that the individuals concerned are not granted subjective rights, firstly because the duty to protect is encompassed in the objective fundamental rights, and also because the duty to protect is not already directed toward specific individual measures; such measures shall not be determined until following a decision by the legislator.<sup>240</sup>

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238 Explicitly BVerfGE 77, 170 (214 f.); 88, 203 (262); 97, 169 (176).

239 BVerfGE 92, 26 (46); 79, 174 (202).

240 In this respect also A. *Wasmuth*, in: FS Rehinder, p. 808 f.

### Part 3: Limits of the constitutional framework for collective rehabilitation measures

The following analysis takes as its point of reference the constitutional concerns expressed in particular against the “annulment of pertinent convictions” rehabilitation measure, even though it is hardly conceivable that the Federal Constitutional Court would declare unconstitutional an annulment act that had been passed by the democratically legitimised legislator.<sup>241</sup> Of interest here is solely the question of the prerequisites under which collective rehabilitation may be possible, and whether these prerequisites are met specifically in terms of Section 175 StGB.

#### A. No constitutional limitations for collective compensation

The rehabilitation measure of collective compensation outlined above (Part 2 B IV) would certainly not push the limits of the constitutional framework if were to be enacted in isolation, i.e. without also annulling the pertinent criminal convictions. Compensation would then be a type of a voluntary social payment. This could be implemented without any concern regarding constitutionality, provided the principles of equality before the law, pursuant to Article 3 (1) Basic Law (for details see D) are observed, and assuming the requisite political will were present, as well as a willingness to allocate the necessary budgetary resources.<sup>242</sup>

If the rehabilitation measure of “collective compensation” were to be decided in addition to rehabilitation involving annulment of the pertinent criminal convictions, it would not come up against any further-reaching constitutional limits than the annulment itself. Therefore, reference can be given to the justification required for this (essentially *a maiore ad minus*) with regard to the constitutional principles of legal certainty, separation of powers and of Article 3 (1) Basic Law (see B D).

#### B. The principle of legal certainty as a barrier to annulment of the pertinent criminal convictions?

##### I. Content and meaning

One objection raised against the annulment of pertinent criminal convictions is the principle of legal certainty, which has always been a recognised component of the rule of law principle pursuant to Article 20 (3) Basic Law. Not only does this principle demand that the adjudication process follows predefined procedures, it also requires that the process should reach a conclusion that has legal certainty.<sup>243</sup> In the words of the Federal Constitutional Court, “legal concord and legal certainty [...] are of such central meaning to the rule of law that for their sake one has to

<sup>241</sup>Likewise *Straßmeier/Ullrich*, ZRP 2013, p. 77.

<sup>242</sup>Likewise the official experts *Keßler* and *Garditz*, according to the minutes of the public hearing of the Committee on Legal Affairs of 15 May 2013, p. 32 and 36. Also *Dreier*, in: FS BVerfG, p. 176 f., considers collective compensation to be fundamentally unproblematical in a constitutional state.

<sup>243</sup> Also already in BVerfGE 2, 380 (381).

accept the possibility of wrongful decisions in individual cases.” The finality of court decisions, which is enacted in lower-ranking law, is also justified in constitutional terms: it is this *res judicata* that creates the legal finality of decisions on disputes.<sup>244</sup>

If third parties are involved, the legal certainty principle is reinforced by the “principle of protection of legitimate expectations”, although this does not play a role in the present context. In the case of consensual homosexuality in the absence of aggravating circumstances, there are no third parties who have become “victims” of the acts in question,<sup>245</sup> and nor is there an interest of whatever nature from the court or even from individual judges involved at the time in protecting the legal validity of judgements.

## II. Recognised encroachments of the principle of legal certainty with criminal convictions that breach higher-ranking law

It shall be recalled that the area of concern here is exclusively encroachments in connection with criminal convictions. Owing to the gravity of the consequences in law when statutes and associated convictions in criminal law violate higher-ranking law, criminal law is a part of the overall legal system in which such violations carry greater weight; in the words of *Bethge*<sup>246</sup> a final criminal conviction based on a legal norm that has been enacted or interpreted in violation of the constitution (the case covered by Section 79 (1) BVerfGG) constitutes the “extreme case of a breach of justice.”

### 1. In the case of introduction of a new legal system

To date, there have been two cases in which the legislator has enabled or itself brought about the annulment of criminal convictions owing to their incompatibility with higher-ranking law (in the case of the law on rehabilitation and compensation owing to unjust convictions in the former East Germany, StrRehaG, by the declaration of incompatibility with the rule of law; and in the case of the NS Annulment Act, NS-AufhG, by introduction of relevant legislation). Reference has been made to both laws in previous sections (Part 1 D I 2). Both laws were upheld by the Federal Constitutional Court: StrRehaG by the judgement of 7 December 1999<sup>247</sup> and the NS-AufhG by the order of 8 March 2006.<sup>248</sup> Both decisions have met with approval in the jurisprudence.

In its 1999 decision, the Federal Constitutional Court found that the prerequisite for declaring the pertinent convictions contrary to the rule of law on the basis of StrRehaG was the “continued stigma of a conviction that was imposed with gross disregard for the human rights that are generally recognised among the community of peoples”. In its 2006 decision, the court held that it did not violate

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244 BVerfGE 47, 146 (161); Cf. furthermore BVerfGE 107, 395 (401 f.).

245 This is also expressly conceded by *Garditz*, statement on the motions BTDrucks. 17/10841 and 17/4042, p. 3 f.

246 In: Maunz, BVerfGG, Section 79 para. 3.

247 BVerfGE 101, 275; also advocated by *Dreier*, in: FS BVerfG, p. 191.

248 BVerfG, order of 8 March 2006, 2 BvR 486/05 (juris).

the principle of legal certainty to set aside “judicial verdicts that [...]are based on provisions that embody serious injustice, and therefore clearly constitute an injustice”.<sup>249</sup> Both cases concerned encroachments in connection with a fundamental change of political and legal system.

## 2. Within the period of validity of the Basic Law

As noted in the section on potential rehabilitation measures (Part 2 B V 1 a), Section 359 StPO allows the re-opening, for the convicted person’s benefit, of proceedings already concluded by final judgement, thereby permitting a further encroachment of the principle of legal certainty. In accordance with Section 359 No. 6 StPO, this option is available if the ECtHR has held that there has been a violation of the EHCR or its protocols, and the judgement was based on this violation. In such a case, the violation of the Convention must have been previously determined in an individual case, before a decision can be taken in a further individual hearing on the re-opening of proceedings. Where proceedings are being re-opened with the aim of annulling a conviction owing to a violation of the EHRC, Section 79 (1) BVerfGG defines the possibilities for re-opening proceedings pursuant to Section 359 StPO<sup>250</sup> in those cases in which the conviction is based on a law that the Federal Constitutional Court has declared to be incompatible with the constitution.<sup>251</sup> This aims to strike a balance between the rights of those unjustly convicted on the one hand, and the principle of legal certainty on the other. The Federal Constitutional Court gave an early confirmation that this solution was constitutional.<sup>252</sup>

