Greg Taylor

Re-trials after Acquittals in Germany

Criminal Law Journal, 2022; 46(4):234-244

RE-TRIALS AFTER ACQUITTALS IN GERMANY

Greg Taylor[*]

Abstract

The addition to the investigatory armoury of D.N.A.-based evidence has caused the double jeopardy principle to be called into question in many countries. Germany is no exception, and as in some other European countries the principle also has constitutional status there, further complicating matters. A unique aspect of German discussion on the topic, however, is memories of what the Nazis did to double jeopardy as well as the precise wording and interpretation of the constitutional principle, to which there were already four unwritten exceptions that had nothing to do with D.N.A. After several false starts, in 2021 the *Bundestag* added a fifth by finally passing a law allowing for the re-opening of prosecutions when there is compelling new evidence. This note outlines the developments in Germany and the debate on its propriety.

1. Introduction

In December 2021 Germany's Code of Criminal Procedure was amended to add a further ground for re-prosecution (or in the Code's terms : re-opening criminal cases to the disadvantage of the accused). The prior law in § 362 of the Code[1] allowed re-opening, first, on three *propter falsa* grounds : falsification of documents presented for the accused, false evidence by witnesses in favour of the accused or

[*] Fellow of the Royal Historical Society. Professor of Law, University of Adelaide; Honorary Professor of Law, Marburg University, Germany; Honorary Professor, R.M.I.T. University, Melbourne. The research on which this article is based takes account of events and publications to the end of September 2022.

[1] There are also one or two further possibilities for re-opening in other laws, such as § 79 of the *Federal Constitutional Court Act*, which allows it when a criminal provision has been declared unconstitutional and invalid. For obvious practical reasons, however, this very rarely applies, or simply does not apply (depending on one's

a criminal breach of judicial duties on the part of a participating Judge, professional or lay (the rough equivalent of the English[2] and Australian[3] "tainted acquittal"). Secondly, there was also one *propter nova* ground, 'when an acquitted person has made a credible confession to the crime, in or out of Court'.

To those four existing and rarely used[4] grounds for re-opening prosecutions in Germany there was added by the amendment of December 2021 a further *propter nova* ground (hereinafter "ground 5") which permits re-opening :

> 5. if new facts or means of proof are adduced which alone or in combination with previously adduced evidence provide compelling reasons for convicting the acquitted accused of murder (§ 211 of the Criminal Code), genocide (§ 6 (1) of the Code of Crimes against International Law), crimes against humanity (§ 7 (1) Nos. 1 and 2 of the Code of Crimes against International Law) or war crimes against a person (§ 8 (1) No. 1 of the Code of Crimes against International Law).

The apparent duplication involved in the phrase 'facts or means of proof' (*Beweismittel* in the original) exists because in a non-adversarial system some evidence may not be witness testimony about facts but consist of documents or exhibits introduced by the Court itself.[5] But there is still plenty of room for difficulties of interpretation and application here. As cases such as *Attorney-General (New South Wales)* v. *"X.X."*[6] show, provisions for re-opening prosecutions after acquittals on the ground of new

---

view) to previous acquittals : Lorenz Leitmeier, „‚Im Namen des Volkes : der Angeklagte wird bis auf Weiteres freigesprochen'?" StV 2021, 341, 344f; Klaus Letzgus, „Wiederaufnahme zuungunsten des Angeklagten bei neuen Tatsachen und Beweismitteln" NStZ 2020, 717, 718; Klaus Marxen/Frank Tiemann, *Die Wiederaufnahme in Strafsachen* (3rd ed., C.F. Müller, Heidelberg 2014), p. 166.

[2] *Criminal Procedure and Investigations Act* 1996 (U.K.) ss 54 – 57. There is also considerable similarity with Scots law under the *Double Jeopardy (Scotland) Act* 2011 ss 2 – 4.

[3] For example, *Criminal Procedure Act* 2009 (Vic.) s 327D.

[4] Burkhard Feilcke in Klaus Miebach/Olaf Hohmann (eds.), *Wiederaufnahme in Strafsachen : Handbuch* (C.H. Beck, Munich 2016), p. 295.

[5] Code of Criminal Procedure §§ 214 (4), 245 (1), 249 (1).

[6] (2018) 98 NSWLR 1012; special leave to appeal refused : [2019] HCATrans 52.

evidence raise numerous and often surprising and unanticipated questions of application and interpretation,[7] at the root of which is very often the fact that the existing rules of criminal procedure were not designed with re-trials after acquittals in mind.

Cases involving new evidence other than D.N.A. are also certainly conceivable, such as the re-appearance of a crucial witness. However, ground 5's requirement for compelling reasons for conviction by new evidence will limit drastically the number of such cases, as will of course the tight restrictions on the offences that may be subject to re-prosecution. As the *"X.X."* case just cited[8] with its review of case law both in Britain and Australia shows, in common-law countries the requirement for evidence to be new or fresh can cause a lot of debate. In Germany there have already been controversies, in the reverse case of an attempt by a convicted accused to secure an acquittal using allegedly new evidence,[9] about whether evidence that was available to the initial Judges but not taken into account by them can be said to be new;[10] for present purposes it may be said that it is very unlikely that such evidence would have been ignored at the first trial if it provided compelling reasons for conviction. Such cases cannot be ruled out *a priori*, but new evidence in the form of D.N.A. evidence is what ground 5 is intended to cater for and what it will undoubtedly mostly, if not wholly be used for.

