

# Articles

## Consensual Cannibalism: A Case Study on Germany's Most Notorious Murder Case and the Offences Against Life

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*The killing of humans amongst each other is a fundamental aspect of human civilization and criminal law. The sixteenth chapter of the German Criminal Code tries to solve this fundamental issue by considering especially reprehensible reasons and mitigating circumstances, attempting to find the appropriate punishment for the conduct.*

*The article introduces the reader to this system, using as its baseline a most notorious case - that of the Rotenburg Cannibal. It is simple enough to find criteria for what makes an act especially reprehensible. How these criteria are to be applied once the victim consents and demands into this otherwise reprehensible act opens up a whole new layer of complexity which even puts the fundamentals to the test and is not easily dealt with.*

*The author summarizes the arguments put forward by defendant counsel, the prosecution and both the trial court and the appellate court. The limits of the privilege afforded to consensual homicide or "homicide on demand" are deemed to have been exceeded, whereas the murder sentence handed down by the courts is criticized. The reader is invited to critically question the underlying system and the solutions arrived at by the courts while being provided with the necessary tools to reach their own conclusions on the case.*

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## A. Introduction

The field of criminal law is notorious for having to deal with grotesque murders, hideous acts and other problems that challenge both the courts' morality and their ability to apply the law when it comes to deciding on a judgement. However, no case is quite like that of the Rotenburg cannibal. Cases of cannibalism are already a spectacular occurrence in trials.<sup>1</sup> A cannibalism case, combined with a voluntary agreement between the victim and the perpetrator and accompanied by hours of documented footage, however, is an anomaly even in this field. Accordingly, it had some of the biggest national as well as international media coverage at the time.<sup>2</sup>

As it is one of the biggest German criminal cases still to this day, this article aims not just to analyse the dogmatic problems which it revealed but also to introduce and demonstrate generally, the approach a German criminal lawyer would take when assessing such a case. By the end of this article, the reader should be able to pass their own judgement on the case based on the courts' findings as well as the legal tools provided. In a manner which might be unfamiliar to common law lawyers, the proceedings largely did not rely on prior decisions, as German Law is primarily one of statutory law. Thus, to grasp challenges facing the judiciary, the reader needs to be familiar not just with the exact facts of the case as well as the personality and motives of the perpetrator, but

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<sup>1</sup> Just compare Michael Newton, *Die große Enzyklopädie der Serienmörder* (Robert Zingerle, Fatima Awwad and Sabine Geiger trs, 3rd edn, Leopold-Stocker-Verlag 2005) 83, 158, 217, 219 (describing most infamous cannibalism cases in Germany).

<sup>2</sup> Richard Bernstein, 'Germany: Cannibal gets Life Sentence in Retrial' (*New York Times*, 10 May 2006) <<https://www.nytimes.com/2006/05/10/world/europe/10briefs-brief-001.html>> accessed 15 August 2024; CNN, 'Alleged Cannibal Tried for Murder' (*CNN*, 4 December 2003) <<https://edition.cnn.com/2003/WORLD/europe/12/03/germany.cannibal.trial/>> accessed 15 August 2024; Ray Furlong, 'Frenzy Builds for German 'cannibal' trial' (*BBC News*, 2 December 2003) <<http://news.bbc.co.uk/2/hi/europe/3258226.stm>> accessed 15 August 2024.

also the statutes in question as well as the criminal justice system corroborating these statutes.

## B. The Deed and its Perpetrator

Armin M. (M) was born on the 1st of December 1961, as the youngest of three brothers in Essen-Holsterhausen.<sup>3</sup> When he was just 8 years old, he lost all the men in his life, as his two brothers moved out to study in Berlin and his father left after divorcing his mother. This disconnect from male figures led him to develop an imaginary friend called “Frank.”<sup>4</sup> However, as he eventually found his merely imaginary companion no longer satisfactory, M started to seek the companionship of someone “more in the flesh.” Said turning point came after watching an adaptation of Robinson Crusoe in which a person’s corpse is eaten by their friend, allegedly in honour of their memory. His neighbours at the time also had a butcher’s shop, which made it easy to observe the slaughtering of pigs, developing his interests further.<sup>5</sup> Based on these experiences, his longing for companionship was twisted into the desire to become “one” with another person, i.e. another person voluntarily offering their life to M so that they could keep on living inside of him. In M’s view, this voluntary sacrifice was necessary to establish the connection which he was seeking.<sup>6</sup>

In the mid-2000s, M started to interact with people of similar interests in online chatrooms about cannibalism, which would eventually lead to the meeting with Bernd B. (B) on the 9th of March 2001.<sup>7</sup>

B was mainly motivated by his sexual masochism, expressed in the desire to be mutilated and killed. He already had a history of asking prostitutes to cut off his genitalia, and in his online chatrooms with M he described himself as “M’s flesh.”<sup>8</sup> Sparing the gruesome details, after a lot of hesitation on the side of M and strong encouragement by B, M eventually cut off B’s genitalia, so that the two of them could eat it later. Afterwards, B took a warm bath to bleed out and enjoy the feeling of having been mutilated. B rejected all of M’s offers to call an ambulance and insisted on following through with the plan, which was

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<sup>3</sup> Martin Knobble and Detlef Schmalenberg, ‘Kriminalität: Der Kannibale’ (*Stern*, 22 July 2003) <[www.stern.de/panorama/kriminalitaet-der-kannibale-3514316.html](http://www.stern.de/panorama/kriminalitaet-der-kannibale-3514316.html)> accessed 24 July 2024.

<sup>4</sup> Günther Stampf and Thomas Müller, ‘Der Kannibale von Rotenburg: Das Interview – Ungekürzt und Unzensuriert’ (2008) <<https://www.youtube.com/watch?v=Bv8lGo7eHjw>> accessed 24 July 2024, 00:07:00.

<sup>5</sup> *ibid* 00:08:45.

<sup>6</sup> *ibid* 00:11:00.

<sup>7</sup> FAZ, ‘Eine Chronik des Kannibalismus-Falls von Rotenburg’ (*FAZ*, 30 January 2004) <<https://www.faz.net/aktuell/gesellschaft/hintergrund-eine-chronik-des-kannibalismus-falls-von-rotenburg-1129308.html>> accessed 15 August 2024.

<sup>8</sup> Knobble and Schmalenberg (n 3).

that he should be stabbed in the neck once he passed out.<sup>9</sup>

During the night, M cut up the by now bled-out B and stored roughly 30 kilograms (or 70 pounds) of flesh in his refrigerator, recording the process with a camera in a manner agreed upon earlier. When asked afterwards how he felt about his eventual victim, he stated that he saw him as a friend who is always by his side.<sup>10</sup> M was ultimately arrested after a student found another one of his ads on the internet and reported him to the police, who then found the fridge containing B's remains.<sup>11</sup>

### C. An introduction to German criminal law: Offences against life and the relationship between the different statutes

The various forms of homicide are laid down in the Special Part (*Besonderer Teil*) of the German Criminal Code (*Strafgesetzbuch – StGB*), division (*Abschnitt*) 16, “Offences against life” (*Straftaten gegen das Leben*). If a person commits homicide (*Totschlag*, section 212 paragraph 1), i.e. intentionally kills another person, the sentence may be less than 5 years. In especially severe cases the perpetrator is sentenced to life imprisonment for murder (*Mord*, section 211). A murderer is defined by section 211 paragraph 2 as “whoever kills a person because of lust for murder, sexual satisfaction, greed or other petty reasons, malice, while constituting public danger, or in order to enable or hide another crime.” Whoever kills another person while also fulfilling one or more of these 9 elements is categorized as a murderer. A murderer will always be sentenced to life imprisonment (section 211 paragraph 1), “life imprisonment” translating to at least 15 years, whereafter the perpetrator may apply for a 5-year parole (section 57a).<sup>12</sup>

Another statute regulating homicide is section 216, “killing upon request” (*Tötung auf Verlangen*), whose exact elements and details will be discussed at a later stage of this article. The essential idea behind this provision is that a killer who acted based on the demand of the victim is not justified or excused in his actions, but that his sentence is at least reduced to anywhere between 5 months to 5 years. The need for section 216 is also exemplary for the issue at hand, as it is situated right at the intersection between individual sovereignty and the objective values of the legal system. Even though only

<sup>9</sup> Stampf and Müller (n 4) 01:26:00.