## III. No character of finality, leeway for the legislator to take action

Potential encroachments of the principle of legal certainty can be justified by the legislator alone – who has also been identified as the first addressee for such initiatives, as outlined in the section on the existence of a state duty to protect (Part 2 C II 2). Against this background, it is remarkable that, unlike the Bundestag, which with changing membership and majorities over the years has repeatedly launched initiatives to enact rehabilitation measures in connection with Section 175 StGB (see Part 1 D II), the Executive, in particular, has repeatedly expressed its scepticism<sup>253</sup> or articulated the need for further investigation.<sup>254</sup>

As to the substance of the matter, there is no evidence that the encroachments of the legal certainty principle recognised in the case law of the Federal

249 Order of 8 March 2006, *ibid.*, para. 75.

250 According to the general views, Section 79 (1) BVerfGG can be read as an additional reason for re-opening of proceedings in the sense of Section 359 StPO; Cf. *Graßhof*, in: Umbach/Clemens/Dollinger, BVerfGG, Section 79 para. 11; *Bethge*, in: Maunz, BVerfGG, Section 79 para. 23 f.

251 Cf. only *Frister*, in: Wolter, SK-StPO, Section 359 para. 1 f.; *Bethge*, in: Maunz, BVerfGG, Section 79 para. 2.

252 BVerfGE, 2, 380 (403 f.).

253 Cf. For example the minutes of the 901<sup>st</sup> session of the Bundesrat of 12 October 2012, p. 461 f.

254 At least, the Ministers of Justice, according to the resolution at the spring conference of 17 and 18 June 2015 in Stuttgart, consider it “necessary that the individuals concerned are rehabilitated and compensated”, and that “measures shall have to be enacted promptly at Federal level”. As for the Federal Ministry of Justice and Consumer Protection, it is communicated (on number 6) that the Ministry continues to investigate the possibilities.

Constitutional Court and outlined in the previous section need to be regarded as final – thereby barring the democratically legitimised legislator from deciding on further measures to fulfil its rehabilitation mandate. When it is argued that there are “grounds given in the legal system” against an annulment of convictions under Section 175 StGB, in that an annulment “could not be integrated into existing rehabilitation law”<sup>255</sup> or even that the inability to make a “coherent integration into the valid legal rehabilitation regime constitutes a violation of Article 3 (1) Basic Law”,<sup>256</sup> this pertinently demonstrates the need for careful study of potential reasons for encroaching this principle. However, it would fall short of the mark to infer that, because no annulment law concerning rehabilitation has been enacted since the Basic Law has been in force, any such law would inevitably be incompatible with the constitution. The official expert *Schwarz* gave an apt summary when he noted that it was a “question of evaluation” in which “even legal policy experts could arrive at different conclusions”, therefore “the question from the perspective of the legal experts will ultimately be played back to the politicians.”<sup>257</sup>

A look at the encroachments recognised to date in the case law of the Federal Constitutional Court shows firstly that the array of rehabilitation measures at the state’s disposal is not limited to just re-opening legal proceedings.<sup>258</sup> Annulment acts offer an alternative – one that has already been practised and is recognised, albeit to date solely in cases of a complete change of legal and political system. This alternative, in turn, is not limited by the constitutional framework to cases in which there has been a change of legal and political system. No statement to this effect can be deduced from the settled case law to date on the law on rehabilitation and compensation owing to unjust convictions in the former East Germany (StrRehaG) or the NS Annulment Act (NS-AufhG). On the contrary: the Federal Constitutional Court, in its order of 8 March 2006 on the NS-AufhG in general,<sup>259</sup> i.e. without explicit reference to the case of overcoming a regime of injustice, stated that a general annulment of criminal convictions that remain on the records can also be considered if these convictions “are based on provisions that embody grave injustice and therefore represent obvious injustice (para. 75)”.

In its judgement of 1 July 1953, which in principle legitimised the re-opening of proceedings option,<sup>260</sup> the court held that judgements could in principle “not be eradicated solely due to a change in the understanding of the law”. However, in the sentence immediately following, the court states: “an exception to this rule could only be justified when occasioned by particularly compelling and serious reasons that override considerations of legal certainty”. The court then indicates to the legislator that enacted the law under review that “limited fiscal interests” would not be sufficient. Objectively, the statement in these words of the Federal Constitutional Court means that the constitution will not prohibit an encroachment of the legal certainty principle when there are particularly compelling and serious reasons to take such action – even in the absence of a change of legal and political system.

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255 *Garditz*, statement on the motions BT-Drucks. 17/10841 and 17/4042, p. 5.

256 *Ibid.*, p. 12.

257 Minutes of the hearing at the 132<sup>nd</sup> session of the Committee on Legal Affairs of 15 May 2013, p. 23.

258 *Löhnig*, ZRP 2013, p. 221.

259 2 BvR 486/05 (juris).

260 BVerfGE 2, 280 (405).

In this regard, there is no inference that “judgements from a barbaric regime” are being “equated with those handed down since the Basic Law has been valid, a move that would have a highly detrimental impact on the rule of law.”<sup>261</sup> The annulment of the comparatively small number of convictions under Section 175 StGB (seen in terms of the entire Federal criminal justice system) by no means categorically equates the judgements of the NS regime of injustice with those of the post-war period. On the contrary: it would provide further testimony of the globally esteemed, undisputed quality of the Federal Republic of Germany as a country in which the rule of law is upheld.<sup>262</sup> Furthermore, the rehabilitation measure of “annulling convictions based on criminal provisions that contradict higher-ranking law” – even during validity of the Basic Law (i.e. without the need for the annulment to be based on complete change of legal and political system) – can be justified specifically because the Federal Republic of Germany bears direct responsibility for the decisions taken in the post-war period, and the measure of the Basic Law has also claimed validity for such decisions from the outset.<sup>263</sup>

What is particularly striking in this context is that the Federal Constitutional Court has emphasised in all pertinent decisions on rehabilitation measures that the legislator has “considerable discretion” within the constitutional framework, and that the provisions and measures it enacts would only constitute a violation of constitutional law if they were “clearly completely inappropriate or completely insufficient” to achieve the rehabilitation goal in question.<sup>264</sup>

#### IV. Requirements for encroachment of legal certainty without complete change of legal and political system, and the existence of these requirements in association with Section 175 StGB

##### 1. Rehabilitation mandate by constitution: in defence of fundamental rights, rule of law and duty to protect (social state)

As already determined (Part 2 C II), in the event of a continued stigma of conviction resulting from criminal sanctions that are incompatible with higher-ranking law, the state is fundamentally entitled to enact rehabilitation measures. In such a case it is taking action to fulfil a rehabilitation mandate that is founded in the principles of fundamental rights, the rule of law, and the social state principle. In alignment with the general legal doctrine on the state’s duty to provide protection under the Basic Law, the state is entitled to provide protection even insofar as it entails infringing on the fundamental rights of others (not relevant in our context) or encroaching other constitutional principles (here the principle of legal certainty).<sup>265</sup>

Rehabilitation occasioned by a continued stigma of conviction is already mandated when the criminal provision in question (here Section 175 StGB) is

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<sup>261</sup> *Löhnig*, statement on the motions BT-Drucks. 17/10841 and 17/4042, no. 3b.