The change was made by a law signed – reluctantly, as we shall see – by the Federal President on 21 December 2021 bearing the vastly overblown and question-begging title "An Act for Establishing Substantive Justice"[11] (a title which suggested that no such thing existed beforehand in Germany, surely an excessively pessimistic view).[12] The change had been foreshadowed four years earlier in the coalition agreement between the Christian Democrats and the Social Democrats after the federal general elections of 2017,[13] but it was put on to the agenda only just in time for it to be passed before the

[7] See in relation to Germany, *e.g.*, Marxen/Tiemann, above n 1 at 96 – 103; Fielcke, above n 4 at 295 – 307.
[8] See above, fn 6.
[9] Code of Criminal Procedure § 359 No. 5.
[10] Ulrich Eisenberg, „Aspekte des Verhältnisses von materieller Wahrheit und Wiederaufnahme des Verfahrens gemäß §§ 359ff StPO" JR 2007, 360, 363.
[11] *Gesetz zur Herstellung materieller Gerechtigkeit*, BGBl 2021 I 5252. This translation, along with the translation of ground 5 that has just appeared in the text, along with all other translations from German in this article, is by this article's author.
[12] Björn Schiffbauer, „‚Unerträglich' als valides Argument des Gesetzgebers? – Aktuelle Normsetzung und das Konzept des Rechts" NJW 2021, 2097, 2097.
[13] *Ein neuer Aufbruch für Europa, eine neue Dynamik für unser Land, ein neuer Zusammenhalt für unser Land : Koalitionsvertrag zwischen C.D.U., C.S.U. und S.P.D., 19. Legislaturperiode* (2018), p. 125; Teresa Frank, *Die Wiederaufnahme zuungunsten des Angeklagten im Strafverfahren : Reformdiskussion und Gesetzgebung seit dem neunzehnten Jahrhundert* (de Gruyter, Berlin 2022), pp. 317f; Letzgus, above n 1 at 717f.

following general elections four years later. It may well be that delay in the Ministry of Justice – due to constitutional rather than broader policy-based doubts about the proposal[14] – caused this long interval between promise and reality.[15]

Second prosecutions in Germany were prohibited, subject to the four exceptions mentioned, for more or less the same reasons as elsewhere. These have been very well summarised by Professor Fiona Leverick.[16]

> Permitting re-prosecution might increase the risk of wrongful conviction, encourage complacency in the initial investigation or cause distress to the accused who has to go through a second trial. The most convincing arguments, however, are based on the value of finality in the criminal process. A strict double-jeopardy rule ensures that acquitted persons can get on with their lives without having to live in perpetual fear of re-prosecution, jury verdicts cannot be accepted or rejected at will by the state and the financial cost of multiple trials is avoided.

In Germany, of course, the reference to jury trials must be deleted, although perhaps there is less to it than meets the eye given that any re-trial must also be by jury in jurisdictions where juries exist. Germans would certainly also add to this list the obligatory reference to the all-important *Rechtsstaat* concept which underlies all post-War German constitutionalism,[17] although it too cuts both ways given

[14] What is said in Oliver Sabel, „Die Wiederaufnahme des Strafverfahrens zuungunsten des Angeklagten bei Mord und Völkermord“ in Beate Czerwenka/Matthias Korte/Bruno Kübler (eds.), *Festschrift zu Ehren von Marie Luise Graf-Schlicker* (R.W.S., Cologne 2018), pp. 568, 571, along with the position held by the writer of that chapter and the person honoured by the *Festschrift*, strongly suggests that the Ministry supported the proposal in principle but believed that a constitutional amendment was necessary to effect it.

[15] This was suggested by speakers in the *Bundestag* Debates, 11 June 2021, pp. 30370, 30372; and see Letzgus, above n 1 at 318f; Andreas Piekenbrock, „Die Unverjährbarkeit von Ansprüchen aus unverjährbaren Straftaten“ JZ 2022, 124, 124.

[16] “‘Legal History’ in the Making : *H.M. Advocate* v. *Sinclair* and the *Double Jeopardy (Scotland) Act* 2011” (2015) 19 Edinburgh LR 403, 404. Obviously the precise significance of these various justifications is debated (such as by the authors cited below, fn 24), but in a short note such as this Professor Leverick’s excellent summary suffices.

[17] This principle came strikingly to the fore in the present context in BVerfGE 21, 378, in which the Court held that military punishments did not occur under the ‘general criminal laws’ and therefore did not stand in the way of criminal punishment for the same act under Article 103 (3) (to be quoted in the text shortly), but also that the *Rechtsstaat* principle required account to be taken of military penalties anyway in fixing the criminal punishment.

that proponents of change can argue that allowing murderers to escape justice does not reflect the values of the rule-of-law state.[18]

As already indicated, the principal motivating factor for this change is the possibility of strong D.N.A. evidence emerging after an acquittal. One particular case was at the forefront of the campaigners, namely that of Frederike von Möhlmann, a seventeen-year-old schoolgirl murdered in 1981. Convicted at his first trial in 1982, the man accused of her murder appealed and was acquitted at a second trial in 1983. Since then, D.N.A. evidence has emerged confirming his guilt, and proceedings against him re-started in late February 2022, only two months after the commencement of ground 5.[19] In July 2022 the Federal Constitutional Court ordered the accused's release on bail by five votes to three, subject to stringent conditions intended to ensure that the accused, who is of Turkish origin, does not flee.[20] (Could this split decision indicate how the Court might eventually decide on the constitutionality of ground 5, or did the need to keep open the mere possibility of acquittal – which seems remote – or, more to the point, a forthcoming invalidation of ground 5 motivate at least some of the five Judges who voted for release?) While the von Möhlmann case has been the most prominent one, and indeed the father of the young woman appeared through counsel at the *Bundestag*'s committee hearing on the proposed addition of ground 5,[21] one or two other comparable D.N.A. cases are sometimes also mentioned.[22]

Given the rarity of the international crimes referred to in ground 5, in the ordinary run of events murder will be the only crime that will be subject to re-opening under ground 5, and only in its completed version (no attempts or related offences such as incitement)[23] – thus ensuring that re-openings against

[18] Elisa Hoven, „Die Erweiterung der Wiederaufnahme zuungunsten des Freigesprochenen – eine Kritik" JZ 2021, 1154, 1158.
[19] OLG Celle, 2. Strafsenat, Beschluss vom 20. April 2022, 2 Ws 62/22, 2 Ws 86/22 – noted in NJW-Spezial 2022, 314.
[20] NJW 2022, 2389.
[21] Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, *Wortprotokoll der 160. Sitzung*, 21 June 2021, pp. 14f; see also below, fn 54.
[22] For example, the killing of a twenty-eight-year-old woman in a video store in Düsseldorf in 1993 : Klaus Marxen/Frank Tiemann, „Die geplante Reform der Wiederaufnahme zuungunsten des Angeklagten" ZIS 2008, 188, 188.
[23] For that reason, in what follows usually murder will be the only crime referred to as justifying re-opening and not the international crimes. Earlier failed Bills had included incitement, such as that from 2008 in *Bundestag, Drucksache* 16/7957 and that from 2010 in *Bundesrat, Drucksache* 222/10 (on these, see further Hoven, above n 18 at 1155). Arguably attempted murder should be included in the law passed at the end of 2021 given that it too is not subject to limitation; but it is not.

