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## *Reopening of Criminal Proceedings After Acquittal (2 BvR 900/22): Germany's Stance on Double Jeopardy and Its Implications for Criminal Justice Reform*

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### I. OVERVIEW

Germany's Federal Constitutional Court (*Bundesverfassungsgericht*) recently confronted a pivotal question about the balance between individual rights and state authority: Should the state have the power to reopen a criminal case if new facts or evidence emerge after an acquittal?<sup>1</sup> This question goes to the heart of the legal principle of double jeopardy (*ne bis in idem*), that safeguards individuals from being tried twice for the same offense.<sup>2</sup> In a landmark decision, the Federal Constitutional Court confronted the critical issue regarding the prioritization of legal certainty over substantive justice under Basic Law (*Grundgesetz*).<sup>3</sup>

The case arose when law enforcement sought to reopen criminal proceedings against an individual previously acquitted of serious charges.<sup>4</sup> In a final judgment handed down by the State Regional Court, the individual was cleared of the charges of rape and murder under specific aggravating circumstances.<sup>5</sup> Approximately forty years later, in

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1. BVerfG, 2 BvR 900/22 at ¶ 1, Oct. 15, 2023, [https://www.bverfg.de/e/rs20231031\\_2bvr090022en.html](https://www.bverfg.de/e/rs20231031_2bvr090022en.html).

2. *Id.* at ¶ 20.

3. *Id.* at ¶ 55.

4. *Id.* at ¶ 22.

5. *Id.*

response to the enactment of § 362 no. 5 into the Code of Criminal Procedure by the Act to Obtain Substantive Justice of December 21, 2021, the prosecution requested an arrest warrant for the individual and the reopening of criminal proceedings pursuant to this provision.<sup>6</sup> The amendment allowed for the reopening of proceedings based on newly discovered evidence.<sup>7</sup> The Regional Court initially determined the application admissible, thereby ordering the individual's remand into custody pending further investigation.<sup>8</sup> The Celle Higher Regional Court dismissed a challenge to this decision.<sup>9</sup>

This judgement prompted the individual to file a constitutional complaint with the Federal Constitutional Court challenging the decisions of the Higher Regional Court and Regional Court.<sup>10</sup> The constitutional complaint challenged whether amendment no. 5 to the Code of Criminal Procedure violates the complainant's rights under Article 103(3) of the Basic Law, and whether the new provision is applicable with retroactive effect.<sup>11</sup> The petition argues that allowing such a reopening undermines the finality of acquittals, a principle that is essential for the protection of constitutional rights and legal certainty.<sup>12</sup> The Court concluded that the conditions under which § 362 no. 5, permits reopening of criminal proceedings are overly broad and lack sufficient safeguards to prevent abuse, thereby undermining fundamental legal protections.<sup>13</sup> The Federal Constitutional Court *held* § 362 no. 5 of the Code of Criminal Procedure unconstitutional. BVerfG, 2 BvR 900/22 at paras. 161-62, October 15, 2023.

## II. BACKGROUND

Double jeopardy ensures that convicted and acquitted persons are shielded from multiple prosecutions for the same crime, fostering legal certainty and fairness.<sup>14</sup> The principle of double jeopardy is fundamental to criminal justice systems, both domestically and internationally.<sup>15</sup> This principle is deeply rooted in international human rights commitments to

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6. *Id.*

7. *Id.*; Strafprozeßordnung [StPO] [Code of Criminal Procedure], § 362 no. 5 (Ger.).

8. *Id.*

9. *Id.*

10. *Id.* at ¶ 23.

11. *Id.* at ¶ 1.

12. *Id.* at ¶ 53.

13. *Id.* at ¶ 152.

14. *Id.* at ¶¶ 57, 59.

