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## PERSPECTIVES

### The *Rechtsstaat* as the Path Toward Unity in Liberty

Rainer Funke\*

In the beginning of the third millenium, Berlin, like so many times in its history, is sparkling with contrasts. Historical allusions and, at the same time, contradictions abound, especially in the city's center. Today's offices and conference rooms of the *Freie Demokratische Partei* ("F.D.P.") liberal-libertarian members of Parliament and its faction in the Bundestag, for example, are located in the former so-called Ministry of Justice of the Deutsche Demokratische Republik ("GDR"), in a building which, until 1945, was an annex to the German Reich's Ministry of the Interior. As late as the summer of 1989, few people would have envisioned democratically elected representatives of a reunified Germany going about their legislative tasks in the building complex at Dorotheenstrasse 93. Now it has become the site from which those members of Parliament continue to strive for democracy and the *Rechtsstaat* (rule of law) to make their contribution to reunification.

Even so, molding together the two political systems, with their utterly different social and economic organization, in a way that results not only in law but in justice, has been a Herculean task, especially during the first few years following reunification. In the course of four decades, the two legal systems had grown apart considerably. Putting together the two fundamentally different legal systems proved an immensely complex, huge and challenging task.

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I. THE LEGISLATURE'S ROLE IN THE FRAMEWORK OF THE EVENTS OF 1989-90

A. *The Period of Transition.* In the transition period toward the end of 1989, the Federal Republic of Germany instituted several expert committees, especially for economic issues, transportation, and postal and telecommunication services, while the Ministry of Justice, for the time being, considered it prudent to remain silent. As late as the end of 1989, the judiciary of the GDR had shown no inclination to remove any of their staff. The judiciary had only a few weeks earlier inflicted harsh punishments on GDR citizens for demonstrations and public protests and had—as was eventually discovered—tightly cooperated with the much-hated *Ministerium fuer Staatssicherheit*, the secret police. Yet neither the attorney general, responsible within the ministry for the field of criminal law, which was heavily misused as a political instrument, the president of the Supreme Court, nor the public prosecutor had been removed from office. Interestingly enough, the latter two were subject to immediate supervision by the *Staatsrat* (State Council) and the *Volkskammer* (the “people’s” assembly of representatives), but not the GDR Ministry of Justice.

Even though there were hints at self-critique and a willingness for reforms, the GDR was so reluctant that then-Attorney General Hans A. Engelhard considered it unwise to initiate political negotiations. Everybody involved was well aware that improving legal cooperation must be a top priority. On top of this, many former residents of the GDR who had relocated to the Federal Republic after the wall came down wanted and needed to travel to the GDR in order to settle both private and administrative matters.

These problems were an issue in the Common Declaration by Chancellor Helmut Kohl and Prime Minister Hans Modrow on December 20, 1989. It was agreed that, in the best interest of the people involved and in order to continue the consultations about legal cooperation and to institute an expert committee for consultations on legal cooperation and relief, legal and administrative cooperation should be instituted in a constructive manner, without bureaucratic hurdles. In order to comply with the Common Declaration, then-Deputy Attorney General Dr. Klaus Kinkel asked the chief official of the permanent representation office of the Federal Republic of Germany with the GDR to inquire with the GDR Ministry of Justice in which manner and especially with whom expert talks might take place. When the *Volkskammer* recalled Minister of Justice Dr. Hans-Joachim Heusinger in January 1990 and elected his predecessor, Professor Kurt Wuensche, who had held the office prior to 1972, communication began to improve. On February 1 and 2, 1990, there was an initial round of political talks between the under-secretaries for foreign affairs at Bonn. However, at the time this first meeting took place, the dissolution of the GDR began to grow more and more evident. Prime Minister Modrow pointed out that the budget was not balanced any more and clearly exposed the gradual dissolution of the lower-level administrative agencies. At the same time, he conceded to free elections for a *Volkskammer* as early as March 18, 1990, and, for the time being,

had formed a "government of national responsibility," which included opposition groups.