<sup>262</sup> The official expert *Keßler* also takes this line in his statement on the motions BT-Drucks. 17/10841 and 17/4042, p. 3 f.; additionally *Straßmeier/Ullrich*, ZRP 2013, p. 76 (78).

<sup>263</sup> Cf. already *Wasmuth*, in: FS Rehinder, p. 809.

<sup>264</sup> Cf. BVerfGE 22, 322 (329); 79, 174 (202); 101, 275 (288); BVerfG, Order of 8 March 2006, 2 BvR 486/05 (juris), para. 84.

<sup>265</sup> General on these contexts Cf. only *Jarass*, in: Handbuch der Grundrechte II, Section 38 para. 38.

incompatible with the provisions of higher-ranking law. However, specifically with regard to rehabilitation measures associated with an encroachment of the principle of legal certainty, additional conditions also need to be met. If one considers settled case law concerning encroachments of the legal certainty principle that have been recognised to date in the case law of the Federal Constitutional Court, the mere existence of a comparatively straightforward violation of higher-ranking law is not sufficient; rather, this must be a qualified (or more severe) violation of the constitution (see 2). Furthermore, to preserve the exceptional nature of such encroachments, it should also be determined whether the stigma of conviction burdens a clearly definable (demarcatable) group of people, or whether it is expressed in a more unspecific manner in variety of different circumstances (see 3).

It shall again be emphasised that all considerations relate primarily to the criminal provision (Section 175 StGB) for which the legislator itself is responsible, and not to the criminal convictions imposed on the basis of this provision.

## 2. Serious violation of constitutional provisions

### a) Rationale and description

In its judgement of 1 July 1953, the Federal Constitutional Court held that one of the general prerequisites for encroaching the principle of legal certainty was for a serious breach of constitutional principles to have taken place.<sup>266</sup> Specifically with regard to treatment of convictions under Section 175 StGB, it has been deduced that an encroachment of the legal certainty principle could only be considered if there had been “serious violations of constitutional provisions.”<sup>267</sup>

The conclusion can be drawn that criminal provisions would not in principle constitute a breach that is serious enough to warrant annulment of pertinent convictions, where the elements of the offence in question exclusively constitute a violation of the general freedom of action pursuant to Article 2 (1) Basic Law, in that they are not based on legitimate public concerns or would not stand up to the test of proportionality based on the principles of suitability, necessity and reasonableness. The same can be determined in the case of breaches of the general principle of equality before the law in Article 3 (1) Basic Law in its “basic version” as a mere prohibition of arbitrariness.

By way of contrast, a serious violation of constitutional principles can be determined in the case of violations of Article 1 (1) Basic Law, according to which the “eternity clause” of Article 79 (3) Basic Law itself may not be touched by amendments to the constitution. Constitutional violations beneath this highest level can also be regarded as serious violations in the context under investigation, insofar as there is an impact on the core concept of human dignity that is also embodied in several other fundamental rights. A serious violation of the constitution can also be concluded in the case of a criminal provision whose legal

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<sup>266</sup> BVerfGE 2, 380 (405).

<sup>267</sup> Cf. *Garditz*, statement on the motions BT-Drucks. 17/10841 and 17/4042, p. 4. On the basis of his statement at the public hearing on 15 May 2013, *Garditz* appears to assume that a constitutional violation of this nature exists in the present context, by noting “that the legal force of the convictions of that time would not be a constitutional bar to an abstract general annulment by act of law” (p. 5 of the minutes).

consequences, in the words of Section 1 (1) No. 2 StrRehaG, “are in gross disproportion to the underlying act.”

If an existing criminal provision were to violate the constitution in such a serious manner, it would be declared invalid by the Constitutional Court, and moreover *ex tunc*. According to Section 79 (1) BVerfGG, the individuals impacted by the provision would be entitled to have legal proceedings re-opened. This path is closed in the present context, because the legislator itself eliminated the criminalisation of “non-aggravated” consensual homosexuality by its reform of Section 175 StGB in 1969, thereby “rescuing” itself from the inevitable overturning at some point of that version of Section 175 StGB by the Federal Constitutional Court. The legitimisation of the annulment act now in question gains considerable weight in that the individuals concerned will now have to pay the price for the legislator’s 1969 action to revoke the unconstitutional criminal provision of Section 175 StGB, and the principle of legal certainty is consequently now being used against them.

b) Existence of prerequisites with regard to Section 175 StGB

aa) Violation of Article 1 (1) Basic Law (human dignity)?

Remarkably, the three highest-level Federal bodies (Bundestag, Bundesrat and Federal government) assume that the convictions entail an infringement of the “right to human dignity protected by Article 1 (1) Basic Law” (representative of other sources: resolution of the Bundesrat of 10 July 2015).<sup>268</sup> According to Article 1(1) Basic Law, “human dignity shall be inviolable. To respect and protect it shall be the duty of all State authority.” In legal literature also, there are a number of voices that consider there is a violation of this constitutional provision in the context under discussion.<sup>269</sup> By way of contrast, the official expert *Garditz* considers that the “upgrading” of the right to sexual self-determination by making it a direct element of inviolable human dignity under Article 1 (1) (*Garditz* considers protection to be provided under Article 2 (1) in connection with Article 1(1) Basic Law) essentially trivialises this highest constitutional value and ultimate point of reference of the legal order.<sup>270</sup> In his view, only in individual cases where there had been excessive punishment could one consider there had been a violation of Article 1 (1) Basic Law.

At this point it becomes apparent that there has to date been no clarification of whether Article 1 (1) Basic Law itself represents an independent guarantee of fundamental rights.<sup>271</sup> Both in the literature and in the more recent decisions of the Federal Constitutional Court, assessments can be identified that point in the opposite direction, in which human dignity for example is termed the “root of all basic rights”<sup>272</sup> or as a “fundamental constitutive principle and supreme

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268 BR-Drucks. 189/15, p. 1.

269 Cf. only *Bruns*, in: Landesstelle für Gleichbehandlung, p. 41; *Wasmuth*, in: FS Reh binder, p. 794.

270 Statement on the motions BT-Drucks. 17/10841 and 17/4042, p. 6; also sceptical: *Krieg/Wieckhorst*, Der Staat 54 (2015), p. 542 f.

271 In support et al. BVerfGE 15, 283 (286); 61, 126 (137); for the range of opinion in the literature: *Höfling*, in: Sachs, GG, Article 1 para. 5 with footnote 15.