15. *Id.* at ¶ 101.

protect against arbitrary prosecutorial action.<sup>16</sup> Historically, the European Convention on Human Rights (ECHR), established in 1950, has played a pivotal role in protecting fundamental rights across member states.<sup>17</sup> As of 2024, there are forty-six signatory countries, making it one of the most widely adopted regional human rights treaties.<sup>18</sup> Article 4 of the 7th Protocol to the ECHR explicitly prohibits double jeopardy, aligning member states with international human rights standards and ensuring that individuals are protected from being tried or punished more than once for the same crime.<sup>19</sup>

In Germany, the double jeopardy principle is enshrined in Art. 103(3) of the Basic Law, which explicitly prohibits individuals from being punished for the same act under general criminal laws more than once.<sup>20</sup> At first glance, it appears that there is no constitutional obstacle with § 362 no. 5 of the Code of Criminal Procedure, since the statute only applies to acquitted offenders who were not punished at their original trial.<sup>21</sup> But the Basic Law is characterized by the fact that case law and scholarly opinion connect to conclude that this provision does not make a distinction between the words “prosecuted” and “punished.”<sup>22</sup>

German law included the principle of *ne bis in idem* (not twice for the same) to counteract the countless negations of the principle of *res judicata* that had taken hold during the Nazi era.<sup>23</sup> In particular, these negations had been directed against acquitted persons.<sup>24</sup> A feature of the Nazi regime was that “acquittal by a judge did not result in freedom for the acquitted person.”<sup>25</sup> Thus, the drafters of the Constitution shaped the

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16. *Id.* at ¶ 20.

17. *Id.*; European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

18. *Id.*

19. *European Convention on Human Rights, Art. 4 of Protocol No. 7.*

20. Grundgesetz [GG] [Basic Law], Art. 103(3) (‘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’).

21. *StPO* § 362 no. 5 (Ger.) (5) if new facts or evidence are produced which, independently or in connection with evidence which was previously taken, establish cogent reasons that the *acquitted* defendant will be convicted of murder under aggravating circumstances (§ 211 of the Criminal Code), genocide (§ 6(1) of the Code of Crimes against International Law), a crime against humanity (§ 7(1) nos. 1 and 2 of the Code of Crimes against International Law) or a war crime against a person (§ 8(1) no. 1 of the Code of Crimes against International Law). (emphasis added).

22. BVerfG, 2 BvR 900/22, at ¶ 63; See e.g. BVerfGE 12, 62, 66; BGHSt 5, 323, 329-31. Earlier, BVerfGE 3, 248 appeared to leave open this option of interpreting Article 103(3) according to its wording.

23. BVerfG, 2 BvR 900/22, at ¶ 64.

24. *Id.*

25. *Id.*

*ne bis in idem* principle from the *Reich* Court.<sup>26</sup> While the *Reich* Code of Criminal Procedure of 1877 and the Weimar Constitution did not expressly pronounce the *ne bis in idem* principle, both legal frameworks considered it as an inherent element of the legal order.<sup>27</sup> The case law of the *Reich* Court interpreted this principle as a prohibition on multiple prosecutions and further applied the principle to acquittals.<sup>28</sup> Moreover, in drafting Art. 103(3), Parliamentary Council looked to the new *Land* Constitutions, which included the principle of *ne bis in idem*, and set it out in similar ways.<sup>29</sup> There is no historical evidence that any of the drafters considered the exclusion of acquittals.<sup>30</sup>

In terms of German criminal law history, the principle of *ne bis in idem* is closely related to the presumption of innocence and is to be understood as a counter-principle to the inquisitorial principle of ordinary law.<sup>31</sup> An absolute claim to truth characterized the inquisitorial principle, manifesting in the procedural option of *absolutio ab instantia*.<sup>32</sup> In general, the case could be reopened at any time in the event of a new finding.<sup>33</sup> German law reintroduced double jeopardy during the late eighteenth century as part of the broader legal reforms of the Enlightenment.<sup>34</sup> In this way, acquittals were given substantial significance, since criminal proceedings were to now be permanently concluded.<sup>35</sup> The principle of *ne bis in idem* therefore especially aimed at protecting individuals acquitted for lack of evidence.<sup>36</sup>

On the other hand, Art. 103(3) of the Basic Law reflects to the procedural law as it stood at the time of passing and its interpretation in settled case law at the time.<sup>37</sup> The “rule of law,” *Rechtsstaat*, concept is at the center of all postwar German constitutionalism.<sup>38</sup> Still, proponents of

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26. *Id.* at ¶ 65.

