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**Amnesty Legislation in Germany after 1945 – model for times  
of upheaval?**

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## I. Introduction

In 1945, Germany suffered a military and political, as well as moral, breakdown. As it had no international representation, it was even unable to conclude a peace treaty. The whole country was governed by the Allies. Indeed, after its unconditional surrender on 8 May 1945, the country remained divided for a further forty-five years – until the Two Plus Four Agreement was concluded in 1990, which reunited eastern and western Germany. In contrast to the aftermath of the First World War,<sup>1</sup> war crimes were prosecuted after the Second World War by the Nuremberg International Military Tribunal.<sup>2</sup> Furthermore, around 5,000 people were accused of war crimes in the three western occupation zones. This resulted in 668 death sentences being handed down by military tribunals – 486 of which were carried out.<sup>3</sup>

In this context, the Allies did not distinguish between people and elite. The whole German nation was assumed to have taken part in the Nazi crimes or, at least, to have helped to commit them. Every German should therefore undergo a trial by a denazification tribunal. But the denazification programme soon started to decrease in intensity and most people were categorised as “follower” or “not charged”. Less than three percent of the population were classified as “main culprit” or “charged”. However, the Allies temporarily arrested hundreds of thousands of functionaries of the NSDAP and SS members.<sup>4</sup> They also adjusted the civil service by dismissing suspicious employees and even froze their assets.<sup>5</sup> These measures were only provisional, but were nevertheless quite successful. In the end, denazification and rehabilitation did of course merge, which writers today call a “successful failure”.<sup>6</sup>

It is important to mention that Germany did not try to forget about what happened, but, rather, to keep it in mind. The global context shows that this is a distinctly novel approach: further crimes are to be prevented, not by oblivion, but, rather, by remembrance (*Erinnerungskultur*). However, such remembrance did not begin straight after the Second World War. People only slowly started to remember the persecution and assassination of European Jews in the late 1950s. Trials were initiated

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<sup>1</sup> Gerd Hankel, Die Leipziger Kriegsverbrecherprozesse nach dem Ersten Weltkrieg, in: Martin Löhnig/Mareike Preisner/Thomas Schlemmer (Ed.), Krieg und Recht: Die Ausdifferenzierung des Rechts von der ersten Haager Friedenskonferenz bis heute, Regensburg 2014 (= Rechtskultur Wissenschaft Volume 16), p. 25 ss.

<sup>2</sup> On this, see: Christoph Safferling, Der Nürnberger Prozeß, in: Martin Löhnig/Mareike Preisner/Thomas Schlemmer (Ed.), Krieg und Recht: Die Ausdifferenzierung des Rechts von der ersten Haager Friedenskonferenz bis heute, Regensburg 2014 (= Rechtskultur Wissenschaft Volume 16), p. 87 ss.

<sup>3</sup> Yvonne Hötzel, Debatten um die Todesstrafe in der Bundesrepublik Deutschland von 1949 bis 1990, Berlin 2010, p. 15.

<sup>4</sup> Norbert Frei, Amnestiepolitik in den Bonner Anfangsjahren. Die Westdeutschen und die NS- Vergangenheit, in: Kritische Justiz 1996, p. 484 ss., p. 486.

<sup>5</sup> Norbert Frei, Amnestiepolitik in den Bonner Anfangsjahren. Die Westdeutschen und die NS- Vergangenheit, in: Kritische Justiz 1996, p. 484 ss., p. 486.

<sup>6</sup> Thomas Schlemmer, Ein gelungener Fehlschlag? Die Geschichte der Entnazifizierung nach 1945, in: Martin Löhnig (Ed.), Zwischenzeit: Rechtsgeschichte der Besatzungsjahre, Regensburg 2011 (= Rechtskultur Wissenschaft Volume 2), p. 9 ss.

only reluctantly. For example: The Ulm Einsatzkommando Trial in 1958,<sup>7</sup> and the Frankfurt Auschwitz Trials in the 1960s.<sup>8</sup> Both were highly criticised by jurists and society. It was only in the 1970s that a definite shift of opinion began to take place. On the other hand, the culprits have never been amnestied, because amnesty laws from 1949 and 1954 only had limited effects. There have been criminal proceedings against living Nazi-perpetrators recently.<sup>9</sup> What started as an agreement to keep forgetting slowly turned into a memorial culture, which is at least supported by most people in former West Germany. People from the GDR, by contrast were not involved in building up that culture and have therefore a surprisingly uninterrupted relationship to the Nazi era.