<sup>10</sup> Mark Landler, ‘German Court convicts Internet Cannibal of Manslaughter’ (*New York Times*, 31 January 2004) <<https://www.nytimes.com/2004/01/31/world/german-court-convicts-internet-cannibal-of-manslaughter.html>> accessed 24 July 2024

<sup>11</sup> BBC News, ‘German cannibal tells of fantasy’ (*BBC News*, 3 December 2003) <[news.bbc.co.uk/2/hi/europe/3286721.stm](https://www.bbc.com/news/europe-3286721)> accessed 22 August 2024.

<sup>12</sup> cf Henning Radtke, ‘§ 38 StGB’ in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar zum StGB*, Bd. 2 (4th edn, C.H. Beck 2020) para 8; Ekkehard Appl, ‘§ 454 StPO’ in Christoph Harthe and Jan Gericke (eds), *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 50.

section 228 and section 299 StGB name consent as grounds for justification of their respective offences, the concept, as an expression of the fundamental right of freedom of action (under Article 2 paragraph 1 of the German Constitution) has been extended to all other personal goods.<sup>13</sup> Since life is an individual right, consenting into its elimination should therefore theoretically be possible. However, section 216 abrogates the general rule, according to most legal practitioners due to life also being the objectively highest constitutional value, overshadowed only by the principle of human dignity.<sup>14</sup> Section 216 is thus interpreted as implying that it is categorically unjustifiable to kill another person whilst not defending oneself or another from an imminent unlawful attack (*Notwehr* – self-defence, section 32) or outside of war.<sup>15</sup>

Although the exact relationship between murder and demanded homicide is heavily discussed, the legal consensus is that a judgement of demanded homicide under section 216 bars the perpetrator from being criminalized under either section 212 or section 211. Section 216 therefore has a “privileging effect.”<sup>16</sup> Based on this, it is a matter of discussion whether sections 211 and 216 function as stand-alone offences or as mere specifications of section 212, as well as what the exact motive behind the “privilege” of section 216 is and how it relates to the objective criteria of section 211.<sup>17</sup> However, as this topic is relevant only insofar as the extent of punishing participators (instigators / abettors and assistants / aides, sections 26 and 27) is concerned, it will not be discussed here.<sup>18</sup>

Summarizing the majority view on the relationship between sections 211, 212 and 216, the penalization of homicide is regulated in a three-tiered system.<sup>19</sup> Section 212 acts as the baseline. There are then sections 211 and 216 which act as “*lex specialis*” or, more specifically, function as either “qualifying” as in “aggravating” (as regards section 211) or “privileging” as in “mitigating” (in the case of section 216) elements in addition to the

<sup>13</sup> BGH NStZ 2004, 204, 205; 2021, 494, 496; Rudolf Rengier, *Strafrecht Allgemeiner Teil* (15th edn, C.H. Beck 2023) § 23 para 1.

<sup>14</sup> BGHSt 2,258; 13, 362, 365; Albin Eser and Detlev Sternberg-Lieben, ‘§ 216 StGB’ in Albin Eser and others (eds), *Schönke/Schröder Strafgesetzbuch* (30th edn, C.H. Beck 2019) para 1; Ralf Eschelbach, ‘§ 216 StGB’ in Hans Kudlich and Bernd von Heintschel-Heinegg (eds), *Beck’scher Online-Kommentar StGB* (61th edn, C.H. Beck May 2024) para 21; Alexander Bechtel, ‘Selbsttötung, Fremdtötung, Tötung auf Verlangen. Eine Abgrenzungsfrage von herausragender Bedeutung’ (2016) 56 JuS 887.

<sup>15</sup> Compare Martin Heger, ‘§ 216 StGB’ in Martin Heger, Karl Lackner and Kristian Kühl (eds) *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2023) paras 1 ff.

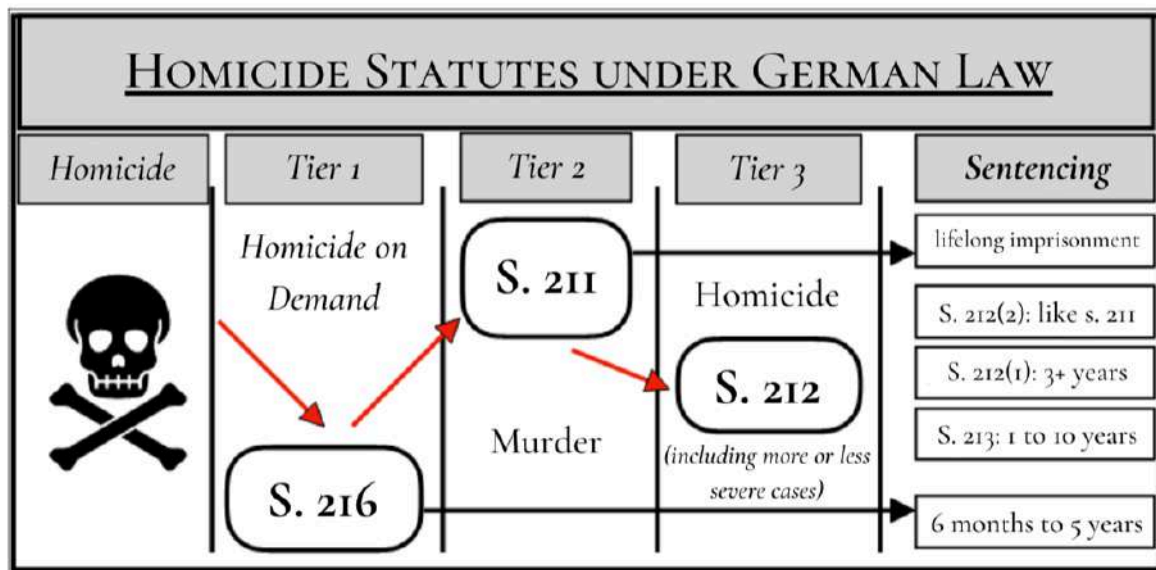
<sup>16</sup> BGHSt 13, 162, 165; Urs Kindhäuser and Edward Schramm, *Strafrecht Besonderer Teil I. Straftaten gegen Persönlichkeitsrechte, Staat und Gesellschaft* (11th edn, Nomos 2023) § 1 para 2; Rudolf Rengier, *Strafrecht Besonderer Teil II. Delikte gegen die Person und die Allgemeinheit* (25th edn, C.H. Beck 2024) § 6 para 3.

<sup>17</sup> Ulfrid Neumann, ‘Vor § 211 StGB’ in Frank Saliger and others (eds), *Nomos Kommentar Strafgesetzbuch* (6th edn, Nomos 2023) para 164.

<sup>18</sup> BGHSt 1, 368; BGH NJW 2005, 996; Wilfried Küper, ‘Im Dickicht der Beteiligung an Mord und Totschlag’ (2006) 61 JZ 1157; Klaus Geppert ‘Die Akzessorietät der Teilnahme (§28 StGB) und die Mordmerkmale’ (2008) 30 JURA 34; Karl-Heinz Gössel, ‘Empfiehl sich eine Änderung der Rechtsprechung zum Verhältnis der Tatbestände der vorsätzlichen Tötungsdelikte (§211 ff. StGB) zueinander?’ (2008) 3 ZIS 153.

<sup>19</sup> Hartmut Schneider, ‘Vor § 211 StGB’ in Günther M Sander (ed), *Münchener Kommentar zum StGB, Bd. 4* (4th edn, C.H. Beck 2021) para 191.

ones of section 212.<sup>20</sup> If the elements of neither of these sections are fulfilled, section 212 paragraph 2 and section 213 may step in to adjust the sentencing in order to properly acknowledge the reprehensibility of the crime (or a relative lack thereof).<sup>21</sup>



#### D. The necessary statutes for the Case

After having gained insight into the system more generally, one can take a more detailed look at the necessary elements of all these statutes. Since section 216 acts as a less reprehensible form of section 212 and section 211 as a qualified form of homicide, the three statutes are to be considered in that same order.