272 BVerfGE 93, 266 (293).

constitutional value”<sup>273, 274</sup> The associated question of principle cannot and shall not be resolved in the following context. With the prerequisites elaborated below, it would be sufficient to show a violation of the general right to free development of personality under Article 2 (1) in conjunction with Article 1 (1) Basic Law, in order to assume a “serious violation of constitutional principles” as a prerequisite for encroaching the principle of legal certainty.

bb) Sufficiently serious violation of Article 2 (1) in conjunction with Article 1 (1) Basic Law

It is undisputed that the Basic Law places the sexual life of an individual – belonging as it does to an individual’s “intimate personal sphere of life” – under the constitutional protection of personal freedoms pursuant to Article 2 (1) in conjunction with Article 1 (1) Basic Law.<sup>275</sup> This also means that individual persons can themselves determine their own relationship with sexuality and their sexual relations with a partner, and fundamentally have the right to determine for themselves whether, within which limits and to what purpose they wish to accept interventions in this sphere by third parties.<sup>276</sup>

(1) Encroachment on the inviolable core sphere, impasse situation without alternative

The Federal Constitutional Court has identified two constellations in which the human dignity element of the general right to free development of personality is violated. One concerns encroachments of the core domain of private life,<sup>277</sup> i.e. when the human dignity at the core of this fundamental right is affected.<sup>278</sup> Whether a particular circumstance is held to be part of this inviolable core is contingent on whether it is highly personal in nature,<sup>279</sup> i.e. also in what way and with what intensity it has an impact on the domain of other individuals or concerns of the community. According to constitutional jurisprudence, the decisive factors are the specific circumstances of the particular case.<sup>280</sup> Sexual life is regarded as a part of the right to free development of personality that fundamentally belongs to the private domain, frequently the inviolable intimate domain or core part of private life.<sup>281</sup> In its incest decision, the Federal Constitutional Court held that there was no inadmissible encroachment of core of

273 BVerfGE 109, 279 (311).

274 Cf. from the literature representing many: *Dürig*, in: Maunz/Dürig; from more recent times e.g. *Isensee*, AoR 131 (2006), p. 173, p. 209 f.; *Dreier*, in: idem, GG, Article 1 paragraph 1 para. 124 ff.

275 Settled case law since BVerfGE 6, 389 (432); 47, 46 (73) and more recently BVerfGE 121, 175 (190); 128, 109 (124); from the literature Cf. *Lorenz*, in: Bonner Kommentar, Article 2 Paragraph. 1, para. 310; *Hillgruber*, in: Umbach/Clemens, GG I, Art. 2 Paragraph 1, para. 50 giving further references. Critical of the blanket assignment of sexual self-determination to the general right to free development of personality is: *Dreier*, in: idem, GG, Art. 2 Paragraph 1 para. 37. This criticism is however unlikely to concern the impact of the state of being homosexual under discussion here.

276 BVerfGE 120, 224 (238 f.); Cf. also BVerfGE 47, 46 (73 f.); 60, 123 (134); 88, 87 (97); 96, 56 (61).

277 BVerfGE 27, 344 (351); 65, 1 (44); 96, 56 (61).

278 *Lorenz*, in: Bonner Kommentar zum Grundgesetz, 133. Erg.lfg. April 2008, Art. 2 Paragraph 1, para. 284; also BVerfGE 109, 279 (312 ff.); see also *Hillgruber*, in: Epping/Hillgruber, GG, Art. 1 para. 27 giving further references.

279 BVerfGE 34, 238 (248); 80, 367 (374).

280 Cf. BVerfGE 34, 238 (248); 80, 367 (374); 109, 279 (314 f.).

281 BVerfGE 47, 46 (73); *Di Fabio*, in: Maunz/Dürig, GG, Lfg. 39, July 2001, Art. 2 Paragraph 1, para. 200.

private life in the case in question. The court stated that limits were placed on how individuals choose to lead their private lives specifically in that certain expressions of sexuality between closely related people were penalised, but also that the legislator was not prohibited from such an encroachment of the core domain of private life because intercourse between siblings did not have sole impact on the individuals themselves. Its impact also reached into the family and society, and there were also consequences for children resulting from the relationship.<sup>282</sup>

These considerations are however not applicable in the case of criminal sanctions on homosexual acts between men. Such acts exclusively affect the homosexuals involved. There can objectively be no fear of negative impact on the family or society, given that no pregnancies can result from these acts, and therefore no children who would be exposed to the supposedly negative impacts. As a consequence, considering this settled case law by the Federal Constitutional Court, it can reasonably be concluded that there has been an intervention in the inviolable core domain of private life.<sup>283</sup> The circumstances are however different in the case of criminal provisions that specifically safeguard the sexual development or sexual self-determination of other individuals, particularly of children and young people, since in such cases a duty of protection exists for these individuals derived from Article 2 (1) in conjunction with Article 1(1) Basic Law.<sup>284</sup>

There is also a second perspective evidencing that criminal sanctions on consensual homosexuality in the absence of aggravating circumstances constituted a violation of human dignity. In its incest decision, the Federal Constitutional Court held that, because the prohibition of incest in criminal law targeted only a narrowly defined range of behaviour and would only selectively reduce the possibilities for intimate relations, the impact in question was not such that there was no alternative available, and the individuals in question would not be placed in an *impasse* situation – i.e. a situation without any alternatives – that would be incompatible with human dignity.<sup>285</sup> A “no-alternative” or *impasse* situation was however created by the criminal sanctions on consensual homosexual acts without aggravating circumstances. Homosexual men had no possibility whatsoever of acting out their homosexual orientation, and therefore faced the choice of either completely forgoing their sexual needs or rendering themselves liable to criminal prosecution. Their right to sexuality was thereby completely negated by Section 175 StGB.<sup>286</sup> The existence of an *impasse* of this nature is documented by the indisputably high number of suicides among homosexual men prosecuted or even convicted under Section 175 StGB.<sup>287</sup> The exact number is unknown. The desperate *impasse* that resulted for homosexual

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282 BVerfGE 120, 224 (242 f.).

283 Cf. also *Lang*, in: Epping/Hillgruber, GG, Art. 2 para. 39, according to which there would (only) then be no violation of the constitution owing to encroachment of the “intimate sphere” by penalising certain expressions of self-determination when the expressions have an impact on third parties who are due especial protection; *Risse*, *Homosexualität*, p. 64, who also rejects the “sphere” theory for reasons of general constitutional-law doctrine (p. 65 ff.).

284 *Di Fabio*, in: Maunz/Dürig, GG, Lfg. 39, July 2001, Art. 2 Paragraph 1 para. 202.

285 BVerfGE 120, 224 (243).

286 Oral contribution of the official expert *Keßler*, minutes of the public hearing of the Committee on Legal Affairs of 15 May 2013, p. 17 f.

287 Cf. oral contribution of the official expert *Lautmann*, minutes of the public hearing of the Committee on Legal Affairs of 15 May 2013, p. 19, who references the Frankfurt homosexual trials of 1950/1951, in the context of which there were six suicides of individuals prosecuted under Section 175 StGB.

men owing to sanctions of consensual homosexual acts under Section 175 StGB also contributes to a violation of Article 1 (1) Basic Law.