## II. The Amnesty Law of 31 December 1949 (StFG 1949)

### 1. “The History of Suffering of the German People”

“At the beginning there was...the idea of amnesty.”<sup>10</sup> This is how the historian Norbert Frei rightly describes the policy of the past in early the Federal Republic of Germany. The amnesty law (*Straffreiheitsgesetz*, StFG 1949), which came into force on 31 December 1949, was one of the first legislative actions of the German Bundestag.<sup>11</sup> However, even before this (i.e. between 1945 and 1949), amnesties had been passed in some federal states of the western occupation zones.<sup>12</sup>

The amnesty project, as a sign of the state’s new start, was socially, as well as politically, controversial. After the “confusion of the recent years,”<sup>13</sup> these so-called “apocalyptic years”,<sup>14</sup> were meant to be brought to an end. However not the merely unthinkable German crimes were meant by that, but the needs of the population in the subsequent period of occupation. Politicians complained about “the history of suffering of the German people”,<sup>15</sup> who, after a bombing campaign, exodus, and expulsion, also had to bear occupation and denazification. Amnesty could appear as a symbolic

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<sup>7</sup> See Claudia Fröhlich, der “Ulmer Einsatzgruppenprozeß“ 1958. Die Wahrnehmung des ersten großen Holocaust-Prozesses als rechtsgeschichtliche Zäsur, in: Martin Löhnig/Mareike Preisner/Thomas Schlemmer (Ed.), *Krieg und Recht: Die Ausdifferenzierung des Rechts von der ersten Haager Friedenskonferenz bis heute*, Regenstauf 2014 (= Rechtskultur Wissenschaft Volume 16), p. 99 ss.; Tonio Walter, *Der Ulmer Einsatzgruppen-Prozeß – Eine Urteilsanalyse*, in: Martin Löhnig/Mareike Preisner/Thomas Schlemmer (Ed.), *Krieg und Recht: Die Ausdifferenzierung des Rechts von der ersten Haager Friedenskonferenz bis heute*, Regenstauf 2014 (= Rechtskultur Wissenschaft Volume 16), p. 123 ss.

<sup>8</sup> Andrea Löw, *Die “Stunde der Auseinandersetzung mit den deutschen Verbrechen“: Der erste Frankfurter Auschwitz-Prozeß*, in: Martin Löhnig/Mareike Preisner/Thomas Schlemmer (Ed.), *Krieg und Recht: Die Ausdifferenzierung des Rechts von der ersten Haager Friedenskonferenz bis heute*, Regenstauf 2014 (= Rechtskultur Wissenschaft Volume 16), p. 151 ss.

<sup>9</sup> See for example Rainer Volk, *Der Demjanjuk-Prozeß*, in: Martin Löhnig/Mareike Preisner/Thomas Schlemmer (Ed.), *Krieg und Recht: Die Ausdifferenzierung des Rechts von der ersten Haager Friedenskonferenz bis heute*, Regenstauf 2014 (= Rechtskultur Wissenschaft Volume 16), p. 165 ss.

<sup>10</sup> Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 29.

<sup>11</sup> BGBl. 1949 I p. 37.

<sup>12</sup> Johann-Georg Schätzler, *Handbuch des Gnadenrechts*, 2<sup>nd</sup> Edition, München 1992, p. 236.

<sup>13</sup> BT-Protokolle, 2.12.1949, Dehler (Minister of Justice), p. 574.

<sup>14</sup> BT-Protokolle, 2.12.1949, Wahl (CDU), p. 581.

<sup>15</sup> BT-Protokolle, 2.12.1949, Wahl (CDU), p. 581.

countermeasure “victor’s justice”<sup>16</sup> of the allies. Besides the discharge of the badly appointed and overworked German justice, which should have had sufficient capacities for the pursuit of serious (Nazi-) crimes, the aim was to strengthen the acceptance of the Germans for the new democracy.<sup>17</sup> Therefore especially the many black market and financial offences which, considering the precarious economic situation of many people, seem understandably, should be amnestied.<sup>18</sup>

