"Realizing Material Justice"

Ne Bis in Idem and the Rule of Law under Pressure in Germany?

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Until late 2021, § 362 of the German Code on Criminal Procedure (StPO) only included four grounds to reopen closed court cases to the detriment of a person previously acquitted or convicted for the same deed. These grounds relate to manifest deficiencies in the way in which a trial was conducted or concerned a credible confession of a person who had been acquitted. This state of the law goes back to the late 19th century and was unchanged for the most time since, with infamous exceptions in the time between 1933 and 1945 where National-Socialist legislation provided for the possibility to reopen cases where the "*gesundes Volksempfinden*" so required.[1] It was in the light of this experience that the Basic Law introduced a special provision on the principle of *ne bis in idem* in Article 103 para. 3 which has to date been understood by most scholars in constitutional law to be a bar against introducing further grounds for reopening criminal court cases beyond the state of the law as it existed before the National Socialists came to power.[2] Art. 103 para. 3 of the Basic Law is a particular emanation of the *Rechtsstaatsprinzip*,[3] setting forth that the considerations of material justice must yield to the stability of the law, i.e. the legally protected expectation that a criminal case is closed once and for all if a charged individual has been acquitted.[4]

In the summer of 2021, a new ground for opening up closed cases was introduced into parliament. The initiative suggested to add a new No. 5 to § 362 of the Code on Criminal Procedure. This move was the result of a long-lingering campaign and took place before the background of a tragic murder of a 17-years old girl in 1981. New means of DNA analysis seem to confirm that a man who was tried but eventually acquitted in the 1980s was indeed the perpetrator. After the Bundestag passed this piece of legislation in the summer of 2021, it took a remarkable period of time before the Federal President Frank-Walter Steinmeier signed it into law on 22 December 2021, not without the unusual (but not unprecedented) step of publicly expressing his serious concerns about the constitutionality of the act in a press statement. Apart from explaining the context for the Federal President's decision, this blog will focus on the relationship between legal certainty and material justice and how they have been juxtaposed in the course of the drafting history of the act. I will argue that the act is based on a problematic misunderstanding of the role of justice in legal discourse which has been prioritized over more formal aspects of the Rule of Law.

A popular, yet damaging mistake

Under Article 82 para. 1 of the Basic Law, the Federal President could have refused to sign the act into law. In line with the general practice of his predecessors he seems to reserve this right for him for situations when there is no reasonable doubt about the unconstitutionality of the piece of legislation. Though the statement of the President gives the impression that this threshold was actually met, President Steinmeier nonethe-

[1] On this historical dimension see *Brade*, Der Grundsatz "ne bis in idem", Art. 103 Abs. 3 GG – Ein Plädoyer für die Effektivierung des Grundrechtsschutzes, AöR 146 (2021), 130, 136; *Remmert*, in: Dürig/Herzog/Scholz, Grundgesetz-Kommentar, 85th instalment, 2018, Art. 103 Abs. 3, para. 18.

[2] *Nolte/Aust*, in: Huber/Voßkuhle (eds.), von Mangoldt/Klein/Starck – Grundgesetz-Kommentar, vol. III, 7th edn., 2018, Art. 103, para. 178.

[3] *Schulze-Fielitz*, in: Dreier (ed.), Grundgesetz-Kommentar, vol. III, 3rd edn., 2018, Art. 103 III, para. 37; *Remmert* (note 1), Art. 103 Abs. 3, para. 7; *Kunig/Saliger*, in: Kämmerer/Kotzur (eds.), von Münch/Kunig – Grundgesetz-Kommentar, vol. II, 7th edn., 2021, Art. 103, para. 63.

[4] *Schulze-Fielitz* (note 3), Art. 103 III, para. 35.

less reached the conclusion that a last degree of certainty allowing for an outright non-signature of the act was not attained. Even for opponents of the piece of legislation at issue here, this is a reasonable position as the German constitutional system provides for different avenues to determine the constitutionality of legislation. It is in any case preferable to entrust this task to the Federal Constitutional Court. While the Federal President is also a "guardian of the Constitution", he is only one among others. With his statement, he has certainly rung an alarm bell and it is now for other actors to ponder the implications of this call.

This short blog is not the right place to go into the doctrinal details of the constitutionality of the act of legislation. The proposed legislation was subject to numerous academic contributions and its conformity with the Basic Law was also the subject of an expert hearing in the Federal Parliament's legal committee in which views differed on the matter.[5] In the following, I would like to follow up on the justification and rhetoric with which this piece of legislation was accompanied. The draft bill was introduced into Parliament by the parliamentary groups of the Christian Democrats and the Social Democrats, at the time the parties forming the coalition government. Remarkably, the Federal Ministry of Justice refused to participate in the legislative process for the reason of constitutional doubts on the matter.

The act was introduced into Parliament with the title "*Gesetz zur Herstellung materieller Gerechtigkeit*" – meaning that the Act was literally supposed to realize material justice. The explanation of the legislative initiative further sets out that "legal peace" ("*Rechtsfrieden*") and the "sense of justice of the population" would suffer as much in the case of an unwarranted acquittal than in the case of a conviction which turns out to be unjustified. The argumentation culminates in various and repeated findings that acquittals would be "unbearable" ("*unerträglich*") if the person acquitted would in reality be the perpetrator. As also forcefully argued by Björn Schiffbauer in an article for the "Neue Juristische Wochenschrift", it is this rhetoric of unbearableness and the quest for material justice which makes this seemingly innocuous piece of legislation damaging for the *Rechtsstaat*. It plays with the idea that material justice can be optimized by a simple twitch of the legislator. And what is worse, it insinuates that the previous legislative framework was unbearable and unjust.[6] By labelling these arguments as attempts to optimize material justice and the *Rechtsstaat*, the legislation confuses *Rechtsstaatlichkeit* with enforcement of the law, a category mistake which is, unfortunately, popular these days.[7]

