

FCC: German Legislator Was Prohibited from Introducing Ground for Reopening Criminal Proceedings



News

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On 31 October 2023, the German Federal Constitutional Court (FCC) declared a provision void that allowed the reopening of criminal proceedings if new evidence comes to light with regard to very severe offences. According to the provision in question – Section 362 no. 5 of the German Criminal Procedure Code – the reopening of proceedings concluded by final judgment to the defendant’s detriment is admissible 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 (*Mord*, Section 211 of the Criminal Code) or certain crimes against international law (genocide, crime against humanity, and war crime against a person). This provision was introduced in December 2021.

In the case at issue, criminal proceedings against a defendant were reopened on the basis of this provision in February 2022, charging him for rape and killing of a girl in 1981, even though the defendant was acquitted for this offence in 1983.

The FCC found that the double jeopardy rule (enshrined in Art. 103(3) of the Basic Law (*Grundgesetz* – GG)) prohibits the legislator from enacting provisions that allow criminal proceedings to be reopened to the acquitted person’s detriment on the grounds that new facts or evidence have emerged. This rule is the manifestation of a decision to prioritise legal certainty over substantive justice and it leaves no space for balancing the double jeopardy rule with other constitutional interests, according to the majority of the FCC Senate’s judges.

Furthermore, insofar as Section 362 no. 5 of the Code of Criminal Procedure is applied to acquittals that were already final at the time of its entry into force, it violates the prohibition of retroactivity (Art. 103(3) in conjunction with Art. 20(3) of the Basic Law), the FCC argued.

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