## 2. Content of the StFG 1949 and Legal Problems

§ 2 I StFG 1949 ordered impunity for final custodial sentences of up to a maximum period of six months and for fines up to 5000 DM. Furthermore, § 3 I StFG 1949 ordered that all pending and future proceedings be closed, in which sentences in the same category were to be expected. As such, a procedural and implementation impediment was intended,<sup>19</sup> insofar as the perpetrator committed the crime before the date of 15 September 1949. So long as the criminal act did not include acquisitiveness, cruelty, or a dishonourable attitude, imprisonment for up to one year could also be amnestied, in accordance with § 2 II 2 StFG 1949. Regarding the interpretation of these terms – especially the idea of honour, which is subject to temporal change – the lawyers at the time pleaded for a generous interpretation, according to the *in dubio pro reo* principle.<sup>20</sup> Especially in political crimes, such as the Nazi-crimes present, a dishonourable attitude was rarely assumed.<sup>21</sup> Consequently, minor cases of homicide (a minimum sentence of 6 months) and physical injury with lethal consequence (a minimum sentence of 3 months) could be covered by § 2 StFG 1949.<sup>22</sup>

Regarding the legal reconditioning of the Nazi-injustice, §§ 9 and 10 StFG 1949 were of particular relevance. § 9 I and 2 StFG 1949 stipulated that “actions with a political basis, which were committed after the 8 May 1945 due to the special political circumstances of the last years”, were to be left unpunished, although this did not apply to crimes committed out of “acquisitiveness, cruelty, or dishonourable attitude” (§ 9 III StFG 1949).

In matter of fact, § 9 StFG 1949 was conceived for cases in which victims of National Socialism had taken post-war revenge against former Nazis.<sup>23</sup> However, due to the law’s deliberately neutral

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<sup>16</sup> BT-Protokolle, 2.12.1949, Wahl (CDU), p. 581; Norbert Frei, Amnestiepolitik in den Bonner Anfangsjahren. Die Westdeutschen und die NS-Vergangenheit, in: Kritische Justiz 1996, p. 484 ss, 489.

<sup>17</sup> Frank Süß, Studien zur Amnestiegesetzgebung, Berlin 2001, p. 237; Andreas Eichmüller, Keine Generalamnestie, München 2012, p. 37 and p. 41.

<sup>18</sup> BT-Protokolle, 2.12.1949, Reismann (Zentrum), p. 576; Torben Fischer/Matthias N. Lorenz (Ed.), Lexikon der “Vergangenheitsbewältigung“ in Deutschland, 3<sup>rd</sup> Edition, Bielefeld 2015, p. 99; Norbert Frei, Vergangenheitspolitik, München 2012, p. 39.

<sup>19</sup> Hansgeorg Birkhoff/Michael Lemke, Gnadenrecht, München 2012, p. 19, see rectical 52.

<sup>20</sup> Schmidt-Leichner, NJW 1950, p. 41 ss, p. 46; Seibert, NJW 1950, p. 173.

<sup>21</sup> OLG Hessen, NJW 1950, p. 476 ss, p. 477; Norbert Frei, Vergangenheitspolitik, München 2012, p. 49 s.

<sup>22</sup> Norbert Frei, Vergangenheitspolitik, München 2012, p. 52.

<sup>23</sup> Johann-Georg Schätzler, Handbuch des Gnadenrechts, 2<sup>nd</sup> Edition, München 1992, 244; Norbert Frei, Vergangenheitspolitik, München 2012, p. 41 and p. 48.

phrasing, impunity did not require any specific anti-Nazi attitude. Supporters of the regime, who had tried to influence their denazification trial (e.g. by committing perjury or bribing officials), benefited as well.<sup>24</sup> According to the widespread opinion in the legislative procedure, emphasizing subjective characteristics hinders an easy and generous application of the law, due to difficulties of gathering evidence in particular cases, particularly as the expression “political basis” of a crime seems very vague.<sup>25</sup> In addition, ethos characteristics as specific requirements of an offence as features of the Nazi-legislation were scorned. Furthermore, with reference to Art. 3 I of the Constitution, which lays down the equality of all citizens before the law, it was also seen as problematic to give preferential treatment, as it were, to some of the politically motivated crimes.<sup>26</sup>

Possible effects of the impunity law on the prosecution of Nazi-crimes had not been explicitly mentioned during the political debate.<sup>27</sup> The Minister of Justice, Dehler (FDP), did not mention this point in his parliamentary speech, even though he claimed to have brought up the major aspects of the law.<sup>28</sup> This conscious concealing of the law’s past policy consequences (*vergangenheitspolitische Konsequenzen*) is also explicable considering the involvement of other countries and the Allied High Commission, who still had to agree on the amnesty and did so despite concerns.<sup>29</sup>

§ 10 I StFG 1949 concerned politically motivated crimes “concealing the civil status”, which had been committed after 10 May 1945, regardless of their penal tariff. Accordingly, people had to voluntarily submit all required information about themselves before 31 May 1950, in order to end their existence as an “illegal”. Furthermore, no offence in the sense of §10 II StFG 1949 was allowed to be present, i.e. neither homicide nor an offence committed involving cruelty, a dishonourable attitude, or avarice. This regulation was designed for former Nazis, who had gotten a new identity in order to avoid possible prosecution or denazification.<sup>30</sup> The regulation included, in addition to forgery of documents or perjury (by using a false name in court), burglary or arson, in order to destroy or purloin personal files.<sup>31</sup> Termination of illegal existences was obviously not only in the interests of

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<sup>24</sup> Schmidt-Leichner, NJW 1950, p. 41, p. 44.

