



Incest Prohibition

OPINION

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1 INTRODUCTION

The occasion for the German Ethics Council's addressing the topic of the "incest prohibition" is the ruling by the European Court of Human Rights on 12 April 2012, with which the appeal against the 26 February 2008 judgment of the *Bundesverfassungsgericht* (Federal Constitutional Court) regarding the criminality of sibling incest was rejected.¹ Underlying the decision was the case of a man from Leipzig, who had fathered four children with his sister, been sentenced multiple times pursuant to Section 173 of the *Strafgesetzbuch* (Criminal Code, StGB) for sexual intercourse between consanguine relatives and because of this had served several years in prison. In 2008 the Federal Constitutional Court had rejected the constitutional complaint against the judgment and declared Section 173 (2) sentence 2 StGB (regarding sibling incest) to be compatible with the *Grundgesetz* (Basic Law, GG).² The legislature had not overstepped its scope for decision by deeming – according to the statute's rationale – the conservation of the familial order; the protection of the sexual self-determination of the respectively "subordinate" partner in the incestuous relationship; as well as the eugenic grounds given the special risk of genetically conditioned illnesses among children from incestuous relationships as sufficient for a criminal sanction. In public coverage and in professional circles, the ruling was in many cases received critically.

Against the background of this debate, the German Ethics Council conducted interviews with some of those affected by the incest prohibition in Section 173 (2) sentence 2 StGB. These interviews involved half-siblings, who had become acquainted only as adults and who had no children in common.³

1 ECtHR, 43547/08.

2 BVerfG, 2 BvR 392/07, with a dissenting opinion by Judge Hassemer.

3 Any mention of names must be avoided here in the interest of the concerned parties due to the persisting criminal liability.

Additionally, a public hearing took place on 22 November 2012 with experts from the field.⁴

The concerned parties described their difficult life-situation in view of the threat of punishment. They felt infringed upon in their basic rights to freedom. They were forced into secrecy and denial of their love, additionally so and above all in relation to their children from other relationships and in relation to their social environment. Some of those concerned also described that they were susceptible to blackmail. Thus, the father of one of the children belonging to a mother threatened that parental custody would be taken away from the mother due to her relationship with her half-brother. In another case, the father of one of the concerned parties pressed charges against his son and triggered a criminal process. The affected feel discriminated against in the whole of their daily lives.

According to all available data, incest would appear to be very rare in Western societies. Nonetheless, the German Ethics Council views it as their duty to deal with problems that may indeed affect only a few people, yet under certain circumstances in profound ways.⁵ In addition, those people affected by the incest prohibition are not able to speak publicly for themselves. The cases of which the Ethics Council is aware pose a range of important moral and legal questions, which ought to be discussed on the basis of sufficient information and free from prejudices. In the process, the question to be posed above all is whether criminal law is the correct instrument for a proper handling of the set of problems associated with incest.

With its ruling that Section 173 StGB is not unconstitutional, the Federal Constitutional Court did not simultaneously say

4 The official experts were Hans-Jörg Albrecht, Claudia Jarzebowski, Markus M. Nöthen and Andrea Bramberger.

5 In the future it cannot be precluded that the number of cases of undesired sibling incest will rise given the background of sperm donation. In the USA, the website "Donor Sibling Registry" currently serves in 39 states to let those parties conceived through sperm- or egg-donation to be able to determine through an anonymous identification number whether they have the same progenitor (cf. <http://www.donorsiblingregistry.com> [2014-06-16]).

that the criminal proscription of incest needs to be maintained on constitutional grounds in its current form; nor, thus, that it may not be abrogated or altered by the legislature. Against this background, it needs to be examined whether there should be a vote for the retention, abrogation or alteration of the provision on ethical grounds.

Incest (from *incestus* = “unchaste”) refers generally to sexual intercourse between people who are closely related. Pursuant to Section 173 StGB in its current form, intercourse between biological relatives from ascending and descending lines, as well as between natural siblings, is legally punishable.⁶ In contrast to other criminal norms, which proscribe actions against sexual self-determination (Sections 174 to 184 and 184g StGB), the provision does not depend upon coercion; abuse; exploitation of relations of authority or trust; the underage status of one of the participants; or similar factors. To that extent, one speaks in part of “incest as such.”⁷ The incest debate is hence characterized by conflict not least of all because sexual abuse is usually conceived as part of the equation.

The present opinion is concerned with consensual intercourse between consanguine relatives. The recommendations relate to incest between biological siblings.

6 For a comprehensive representation of the legal regulation, see chapter 3.

7 Cf. Albrecht/Sieber 2007, 27 ff.

2 ACCOUNTS BY THOSE AFFECTED

Reports made to the German Ethics Council by those affected have concerned exclusively half-siblings who became acquainted only as adults, in part because the partition of Germany also led to families' being separated.

One woman recounts: "I was eighteen years old when I learned that I still had a half-brother. [...] Over and over again these thoughts, this cannot be. We are not allowed to do this. I saw him on the train station platform, and for that moment every doubt ceased. I simply could not resist. It didn't work. Although so much spoke against it, we became involved with each other. The feelings overwhelmed us. [...] We talked and saw all the problems in front of us, yet the feelings were bigger. Us against the rest of the world. We laughed and cried. Went through every situation together. But ultimately it was all the same to us. We wanted each other. At any price."

In another account it becomes clear not only that the mutual attraction prevailed after overcoming initial qualms, but also that a state of social distress emerged after explicit involvement with the legal frameworks: "At this point in time I was 44, she 36. [...] Our contact became stronger and more frequent, and we now telephoned several times daily. Suddenly neither of us wanted to deny ourselves any longer. The visits and trips increased, and suddenly we had fallen in love and at first could hardly accept it ourselves. Can this be? Well, this is a free land, so we are allowed to decide for ourselves; that was our assumption. We decided to stand by our love and to live it. But to be certain that we do not stumble into any legal pitfall, I began to do research. I was shocked when I came across Section 173 StGB in my research, and I called a specialist attorney, who told me that this Section 173 StGB had hardly any acceptance among lawyers. [...] 'After all, whom does this interest?' – so her words. We moved in together, and the tight rope act began: with whom to speak about this?"

All reports recount such social hardships. These relate, with varying emphases, to the family and work environment, as well as to dealings with existing circles of friends: “What if someone who is not well-disposed towards us learns about this and uses the issue against us? But at the same time: what should this person have to prove to us? Even if we remain legally untouchable, social pressure could arise in the children’s school or on the job, where clients or colleagues suddenly turn up their nose or we become excluded.”

One of those affected writes: “Ultimately our families started to make conjectures that we were together; friends from there wanted to visit us here; etc. The noose tightened further. Nights where we cried together were repeated more and more frequently. We knew no way out; simply going back was no longer possible. On top of this came the fear of losing our jobs if everything ‘leaked out.’”

In part those concerned have explicitly had the experience of being put under pressure due to the criminal liability for their actions: “We realized that we had to be honest with the children and spoke with the two oldest (10 and 17 years old). We explained to them our situation; it did not matter to them; for them it was only important that their mother and they themselves were happy and that was the case. Even after explanation of the eventualities, they wanted everyone to stay together. Unfortunately we became incautious, and the estranged husband found out that there was more between us, and then the battle started for us! He got in touch with our father, and our father then wanted to blackmail us: Either we break off contact from each other or he presses charges against us for sexual intercourse between relatives. He reinforced this threat with many letters in which was written, for example, that he and the estranged husband of A will ensure that A loses the children, that they want to finish us off. The father also wrote that he wished M were dead.”

One essential point, addressed numerous times by those concerned, is the law’s objective in “Protection of the Family.”

In this context, it becomes manifest against the background of the accounts that it is not perfectly clear in the experience of the affected adults what family is actually supposed to be protected, since they have experienced the newly created familial structures – for which Section 173 StGB represents a danger – as something positive: “It was a new, small family that was very, very loving, and for the first time in my life I felt as though I had come home. I loved my half-sister above everything and was ready to put up with huge conflicts and problems just to be able to live this relationship.”

One person emphatically formulates the endangerment of a (new) family through the criminal provision of Section 173 StGB as follows: “Most of the time we have to hide our love, since it is clear to us that in the eyes of the law and the public we are not allowed to be a couple. As someone affected by this, one naturally becomes occupied with the reasons. One would like to understand why one’s own lived reality, which one perceives as correct and injurious to none, is so strictly repudiated; why that, which makes one happy, is frowned upon, forbidden and abhorred. The longer I took up these issues, the angrier I became. In any case my faith in the legislation, politics and legal practice in our country was deeply shaken. Above all I could not comprehend the justification that in Section 173 StGB it was a matter of the protection of the family. In the case of the brother-and-sister couple from Leipzig, this paragraph in no way protected a young family, but rather properly crushed it.”

Equally the woman concerned, who speaks below, thematizes the problem that a new family is considerably compromised by the proscription of incest in Section 173 StGB: “Now I am pregnant. And he is in panic. Panic at being charged for this. Panic that something could befall us, or that, if he has to go to prison, his family is no longer taken care of. That our child goes to a home. [...] He says over and over again, the child has no future here. We’re ruining the child’s life. [...] He himself says that he is unbelievably afraid. [...] Now he is gone,

I'm alone with the situation. Why? Because a system does not let us live as we want to live.”

Due to the criminality of the incestuous relationship, no possibility exists of one's campaigning for oneself for a lifting or modification of Section 173 StGB, and this circumstance is experienced as particularly difficult: “We have to hide ourselves, we have to lie and constantly keep our public image within certain bounds. [...] My half-brother and I have both studied; we know exactly what we are doing; we come from completely normal families. And all the same we fell in love with each other; all the same we are living – behind closed doors – our relationship. We do not want to make a social model out of our relationship; we don't particularly want to have it discussed in public. We would like to live in peace, without justifying ourselves and certainly without having to fear prosecution. Through this superfluous, obsolete and completely useless law I feel labeled and helpless, because I actually cannot do anything about it out of fear of losing my children.”

Some of those affected describe how, after initial mutual conviction of being able to live the relationship despite all difficulties, the pressure from outside grew so considerably that they ultimately separated: “The problem was never our love. That only did us good. The inalterable moral expectations of others were exclusively the problem.”

3 DEPICTION OF THE LEGAL PROVISION

3.1 The criminal offence of incest and other sexual acts

3.1.1 Sexual intercourse between those biologically related

Section 173 StGB makes punishable sexual intercourse between consanguine descendants and relatives of ascending line, as well as between consanguine siblings (“incest prohibition”). Section 173 StGB is in Chapter 12 concerning offences related to the personal status registry, marriage and the family. The protective purpose of Section 173 StGB is, according to the statute’s rationale, to preserve the freedom of the family against sexual relationships that endanger marriage and the family.⁸

In the current wording,⁹ the statute regarding this offence reads as follows:

- (1) Whosoever performs an act of sexual intercourse with a consanguine descendant shall be liable to imprisonment not exceeding three years or a fine.
- (2) Whosoever performs an act of sexual intercourse with a consanguine relative in an ascending line shall be liable to imprisonment not exceeding two years or a fine; this shall also apply if the relationship as a relative has ceased to exist. Consanguine siblings who perform an act of sexual intercourse with each other shall incur the same penalty.
- (3) Descendants and siblings shall not be liable pursuant to this provision if they were not yet eighteen years of age at the time of the act.¹⁰

8 BT-Drs. 6/1552, 14; BT-Drs. 6/3521, 17.

9 Version pursuant to Article 6 No. 3 of the *Adoptionsgesetz* (Adoption Act) from 2 July 1976 (BGBl. I, 1749).

10 Translator’s note: All translations of the Criminal Code are adopted from the translation provided by Dr. Michael Bolander (cf. http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [2014-11-15]).

By “sexual intercourse” is meant vaginal intercourse between man and woman.” Hence, other sexual acts do not fall under this provision.

Only consanguine relatives (as well as half-siblings) are covered by Section 173 StGB, thus neither step-siblings, adoptive and foster siblings, nor parents whose legal relation to the child depends on adoption or marriage.

3.1.2 Other sexual acts

Chapter 13, “Offences against sexual self-determination” (Sections 174 ff. StGB), contains further criminal provisions that are relevant in the present context. Several provisions here are constructed generally with a view towards protection from violent assaults and injuries against sexual self-determination.¹² In addition, others are aimed primarily at the protection of children – in other words, those under 14 years of age (cf. Sections 176, 176a StGB) – and juveniles under 18 years. Such persons are supposed to be able to develop sexually without

11 Cf. BGH, 2 StR 204/60; BGH, 2 StR 242/00; Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 173 para. 14; Kühl in: Kühl/Heger 2014, Section 173 para. 3; Lenckner/Bosch in: Schönke/Schröder 2014, Section 173 para. 3; Ritscher in: Joecks/Miebach 2012, Section 173 para. 9. The *Bundesgerichtshof* (Federal Court of Justice) did indeed decide on 15 May 2013, in the framework of the (civil law) question of whether a sperm donor, as biological father, can challenge the legal fatherhood of another man, that the concept of “*Beiwohnung*” [sexual intercourse] in the sense of Section 1600 (1) No. 2 BGB can embrace the procedure of sperm donation (cf. BGH, XII ZR 49/11). (Pursuant to Section 1600 (1) No. 2 a challenge is only entitled to someone who has assured under oath to have lain with [*beigewohnt*] the mother during the period of conception.) The Federal Court of Justice thereby conceded the possibility, under certain preconditions, of being able to acquire the legal fatherhood. This decision, which the Federal Court of Justice bases primarily on the meaning and purpose of Section 1600 BGB and its position in the system of law concerning lineage, can nonetheless not be carried over to criminal law.

12 Section 177 StGB regulates criminal liability for protection from sexual assaults committed with violence, through threat or by exploitation of a position of defenselessness. Sexual abuse of those persons mentally or physically incapable of resisting is covered under Section 179 StGB.

interference.¹³ With the exception of Section 174 (1) No. 3 StGB,¹⁴ the provisions in Chapter 13 do not directly address incestuous relationships, but in general rather set norms of criminal liability for offences against sexual self-determination.