After finding out during a visit to Moscow on January 30, 1990, that the Soviet Union would not be principally opposed to German reunification (it was assumed, at that point in time, by way of a confederation), Prime Minister Modrow introduced his "*Plan für Deutschland, einig Vaterland—Konzeption für den Weg zu einem einheitlichen Deutschland*" (plan for Germany as a united fatherland—concept for the way to a united Germany) on February 1, 1990. From the Federal Ministry of Justice's point of view, the most significant fact about this plan was the explicit mentioning of initial steps toward unification of the law.

This marked the start of a race towards reunification that most of the officials involved at first considered a marathon but which, as time progressed, grew closer to a sprint. After all, one has to keep in mind that at that point there were not even nine months left for preparing reunification properly with due regard to the *Rechtsstaat*.

The main difficulties consisted of incorporating the centrally planned economy into the *Soziale Marktwirtschaft* and of the constitutional and public international law issues of reunification. In addition to this, the judiciary system had to be completely rebuilt, with human resources being especially scarce. Thus, it quickly became evident that only cooperation from lawyers from the "old" states would facilitate the fast and high-quality institution of both a judiciary and government agencies. However, everybody involved knew that the Federal Ministry of Justice would have to provide the GDR Ministry of Justice with support for the necessary legislative proposals. Not only was returning "people's property" to private property and attributing property rights to particular public entities an extremely complicated legal issue, the process has also led—and continues to lead—to weighty political discussions. On top of this, officials faced the difficult task of making up for not only the GDR's past unjust expropriations, but also, where possible, the ones committed during the Third Reich. Finally, the issue of rehabilitation of politically prosecuted persons played an important role in all these proceedings, as did the connected issue of whether there should be a statute of limitations for unlawful acts committed by the SED, the former communist party.

At the end of January, after Soviet Premier Gorbachev's declarations in Moscow had made it clear that national unity might be achieved faster than had been anticipated just days before, Chancellor Dr. Kohl heralded the institution of working committees. Even at this early point, it became obvious that legal unification and especially the issue of property rights would become central to the reunification process. In accordance with a government decision of February 7, 1990, a committee on "German Unity" was established which featured, among five other subcommittees, one on legal issues and especially adjustment of the law. It was presided over by the Federal Ministry of Justice and, with the Deputy Attorney General as its head, was staffed with representatives of other ministries, the states, the Federal Courts, the Public Prosecutor, and four law professors.

Looking back, it is hard to imagine how unprepared both governments were for the political challenges of reunification. It must not be forgotten that the GDR leadership clique had suppressed any cooperation between the Federal Republic and the GDR. Moreover, since the mid 1960s, the GDR had begun to reorganize its foremost statutes and to adapt them to a socialist society. In 1966, the family law code came into force, and in 1968, the penal code, which was completed by a code of criminal procedure in 1974. Finally, from 1976 there was a new civil code, the ZGB, and a revised code of civil procedure. Thus at the time of reunification there were two independent, irreconcilable, and mutually exclusive legal systems.

As soon as it became clear that the two economic and social systems would predominantly be adapted to the *Soziale Marktwirtschaft*—in the shape it had taken in the Federal Republic throughout the years of its existence, it was also evident in which manner the adjustment of the legal systems would have to be achieved.

After the largely unexpected result of the election to the *Volkskammer*, the new Prime Minister Lothar de Maiziere gave a state of the nation address on April 19, 1990, heralding the wish of the GDR to soon be united with the Federal Republic by joining the Federal Republic according to the procedure laid down in then Article 23 of the Basic Law of the Federal Republic of Germany. This meant acceptance of the Basic Law of the Federal Republic of Germany, the most freedom-minded, democratic constitution ever to be in force on German soil. This gave a clear signal to everybody involved in legislative politics that there were four immediate issues. First, the legal ground for a free market economy had to be laid in order to make possible a monetary union. Second, there was need for immense transitory rules. Third, since the GDR lacked the lawyers needed to adapt to the legal system it was about to join, it was in need of support in its legislative efforts.