<sup>25</sup> BT-Protokolle, 2.12.1949, Dehler (minister of justice), p. 573 and Leibbrand (KPD), p. 580; BT-Protokolle, 9.12.1949, Kopf (CDU), p. 656 s.

<sup>26</sup> BT-Protokolle, 9.12.1949, Kopf (CDU), p. 656; Klaus Marxen, *Rechtliche Grenzen der Amnestie*, Heidelberg, 1984, p. 47 s.

<sup>27</sup> Andreas Eichmüller, *Keine Generalamnestie*, München 2012, p. 42; Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 38 s.

<sup>28</sup> BT-Protokolle, 2.12.1949, Dehler (minister of justice), p. 574.

<sup>29</sup> See Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 38 and p. 43 s.

<sup>30</sup> Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 38 and p. 51.

<sup>31</sup> Schmidt-Leichner, NJW 1950, p. 41, p. 44; Annette Weinke, *Die Verfolgung von NS-Tätern im geteilten Deutschland*, Paderborn u.a. 2002, p. 59.

the affected people themselves, who could return to a normal life, but also in the State's interest, to restore order and uniform registration of its citizens.<sup>32</sup>

### 3. The Impact of the StFG 1949

By 31 January 1951, exactly 792,176 people had profited from the first amnesty law – most from general amnesty introduced by § 2 StFG 1949.<sup>33</sup> Only 516 people benefitted from § 9 StFG 1949; § 10 StFG 1949 helped 241 of the estimated 80,000 suspected submerged people to legalise their status.<sup>34</sup> The minor effects of § 10 StFG 1949 can be explained by the fact that many “illegals” had established themselves well in their new livelihoods and many also feared being prosecuted for serious, non-amnesty-capable Nazi-acts.<sup>35</sup> However, this does not mean that the StFG 1949 would have only favoured a few Nazi-offenders. Many Nazi-motivated acts were already covered by the general impunity, so that §§ 9 and 10 StFG 1949, which were only applicable to post-war crimes anyway, only applied in very serious cases.<sup>36</sup> Altogether, the punishment exemption probably concerned tens of thousands Nazi-crimes.<sup>37</sup> Above all, however, hundreds of thousands of asset and black market offenses fell under § 2 StFG 1949.<sup>38</sup> In addition, the amnesty was also a political signal that Germans now wanted to determine for themselves the interpretation of their past and were also willing to answer the question of (collective) guilt in their favour.<sup>39</sup>

## III. The Amnesty Law of 17 July 1954

### 1. General Amnesty?

Despite the far-reaching effect of the first amnesty law, the possibility and necessity of a further impunity law was discussed in the Bundestag after the removal of some restrictions by the Allies and because of some continuing economic hardship.<sup>40</sup> Even many Jews living in Germany advocated a

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<sup>32</sup> Norbert Frei, Amnestiepolitik in den Bonner Anfangsjahren. Die Westdeutschen und die NS-Vergangenheit, in: Kritische Justiz 1996, p. 484 ss., p. 488.

<sup>33</sup> Johann-Georg Schätzler, Handbuch des Gnadenrechts, 2. Auflage, München 1992, p. 265; Norbert Frei, Vergangenheitspolitik, München 2012, p. 50.

<sup>34</sup> Norbert Frei, Vergangenheitspolitik, München 2012, p. 51; Peter Reichel, Vergangenheitsbewältigung in Deutschland, München 2001, p. 110.

<sup>35</sup> Peter Reichel, Vergangenheitsbewältigung in Deutschland, München 2001, p. 110; Norbert Frei, Amnestiepolitik in den Bonner Anfangsjahren. Die Westdeutschen und die NS- Vergangenheit, in: Kritische Justiz 1996, p. 484 ss., 489.

<sup>36</sup> Norbert Frei, Vergangenheitspolitik, München 2012, p. 51.