#### I. Homicide on demand (section 216 StGB)

Section 216 grants the exceptional privilege to infringe on the objectively highest valued good, suffering only a reduced sentence.<sup>22</sup> The privileging elements of section 216 are threefold, all of which need to be fulfilled and whose requirements are accordingly high. Specifically, the killing must have been induced by a serious and explicit demand by the victim. The “demand” in question has to be understood as more than just the victim’s consent into the killing, as the victim must desire to be killed and must exert some direct influence on the perpetrator’s will.<sup>23</sup> While the demand needs to be an expression of the

<sup>20</sup> Neumann (n 17) para 164.

<sup>21</sup> Rüdiger Deckers, ‘Die Provokationsvariante des § 213 StGB, insbesondere unter Betrachtung der Anwendung auf Körperverletzungsdelikte’ in Ernst-Walter Hanack and others (eds), *Festschrift für Peter Rieß zum 70. Geburtstag am 4. Juni 2002* (De Gruyter 2002) 651; Gerd Geilen, ‘Provokation als Privilegierungsgrund der Tötung? – Kritische Betrachtungen zu § 213 StGB’ in Hans-Heinrich Jescheck (ed), *Festschrift für Eduard Dreher am 70. Geburtstag am 29. April 1977* (De Gruyter 1977) 357; Hartmut Schneider, ‘§ 213 StGB’ in Sander (n 19) para 1.

<sup>22</sup> Frank Saliger ‘§ 216 StGB’ in Saliger and others (n 17) para 1.

<sup>23</sup> BGH NJW 2019, 449, 450 [19]; Rengier (n 16) § 6 para 7.



victim's desire, it is not required that the victim takes the initiative. Rather, section 216 also allows for the desire to be killed to be expressed reactively after a suggestion on the part of the perpetrator.<sup>24</sup> The term "explicit" signifies that the victim must have made it unmistakably clear that they want to be killed. There must be no doubt about their intention.<sup>25</sup>

The demand must also be serious, meaning that the victim must make the demand in a conscious state of mind and out of their own free will. Any sort of mental defect impairing their freedom of choice, such as a state of depression, would hinder the seriousness of the demand.<sup>26</sup>

A universal element for most crimes under the German penal code is that the objective elements must be accompanied by a subjective intent to fulfil them (see section 15 StGB). Hence, the perpetrator must have known and assented to his actions causing the death of the victim and must have known about the demand and its seriousness. The last element is that the killer must have been "induced" by the victim. To meet this requirement, the killer must have been guided by the demand of the victim, meaning the demand must have been the cause of and primary motive behind the killing.<sup>27</sup> Only when all of these elements are satisfied cumulatively, the privilege of section 216 will take effect. However, if the killer has erred about the seriousness of the demand, section 16 paragraph 2 dictates that they will still be sentenced under section 216 and not the harsher sections 212 or 211.

## II. Murder (section 211 StGB)

The murder statute, on the other hand requires that the homicide has occurred while satisfying one or more of the nine criteria listed in section 211 paragraph 2. These criteria can be divided into three different groups: (1) An especially lowly motivation to kill (desire to kill, sexual satisfaction, greed, or petty reasons), (2) the reprehensibility of the objective execution of the act (treachery, cruelty, or using means which constitute public danger) or (3), a specific overarching goal behind the killing (namely to enable or cover up another crime).<sup>28</sup> Thus, the first and third groups entail subjective reasons, while the second group includes objective elements.

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<sup>24</sup> Bechtel (n 14) 886.

<sup>25</sup> BGH NJW 1987, 1092; K Kühl, 'Anmerkung zum Beschluss des BGH vom 25.11.1986 – 1 StR 613/86' [1988] JR 338; Carsten Momsen and Caroline Jung, 'Der "Kannibale von Rotenburg" – Ein vorläufiges Resümee' (2007) 2 ZIS 162.

<sup>26</sup> BGH NStZ 2011, 340-41; StV 2012, 90, 91

<sup>27</sup> Volker Haas, '§ 26 StGB' in Holger Matt and Joachim Renzikowski (eds), *Strafgesetzbuch Kommentar* (2nd edn, Verlag Franz Vahlen 2020) paras 8 ff; Carsten Momsen, '§ 216 StGB' in Helmut Satzger, Wilhelm Schluckebier and Raik Werner (eds), *Strafgesetzbuch Kommentar* (6th edn, Wolters Kluwer 2024) para 6.

<sup>28</sup> Johannes Wessels, Michael Hettinger and Armin Engländer, *Strafrecht Besonderer Teil 1 – Delikte gegen die Person und Allgemeinheit* (47th edn, C.F. Müller 2023) § 2 para 37.

## 1. Attempts at restriction

As the fulfilment of either of these elements results in the perpetrator being sentenced to a lifelong prison sentence, it is acknowledged that there need to be limiting mechanisms so as not to punish disproportionately, especially persons who might satisfy an objective criterion while having acted out of a noble motivation. There are three approaches which are proposed: A restrictive interpretation of the individual criteria, a single corrective measure aimed at eliminating certain types of perpetrators, or a mitigation of the sentence.

The “perpetrator-type” correction, as demanded by some, requires that in addition to the satisfaction of a criterion of section 211 paragraph 2, the special reprehensibility of the act needs to be determined or denied separately.<sup>29</sup> Because of its vague criteria, however, all such approaches have been denied by the Federal Court (*Bundesgerichtshof* - BGH).<sup>30</sup> The Federal Court on the other hand has acknowledged the potential shortcomings of the murder statute and refers to the appearance of “impactful unusual circumstances” only when assessing certain criterions, namely “treachery”, and lightens the sentence, should these be present.<sup>31</sup> The only limitation of the murder statute that is demanded universally and even by the Federal Constitutional Court (*Bundesverfassungsgericht* - BVerfG) is a “restrictive interpretation” of its various elements in order for the lifelong prison sentence and statute to be constitutional.<sup>32</sup>

## 2. Murder criteria

So as not to overload this article with abstract preliminary explanations, only the murder elements essential for the subject matter at hand will be highlighted. These are the desire to kill, sexual satisfaction, petty reasons and the enabling of another crime. The attentive reader will have spotted that, even though the case at hand deals with the grotesque phenomenon of cannibalism, not a single objective criterion of section 211 is relevant for the discussion.

The “desire to kill” is a variant which is rarely fulfilled but simple in its explanation. It requires that the perpetrator acted solely out of his interest to see another person die, thereby displaying a general disregard for someone else’s life.<sup>33</sup> This is determined by analysing if the death itself constitutes the main and sole reason for the act.<sup>34</sup>

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<sup>29</sup> Albin Eser and Detlev Sternberg-Lieben, ‘§ 211 StGB’ in Albin Eser and others (n 14) para 10; Riess, ‘Zur Abgrenzung von Mord und Totschlag’ (1968) 21 NJW 628, 630.

<sup>30</sup> BGHSt 9, 385, 389; 11, 139, 143; 30, 105, 115.

<sup>31</sup> BGH NJW 1981, 1965.

<sup>32</sup> BVerfGE 45, 187, 261 f.

<sup>33</sup> BGH NStZ 2007, 522, 523.

<sup>34</sup> Eser and Sternberg-Lieben (n 29) para 15.



