



## Research of the FADA at a glance:

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

### An overview of the expert opinion

Until 1994, homosexual activities between men were punishable under constantly changing criteria under criminal law. The young Federal Republic of Germany had upheld Section 175 of the German Penal Code that had been tightened by the National Socialists in 1935. The victims of law enforcement, from 1945 to the revocation of the penal provision in 1994, have not been rehabilitated to this day, nor have the judgements that criminalised them been revoked. Prof. Dr. Martin Burgi was commissioned to write an expert opinion on this subject, examining the possibility of rehabilitating these victims of law enforcement. The expert opinion came to the clear conclusion that the legislator is under an obligation to take action and rehabilitate the victims. Despite the revocation of the penal provision in 1994, the stigma of having been convicted under a penal provision that is not compatible with higher-ranking law remains to this day. Consequently, the legislator has a mandate to rehabilitate that can also justify breaching the principle of the rule of law. In this context, the option of collective rehabilitation, by means of a Repeal Act, should be given preference over individual rehabilitation. Collective compensation presents no problems from a legal viewpoint.

### Author, title and publication year of the expert opinion

Prof. Dr. Martin Burgi, Rehabilitierung der nach § 175 StGB verurteilten homosexuellen Männer: Auftrag, Optionen und verfassungsrechtlicher Rahmen, 2016

### Results

**1.** Under the provisions contained in Section 175 of the Penal Code, sexual activity between adult men in the absence of qualifying circumstances (hereinafter: 'simple homosexuality') was punishable in the Federal Republic until 1969 and in the German Democratic Republic until 1968. Between 1945 and 1969, law enforcement practice, in the Federal Republic alone, led up to 50,000 convictions. For those affected, conviction meant an impingement on their freedom as well as injury to both body and soul through imprisonment, coupled with serious detrimental social impacts ranging from the loss of employment, and one's home, to ostracism by large sections of society and even the loss of the civic rights on which middle-class existence is based. This expert opinion, which is fundamentally a review of the principles of constitutional law, focuses precisely on this period in history.

2. In the meantime, both the *Bundestag* and the *Bundesrat* (Upper House of the German Parliament) consider the fact that, between 1945 and 1969, so-called simple homosexuality continued to be punishable, to be an injury to the human dignity of those affected. Whereas the *Bundestag* has restricted itself, thus far, to expressing its "regret", the *Bundesrat* is demanding statutory provisions, the content of which will "predominantly" be the vacation of the pertinent criminal convictions. In 2002, all of the judgements handed down during the National Socialist period under Section 175 of the Reich Penal Code (RStGB) were overturned by the Act to Reverse Unjust National Socialist Judicial Rulings in Criminal Cases; after the creation of the Federal Republic of Germany, Section 175 of the Reich Penal Code was incorporated into the German Penal Code, unmodified, in the sharpened version that had been adopted by the National Socialists.

3. The jurisprudential analysis shows that there is a constitutional law legitimation for adopting state rehabilitation measures for the benefit of those affected. Its point of reference is the current state of the persistence of the stigma of having been convicted under a criminal provision that is incompatible with higher-ranking law (Section 175 of the Penal Code). This is in line with earlier judgements handed down by the Federal Constitutional Court according to which, under specific circumstances, the persistence of a stigma arising from a criminal conviction can lead to rehabilitation measures. The basis of the State's rehabilitation mandate includes its duty to protect the fundamental rights of its citizens as well as the principle of the rule of law and that of the social state. The existence of this rehabilitation mandate influences the delineation of possible limits to individual measures taken in its implementation. The rehabilitation mandate itself focuses on the goal, not on the individual concrete measures needed to achieve this goal. However, in the light of the persistence of the stigma of the criminal conviction, the State is under the obligation to examine whether this situation is compatible with the standards laid down by higher-ranking law and to re-evaluate its previous inaction.

4. The legislator has considerable leeway for discretion, assessment and action, both in its function as the first addressee of the rehabilitation mandate, laid down in the Constitution or Basic Law, as well as in deciding in favour of breaching the principle of legal certainty and that of the division of powers.

5. Possible measures for collective rehabilitation include: overturning the pertinent criminal convictions by means of legislation and/or collective compensation in the form of a significant sum of money for the purpose of conducting educational, awareness-building projects and holding commemorative events. By contrast, expanding the prerequisites for reopening a case for the convicted person's benefit, pursuant to Section 359 of the Code of Criminal Procedure, or the introduction of a procedure to declare the individual judgements to be an infringement of human rights, appear to be just as inappropriate in successfully fulfilling the rehabilitation mandate, as an individual compensation approach. Indeed, given the time that has elapsed, it can be assumed that, in the majority of cases, the relevant case files are no

longer available and that the characterising requirement of individual rehabilitation measures - that decisions need be taken on a case-by-case basis - would require a scarcely conceivable procedural effort, not only on the part of the affected men but also for the courts and the relevant authorities.

**6.** The collective rehabilitation measure that would be best suited to fulfilling the rehabilitation mandate and which consists of vacating the relevant criminal convictions, is not likely to fail as a result of the existence of robust constitutional limits.

**a)** Of particular importance in this case is the existence of all of the preconditions for breaching the principle of legal certainty since the continuing stigma of a criminal conviction continues to be a burden on a clearly defined circle of persons who are, personally, seriously affected by the law enforcement practices of the State and is based on a rule (Section 175 of the Penal Code) which constitutes a serious violation of constitutional law provisions. Indeed, Section 175 of the Penal Code constitutes an interference in the inalienable core area of a person's private life as covered by the general personality rights 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. The aforementioned prerequisites for breaching the principle of legal certainty are based, in some cases, on hitherto recognised breaches although these cannot be considered conclusive; the mere conclusion that it is unconstitutional based entirely on the lack, thus far, of a Repeal Act within the temporal applicability of the Basic Law (in other words without a system upheaval) falls short of the mark.

**b)** Even the principle of the division of powers that has nowhere been achieved in its pure form (in the words of the Federal Constitutional Court) can be breached in the present case, which is one of a serious constitutional law violation by the criminal penalties provision (contained in Section 175 Penal Code), on the one hand, and a collective, clearly definable scope of impact, on the other hand, especially since a Repeal Act would only have an effect *ad personam* and would primarily be linked to the earlier responsibility of the legislator himself.

**c)** Finally, the vacation of the criminal convictions based on Section 175 of the Penal Code would not constitute a breach of the general principle of equal treatment under Article 3 (1) of the Basic Law with regard to the simultaneous persistence of criminal convictions based on a violation of the provisions governing the criminal offences of procurement and adultery that were in force at the time. In both of those cases, there was either no breach, or a clearly less serious breach, of the Constitution, and enforcement practice was less intensive, as was the degree of impact. The stigmatisation and the intensity of the social repression suffered primarily, and typically, by persons convicted under Section 175 of the Penal Code were, in this regard, unparalleled.

**7.** A rehabilitation measure consisting of a collective compensation would similarly raise no constitutional concerns.

## More information

The expert opinion: "Rehabilitierung der nach § 175 StGB verurteilten homosexuellen Männer: Auftrag, Optionen und verfassungsrechtlicher Rahmen" can be downloaded (in German language only) => [here](#).

A print version of the expert opinion has been published by the Nomos Verlag: Burgi/Wolff, Rehabilitierung der nach § 175 StGB verurteilten homosexuellen Männer, ISBN 978-3-8487-3277-7.

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