<sup>37</sup> Annette Weinke, Die Verfolgung von NS- Tätern im geteilten Deutschland, Paderborn et al. 2002, p. 59; Norbert Frei, Vergangenheitspolitik, München 2012, p. 52; lower number according to Andreas Eichmüller, Keine Generalamnestie, München 2012, p. 39.

<sup>38</sup> Norbert Frei, Vergangenheitspolitik, München 2012, p. 53; Peter Reichel, Vergangenheitsbewältigung in Deutschland, München 2001, p. 109.

<sup>39</sup> Vgl. Torben Fischer/Matthias N. Lorenz (Ed.), Lexikon der “Vergangenheitsbewältigung“ in Deutschland, 3<sup>rd</sup> Edition, Bielefeld 2015, p. 99; Norbert Frei, Vergangenheitspolitik, München 2012, p. 53.

<sup>40</sup> BT- Protokolle, 26. 2. 1954, Neumayer (Justizminister), p. 587; BT- Protokolle, 18. 6. 1954, Furler (CDU/CSU), p. 1556; Becker, JR 1954, p. 321.

further impunity law, because many of them struggled to find their place in society after being released from concentration camps, which often resulted in criminal offences due to integration and economic difficulties.<sup>41</sup> These considerations eventually led to the *Law on the decree of penalties and fines and the suppression of criminal proceedings and procedures* of 17 July 1954 (*Straffreiheitsgesetz*, StFG 1954).<sup>42</sup>

An extensive amnesty also seemed consequential in view of the upcoming rearmament of Germany and the associated pardons of condemned German war criminals by Allies.<sup>43</sup> It showed that the occupying powers increasingly regarded the Federal Republic of Germany as an ally, no longer as a defeated enemy. Thus, the fight against communism, also with a view to the Korean War, was given priority over dealing with the still widespread Nazi-ideology.<sup>44</sup> The demand of many politicians of the right-wing parties – in particular the former high-ranking Nazi-officials and later FDP politicians, Ernst Achenbach and Werner Best – for a general amnesty of all Nazi-crimes was, however, politically non-negotiable, even with regard to foreign countries.<sup>45</sup> Amongst the population, a general amnesty would certainly not have been unwelcome. After all, in 1952, still about a third of all Germans had a positive image of Hitler and, therefore, were often well-disposed towards Nazi criminals.<sup>46</sup>

## 2. The “Breakdown Paragraph” (§ 6 StFG 1954) and the Nazi-Past

Already by reading §1 StFG 1954, a kind of preamble, it is quite evident how far-reaching the law was intended to be. The goal of the law was expressly the “adjustment of the extraordinary conditions created by war or post-war events”. From this point of view, § 6 StFG 1954 is especially interesting, which section amnestied those imprisonment for up to three years, if the perpetrator in question had committed the offending act during the “collapse” of the German Reich, i.e. between 1 October 1944 and 31 July 1945 (the so-called *Endphaseverbrechen*, crimes that occurred during the final phase of the war). This was provided that they had acted in an official capacity or under a legal duty (in particular, under order), and that acting otherwise was not especially “to be expected according to his position and ability to reason”. Ability to reason was absent, for example, if the perpetrator's capability of understanding was limited due to fatigue, hunger, or an exceptionally hazardous situation.<sup>47</sup> For those receiving orders in leadership positions, § 6 StFG 1954 was not applicable,

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<sup>41</sup> Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 104.

<sup>42</sup> BGBl. 1954 I p. 203.

<sup>43</sup> Joachim Perels, *Das juristische Erbe des “Dritten Reiches”*, Frankfurt a.M. et al. 1999, p. 208 s.

<sup>44</sup> Andreas Eichmüller, *Keine Generalamnestie*, München 2012, p. 108.

<sup>45</sup> Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 106; Andreas Eichmüller, *Keine Generalamnestie*, München 2012, p. 109.

<sup>46</sup> Becker, *JZ* 1954, p. 321; Andreas Eichmüller, *Keine Generalamnestie*, München 2012, p. 108.