Differently than Section 173 StGB, the provisions in Chapter 13 (Sections 174 ff. StGB) do not set sanctions only for the consummation of sexual intercourse, but instead are connected to the committing of “sexual acts” or allowing them to be committed. The concept of “sexual acts” is, nevertheless, narrowed in Section 184g No. 1 StGB as follows: “Within the meaning of this law, sexual acts shall only be those which are of some relevance to the protected legal interest in question.” Key to the criminal-law assessment here is the perspective of an imaginary objective observer: Physical contact represents a sexual act if it is sexually related according to its *external appearance* and its social meaning.¹⁵ The question whether such contact is actually to be classified as sexual activity is ultimately to be assessed on the basis of the criterion of “relevance” with a view to the concretely protected legal interest.¹⁶ For this reason, classification as criminally relevant activity can vary within the elements of the offences given in Chapter 13 of the Criminal Code.¹⁷

13 Cf. Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 176 para. 10; Heger in: Kühl/Heger 2014, Section 176 para. 1; Perron/Eisele in: Schönke/Schröder 2014, Section 176 para. 1 with further references; Renzikowski in: Joecks/Miebach 2012, see preliminary note concerning Sections 174 ff. para. 22 ff.

14 Whoever commits sexual acts on his or her not yet 18-year-old natural or adopted child or permits such to be committed is punished accordingly.

15 Cf. BGH, 3 StR 255/80, 338 ff.; Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 184g para. 1 with further references; Heger in: Kühl/Heger 2014, Section 184g para. 2; Perron/Eisele in: Schönke/Schröder 2014, Section 184g para. 6 with further references.

16 Cf. Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 184g para. 3 with further references; Heger in: Kühl/Heger 2014, Section 184g para. 5; Perron/Eisele in: Schönke/Schröder 2014, Section 184g para. 15 ff. with further references.

17 Cf. Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 184g para. 3 with further references; Heger in: Kühl/Heger 2014, Section 184g para. 6; Perron/Eisele in: Schönke/Schröder 2014, Section 184g para. 16 with further references.

Sexual contact by over-14-year-olds with under-14-year-olds is punishable without exception (cf. Sections 176, 176a StGB). However, under-14-year-olds are not yet of legal punishable age (cf. Section 19 StGB), hence sexual activities between siblings under 14 years of age are not criminally sanctioned.¹⁸

Apart from that, certain variants of abuse are especially punishable if the victim is under either 16 or 18 years of age (Section 182 StGB). In these cases, it is partially¹⁹ the age of the perpetrator and the associated age-difference that receive special consideration (see respectively Section 182 (2) StGB²⁰ and Section 182 (3) StGB²¹). In this boundary area between 14 and 18 years, according to the assumption of the legislature, the sexual maturation process is not yet fully completed, so that an increased need for protection exists.²² As well, the exploitation for sexual activities of a special child-rearing or supervisory relationship is fundamentally liable for punishment (cf. Section 174 (1) StGB).

Of particular relevance in the context of incest is Section 174 (1) No. 3 StGB, which for parents penalizes the committing of sexual activities (or allowing to be committed) on

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- 18 Concerning the problem of consensual, age-appropriate sexual relationships between an under-14-year-old and an over-14-year-old, see Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 176 para. 10.
 - 19 An exception arises insofar as there is the taking advantage of a victim's exploitative situation pursuant to Section 182 (1) StGB. Here criminal liability is in force independent of an age range. Included with such (in distinction to Section 177 (1) No. 3 StGB) are primarily acts with consent of the victim (cf. Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 182 para. 4; Perron/Eisele in: Schönke/Schröder 2014, Section 182 para. 4 ff.).
 - 20 Section 182 (2) StGB applies to perpetrators over 18 years old and presumes remuneration.
 - 21 Section 182 (3) StGB applies to perpetrators over 21 years old and presumes an exploitation of the "victim's lacking capacity for sexual self-determination." The differentiation from Section 179 StGB ("Sexual abuse of persons who are incapable of resistance") is problematic. On this, see Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 182 para. 11; Perron/Eisele in: Schönke/Schröder 2014, Section 182 para. 13.
 - 22 BT-Drs. 12/4584, 7 f.; cf. also Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 182 para. 4 ff.; Perron/Eisele in: Schönke/Schröder 2014, Section 182 para. 2 with further references.

their consanguine or adopted child under 18 years of age.²³ An exploitation of the relation of dependence resulting from the familial relationship is not required: rather, the incapacity of the child to resist a parent's sexual requests is apodictically presumed.²⁴ To the extent that all sexual activities and not only sexual intercourse are covered, the elements of the offence in Section 174 (1) No. 3 StGB go further than those of Section 173 StGB. Also punishable is the person who engages in sexual activities in front of the ward or who arranges for the ward to engage in sexual activities in front of that person in order to sexually arouse him or herself or the ward (Section 174 (2) StGB). Additionally, the threat of punishment is markedly higher than in the case of Section 173 StGB.²⁵ Through the elements of an offence in Section 174 (1) No. 3 StGB, minors are thereby very broadly protected in relation to their consanguine or adoptive parents.

3.1.3 Summary

The following are valid in general:

- » Sexual activities *by* a child under 14 years old on or with another person are not punishable (Section 19 StGB).
- » Sexual activities *by* a child over 14 years old *on* a child under 14 years old are punishable (Sections 176, 176a StGB).

23 The so-called *Scheinvater* [ostensible father] – that is, the father who was married to the mother at the point of birth (and hence is the legal father), but is not the biological father (cf. Section 1592 BGB) – can, however, not be the perpetrator in the sense of Section 174 (1) No. 3 StGB, nor in that of Section 173 StGB; to that extent, a protective gap exists (cf. Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 174 para. 18 with further references; Perron/Eisele in: Schönke/Schröder 2014, Section 174 para. 11).

24 Cf. Heger in: Kühl/Heger 2014, Section 174 para. 1; Perron/Eisele in: Schönke/Schröder 2014, Section 174 para. 11.

25 An offense pursuant to Section 173 (1) StGB is penalized with imprisonment of up to three years or a fine; one pursuant to Section 174 (1) No. 3 StGB, on the other hand, with imprisonment of three months up to five years.

- » If the younger partner is over 14 years old, a criminal liability exists for the older partner, pursuant to Sections 173, 174 ff. StGB, only when further circumstances appear that justify the liability.

In reference specifically to incest, the following are valid in this respect:

- » *Consensual sibling incest* is punishable for that *consanguine* sibling who is older than 18 years of age (Section 173 (2) StGB).
- » *Consensual incest* with a (consanguine) descendant is punishable for a *parent* regardless of the age of the descendant (Section 173 (1) StGB), and is, moreover, also punishable as sexual abuse in the event that the consanguine or adoptive child is not yet 18 years of age (Section 174 (1) StGB).
- » *Consensual incest* is punishable for a *descendent over 18 years of age* with a (consanguine) relative of ascending line regardless of the age of the relative (Section 173 (2) StGB).

Should Section 173 StGB be completely abrogated, the following activities would no longer be punishable:

- » *consensual sibling incest by a sibling of legal age* with a sibling who is at least 14 years of age,
- » *consensual incest by a parent* with a (consanguine) descendant over 18 years of age,
- » *consensual incest by a descendant over 18 years of age* with a (consanguine) relative of ascending line who is over 18 years of age.

		... according to age of other partner			
		under 14	14 to 16	16 to 18	over 18
Criminal liability of sexual partner...	under 14	exempt from punishment (cf. Section 19 StGB)			
	14 to 18	Sections 176, 176a StGB	if applicable Section 182 (1) StGB		exempt
	over 18	Sections 176, 176a StGB	if applicable Section 182 (1, 2) StGB		exempt
	over 21	Sections 176, 176a StGB	if applicable Section 182 (1, 2) StGB if applicable Section 182 (3) StGB	if applicable Section 182 (1, 2) StGB	exempt
	Parent additionally	Section 174 (1) No. 3 StGB Section 173 (1) StGB			Section 173 (1) StGB
	Descendant over 18 additionally*	Section 173 (2) sentence 1 StGB			
	Sibling over 18 additionally	Section 173 (2) sentence 2 StGB			

Overview: Criminal liability of consensual sexual activities between close relatives

(* The law abstracts from the question, which of the situations listed here are at all biologically possible.)

3.2 Prior history for today's legal provision

Historically, the incest prohibition derives first of all from Biblical legal texts (cf. Leviticus 18), which for blood relatives makes marriage and sexual intercourse outside marriage liable for punishment.²⁶ In contrast, sibling marriage was permissible or even welcome in other civilizations of antiquity, for instance in Egypt or Persia. The criminal liability of incest in the territories of Germany can be demonstrated from at least the beginning of the 16th century (Section 117 of Charles V's *Constitutio Criminalis Carolina*, or "Carolina" from 1512). However, even within the German lands, the incest prohibition was not universally in force. It was lifted sporadically for certain social groups such as the European high nobility.

From 1871, Section 173 of the *Reichsstrafgesetzbuch* (Criminal Code of the German Empire) (RStGB) regulated the incest prohibition under the term "*Blutschande*" [translator's note: incest, or literally "blood shame"] in Chapter 13 ("Crimes and misdemeanours against morality").²⁷ It classified incest as a crime. In the course of the ongoing criminal law reform process from 1902 to 1925, Section 173 RStGB was adopted – despite efforts in legal studies to lift it because it was said to punish mere immorality – "because incest represents the most severe attack against the moral essence of the family and gives rise to dangers for the progeny."²⁸ The draft of 1927 likewise retained the penalization of incest, "because no penal means should be left unused in protecting young persons, as well as

26 Cf. Al-Zand/Siebenhüner 2006, 68 f.; for more exact analyses with further evidence regarding the law of Greek antiquity, as well as for Islamic, Roman, Canon and German law, cf. BVerfG, 2 BvR 392/07, para. 3 ff.; Albrecht/Sieber 2007, 4 ff.; Dippel in: Laufhütte/Rissing-van Saan/Tiedemann 2009, Section 173 para. 1.

27 The legal precedent was Section 141 of the *Preußisches Strafgesetzbuch* (Prussian Criminal Code) from 1851; the *Allgemeine Landrecht für die Preussischen Staaten* (General Land Law for the Prussian States) and the *Strafgesetzbuch für den Norddeutschen Bund* (Criminal Code for the North German Federation) contained corresponding provisions.

28 BVerfG, 2 BvR 392/07, para. 4.

adults, from abuse by authoritarian personalities.”²⁹ Under National Socialism, the criminality of incest among those related by marriage was lifted by decree for cases in which either the marriage, on which the family tie was based, or the common household of the spouses was annulled, because “the purpose of the legal consequences attached to incest [*Blutschande*]’ should be ‘principally defence against risks inherited through inbreeding’ and furthermore no protective need for the national folk [*völkisches Schutzbedürfnis*] exists.”³⁰ Criminal liability for sexual intercourse between in-laws (i.e., non-consanguine relatives) remained if the marriage upon which the family relation was based still existed at the time of the offence. Punishment could be put aside if the common household of the marriage partners was annulled at the time of the offence. This provision was adopted into the Criminal Code in 1953 and remained valid until 1973.

With the *Viertes Strafrechtsänderungsgesetz* (Fourth Criminal Code Amendment Act)³¹ of 1973, the criminal sanction was lowered; incest was downgraded to a misdemeanour; the provision from Chapter 13 (which was re-titled “Offences against sexual self-determination”) was shifted into Chapter 12 (“Offences related to the personal status registry, marriage and the family”); and criminal liability for incest between in-laws was lifted. Juveniles, who at the time of the offence were not yet 18 years of age, were classified as exempt from punishment. In the framework of the legal reform of adoption law in 1976,³² the criminal provision of Section 173 StGB was then clarified to the effect that sexual intercourse with consanguine relatives – even following termination of the relations associated with kinship due to outside adoption – is punishable and that sexual

29 Ibid.

30 Ibid., para. 5, with reference to Kerrl 1933, 68, cited in BVerfG, 2 BvR 392/07, para. 5.

31 *Viertes Gesetz zur Reform des Strafrechts* from 23 November 1973 (BGBl. I, 1725).

32 Adoption Act of 2 July 1976 (BGBl. I, 1749).

intercourse with non-consanguine relatives remains exempt from punishment.³³

In the former East Germany, “sexual intercourse between relatives” was punishable pursuant to Section 152 of the German Democratic Republic’s criminal code.³⁴ The ability of the socialist family to raise children in a moral and ethical fashion was named as the protected good of the provision, which was arranged structurally under the chapter heading “Sexual abuse of juveniles.”³⁵ For sexual intercourse with relatives in direct line, persons of legal age were punished with imprisonment of up to two years; siblings were sentenced to probation or imprisonment of up to two years; and juveniles could be released from punishment.

In all of the previously mentioned statutes, sexual intercourse between siblings is consistently liable for lesser punishment than intercourse between relatives of ascending or descending line.

33 The term “relative in descending line” was replaced by “consanguine descendant”; that of “relative of ascending line” by “consanguine relative of ascending line”; and “sibling” by “consanguine sibling.” According to the rationale for the statute, this was necessary because otherwise the elements of the offence of Section 173 StGB would have been changed by the adoption law reform. Since the 1976 reform of adoption law, all existing kinship relations are terminated and the adopted child is now only related – with all legal consequences – to the new family. The modification of the wording in Section 173 StGB ensures, according to the rationale of the law, “that the legal status previously in force is retained” (BT-Drs. 7/3061, 61). According to the advisory opinion of the Max Planck Institute for Foreign and International Criminal Law, it is, nevertheless, partly a question of a change in content to the criminal provision. “The legislature thereby vacated the criminal liability for incest in cases where the presumed danger of hereditary illnesses for offspring cannot justify the elements of the offence. This delimiting of the elements of the offence is, however, still substantiated by the custom-/morality-based argument that incestuous relationships among those with only acquired kinship is assessed as less objectionable in comparison to those based on natural kinship” (Albrecht/Sieber 2007, 15).

34 Cf. *Strafgesetzbuch der Deutschen Demokratischen Republik* from 12 January 1968 (GBl. I Nr. 64, 591), last amended through the Act of 14 December 1988 (GBl. I, 335), annulled by the Unification Treaty of 31 August 1990 (BGBl. II, 889).

35 Cf. Albrecht/Sieber 2007, 12; Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 173 para. 9.

The incest prohibition has invariably been a contentious topic in Germany. Since 1902, during each of the major reforms of the criminal code and in jurisprudence up to today the claim has been made to drop the criminal offence of incest on the grounds that there are no convincing reasons for the punishment of incest.³⁶ In any case the purpose of the criminal provision is highly debated, and the reasons given for criminal liability have changed over the course of time.

Convictions due to *consensual* incest, that is, without an offence against sexual self-determination simultaneously obtaining, are – in Germany as well as abroad – very rare. There may presumably be up to twelve convictions per year,³⁷ although it is not clear whether such cases are actually always related only to consensual incest or whether they may also be related to abuse (Sections 174 ff. StGB). Isolated empirical surveys arrive at different numbers of criminal proceedings. It is not known how many proceedings have been suspended.³⁸

36 For instance, the alternative draft of one criminal code envisaged no longer punishing “*Blutschande*.” (Baumann et al. 1968, 59); for further details regarding the legal discussion around Section 173 StGB, see Dippel in: Laufhütte/Rissing-van Saan/Tiedemann 2009, Section 173 para. 14, 16; Kubiciel 2012, 282 f. with further references; Ellbogen 2006, 190 ff. with further references; Schramm 2011; Albrecht/Sieber 2007, 16 with further references; BVerfG, 2 BvR 392/07, para. 4.