Confusing law and justice

This piece of legislation thereby gives us a snapshot into broader debates on the relationship between the *Rechtsstaat* and justice, between positive constitutional law and natural law in Germany. The early years of the Federal Republic witnessed a revival of natural law approaches, which were supposedly a reaction to the positivist inclinations of lawyers in the late Weimar era as well during National Socialism.[8] Today, it is the prevailing view that this criticism of positivism was eventually misguided as, for instance, the rise of the National Socialists and their grip on the legal system had nothing to do with positivism properly understood, but was instead based on an anti-positivistic turn to interpreting vague general provisions of the law in line with National Socialist ideology.[9]

The *Gesetz zur Herstellung materieller Gerechtigkeit* is blind towards history in a dual sense: It overlooks (or does not care?) that it builds unwittingly on role models from National Socialist time and, to make matters worse, then operates with vocabulary inspired

[5] For critical statements see *Aust/Schmidt*, Ne bis in idem und Wiederaufnahme – Verfassungsrechtliche Grenzen aktueller Reformvorschläge zur Erweiterung von § 362 StPO, ZRP 2020, 251; *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; *Brade* (note 1); *Eichhorn*, Strafprozessuale Wiederaufnahme und Verfassungsrecht, KriPoz 6 (2021), 357; for criminal law scholars arguing in favour of the constitutionality see *Kubiciel*, Reform der Wiederaufnahme zuungunsten des Freigesprochenen im Lichte des Verfassungsrechts, GA 2021, 380; *Hoven*, Die Erweiterung der Wiederaufnahme zuungunsten des Freigesprochenen – Eine Kritik der Kritik, JZ 2021, 1154.

[6] *Schiffbauer*, „Unerträglich" als valides Argument des Gesetzgebers? Aktuelle Normsetzung und das Konzept des Rechts, NJW 2021, 2097.

[7] See also *Möllers*, Freiheitsgrade – Elemente einer liberalen politischen Mechanik, 3rd edn., 2021, p. 209.

by Gustav Radbruch's famous formula how to distinguish between law and non-law, justice and injustice in the transitional period after massive state crime (as highlighted already by Stefan Conen in the Legal Committee expert hearing). When writing about the continuing authority of law from the Nazi era, Radbruch coined the expression of unbearableness which, vague as it is, served to distinguish those situations where legal security and stability protected also legal decisions from the Nazi era from those were a correction would need to take place.[10]

Ultimately, this piece of legislation confuses law and justice. It portrays a misguided sense of the relationship between the *Rechtsstaat* and justice. It might be uncontroversial to hold that the aim of all state conduct in a *Rechtsstaat* is justice.[11] But justice is not an argument within the ordinary legal discourse. A *Rechtsstaat* proceduralizes claims for justice in the forms of the law.[12] In the context of the principle of *ne bis in idem*, in addition, the drafters of the Basic Law themselves have made a decision on the appropriate balance between justice and legal security. The *Gesetz zur Herstellung materieller Gerechtigkeit* flies in the face of this premeditated balancing exercise area undertaken by the Constitution itself.[13] The act and the public debate accompanying its creation reveal a lack of respect for the formal dimension of the *Rechtsstaat*. As opposed to the seemingly supreme goal of realizing material justice, the more formal dimensions of the *Rechtsstaat* seem to be of secondary importance to some actors.[14]

The Federal President Frank-Walter Steinmeier has called on the political branches to reconsider this piece of legislation, stopping just short of openly advocating for its repeal. If the legislator does not heed this call, it will be for the Federal Constitutional Court to eventually determine the constitutionality of the provision if a case is brought to Karlsruhe. The broader damage to the idea of the *Rechtsstaat* is done, however.

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[8] For a thorough assessment of this natural law revival see *Foljanty*, Recht oder Gesetz – Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit, 2013.

[9] See the seminal contribution by *Rüthers*, Die unbegrenzte Auslegung – Zum Wandel der Privatrechtsordnung im Nationalsozialismus, 8th edn., 2017, especially at pp. 98-99 on the limited explanatory value of positivism.

[10] *Radbruch*, Gesetzliches Unrecht und übergesetzliches Recht, SJZ 1946, 105.

[11] *Huber*, Rechtsstaat, in: Herdegen/Masing/Poscher/Gärditz (eds.), Handbuch des Verfassungsrechts – Darstellung in transnationaler Perspektive, 2021,para. 66.

[12] *Hesse*, Der Rechtsstaat im Verfassungssystem des Grundgesetzes, in: Hesse et al. (eds.), *Staatsverfassung und Kirchenordnung – Festgabe für Rudolf Smend zum 80. Geburtstag am 15. Januar 1962*, 1962, 71, 77; see also *Scheuner*, Die neuere Entwicklung des Rechtsstaats in Deutschland, reprinted in: Forsthoff (ed.), Rechtsstaatlichkeit und Sozialstaatlichkeit – Aufsätze und Essays, 1968, pp. 461, 488 [1960]; *Sommermann*, Taugt die Gerechtigkeit als Maßstab der Rechtsstaatlichkeit, Jura 1999, 337.

[13] See previously *Aust*, Rechtsstaat oder Gerechtigkeit?, Frankfurter Allgemeine Zeitung of 17 June 2021, 6; see also on the general point *Schulze-Fielitz* (note 3), para. 37.

[14] Similar in this regard *Huber* (note 11), para. 67.