27. *Id.*

28. *Id.*

29. *Id.* at ¶ 66.

30. *Id.*

31. *Id.* at ¶ 68; Adversarial vs. Inquisitorial Legal Systems, U.N. Off. on Drugs & Crime, <https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html> (last visited Nov. 12, 2024) (“The inquisitorial principle is a legal system where the court is actively involved in investigating the facts of a case.”).

32. BVerfG, 2 BvR 900/22, at ¶ 68.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at ¶ 81.

38. BVerfG, 2 BvR 2735/14 at ¶¶ 1-126, [https://www.bverfg.de/e/rs20151215\\_2bvr273514en.html](https://www.bverfg.de/e/rs20151215_2bvr273514en.html) (The Court emphasized the importance of maintaining legal certainty and the rule of law in the context of democratic governance).

change argue that the state's power to punish crime, which is rooted in the principle of the rule of law, is consistent with the authority to reopen criminal proceedings and can be balanced with the double jeopardy rule.<sup>39</sup> However, Art. 103(3) is heavily based on ensuring legal certainty.<sup>40</sup> The concept of legal certainty, which underpins the principle of double jeopardy, has developed through various judicial interpretations in Germany's legal history.<sup>41</sup> German courts have consistently emphasized the importance of finality in criminal judgments, viewing it as essential for maintaining public trust in the judicial system.<sup>42</sup> Basic Law establishes the authority of the judiciary to interpret individual rights considering evolving social values and norms.<sup>43</sup> While all of these considerations are important, they do not outweigh the importance of legal certainty as a fundamental component of the rule of law, and the Court acknowledges that it is not without consequences to have a criminal justice system based on the principle of *in dubio pro reo*, meaning the defendant must be given the benefit of the doubt.<sup>44</sup>

It is the responsibility of the Federal Constitutional Court to resolve complex cases involving statutory provisions that may infringe upon constitutional rights.<sup>45</sup> The Court has consistently asserted that any legislation allowing for retrials must adhere to strict standards that protect the fundamental right of individuals against double jeopardy, reflecting Art. 103(3) of the Basic Law, which does not allow any balancing of interests.<sup>46</sup> The Federal Constitutional Court has clarified that while Art. 103(3) provides this protection domestically, the application of double jeopardy in cross-border cases requires analysis under different legal frameworks.<sup>47</sup>

In cases involving international dimensions, the Court must evaluate applicable European Union (EU) laws to determine if and how double

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39. BVerfG, 2 BvR 900/22, at ¶ 1, (dissenting opinion of Justices Müller and Langenfeld).

40. *Id.*, at ¶ 87.

41. *See* Mihalache v. Romania, App. No. 54012/10, Eur. Ct. H.R. (2019) (This case emphasized how legal certainty underpins the *ne bis in idem* principle, by assessing whether a prosecutorial decision can be considered final for the purposes of double jeopardy, which would prevent further proceedings on the same facts).

42. BVerfG, 2 BvR 900/22, at ¶ 145.

43. *See* Lüth, BVerfGE 7, 198 (1958) (The Federal Constitutional Court established that the Basic Law is not a static document but also one that requires interpretation through the lens of contemporary social norms and values).

44. BVerfG, 2 BvR 900/22, ¶ 158.

45. *Id.* at ¶ 53.

46. *Id.* at ¶ 82.

47. *Id.* at ¶ 101 (“The protection of Art. 103(3) of the Basic Law is only engaged by judgments of German criminal courts. For transnational constellations, it must be examined to what extent double jeopardy is ruled out by international law or by EU law.”).

jeopardy protections apply.<sup>48</sup> For example, EU law offers broad protection against double jeopardy across its member states under Art. 50 of the Charter of Fundamental Rights.<sup>49</sup> Art. 50 is similar to the double jeopardy protections in the ECHR, ensuring that citizens are shielded from repeated legal action across EU jurisdictions.<sup>50</sup>