37 Cf. Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 173 para. 10; Ritscher in: Joecks/Miebach 2012, Section 173 para. 8.

38 Albrecht (2012) assumes that of the 900,000 people born each year, approximately three to four persons up to 35 years of age are registered due to sibling incest pursuant to Section 173 StGB. This estimate is based on the Freiburg Cohort Study (*Freiburger Kohortenstudie*), in which certain birth cohorts were examined in terms of registration in the police and court systems. Underlying Albrecht's estimate are the birth cohorts in Baden-Wuerttemberg from the years 1970, 1973, 1975 and 1978, which were evaluated with reference to police and judicial registrations pursuant to Section 173 (2) sentence 2 StGB (Sibling Incest) and for which, up to today, eleven legal settlements exist. Nevertheless, in these cases the registration also arises in part because one of the concerned parties had decided to file a complaint due to violent assault, whereby the cases were then, however, prosecuted pursuant to Sections 177, 176 StGB. For this reason, exact data on the number of all judicially prosecuted, let alone all actually occurring consensual incest cases are not available. Additionally, investigations on the course of proceedings for cases related to Section 173 StGB are not available. Equally, little can be stated regarding the number of children produced through relations of incest.

In view of the development of legal provisions in different countries on questions of a right to information regarding certain biological relationships, as well as the increasing searches for kin through internet-based services, it can be assumed that consanguine siblings, who were not previously acquainted, will (re)find each other more and more. The incestuous relationship of (re)found siblings may then be related to the phenomenon of *genetic sexual attraction* (cf. Chapter 4.3).³⁹ Given the permitting of sperm donations, such relationships may conceivably increase in the future. Through this practice, half-sibling kinships become possible between numerous descendants of one and the same donor – descendants who have grown up without knowledge of one another, who nonetheless at some point discover their common father as well as the identity of their half-siblings, and who in the process become acquainted with one another (on occasion prior to reaching the legal age). In the meantime, international media report more frequently about such cases.⁴⁰

In terms of civil law, the incest prohibition is flanked by the prohibition against marriage between close relatives. According to Section 1307 of the *Bürgerliches Gesetzbuch* (Civil Code, BGB), a marriage may not be concluded “between relatives in direct line [nor] between fully and partially consanguine siblings.” This also pertains when the concerned person has left the kinship relation due to an adoption. Under Section 1308 BGB, a marriage is also not supposed to be concluded between persons whose kinship has been established through adoption. The family court can issue a dispensation from this prohibition for marriage between adopted siblings who are not related in a consanguine manner insofar as no significant reasons pose an obstacle to the conclusion of the marriage. Apparently without

39 Cf. Albrecht/Sieber 2007, 92; Albrecht 2012, 11.

40 In Brazil, a couple is supposed to have first learned that they were siblings during a radio show. See http://www.focus.de/panorama/welt/dramatische-enthuellung-in-brasilien-paar-erfaehrt-live-dass-sie-bruder-und-schwester-sind_id_4044408.html [2014-08-25].

exception the prohibition against marriage also remains in force in states where consensual incest is not punishable. Attempts to lift the prohibition against marriage for close relatives are not present in these states. In the juridical and public debates over the incest prohibition in Germany, this is also not put into question. The prohibition against marriage is also not a subject of the present opinion by the German Ethics Council.

3.3 Legal provisions in other states

In its country comparison regarding criminal liability for incest, the advisory opinion commissioned by the Federal Constitutional Court from the *Max-Planck-Institut für ausländisches und internationales Strafrecht* (Max Planck Institute for Foreign and International Criminal Law) takes as its object of investigation “the performance of mutually agreed upon sexual activities between adult family members.”⁴¹ The criminality of incest thus signifies here that incest is punishable even without the presence of other wrongs such as sexual abuse, use of force, etc. (incest as such, cf. Chapter 1). The criminality of incest remains in force in this sense in Australia, Chile, Denmark, England, Greece, Italy,⁴² Canada, Poland, Romania, Sweden, Switzerland, and Hungary, as well as in nearly all the federal states of the USA.⁴³ In France, criminality for incest was lifted in the course of the Enlightenment with the introduction of the *Code pénal* in 1810, and in other countries oriented toward the French *Code pénal*, incest is also exempt from punishment. Exemption from punishment prevails in Belgium, the Netherlands, Luxembourg, Portugal, Russia, Spain, Ivory

41 Albrecht/Sieber 2007, 26.

42 In Italy, criminal liability is dependent on whether a public scandal is raised by the incestuous behaviour.

43 Cf. Albrecht/Sieber 2007, 28 ff.

Coast, Turkey, China, Japan, South Korea, Argentina, Brazil and other Latin-American states.⁴⁴

Concerning the legal position in those states which punish consensual incest, the following may be said: Only a few countries make arrangements to include adopted and step-children in the threat of punishment. In most states, incestuous activities are punishable between both full- and half-siblings; in Sweden, half-siblings are exempted. All the legal systems examined envisage the elements of the offence as fulfilled through the consummation of sexual intercourse, although intercourse-like activities are also partially punishable; the concept of sexual intercourse is predicated in part on penetration, so that oral and anal intercourse – among same-sex persons as well – fall under criminal sexual intercourse. Homosexual activities are included only in those legal systems which are predicated not only on sexual intercourse in the more narrow sense, but rather allow intercourse-like or other sexual activities to suffice for the threat of criminal penalty (Denmark, England, Greece, Italy, Poland, Hungary and 28 federal states of the USA). In none of the examined legal systems is liability negated simply because a pregnancy is prevented due to birth control or infertility. As well, in none of the examined legal systems that penalize consensual incest is liability excluded if the concerned siblings grew up apart or have not lived together in a common familial unit.⁴⁵

Consequently, no consensus exists internationally regarding the culpability of incest. The advisory opinion commissioned by the Federal Constitutional Court comes to the conclusion that worldwide the legal policy debate is characterized by a tendency towards decriminalization of incest.⁴⁶ According to the statements of the authors of the advisory opinion,

44 Ibid.; Al-Zand/Siebenhüner 2006, 69; Dippel in: Laufhütte/Rissing-van Saan/Tiedemann 2009, Section 173 para. 15.

45 Cf. Albrecht/Sieber 2007, 30 ff.

46 For example, in Chile, Denmark, England, Italy, Sweden, Switzerland and the USA (cf. Albrecht/Sieber 2007, 47 f. with further references).

in many of the 20 examined countries that punish consensual incest between adults, the penalization is sometimes heavily criticized in literature or reform panels and its abolition called for, although in doing so the point is also made that protective gaps for under-age children need to be avoided in the framework of sexual offences (Denmark). In Switzerland a move towards decriminalization was defeated.⁴⁷ In those countries that do not specify any criminal liability for consensual incest, an “authentic discussion” concerning a possible reintroduction of liability is not to be detected.

As a rule, the discussion of incest’s criminality intersects with the discussion about sexual abuse crimes, which in all states are punishable according to other statutes. The debate conducted in France to address the question of “*inceste*” was aimed not at consensual incest as such, but rather at sharpening the existing criminal liability for sexual activities which occur in relationships of dependency or through coercion in the family or social proximity.⁴⁸

3.4 Supreme-court jurisprudence regarding the German incest prohibition

The complainant before the Federal Constitutional Court, whose conviction was the subject of the constitutional decision, had only become acquainted as an adult with his eight-year-younger sister. Previously, he had lived from the age of three in children’s homes and with foster parents and had been adopted by his foster parents at the age of seven, whereby the legal kinship-relationship to his sister was terminated. From the siblings’ union came four children. The appellant complained of injury to his constitutional rights according to Article 2 No. 1 in conjunction with Article 1 No. 1, Article 3 Nos. 1

47 Cf. Eidgenössisches Justiz- und Polizeidepartement 2012, 51 ff.

48 Cf. Albrecht 2012, 2; Albrecht/Sieber 2007, 47.

and 3, as well as Article 6 GG (right to general freedom of activity and sexual self-determination; right to equal treatment with perpetrators of other incestuous sexual acts that are not criminal; right to protection of his family produced through incest, which was destroyed through the punishment and imprisonment). The constitutional complaint was rejected in February 2008 by decision of the Second Senate of the Federal Constitutional Court. The court asserted that the criminal statute of Section 173 (2) sentence 2 StGB is compatible with the Basic Law; that it is a fundamental matter for the legislature to define the domain of criminal acts with consideration for the respective situation. The Federal Constitutional Court has solely to be vigilant that the criminal statute is materially in unison with the rules of the constitution and corresponds to the unwritten constitutional principles, as well as to the basic decisions of the Basic Law. In the survey of understandable penal objectives, the criminal provision is justified against the background of a culturally- and historically-ground conviction, then as now operating in society, of the appropriateness of incest's criminalization, as is also to be found through international comparison.⁴⁹ The court also observed that the legislature has broad room for decision-making, to which it is entitled and in any case has not overstepped.⁵⁰

The subsequent appeal to the European Court of Human Rights, on the basis of injury to the right to respect for private and family life (Article 8 ECHR) was rejected in the chamber process in 2012. This was justified on the grounds that the contracting states have broad room for judgment, particularly broad when the issue in question is not answered uniformly by the member states, and especially then when it touches upon a sensitive moral or ethical topic. That is the case here.⁵¹ In criminalizing sexual intercourse between blood relatives, the

49 BVerfG, 2 BvR 392/07, para. 50.

50 *Ibid.*, para. 41.

51 Cf. ECtHR, 43547/08, No. 60.

national legislature is not said to be overstepping the decision-making scope afforded to it in balancing interests that collide on institutional or intrinsic grounds. In the meantime, the decision is legally binding.

Since both lower courts and the Federal Constitutional Court, as well as the European Court for Human Rights have confirmed statute Section 173 (2) sentence 2 StGB, the process of judicial overview of the criminal provision has ended. A decision on whether Section 173 StGB should respectively be maintained or lifted is now only possible through the legislature. Its scope for judgment, repeatedly confirmed by the highest court, is also pertinent.

3.5 Depiction of the reasons for punishment

For Section 173 StGB, which has remained essentially unchanged since 1973, the following reasons for punishment emerge from the statutory materials:

1. Protection of the family;
2. Protection of possible future children from incest, who could be discriminated against on account of their genealogy;
3. Avoidance of the inception of genetically burdened descendants;
4. Protection of the personality development and sexual self-determination of that partner who may be weaker or more vulnerable, even in cases of consensual sexual activities, as well as protection from trauma;
5. Maintenance of a socially prevalent taboo and of the social conviction of the appropriateness of punishment for incest, as well as avoidance of presumably providing false signals to the public sphere through decriminalization and

of losing the generally preventative impact in regard to acts of incest.⁵²

According to the rationale of the law, the punitive basis for Section 173 StGB lies foremost in protection of marriage and family. It is further explained that as a rule incestuous relationships signify a considerable strain for the family. Not only may their effects include destruction of the family, but also they may not infrequently lead to serious psychological damages, namely among minors. Moreover, there may be eugenic aspects to bear in mind, which help to understand why the currently applicable law limits punishment to cases of sexual intercourse and is not extended to other – equally family-endangering – sexual activities. Among children born from an incestuous relationship, the danger of inherited impairments cannot be excluded due to the increased chances of the accumulation of recessive genes. Because of the predominantly still prevailing taboo against incest, the risk, furthermore, exists of discrimination against children of incest, along with increased negative consequences for the psychological development of these children.⁵³

The written report of the *Sonderausschuss für die Strafrechtsreform* (Special Commission for Criminal Law Reform) explains further concerning the draft of the law that, according to present scientific research, the most frequent cases of incest by far concern those between a father from 30- to 40-years of age and a daughter from 13- to 17-years. Even allowing that such an incest relationship may frequently be the expression of the older incest partner's already dysfunctional marriage, it is certain that such relationships effect (further) severely marriage- and family-destroying consequences. Added to that is the fact that daughters affected by incest are often impeded in their own development in lasting ways. In the scientific

52 Cf. also Albrecht 2012, 3 ff.

53 BT-Drs. 6/1552, 14.

literature, sustained damages of considerable size have been demonstrated, such as frigidity, learning disability, neglect, tendency towards prostitution, as well as the severest forms of depression with risk of suicide. In cases in which a pregnancy has resulted from the incest relationship, a special burden due to the discriminating reaction of the public sphere can arise for the younger incest partner, but also for the descendant. In sibling incest, the family-destroying impact may be more limited; for minors who are affected, however, the impacts are at least as severe when either family members or authorities need to consider the separation of the siblings from a civil-law perspective (cf. Section 1666 BGB). The female incest partner may also stand under pressure of authority when the brother is substantially older. The risks of a developmental disorder for adolescent participants in incest and the risk of pregnancy may also be relevant here. Also cited is the increased danger that an illness can become manifest due to accumulated, recessive genes.⁵⁴ The criminal provision of Section 173 StGB is further justified by saying that a catch-all provision is necessary for those cases where the youth-protection elements of law related to criminal sexual offenses are not operative.⁵⁵

In legal literature, the protection of sexual self-determination is also invoked in part as one of the penal grounds for Section 173 StGB, although this provision is found in Chapter 12 of the Criminal Code (“Offences related to the personal status registry, marriage and the family”) and those for Sections 174 ff. StGB also regulate the protection of sexual self-determination for sexual activities in the family.⁵⁶ Through the

54 BT-Drs. 6/3521, 17 f.

55 For this *ibid.*, 18: “The cases warranting punishment in which the younger partner is at least 18 years old as well as the cases of sibling incest in which the younger partner is at least 14 years old were not included in these statutes.”