the accused will continue to be rare. This is a much narrower rule than that in the comparable legislation in England and Wales, which allows re-opening for crimes punishable by life imprisonment (despite a recommendation by the Law Commission to restrict it to murder only).[24] It is narrower even than the more restricted lists in New South Wales (which requires an offence to be punishable by life imprisonment if it is to be the subject of a re-trial on the ground of fresh and compelling evidence, restricting the list to murder, aggravated sexual assault in company and serious drug trafficking)[25] and in Victoria (which permits re-trial for new evidence essentially for homicide offences, rape and similar offences and some serious drug trafficking offences, although not all of them are punishable by life imprisonment).[26] It must furthermore be recalled that murder, in German law, is not in essence even every deliberate killing, but only every deliberate killing with an aggravating factor such as cruelty or avarice (such factors having originally been thought to justify the death penalty, long since abolished under Article 102 of the Basic Law); *Totschlag*, usually and somewhat misleadingly translated as manslaughter and perhaps more accurately seen as equivalent to second-degree murder in U.S. terms, is the basic intentional-homicide offence in the absence of such aggravating factors.[27] Ground 5 allows no re-opening of *Totschlag* acquittals. Opinion is divided among German commentators about whether it would be possible for a case to be re-opened and the accused re-charged with murder under ground 5 but the verdict to be only *Totschlag*, as long as the limitation period (twenty years as a rule) for the latter has not expired.[28]

---

[24] *Criminal Justice Act* 2003 (U.K.) Part 10 & Schedule 5 Part 1; Ian Dennis, "Quashing Acquittals : Applying the 'New and Compelling Evidence' Exception to Double Jeopardy" [2014] Crim LR 247, 248 fn 10; Paul Roberts, "Double Jeopardy Law Reform : a Criminal Justice Commentary" (2002) 65 MLR 393, 412, 422f; Paul Roberts, "Justice for All? Two Bad Arguments (and Several Good Suggestions) for existing Double Jeopardy Reform" (2002) 6 Int Jo Ev & Proof 197, 199.

[25] *Crimes (Appeal and Review) Act* 2001 (N.S.W.) ss 98 (1), 100 (1).

[26] *Criminal Procedure Act* 2009 (Vic.) s 327M.

[27] Criminal Code §§ 211, 212. The *locus classicus* on this in English is George Fletcher, *Rethinking Criminal Law* (O.U.P., 2000), pp. 325 – 331. Germany's present definition of murder also goes back to the Nazi period, but it is based largely on Swiss models and has survived despite occasional attempts to revise it. The history is traced in great detail in Martina Plüss, *Der Mordparagraf in der N.S.-Zeit* (Mohr Siebeck, Tübingen 2018), on which there is also a useful corrective in the form of a book review by Friedrich-Christian Schroeder, JZ 2019, 351.

[28] Jörg Eisele, „Das Gesetz zur Wiederherstellung der materiellen Gerechtigkeit : zur Wiederaufnahme des Strafverfahrens bei unverjährbaren Delikten" Bonner Rechtsjournal 2022, 6, 10; Prof. Dr Klaus Gärditz to the Legal and Consumer Affairs Committee, 20 June 2021, in Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, above n 21 at 54; Johannes Kaspar, „Mord-Freisprüche nur noch unter Vorbehalt? Strafprozessuale und verfassungsrechtliche Probleme der neuen Wiederaufnahme des Verfahrens gemäß § 362 Nr 5 StPO" GA 2022, 21, 23 – 25 (pointing out also that ground 5 requires a prior acquittal, so a re-opening after a conviction for *Totschlag* in order to attempt to secure a conviction for murder is not permissible); Letzgus, above n 1 at 719. A former senior state prosecutor, speaking in *Bundestag* Debates, 24 June 2021, p. 30754, makes the doubtlessly correct prediction that the effect of allowing second prosecutions for murder but not *Totschlag* alone would be (assuming that the limitation period for *Totschlag* has expired, rendering

The amending law of 21 December 2021, in Article 2, also abolished limitation periods on civil claims arising from a crime that is not subject to a limitation period for criminal prosecutions.[29]

2. Constitutional objections (1) – the prohibition of re-trials

The principal objection to double jeopardy reform lies in Article 103 (3) of the Basic Law,[30] which runs, in full : 'Niemand darf wegen derselben Tat auf Grund der allgemeinen Strafgesetze mehrmals bestraft werden' – "no-one may be punished for the same act under the general criminal laws more than once". At first sight this would not seem to constitute any sort of obstacle as the change made in 2021 was unequivocally limited to cases involving accused persons who had been acquitted, and therefore of course not punished, at the original trial.

Characteristically for German law, however, which is supposed to be a glorious realm of codifications making the discovery of the law so much easier, case law[31] and scholarly opinion[32] unite in the conclusion that this provision does not actually mean what it says, but rather is to be read as if it said "prosecuted" rather than "punished".[33] This at least expands the protection offered to the individual and

conviction for it impossible) that every defence counsel will concentrate on rebutting the necessary aggravating factor(s) for murder in any particular case, 'for there is only the thinnest of partitions, which can easily be torn down, between murder and *Totschlag*'.

[29] As the *Bundesrat* (the upper House) pointed out in allowing the Bill through, this would allow for claims to be made even after the death of the perpetrator against the heirs, whereas criminal prosecutions would of course end with the perpetrator's death; the *Bundesrat* recommended renewed consideration of this angle by the government : *Bundesrat, Drucksache* 662/21; *Bundestag* Debates, 11 November 2021, pp. 113f. Five States' representatives gave written statements in the *Bundesrat* doubting the constitutionality of the proposed change : *Bundesrat* Debates, 17 September 2021, pp. 403 – 406. See further Piekenbrock, above n 15.