In the *Maastricht Treaty Decision* (1993), the Federal Constitutional Court, ruled that the Maastricht Treaty, which established the European Union, aligned with the Basic Law, provided that the European Union honors Germany's democratic principles and functions within explicitly delegated powers.<sup>51</sup> Petitioners argued that the Treaty endangered Germany's democratic structures by transferring significant powers to the EU.<sup>52</sup> The Court reasoned that EU actions must respect the constitutional rights of German citizens and cannot exceed the authority granted by member states.<sup>53</sup> This decision set clear limits on the EU's powers in relation to German sovereignty but also exemplified the Court's broader role in ensuring that external agreements respect constitutional safeguards like the principle of double jeopardy.<sup>54</sup>

Earlier rulings, such as *Solange I* (1974) and *Solange II* (1986), had already addressed the balance between European and German law by limiting the application of European law in cases where it conflicted with Germany's constitution.<sup>55</sup> These *Solange* decisions reinforced the Court's commitment to preserving fundamental principles, such as double jeopardy protection, even in cross-border legal contexts, and helped

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48. *Id.* at ¶ 110.

49. *Id.*

50. *Id.* at ¶¶ 20, 110.

51. 2 BvR 2134/92, 2159/92, reprinted in 1993 NEUE JURISTRISCHE WOCHENSCHRIFT (N.J.W.) 3047 (extracts), translated in [1994] 1 C.M.L.R. 57 (Brunner v. European Union Treaty). The decision has meanwhile also been published in 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155. The translation of this case contained in the Common Market Law Reports does not always accurately interpret the Federal Constitutional Court's special emphasis on describing the European Union as something different from a conventional governmental organization, but not yet a supranational organization with its own sovereign rights independent from its Member States; Manfred H. Wiegandt, *Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops*, 10 AM. U. INT'L L. REV. 889, 889-90 (1995).

52. *Id.* at 893 ("The court declared that the allegation that the transfer of sovereign powers to the EU would likely diminish the basic rights protection of German citizens was inadmissible.")

53. *Id.*

54. *Id.* at 899.

55. BVerfGE 37, 271, 2 BvL 52/71 *Solange I*, May 29, 1974, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>; BVerfGE 73, 339 2 BvR 197/83 *Solange II*, Oct. 22, 1986, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=572>.

solidify the Court's role as a guardian of constitutional rights within an evolving European legal framework.<sup>56</sup>

### III. COURT'S DECISION

In the noted case, the Federal Constitutional Court ruled that § 362 no. 5 of the Code of Criminal Procedure, which permitted the reopening of criminal cases after acquittal based on newly discovered evidence, is unconstitutional.<sup>57</sup> The Court reasoned that the statute disproportionately undermines the finality of criminal judgments and violates the fundamental right enshrined in Art. 103(3) of the Basic Law.<sup>58</sup> Art. 103(3) guarantees the fundamental right to protection against double jeopardy.<sup>59</sup> For legal protections to remain fundamental, states must respect the finality of acquittals without balancing state interests with individual rights.<sup>60</sup> If the legislature is free to strike a different balance between legal certainty and the state's power to punish crime, Article 103(3) of the Basic Law would fail to protect the defendant's legitimate expectation in the finality of the judgment.<sup>61</sup>

The Court's methodology focused primarily on the importance of protecting the finality of acquittals to uphold the rule of law.<sup>62</sup> Once a person has been acquitted, the state must respect that final judgement to guarantee legal certainty and individual liberty.<sup>63</sup> According to the Court, "[t]he right under Art. 103(3) of the Basic Law protects not just convicted, but also acquitted persons."<sup>64</sup> In analyzing the constitutionality of § 362 no. 5 of the Code of Criminal Procedure, the Court takes an approach that resembles a proportionality test to assess whether the statute struck an appropriate balance between the state's interest in prosecuting crimes and the individual's right to legal certainty.<sup>65</sup> This proportionality test played a key role in the Court's decision.<sup>66</sup> The test involves three steps: (1) assessing the legitimacy of the aim, (2) the suitability of the measure to achieve that aim, (3) whether the measure was necessary and

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56. *Id.*

57. BVerfG, 2 BvR 900/22 at para. 161.

58. *Id.* at ¶¶ 54-55.