56 Consensual sexual activities between adults are not or only marginally discussed. In the public discussion as well, the problem of incest or respectively that of sexual activities in the family is discussed quite predominantly in conjunction with investigations regarding sexual abuse and is even equated with sexual abuse. See also Albrecht 2012, 2.

incest prohibition, cases of a hidden, intra-familial abuse of power should thus be prevented, especially within familial relations of dependency, under whose pressure the participants may act superficially in a consensual manner, but where one of the participants may in truth act at the direction of the other.⁵⁷ This may be the case for example when an incest begun in childhood is continued beyond the age-limit of Section 174 (1) No. 3 StGB.⁵⁸ It can be that the refusal of one of the participants vis-à-vis the other is not (any longer) sufficiently clear to recognize and hence that a punishment due to sexual exploitation pursuant to Section 177 StGB is not to be taken into account. As well, initially consensual incestuous experiences can change later into an one-sidedly dominated relationship of abuse.⁵⁹

For the rationale behind the penal basis for “Protection of marriage and family,” the Federal Constitutional Court draws on the empirical findings prepared for its decision in the advisory opinion of the Max Planck Institute for Foreign and International Criminal Law⁶⁰ and evaluates these as follows: Through social science methods, family- and society-damaging impacts of sibling incest are indeed difficult to differentiate from other influences. Nonetheless, the assumption of such impacts is plausible. The following may arise as negative effects: reduced self-confidence, functional sexual disorders in adulthood, inhibited individuation, deficits in the psychosocial forging of identity and capacity for relationships, failures in the work environment, depression, as well as indirect injuries for third-party family members through exclusion and social isolation. In the advisory opinion, the empirical studies were assessed as being non-representative; they did show, however,

57 Cf. Frommel in: Kindhäuser/Neumann/Paeffgen 2013, Section 173 para. 13.

58 Pursuant to Section 174 (1) No. 3 StGB, whoever performs sexual activities on his or her natural or adopted child that is not yet 18 years old is to be punished (with a considerably higher criminal penalty than Section 173 StGB).

59 Cf. Albrecht 2012, 12.

60 Cf. Albrecht/Sieber 2007, 88 ff., 94–96.

that the legislature does not find itself outside its evaluative scope when it acts on the assumption that associations of incest between siblings can lead to grave family- and society-damaging impacts.⁶¹ Indeed, the advisory opinion of the Max Planck Institute points out that its depiction concerns cases where sexual abuse has occurred in childhood or adolescence and not consensual contact.⁶² Empirical surveys on sexual activities within the family place their emphasis on sexual violations of children and juveniles; surveys concerning unreported cases are centred on situations entailing violence and other means of coercion.⁶³ Moreover, the empirical analysis refers to selective clinical groups or non-representative samples so that according to the advisory opinion of the Max Planck Institute, at least for sibling incest, the subject of the Federal Constitutional Court's decision, subsequent damages in terms of developmental psychology cannot be precisely determined.⁶⁴

61 Cf. BVerfG, 2 BvR 392/07, para. 44; empirical information from Albrecht 2012, 12 ff., 15.

62 Cf. Albrecht/Sieber 2007, 95 f.

63 Cf. *ibid.*, 89; Albrecht 2012, 8 ff., 13.

64 Cf. Albrecht/Sieber 2007, 96.

4 ON THE ETHICAL ASSESSMENT OF THE PROHIBITION AGAINST INCESTUOUS ACTS

The primary objective of the following ethical reflection is not a definite ethical assessment of incestuous relationships as such. Rather, it is about highlighting the premises of possible moral positions and the adequacy of their ethical implications and social consequences. In doing so, it is fundamental to keep in mind that numerous forms and variants of sexual contacts exist, which are or have been defined in varying legal and cultural circles and at different historical times as “incest.”⁶⁵ Prohibition-norms and strategies of tabooing that are linked to such prohibitions diverge in trans-cultural terms equally across scope, content and punitive reinforcement.⁶⁶ In their relation to respectively diverse forms of incest, they also serve manifestly different objectives of protection.

First and foremost, four principal objectives of protection for a prohibition against incest can be differentiated with regard to morally relevant goods: Besides the safeguarding of sexual self-determination, these are the protection of children; the protection of the family; and the maintenance of the social and psychological functions of the taboo. Since this opinion is concerned exclusively with consensual acts of incest, in what follows observations concerning the possible genetic burden for children from incestuous relationships (“Genetic Arguments”)⁶⁷; concerning protection of the family (“Family Arguments”); and concerning considerations of social tabooing (“Taboo Arguments”) stand in the foreground. Were this

65 Summarizing cf. Leavitt 2003 with further references; on the culture-historically diverse forms of the taboo-inducing “moral sentiments” with regard to acts of incest, cf. Lieberman 2008, 170 ff.

66 Cf. chapters 4.3 and 5.5.

67 On possible discrimination and emotional conflicts of children, cf. chapter 5.2.

a matter exclusively of the protection of sexual self-determination, a prohibition of consensual incest among persons capable of self-determination would not be justifiable ethically. What must be deliberated is rather to what extent a restriction of sexual self-determination may be justified through the protection of the other relevant goods.

4.1 Genetic arguments

Genetic arguments are *a priori* not relevant if the development of pregnancy is precluded through contraception or natural circumstances. Given such cases, a general condemnation of all incestuous acts only through genetic arguments would already be insupportable on logical grounds.

But even when the risk of procreation of a genetically damaged child actually exists (cf. chapter 5.3), this is indeed of ethical relevance, yet no convincing argument can be derived from this circumstance against consensual acts of incest. This is also valid against the background that for other couples who carry a genetic burden, a prohibition against procreation has not been allowed to be proposed or considered in any manner.

In this connection, the position is also maintained that the potentially affected child is not already therefore damaged through its birth because for this child, in its individuality, there exists no other possibility of existence other than that of being born with its concrete and even damaged genetic endowment. In contrast, it is objected that future individuals are to be taken into account in the evaluation of an act such as procreation when it can be foreseen that this will negatively affect them to a considerable extent. Cases of such serious genetic impairment that not to have been born (non-existence) would be preferable to the affected life may nonetheless be extremely rare, if one wishes to recognize them at all, and in any case do not belong to the typical instances of incest-related genetic defects.

Also to bear in mind is that the incest prohibition involves solely vaginal sexual intercourse and hence natural procreation, but not the creation of children by means of in vitro fertilization. Those who invoke genetic arguments would logically need to assert that both assisted reproduction of genetically related persons and reproduction of all other couples with an increased risk of the inheritance of a genetically predisposed illness or disability are morally inadmissible.

In any case, the possibility of human genetic advising remains open for those couples concerned – albeit complicated by the existing threat of punishment – in order to clarify possible health burdens of the future child and make a responsible decision.⁶⁸

4.2 Family arguments

4.2.1 The institution of the family

In relation to protection of the family, it is important to make clear which concept of family is taken as a basis. Two concepts can be differentiated: a legal concept, which is related to the purely legal nexus of relationships between two people that is constituted in the Civil Code; and a concept from the living environment, which is related to a materially existing familial life-context, thus an actually lived set of family bonds, which are characterized through the diverse experiences of attachment between the individual family-members.

In everyday speech, both understandings of the family are used side by side. Thus, one speaks, for example, of someone having a large family and means by that the legally composed kinship structure to which family members also belong with whom no contact exists. On the other hand, one speaks of a family being destroyed because a partner has separated. Here

68 Cf. Deutscher Ethikrat 2013.

one makes use of an understanding of family that derives from the lived-environment aspect of actually living together or belonging.

An actually lived set of family bonds is distinguished through the consistent contact of family members in their respective family roles. As a rule, especially among children under 18 years of age, such a set of family bonds is marked by living together and hence the children's growing up together among their parents, although this set of family bonds may of course also persist once the children are grown up and live in other places.

Insofar as the family, in this sense of a materially existing life-context, serves as the basic element of social structure, each member of such a family is morally obliged not to disrupt their internal relationships in a manner that restricts or even endangers the social function of the family. In this context, the question may be posed whether an act can also then be (morally) inadmissible if it occurs so extremely rarely that it has no measurably adverse influence on the social institution of the family.⁶⁹ It may be further questioned whether a moral justification might be considered for the individual case of something like sibling incest provided that the relationship is based in genuine, mutual love between the participants. This would then also have to be valid if one were to assume for testing of the argument that a lifting of the incest prohibition might lead to an increase in acts of consensual incest.

If, *first*, the family in the sense of an actually lived set of family bonds with all its normatively significant implications ought to be considered socially valuable (which is without doubt the case); if, *second*, this image could erode at any rate

69 For legal prohibitions, the comparison of different legal systems with and without such a prohibition shows that the incidence of acts of incest does not increase, even without prohibition: nowhere do the incidents vary significantly (for the USA, cf. Anonymous 2006 on this point; for Great Britain, cf. Noble/Mason 1978). For moral prohibitions, the same should apply; in any case, cultural anthropology studies on the historically progressing decrease in the extent of incest prohibitions suggest this (cf. Leavitt 1989).

in parts (which is plausible in the event that consensual acts of incest were to strongly increase within such a set of family bonds), then the individual agent cannot invoke by *de facto* absence of damaging consequences that his or her actions harmed no one (and profited him or herself) and thus cannot be disallowed. The postulate of generalizability as the basic principle of justice excludes, concisely and crudely, any “free riding.” This means that the exception of oneself from a general prohibition, whose compliance is required on the part of the vast majority for the preservation of a social good, is not morally justifiable.

But even then, if frequent acts of this type are not merely therefore excluded because most others observe an existing prohibition, but rather because they would have no inclination to such action even without the prohibition (indeed the case with incest), then on grounds of fairness one will have to generalize the criterion for action and hence also ask: How would it be if a great many others were to act in this manner, to enter into consensual incest relationships? Then, possibly, the outlines of today’s operative image of the family as a composite of relationships in which only the parents have a sexual relationship would erode and some of their socially significant functions would be compromised. Such unwished-for consequences do not need to be provable, but rather merely sufficiently plausible. This already – so the advocates of a prohibition – would justify the moral verdict of an impermissible risk and thereby a *prima facie* prohibition of the corresponding act in general.

Critics point out in this context, however, that according to criminological experiences and social science findings, consensual incest occurs not as the cause, but rather as the consequence of problematic or already disrupted family circumstances or, for example, through those that have concluded in

adoption or divorce.⁷⁰ A *prima facie* prohibition could only follow from the risk of damage to actually lived sets of family bonds, and not from already disintegrated families in which the good of the experience of attachment and of the sense of belonging do not or no longer exist. Besides this, it needs to be taken into account that children descending from an incest relationship run the danger of growing up in this way in dysfunctional family relationships. Nevertheless, this may not be imputed sweepingly.

Deviations from a prohibition may therefore be justified though the individual specifics of cases if these are themselves morally significant, of sufficient weight and capable of being generalized. Provided that the incest relationship is based on a genuine, mutual affection and no set of actually established family bonds exist that could be damaged, personal interests of sufficient weight and worthy of protection would exist to justifiably counter a general incest prohibition – namely the desire to allow a mutual love to be fulfilled as a relationship, which would personally injure no one. If one acknowledges a love relationship under such conditions to be a good worthy of protection, then one must also acknowledge the moral right to live out this relationship in society in a publicly visible manner. The admonition that possible public prosecutorial investigations may be stopped in individual cases under the existing criminal provision is not, however, such an acknowledgement.

Also to be considered is that the understanding of family as a supportive social institution and site of identity-forming socialization has transformed substantially in the last years. Almost every second marriage in Germany ends in divorce; a large proportion of single parents exists; and same-sex couples with children also count as families. What has emerged in such times of transformation as central for the personality development and socialization of children are not primarily traditional

70 Cf. Dippel in: Laufhütte/Rissing-van Saan/Tiedemann 2009, Section 173 para. 13; Al-Zand/Siebenhüner 2006, 72; cf. also Albrecht 2012.

ideas of the family resting on constellations of living together, but rather affectionate care for and acknowledgement of the child, as well as a harmonious framework for relationships within the actually lived set of family bonds, which can also exist – it may be added – without a basis in blood kinship.

Against this background, two divergent perspectives can be differentiated from each other:

(1) On the one hand, one can qualify a consensual incest relationship outside of an actually lived set of family bonds as morally “non-reprehensible.” A new family can even arise, which entirely in the spirit of the social institution does justice to the objective of mutually reliable responsibility.

(2) On the other hand, one can also see in a consensual incest relationship on the symbolic level or on that of principles a putting into question of the integrity of the institution of the family and its legally constituted roles.⁷¹

4.2.2 Relationships between family members

Parent-Child Relationships

A parent-child incest within a lived set of family bonds can displace other family members from their genuine roles inside the family or cause a strain through competition that disposes members to mutual jealousy. For instance, in the case of an incestuous father-daughter relationship, the role of the mother as the father’s sexual partner is infringed upon by the daughter. Therein lies not only a breach by the daughter and the father of moral duties of solidarity within the family, namely the maintenance of mutual respect; but equally the moral prohibition against doing harm is also damaged, which possesses a greater weight in relation to family members than to strangers. One may perhaps argue about whether someone from outside who interferes through adultery into a family’s internal trust

71 Cf. dissenting vote in chapter 7.

relationships can claim a moral justification for such action, namely his or her love for the sexual partner bound to the family. In our example of an incest case, the daughter, however, could hardly justify this, and the father surely not; for he abuses not only the mother's trust, but also harms or indeed destroys her emotional relationship to her own daughter.

Even assuming the daughter to be of legal age and the incest relationship to be consensual, an incestuous relationship described in such way thus can signify a considerable strain for an existing set of family bonds. This also obtains to a certain extent for the case where the incest relationship no longer occurs in an actually lived family context, but rather in one of merely legal form. In such a case, no family-specific roles lived in practice can indeed be harmed any more in the original family; however, especially deep-running feelings can definitely be injured, for instance those of the other parent for his or her own child, on the one hand, and for the marriage partner, on the other. Should such a case result in the inception of a child, this can additionally cause considerable role-confusion, when for example father and grandfather are one and the same person.

As well, participants' roles and the fundamental relationship of responsibility to one another are particularly affected through incest when they belong to different generations. The duties of care, changing dependent on age, and the relational certainties between relatives of ascending and descending line differ ostensibly from those between siblings.

Sibling relationships

If no actually lived set of family bonds exist, consensual incestuous relationships between siblings do not infringe on the roles in familial cohabitation in a way that harms the understandable needs of family members. They may well disappoint parents' legitimate expectations concerning their children's behaviour and thereby *prima facie* breach moral prohibitions. Yet, such prohibitions are not specifically related to incest;

they epitomize children's general moral obligations towards their parents' sentiments.⁷² Should such an actual set of family bonds remain in force, then a trade-off exists between damage to the family and the children's right to freedom.