[30] Some state constitutions, such as that of Hesse (Art. 22 (3)), also sometimes include a prohibition of double jeopardy, but as virtually all important criminal law in Germany is in federal statutes these provisions are not pursued here.

[31] For example, BVerfGE 12, 62, 66; BGHSt 5, 323, 329 – 331. Earlier, BVerfGE 3, 248 appeared to leave open this option of interpreting Article 103 (3) according to its wording.

[32] References to the main sources may be found in Prof. Dr Klaus Gärditz to the Legal and Consumer Affairs Committee, 20 June 2021, in Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, above n 21 at 54.

[33] Compare Article 4 (1) of the Protocol No. 7 to the European Convention on Human Rights : 'tried or punished'. See however Article 4 (2) on the issue at hand. It is worth noting also that Germany has never ratified this Protocol. Article 50 of the Charter of Fundamental Rights of the European Union applies, under Article 51,

is therefore far less objectionable than a narrow reading would be; and it takes account of the fact that the Nazis, to whose practices this provision responds, sinned in this field mostly by allowing the re-prosecution of the acquitted.[34] However, one simple way of solving the constitutional problems arising under the amendment would be to read Article 103 (3) as meaning what it says and no more, as a few scholars have now begun to advocate,[35] or alternatively to amend it in some way so as to make its words reflect the interpretation of it, possibly inserting some explicit exceptions as well.

But, the reader may object, if Article 103 (3) really means "prosecuted", how is it that there were already before 2021 four other exceptions to the prohibition of re-trials in the Code of Criminal Procedure, two – as was seen in the introduction – based on falsification of evidence for the accused, one on the commission of a criminal offence by trial officials and one arising in case of a credible confession by the acquitted accused? It is here that further baroque complications are added to the apparently simple words of Article 103 (3), for although its terms, unlike those of some other rights provisions in the Basic Law, do not permit any statutory exceptions to its prohibition (as amended by case law to embrace prosecutions after acquittals), it is read as if it did allow some statutory exceptions. In decisions in 1953 and 1961, the Federal Constitutional Court declared that exceptions in the Code of Criminal Procedure that existed when the Basic Law came into force were also unwritten exceptions to the rule in Article 103 (3);[36] but in neither case was a final decision about any further possible exceptions or the reasons underlying the existing exceptions necessary : the case in 1961[37] turned on the solely formal ground that a prosecution in the "German Democratic Republic" (East Germany) did not count at all as a criminal proceeding for the purpose of Article 103 (3). A further decision in 1981, which also was decided easily enough given that membership in a criminal association is clearly a different act from crimes committed by that association and there was therefore no question of a duplicate trial for the same act after acquittal, referred to the possibility of developments in the law's understanding of a single act and added that Article 103 (3) 'guarantees only the core of what has been worked out in the case law as the content of the proposition *ne bis in idem*' and did not prevent 'adjustments at

---

only to the European Union itself and not its member states. On the International Covenant on Civil and Political Rights, see Sabel, above n 14 at 565 (stating that Art. 14 (7) of the Covenant permitted re-opening).

[34] Alexander Brade, „Erweiterung von § 362 StPO im Lichte des Verfassungsrechts" ZIS 2021, 362, 362.

[35] Hoven, above n 18 at 1156f; Klaus Letzgus, „Wiederaufnahme zu Ungunsten des Angeklagten : ein Plädoyer für die Einzelfallgerechtigkeit" in Claudius Geisler *et al.* (eds.), *Festschrift für Klaus Geppert* (de Gruyter, Berlin 2011), p. 791; Letzgus, above n 1 at 718f.

[36] BVerfGE 3, 248, 252f; BVerfGE 12, 62, 66.

[37] On the case in 1953, see below, fn 39. Like virtually all cases in Germany, the reports of the Courts' decisions are published without the names of the parties, which therefore cannot be cited.

the borderline'.[38] It provided no further guidance about what such 'adjustments' might be. The provision has been occasionally mentioned in other cases since,[39] but what has been said exhausts the useful commentary of the Federal Constitutional Court on the point at issue. It is the 'probably dominant' scholarly opinion, based on the meagre case law just summarised, that the test for validity is whether a change can be said to be 'an extrapolation inherent in the system'.[40] It is on these meagre glosses upon a gloss on the otherwise plain words of Article 103 (3) that the constitutionality of the change made in 2021 must be judged.

Clearly this state of affairs makes it necessary to inform ourselves about the history. The pre-2021 version of § 362 may be traced back to the Code of Criminal Procedure originally enacted in 1877 by "We William, by the Grace of God German Emperor, King of Prussia *etc.*" and the parliamentary organs of the day.[41] Prior to this national Code each German state had its own; and the makers of the 1877 Code rejected rules in states such as Württemberg permitting re-prosecution for any type of compelling new evidence, but allowed it only when the accused made a confession : doing so was his free choice and thus this rule protected the accused's interests.[42] The Code as enacted in 1877 had, with only a few very minor changes which do not affect the present issue,[43] exactly the same four exceptions as § 362 at the end of 2020. However, in May 1943 the Nazis eliminated the special rules of § 362 as far as they protected the accused, and made the acquitted accused liable to suffer re-opening of the case on almost exactly the same conditions as for re-litigating a conviction : in essence there needed to be only new facts which justified either conviction or a 'significantly more stringent' treatment of the accused alongside an overarching test, the need to prosecute to protect the *Volk* (obviously very much an open door in this era).[44] It was not until 1950 that the Code of Criminal Procedure