A murder out of sexual satisfaction is typically at hand (1) where sexual satisfaction is sought in the killing itself, (2) in cases of necrophilia, i.e. if the perpetrator kills in order to satisfy their lust using the corpse after the fact, or (3) if the killer knowingly risks the death of their sexual partner in the course of or as a consequence of the sexual act.<sup>35</sup>

“Petty reasons” in the context of section 211 means that the motivation must be, judged by general moral standards, considered to be of the lowest level and therefore especially despicable.<sup>36</sup> This is to be determined by a complete evaluation of the facts, including the living conditions of the perpetrators and his personality.<sup>37</sup> Typical examples of this element are killings out of xenophobia<sup>38</sup> or racial hatred,<sup>39</sup> killing for the sake of venting of frustration on someone uninvolved,<sup>40</sup> or killing just to show off.<sup>41</sup> Basically, if the killing is an expression of extreme, egoistical disregard for other life, and the motivation is therefore not relatable, the killing happened for petty reasons.<sup>42</sup> Lastly, there is the element of “enabling another crime,” which could also be regarded as a murder “out of petty reasons” but specifically penalizes the heightened lethality of a murderer who is not only willing to achieve his goals by “trampling over corpses,” but is also aiming at even more criminal activity.<sup>43</sup> It is an exclusively subjective element which merely requires the murderer to have an “enabling intent”, i.e. wanting to achieve an unjust goal using the killing, regardless of it being successful or not.<sup>44</sup>

### 3. Delineation between sections 211 and 216 StGB

Such subjective reasons are also the primary distinction between the privilege of section 216 and section 211. While section 211 accounts for increased reprehensibility associated with certain personal reasons for a killing, the protective purpose (*Normzweck*) of section 216, according to the majority view between legal practitioners, is to account for the voluntary waiver of life by the victim as well as the psychological

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<sup>35</sup> Rengier (n 16) § 4 para 12.

<sup>36</sup> BGHSt 3, 132, 132-33; BGH NJW 1993, 1664, 1665; NStZ 2002, 368; NStZ-RR 2003, 78.

<sup>37</sup> BGHSt 35, 116, 127; BGH NStZ 2023, 231; BeckRS 2008, 13471.

<sup>38</sup> BGH NStZ 94, 124.

<sup>39</sup> BGHSt 18, 37.

<sup>40</sup> BGH NStZ 2015, 690, 691.

<sup>41</sup> BGH NStZ 1999, 129.

<sup>42</sup> Gunnar Duttge, ‘§ 211 StGB’ in Dieter Dölling, Gunnar Duttge and Stefan König (eds), *Gesamtes Strafrecht – Handkommentar* (5th edn, Nomos 2022) paras 34-38.

<sup>43</sup> BGHSt 39, 159, 161; BGH NStZ 1996, 81; NJW 2000, 2517, 2519; Wessels, Hettinger and Engländer (n 28) § 2 para 73.

<sup>44</sup> BGH NJW 2021, 326, 329; NStZ 2005, 332, 333.

conflict raised inside the killer by the demand, as mitigating circumstances.<sup>45</sup> It is seen as the necessary balance between the prohibition of killing another person while also accounting for the freedom of action of the victim. Hence, if a killer has been instigated by the victim and is therefore guided in his actions by external reason (the freedom of action of the victim), the act is not as reprehensible as an act which has been committed for personal reasons.<sup>46</sup> This, however, does not mean that the perpetrator needs to have only a single motivation but rather that, among a variety of motives, the primary guiding force determines whether the act is subsumed under section 211 or section 216.<sup>47</sup>

### III. Intentional homicide (sections 212 and 213 StGB)

If neither section 216 nor 211 is fulfilled, the homicide is then judged according to section 212, while the sentencing of the act is based on section 212 paragraph 1, paragraph 2 or section 213. Since both section 212 paragraph 2 and section 213 are sentencing provisions and not stand-alone statutes, there is no general rule on which of these provisions takes precedence. Rather, whether these provisions are to be carefully assessed or only quickly considered and discarded by the judge is dependent on the individual case.

Section 212 paragraph 2 deals with homicides that are especially reprehensible and should therefore also result in a lifelong sentence. Hence, a case of section 212 paragraph 2 is at hand where a homicide, because of its unlawful and vile character, is held to be as reprehensible as a murder. However, even though the sentencing is equivalent to section 211, section 212 paragraph 2 cannot be employed as a substitute if no specific murder criterion is satisfied. Instead, the reprehensibility of the act in its totality needs to amount to the same as that of a murder.<sup>48</sup> Examples include the killing of one's wife in front of the children<sup>49</sup> or an execution-like act.<sup>50</sup>

Section 213, on the other hand, awards a lowered sentence of one to ten years in "less severe cases." Typically, these are ones where the perpetrator acted out of affect (in the

<sup>45</sup> Hartmut Schneider, '§ 216 StGB' in Sander (n 19) para 1; Saliger (n 22) para 2; Gunther Arzt, Ulrich Weber, Bernd Heinrich and Eric Hilgendorf (eds), *Strafrecht Besonderer Teil* (4th edn, Verlag Ernst und Werner Gieseking 2021) § 3 para 12; Ralph Ingelfinger, *Grundlagen und Grenzbereiche des Tötungsverbots* (Heymanns 2004) 215 ff; Pierre Hauck, 'Rechtfertigende Einwilligung und Tötungsverbot' (2012) 159 GA 202, 210; Katrin Gierhake, 'Zum „ernstlichen Tötungsverlangen“ i.S. des § 216 I StGB und zum Irrtum über dessen Vorliegen gemäß § 16 II StGB – Zugleich Überlegungen zum Strafgrund der Tötung auf Verlangen' (2012) 159 GA 291, 300.

<sup>46</sup> BGHSt 2, 258; Rolf D Herzberg, 'Das Zusammentreffen privilegierender und qualifizierender Umstände bei den Tötungsdelikten: Zugleich ein Beitrag zur Neufassung der Tötungsdelikte' (2000) 55 JZ 22 1093.

<sup>47</sup> Arndt Sinn, '§ 216 StGB' in Jürgen Wolter and Andreas Hoyer (eds), *Systematischer Kommentar zum Strafgesetzbuch Bd. 4* (10th edn, Wolters Kluwer Deutschland 2024) para 6.

<sup>48</sup> BGHStV 2022, 96; Carsten Momsen '§ 212 StGB' in Satzger, Schluckebier and Werner (n 27) para 14; Albin Eser and Detlev Sternberg-Lieben, '§ 212 StGB' in Eser and others (n 14) para 12.

<sup>49</sup> BGH BeckRS 2005, 4291.

<sup>50</sup> BGH NJW 1982, 2264.

heat of the moment, simply put) or a similarly energized state and is thereby severely reduced in their cognitive faculty.<sup>51</sup> Cases named by the statute itself include the severe abuse of the perpetrator or a close companion by the victim, or where the perpetrator has been provoked by the victim through intense slander. Otherwise, an unwritten case of section 213 is affirmed if, because of the totality of the circumstances, the killing act differs from a “regular” homicide in such a way that the application of the sentence of section 212 paragraph 1 is deemed as inappropriate.<sup>52</sup> This includes forms of self-defence which do not meet the criteria of the self-defence statute<sup>53</sup> or a killing committed under extreme intoxication and a correlating absence of restraint.<sup>54</sup>

After these provisions are considered and their respective elements denied, the homicide is to be penalized under the sentencing rule of section 212 paragraph 1.

#### **IV. Interim review**

Dissecting the details of the German system of the offences against life, it has become apparent that the three-tiered system described earlier can be described more accurately as one consisting of five tiers, wherein the last stage of section 212 allows for a flexible assessment of the crime, not bound to the hard standards set by section 211.

#### **E. The court procedure**

After acquiring the necessary insight into the relevant statutes for this case as well as the facts surrounding the perpetrator and his acts, we can now discuss the parties’ respective strategies and the various court proceedings.

##### **I. The defendant’s strategy**

The defendant M’s strategy was to plead for a consensual homicide in accordance with section 216 or at least a minor case in the sense of section 213. One of the main reasons why B insisted on documenting the act was exactly to prove that it was consensual and mutually agreed upon. The video recording was made so that the Court could ascertain that B himself wanted to be killed and eaten, and that this guided M’s actions.<sup>55</sup>

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<sup>51</sup> Albin Eser and Detlev Sternberg-Lieben, ‘§ 213 StGB’ in Eser and others (n 14) para 1.

<sup>52</sup> BGH NJW 1956, 756.

<sup>53</sup> BGH NStZ 2015, 151, 151-52.

<sup>54</sup> BGH NStZ-RR 2023, 168-69.