Fourth, the complex issue of unresolved ownership questions had to be resolved. The work was finally completed by the signing of the *Einigungsvertrag* (Treaty on German Reunification) on August 30 and 31, 1990, at Bonn and Berlin and an additional agreement about its interpretation and implementation. The *Bundestag*, the *Bundesrat* and the *Volkskammer* ratified the agreements on September 20 and 21, 1990, respectively.

B. *The Legal Framework for Reunification.* It must not be ignored that there existed no constitutional law precedent for the reunification of the two German states. Only in realizing this and also taking into account the enormous number of aspects of everyday life that had to be regulated, can one begin to imagine the significance of the legal transaction. While it is certainly true that the short drafting period of the *Einigungsvertrag* has resulted in formal mistakes and also in minor content mistakes, this by no means diminishes the achievement of the participants in this historic venture.

According to the *Vertrag ueber die Wirtschafts-und Waehrungsunion* (Treaty on Economic and Monetary Union), the GDR had entered into an obligation to adjust its legal system. This included the adjustment of its constitution, which had already

been altered seven times since November 9, 1989, without achieving widespread acceptance. Attempts at drafting a new constitution failed. In the end, the constitution was adjusted by the so-called *Verfassungsgrundsatzgesetz* (statute on constitutional principles) on June 17, 1990.

While there was no precedent for the economic and monetary union of both German states, there was, in fact, a precedent for joining the Federal Republic. This was the example of the Saarland whose access to the Federal Republic had been regulated by statute. However, the new government of the GDR by no means wanted to give up on their quest for a contractual solution. Thus the Federal Ministry of Justice prepared for an agreement, even though it would actually have preferred a statutory, and more flexible, solution. From the point of view of the GDR, the beauty of the contractual solution lay in the fact that any guarantees given to a disappearing state could later be claimed by those entities that were considered successors to those former states.

The recurring issue of property or possession of homes, flats and dachas was of immense importance to both the GDR government and the citizenry. It was this issue that led to the question of whether certain GDR regulations ought to remain valid for at least some time even after reunification. However, not even the GDR government agencies themselves were always quite certain what was GDR law and what was not, for the so-called index-book of statutes, introduced in 1951, was no more than a cardboard box with tens of thousands of loose leaves; there was no electronic database on the law whatsoever.

In the end, the *Einigungsvertrag* contained both a "negative catalogue," citing the GDR regulations that would not be substituted by the law of the Federal Republic, and a "positive catalogue" that explicitly listed which GDR provisions should remain valid in spite of general applicability of the law of the Federal Republic. Many of the exceptions dealt with civil law, especially land and homestead leases.

The integration of the new states as well as certain rules within the Treaty also made it necessary to amend the Basic Law of the Federal Republic. While the Federal Government wanted no more than the minimum amount of necessary changes, the Social Democratic Party ("SPD") as well as the majority of the states governed by the SPD were pushing for more global amendments to the constitution, especially the introduction of explicit state goals and policies. However, neither within the amendment committee nor, consequently, in the Bundestag did the proponents of a general revision of the Basic Law succeed in winning a sufficient majority.

C. *The Judiciary.* As concerned the judiciary, the main problem was that the constitution of the GDR, based on Marxism-Leninism, had not really had any use for a judiciary. Consequently, the courts were not properly organized, they were by no means sufficiently funded, and there was a lack of both judges and attorneys-at-law—the whole GDR had less than six hundred attorneys. There was just one field where theoretically one could have drawn on an abundance of human resources: even

compared with the Federal Republic, the number of public prosecutors was exceedingly high.

This led to the question of which GDR judges and prosecutors ought to be accepted into the judiciary of the Federal Republic, and which ones could not be accepted under any circumstances. The involvement of both groups in "GDR injustice" forbade a simple transfer into the new system. On the other hand, one had to differentiate in the most exact possible manner who had disqualified themselves through prosecuting political opponents of the GDR regime and through working for the *Ministerium fuer Staatssicherheit*, and who, without such ballast, was qualified to act for the Federal Republic, a state based on the *Rechtsstaat*.