(2) Alternative: grossly disproportionate encroachment in Article 2 (1) in conjunction with Article 1 (1) Basic Law

It can also be contended that the burden on homosexual men resulting from Section 175 StGB represents a disproportionate encroachment of the general right to free development of personality, with the result that this criminal provision embodied “grave injustice”.<sup>288</sup>

Homosexual acts are indisputably a constitutionally protected right to free development of personality, the recriminalisation of which (although such a move would not be seriously considered) would manifestly represent a disproportionate and therefore unconstitutional intervention in the general right to free development of personality (Article 2 (1) in conjunction with Article 1 (1) Basic Law). With regard to the burden, it is difficult to conceive of a more intense encroachment of the personal and private life of an individual. It impacts on the sexual domain as the central and most intimate area of personal self-realisation.<sup>289</sup>

An encroachment of this nature would therefore be grossly disproportionate. Given that interventions into personal private life are in any case only permitted when there is a particular public interest,<sup>290</sup> in the context under investigation there is no public interest or concern at all that would stand in the way of consensual homosexual practice in the absence of aggravating features.<sup>291</sup> Neither the rejection of homosexuality by religious communities nor the prevention of “contagion” with the “disease” of homosexuality can seriously be asserted as opposing and legitimate concerns of constitutional relevance.<sup>292</sup> Furthermore the criminalisation of homosexual acts has manifestly proven to be completely inappropriate as a means to prevent the homosexual orientation of a person.

Lastly, the lack of impairment of legal interests would also render Section 175 StGB constitutionally unacceptable.<sup>293</sup>

(3) Conclusion

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288 Section 1 (1) No. 2 StrRehaG is predicated on the fact that gross disproportionality is “incompatible with a democratic order of rule of law” thereby justifying rehabilitation.

289 Cf. BVerfGE 96, 56 (61); *Lorenz*, in: *Bonner Kommentar zum Grundgesetz*, Art. 2 Abs. 1 para. 310. The Administrative Court (VG) of Frankfurt a. M., Judgement of 25 November 2005, 6E 1715/04.A(1), sees a “grave and unbearable encroachment of the right to free development of personality” in the demand to permanently suppress sexual orientation.

290 BVerfGE 115, 1 (15); 121, 175 (190).

291 Statement of the official expert *Garditz* on the motions BT-Drucks. 17/10841 and 17/4042, p. 2; elaborating, also engaging with the potential grounds for justification of the “moral law” *Risse*, *Homosexualität*, p. 77 ff.; *Krieg/Wieckhorst*, *Der Staat* 54 (2015), p. 543 f.

292 The constitutionally legitimate protection noted in the incest judgement of the Federal Constitutional Court (BVerfGE 120, 224 [243 ff.]) of marriage and family, the protection of a “subordinate partner in an incestuous relationship” and the avoidance of serious genetic disorders cannot be applied in the context under investigation; the same is true of the Chamber Order of 8 December 2015, 1 BvR 1864/14, concerning animal protection as grounds to justify making sodomite acts a criminal offence.

293 Statement of the official expert *Garditz* on the motions BT-Drucks. 17/10841 and 17/4042, p. 2.

The criminal provisions of Section 175 StGB constitute an encroachment of the inviolable core of private life in accordance with Article 2 (1) in conjunction with Article 1 (1) Basic Law; they certainly constitute a grossly disproportionate infringement of this fundamental right. The verdict of gross disproportionality of the Section 175 StGB criminal provision is reinforced if one includes the principle of equality before the law in accordance with Article 3 Basic Law, because the Federal Constitutional Court in cases associated with sexual orientation demands “substantially stricter standards of review” than the general ban on arbitrariness in accordance with Article 3 (1) Basic Law<sup>294</sup> and thereby establishes a kind of minimum standard of inadmissible differentiations in intended proximity to the absolute prohibitions of discrimination specified in Article 3 (3) first sentence.<sup>295</sup>

### cc) ECHR

The existence of gross injustice can also be substantiated by case law of the ECtHR since the early 1980s. According to ECtHR rulings, laws that criminalise consensual homosexual acts between adults are not compatible with the right to respect for private life guaranteed in Article 8 ECHR (see also Part 1 C II). Since the ECtHR wishes solely to safeguard a minimum level of human rights,<sup>296</sup> it could be argued that in a case in which compliance falls short of even this minimum human rights standard – which will normally be beneath the standard of fundamental rights guaranteed by the Basic Law – a gross violation of justice exists. This would also correspond with Section 359 No. 6 StPO, which permits an encroachment of the rule of law principle in its manifestation as the principle of legal certainty – also in consequence of material justice considerations – when a decision of the ECtHR has determined a violation of the ECHR. This does not conflict with the fact that the ECtHR understands the ECHR – following the model of a living constitution – to be a dynamically evolving framework that must continually be adapted to circumstances in wider society:<sup>297</sup> because the context in question specifically concerns a continued stigma of conviction owing to a criminal provision that is incompatible with higher-ranking law.<sup>298</sup> No statement is however made here on how the legal situation at the time would have been judged by the ECtHR or by other courts.

As already noted (Part 1 C III), the UN Committee on Human Rights decided that Australia’s total ban on homosexual relations was a violation of the right to private life (Article 17) and of the right to equality before the law (Article 26). This can be understood as a further indication to conclude there has been gross disproportionality.

294 BVerfG, NJW 2013, p. 847 (852); see also for the context under investigation *Bryde*, in: FS Bruns, p. 14 f.

295 As per decisions BVerfGE 126, 400 (inheritance tax); BVerfG, NJW 2013, p. 2257 (income tax for married couples); BVerfGE 131, 239 (family allowance) and BVerfG, NJW 2013, p. 847 (successive adoptions).

296 Cf. Art. 53 ECHR.

297 Statement of the official expert *Garditz* on the motions BT-Drucks. 17/10841 and 17/4042, p. 10, who draws the conclusion that it is impossible to project decisions back along the timeline and apply them to earlier circumstances.

298 Cf. for “re-evaluation of the past” with a view to events in the former German Democratic Republic *Pieroth*, *Der Rechtsstaat und die Aufarbeitung der vor-rechtsstaatlichen Vergangenheit*, VVDStRL 51 (1992), p. 92 (99 ff.).

### 3. Collective, clearly demarcatable impact

Another prerequisite for encroaching the principle of legal certainty – that of a collective, clearly delimited impact – is also fulfilled.<sup>299</sup> As described in detail in the introductory section (Part 1 B III 2 a), homosexual men as a clearly demarcatable group were exposed to grave social risks, including loss of employment, termination of the lease on their apartment, and even loss of their entire social standing and place in society. Approximately 50,000 people were affected. Since there were so many prosecutions, and prosecutions were sought and pursued so intensively, an additional collective categorisation can be argued that also sets this group apart from others (for further elaboration, see also below in connection with the examination of Article 3 (1) Basic Law; D III).

The collective impact on homosexual men between 1949 and 1969 is exacerbated in that Section 175 StGB criminalisation of consensual homosexuality in the absence of other qualifying circumstances was based on a provision that remained valid post-1949 in the far stricter form introduced during the National Socialist era (see Part 1 B III 2 a) and with largely identical interpretation. As already noted at several points, the issue in this context is the common impact occasioned by a criminal provision – and not so much the common impact caused by judicial activity in court proceedings whose compliance with the rule of law since 1949 can be no doubt.<sup>300</sup>

In that the group is marked out owing to the mere circumstance of being homosexual and wishing to actively practice homosexuality, it is also marked out by a primarily static characteristic that delimits it even more clearly. Members of this group were moreover no longer able to seek judgement on the unconstitutionality of Section 175 StGB by means of a constitutional complaint after 1957, because in that year the Federal Constitutional Court confirmed the law was constitutional – with the resulting binding effect of the judgement (under Section 31 (1) BVerfGG).