4.3 Taboo arguments

The philosopher and psychologist Jonathan Haidt published a study in 2001, in the framework of which a (invented) story of consensual sibling incest was recounted to the test subjects, which they then had to judge ethically.⁷³ Two adult siblings, already apparently living outside the set of family bonds, go on a vacation trip, during which sexual intercourse occurs between them one night. Both desire the intimate encounter out of a mutually evinced curiosity. The risk of pregnancy is excluded; the sister has taken contraceptives for a long time, and in addition, the brother uses a condom. Afterwards, they experience the common sexual experience to be an enriching secret of their personal emotional attachment, yet they decide not to repeat it. Without hesitation, the great majority of those questioned explained the behaviour of both siblings as morally wrong – and, after inconclusively testing out all conceivable reasons for this verdict, argued: one does not know why and cannot explain it, but one is unequivocally certain that the two behaved wrongly. Haidt takes this as a sign of a nearly universally shared intuition that is rationally neither capable of authentication nor in need of authentication. This intuition is based ultimately on an emotional foundation, which is firmly set against appeals to argument. Moral judgments are said to be far more closely comparable to unmediated perceptions than to authentic processes of reflection.

72 On such filial duties, cf. Hoff Sommers 1986.

73 Cf. Haidt 2001. Such experiments are often repeated, even in the past several years in a "brain scanner" under observation of the neuronal correlates of intuitive decision-making.

A taboo is to be understood as a mostly tacit social convention based on powerful emotions, which marks and maintains boundaries far beyond those of legal provisions. In these cases a taboo is a social substitute-measure taking the place of the effort of discursive processes of agreement in order to stabilize social practice. When tabooing is exposed in the spirit of elucidation, considerable social resistance is accordingly to be reckoned with, the fall-out from which will be all the more intense to the extent that it is tied to deep emotional identifications. Characteristics of this kind of tabooing are hence immunization against objections and authoritative assertion of corresponding convictions.

Still, the incest taboo requires a critical analysis. As with other powerful social taboos, it needs first to be asked on what basis the incest taboo develops its force. On the one hand, it may rest on a moral verdict; on the other, on a biologically impressed behavioural disposition.

One answer is found in the work of the Finnish philosopher, sociologist and ethnologist Edward Westermarck, who has assumed an *innate aversion* to acts of incest among humans who grow up together and thus have close physical contact as siblings. On this basis they have learned to define themselves not as sexual partners, but as siblings. Siblings growing up together would therefore later evince a mutual, intuitive sexual aversion⁷⁴ and in adolescence turn towards same-sex and later opposite-sex “peers” outside the family.⁷⁵ Westermarck’s thesis of incest aversion as a result of siblings’ early proximity is supported by studies on kibbutz children in Israel, who later marry only rarely, and by the example of high divorce rates and low birth rates among Shim-pua marriages in Taiwan (the future bride moves during the first year of her life into the groom’s family). Whether this aversion is an innate biological disposition, even an “evolutionary acquisition,” so that

74 Cf. Westermarck 1934, 22–24.

75 Cf. Schlegel/Barry 1991, 21–25.

one could speak of a biological incest inhibition, or whether it is a socio-culturally learned norm is a point of controversial discussion in Westermarck's reception history.⁷⁶ Independent from this controversy, however, an incest aversion through early proximity and common socialization may explain the rare appearance of incest among siblings growing up together and the comparatively more frequent incest among siblings not growing up together.⁷⁷

The debated *genetic sexual attraction* in sibling, father-daughter or mother-son relationships, in which the partners become acquainted only later or reunite after a long period of separation, also does not contradict the thesis of sexual aversion through proximity. Most people classify resemblances in facial features or physical attributes generally as especially attractive or as eliciting trust. Such resemblances may have a familial dimension and may also play a role in incest relationships among siblings who have grown up apart. The Westermarck thesis does not negate the attraction in recognizing resemblance, but rather says merely that growing up together inhibits this.

76 Cf. Bramberger 2012; further literature references are also to be found in Albrecht 2012, 15 (fn. 54).

77 Against Westermarck's thesis of close proximity as triggering aversion, it has been objected that consensual incestuous parent-child relations would then not be explicable. Freud's arguments on the Oedipus complex would also conflict with the thesis of low sexual attractiveness among those living closely together. The early erotic inclination of the child to the opposite-sex parent, which Freud assumes generally for early-childhood psychosexual development, suggests an innate incest tendency (cf. Bramberger 2012). Against this it can nevertheless be argued, on the one hand, that this thematic involves emotionally incestuous needs (in contrast to sexually incestuous needs); on the other, that the thematic assumed by Freud is one of a certain early-childhood psychosexual development phase, in which the desire for relationship is not to a sibling, but to a parent. The thesis of incest aversion through early proximity and common socialization thus appears to have a high plausibility at least for the rarity of sibling incest. The practically rare, but theoretically conceivable consensual attraction of a child in a parent-child incest can rather be explained due to an emotional dependency that still persists in early adulthood and in which the possible unwillingness is compensated through an identification with the parent.

In more recent psychological literature, the incest inhibition is discussed in the context of attachment theory. According to classical attachment theory, as established by the English child psychiatrist John Bowlby, the attachment to the mother is decisive for the child's later behaviour in relationships, especially for orientation outside the family in seeking a partner. In more modern approaches, the maternal attachment as sole crucial socialization factor is put into question, and instead a supportive social network in and around the family that provides security and trust is regarded as decisive for later behaviour in relationships.⁷⁸ Avoidance of incest and altruistic behaviour in the family would be linked. Incest would be most likely between individuals without an early reliable familial experience of attachment. Additionally, the lack of such attachment experiences may be a risk factor for forced acts of incest, as studies on sexual offenders and victims of acts of incest show.⁷⁹ A secure attachment in early childhood development is identified as crucial for the avoidance of Oedipal desire, i.e., incest between a parent and child, and it should be noted that even in the classic tale, Oedipus desired his mother only after he had grown up abroad without an attachment to her.⁸⁰

Against this background, it still needs to be clarified whether the tabooing of incest, which is without doubt to be found in social contexts, can rationally be reconstructed as a manifestation of a denial of argumentation or as a phenomenon predicated on biological psychology. In both instances, the question of moral relevance remains.

Here one needs to differentiate between genuinely (socio-) moral norms, for whose binding quality no reasonable alternative is recognizable, and cultural norms, which may indeed critically shape a form of life, but in a historically and regionally contingent manner. The significant difference resides in how

78 Cf. Badinter 2010.

79 Cf. *inter alia* Berner 2011.

80 Cf. Erickson 1993.

high the claim to validity is in the respective case: Socio-moral norms lay claim to general validity, whereas cultural norms (such as table manners or rules of politeness) indeed help to significantly construct social practice and its corresponding customs, yet impose no demand for general, normatively compulsory validity. Rather, they establish social conventions. As such, they acquire at best indirect moral significance, for instance because their breaking may injure others' feelings or because they can have impacts on the fair distribution of opportunities and *therefore* would elicit moral disapproval, but not due to the sheer breaking of the convention itself.

Even cultural norms, however, contribute to the understanding of self and to the personal identity of the participant in a particular culture, and they can hence make a claim to a hypothetical and reversible protection. A limitation to consider in relation to such cultural norms is, nevertheless, that they are in danger of rationalizing positions of resentment against members of society. All too frequently in history, there have been (nearly) universally shared intuitions which we today find, with good reason, to be false, indeed absurd – for instance, that men would possess a higher moral value than women (and therefore a claim to power over them); that the interests of people with darker skin colour would be of less moral weight than those of people with lighter skin colour; or that homosexuality would be reprehensible. In their times, such cultural norms were even quite distributed among many of those suffering from them. They were and remain, nonetheless, wrong and indeed unjust.

Correspondingly, no conclusion about the moral correctness of the (nearly) universally shared emotional hostility to incest can be drawn from the diffusion of the incest taboo across nearly all societies of the past and present. But at the same the inverse conclusion can also not be drawn. What can be deduced, however, from the insight that the rejection of incest is an intuition widely resistant to revision and nearly universally shared is the supposition that a retraction of the moral

verdict on consensual forms of incest could irritate or injure the feelings of many people. Yet, in no normative sphere of modern society is there still an *eo ipso* primary claim even by large majorities to subjugate at least small minorities to their impression or intuitions of “decent” life and action. Legally composed societies must seek a balance in the framework of their order of norms between corresponding majority and minority positions, and in the process they must attach the importance that is morally as well as legally due to the protection of freedom of that few in the face of the protection of feelings of the large majority.

5 DISCUSSION OF THE PENAL GROUNDS FOR SECTION 173 STGB

5.1 Protection of the family

The legislature and the Federal Constitutional Court name, foremost, the defence from family-damaging impacts of incest as the statutory objective or, respectively, penal ground for the incest prohibition. In addition to the legal materials, this is as well documented through the consolidation achieved since the 1973 *Viertes Strafrechtsänderungsgesetz* (Fourth Criminal Code Amendment Act) of the criminal provision into Chapter 12 (“Offences related to the personal status registry, marriage and the family”).

The protection of the institution of the family, as one of the central models of socialization, stands behind Section 173 StGB. This model presupposes a family structure with a role-differentiated development of children, juveniles and adolescents and justifies the prohibition against the “sexualization of kinship relationships.”⁸¹ Additionally, the Federal Constitutional Court has underlined this aspect by saying: “Incest ties – even those between siblings – lead [...] to an overlapping of kinship relationships and social role-divisions and thereby to an impairment of the assignments providing structure within a family.”⁸² Such overlapping roles – so the Federal Constitutional Court – “do not correspond to the image of the family that lies at the basis of Article 6 No. 1 GG.”⁸³ This also justifies qualifying consensual incest, for instance among siblings of legal age, as a behaviour that infringes upon the meaning and purpose of Section 173 StGB. Also, the protection of the family

81 Hilgendorf in: Arzt et al. 2009, Section 10 para. 28; cf. further Schramm 2011, 423 ff.

82 BVerfG, 2 BvR 392/07, para. 45.

83 Ibid.

structure does not lose its relevance – as it is further argued – with the attainment of the age of consent.⁸⁴

The defence from incest's family-damaging impacts as the penal ground for Section 173 StGB is, however, rejected by critics of the incest prohibition as implausible and contradictory in its lack of differentiation. It may already be ambiguous which concept of family lies at the basis of the criminal provision.

For the criminal provision in its present form, in the view of critics, requires that the concerned parties neither live together jointly in a family nor ever have lived together. Regarding sibling incest, the criminal liability also begins only at the end of the 18th year of life; that is, at a point in time at which children are grown up and as a rule leaving the family of origin. The background to the criminal provision is obviously a family concept that extends beyond familial cohabitation – that is, the actually lived set of family bonds; beyond merely physical kinship; and consequently on into the purely legal form of the “institution of the family.” Precisely as the institution of the family is constituted through the purely legal mesh of relationships constructed in the Civil Code, this institution is divested of its legitimate breadth as a protective norm of the criminal code. The assumption of an arrangement of order for the family prevailing outside of familial living-together would be a fiction and, in the view of critics, cannot be a ground for a criminal provision.⁸⁵

The designation of the family as “emotional center for the individual,”⁸⁶ which is undermined through incestuous relationships, is discussed in the literature in regard to the development of children and juveniles independently from the fact

84 The Federal Constitutional Court says concerning the constellation where siblings only become acquainted as adults: “It [the criminal provision] also gains its weight through the absoluteness with which it lays claim to comprehensive and situation-independent compliance” (ibid., para. 57).

85 Cf. in this regard and on the following, Roxin 2009 summarizing.

86 Sebo 2006, 49.

that this meaning can of course be given for all family members of all age levels. There it is asserted that the family loses significance in terms of its socialization function with the increasing age of the child because other, extra-familial relationships and orientations then become increasingly more important. If it is thus a question of protecting the family for the criminal provision's rationale, then this bears overwhelmingly on the possible endangerment for the development of children and juveniles. This could, as the critics of the penal incest prohibition also note, without a doubt be the case if it is a matter, for example, of a father's incest with an underage daughter. Such a case would, however, fall under the criminal provision of Section 174 (1) No. 3 StGB, which punishes sexual acts by a parent on his or her under-18-year-old natural or adopted child. For incest between adult siblings who have grown up apart and first become acquainted in adulthood, a family-destroying effect seems less plausible. One might rather assume in these cases that the incest could arise only subsequently to an earlier separation of the family – a separation that a family dysfunction may have already preceded. But even in an incest between underage siblings growing up together or in an incest in which at least one sibling is under 18 years old, it may be open to question whether *a priori* a family-destroying effect would be entailed.

The separation of incestuous siblings, still taken for granted as necessary in the written report of the 1972 *Sonderausschuss für die Strafrechtsreform* (Special Commission for Criminal Law Reform)⁸⁷, would hardly be consistent with today's pedagogical convictions. A separation could only be sensible if it were a matter of a violent assault, in order to protect the victim from a renewed encounter or even repetition of the crime. Such cases, which are doubtlessly either the consequence of a dysfunctional family situation or the trigger for such a dysfunction, would in any case be dealt with under the criminal

87 BT-Drs. 6/3521, 18.

penalties of Sections 176, 176a und 182 StGB, so that Section 173 StGB could yield no additional protective effect here. Other cases need to be reacted to through family counselling, supporting communication and, as the case may be, assistance of the Child and Youth Services Act. A destruction of the family would only be initiated through the siblings' separation.

Also speaking against the assumption of a penal rationale as defending against incest's family-damaging effects is that the criminal penalty may be viewed as contradictory: It is, on the one hand, too broad and, on the other, too narrow to afford the aimed-at protection.⁸⁸ On the one hand, even sexual intercourse outside of an existing family is included in the prohibition, because neither factually nor legally would the existence of a common family or even of a legal kinship be a precondition for the criminal penalty (for example, if kinship is annulled through adoption). On the other hand, Section 173 StGB penalizes only sexual intercourse and not other sexual activities that could be equally serious or even more so in their impact. Additionally, the threat of punishment covers only consanguine relatives, even if the family unit is composed of additional individuals. Critics point out in this context that sexual activities permitted between step-, adopted- and foster-children; with adopted children;⁸⁹ or of the legal father with his non-consanguine child (cf. Section 1592 BGB) – just as adultery, no longer punishable since 1969 – could destroy

88 See the dissenting opinion of Judge Hassemer in BVerfG, 2 BvR 392/07, para. 111. Nevertheless, in the opinion of the majority of the Court's Senate, the area of coverage, while too narrow in relation to the penal grounds, can be accepted. On this point, the Federal Constitutional Court says: "As an instrument for the protection of sexual self-determination, the health of the population and especially of the family, the criminal provision fulfils – even through its broadly cast impact above and beyond its area of coverage, which is narrowly defined by the elements of the offence and reinforced by punishment – an appellative, norm-stabilizing and hence generally preventative function, which makes clear the targeted values of the legislature and thereby contributes to its preservation" (BVerfG, 2 BvR 392/07, para. 50).