Appointment committees for judges undertook examinations, based on exact rules, that were designed to instill the citizens with confidence in the judiciary. Since the *Ministerium fuer Staatssicherheit* had been nearly omnipresent throughout the whole administrative system of the GDR, most candidates had, in some way or the other, come into contact with this organization. Thus there had to be close scrutiny in each case to determine whether there had been a statutory compulsion to play along or whether there had been conspirative interaction with the *Staatssicherheit*. The result was roughly as follows:

Of about 1,412 judges and 1,316 public prosecutors, altogether 1,613 presented themselves for an examination. About 60 percent—about 630 judges and 400 public prosecutors—were finally accepted by the federal judiciary and were given intensive, and in the end effective, training.

## II. PARTICULAR AREAS OF THE LAW

The Federal Ministry of Justice was mainly busy adjusting, revising or preparing the relevant statutes in a way that, in the long run, would facilitate a general adjustment to the law of the Federal Republic.

Even as late as the year 2000, there still are peculiarities in the realm of the judiciary and the organization of the courts regarding the special structure, but also the financial possibilities of the new states. As late as in the end of 1999, the federal legislature passed a law that allows states to pass laws regarding the staffing of courts and the entry of titles into land registers. In the field of bankruptcy law, only the Bankruptcy Statute, which came into force on January 1, 1999, created a unified law for all German Laender.

This can be illustrated using sample issues that have been producing regulatory work for the Ministry of Justice until today, namely the adjustment of private law issues, unresolved ownership issues, and issues concerning rehabilitation of the victims of GDR government injustice.

A. *Adjusting Private Law Issues.* The most challenging and complex task for the Federal Ministry of Justice was the restoration of a unified body of private law, for in the end this would have to go along with the step-by-step adaptation of the

circumstances of everyday life in both parts of Germany. In the field of leases, for example, this adaptation lasted until 1998, with transitory rules for particular arrangements under GDR law reaching into 2022.

A huge problem for everybody involved turned out to be the discrepancy between the written law and the practice in the GDR—for in the end, the wish of the government, and thus the SED, always preempted whatever might have been the written law. Especially where the form of legal transactions is concerned, German courts still have to deal with the question of where there has been a real lack of form and where the lack of formality was but socialist legal practice.

It deserves to be noted that certain statutes were taken over very early, especially those concerned with consumer protection. This proved necessary because the citizens of the former GDR were not yet used to the practice of door-to-door sales, consumer credits, or insurance law.

The law regarding corporations was especially difficult to assess. Mere adaptation of the law of corporations was not feasible because the *Kombinate* and *Volkseigene Betriebe* of a centrally planned economy had to be first transformed into corporations. Since a regulation for transforming those entities would have taken too much time, there finally was the *Treuhandgesetz* which, a few days before the ratification of the Treaty on Economic and Monetary Union, transformed those entities into corporations, well aware that this rather radical measure would necessitate enormous repairs along the way. However, the decision against the slower and methodically correct legal way in favor of the politically and historically necessary quick measures had long been made.

Another issue was to what extent the ZGB and the FGB (code of family law) of the GDR ought to remain in force. Unlike many other GDR statutes, the ZGB, which regulated the relations “between production entities and citizens and among citizens,” could formally be considered to continue the tradition of German contract law. Since the German legal system is highly interwoven, though, a continuation of two separate laws of, say, obligations was not feasible. Thus the BGB, the German Civil Code, took force in the former GDR. There remained, however, special regulations within the ZGB about the use of land for recreational purposes and publicly instituted rights to use and share land, as well as the legal institution of independent property rights in buildings.

Most obvious to the public were the issues in the field of lease law. Since the already quite socially minded lease law of the Federal Republic of Germany underwent criticism for its supposedly insufficient protection of tenants, the GDR wished for a long-term and step-by-step introduction of the lease law of the BGB only.