<sup>55</sup> Claus Peter Müller, ‘Plädoyers im Kannibalen-Prozess’ (FAZ, 26 January 2004) <<https://www.faz.net/aktuell/gesellschaft/kriminalitaet/kasseler-prozess-plaedoyers-im-kannibalen-prozess-1134478.html>> accessed 22 August 2024.

M cooperated with the Court, giving very detailed descriptions and explanations not just of the killing itself but also of his earlier contact with B. He insisted several times that he had only acted because of B's firm demands.<sup>56</sup> In essence, M wanted and needed to prove that his personal reasons were secondary motivation for the act, whereas the dominant reason would have been the demand by B. This strategy was necessitated by the aforementioned rivalry between sections 211 and 216. Since most of the elements of murder are specifications of an "especially egoistic and detestable motivation to take someone's life,"<sup>57</sup> if the defence can establish that the primary reason for the act was because of the victim's demand, then a sentence in accordance with section 211 would not be possible.<sup>58</sup>

## II. The prosecutor's strategy

On the other hand, the prosecution made the case that four of the aforementioned elements of section 211, namely the desire to kill, sexual satisfaction, petty reasons and the enabling of a different crime, had been fulfilled. In the prosecution's view, M had mainly killed B out of curiosity and therefore a desire to kill, all his other reasons being of secondary importance. To that end, they cited M's upbringing and early cannibalistic interests.<sup>59</sup>

Regarding the murder out of "sexual satisfaction", the prosecution argued that M acted as a necrophile, since he later masturbated to the sighting of the videotape. According to them, there had at least been indirect sexual intention as the primary guiding force for his act. Citing the earlier chatroom messages between the actors and the subsequent masturbatory acts with reference to the recording, they posited that there had been sexual intent at the time of the killing as well as the recording, which was then expressed by the following masturbation for sexual satisfaction.<sup>60</sup>

In terms of "petty reasons," the prosecution posited that there were no understandable, in any way sympathetic reasons for the killing. Instead, they focused on M desire to "become one" with his victim, interpreting it as a selfish and lowly reason.<sup>61</sup> Lastly the prosecution argued that M had wanted to enable another crime, since he planned on "disturbing the peace of the dead" within the meaning of section 168.

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<sup>56</sup> Gönke Jacobsen, 'Lebenslang trotz schwerer psychischer Störung – Abkehr von der restriktiven Auslegung der Mordmerkmale?' (2006) 18 NK 73.

<sup>57</sup> Albin Eser and Detlev Sternberg-Lieben, 'Vor § 211 StGB' in Eser and others (n 14) para 4.

<sup>58</sup> See n 28.

<sup>59</sup> Helmut Schwan, 'Staatsanwaltschaft will Höchststrafe für „Kannibalen von Rotenburg“' (*Welt*, 3 May 2006) <<https://www.welt.de/vermischtes/article214181/Staatsanwalt-will-Hoehchststrafe-fuer-Kannibalen-von-Rotenburg.html>> accessed 12 September 2024.

<sup>60</sup> NBC News, 'German Cannibal sentenced to 8 ½ years' (*NBC News*, 30 January 2004) <<https://www.nbcnews.com/id/wbna4104727>> accessed 22 August 2024.

<sup>61</sup> Müller (n 55).

### III. The District Court's decision

On the 30<sup>th</sup> of January 2004, the District Court of Kassel found M guilty of homicide in the sense of section 212 and sentenced him to 8 and a half years in prison.<sup>62</sup>

First, the Court found that the demand by B had not been “serious” in the sense of section 216 because B had suffered from mental issues and was therefore incapable of judging the weight of his actions. This alone did not eliminate the application of section 216 (in conjunction with section 16 paragraph 2), however, as it was found that M was under the assumption that B had been in a conscious state of mind.<sup>63</sup> The reason why section 216 was ultimately denied was because M had already been determined to kill B, even before the latter gave his consent. B’s consent was therefore not the dominant motivator.<sup>64</sup>

However, the Court also rejected any arguments the prosecution had made in favour of a murder verdict. They ruled that M had not been motivated by lustful sexual gratification but rather by his desire to experience a human connection. Regarding the masturbation while watching the video, the court cited the timeframe between the killing and the masturbation.<sup>65</sup> At that point in the development of jurisprudence concerning section 211, case law demanded that for a killing to qualify as a murder for sexual satisfaction, there had to be a short timeframe between the killing and the sexual act in order to establish an immediate connection.<sup>66</sup> In typical cases, as aforementioned, the satisfaction would be sought either in the killing act itself, in the corpse, or by prioritizing one’s own satisfaction to such an extent that the victim dies because of it.<sup>67</sup> Thus all the cases had in common that there was a direct connection between the killing and the satisfaction in a spatial and temporal sense. Because M had only admitted to masturbating while watching the video at a later date, the court found that there was no such immediate connection.<sup>68</sup> Regarding the enabling of another crime, the Court argued that there had not been an intended “disturbance of the peace of the dead” because B’s consent into the cannibalization and the chary butchering had caused the act to not be insulting, hence not violating B’s postmortal claim to dignity.<sup>69</sup>

The Court then found that the killing also did not happen for “petty reasons.” They

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<sup>62</sup> BBC News, Manslaughter verdict for cannibal (*BBC News* 30 January 2004) <<http://news.bbc.co.uk/2/hi/europe/3443293.stm>> accessed 15 August 2024.

<sup>63</sup> LG Kassel, 2650 Js 36980/02 (30 January 2004) 202.

<sup>64</sup> *ibid* 203; Wolfgang Mitsch, ‘Der „Kannibalen-Fall“’ (2007) 2 ZIS 197, 198.

<sup>65</sup> LG Kassel (n 63) 206; beck-aktuell-Redaktion, ‘BGH verweist Fall des „Kannibalen von Rotenburg“ zurück ans Landgericht’ [2005] becklink 146368.

<sup>66</sup> BGHSt 7, 353; Burkhard Jähnke, ‘§ 211 StGB’ in Burkhard Jähnke and others (eds), *Strafgesetzbuch. Leipziger Kommentar Bd. 5* (11th edn, De Gruyter 2005) para 7; Michael Köhne, ‘Die Mordmerkmale „Mordlust“ und „zur Befriedigung des Geschlechtstriebes“’ (2009) 31 JURA 100, 103.

<sup>67</sup> See n 35.

<sup>68</sup> LG Kassel (n 63) 207.

<sup>69</sup> *ibid* 210.

elaborated that M's reasons sprang out of pathological wishes and desires which were not the result of any illness or mental disability. According to the Court, M was in a complex mental state where he had the dominant desire to become one with another person while also respecting the life of his victim, to a point where the killing was not motivated by selfishness.<sup>70</sup>

In conclusion, according to the District Court, neither the privileging elements of section 216 nor the qualifiers of section 211 were met. Because M was not criminally irresponsible or legally insane within the meaning of section 20, the District Court ruled M to be guilty (merely) of homicide. The sentencing rules of section 212 paragraph 2 and section 213 were not applied.<sup>71</sup>

#### **IV. The Federal Court's decision and ultimate outcome**

By many, this ruling by the District Court was seen as a compromise, allowing them to punish M while also considering the mitigating special circumstances which accompany the case. Unsurprisingly, both M and the prosecutors appealed the case.

According to the Federal Court of Justice (*Bundesgerichtshof* – BGH), in its opinion delivered on the 22<sup>nd</sup> of April 2005, the decision of the District Court did not hold up to legal scrutiny. The ruling was therefore nullified and remanded for trial. The federal judges were especially displeased with the decision to deny a murder for sexual satisfaction. They also found fault with the decision because the District Court had not properly discussed a murder “to enable another crime.”<sup>72</sup> The judges argued that the element of a sufficient timeframe in between the killing act and the sexual act needs to be interpreted in a more extensive manner. The immediate connection between the killing and the satisfaction was to be viewed as an “ends and means relationship.” Thus, M's later viewings of the recording as well as the handling of the corpse were deemed sufficient to fulfil this element, since the killing and recording were both means for reaching the ends of sexual satisfaction.<sup>73</sup>

Regarding a killing to “enable another crime,” the Court mainly found that the main crime which M had wanted to enable was a “disturbance of the piece of the dead,” as in section 168. The judges pointed towards section 168 paragraph 1, the 2<sup>nd</sup> alternative punishing “anyone who commits insulting mischief to a corpse or its remains.” Such “insulting mischief” is described as a “grossly indecent action or an action which is characterized by a particularly crude disposition by which the offender expresses his contempt for the

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<sup>70</sup> *ibid* 210-15; Jessica Wagner, ‘Der Kannibalen-Fall – Probleme des Eingreifens der in Betracht kommenden Delikte’ [2011] *StudZR* 174.