### 4. Conclusion

With regard to annulment of criminal convictions based on Section 175 StGB in the version valid to 1969, all requirements are met for a constitutionally permissible encroachment of the principle of legal certainty. In particular, the continued stigma of conviction of the moreover clearly demarcatable group of people is based on a legal norm that violates provisions of the Basic Law in a particularly serious manner. The constitutional limit of the legal certainty principle therefore does not present a barrier to realising the state rehabilitation mandate.

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<sup>299</sup> *Garditz*, statement at the hearing in the Committee on Legal Affairs, p. 4, summarises this requirement with the formulation that there have to be “systematically limitable” constitutional violations; but with this alone he does not adequately take into account the indeed relevant circumstance of the intensity of criminal prosecution and the social situation of the individuals involved.

<sup>300</sup> Similar: *Wasmuth*, in: FS Reh binder, p. 789.

### C. Separation of powers principle as a barrier to annulment of the pertinent criminal convictions?

Building on the examination of the legal certainty principle, a consideration of the separation of powers principle must factor in the circumstance that annulment of the pertinent criminal convictions would also impact on another state function, that of (criminal) jurisdiction. This is construed by some as an insurmountable constitutional barrier,<sup>301</sup> or as grounds to call for further study in terms of constitutionality.<sup>302</sup> With respect to the convictions under Section 175 StGB, the question here is whether an encroachment of the separation of powers principle can be justified.<sup>303</sup> At all events, this principle does not constitute an absolute barrier.

Of no relevance is Article 97 (1) Basic Law (judicial independence), which prohibits parliament from adopting resolutions affecting ongoing court proceedings, from exerting influence on such proceedings, and from expressing disapproval of court decisions. The purpose of this provision is to empower judges to take decisions in individual cases free of the political wishes and preferences of the legislator. For this reason, parliament is also prohibited from enacting a law targeted at a specific legal matter that would result in an ad-hoc redefinition of the legal situation.<sup>304</sup> The law in question here – the potential annulment of criminal convictions based on Section 175 StGB – would not impinge on the judicial activity of several decades ago. It is highly unlikely that a judge who at one time imposed judgements of this nature would be compromised in exercising his judicial duty by an act of collective rehabilitation of the former convicted individuals. The bar is set very high for the legislator to take action, always in exceptional cases (as will be explored in the following), and there is no chance of the impression arising among the judiciary that they are constantly pronouncing judgements under the ‘sword of Damocles’ of potential subsequent annulment by the legislator.<sup>305</sup> The ultimately decisive issue is that, given the continued stigma of conviction owing to an unconstitutional criminal provision, the actual addressee of the act of annulment by the legislator is not the judiciary but the (inactive) legislator of former times.

#### I. Content and meaning

The separation of powers enshrined in Article 20 (2) second sentence is a fundamental principle of the Basic Law in terms of how the state is organised and

301 Schwarz, statement on the motions BT-Drucks. 17/10841 and 17/4042, p. 4.

302 As stated by the former Minister of Justice *Leutheusser-Schnarrenberger* in an interview of 3 June 2014 on “Spiegel Online”. Since then, she has expressed the view that “after much consideration [...] (I) am largely of the opinion that the legal objections I have already mentioned would indeed be manageable” (interview with *Kerler*, Deutschlandfunk of 19 November 2014).

303 *Grziwotz*, statement on the motions BT-Drucks. 17/10841 and 17/4042, p. 22 f.; *Löhnig*, statement on the motions BT-Drucks. 17/10841 and 17/4042, no. 3b, who ultimately answer this question in the negative.

304 Cf. in general *Tschentscher*, Demokratische Legitimation, p. 151 f.; *Hillgruber*, in: Maunz/ Dürig, GG, Art. 97 para. 92.

305 This is also the conclusion drawn by *Straßmeier/Ullerich*, ZRP 2013, p. 79; *Mengel*, Strafrechtliche Verfolgung, p. 17; *Lautmann*, RuP 2015, p. 17.

how it functions. It serves to ensure the state bodies exercise mutual control upon each another, and serves to moderate state power. In numerous decisions, the Federal Constitutional Court has determined that separation of powers is “nowhere implemented in its pure form”, and that in reality there are “numerous power interdependencies and balances”. For this reason, the Basic Law does not demand “absolute separation, but rather mutual controls, checks and balances of powers”, provided the division between the three powers made by the Basic Law is guaranteed overall. The court determined that none of the powers may be “accorded unconstitutional dominance over another power”, and no power may be “deprived of the responsibilities it requires in order to fulfil its duties under the constitution”.<sup>306</sup> In its case law to date, the court has therefore found encroachments of the separation of powers principle only in rare exceptional cases, and moreover considers this principle to have only “weak normative impact”.<sup>307</sup> The consensus now is that the characterising feature of the separation of powers lies not in the separation itself, but in the differentiated functionality assigned to each power.<sup>308</sup> The historical function of the separation of powers principle, aptly described by the official expert *Grziwotz* at the expert hearing on 15 May 2013, namely to protect individuals in the struggle with the power of the police state, and against arbitrariness and despotism,<sup>309</sup> is manifestly not called into question in the context under discussion.

With regard to the requirements for encroaching the separation of powers principle in the case under appraisal here – the annulment of pertinent criminal convictions by the legislator – the Federal Constitutional Court, in its order of 8 March 2006 on the NS Annulment Act (NS-AufhG), follows the line already drawn on the legal certainty principle; this is described in the previous section of this analysis (B II). The court stipulates the same requirements for an encroachment of the separation of powers principle as for one on the principle of legal certainty. In this decision (see para. 75), the court states that the NS Annulment Act (NS-AufhG) therefore does “not violate the separation of powers principle or the principle of the rule of law”.

## II. Rehabilitation mandate and discretion of the legislator

In the case of the principle of legal certainty, it is also noted that an encroachment of the constitutional principle of separation of powers can in principle be legitimised owing to the existence of the state rehabilitation mandate as a consequence of the continued stigma of criminal conviction based on a criminal provision that is incompatible with higher-ranking law. In addition, the legislator has considerable discretionary power in its choice of decision. This was confirmed by the Federal Constitutional Court specifically also with respect to the separation of powers principle, both in its decision on the Criminal Prosecution Rehabilitation Act (StrRehaG)<sup>310</sup> and in its order on the NS Annulment Act (NS-AufhG).<sup>311</sup>

306 Settled case law since BVerfGE 9, 268 (279 f.); 34, 52 (59); 106, 51 (60); 98, 218 (251 f.).

307 See also assessment of *Grzeszick*, in: Maunz/Dürig, GG, Art. 20 Paragraph 95.

308 View *P. Kirchhof*, in: Isensee (publ.), Gewaltenteilung, p. 99 (106 ff.); *Schulze-Fielitz*, in: Dreier, GG, Bd. II, Art. 20 (Rechtsstaat), para. 75.