One has to be aware that three-fourths of the citizens of the GDR were directly affected by the law on housing, since on the one hand, the GDR constitution provided a basic right to housing, and on the other hand, the ZGB instituted nearly perfect

government planning in this area. This also led to the fact that rentals for old buildings were as low as they had been in 1936, which covered only about 30 percent of today's cost for repair and administration. This as well as many other regulations produced the effect that an immediate introduction of Federal German lease law would have created complications with an immense political impact. Later on, it was agreed that the law of leases would have to be attached to an increase in people's incomes and the quality of the housing.

B. *Unresolved Ownership Issues.* One of the most controversial issues about reunification has been the restitution of private property that was subjected to takings from 1945 to 1949 and by the GDR. Even today, one will find advertisements in national newspapers heavily criticizing the decisions made in this respect.

The fact that the discussion took place in a very emotional setting and that the topic easily lent itself to misuse for political reasons made it necessary to proceed with the utmost sensitivity. Many people do not realize today that most private property issues have been resolved. The much criticized principle of "return over damages" ("*Rückgabe vor Entschädigung*") was supplemented with the market principle of "investment before return" ("*Investition vor Rückgabe*"), in connection with a right to damages. In this context, there were a number of different cases which, unfortunately, tended not to be discerned in public discussion. Before May 9, 1945, there were takings based on the law in force under Soviet occupation that concerned takings without damages of industry, small and medium-sized enterprises, and larger service enterprises, as well as—in the course of the so-called "land reform" ("*Bodenreform*")—owners of large but also smaller farms. The GDR saw various kinds of loss of property, for example, forced sales of property in exchange for emigration visas and takings in the course of staged criminal prosecutions. Then there was the loss of property for citizens of the Federal Republic of Germany who had either been resident in the Federal Republic on May 9, 1949, or had left the GDR after that date. There was also a *de facto* expropriation in the case of apartment houses in debt because, as already mentioned, GDR law did not allow landlords to charge cost-efficient rents.

One must keep in mind the ever-present possibility of unresolved property issues endangering the consultations between the Federal Republic and the GDR. In spite of initial optimism, this conflict grew considerably during March 1990. Not only did the Modrow administration refuse to even question the system of property rights as it had developed in the GDR, it was not even willing to put a stop to further injustice being done. Rather, through the statute of March 7, 1990, it facilitated transactions in land belonging to the *Volksvermögen* ("the people's" as opposed to private property) that have been keeping German courts busy until today. Moreover, the Modrow administration passed bills that strengthened the position of those who had received land as a result of the so-called "land reform" of 1945 through 1949. The GDR went so far as to not even accept a regulation about damages or the right to step in for contracts about the sale of land that was subject to takings during that period.

As far as other takings are concerned, restitution was confined to those pieces of land where there were no buildings or which were used for recreation, for private or commercial leasing. The continuation of GDR law for recreational land and apartment leases gives an idea of how much of the situation persisting in the GDR was perpetuated.

Associations and persons who had been persecuted during the Nazi regime for reason of their race, religion, political opinion, or view of the world and had thus lost their fortunes were included among those entitled to damages. Especially for those in the resistance against the Hitler regime, this regulation justly carried the advantage that their property was to be returned if it had been subject to takings not only during the Nazi regime but also during the period of Soviet occupation.

Where property restitution was concerned, it soon evolved that continuous statutory amendments were made necessary by the fact that during the process of reunification, many differences between the two legal systems could not be recognized. In much the same way, the formality issues did not become sufficiently clear before the beginning of the nineties. This necessitated many a clarifying statute by the "unified legislature," meaning the Federal German Parliament after reunification.

In this context, the *Mauergrundstücksgesetz* of 1996, literally, the statute on land bordering on the Berlin wall, deserves to be mentioned. This statute provided for repurchase of land taken by the GDR for the purpose of construction of either the Berlin Wall or any other military border control structures along the German-German border at heavily reduced prices.

As with all questions on the restoration of property, there evolved a need for political compromise in order to achieve a socially acceptable result. Legal order and peace has not yet been achieved. On the other hand, throughout the new *Laender*, there persists the widespread opinion that the solution to those property issues was one of the worst mistakes committed in the process of reunification, while on the other hand, representatives of former owners of land stemming from the land reform still argue in favor of a complete restitution for those takings. In this regard, only time will heal the pain.