<sup>71</sup> Jacobsen (n 56) 73.

<sup>72</sup> BGH NJW 2005, 1876.

<sup>73</sup> *ibid*.



object or the dead person.”<sup>74</sup> According to the judges, M’s act of eating B and later masturbating to the sight of the recording met this requirement. The Federal Court supported this argument with some degrading comments that M had made which were documented in the recording. The judges denied that the underlying agreement or the deep emotional connection between M and B elements were relevant for the fulfilment of section 168, since that offence does not just protect individual rights but also a certain sense of piety. In the judges’ opinion, the latter had been violated, because M had knowingly expressed his contempt for humanity and disregard for the right to human dignity itself.<sup>75</sup>

With these new findings the case was then assigned to the District Court of Frankfurt am Main for another assessment. The reason why it was a different court than the initially responsible District Court of Kassel is because of section 354 of the Code of Criminal Procedure (*Strafprozessordnung* – StPO). If an appellate court has found fault with the initial judgement, it can remit the case either to the initial court or another court of the same level. Fault in this context means that the higher court has found that the law has been incorrectly applied or assessed. The appellate court, however, cannot re-assess the case as a whole, admit new evidence, or dismiss the initial judgement because of later findings. It may only correct the initial court’s reasoning and application of the law. The facts of the case can only be investigated and assessed by the district courts and therefore, if the court also finds that the corrected application of the law demands the facts of the case to be reassessed, it will remit the case to a district court. Precisely to which court the case is then assigned to is at the discretion of the appellate court. Usually, the case is to be assigned to a different chamber of the initial court. However, it may also be assigned to a different court of the same rank and in the same state (section 354 paragraph 2 StPO). Because of the overall publicity of the case, it seems plausible that the Federal Court repartitioned to the Frankfurt Court in order to enable a third independent assessment and diminish any possible bias of the Kassel Court or criticism directed thereat.

The Frankfurt Court decided in line with the findings of the Federal Court and, on the 9<sup>th</sup> of May 2006, sentenced M to a lifelong sentence for murder due to having killed for sexual satisfaction as well as for the enabling of another crime.<sup>76</sup> The verdict then became final on the 7<sup>th</sup> of February 2007, after an appeal (*Revision*) by M was denied by the 2<sup>nd</sup> Criminal Senate of the Federal Court.<sup>77</sup>

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<sup>74</sup> RGSt 42, 145, 146; BGH NStZ 1981, 300.

<sup>75</sup> BGH (n 72) 1878.

<sup>76</sup> LG Frankfurt/Main - 5/21 Ks 3550 Js 220983/05 (04/2005).

<sup>77</sup> BGH - 2 StR 518/06, BeckRS 2007, 3006.

## F. Analysis

### I. Section 216 StGB

Surprisingly, and much to the dismay of M, not a single court which had been confronted with the case assumed that it was one of “homicide on demand.” The primary reason why every court denied the application of Section 216 was because of the crucial element of the designation by the victim, i.e. the demand being the driving factor behind the killing.<sup>78</sup>

In the author’s view, the courts correctly denied an application of section 216. The reader might find this result counter-intuitive, since an essential element of M’s actions, as acknowledged by the court,<sup>79</sup> was B’s consent. It is a fact that even though there was some initial interest by M, the trigger for the killing was situated within B himself.<sup>80</sup> Had he not consented to the act, it would not have happened. Furthermore, B did not merely consent, i.e. tolerate to being killed, but rather demanded to be stabbed after passing out, even after M offered to call for an ambulance.<sup>81</sup> Even after being given the option not to be killed, he actively demanded this of the hesitating M to, thereby convincing him to uphold their agreement. This is also in line with the purpose of section 216 which reduces the sentencing of the homicide because it accounts for the reduced reprehensibility of the act evoked by the victim’s consent.<sup>82</sup> Therefore, because the consent played such an essential role in the act and it is in line with the fundamentals of section 216, one could argue for it to be applicable. However, these arguments merely prove that the killing was caused by B’s serious and explicit demand, not that M had technically been instigated by that demand. M’s personal interest to cannibalize, i.e. kill another person and assimilate them to him, was also a primary factor for the course of events. B was mainly driven by his interest to have his genitalia amputated and thereby reach his “ultimate pleasure,” the consent into the killing acting as a means so that M would grant him this wish.<sup>83</sup>

To reiterate, section 216 requires that the perpetrator must be motivated by the demand of the victim. The statute uses the same wording as the offense of instigating another crime (section 26) and therefore has roughly the same requirements. The element relevant in this case is that the instigation must be the primary driving factor behind the act, hence that the wishes of the victim need to be the driving factor.<sup>84</sup> Consequently, if the perpetrator already has the inner motivation to commit the act before being instigated to

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<sup>78</sup> Mitsch (n 64) 198.

<sup>79</sup> BGH (n 72).

<sup>80</sup> Harro Otto, ‘Anmerkung zu BGH, 22.4.2005 – 2 StR 310/04’ (2005) 60 JZ 799.

<sup>81</sup> BGH (n 72).

<sup>82</sup> See n 22.

<sup>83</sup> BGH (n 72).

<sup>84</sup> Christoph Safferling, ‘§ 216 StGB’ in Matt and Renzikowski (n 27) para 10.

do so, being a so called “omnimodo facturus,” an instigation is not possible.<sup>85</sup> As such section 216 runs parallel to the different subjective motives of section 211, i.e. the subjective driving factor constitutes the turning point for determining the appropriate statute.<sup>86</sup> This inner motivation by M to cannibalize B was already present in this case and represented one of the reasons why the two parties came to their final agreement. Since B initially only wanted to be maimed, the desire by M to cannibalize another caused B’s interest to be mutilated to transform into the demand to be killed.<sup>87</sup> The deed was thus the *quid pro quo* for the given consent.

Just as much as M respected B’s interests, the agreement served for M to fulfil his own wishes, not to adhere to B’s. Both interests equally motivated the killing and were equally fulfilled. Therefore, no interest had a clear superiority over the other. This causes the deed not to fall under section 216’s altruistic purpose of privileging the perpetrator who mainly acts to satisfy the interests of another, this external factor needing to be the dominant motivation.<sup>88</sup> It was also M who had the initial interest to cannibalize another person and was actively searching for a consenting partner. Even though the consensual agreement with B was a necessity for M, it was merely the tipping point for the final commitment of the act by the hesitating M. Therefore, his determination cannot be fully attributed to the instigation by B in the way needed for section 216.<sup>89</sup> In the author’s opinion, the application of section 216 should thus be denied.

## II. Section 211 StGB

The Federal Court did not contend that the murder criteria “petty reasons” and “desire to kill” were somehow fulfilled. As the Kassel Court already established, M was less interested in annihilation or anything strictly egotistical than in assimilating with B. The Federal Court did, however, insist on the elements of “sexual satisfaction” and “enabling intent.”

### 1. Killing for sexual satisfaction

For the element of “sexual satisfaction,” the District Court latched onto the precedent that there had to be a narrow timeframe between the killing act and the sexual satisfaction reached by it.<sup>90</sup> The reason for that interpretation, in turn, was the principle of “restrictive

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<sup>85</sup> Frank Saliger, ‘§ 216 StGB’ in Saliger and others (n 17) para 16; Satzger, ‘Der „omnimodo facturus“ – und das, was man in jedem Fall dazu wissen muss!’ (2017) 39 JURA 1169, 1170.

<sup>86</sup> See n 47.