89 "Child" is meant here in terms of family law; sexual activities with under-14-year-olds ("children" in the sense of the Criminal Code) are punishable (see chapter 3.1.2).

the family's living together. The stepfather would be allowed to have sexual intercourse with his stepdaughter and even to marry her. Equally, sexual intercourse by the adoptive father with his adult adopted daughter would also not be prohibited. In comparison, the social space of protection that is covered by Article 6 GG⁹⁰ does not refer only to consanguine relations.⁹¹ From all this, critics of the provision conclude that Section 173 StGB would be able to protect the family neither as a social institution nor as a legal one. This does not signify a denial of incestuous relationships between parent and child or between siblings, even if they are consensual, as potentially posing a heavy burden on families' ability to live together.

On account of the criminal liability for incest, however, a newly arising family could also be threatened. The concern is that a criminal prosecution of an otherwise voluntary and self-determined incest relationship could be the first step towards or compound the damage or destruction of the family that is itself feared in the law's rationale. The intervention through criminal law could lead to serious burdens for the families, and this runs counter to the reasons cited for the punishment.

90 Pursuant to Article 6, "family" is any close community of parents and children. "Family in the sense of No. 1 is the actual life- and child-rearing-community of parents and children. An actual attachment is necessary, without a common household needing to exist" (Jarass in: Jarass/Pieroth 2014, Article 6 para. 8, in reference to BVerfGE 127, 263 [287]).

91 This can, so the Federal Constitutional Court, also be accepted under constitutional law with regard to the legislature's wide scope for construction (para. 54). According to the Federal Constitutional Court, the prohibition does not extend to step- and adopted children since corresponding acts contradict the traditional image of the family to a lesser extent (BVerfG, 2 BvR 392/07, para. 55). "The fact that sexual-intercourse-like acts and sexual intercourse between same-sex siblings are not penalized, whereas sexual intercourse between consanguine siblings fulfils the element of an offence even in cases where conception is precluded, does not put into question the fundamental reachability of the (partial) objectives of the protection of sexual self-determination and of prevention of genetically predisposed illnesses" (ibid., para. 56). This is also valid according to the Federal Constitutional Court for cases in which siblings first become acquainted as adults and protection of the family structure can play no role. Justice in individual cases can be respected through the application of law, according to the Federal Constitutional Court (para. 57).

5.2 Protection of possible children from incest relationships against discrimination

The rationale for the law also names as a penal ground the protection against discrimination of children possibly issuing from an incest relationship.

Against this it is asserted that already a legal subject to be protected is lacking. The general personal rights anchored in the Basic Law would only be able to unfold if the concerned party, who should be protected, exists. A not yet conceived child could have no interest in non-existence and non-discrimination.

On the other hand, others point out that future individuals would absolutely need to be included in the evaluation of an act when it is foreseeable that the impacts of the act will concretely bear on the interests of these future individuals. In considering holistically the conditions for conception and the life perspectives dependent on such, it concerns an “advance effect” [*Vorwirkung*] of the corresponding individual’s rights.⁹² Aside from this, the state’s power to set law would not be limited to the protection of legal subjects for the safeguarding of their individual basic rights. The logical application of the argument – it could not lie in the interest of the child not to be conceived – would put into question provisions of artificial reproduction to the extent that these aim at the welfare of the future (born) child. This would apply, for example, to the provisions of the *Embryonenschutzgesetz* (Embryo Protection Act), which forbid the procurement of a surrogate mother in view of the welfare of the future child.⁹³ In its decision on the incest prohibition, the Federal Constitutional Court – in the framework of the penal rationale for the avoidance of genetically

92 Cf. in more precise terms Taupitz in: Günther/Taupitz/Kaiser 2014, Section 1 (1) No. 1 para. 8 with further references.

93 Cf. for example *ibid.*, Section 1 (1) No. 1 para. 5 f.

predisposed illnesses among descendants – also endorsed the protection of the not yet conceived child.

Independent from this dispute, the argument concerning possible discrimination ought, on its own, to be subjected to a critical consideration. Just as against the background of the debate around the inclusion of children with disabilities, but also of all other children who are different, whether because they come from other countries or are not part of intact families, the argument – not to conceive them on account of the risk of discrimination – could not expect any acceptance in public debate. This should not be any different for possible children from incest relationships.

Finally, any possible discrimination is to be combated above all there where it takes place. Without a doubt, a child's origin from an incestuous union brings with it the risk of later discrimination. Whether it actually comes to that, however, depends on varying factors. Both the familial and the social environment play a role in this. Accordingly, it is broadly a matter of a hypothetical assumption of discrimination, which does not mean that there would not be such in the individual case. Indeed, such discrimination can become even more probable through a criminal prosecution of the parents. Rather, one might steer the perspective towards possibilities of dealing with the discrimination of those children stemming from an incest relationship. Here, family counselling and family-supporting offerings from Child and Youth Services are possible and necessary. Even possible intrapsychic conflicts of the child over accepting the kinship of its parents may require advisory support and child- and youth-psychotherapeutic aids.

5.3 Avoidance of genetically conditioned illnesses in offspring

The legislature has also explained criminal provision Section 173 StGB and its limitation to sexual intercourse by

making reference to eugenic aspects (avoidance of genetically conditioned illnesses in descendants from the incest relationship).⁹⁴ Yet in contradiction to this, Section 173 StGB also forbids sexual intercourse for those averse to procreating; persons using contraception; and those not (any longer) capable of procreating, such as half-siblings over 60 years of age.

It is indisputable that incest can lead to recessive genes – that is, those that have not developed into an illness in the parents – joining together in the offspring and then effecting an illness or impairment in the child. The genetic risks for children from incest relationships are hence heightened. The greatest theoretical risk is for children from father-daughter, mother-son, or full-sibling relationships. In these cases, 50% shared genetic material is present as a rule; their offspring have as a result approximately a 25% homozygous genome. In children of half-siblings or other second-degree relatives (uncle/niece, aunt/nephew), the ratios of shared genomes are halved to an average of 25% and hence the ratio of homozygous genetic materials in offspring to approximately 12.5%.

Investigations that include both children and relatives of first- and second-degree show a *de facto* risk of over 50%. In this regard, it is a question not only of known recessively conditioned genetic illness, but also of not definitively genetically conditioned deformities and impairments of intelligence. Only 46% of the examined incest children were without indications.⁹⁵

94 Cf. chapter 3.5. In the law's statement of grounds, it says: "Additionally, eugenic aspects are to be considered, which make it understandable that the law presently in force already limits criminal liability to sexual intercourse and does not extend to other – equally family-endangering – sexual activities" (BT-Drs. 6/1552, 14). With this remark, the rationale for the law, which names elsewhere the protection of the family as penal ground, contradicts itself.

95 This point derives from a summary of four studies from the years 1967 to 1982 with 213 children in total, although none of the studies was systematic (Adams/Neel 1967, Carter 1969, Seemanová 1971 and Baird/McGillivray 1982; summarized in Bittles 2010; cited by Nöthen 2012, 7). Respectively, 11.7% of indications were attributable to autosomal-recessive illnesses; 16% to deformities/sudden infant death syndrome; 14.6% to other disorders, including light impairment of intelligence; only 46% had no conspicuous indication.

The spectrum of detectable disorders is explained in human genetics by the fact that besides the heightened risk for known autosomal-recessive illnesses, genetic susceptibilities for multifactorially induced illnesses also appear with equal likelihood.

In the opinion of critics, however, eugenic aspects are not to be considered as a penal rationale on basic legal grounds: insofar as the protection of possible future offspring from genetic harms is intended, a legal subject is already lacking that could be protected. The inheritance of genetic traits coincides with the origin of life. The created life would thus only be conceivable as it has originated – with its genetic constitution – and as such enjoys the protection of human dignity, life and physical integrity. Others refute this objection by pointing out that the state's protection can absolutely include future legal subjects, who may be threatened by an impairment of their welfare through the manner or accompanying circumstances of their inception. A view based solely on individual basic rights would largely drain the state's protective duty for future individuals (on this controversy, see also chapter 4.2 and 5.2).

Yet, penal grounds predicated on eugenics would in no way aim, according to proponents of the incest prohibition, only at concrete individuals, but rather at the population *in toto*. Thus the Federal Constitutional Court itself speaks not only of the avoidance of genetically conditioned illnesses for descendants of incest relationships as a penal rationale, but also of “protection of the health of the population.”⁹⁶ To this is countered, however, that then all other couples that are aware of a hereditary predisposition would consequently need to have their reproduction prohibited by criminal law. In a society where reproductive choices fall inalterably into parents' most highly

96 The Federal Constitutional Court speaks of this on one occasion, that “the avoidance of serious genetically conditioned illnesses among descendants from incest relationships” could be raised as a “supplementary” penal rationale (BVerfG, 2 BvR 392/07, para. 41); at another point in the decision, the language entails protecting the “health of the population” as penal rationale (*ibid.*, para. 50).

personal area of responsibility, this would be rejected in the strongest terms. The *Deutsche Gesellschaft für Humangenetik* (German Society of Human Genetics) also remarked critically on this in an opinion regarding the Federal Constitutional Court's decision and cited as an example the relatively frequent, congenitally conditioned tendency for cystic fibrosis. Literally the opinion notes: "The argument that reproduction needs to be thwarted in couples whose children possess an elevated risk for recessively inherited illnesses is an attack on the reproductive freedom of all."⁹⁷ Indeed, the freedom to decide whether to realize a desire for children and the associated individual evaluation of risk counts in today's society, for good reason, as part of the untouchable core of personal rights. A legislative objective of "precaution towards genetically conditioned illnesses" would erode this consensus.⁹⁸

Also to be considered are the social impacts and consequences for people with disability, should the punitive reinforcement against incest be justified with the argument of possible genetically impaired offspring. People with disability could thereby feel degraded in their form of existence. This could injure them in their dignity, in their right to equality and non-discrimination. By deprecating the form of existence of a possible child from an incestuous union, the discrimination to be prevented – which is cited as the rationale for the punitive reinforcement – first occurs. The opposite effect is thereby produced from what the punitive threat is supposed to prevent.

97 Deutsche Gesellschaft für Humangenetik 2008.

98 In the international discussion concerning criminal liability for incest, this argument is also adduced. Thus, the English-Canadian political scientist and philosopher Collin Farrelly notes: "If we can justify imprisoning consenting adults for choosing partners who will increase the risk of having children with disabilities, then we set a troubling precedent for all couples who may pass on genetic disorders to their children" (Farrelly 2008, [Abstract]). See also Al-Zand/Siebenhüner 2006, 76 f. It should also be taken into consideration that in the context of the incest prohibition, the new possibilities of a complete sequencing of the genome before and after inception open a completely new dimension as a precaution against genetically conditioned offspring.

The criticism towards a eugenic argument is also related to its insensitive handling of history. With the argument of using state-based measures to hinder certain genetically undesired progeny, people with genetic anomalies were disenfranchised and murdered under National Socialism.⁹⁹ For that very reason, this argument should not – so, too, the opinion of the German Society of Human Genetics – be enlisted for the justification of incest’s criminal liability. This would also be perverse in terms of constitutional and ethical principles. Human dignity and the experiences of the national-socialist past would fundamentally prohibit – so the constitutional argument – lending any weight to eugenic points of view by means of criminal law.¹⁰⁰

5.4 Protection of sexual self-determination

Criminal offences against sexual self-determination are handled in differentiated ways by Sections 174 ff. StGB (cf. chapter 3.2). That Section 173 StGB should also provide a punitive basis for the protection of sexual self-determination is not immediately implied by the provision. Against doing so also speaks the fact that according to Section 173 StGB both participants – insofar as they are over 18 years old – are equally punished so that Section 173 StGB does not concern a perpetrator-victim relationship as is the case with the criminal offences against sexual self-determination.¹⁰¹

99 The inherited condition [*Die Erbverfassung*] of the people was the protected good of the 1933 law on averting genetic illnesses in offspring; the goal, the “extirpation [*die Ausmerzung*] of pathological hereditary dispositions” (Hoche, cited in Al-Zand/Siebenhüner 2006, 76); on the goal itself, see Al-Zand/Siebenhüner 2006, 76; at greater length, see Schmuhl 1987.

100 Cf. Roxin 2009, 547.

101 Cf. the dissenting opinion of Judge Hassemer in BVerfG, 2 BvR 392/07, para. 87; Roxin 2009, 547.

In the juristic discussion of Section 173 StGB, it is pointed out against this background that the protection of sexual self-determination within and outside of the family is guaranteed through the criminal provisions of Sections 174 ff. StGB. In particular, the criminal penalty for Section 174 (1) No. 3 StGB is highlighted, which punishes sexual acts performed on a consanguine or adopted child who is not yet 18 years old. It does so, moreover, with a considerably higher criminal penalty than Section 173 StGB, without necessarily requiring abuse to be proven. On attaining the age of consent, each person would then be responsible for his or her own sexual behaviour, insofar as that person is not the victim of sexual coercion or unable to defend him or herself.¹⁰² If it is said vis-à-vis an incest relationship, already begun before one of the partners has attained the age of consent, that the victim frequently may not make known, even after attaining the age of consent, his or her rejection of the undesired sexual intercourse due to dependencies in the family, so that a punishment based on sexual coercion must be taken into account and therefore Section 173 StGB must enable a punishment¹⁰³; this does not, nevertheless, legitimate punishment of *any and all* consensual incest – and certainly not that of the “victim.”¹⁰⁴ Dependencies of lesser grade could not suffice for a punishment, especially as long-lasting sexual relationships can also produce dependencies (understandably not punishable ones). Even Section 173 StGB does not require that the incest relationship has begun before the attainment of one partner’s age of consent.¹⁰⁵

Additionally, Section 173 StGB would not be able to realize the protection of sexual self-determination in a truly effective manner since only sexual intercourse is penalized – but not other sexual acts and sexual violations, which can be equally

102 Cf. Roxin 2009, 547.

103 Cf. BVerfG, 2 BvR 392/07, para. 48.

104 Cf. the dissenting opinion of Judge Hassemer in BVerfG, 2 BvR 392/07, para. 87.

105 Cf. Roxin 2009, 547.

traumatizing. Moreover, other sexual acts between same-sex family members¹⁰⁶ are not covered by the criminal provision in any case. By limiting the criminal provision to sexual intercourse, sexual modes of behaviour are indirectly accepted that may equally impact the protection of the family and sexual self-determination. For this reason, the protective standard itself effectively concedes its own irrelevance.¹⁰⁷

Critics of the criminal provision additionally point out that the incest debate is especially prone to conflict because it is broadly equated with the debate over sexual abuse or, respectively, that sexual abuse is usually conceived as part of the issue.¹⁰⁸ The debate around incest is almost always related to facts in which offences pursuant to Sections 174 ff. StGB also play a role. The empirical research concerning solely the elements of the offence associated with Section 173 StGB is sparse because the existing studies¹⁰⁹ refer overwhelmingly to abuse in the family.