[38] BVerfGE 56, 22, 34f. See further below, fn 59.
[39] For example, BVerfGE 65, 377, in which a traffic-related matter was resolved summarily by a penalty notice (*Strafbefehl*) and the victim later died of the injuries received in the accident. Given that a *Strafbefehl* is not the most solemn proceeding and the facts themselves (as distinct from the Court's knowledge of them) changed as a result of the victim's death, the case is of little use for present purposes, nor did the Court say anything in *obiter dicta* of present relevance. See now § 373a of the Code of Criminal Procedure.
[40] Sophie-Charlotte von Bierbrauer zu Brennstein, „Der neue § 362 Nr 5 StPO im System der Wiederaufnahmegründe" HRRS 2022, 118, 118.
[41] RGBl 1877 253, 325. Emperor William I is the man in question here, not "the *Kaiser*", William II.
[42] André Bohn, *Die Wiederaufnahme des Strafverfahrens zuungunsten des Angeklagten vor dem Hintergrund neuer Beweise* (Duncker & Humblot, Berlin 2016), pp. 26 – 35, 223f; C. Hahn, *Die gesamten Materialien zur Strafprozeßordnung und dem Einführungsgesetz zu derselben vom 1. Februar 1877* (R. von Becker, Berlin 1880), pp. 42, 264f, 378 – 389, 1667, 2309.
[43] See below, fn 47.
[44] *Dritte Verordnung zur Vereinfachung der Strafrechtspflege vom 29. Mai 1943*, RGBl 1943 I 342, 345. Further background is in Alexander Brade, „Der Grundsatz *ne bis in idem*, Art. 103 III GG : ein Plädoyer für die Effektivierung des Grundrechtsschutzes" AöR 146 (2021), 130, 136; Matthias Grübe, „Die strafprozessuale Wiederaufnahme *in malam partem* und das Verfassungsrecht" ZIS 2022, 1, 4f; Anette Grünewald, „Die

was formally amended to restore its pre-1943 state on this front,[45] which event post-dates the Basic Law of 23 May 1949![46] It is certain however that the pre-1943 state of the law was present to the minds of those who conceived Article 103 (3), and indeed two of the four occupying powers had restored the pre-1943 law in their zones immediately after the War.[47] Clearly enough, despite their failure to record their intention in the Basic Law its drafters intended no change in the four long-standing and very recently re-adopted grounds for re-opening.[48]

But are further exceptions permitted, or is the law frozen as it stood in 1949/50? The case law, as we have seen, provides only the vaguest of hints. In favour of the change made to allow a second trial, supporters urge that the pre-existing grounds for that step, such as the existence of falsified documents, must be based on the need to ensure that material justice triumphs in the end, and if a mere falsified document permits re-opening a case it is no great step – an extrapolation of the existing system,[49] indeed – to permit it for all sorts of evidence, particularly evidence that provides compelling reasons for re-opening, and then only for the most serious crimes.[50] We may also observe that in murder cases ground 5 really swallows up ground 4,[51] for if there is a credible confession there is surely compelling new evidence; this further emphasises that ground 5 is merely an extrapolation from the

---

Wiederaufnahme des Strafverfahrens zuungunsten des Angeklagten" ZStW 120 (2008), 545, 554f; Marxen/Tiemann, above n 22 at 190f; Werner Schubert (ed.), *Quellen zur Reform des Straf- und Strafprozeßrechts* Band III.1 (Walter de Gruyter, Berlin 1991), pp. 10, 63. Yet little is known about the practical application of this change in the last two years of the regime : Hoven, above n 18 at 1159. The Weimar Constitution (which did not trouble the Nazis by 1943 anyway) contained no equivalent of Article 103 (3). Remarkably, the "German Democratic Republic", in § 328 of its Code of Criminal Procedure, also assimilated the pre-conditions for re-opening for and against the accused, with the important exception that there was an absolute limit of five years after the initial decision for re-opening against the accused.

[45] *Gesetz zur Wiederherstellung der Rechtseinheit auf dem Gebiete der Gerichtsverfassung, der bürgerlichen Rechtspflege, des Strafverfahrens und des Kostenrechts* BGBl 1950 I 455, 665f; see further Bohn, above n 42 at 87f.

[46] Christoph Zehetgruber, „Ist eine Erweiterung der Wiederaufnahmegründe zu Ungunsten des Angeklagten möglich?" JR 2020, 157, 160.

[47] Ordinance No. 15, Criminal Procedure, Military Government Gazette Germany – British Zone of Control, No. 5, undated (entry into force on 1 October 1945), p. 51; Military Government, Germany, *Instructions to Judges No. 2/Allgemeine Anweisungen an Richter Nr 2 : Gerichtsverfassungsgesetz und Strafprozeßordnung* (Vandenhoeck & Ruprecht, Göttingen 1946), pp. 110f, 164; *Bundestag, Drucksache* 1/530, Attachment 1a („Begründung zu dem Entwurf"), p. 52, and, for the principal change, *Bundestag, Drucksache* 1/1138, p. 65 (the Bill, in line with the pre-1943 law, had referred only to false sworn statements as possibly justifying re-opening, whereas the change embraced unsworn evidence); Bohn, above n 42 at 87f.

[48] Prof. Dr Klaus Gärditz to the Legal and Consumer Affairs Committee, 20 June 2021, in Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, above n 21 at 55f, disputed by Brade, above n 44 at 171. The history of Article 103 (3) is traced in Klaus-Berto von Doemming/Rudolf Werner Füßlein/Werner Matz, „Entstehungsgeschichte der Artikel des Grundgesetzes" AöR 1 (n.F.) (1951), 741, 744.

[49] See above, fn 40.

[50] Hoven, above n 18 at 1157; von Bierbrauer zu Brennstein, above n 40 at 119.

[51] Eisele, above n 28 at 9; Letzgus, above n 1 at 719f; Letzgus, above n 35 at 798.

existing rules. Furthermore, it would hardly be consistent to treat the maker of a voluntary[52] confession, already subject to re-prosecution, less favourably than a person involuntarily caught by D.N.A. evidence.[53] The lawyer for the von Möhlmann family, in his submission to the *Bundestag* committee, drew a further insightful parallel : as murder is not subject to limitations rules, murderers can never be sure of their 'triumph over the facts'[54] – a principle that should apply to acquitted murderers as well as those who have never been tried. Needless to say, emphasis is also placed upon the obvious argument that the exception to be created is very narrow and very few cases will be affected,[55] while those few cases will simultaneously involve the most serious breaches of the criminal law justifying extra effort on the part of the state to ensure that justice is served and seen to be served.[56]