59. *Id.*

60. *Id.* at ¶ 55. ("This constitutional decision, which prioritizes legal certainty over substantive justice, is exempt from any balancing and does not afford the legislator any leeway with regard to the legal framework for the reopening of criminal proceedings.")

61. *Id.* at ¶ 88.

62. *Id.* at ¶ 158.

63. *Id.* at ¶ 88.

64. *Id.* at ¶ 59.

65. *Id.* at ¶¶ 59-96.

66. *Id.*

proportionate to the goal pursued.<sup>67</sup> The Court reasoned that while reopening a case for serious crimes may serve a legitimate purpose, the amendment was not narrowly tailored.<sup>68</sup>

The Court first acknowledged the state's legitimate interest in prosecuting serious crimes, recognizing that reopening cases based on significant new evidence could support this goal.<sup>69</sup> However, while the Court agreed that prosecuting crime is a valid state interest, it questioned whether this aim justified the amendment's impact on fundamental rights, particularly the finality of acquittals.<sup>70</sup> In the second step, the Court examined whether § 362 no. 5 was appropriate to achieve its goal of ensuring substantive justice considering new evidence.<sup>71</sup> The Court found legal certainty takes precedence over the principle of substantive justice.<sup>72</sup> The amendments' lack of specificity created a risk that § 362 no. 5 could be misapplied, undermining the principle of finality without necessarily advancing justice in a targeted way.<sup>73</sup> The final step considered whether the statute was the least restrictive measure necessary to achieve the legitimate aim of reopening cases in the interest of justice.<sup>74</sup> Here, the Court concluded that legislators had not narrowly tailored § 362 no. 5 to protect acquitted individuals' rights under Art. 103(3).<sup>75</sup> The statute's broad application allowed the possibility of reopening cases in ways that could unduly infringe upon the fundamental right to legal certainty, thus tipping the balance in favor of state power and undermining public trust in the judicial process.<sup>76</sup>

In declaring that § 362 no. 5 of the Code of Criminal Procedure unconstitutional, the Court drew on both domestic constitutional principles and international legal standards.<sup>77</sup> Domestically, the Court relied on the Basic Law, mostly Art. 103(3).<sup>78</sup> The decision highlights how reopening criminal proceedings disproportionately infringes upon the constitutional protection of double jeopardy.<sup>79</sup> The Court also cited Art. 20(3), which governs the rule of law and legal certainty, emphasizing

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67. *Id.*

68. *Id.* at ¶ 94.

69. *Id.* at ¶ 60.

70. *Id.*

71. *Id.* at ¶ 71.

72. *Id.* at ¶ 75.

73. *Id.* at ¶¶ 72, 75.

74. *Id.* at ¶ 78.

75. *Id.* at ¶ 94.

76. *Id.*

77. *Id.* at ¶ 101.

78. *Id.* at ¶ 54.

79. *Id.* at ¶ 55.



that legal judgments must be final to uphold the integrity of the judicial system.<sup>80</sup> The reopening of acquitted cases clearly contradicts Art. 20(3) as any retroactive effecting of legal consequences is generally impermissible under German constitutional law.<sup>81</sup>

Internationally, the Court examined various provisions of the EU and international law.<sup>82</sup> This included the Code of Crimes against International Law and the ECHR.<sup>83</sup> Art. 4 of the 7th Protocol to the ECHR does recognize the possibility of restricting the *ne bis in idem* principle in some states only if new facts or evidence have emerged and there is a limitation period that must be observed from the time these new developments are known.<sup>84</sup> However, the Court further examined international law by interpreting Art. 50 of the Charter of Fundamental Rights.<sup>85</sup> Similarly, to Art. 103(3) of the Basic Law, Art. 50 of the Charter offers protection against double jeopardy across EU member states.<sup>86</sup> The Court cited the Charter to provide context for how the examination of how the principle of double jeopardy operates within the legal framework of the EU.<sup>87</sup>