By contrast, others doubt that the provisions of Sections 174 ff. StGB alone adequately guarantee the protection of sexual self-determination from violations within the dependencies caused by familial proximity or taking root in kinship. Here it is a question of whether the exploitative situation or lacking self-determination relevant for application of Section 182 StGB in the case of an incestuous act of sexual intercourse with an under-16-year-old can be sufficiently grounded

106 Since only vaginal intercourse between a man and woman is covered by Section 173 StGB.

107 Cf. Roxin 2009, 548.

108 Cf. Albrecht 2012, 2.

109 Cf. Albrecht 2012, 7.

solely by reference to the family dependency.¹¹⁰ Furthermore, it is pointed out that the group between 16 and 18 years of age would not be protected in the event that the voluntariness of the relationship is only a semblance. Against this it is countered that the provisions of Sections 174 ff. StGB refer in a quite differentiated manner to varying forms of dependent relations among sexual contacts. Even cases of “forced voluntariness” could be punished under the framework of provisions for Sections 174 ff. StGB.

In the social-sciences discussion regarding self-determination within incestuous relationships, it is emphasized that certain constellations of roles and family-based relational situations can limit or complicate self-determination, or make it impossible. These aspects are also discussed in cases of consensually incestuous sexual intercourse, because even a relationship felt to be consensual need not in every case be free from pressure or a feeling of obligation.¹¹¹ At the centre of the argumentation stands the special quality of familial relationships. These are “unbreakable” and therefore contain a special risk potential for psychic duress. Some authors speak of the family relationship’s “inescapability,”¹¹² although this is increasingly losing its weight as an argument given the modern development of the family and the increasing dissolution of the nuclear family in favour of so-called *modified extended families*¹¹³;

110 In Kanwischer’s view, sexual self-determination is the sole possible protected good of Section 173 StGB and that with the intention of preventing the exploitation of a dependency relation produced by and continuing within the family. He leaves open, however, whether this protected good is not already adequately protected through Section 174 StGB. The legislature is supposed to examine this. Should the legislature come to the conclusion that Section 174 StGB is adequate, then Section 173 StGB ought to be deleted. Otherwise, a supplement to Section 174 StGB or a correspondingly recast Section 173 StGB ought to be considered. In the process, the element of the offence of consanguinity should then be struck and the limitation of the criminal act to sexual intercourse lifted. Instead, it should be applied to the family context and any kind of sexual intercourse should be included as the criminal act (cf. Kanwischer 2013, 179).

111 Cf. Bramberger 2012.

112 Cf. among others BVerfG, 2 BvR 392/07, para. 27.

113 For the first use of the concept, cf. Gordon 1972.

that is, familial networks among sometimes prematurely separated living-situations and often with important non-familial relationships to others. Essentially this concerns – so it is stressed – the protection of minors, who could find themselves exposed to psychological pressures not to contradict an older sibling. Here, the distinction between an actual mutuality and a supposed one, expressed out of a pressure to conform or from shame, can become especially complicated.¹¹⁴ Whether this justifies a special criminal offence provision, however, which goes beyond the elements of the offenses formulated in Sections 176, 176a StGB for sexual acts on under-14-year-olds and in Section 182 StGB for sexual acts on 14- to 18-year-olds by taking advantage of an exploitative situation, is not stated.

Against the special criminal liability for a consensual incestuous relationship with a minor above and beyond those criminal offence conditions regulated in Sections 176, 176a and 182 StGB, it is argued that family relationships do not necessarily possess a greater weight for a child or juvenile than certain extra-familial ones, such as those to teachers or child-care workers. The imposition of a sexual act results in both cases through exploitation of an existing dependency within an existing trust-relation; it represents a serious criminal act; and for victims it can lead to severe psychological impairments, as well as being chronic and personality-changing. Impairments cited, among others, are eating disorders; post-traumatic stress disorder; as well as anxiety and affective disorders.

The question of sibling incest and self-determination is also discussed in the literature on family counselling only in the area of childhood and adolescence. In doing so, three forms are differentiated for sibling incest under 18 years of age:

- >> “sexual assault” of prepubescent children on siblings of the same age or younger,

114 Cf. Bramberger 2012.

- >> “caring-affectionate incest,” which frequently begins consensually and entails mutual loyalty and elements of erotic joy and curiosity, but later may also turn into compulsion and violence, and
- >> “power-oriented incest [...] with sadistic and exploitative traits,” which concerns a form of sexual violence.¹¹⁵

While the first and third forms of juvenile sibling incest clearly fall into the area of heteronomy and the bare exercise of force, the second poses the question of a possible subtle psychic compulsion and of the ambivalence of actual or supposed mutual consent among the participants. In this respect, the spectrum is not fundamentally different from the possible constellations of sexual activities between minors outside of the family. Here as well, there are clear-cut cases in which a superiority or an exploitative situation are taken advantage of, and those in which this may be in question and where legal practice in the framework of the assessment pursuant to Sections 176, 176a und 182 StGB can factor in this differentiation.

Among siblings of the age of consent, the question of possible psychic compulsion is posed differently. Here as well, the mutual consent could be subject to psychic compulsions that the concerned person does not perceive him or herself, but which are later felt in retrospection as compulsion or exercise of violence. Without being able to refute this objection for each individual case, critics, nonetheless, estimate this risk among siblings of the age of consent to be very low and basically indistinct from the risk of supposed mutual consent within non-familial relationships. In the case of those who have grown apart, any compulsion-creating family ties are as a rule of little effect.

In the case of siblings growing up together or in that of parent-child acts of incest where the younger partner is over 18 years old, it would have to be assumed that each person retains the capacity for judgment, however individually differentiated.

¹¹⁵ Cf. Schwager 2005, 9.

For cases in which the incest has begun at an age under 18 years – but no complaint has been lodged during this time – and then continued after reaching 18 years of age, special difficulties may exist among both partners to express rejection or to acknowledge the rejection of the other. Nevertheless, this could not justify its own criminal offence, whereby for the person pressing charges it would in this case concern not the offence of incest, but rather lack of volition. It would be conceivable, however, that a distinct criminal liability for incest might impede filing a complaint in such cases because the elements associated with an incest offence are inflected by shame more than an offence based on compulsion.¹¹⁶

5.5 Maintenance of a socially anchored conviction concerning the merit of punishment for incest and of a socially prevailing taboo through the criminal provision of Section 173 StGB

The question is ultimately whether flanking or in place of the penal grounds outlined, if these cannot be viewed as sustainable, the maintenance of a socially anchored conviction concerning the merits of punishment for incest or the protection of a socially recognized taboo are adequate as punitive rational. Indeed, many have critically remarked that no good reasons exist or have existed for the introduction of a *criminal provision* for the prevention of incest; or that in any case the concrete *design* of Section 173 StGB is unsatisfactory. At the same time, they also point out that an *abrogation* of the provision, now that it exists, could send society a false signal. After all, intra-familial conflicts through consensual incest relationships may not be dismissed out of hand, nor may hidden dependencies be excluded between the family members concerned.

¹¹⁶ Cf. Sebo 2006, 53.

Therefore, the state should not send society a false signal by lifting Section 173 StGB.

For an appraisal of this position, one first needs to examine to what extent the conviction concerning the merits of punishment for incest is anchored in society, as the Federal Constitutional Court states.¹¹⁷ At least in the press reports and commentaries on the Federal Constitutional Court's decision, no pressing tendency towards punishment or satisfaction about the decision was recognizable¹¹⁸; rather, compassion could be read for the concerned siblings, who had grown up under the most difficult circumstances; understanding for their intimate relationship, which had emerged out of inner isolation and provided support and a feeling of security; and unease regarding the four-time father's several years of imprisonment and regarding the family being destroyed through the imprisonment. In Jonathan Haidt's experiment, it is a question of incest between siblings who have grown up together and who are aware of their kinship relation (cf. chapter 4.4). Possibly these are essential factors for the intuitive moral condemnation – factors that were not given in the case underlying the Federal Constitutional Court's decision. But even should an expectation of punishment clearly be anchored in society, it remains to scrutinize whether it needs to be settled through a legal punitive reinforcement.

Basic statements from the fields of sociology and psychology regarding incest (cf. chapter 4.3) are largely in agreement that the incest inhibition is constituted through early proximity in the family and early family bonding experiences. If these do not exist due to early separation of the family or for other reasons, the inhibition is reduced or even absent, and other factors such as *genetic sexual attraction* may come into play. The effectiveness of the incest taboo evolves out of experiences and perceptions stamped in childhood, and less from the moral condemnation associated with the taboo or the threat

117 Cf. BVerfG, 2 BvR 392/07, para. 50.

118 Cf. Roxin 2009, 545, 549.

of ostracism or apparently even less so from the punitive reinforcement, as the lack of increase in incest shows in states where no criminal liability exists.

Nevertheless, some of the authors claim quite generally that a social agreement that settles into a taboo ought to be detectable in the rules, as well as the laws, with which a community provides itself. Yet, one might ask whether this is supposed to occur on the grounds that it strengthens or provides a lasting reminder about the taboo, so that otherwise the risk of a weakening would be threatened, or whether reasons of self-reassurance speak in favour of it. In addition, other strong taboos, such as that of not eating human flesh, preserve their strength without legal regulation. Should the criminal provision for incest fall, those who argue for its maintenance are still sure that this would not lead to an increase in incestuous relationships and assaults.¹¹⁹ The taboo would retain its effect even without the criminal provision so that against this background there is no need for a criminal provision for the maintenance of social awareness concerning the value of the family and its fabric of roles.

Nevertheless, in the discussion specific to the incest prohibition, it is occasionally feared that abolishing Section 173 StGB could lead to a false signal in the public sphere; to a de-tabooing of incest; and to the loss of a positive general preventative measure against acts of incest. Adultery, which was punishable earlier, and consensual homosexual activities, which were likewise punishable previously, no longer represent a breaking of taboo. Currently, however, a similar de-tabooing of incest does not exist, and it should also not be the case. Against this it may especially be argued that neither the earlier prohibition against homosexuality hindered it, nor has today's lack of criminal liability and social de-tabooing increased its frequency. A generally preventative effect of the earlier Section 175 StGB was indeed repeatedly claimed, but could not be demonstrated. Equally, a generally preventative effect for Section 173 StGB in

119 Cf. Jarzebowski 2012.

relation to incest is not provable. The experiences from those states in which a comparable criminal provision is not in force also speak against the generally preventative effect of a criminal offence for incest. The experiences outlined in the individual cases described to the German Ethics Council further point in this direction, that the threat of punishment had neither a preventative nor a norm-clarifying effect. It can therefore be assumed that neither a weakening of the taboo nor an increase in acts of incest is tied to a lifting of the proscription, let alone is there any encouragement towards such acts or even a generalized process of destabilization to be expected.

The lifting of the taboo is also not the goal of the critics of Section 173 StGB, as the critical points elaborated in this opinion show. The taboo is constituted, rather, as inspection of the social-scientific and psychological theory-formation shows, on the basis of early socialization experiences of proximity and attachment. Nevertheless, a critical and rational examination of the taboo, in particular its absoluteness, is equally appropriate to a society with a pluralistic value system as is an eschewal of the hostility towards discussion that regularly accompanies the taboo. The discussion needs to be conducted across the varying values and evaluations that stand behind the taboo. In doing so, a differentiation between, on the one hand, indisputable values (such as the protection of minors against sexual assaults and the exploitation of dependency) and, on the other, non-agreed upon values (such as the criminal liability for consensual sexuality among consanguine relatives) is needed. Critics also point out that the further maintenance, supported by the general taboo, of criminal liability for consensual incest among persons capable of sexual self-determination would be inconsistent with the social conception of sexual freedom and self-determination. In no other context would entering into a voluntary sexual relationship between persons capable of self-determination be regulated through state conditions or prohibitions.¹²⁰

120 Cf. Sebo 2006.

6 CONCLUSIONS AND RECOMMENDATIONS

Under the concept of incest, different types of acts are assembled together, subject to varying moral and criminal evaluations. Thus, consensual acts of incest between adult siblings are to be differentiated from those in which at least one of the partners is still underage. For both constellations of cases, it is also significant whether or not the sexual partners belong to a still actually lived set of family bonds. Fundamentally different to judge, namely as harms to considerably more weighty protective norms, are incest cases that display abuse, coercion, rape or the taking advantage of an exploitative situation and hence satisfy the elements of offence necessary for a crime against sexual self-determination pursuant to Sections 174 ff. StGB. Such sexual crimes are not the subject of the present opinion. The same applies to acts of incest by parents on their underage natural or adopted children, which is penalized under Section 174 (1) No. 3 StGB.

The majority of the German Ethics Council is of the opinion that in the case of consensual acts of incest among adult siblings, neither the fear of negative consequences to the family, nor the possibility of the birth of children from such incest relationships can justify a criminalized prohibition of these relationships. It is indeed right and beyond dispute that the primary protective goal of Section 173 StGB is the institution of the family. In those instances, however, when the personal responsibility and self-determination of adult sexual partners cannot be doubted and they live outside a family of origin, the threat of punishment reaches beyond the boundaries of this provision's objective. Then again, it also needs to be borne in mind that Section 173 StGB only covers vaginal intercourse between consanguine relatives, while in contrast other sexual activities with on occasion equal impacts for the family, such

as anal intercourse or same-sex relationships between consanguine relatives, remain exempt from punishment.

The criminal prohibition of consensual sexual relationships signifies a deep intrusion into sexual self-determination. Such sexual relationships belong to the core of an individual's ability to shape one's own life. The state should only intervene with criminal prohibitions in this innermost sphere of the person when it concerns acts that threaten or harm the personal rights of a third person. This is evident for all cases of "Offences against sexual self-determination" (Sections 174 ff. StGB). In particular, the sexual abuse of children; abuse of juveniles; taking advantage of relations of dependency, of an exploitative situation or of lacking sexual self-determination; as well as sexual coercion and rape are penalized. This is of course also valid for sexual acts between consanguine relatives. Their legally due protection against incestuous sexual crimes is thereby ensured as well.

Yet, above and beyond this protection guaranteed by individual basic rights, the institution of the family, as protected under Article 6 GG, comprises at the same time a space of constitutional guarantees for the specific roles that are typically adopted by the members of a family. By this, actual life-circumstances are evidently denoted. By contrast, the nexus of norms from family law, which gives these circumstances their legal form, does not belong to this understanding.