Opponents of the change have two sorts of doctrinal standpoints : one accepting the historically based arguments for the previous four exceptions in § 362 and the other rejecting them.[57] The first group reads the case law, and particularly the case from 1981 mentioned earlier,[58] to indicate that the Court meant that only developments in the law's doctrinal conception of what constitutes a single act,[59] not other developments such as new investigatory methods, could justify 'adjustments at the borderline'[60] in the law on re-opening prosecutions – certainly a possible reading of what the Court had to say, but in reality the Court did not have in mind, and its words were not addressed to the present situation at all.[61] While the history sanctifies the previous exceptions which go back to 1877, they add, justice

[52] As we have seen, the word used in the provision is 'credible', which an involuntary confession could hardly be. Dennis, above n 24 at 249 – 251, shows that not every confession is credible; ground 4 however has that base covered, as it requires a credible confession.
[53] Letzgus, above n 35 at 788; Zehetgruber, above n 46 at 162f.
[54] Dr Wolfram Schädler to the Legal and Consumer Affairs Committee, 17 June 2021, https://www.bundestag.de/resource/blob/848910/afb0dcd0044b2ccf64528079af787a12/stellungnahme-schaedler-data.pdf, at p. 3. This phrase was repeated in his oral evidence : above n 21 at 15.
[55] Prof. Dr Klaus Gärditz in Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, above n 21 at 18; see also Letzgus, above n 1 at 719; Thomas Singelnstein, „Die Erweiterung der Wiederaufnahme zuungunsten des Freigesprochenen" NJW 2022, 1058, 1060.
[56] Prof. Dr Klaus Gärditz to the Legal and Consumer Affairs Committee, 20 June 2021, in Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, above n 21 at 58; Michael Kubiciel, „Reform der Wiederaufnahme zuungunsten des Freigesprochenen im Licht des Verfassungsrechts" GA 2021, 380, 390.
[57] Grünewald, above n 44 at 568 – 570. Kubiciel, above n 56 at 380, points out the reminiscences of U.S.-style originalism in the historically based arguments.
[58] See above, fn 38.
[59] The point is that if there is more than one act, a second prosecution may be possible in relation to whichever act(s) were not the subject of the original prosecution. This doctrinal complication cannot be pursued here, but in general, there being no other available source of law on this point, the concepts of the criminal law are used to decide what counts as a single act for the purposes of Art. 103 (3) also – hence the statement that developments in doctrine may affect the constitutional provision.
[60] Stefan Conen to the Legal and Consumer Affairs Committee, 21 June 2021, in Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, above n 21 at 40f.
[61] Hoven, above n 18 at 1157; Kubiciel, above n 56 at 388. At any rate, the Court's decisions, whatever they mean, do not bind itself, only lower Courts : Peter Stainer/Dominic König, "The Concept of *Stare Decisis* in the

includes procedural justice and the prohibition on re-opening prosecutions except in the cases allowed in 1877 is just and right.[62] But the most thorough-going view of those opposed to ground 5 is the second group's : no statutory exceptions at all are permitted to the constitutional prohibition on re-prosecution, probably not even the four exceptions set out in § 362 as it existed before 2020 but certainly not ground 5, as Article 103 (3)'s wording does not permit any and statutes cannot overrule the constitution; at most high-level constitutional principles such as the protection of human dignity might occasionally clash with the prohibition on re-prosecutions and require exceptions for the overall coherence of constitutional doctrine (a well-established idea in German constitutional law).[63]

On a practical level, opponents of the change express the equally obvious contrary fear that the present is but the first of many breaches of the important *ne bis in idem* principle.[64] They fear that the present change will be merely the thin end of the wedge and further crimes will be added to the list,[65] although one proponent of the change points out that no further crimes have been exempted from limitation statutes since the time limit on prosecutions for murder was removed, largely in order to ensure that Nazi murderers did not escape, in 1979.[66] Other "contra" writers turn the "pro" argument

German Legal System – a Systematically Inconsistent Concept with High Factual Importance"(2018) 27 Studia Iuridica Lublinensia 121, 128. But in this instance the Court, given the laconic ambiguity of its previous pronouncements, would clearly be able to develop its jurisprudence without going to the extreme of expressly overruling itself.

[62] Leitmeier, above n 1 at 344; Florian Slogsnat, „*Ne bis in idem* – Legitimität und verfassungsrechtliche Zulässigkeit einer Erweiterung der Wiederaufnahmegründe zuungunsten des Beschuldigten durch das Gesetz zur Herstellung materieller Gerechtigkeit" ZStW 133 (2021), 741, 755, 761 – 763.

[63] Brade, above n 44 at 170 – 173; Laurenz Eichhorn, „Strafprozessuale Wiederaufnahme und Verfassungsrecht" KriPoZ 2022, 357, 358 – 361; Ulfrid Neumann, „*Non numquam bis in idem crimen iudicetur*? Zur Fragwürdigkeit einer Wiederaufnahme des Strafverfahrens zu Ungunsten des Angeklagten (§ 362 StPO)" in Heinz Müller-Dietz *et al.* (eds.), *Festschrift für Heike Jung zum 65. Geburtstag* (Nomos, Baden Baden 2007), pp. 655 – 677. Martin Kment in Hans Jarass/*id.*, *Grundgesetz für die Bundesrepublik Deutschland – Kommentar* (17th ed., C.H. Beck, Munich 2022), p. 1158 – a very popular and widely used commentary – agrees that only constitutional principles can compete with the rule in Art. 103 (3), but counts those in the existing § 362 as falling within this rule because they give effect to the requirements of justice – a rather unconvincing two-bob-each-way view. It is unclear whether ground 5 was intended to be embraced by this pronouncement although the foreword to the seventeenth edition is dated January 2022 (at p. vi).

[64] For example, Dr Ulf Buermeyer, above n 21 at 20; Stefan Conen in Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, above n 21 at 23. Some of their opponents would welcome such an extension to other crimes : Heinz Schöch, „Wiederaufnahme zuungunsten Freigesprochener bei neuen D.N.A.-Analysen?" in René Bloy et al. (eds.), *Gerechte Strafe und legitimes Strafrecht : Festschrift für Manfred Maiwald zum 75. Geburtstag* (Duncker & Humblot, Berlin 2010), pp. 775 – 777, 782.