309 Statement, p. 24 f.

310 BVerfGE 101, 275.

311 2 BvR 486/05 (juris), para. 84.

### III. Compatibility with the separation of powers principle

The fulfilment of requirements already determined in the section on legal certainty – the existence of a serious constitutional violation and a collective, clearly demarcatable impact (B IV) – contributes to legitimising the change of the original separation of powers that would be associated with an annulment act. It has an effect here that the legislator enacting a rehabilitation law does not take the place of a judge in a specific individual case, but takes action expressly without examining individual cases (i.e. *ad personam*).<sup>312</sup> The decision takes the form of an abstract and general provision.<sup>313</sup> It should also be reiterated that the very foundation of the continued stigma of conviction is the past decision taken by the legislator to retain Section 175 StGB.<sup>314</sup>

What definitively brings the balance down in favour of the pertinent annulment law being compatible with the separation of powers principle is a comparative examination of case-by-case rehabilitation (by which new grounds would be added to those already listed in Section 359 StPO to enable legal proceedings to be re-opened). If objective reasons are to be found indicating that the legislator is unable to fulfil its rehabilitation mandate by enabling proceedings to be re-opened, but only with an annulment act, the fact that the former measure would potentially have less impact on the principle of separation of powers would still not constitutionally bar the legislator from exercising the annulment option.

These are exactly the circumstances in the present context,<sup>315</sup> because new court proceedings would in all likelihood be perceived by the individuals concerned as “fresh degradation after a lifetime of humiliation.”<sup>316</sup> The practical problems described above (Part 2 B V 2) that would arise if the “re-opening of proceedings” route were taken to rehabilitation (above all missing case files, substantial workload for the judiciary and the advanced age of the individuals concerned) would exacerbate the situation. It must again be considered that the nature of this injustice is not grounded in the *application* of legal norms (which would have made the alternative of re-opening proceedings more viable). The continued stigma of conviction results from the *statutory criminal provision itself*; the circumstances are therefore clear and unambiguous enough<sup>317</sup> to enable the political goal of rehabilitation to be accomplished directly, by enacting a law.

### IV. Conclusion

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312 Also pointed out by *Garditz*, statement on the motions BT-Drucks. 17/10841 and 17/4042, p. 4.

313 Likewise *Straßmeier/Ullrich*, ZRP 2013, p. 77; *Lautmann*, RuP 2015, p. 16.

314 Also pointed out by *Keßler*, statement on the motions BT-Drucks. 17/10841 and 17/4042, p. 3, *idem*, minutes of the 132<sup>nd</sup> session of the Committee on Legal Affairs on 15 May 2013, p. 16 f. also *Straßmeier/Ullrich*, ZRP 2013, p. 7.

315 In this respect the same applies as decided by the Federal Constitutional Court with regard to the NS Annulment Act (NS-AufhG) in its order of 8 March 2006, 2 BvR 486/05 (juris), para. 90; different view *Krieg/Wieckhorst*, Der Staat 54 (2015), p. 559 ff., who consider the only admissible way to deal with convictions in the earlier Federal Republic would be a newly conceived re-opening of proceedings.

316 Also see formulations of the Federal Constitutional Court, *ibid.*, para 100.

317 Along the line of the formulation in BGHZ 10, 75 (79), according to which it is only a formal objection if one were to indicate that the only path open to eliminate materially wrong and unjust judgements would be that of a formal re-opening of proceedings.

The collective rehabilitation measure of a law to annul the pertinent criminal convictions proves to be compatible with the principle of separation of powers. This principle – which is nowhere implemented in its pure form – can be encroached upon in the case under examination, where there has been a serious violation of the constitution by a provision of the criminal code, and the violation has had a collective, clearly demarcatable impact. This is all the more viable in that an annulment law would merely have an impact *ad personam* and be primarily in consequence of the earlier responsibility of the legislator itself. The alternative – adding new grounds for re-opening proceedings – would indeed present a lesser encroachment of the separation of powers principle. However, since major objective reasons are also to be factored in, this does not make an annulment law inadmissible.

D. The general principle of equality before the law of Article 3 (1) Basic Law as a barrier to annulling the pertinent criminal convictions?

I. Content and approximate meaning in this context

In the discussion to date, it is in part asserted that Article 3 (1) Basic Law demands equal treatment with regard to the stability of legally binding decisions, which is why general encroachments of the force of law must pertain to groups of cases that are comparable in terms of severity and quality. In the early years of the Federal Republic of Germany, there were other provisions on criminal offences in addition to Section 175 StGB which would today meet with a “complete lack of understanding”<sup>318</sup> and which, like the criminalisation of consensual homosexuality in the absence of aggravating circumstances (Section 175 StGB), were not repealed until the major reform of the Criminal Code in 1969. It could be argued that an isolated examination of judgements solely under Section 175 StGB would therefore constitute arbitrary unequal treatment of the victims of other convictions, which is why a violation of the general principle of equality before the law would have to be assumed.<sup>319</sup> Specifically considered in this context are the former criminal sanctions on procuring (see Section 180 StGB old version)<sup>320</sup> and adultery (Section 172 StGB old version).<sup>321</sup>

In accordance with the general principle of equality before the law, the legislator is prohibited from treating equal things unequally without due cause, and likewise prohibited from treating essentially unequal things equally. It is determined by proportionality whether and to what extent the similarity or difference is significant under the law. Article 3 (1) Basic Law permits the legislator only to treat groups of people unequally when the differences between them are of such a

318 As stated by Member *von Essen* (FDP), minutes of plenary BT proceedings 16/219 of 6 May 2009, p. 23961 B-C. 319 *Löhnig*, statement on the motions BT-Drucks. 17/10841 and 17/4042, no. 3b; *Schwarz*, statement on the motions BT-Drucks. 17/10841 and 17/4042, p. 3; *Garditz*, statement on the motions BT-Drucks. 17/10841 and 17/4042, p. 4 and 5, where this is used more as a constitutional line of argument, before in the summary (on p. 12) it is explicitly stated that an annulment of convictions imposed under Section 175 StGB would violate “Art. 3 (1) GG”. The line of argument used by this author to date, of an apparently incoherent “integration into the valid rehabilitation law” thereby inadvertently becomes the basis of an apparent constitutional barrier.

320 To 1973, this included all acts with which the perpetrator, through mediating or by granting or by procurement of opportunity, abetted the commission of lewd and lascivious acts between third parties. Procurement was a prosecutable offence when the perpetrator acted habitually or for personal gain.

321 Defined as breach of marital fidelity by extramarital intercourse on the part of one of the spouses with a third person.

nature and significance so as to justify the unequal treatment.<sup>322</sup> It need not be explored in detail in the following whether extending the relevant annulment act to include the former criminal provisions concerning procuring or adultery would exceed constitutional limits; all that needs to be determined is whether limiting an annulment act to the provisions of Section 175 StGB is based on objective and adequately strong reasons.