C. *Rehabilitation and Reparation.* Alongside the visible acts of expropriation, the GDR had caused incalculable nonmaterial damage to its citizens in the form of criminal prosecution, professional discrimination, and other government wrongdoing. It quickly became clear that, within the short time span remaining for the GDR, it would have to try to get started on rehabilitation or at least reparation. Thus, judgments by GDR courts were reversed through reinstatement procedures as early as January 1990. While the GDR was still in existence, about fifty cases of rehabilitation proceeded on the basis of the GDR code of criminal procedure. After reunification, thirteen thousand more judgments were reversed. The increase in numbers is explained by the fact that by now, the indicted persons themselves as well as their relatives were entitled to bring their claims.

During its forty-year history, however, the GDR did not only use criminal law to fight crime, but also, in manifold ways, to suppress persons opposing the regime's views. Judgments from cases such as the Waldheim trial, in which long-term jail and even death sentences were given without evidence and without a statement of the indicted person's guilt, are as much in need of rehabilitation as the cases known as "Aktion Rose," in which about four hundred hotel and hostel proprietors suffered staged criminal prosecutions intended to facilitate takings. In most cases, it was agreed that a judgment would be reversed if it was irreconcilable with the *Rechtsstaat*.

Along with the rehabilitation of criminal law, administrative law and professional rehabilitation were undertaken. This was supposed to counterbalance disadvantages caused by government agencies or government-run business entities. This excluded, however, the rehabilitation of GDR citizens who had suffered discrimination during occupation. The rehabilitation concerning agency behavior and professional discrimination proved far more difficult. The GDR had not offered any relief against acts by the government or the administration. Thus it was difficult to assess acts like the revocation of a driver's license or commerce license, the forced entry to a *Landwirtschaftliche Produktionsgenossenschaft*, overstated taxes, seizure of a motor vehicle, prosecution by the secret police, or other intolerable acts of "daily life" suffered by citizens of the GDR.

Prominent examples in the professional realm were the exclusion from higher education for the refusal to succumb to the *Jugendweihe* (a secular youth initiation ritual), the expulsion from a university, the stop of a proceeding to award a doctorate degree, the removal from responsible positions to mere support functions, or, especially with teachers, terminations because of contacts with West Germany, critical utterances or insufficient involvement in the "social organizations" of the SED-run country. In the same way as with criminal rehabilitation, the width of the injustice made it hard to be grasped in a statute. On top of this, there were arguments within the federal system about who was to bear the costs.

It was not until after reunification had taken place that, as had been the case in other areas of the law, a factual analysis of what had happened allowed for the statute on rehabilitation and reparation to be modified to reflect the actual circumstances. This required not only an analysis of what had happened but also a forecast of the costs which the Federal Republic was likely to incur. At first sight, arguing along the lines of cost might seem extremely cheap in the context of reparation. However, one has to keep in mind that in the beginning of 1991 the amount of debt that the Federal Republic had inherited from the GDR gradually became clear, as did the scale of cost for the withdrawal of the Soviet troops and the payments for the support of the sickly Soviet economy. Even so, payments for reparation have been increased through 1999, in keeping with the financial strengths of the Federal Republic of Germany, within the framework of the "statutes for restitution" against unjust acts committed by the SED. In 1991–1992, there were already DM1.55 billion set aside for rehabilitation.

### III. CONCLUSION

German unity has posed an immense and close-to-unconquerable challenge to everybody representing the *Rechtsstaat*, especially the legislature. Many problems did not surface until after some years and, consequently, could not be taken into consideration until years later, unless the judiciary had provided for those issues by way of far-sighted judgments. Reunification has, however, clearly proved one truth. Freedom and democracy cannot be achieved or preserved except through a functioning *Rechtsstaat*. Only the rule of law was able to balance the manifold controversial interests and political ideas. The *Rechtsstaat* was the one path toward unity in liberty.