[65] Maximilian Lenk, „Das ‚Gesetz zur Herstellung materieller Gerechtigkeit' – gerecht oder rechtsstaatlich bedenklich?" StV 2022, 118, 123; Florian Ruhs, „Aktuelle Reformbestrebungen der Wiederaufnahme in Strafsachen" ZRP 2021, 88, 90f.

[66] *Bundesrat* Debates, 17 September 2021, p. 404; Barbara Havliza, „Wiederaufnahme in schweren Fällen : *Pro*" DRiZ 2021, 266. The interesting background is summarised in Martin Clausnitzer, "The Statute of Limitations for Murder in the Federal Republic of Germany" (1980) 29 ICLQ 473. Under the § 5 of the Code of Crimes against International Law of 2002, the other crimes referred to in ground 5 are also not subject to expiry, but these are variations on the theme of murder and not really exceptions.

on its head, emphasising that the abolition of the finality of the verdict in the most serious crimes is hardly a minor matter precisely because of their seriousness and the consequences for the accused.[67] They also point out that the four existing grounds for re-opening require either a fundamental error in proceedings going to its *Rechtsstaat* status or the free choice of the accused to make a confession; ground 5 is therefore not a natural extrapolation from existing rules, but would rather add a different type of re-opening ground along the lines of "plainly wrong".[68]

In the absence of any evidence that the Basic Law was intended to petrify the law of criminal procedure on this point, it does seem however that the balance of the argument is on the side of the constitutionality of this change. It will be apparent that this author would prefer to solve the constitutional problem by reading Article 103 (3) according to its terms, in which case it would not apply to prior acquittals at all – and the broader desirability of some exceptions to double-jeopardy rules is attested to by the fact that it is not only common-law jurisdictions that have been convinced to change on this front over the last decade or two : Austria has long had comparable, and indeed less strict rules permitting re-opening for new evidence,[69] and similar rules exist in the unified national Code of Criminal Procedure adopted by the Swiss in 2007.[70] If the extended reading of the constitutional ban is maintained, it would seem very hard to justify rationally a situation in which a murderer who credibly confesses could be re-tried, but one whose guilt is established beyond doubt by D.N.A. evidence would remain immune forever; for this author, the decisive point is that a credible confession to murder is now simply compelling new evidence under ground 5, and thus this development does seem to be a natural progression from the previous law.

---

[67] Prof. Dr Helmut Aust to the Legal and Consumer Affairs Committee, 16 June 2021, in Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, above n 21 at 31f.

[68] That is not a quotation. Such arguments are made by, for example, Prof. Dr Helmut Aust to the Legal and Consumer Affairs Committee, 16 June 2021, in Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, above n 21 at 31; by the Justice Minister of Thuringia in *Bundesrat* Debates, 17 September 2021, p. 405; and by Bohn, above n 42 at 236f; Grünewald, above n 44 at 574 – 579; Kaspar, above n 28 at 30f; Thomas Scherzberg/Philipp Thiee, „Die Wiederaufnahme zu Ungunsten des Angeklagten" ZRP 2008, 80, 83; Bertram Schmitt, *Strafprozeßordnung* (65th ed., C.H. Beck, Munich 2022), p. 1711.

[69] Code of Criminal Procedure §§ 352 (1) No. 2, 355 – despite § 17 setting out the general *ne bis in idem* principle.

[70] § 410 (1) (a) (despite § 11). Most of the Cantons of Switzerland also had comparable rules before 2007 (*e.g.* Zürich § 443 No. 2) : Robert Hauser/Erhard Schweri, *Schweizerisches Strafprozeßrecht* (4th ed., Helbing & Lichtenhahn, Basel 1999), pp. 456f. Nevertheless in the 2007 national Code re-opening the prosecution after acquittal is part of the appellate system and requires, somewhat paradoxically, 'new facts existing before the decision' or 'new means of proof' with no express restriction to what existed at the time of the decision; the searches I was able to conduct did not indicate any cases in which newly emerged D.N.A. evidence had been subjected to these measuring-sticks, which were clearly not drafted with it in mind.

3. Constitutional objections (2) – retrospectivity

As in England and Wales[71] and the Australian states[72] – but not New Zealand[73] – the change to the law in Germany is retrospective, although it does not explicitly say so, in the sense that a person acquitted before it was made can nevertheless be re-tried after its commencement.[74] There is a prohibition on retrospective changes to the criminal law in Article 103 (2) of the Basic Law, but it is long settled and beyond dispute that the prohibition applies only to changes to the substantive criminal law and thus not to changes in criminal procedure.[75] Murder has of course always been a crime; the only change was to the procedural question regarding the permissibility of re-opening prosecutions after acquittals. This therefore does not fall under the express prohibition.

The *Rechtsstaat* principle limits retrospectivity in all other fields, however, by an unwritten constitutional principle derived from it and designed to protect the reliance interest and trust in the stability of the law. The Court makes a distinction between true and apparent retrospectivity : the latter is said to exist when the law is changed before a transaction has been concluded, as distinct from attaching legal consequences to a state of affairs that is wholly in the past, which is true retrospectivity and generally not permitted by the *Rechtsstaat* principle. This distinction, which might work quite well in relation to taxation liabilities, for example,[76] is unfortunately not very apposite to the present situation. It would also not be helpful to point out, as some proponents of the change do, that new trials will take place only in the future,[77] for until a time machine is developed all laws can cause events only after their enactment. The question on the retrospectivity front is rather whether past events are

[71] Roberts "Justice for All?", above n 24 at 199f; and see *Double Jeopardy (Scotland) Act* 2011 s 14.
[72] *E.g.*, *Crimes (Appeal and Review) Act* 2001 (N.S.W.) s 99 (3); *Criminal Procedure Act* 2009 (Vic.) s 441 (4).
[73] *Criminal Procedure Act* 2011 s 151 (5), restricting re-trials to acquittals after the commencement of the *Crimes Amendment Act (No. 2)* 2008 (N.Z.) s 6 which originally introduced the change.
[74] von Bierbrauer zu Brennstein, above n 40 at 120; Lenk, above n 65 at 120.
[75] This well-established principle permitted the abolition of limitation periods for murder (above fn 66). The inapplicability of Article 103 (2) outside the core criminal law was most recently confirmed in BVerfGE 156, 354.
[76] As in BVerfGE 157, 177, which also indicates the difference between true and apparent retrospectivity, although it was already very well established.
[77] Prof. Dr Michael Kubiciel to the Legal and Consumer Affairs Committee, undated (June 2021?), in Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, above n 21 at 62.