From this, consequences emerge for the breadth of the requisite protection under criminal law. Criminal law, as the severest instrument of state intervention into constitutional areas of freedom, may not be deployed for the protection of merely symbolic abstractions, such as the purely legal composition of the family in its internal role-structure. Criminal liability for acts of incest can only be justified by their aptitude to harm an actually existing set of family bonds and the roles lived within this family. Criminal law's object of protection for the institution of the family are the family members in their real needs and interests within the common life of the family, not mere legally-existent kinship relationships.

Precisely against this background, it needs to be kept in mind that Section 173 StGB also encroaches on lived family relationships. This happens, for example, through the threat of punishment and prosecution of existing families in which the couples only learn that they are siblings after starting a family.

The majority of the German Ethics Council also does not regard criminal law as an appropriate means to protect a social taboo. The protection of a third party's moral sensitivity and feelings of aversion or those of the majority in society alone cannot justify threats of punishment as serious intrusions into the personal basic rights of others. In a liberal order in accordance with the rule of law, such as that of the Basic Law, narrow boundaries are set on the protection of emotions via criminal law. Criminal law does not have the task of enforcing moral standards or limits for sexual intercourse among citizens of legal age. It does have the mission of protecting the individual from damages and gross harassment, as well as the social order in society from disturbances. Not among its tasks, however, is preserving the "normal sensibility," even of the large majority, from any and all moderate imposition where one perceives that one's own measures of sexual normalcy are not shared by everyone else.

Against this background, the majority of the German Ethics Council recommends a revision of Section 173 StGB with reference to sibling incest.

a) The penalization of consensual incest among adult (over 18 years old) siblings should be dispensed with.

Rationale:

The protected good of Section 173 StGB recognized as central in current discussion is the family in the reality of its actually lived relationships and its members' intra-familial roles that are constitutive for it. This protected good is indeed definitely affected when the partners of a sibling incest relationship are

already of legal age insofar as they still live together in an actual set of family bonds and at least with one further member of their family of origin. Nevertheless, in these cases the already grown siblings' important basic right to sexual self-determination, which is constitutive for the personality, predominates.

This recommendation does not touch upon the question, to what extent criminal liability for consensual sexual intercourse between natural, majority-age relatives of ascending or descending line should be lifted. Cases of consensual acts of incest that span generations are to be evaluated differently since the significance of the relationship of generations to one another is different from the relationship between siblings. These constellations are not discussed further here.

b) Furthermore, criminal liability for consensual sexual intercourse among siblings should be lifted if one of the partners is over 14 years old, but not yet 18 and the siblings either respectively do not live together in a set of family bonds or have not done so for sufficiently long time and the prospective restoration of such a set of bonds is not to be expected according to objective judgment.

By contrast, the relevant criminal liability for the adult partner in consensual sexual intercourse among siblings should be maintained if the other partner is under 18 years old and the siblings actually live together in a set of family bonds. The criminal liability in these cases should cover not only sexual intercourse, but also other sexual acts of considerable weight.

Rationale:

If a set of family bonds lived in practice does not (any longer) exist, then the protected good, which is given only in and through its existence, evidently can no longer be attacked. Therefore, it should then also no longer be classified as the object of a legal protection reinforced by punishment. Consensual incest relationships by siblings who are not connected in

lived practice, but rather only through legal formality or consanguinity, should therefore also remain exempt from punishment if one of the partners is over 14 years old, but not yet 18, insofar as no doubt exists concerning his or her capacity for autonomous sexual self-determination. The fact that two people are siblings should not lead in these cases to their sexual intercourse being handled differently under criminal law than sexual intercourse among people who are not related. Criminal liability for a breach of the provisions concerning protection of sexual self-determination (Sections 174 ff. StGB) naturally remains inviolate.

How the distinction concerning an “actually lived set of family bonds” would more precisely be defined in a possible amendment of Section 173 StGB remains the business of the legislature. Undoubtedly the factual specification of the elements of the offence is conceivable in different forms that would be readily adequate for the constitutional requirement of certainty for criminal provisions. It would be equally unproblematic to leave to future case law the concretization of the distinction without additional measures regarding the elements. As well, the exact determination of the length of time that should have passed after the dissolution of a formerly existing set of family bonds so that an “adequately long non-continuance” of this set of bonds can be assumed, is the business of the legislature.

By contrast, it appears justifiable in legal-ethical terms, as well as constitutionally, to judge the protected good of the family as of more weight and hence prior in rank to individual rights to freedom when one of the siblings is not yet 18 years old and both still live together. Such a set of family bonds can be harmed not only through sexual intercourse, but also through other sexual activities of considerable weight.

A revision to Section 173 StGB in the suggested manner requires no concrete injury to the family; rather it would already allow the risk of such an injury to suffice. That provides the provision the character of a so-called abstract crime of

endangerment, whose protected good is solely the actually lived set of family bonds. The threat of punishment is “abstract” in the formal sense of the system of criminal law; for the facts required for an offence as formulated according to the above measures contains no feature of a concrete injury that would be a precondition for criminal liability. Abstract crimes of endangerment must be closely tailored, and the assumption of an abstract danger needs to be well-grounded. Such provisions have consistently settled in the border area of due-process-based legitimacy, since they threaten modes of behaviour that in individual cases may be entirely non-risky for the protected legal good. Typical constellations in which such a danger is generally excluded should thus not be covered. For the reasons adduced above, to be counted among these should be sibling incest relationships that occur outside of a lived set of family bonds.

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7 DISSENTING VOTE

We cannot join the majority vote. In part, the critical analysis of the regulatory concept behind Section 173 StGB indeed merits approval (I.); however, the claim to validity of the criminal provision may be legitimated – despite the argument laid out above – with the protection of the family and its central socialization function (II. and III.). Complementing this, a pre- and post-operative protection of self-determination may be added (IV.). An alteration restricting punishment or even an abrogation of the provision would be an irritating signal that is apt to relativize and weaken the protected good, which is ethically as well as constitutionally grounded (V.).

I. The universal incest prohibition is reinforced by punishment in numerous states. In the legally comparative advisory opinion prepared by the Max Planck Institute for Foreign and International Criminal Law for the proceedings before the Federal Constitutional Court, the authors come to the conclusion that in 13 out of 20 countries examined, mutually agreed upon incestuous sexual activities between adults are punishable.¹²¹ Germany also counts among these. In this regard, provision Section 173 StGB as currently valid stands in a long line of tradition.¹²² However, this should not disguise the fact that both the merits of punishing such behaviour and the argumentative support for such have been greatly disputed since the time of the Enlightenment. These debates persist today and have reached, for the time being, their high point in the two proceedings before the Federal Constitutional Court and the European Court of Human Rights.

The majority vote deals extensively with the criminal elements of the offence and the arguments adduced for its justification. In part, the critical analysis merits approval. This is

121 Cf. Albrecht/Sieber 2007, 28 ff.

122 Additionally, cf. for example Schramm 2011, 404 ff.

initially valid insofar as the fragmentary/inconsistent structure of the offence in Section 173 StGB is explicated as questionable; however, it is now plain to see that the counter-argument suggested by the representatives of the majority vote amounts to a further fragmentation of the criminal provision. Also, some of the lines of argument brought forward for defence of the provision can be rejected in accordance with the majority vote. Namely “genetic aspects”¹²³ – taken as a supplementary argument by the Federal Constitutional Court¹²⁴ – cannot (and should not) deserve any acceptance given the standing of the Basic Law as an inclusive human rights regime.

II. Nonetheless, a basis, ethically and constitutionally sound in equal measure, can be given for the criminal provision’s claim to validity: the central protected good of Section 173 StGB is the family in its elementary socialization function; more precisely: the integrity and incompatibility of different familial roles as (an important) precondition to a successful personality development.

1. As interpretive aspects regarding its historical origins and grammatical structure reveal, the criminal provision of Section 173 StGB finds its crucial basis for legitimation in the protection of the family as a central social institution in which essential parts of individuals’ identity-forming socialization occur and which – even for adult family members – constitutes a social proximity that follows other rules and expectations than (competitive) society in general. The family, as an institution understood in this way, is more than the sum of single relationship patterns (parent-child relationships, sibling relationships, etc.) within the family system. The core of Section 173 StGB that even today is to be convincingly deduced in

123 Thus the terminology in the official rationale for the draft law of 1973 (BT-Drs. 6/3521).

124 Cf. BVerfG, 2 BvR 392/07, para. 49: “The supplementary citing of this aspect to justify the criminal liability for incest is not therefore excluded because it was misused historically for the deprivation of rights of people with inherited illnesses and disabilities.”

ethical terms as well as in those of theories of freedom consists in the protection of the family and in the safeguarding of the incompatibility of different roles in the set of family bonds.

An essential task of the family is to constitute and shape a form of life for reliable relationships between generations and sexes. Then again, the fulfilment of this task is the precondition for the realization of certain familial “services,” particularly the development of individual and collective identity.¹²⁵ The internal family relationships are specifically stamped through elements of reciprocity or complementarity, but also through the degree of intimacy. The respective “relationship histories” are coupled with different roles and functions.¹²⁶ Incest means simultaneously a doubling of roles and a “fragmentation of familial structures.”¹²⁷ Yet, the conditions for validity in fulfilling familial tasks or, respectively, services – sketched above – are thereby fundamentally thrown into question. To ward off this risk is the central concern of the criminal provision of Section 173 StGB.

2. The protective goal of the provision and its basis for validity are not put into question when Section 173 StGB, with its fragmentary composition, does not cover sundry constellations which are equally marked by a dysfunctional diffusion of roles. This applies, for example, to incestuous relationships within a foster family or in “part-families” living together as “whole-families.” Sexual practices other than vaginal sexual intercourse also remain ignored. To that extent, Section 173 StGB may indeed not deploy a protective effect on the basis of its version of text; yet in all other respects this leaves its protective function unaffected. In any case, the fragmentary version of the elements of the offence does not permit the conclusion that Section 173 StGB is not tailored to protection of the family.

125 On the differentiation of the family's tasks and services, cf. for example Schneewind 2010, 132.

126 Cf. Gloger-Tippelt 2007.

127 Löhnig 2010.

III. Now it may be objected vis-à-vis the position developed here that in any case the protection of the family could then not be adduced as the penal statute's basis for legitimation, if an incestuous relationship outside of existing or respectively lived family structures is established.¹²⁸ In fact, an important aspect of the discussion is thereby pointed out. However, from our perspective it appears to indicate the need to differentiate two levels of the argument: In an exclusively individual-specific evaluation, a consensual incest-relationship outside of a set of family bonds lived in practice can possibly be qualified as "non-reprehensible."¹²⁹ On the other hand, the concrete "role-diffusion" in practice can also be interpreted as a putting into question in principle of the general norm – namely: the integrity and incompatibility of different family roles. Here the task can be assigned to law of maintaining the significance of the norm in general consciousness.¹³⁰

Incidentally, it signifies a problematic reduction when the majority vote wants to recognize solely the "lived in practice" or respectively the "actually lived set of family bonds" as the legitimate protected good of Section 173 StGB (and at the same time to place this at the disposal of the participants as soon as these have completed the 18th year of life).

IV. Section 173 StGB is also able to deploy a *supplementary protective function* for the benefit of sexual self-determination. In the process here it is not a matter of the catch-all function mentioned by the Federal Constitutional Court¹³¹, but rather of how the criminal liability of consensual incest between adults can to a certain extent produce *pre- and post-operative protection of self-determination*: (1) By way of example, it signals to the father or to the older brother that his possible incestuous relationship to his 16-year-old daughter or sister cannot be converted into a legal one with the passage of time (the

128 Additionally, cf. the majority vote, chapter 5.1.

129 Additionally, cf. the majority vote, chapter 4.2.

130 Additionally, cf. generally in other context BVerfG, 2 BvF 2/90, para. 173.

131 Cf. BVerfG, 2 BvR 392/07, para. 48.

completion of the 18th year of life). (2) And it strengthens the position of the daughter or sister if she wishes to end the incestuous relationship after attaining the age of majority. A range of studies concerning sibling incest argue that the brothers are not infrequently considerably older than the sisters, the which increases the danger of the formally consensual incest behaviour being moulded by “direction of the other.”¹³²

V. The representatives of the dissenting vote evaluate the family-protective function of Section 173 StGB, outlined above (III.), as constitutionally legitimate and ethically important. Legal-political considerations concerning alteration or abrogation of the provision are, therefore, to be carefully weighed while taking into consideration possible repercussions. Just as the existence of (penal) legal norms can deploy a behaviour-stabilizing effect, so too, conversely, their lifting or modification can unleash or strengthen a process of destabilization. The symbolic meaning of a respective legislative act as a prominent form of the expression of popular sovereignty should not be underestimated.

In our opinion, an alteration of Section 173 StGB restricting criminal liability would send an irritating signal. Such a decision would – this is perfectly indisputable – bear on a topic of taboo, which requires of politics a special measure of sensitivity to context. Against this background, the legislature may and ought to consider conceivable risks for the integrity of the family structure as especially serious in its calculation of consequences. Besides this, the assumption does not lie far off that suggestions for alteration, as formulated in the majority vote, may trigger demands for still further reaching interventions. The representatives of the majority vote themselves already mention such future topics.

The representatives of the position adopted here do not mistake that through the application of Section 173 StGB, some couples fall (or have fallen) into a tragic life-situation.

132 Cf. *ibid.*, para. 47 f.

Yet, constellations such as those described in the majority vote can possibly – without legislative intervention – be afforded adequate reckoning in the process of the application of law. A teleological reduction of the provision is to be considered, coupled with a waiving of the initiation of prosecutorial investigation proceedings or with a termination of the proceedings.¹³³

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133 On the possibilities of a teleological reduction of the provision, see, for example, Kubiciel 2012, 288 and Hörnle 2008, 2087. On the arrangement of the criminal process to avoid criminal liability, cf. also BVerfG, 2 BvL 43/92.

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ABBREVIATIONS

BGB	Bürgerliches Gesetzbuch (Civil Code)
BGBI.	Bundesgesetzblatt (Federal Law Gazette)
BGH	Bundesgerichtshof (Federal Court of Justice)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Decisions of the Federal Court of Justice in Criminal Cases)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the Federal Court of Justice in Civil Cases)
BT-Drs.	Bundestagsdrucksache (Bundestag printed paper)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Decisions of the Federal Constitutional Court)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GBl.	Gesetzblatt (Law Gazette)
GG	Grundgesetz (Basic Law)
No.	Number
Para.	Paragraph*
RStG	Reichsstrafgesetzbuch (Criminal Code of the German Empire)
StGB	Strafgesetzbuch (Criminal Code)

(* Translator's note: In the original German citations, "Rn." [*Randnummer*, or literally "number on the margin"] refers to the practice of numbering paragraphs in the margin of many German legal opinions. Here, "Rn." is translated as "para.")

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