<sup>47</sup> Elmar Brandstetter, *Straffreiheitsgesetz 1954 Kommentar*, Berlin et al. 1954, § 6 n. 10 s.

insofar as the person concerned had voluntarily reached such a position, because then one could expect them to refuse a criminal order – even under danger for life and limb.<sup>48</sup> The ruling sought to dissolve the conflict between the obedience duty and the general duty, not to harm legal interests of third parties, for those order recipients who had opted to obey.<sup>49</sup> In the face of the inhuman situation during the collapse, in which the moral compass often did not work, the offender should not be blamed for decisions deemed to be wrong after the fact.<sup>50</sup> A justifiable superior order (so-called *Befehlsnotstand*), in the criminal sense of § 6 StFG 1954 was not required, the mere presence of action on command was sufficient.<sup>51</sup>

In principle, the defendant had to prove the existence of the requirements of the StFG 1954.<sup>52</sup> In the opinion of the Hamm Higher Regional Court, however, the purpose of the law to draw a line could only be achieved if a decision was made *in dubio pro reo* in the event of difficulties of evidence regarding the ability to reason.<sup>53</sup> Even if the perpetrator was able to see reason, it might be unreasonable to assume that the refusal of an order to kill was accompanied by severe sanctions or that the perpetrator could assume that the victims deserved to die because they were criminals.<sup>54</sup> In the opinion of the court, the killing of prisoners of war by Gestapo members was, therefore, also worth amnesty where it was not possible to ascertain whether they could actually have been expected to cease shooting.<sup>55</sup> Moreover, the courts held that a “perceived” conflict of obligations was sufficient.<sup>56</sup> Thus, it was enough for the perpetrator to *think* that they would be faced with unacceptable sanctions if they refused to obey an order. Through § 6 StFG 1954, the popular excuse that a refusal to obey an order would have led to severe repercussions from superiors (which was often not the case, according to today's state of knowledge) became law and thus officially justifiable.<sup>57</sup>

This mildness of the courts in the application of the law had already been forecasted by SPD opposition during the Bundestag debate on the StFG in 1954.<sup>58</sup> Representatives had feared that even the cruellest crimes would fall below the three-year limit and that the reasons for exclusion would be

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<sup>48</sup> Elmar Brandstetter, *Straffreiheitsgesetz 1954 Kommentar*, Berlin et al. 1954, § 6 n. 10.

<sup>49</sup> Elmar Brandstetter, *Straffreiheitsgesetz 1954 Kommentar*, Berlin et al. 1954, § 6 n. 9.

<sup>50</sup> Elmar Brandstetter, *Straffreiheitsgesetz 1954 Kommentar*, Berlin et al. 1954, § 6 n. 9.

<sup>51</sup> Andreas Eichmüller, *Keine Generalamnestie*, München 2012, p. 127.

<sup>52</sup> OLG Hamm, *NJW* 1955, p. 75.

<sup>53</sup> OLG Hamm, *NJW* 1955, p. 75, p. 76.

<sup>54</sup> OLG Hamm, *NJW* 1955, p. 75, p. 76.

<sup>55</sup> Joachim Perels, *Das juristische Erbe des “Dritten Reiches”*, Frankfurt a.M. et al. 1999, p. 207.

<sup>56</sup> Frank Süß, *Studien zur Amnestiegesetzgebung*, Berlin 2001, p. 230; Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 130.

<sup>57</sup> Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 129; Torben Fischer/Matthias N. Lorenz (Ed.), *Lexikon der “Vergangenheitsbewältigung“ in Deutschland*, 3<sup>rd</sup> Edition, Bielefeld 2015, p. 100.

<sup>58</sup> BT- Protokolle, 18. 6. 1954; Bauer (SPD), p. 1564.

ineffective.<sup>59</sup> They, therefore, regarded it as a contradiction to “respect for human life”,<sup>60</sup> and as a constitutional problem. The fact that the crimes had been committed a long time before, the associated difficulties of obtaining evidence, and desire for a clean break (*Schlußstrich*) did not, in the opinion of the SPD, justify an end to the prosecution of Nazi crimes.<sup>61</sup>

The arbitrarily chosen period was also criticized – why should Nazi crimes be less punishable, especially after 1 October 1944? The “breakdown” had already threatened in the same way in September 1944.<sup>62</sup> In addition, according to a member of parliament from the CSU parliamentary group, oral hearings, including the taking of evidence, should be made in order to judge whether a conflict of duties actually existed – particularly with regard to the offender's inner life.<sup>63</sup> Therefore, the amnesty was meant to be the better way in individual cases and not by law.<sup>64</sup> The main fear in the government groups, however, was that road traffic offences could be amnestied without justification.<sup>65</sup> The discussion about the “breakdown paragraph” also meant the end of unity in politics in dealing with the Nazi past, even though the SPD finally agreed to the law.