used as a vehicle for inflicting liability, necessarily in the future in the absence of a time machine, under laws that were not in effect when actions were taken.[78]

There is true retrospectivity in regards to people acquitted before the amending law came into effect : those people thought that the Code of Criminal Procedure protected them from further prosecution except in four specific exceptional cases, and they may now find the protection removed because a fifth ground has been added. If changing the consequences of a concluded event is true retrospectivity, *a fortiori* that is so if the event can be declared no longer even concluded and liable to be re-opened.[79] A recent decision of the Federal Constitutional Court, which held that true retrospectivity was involved in abolishing immunity from seizure under the proceeds-of-crime laws, supports this conclusion, for it took the end of the limitation period (rather than the completion of the crime itself) as the indication that the events had concluded.[80] Outside the criminal law, another *obiter dictum* of the Federal Constitutional Court tells us that true retrospectivity would also arise if the limitation period expires and a law afterwards removes the resulting immunity.[81] There is no limitation period for murder, as already noted, but criminal liability was, formerly, concluded by an acquittal just as by the expiry of the limitation period.

The first-mentioned decision, however, approved the true retrospectivity in issue there under the established extraordinary exception permitting it when there are compelling reasons of public policy to do so.[82] It seems very likely that the same exception should apply here. It is of course true that sending someone to prison for a crime is more serious than confiscating the property involved in criminal acts. But the change allowing re-prosecution does not apply across the board as the proceeds-of-crime legislation did, but only to the most serious of all crimes and when the evidence is compelling. The highest constitutional value known to German law is expressed by the first sentence of the Basic Law : 'human dignity is inviolable'; and as this is the highest constitutional value of the lot, it can justify true

[78] There is an excellent discussion of the definitional questions in Andrew Palmer/Charles Sampford, "Retrospective Legislation : Looking Back at the 1980s" (1994) 22 Fed LR 217, 218-223.
[79] Oliver Harry Gerson, „‚Vom Wecken schlafender Hunde' – zu den verfassungsrechtlichen Grenzen des § 362 Nr 5 StPO bei der Wiederaufnahme von Altfällen zuungunsten des Angeklagten" StV 2022, 124, 126; Kaspar, above n 28 at 34; Lenk, above n 65 at 121.
[80] BVerfGE 156, 354.
[81] BVerfGE 18, 70, 80f.
[82] Supposedly, however, this decision has been heavily criticised : Lenk, above n 65 at 121. Really, it is far too early for any such condemnation, even if the decision does not appeal to the opponents of the change discussed in this note.

retrospectivity.[83] Murdering someone is the direct and total negation of human dignity – even the great evil of rape, perhaps the second most serious crime in the criminal calendar, negates this value very severely, but not to the same total extent as wholly extinguishing a person's life.

4. The Federal President's hesitation to assent to the legislation

In a statement on his website consisting largely of an extract from a letter to the President of the *Bundestag*,[84] the Federal President, Frank-Walter Steinmeier of the Social Democrats, referred to his considerable doubts about the constitutionality of the proposal, but concluded by stating that he was not certain of its unconstitutionality and therefore would sign the Bill. This duly occurred, nearly six months after it was passed by the lower and three after its passage by the upper House – much longer than usual. The Federal President's doubts arose, he wrote, on both scores : he considered that the true test under Article 103 (3) was that of 'adjustments at the borderline'[85] and doubted that this case merely undertook such, although the precise reasoning beyond this assertion was not revealed. On the retrospectivity front, the Federal President thought it plausible that the conversion of a permanent into a reversible acquittal might constitute prohibited retrospectivity, but again did not, at least in his published thoughts, go into the possible exceptions to or qualifications of the prohibition of retrospectivity, nor even into the question whether the retrospectivity involved was true or apparent.

Clearly the Federal President had considerable doubts about the constitutionality of the Bill, but he rightly signed it anyway and remitted the consideration of the issue to the Federal Constitutional Court. My analysis of this field has concluded that the emphasis in German practice on this point has shifted from the type of constitutional provision allegedly infringed (federalism-based, rights-based or relating to legislative procedure) to where it rightly belongs : the degree of certainty that there is such a constitutional infringement.[86] While the Federal President, based on the tone and contents of his letter, appears to have personally been of the view that ground 5 was invalid, he rightly recognised

[83] Eisele, above n 28 at 11, and compare Kubiciel, above n 56 at 394.
[84] https://www.bundespraesident.de/SharedDocs/Pressemitteilungen/DE/2021/12/211222-Gesetzesausfertigung-StPO-362.html (press release dated 22 December 2021).
[85] See above, fn 38.
[86] Greg Taylor, "Refusals of Assent to Bills Passed by Parliament in Germany and Australia" (2008) 36 Fed LR 83, 104.

that there were good arguments to the contrary and therefore no-one could be certain what the "correct" answer later to be announced by the Federal Constitutional Court might be. It was therefore necessary to allow the Court to pass on the question by signing the law. There could also be no doubt that an accused person affected by the amendment would be able to challenge it in the ordinary course of the law.

5. Conclusion

The law signed by the Federal President on 21 December 2021 was actually passed by a *Bundestag* that had already ceased to exist by then, the federal general elections of September 2021 having intervened between its passage through the *Bundestag* and the presidential signature. Those elections ended the "Grand Coalition" between the two major parties, the Christian Democrats and the Social Democrats, in place of which was installed a tripartite coalition among the Social Democrats, the Greens Party and the Free Democrats. The last two parties, like all non-government parties other than the right-populist Alternative for Germany, had opposed allowing re-opening of prosecutions for murder when in opposition to the Grand Coalition in the previous *Bundestag*.[87] It is therefore now, to some extent, in the hands of its enemies – and the Federal Constitutional Court.

[87] *Bundestag* Debates, 11 June 2021, pp. 30368 – 30374; 24 June 2021, pp. 30754 – 30755, 30837 – 30842. See also above, fn 29.