In a dissenting opinion joined by eight justices, the majority's strict interpretation of Article 103(3) was contested.<sup>88</sup> The dissent argued that the double jeopardy rule could be balanced with other constitutional interests, such as the state's power to punish serious crimes.<sup>89</sup> They posited that the provision could be considered proportionate if narrowly tailored to allow for the reopening of criminal proceedings in limited, well-justified circumstances, consistent with the rule of law.<sup>90</sup>

#### IV. ANALYSIS

The noted case presents both legal and societal implications, particularly in balancing prosecutorial power with legal certainty under the principle of double jeopardy. The positive implications of this decision reinforce fundamental rights and the rule of law, ensuring that German citizens are afforded the protection against governmental

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80. *Id.* at ¶¶ 142-43.

81. *Id.* at ¶ 145.

82. *Id.* at ¶ 20, 110, 138.

83. *Id.* at ¶ 20, 138.

84. *Id.* at ¶ 20.

85. *Id.* at ¶ 110.

86. *Id.*

87. *Id.*

88. *Id.* at ¶ 1, (dissenting opinion of Justices Müller and Langenfeld).

89. *Id.*

90. *Id.*

overreach by precluding renewed criminal prosecution to convicted and acquitted persons alike.<sup>91</sup> However, the Court's treatment of the complexities surrounding the reopening of criminal proceedings reveals potential weaknesses in its reasoning that warrant further exploration.

One of the most important aspects of this ruling is its reaffirmation of the double jeopardy principle, aligning with Germany's Basic Law and broader international law.<sup>92</sup> The Court emphasizes the necessity of preserving double jeopardy, as a fundamental right worth safeguarding.<sup>93</sup> By underscoring the importance of legal certainty and finality in criminal law, the Court sets clear boundaries around the unconstitutionality of reopening cases.<sup>94</sup> The Court's stance on legal certainty is consistent with Art. 50 of the EU's Charter of Fundamental Rights and Art. 4 of the 7th Protocol to the ECHR, which Germany ratified.<sup>95</sup> These international standards reflect an understanding that final judgements should be respected, strengthening Germany's adherence to established European human rights commitments and its efforts to harmonize domestic law with EU principles.<sup>96</sup>

However, while the Court acknowledges the distinctions between criminal law sanctions and administrative penalties, it does not adequately address how this difference may affect the application of *ne bis in idem* in practice.<sup>97</sup> This lack of clarity could lead to disparate interpretations and enforcement, especially in regulatory offenses or certain tax cases, potentially compromising the legal certainty the Court aims to uphold. A controversy may arise if decisions are made to rectify cases where evidence has been compromised, as this can lead to a motion for reopening the case under German law.<sup>98</sup> Here, a more nuanced analysis could help to balance accountability with the need for finality, preventing misuse that might inadvertently shield offenders from justice.<sup>99</sup>

Moreover, the Court's decision exclusively addresses the unconstitutionality of § 362 no. 5, without examining the constitutionality of provisions nos. 1-4 of § 362 of the Code of Criminal Procedure.<sup>100</sup>

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91. *Id.* at ¶¶ 57-58.

92. *Id.* at ¶ 138 (According to the Court, the Basic Law and International Law are "in close alignment, in both systematic and substantive terms.").

93. *Id.* at ¶ 68.

94. *Id.* at ¶ 158.

95. *Id.* at ¶¶ 20, 110.

96. *Id.*

97. *Id.* at ¶ 99. ("In particular, the prosecution of administrative offences is not subject to the prohibition of Art. 103(3) of the Basic Law.").

98. *Id.* at ¶ 13, (dissenting opinion of Justices Müller and Langenfeld).

99. *Id.* at ¶ 38, (dissenting opinion of Justices Müller and Langenfeld).

100. *Id.* at ¶ 2.