## II. Discretion of the legislator

According to the above analysis, the differentiations to be introduced by the legislator must be based on the respective areas of concern, and must be substantiated by reasonable grounds.<sup>323</sup> Here also, the legislator has considerable discretion to take action, and this scope is rendered even broader by the fact that the measures concern a preferential rather than a prejudicial typification. The greater freedom of the legislator in such cases was expressly determined by the Federal Constitutional Court in its ruling on the NS Annulment Act.<sup>324</sup>

## III. Justification of collective rehabilitation exclusively of those convicted under Section 175 StGB

### 1. Comparatively less severe constitutional violation

Unlike the criminalisation of “non-aggravated” consensual homosexuality, the criminal sanctions in place concerning procuring and adultery have no connection with the human dignity provisions of Article 1(1) Basic Law. The law on procuring did not even impinge on the general right to free development of personality – its only impact was on the general freedom of action pursuant to Article 2 (1) Basic Law.<sup>325</sup> Criminal sanctions on adultery do indeed impinge on sexual life, and thereby also on the general right to free development of personality under Article 2 (1) in conjunction with Article 1(1) Basic Law. However, since the commission of this offence has an impact not only on the two partners committing adultery, but also on the “cheated” spouse, it also impinges on the ‘domain’ of others, thereby ruling out the notion that the criminalisation of adultery constitutes intervention into the core part of private life and inviolable personal intimacy (see B IV 2 b bb). Moreover, the constitutional guarantee of protection of marriage in accordance with Article 6 (1) Basic Law would present an opposing claim of far greater weight in constitutional terms. Unlike Section 175 StGB, the criminalisation of adultery did not prohibit heterosexual practices such, but merely the choice of partner, and this only following marriage.<sup>326</sup>

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322 Cf. BVerfGE 4, 144 (155); 68, 81 (87); 92, 277 (318).

323 BVerfGE 75, 108 (157); 76, 256 (329).

324 BVerfG, order of 8 March, 2 BvR 486/05 (juris), para. 111.

325 Cf. *Straßmeier/Ullrich*, ZRP 2013, p. 78.

326 Line also taken by *Keßler*, minutes of 132<sup>nd</sup> session of the Committee for Legal Affairs on 15 May 2013, p. 17 f.

## 2. Comparatively less intensive practice of prosecution, and lesser impact

As presented in detail in the first part of this opinion (Part 1 B III 2 a bb), homosexual men were systematically persecuted *ex officio* between 1949 and 1969. By way of contrast, the offence of adultery was only prosecuted when a complaint was lodged by the victim. Nor was the law against procuring enforced systematically against hotel owners, tenants or parents.<sup>327</sup> The impact in social terms following a conviction for the offence of adultery or procuring is in no way comparable with the stigmatisation and intense repression by and within society that was predominantly and typically suffered by individuals convicted under Section 175 StGB. Unlike consensual homosexuality without aggravating circumstances, neither procuring nor adultery can be regarded as a fundamental element of one's social identity, and this element as such was consequently not affected.<sup>328</sup>

## IV. Conclusion

Overturing the convictions under Section 175 StGB in the version to 1969 does not constitute a violation of the general principle of equality before the law pursuant to Article 3 (1) Basic Law with regard to the continued existence of convictions owing to a breach of the provisions in force at the time for the offences of procuring or adultery. Remarkably, no demands have to date been made known for rehabilitation of individuals convicted for these offences.<sup>329</sup>

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327 Cf. for both, the oral contribution of the official expert *Bruns*, minutes of 132<sup>nd</sup> session of the Committee for Legal Affairs on 15 May 2013, p. 1.

328 Indeed, a conviction for these offences would arguably have played a definite "marginal" role in the biographies of the persons in question (Cf. *Lautmann*, RuP 2015, p. 17).

329 Cf. *Straßmeier/Ullrich*, ZRP 2013, p. 78; *Lautmann*, RuP 2015, p. 17.

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Male homosexual acts were punishable by law until 1994, albeit with changes over the years to the scope and nature of offences that were criminalised. The young Federal Republic of Germany adopted the stricter version of Section 175 of the Criminal Code (StGB), as amended by the National Socialists. It was not until 1994 that the criminal provision was fully repealed by the German Bundestag. Victims of prosecution between 1945 and 1994, when the legislation was repealed, have to date not been rehabilitated, and the convictions that criminalised them have not been set aside. More than 50,000 men were convicted under Section 175 in the Federal Republic of Germany, and their families, careers and partnerships were destroyed. Prof. Dr. Martin Burgi was commissioned with the production of a legal opinion, which comes to a clear conclusion: the legislator is obliged to take action and rehabilitate those convicted.

## Abbreviations

AöR: Archiv des öffentlichen Rechts	Archive of Public Law (Periodical)
AKG: Allgemeines Kriegsfolgendesetz	General Consequences of War Act
AnwBl: Anwaltsblatt	Newsletter for members of German lawyers 'association
BGBL: Bundesgesetzblatt	Federal Law Gazette
BGHSt: Entscheidungen des Bundesgerichtshof in Strafsachen	Criminal case law decided by the Federal Court of Justice
BT-Drucks (BT-Drucksache)	Parliamentary papers of the Bundestag
BVerfGE	Decision of the Federal Constitutional Court
BVerfGG: Bundesverfassungsgerichtsgesetz	Law on the Federal Constitutional Court
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EuGRZ: Europäische Grundrechte Zeitschrift	European Journal of Fundamental Rights (Periodical)
GBL-DDR: Gesetzesblatt DDR	Law Gazette of the GDR
Gesetz zur Behebung der Not von Volk und Reich	Law to Remedy the Distress of the People and the Reich
GG: Grundgesetz	Basic Law
GVG: Gerichtsverfassungsgesetz	Courts Constitution Act
JoJZG: Journal der Juristischen Zeitgeschichte	Journal of Juristic History
Kontrollratsgesetz	Allied Control Council Law
NJ: Neue Justiz	New Justice (Periodical)
NJW: Neue Juristische Wochenschrift	New Jurists' Weekly Journal
NS-AufhG: Gesetz zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege	Act to Annual Unjust Sentences Imposed during the National Socialist Administration of Criminal Justice
ÖJZ: Österreichische Juristenzeitung	Austrian Legal Journal
RGBL: Reichsgesetzesblatt	Reich Law Gazette
RStGB: Reichsstrafgesetzbuch	Reich Criminal Code
RuP: Recht und Politik	Law and Politics (Periodical)

StGB-DDR: Strafgesetzbuch der  
Deutschen Demokratischen Republik

Criminal Code of the German  
Democratic Republic

StPO: Strafprozessordnung

Code of Criminal Procedure

StrÄndG: Strafrechtsänderungsgesetz

Criminal Code Amendment Act

StrEG: Gesetz über die Entschädigung  
für Strafverfolgungsmaßnahmen

Act to Compensate for Criminal  
Prosecution

StrRehaG: Gesetz über die  
Rehabilitierung und Entschädigung von  
Opfern rechtsstaatswidriger  
Strafverfolgungsmaßnahmen im  
Beitrittsgebiet

Criminal Prosecution Rehabilitation  
Act with respect to criminal  
prosecutions in the former German  
Democratic Republic that are  
contrary to the of law