<sup>87</sup> Michael Kubiciel, “Kannibalen“-Fall. Mord zur “Befriedigung des Geschlechtstriebes” und zur Ermöglichung einer “Störung der Totenruhe”. Anmerkung zu BGH, Urteil vom 22.4.2005’ (2005) 37 JA 763, 764.

<sup>88</sup> See also Werner Hinz, ‘Mord bei einverständlicher Tötung mit sexueller Motivation?’ [2016] JR 576, 582.

<sup>89</sup> See Satzger (n 85) 1172.

<sup>90</sup> beck-aktuell-Redaktion (n 65).

Interpretation” demanded by the Federal Constitutional Court.<sup>91</sup> This interpretive principle was essentially contradicted by the Federal Court in its ruling when it resorted to the “ends and means relationship” as opposed to a spatial and temporal link between the satisfaction and the killing, thereby expanding the scope of this element.<sup>92</sup>

The Federal Court is, of course, correct in its assessment insofar as the wording of section 211 does not explicitly entail such a restriction.<sup>93</sup> It is also not fundamentally wrong to evaluate the act based on the “ends and means relationship,” as it is in accordance with the fundamental idea of punishing someone acting especially wicked by subjugating another to his own pleasure, thereby fully disregarding their value and dignity.<sup>94</sup> To put this into perspective, there was a parallel case in Berlin in 2005, directly inspired by the Rotenburg case. There, two men had met to have sex, but, while one of them was blindfolded, the other stabbed him in the head with a screwdriver in order to then take out his organs, though ultimately not consuming them.<sup>95</sup> Even though it was a fetish meeting where the infliction of pain had priorly been agreed upon, the killing had not. Hence, it was evident that the murderer completely disregarded the victim’s dignity and acted purely out of own sexual desire.

The Federal Court seems to consider the same reprehensibility to be present where the killer created video material which may be used to masturbate to later.<sup>96</sup> This deserves approval insofar as typical cases of this sort are concerned, i.e. ones where from the very beginning, the act and its recording would serve exclusively to satisfy the murderer’s interest. In the Rotenburg case, however, the killing and recording both happened with the consent and demand of the victim. Thus, any later revisitation of the act by watching the recordings is a return to a consensual act, not just satisfying the killer’s own desires but also recalling the victim’s desire as well as the relationship between the two parties. The protective purpose of section 211, namely, to punish a murderer who expresses extreme disregard for another human by ruthlessly subjugating them to their own interests, is therefore not met.<sup>97</sup> Consequently, in accordance also with the precept of restrictive interpretation as far as the letter of the law allows, the rule regarding murder for the sake of sexual satisfaction should be disapplied. This would also be in line with the earlier-mentioned “perpetrator type” correction, which demands a positive assessment

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<sup>91</sup> See n 32.

<sup>92</sup> BGH (n 72); Arthur Kreuzer, ‘Einverständliches Töten als Mord? Kriminologische, strafrechtliche und juristische Bemerkungen zum Revisionsurteil im Kannibalenfall’ (2005) 88 MSchKrim 412, 422.

<sup>93</sup> BGH (n 72) 1877.

<sup>94</sup> Kristian Kühl, ‘Die drei speziellen niedrigen Beweggründe des § 211 II StGB’ [2009] JA 566, 568.

<sup>95</sup> LG Berlin – 522-18/04 (10 May 2005); Michael Mielke, ‘“Kannibale aus Neukölln” kommt in die Psychiatrie’ (*Berliner Morgenpost*, 11 May 2005) <<https://www.morgenpost.de/printarchiv/berlin/article104453003/Kannibale-aus-Neukoelln-kommt-in-die-Psychiatrie.html>> accessed 16 August 2024.

<sup>96</sup> BGH (n 72) 1877.

<sup>97</sup> See Hinz (n 88).

that the act was especially reprehensible, which was not the case here. In a second cannibal case which took place in 2016, also with a consenting victim, the District Court had applied the sentence reduction solution, acknowledging the mitigating circumstances. This was also denied by the Federal Court at the time, only remarking that said “solution” is to be used very sparingly and not in the context of this murder criterion. Further elaborations on how the law is to be interpreted were not made.<sup>98</sup>

## **2. Killing in order to enable another crime**

In addition, M was sentenced for murder because the subsequent act of cannibalism supposedly constituted another crime which the killing merely served to enable.

### **a. Distribution of depictions of violence (sections 131 and 184 StGB)**

Sceptically, the Federal Court suggested the enabling of the distribution of depictions of violence under section 131 and section 184a StGB.<sup>99</sup> Since there had been actual distribution of the video material, there is an argument to be made that the recordings were made to enable a later distribution.<sup>100</sup> It would however have to be proven that the goal of distributing the videos and “luring” in potential victims was the driving factor behind the killing, which cannot be assumed when looking at the consensual act and the interests to be fulfilled. It seems realistic that the act would have been committed regardless of a potential recording.

### **b. Disturbance of the peace of the dead (section 168 StGB)**

More importantly, M was said to have disturbed the peace of the dead and thus violated section 168 StGB. The Federal Court assessed that M had done “insulting mischief” to B by butchering him and later consuming his flesh, expressing his distaste for the human species as a whole and violating human dignity, the act thereby being degrading.<sup>101</sup> That M’s actions can be considered mischief, i.e. grossly inappropriate behaviour,<sup>102</sup> is evident. The main concern related to section 168 is that the act also needs to be “insulting,” i.e. violating or degrading the subject’s dignity or the dignity of the human species.<sup>103</sup> The argument of the Court, in favour of this element being fulfilled, is that section 168 protects a “public sense of piety” which is to be prioritized before the victim’s

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<sup>98</sup> BGH NStZ 2016, 469.

<sup>99</sup> *ibid.*

<sup>100</sup> Hans Kudlich, ‘Anmerkung zu BGH, Urteil vom 22.4.2005 – 2 StR 310/04’ (2005) 45 Jus 958, 960; Anja Schiemann, ‘Mord oder Totschlag? - Kannibalismus und die Grenzen des Strafrechts’ [2005] NJW 2350, 2351.

<sup>101</sup> BGH (n 72) 1878.

<sup>102</sup> Tatjana Hörnle, ‘§ 168 StGB’ in Jürgen Schäfer (ed), *Münchener Kommentar zum Strafgesetzbuch Bd. 3* (4<sup>th</sup> edn, C.H. Beck 2021) para 20.

<sup>103</sup> Momsen and Jung (n 25); Jacobsen (n 56) 74.

individual sense of piety. Accordingly, M's deeds were "insulting" regardless of B's consent or M's special care because the act stripped B of his subjective quality, only regarding him as an object. Of the right not to be treated as a mere object, the victim would then be unable to dispose of.

The subjective element demanded by section 15 is also satisfied, according to the Court, because M knew of the societal taboo against cannibalism and willingly went against it.<sup>104</sup> This is problematic on the one hand because the Federal Court equates the violation of a taboo to the commitment of another crime. Breaking a taboo is merely the transgression of an unwritten code of conduct, whereas a crime can be defined rather as a violation of a written societal rule, established by a higher authority.<sup>105</sup> Arguing that the knowledge of transgressing a taboo is equal to knowingly violating a criminal statute is not unjustifiable, but is once again taking a more extensive approach that also leaves unanswered exactly which statute M wanted to violate.

Moving on, it is unclear from the Court's line of argument whether the act violated the human dignity of B individually or him as part of the human species.<sup>106</sup> The court only refers to the protective purpose of section 168 and deems that to have been violated.<sup>107</sup> The Federal Court is thereby again taking an extensive approach, which is not in line with the fundamentals laid out by the Federal Constitutional Court.<sup>108</sup> Acknowledging that section 168 protects a public sense of piety bears the consequence that there is now a dilemma between the protective purposes of section 168, the legal subjectivity of the individual and the public sense of piety, which unveils the fundamental question of this "insulting" element: Is the autonomy of the individual, as part of his human dignity, to be valued less than the dignity which he deserves as a part of the human species?<sup>109</sup>

According to the Federal Court, at least, it is. This is supported by the words of the very first article of the German constitution, stating that "human dignity is inviolable," thereby acknowledging an objective standard, the maintenance of which every human is entitled to.<sup>110</sup> There is also a systematic argument to be drawn from section 168 being situated within division 11 of the German Criminal Code, "offences relating to religion and

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<sup>104</sup> BGH (n 72) 1878.