As already with the first amnesty, many well-known lawyers supported the “liquidation of the past”<sup>66</sup> and called the StFG 1954 “Sunday child”.<sup>67</sup> In particular, they welcomed the discharge of the courts, which were often overextended with crimes on orders, because of the difficulty subsuming these cases under criminal law norms, as well as evidence problems.<sup>68</sup> The liberal weekly *Die Zeit*, on the other hand, critically viewed this “greatest amnesty of all time”: “Amnesties shake legal certainty, reduce the deterrent effect of the penal system and provoke speculation on further amnesties, especially when they are seemingly regular”.<sup>69</sup>

### 3. The Effects of the StFG 1954

In total, 408,744 persons benefited from the second impunity law up to 30 June 1955, especially due to the general provision in § 2 StFG 1954.<sup>70</sup> Most of the Nazi crimes that could be amnestied may have already fallen under the 1949 law, which is why the problematic § 6 StFG 1954 was applied

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<sup>59</sup> BT- Protokolle, 18. 6. 1954; Bauer (SPD), p. 1564; BT- Protokolle, 26. 2. 1954, Greve (SPD), p. 593.

<sup>60</sup> BT- Protokolle, 18. 6. 1954; Bauer (SPD), p. 1565.

<sup>61</sup> BT- Protokolle, 18. 6. 1954; Bauer (SPD), p. 1563 and p. 1565.

<sup>62</sup> BT- Protokolle, 26. 2. 1954, Greve (SPD), p. 592; Frei, *Vergangenheitspolitik*, p. 128.

<sup>63</sup> BT- Protokolle, 26. 2. 1954, Höcherl (CDU/CSU), p. 597.

<sup>64</sup> BT- Protokolle, 26. 2. 1954, Höcherl (CDU/CSU), p. 597.

<sup>65</sup> N.N., *Hörensagen*, DER SPIEGEL 50/1953 vom 9. Dezember 1953.

<sup>66</sup> Becker, *JR* 1954, p. 321.

<sup>67</sup> Brandstetter, *JZ* 1954, p. 477.

<sup>68</sup> Brandstetter, *JZ* 1954, p. 477, p. 481.

<sup>69</sup> W. Fredericia, *Die Folgen des Amnestiegesetzes*, *DIE ZEIT* 25/1954 vom 25. Juni 1954.

<sup>70</sup> Johann-Georg Schätzler, *Handbuch des Gnadenrechts*, 2<sup>nd</sup> Edition, München 1992, 265; Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 127.

only 77 times in the first year of the law's application, of which 44 were homicides.<sup>71</sup> Of course, § 6 StFG 1954 factually covered all homicide crimes with a National Socialist background committed from October 1944, since the courts rarely imposed prison sentences of more than three years in such homicide cases.<sup>72</sup>

Much more serious were the indirect consequences of the “breakdown paragraph” beyond its original field of application.<sup>73</sup> At the beginning of the 1950s, the number of new preliminary proceedings due to Nazi crimes sank rapidly,<sup>74</sup> and reached a low of 161 proceedings in 1954 (as compared with 4,160 trials in 1948).<sup>75</sup> At the end of the 1950s, the number increased again substantially (there were 1,076 trials in 1959), because many periods of limitation were about to run out. In 1958, a central investigating authority for Nazi crimes was established as a result of the Ulm Einsatzkommando trial.<sup>76</sup> The downturn of the persecution morality can be explained by a policy, which had been signalled to the judiciary by § 6 StFG in 1954, that a criminal prosecution of Nazi crimes was only intended in exceptional cases.<sup>77</sup> This effect was strengthened by the fact that, after 1951, many judges and prosecutors with Nazi Past, who had no greater interest in reconditioning the dictatorship, could return to their positions.<sup>78</sup>

#### **IV. Evaluation of the Amnesty Legislation in the 1950s**

Numerically, those who committed fraudulent acts, petty crimes, and economic crimes for their livelihood benefited most – people who would not have committed criminal acts in orderly conditions. There was no danger that these persons would again commit similar crimes if their emergency situation was alleviated in the course of economic reconstruction. The wrongfulness of such offences was greatly reduced, because the perpetrators, among them many victims of the National Socialism, such as Displaced Persons, often were in a precarious situation that is hardly imaginable today. Surely, the sense of justice of a large majority of Germans, who also had witnessed the difficult circumstances themselves, would not have required an adamant sanctioning of this category of

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<sup>71</sup> Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 127.

<sup>72</sup> Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 129.

<sup>73</sup> Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 128.

<sup>74</sup> For this in detail, see: Edith Raim, *Der Wiederaufbau der Justiz in Westdeutschland und die Ahndung von NS-Verbrechen in der Besatzungszeit 1945-1949*, in: Martin Löhnig/Mareike Preisner/Thomas Schlemmer (Ed.), *Krieg und Recht: Die Ausdifferenzierung des Rechts von der ersten Haager Friedenskonferenz bis heute*, Regensburg 2014 (= *Rechtskultur Wissenschaft Band 16*), p. 69 ss.