Provision no. 5 refers specifically to “facts or means of proof” that emerge after an acquittal, but the Court emphasizes that Art. 103(3) of the Basic Law does not permit re-prosecution in any form, affirming that statutory law cannot override constitutional protections.<sup>101</sup> However, this interpretation could benefit from addressing the circumstances under which newly discovered evidence might warrant reconsideration in cases of significant public interest or grave offenses, as other legal systems permit in limited instances.<sup>102</sup>

A comparative perspective with United States constitutional law, especially regarding the Double Jeopardy Clause of the Fifth Amendment, reveals notable differences in interpretation. The U.S. legal system firmly upholds the principle of double jeopardy: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>103</sup> Without a double jeopardy prohibition, the state would have limitless power to disrupt the lives and fortune of its citizens.<sup>104</sup> But under the “separate sovereigns” doctrine, the U.S. Supreme Court recognizes there is a limit to the Double Jeopardy Clause.<sup>105</sup> The Supreme Court has reasoned that a defendant’s right against double jeopardy is violated only in the case of two prosecutions by the same sovereign.<sup>106</sup> A federal prosecution after a state prosecution, or vice versa, passes constitutional muster because the federal government and the states are distinct sovereigns.<sup>107</sup> This distinction emphasizes a more flexible approach to the reopening of cases in the U.S. legal system by supporting a broader interpretation of justice. While both the German and American legal systems aim to protect individuals from double jeopardy, the noted case indicates a commitment to a stricter, more absolute application of this principle.<sup>108</sup>

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101. *Id.* at ¶¶ 79-80; *StPO* § 362 no. 5.

102. *See* Criminal Justice Act 2003, c. 44 (U.K.) (The law that addresses double jeopardy protections in the United Kingdom, with specific provisions for serious crimes); Criminal Procedure Act 2011, No. 81 (N.Z.) (The law in New Zealand that allows retrials based on new and compelling evidence in serious crimes).

103. U.S. CONST. amend. V.

104. *See, e.g.*, Chief Justice Rehnquist’s appraisal of *Jenkins v. United States*, 420 U.S. 358 (1975), in *Lee v. United States*, 432 U.S. 23, 36 (1977).

105. Separate Sovereigns Doctrine, CORNELL LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/separate\\_sovereigns\\_doctrine](https://www.law.cornell.edu/wex/separate_sovereigns_doctrine) (last visited Oct. 20, 2024) (“Separate Sovereigns Doctrine allows a criminal defendant to be prosecuted by a state court and by a federal court for the same offense or cause of action because there are different state and federal laws.”).

106. *See, e.g.*, *United States v. Lanza*, 260 U.S. 377, 382 (1922). The doctrine also goes by the name of the “dual-sovereignty” doctrine. *See, e.g.*, *Gamble v. United States*, 139 S. Ct. 1960, 1963 (2019).

107. *See, e.g.*, *Bartkus v. Illinois*, 359 U.S. 121, 136 (1959); *Lanza*, 260 U.S. at 382.

108. BVerfG, 2 BvR 900/22, at ¶ 96.

## V. CONCLUSION

The Federal Constitutional Court's decision in the noted case underscores a firm commitment to the principle of double jeopardy enshrined in Art. 103(3) of the Basic Law. By striking down § 362 no. 5 of the Code of Criminal Procedure, the Court prioritizes legal certainty and the finality of acquittals. This ruling reinforces the importance of protecting acquitted individuals from being subjected to ongoing legal jeopardy, which upholds the integrity of the judicial system's finality of judgments.

However, the decision also leaves room for debate, particularly regarding the balance between ensuring justice for serious crimes and maintaining legal certainty. With advances in technology, like DNA analysis and other forensic techniques, highly credible evidence can emerge long after a trial concludes. The dissenting opinion in the noted case suggests that in serious cases, reopening an acquittal could serve justice without unduly eroding legal certainty, if there are strict safeguards. Given the pace of technological progress, it is possible that Germany might eventually move toward a more nuanced approach, especially if forensic advancement increases public confidence in reopening cases with high evidentiary reliability.

This remains an open question as advances in technology and forensic evidence may bring new challenges to the rigidity of current protections in Germany. Countries with similar legal principles have allowed limited expectations in cases involving extraordinary evidence, and Germany might consider following suit if these measures align with its constitutional principles. Ultimately, the Federal Constitutional Court's decision emphasizes the fundamental role of legal certainty in safeguarding the principle of double jeopardy while prompting ongoing reflection on how best to balance the pursuit of justice with the protection of constitutional principles.

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