<sup>105</sup> Schiemann (n 100) 2351; Dirk Fabricius, 'Der Begriff des Tabus. Funktion, Entstehung und Auflösung individueller und kollektiver Tabus' in Otto Depenheuer (ed), *Recht und Tabu* (Westdeutscher Verlag 2003) 26 ff.

<sup>106</sup> Schiemann (n 100) 2351.

<sup>107</sup> BGH (n 72) 1878.

<sup>108</sup> Mitsch (n 64) 200.

<sup>109</sup> Kubiciel (n 87) 766.

<sup>110</sup> Matthias Herdegen, 'Art 1 GG' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz-Kommentar*, Bd. 1 (103rd edn, C.H. Beck January 2024) paras 34 ff.



ideology,” thus demonstrating that section 168 prioritizes public and intangible values.<sup>111</sup> On the other hand, such an exclusively objective standard could pre-emptively undermine the subjective autonomy held to be one primary element of that very guarantee of human dignity.<sup>112</sup> As mentioned before, section 168 also protects the legal subjectivity of the person.<sup>113</sup> Consent into the killing, as another expression of this personal subjectivity of a person, should then be considered to mitigate the reprehensibility normally needed to fulfil the murder statute.<sup>114</sup>

Furthermore, it is unclear, what exactly a “public sense of piety” entails. As criminal law and the constitution under article 103 paragraph 2 demand for a statute to be sufficiently tangible, the introduction of an element which is determined by the zeitgeist and the judge’s personal perspective creates uncertainty and the potential for extensive interpretations.<sup>115</sup> Considering the consent of the victim when assessing the “insulting” nature of the act, even from a public perspective, would cause the element to be a lot more tangible. It would also balance both protective purposes of section 168 since the legal subjectivity as well as the public sense of piety would be considered and respected when evaluating the act. This would also adhere more strongly to the constitutional requirement of article 103 paragraph 2, since every court would be required to evaluate the demand, if present, before introducing their own subjective perspective into the judgement.

To summarize, the legal subjectivity of the individual should be considered while assessing the public sense of piety. The public sense of piety is a standard safeguarding the legal subjectivity of the individual. To disregard this exact subjectivity when applying the standard precisely undermines the values it is trying to protect.

### 3. Dominant motivation

Lastly, regardless of whether the act is classified as insulting or not, the intent to enable the crime would have to be dominant. As mentioned earlier, both the demand by B and the interest by M were causal for the deed being done. Both interests are of approximately equal weight to the effect that, while the threshold of section 216 is not met, neither is the one required for the fulfilment of section 211.

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<sup>111</sup> BVerfGE 115, 118; Filip Horák, ‘Human Dignity in Legal Argumentation: A Functional perspective’ (2022) 18 EuConst 237, 253.

<sup>112</sup> Kubiciel (n 87) 766; Herdegen (n 110) paras 37 ff.

<sup>113</sup> Stephan Stübinger, ‘§ 168 StGB’ in Saliger and others (n 17) para 2.

<sup>114</sup> Thomas Hillenkamp, ‘„Unbedingter Todeswunsch“ und konsensierte Tötung – (k)ein Strafmilderungsgrund?’ in Rainer Beckmann and others (eds), *Gedächtnisschrift für Herbert Tröndle* (Duncker & Humblot 2019) 553, 570.

<sup>115</sup> Nikolaus Bosch and Ulrike Schnittenhelm, ‘§ 168 StGB’ in Eser and others (n 14) para 10.

In the author's view, M's actions falling within the scope of the consent given by B should not be held to qualify as a deed under section 168, the antecedent killing thus not "enabling another crime."

### III. Sections 212 and 213 StGB

Finally, the act has to be assessed from the angle of section 212 paragraph 1, section 212 paragraph 2 and section 213.

Concerning section 213, an argument could be made that M was in such an energized state as required by the statute. It was proven by psychologists and experts that he had developed a schizophrenic personal disorder as well as a fetish for the flesh of men.<sup>116</sup> Therefore, when being able to divulge in these interests, such an energized state could be assumed which then caused him to prematurely act on this desire. However, M never lost his restraint in such a manner, as evidenced by his hesitation even after the amputation of B's genitalia and his offer to call for an ambulance. It can thus not be assumed that he fully succumbed to his mental state in the needed for the application of section 213. Section 212 paragraph 2 cannot serve as a compensation for section 211 but rather, in the absence of section 211, the overall reprehensibility needs to be achieved by a factor which was not considered during the assessment of section 211.<sup>117</sup> Such factors, such as listed above, do not exist in this case, as evidenced by the comprehensive documentation.

Thus, in the author's view, the judgement of M's deeds ultimately boils down to a simple homicide in the sense of section 212 paragraph 1, carrying with it a punishment of no less than five years but no more than fifteen years. Within that margin, the judges would be able to consider the overall cooperation of the perpetrator with the authorities which, under German criminal law, usually lightens the sentence but was, in the actual procedure, completely disregarded by the judges because of section 211's hard and inflexible range of sentences.

### G. Conclusion: A critique of section 211 StGB

In conclusion, the case of Armin M. reveals several problems regarding the homicide statutes, the most obvious being the absolute lifelong sentence of section 211. Between sections 216 and 211, the range of the sentencing of the crime is either six months to five years, or a "lifelong" sentence amounting to a minimum of fifteen years, being enforced for about nineteen years on average.<sup>118</sup> These different sentences sometimes stem from only

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<sup>116</sup> BGH (n 72).

<sup>117</sup> See n 48.

<sup>118</sup> Ralf Eschelbach, '§ 211 StGB' in Kudlich and von Heintschel-Heinegg (n 14) para 122.

tiny differences in the investigation or evaluation of a case, for example in the process of determining which motivation was dominant within the perpetrator.

Furthermore, the inflexible sentencing of Section 211 renders most mitigating circumstances otherwise usable as arguments by the defendant as worthless. In the case at hand, M had been a model prisoner at the time as played a big part in the investigations, cooperating with the public prosecutors.<sup>119</sup> However, the sentence of section 211 does not allow for these factors to be considered, rendering the case entirely dependent on the classification as a murder. It is problematic that the perpetrator can really only expect a fair sentencing which incorporates all the facts only if the act does not constitute a murder.<sup>120</sup> It is also the wrong message to send to future perpetrators and their defending lawyers, since even a proper and model cooperation does not guarantee a lighter sentencing which in turn incentivizes the perpetrator to try and hide as many details of the crime as possible. Conversely, a reform of section 211 would increase the efficiency of the legal proceedings and decrease the time needed for evaluation and discovery. This would also ease the second criticism with section 211, which is that even despite its exhaustive elements and systematic restrictive interpretation, it remains imprecise in its vocabulary. If judges were given some leeway and an opportunity to balance all interests involved in the sentencing of a murder even when one of the elements is fulfilled, they would be less tempted to overanalyse the required elements.<sup>121</sup>

It was the purpose of this article to provide the reader with an overview of the German criminal system regarding homicide and enable them to make their own assessment regarding the handling of the case. Due to the complex nature of the act in question, there is no obviously correct answer, and it is up to one's own assessment and now acquired legal tools to find one's own answer, which might even result in disagreeing with the author or the courts. The discussion is limited by the nature of the statutes in question, so that every treatment will necessarily begin and possibly find an end on an interpretive level, even though a fair evaluation of the act and the perpetrator should be the ultimate goal.

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<sup>119</sup> Stefan Maier, '§ 46 StGB' in Erb and Schäfer (n 14) para 174, 175.

<sup>120</sup> For a critique of section 211 and the need for reform by the then-Federal Minister of Justice and Consumer Protection, see also Heiko Maas, 'Why it is High Time to reform the Homicide Statutes' (2014) 15 GLG 1029.

<sup>121</sup> Rüdiger Deckers and others, 'Zur Reform der Tötungsdelikte Mord und Totschlag – Überblick und eigener Vorschlag' (2014) 34 NStZ 9, 15 ff.