<sup>75</sup> Andreas Eichmüller, *Keine Generalamnestie*, München 2012, p. 225 s.

<sup>76</sup> Andreas Eichmüller, *Keine Generalamnestie*, München 2012, p. 225 s.; Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 128.

<sup>77</sup> Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 128; Joachim Perels, *Das juristische Erbe des »Dritten Reiches«*, Frankfurt a.M. u.a. 1999, p. 208 s.

<sup>78</sup> Torben Fischer/Matthias N. Lorenz (Ed.), *Lexikon der «Vergangenheitsbewältigung» in Deutschland*, 3<sup>rd</sup> Ed., Bielefeld 2015, p. 100 s.; Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 101.

crimes. So there was neither a preventive need nor a need for punishment due to the compensation of injustice. Consequently, the persons concerned had the chance to build themselves a new life, free from the social stigma of being a criminal.

In addition, innumerable tax offences were committed. To quote again *Die Zeit*: “They were committed in many thousands of cases by the general public, because a real state authority wasn’t developed yet. People also had the impression that they had to pay the Control Council taxes only for the occupying power. The criminal proceedings, however, are now implemented by the finance management like as if a consolidated state system had already existed in 1949 and 1950 and only a more or less clever good-for-nothing would not have paid close attention to his tax obligations.”

Nazi offenders who had committed capital crimes also benefited. In the 1950s, there was a social consensus that the Nazi injustice should never be repeated and that anti-democratic ambitions had to be fought. However, the individual perpetrators, “seduced” by the Nazi ideology, were shown leniency and understanding.<sup>79</sup> Apart from the few supposedly “real culprits” who had been condemned in Nuremberg or had escaped the persecution through suicide, one had to integrate the perpetrators in the post-war society.<sup>80</sup> It should, however, be borne in mind that the integration, forced by the impunity acts, was successful insofar as the former perpetrators did not turn against democracy, but helped to build it economically and politically.<sup>81</sup> This, of course, was at the expense of the victims. § 6 StFG 1954, in particular, suggested to the culprits that even people who had killed outside of combat operations also were, all in all, only small cogwheels in the regime’s mechanism, only recipients of orders and therefore to be exempted from punishment.<sup>82</sup> It had already been clear during the debate in the Bundestag that crimes within the “Final Solution of the Jewish Question”, shootings of prisoners of war, and abuses of the civilian population in eastern Europe would fall under the impunity law.<sup>83</sup>

Impunity for persons who had committed Nazi-motivated acts pursued the legitimate aim inasmuch their support and the backing was needed for the construction of the economy and state. If these people had been pilloried by criminal prosecution, they might have continued to support anti-democratic tendencies in protest, even after 1945.<sup>84</sup> Certainly, the integration of the amnesties into the Federal Republic society may have been difficult for Jews, Sinti, and Roma, as well as politically persecuted persons, to bear and may have impaired their sense of justice. After all, without the

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<sup>79</sup> Andreas Eichmüller, *Keine Generalamnestie*, München 2012, p. 37.

<sup>80</sup> Andreas Eichmüller, *Keine Generalamnestie*, München 2012, p. 37; Annette Weinke, *Die Verfolgung von NS- Tätern im geteilten Deutschland*, Paderborn et al. 2002, p. 62.

<sup>81</sup> Annette Weinke, *Die Verfolgung von NS- Tätern im geteilten Deutschland*, Paderborn et al. 2002, p. 62.

<sup>82</sup> BT- Protokolle, 18. 6. 1954, Furler (CDU/CSU), p. 1558.

<sup>83</sup> BT- Protokolle, 26. 2. 1954, Greve (SPD), p. 593; Norbert Frei, *Vergangenheitspolitik*, München 2012, p. 122.

<sup>84</sup> Cf. Lübke, HZ 1983, p. 579 ss., p. 586.

numerous followers – who did not kill anybody personally, but denounced Jews or tortured the civilian population in the occupied territories as Wehrmacht soldiers – the Nazi regime would not have been possible.

Something else applies, of course, to the direct and indirect effects of § 6 StFG in 1954. A blanket amnesty was not appropriate for this group of perpetrators. At most, mercy could have been justified in certain individual cases. A constitutional state must not contribute, through its actions, to the impression that the inviolability of human life and dignity, an indispensable prerequisite for peaceful coexistence, is all at once negotiable against the background of an extraordinary political situation.

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