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The Pains of Growing Together: The Case of the East-German Spies

David P. Currie

Spying is a hoary and equivocal profession. The ancient Egyptians developed a sophisticated system of espionage; a Chinese treatise devoted an entire chapter to the subject as early as 500 BC. Nathan Hale became a hero in the United States by spying on the British during the Revolutionary War, and the British hanged him unceremoniously without trial. Just a few weeks ago the German Constitutional Court was called upon to decide what to do about spies when the countries for and against which they had worked became a single nation.¹

The political branches of the Federal Republic had given a clear answer. Klaus Kinkel, who had directed espionage activities against East Germany, became foreign minister. Markus Wolf, who had engaged in similar activities against the West, was tried for and convicted of treason.²

The West, after all, won the Cold War.

The Constitutional Court saw it differently and reversed the convictions of several high-ranking intelligence officers of the former East German regime on constitutional grounds.

If former adversaries are to live together in harmony, there is much to be said at the policy level for forgiving past offenses.³ After the Civil War, President Andrew Johnson issued a general amnesty for those who had made war against the United States, including Jefferson Davis, president of the so-called Confederate States of America, who had been indicted for treason.⁴ But as both the majority and the dissenters in the German decision pointed out, the negotiators of the Unification Treaty and the Parliament of the reunited nation had decisively rejected pleas for amnesty for East German spies,⁵ and it was not so easy to find such a requirement in the Constitution.

One is reminded, of course, of Nürnberg. Allied trials of Nazi officials for alleged war crimes were widely criticized as *ex post facto*, and Art. 103.2 of the

German Basic Law provides in no uncertain terms that "an act may be punished only if it was defined by law as a criminal offense before the act was committed."⁶ But the Court rightly rejected any suggestion that punishment of East German spies offended the *ex post facto* provision; spying against West Germany had always been a crime under West German law, even if the offender never left East Germany.⁷

Nor did the Court conclude that spying was such a respectable business that, like birdwatching, its penalization inherently offended the constitutional principle that punishment may be inflicted only when the offender is guilty of some moral wrong (*Schuldprinzip*).⁸ Prohibiting espionage, the opinion conceded, served to promote the overriding interest in protecting the free democratic order of the Federal Republic, which alone made possible the enjoyment of fundamental rights.⁹ The same considerations, the Court said, justified extending punishment generally to those who caused injury to West Germany by directing espionage activities from outside its borders—which as the Court added was fully consonant with standard principles of international law.¹⁰

The Constitutional Court did not hold, as had one of the courts below,¹¹ that punishing East German but not West German spies offended the equality principle of Art. 3.1 of the Basic Law.¹² That was certainly a plausible argument. Once Germany became a single country, it was not clear why it was any more reprehensible to have spied for one of its component parts than for the other.¹³ For the Court the decisive fact was that the Federal Republic had survived and the Democratic Republic had not: It was perfectly reasonable not to prosecute one's own spies.¹⁴

Article 25 of the Basic Law makes international law a part of German law and gives it precedence over domestic statutes, but the Court explicitly

denied that prosecution of East German spies was contrary to international norms.¹⁵

Finally, the Court did not hold that *all* East German spies were immune from prosecution after unification. Only East Germans who had confined their activities to East Germany or to other countries where they were safe from extradition were entitled to constitutional protection. The big fish who pulled the strings were to be left in freedom; the little fish who carried out their orders could be put or kept behind bars.¹⁶

The Court based its decision on the principle of proportionality (*Verhältnismäßigkeit*).¹⁷

The Basic Law says nothing about proportionality. The doctrine has its roots in an eighteenth-century codification of Prussian law, which without purporting to limit legislative competence authorized the administration (*Polizei*) to take *necessary* measures (*die nöthigen Anstalten*) to protect the public peace, order, and security.¹⁸ The Constitutional Court from the first found it an implicit constitutional limitation on the powers of all branches of government.¹⁹ Even those fundamental rights which are subject to statutory restriction—such as the right to freedom from bodily restraint guaranteed by Art. 2.2—or which find their limits in “the constitutional order”—i.e., the general freedom of action (“*allgemeine Handlungsfreiheit*”) the Court has perceived in the right to free development of personality protected by Art. 2.1²⁰—are safe against any limitation that does not pass the proportionality test.

Not surprisingly, there has been some uncertainty as to *where* the proportionality requirement is found in the Basic Law. The prevailing view is that it is one aspect of the general principle of the rule of law (*Rechtsstaat*),²¹ which itself (insofar as the central authorities are concerned) is merely implicit in the various structural provisions of Art. 20.²²

Proportionality is the German counterpart of the American doctrine of substantive due process.²³

As the Court said in the present case, the proportionality test has three parts. Any limitation of fundamental rights must be adapted (*geeignet*) to the attainment of a legitimate purpose, necessary (*erforderlich*) to that end, and not overly burdensome (*unzumutbar*) in comparison to the benefits to be achieved.²⁴

The Court had no difficulty with the first two requirements, which are concerned with the rela-

tion between ends and means: punishment for spying was the only way to achieve the statutory goal. It was the third prong of the test, the relation between costs and benefits (sometimes referred to as “proportionality in the narrower sense”) on which the spy prosecutions foundered.²⁵

East German spies, the Court acknowledged, had offended West German law; but they were safe from prosecution, both practically and legally, so long as they remained in the East.²⁶ Against persons in that protected position, said the Court, the West German laws could have little deterrent effect; to subject them to proceedings made possible only because unification had extended the Federal Republic’s authority would impose upon them a particularly heavy burden.²⁷ The fact that West German spies escaped punishment for similar activities, while not enough to offend the equality provision, enhanced the harshness (*Schärfe*) of this burden; and it was detrimental to the unification process to continue to treat East Germany for this purpose as a foreign state.²⁸ Any remaining contribution of such prosecutions to national security, the Court concluded, was “clearly outweighed” by these considerations.²⁹

Three dissenting Justices argued that the Court had undervalued the interest in national security; prosecution would help to deter both others and the defendants themselves from committing further acts of espionage against the Federal Republic.³⁰ There is little profit in haggling here over who had the better of this debate, for we have left the domain of legal analysis. Whether one interest outweighs another is an essentially political decision on which reasonable minds obviously can differ, and they did.

Precisely therein lies the dissenters’ principal objection. Whether to grant a general amnesty, they argued, was a political decision to be made by the political branches of government; the Court had overstepped the boundary between judicial and legislative authority.³¹

But the distinction between adjudication and legislation always blurs when a court undertakes to determine whether a policy decision is arbitrary, or disproportionate, or unreasonable. It is the essence of constitutional doctrines like these that courts retrace the same paths of decision that the political branches

have followed, giving more or less deference to their conclusions. We have seen this in the United States with decisions striking down legislative attempts to prohibit slavery, to limit working hours, and to forbid abortion.³² The German Court is no stranger to this process; its reports are studded with cases second-guessing legislative judgments, in matters ranging from sex-change operations and limitation of the number of drugstores to the romantic question of hunting with falcons.³³

The dissenters did not challenge the proportionality principle itself; they argued that it had been misapplied. Prior decisions, they said, suggested that proportionality should be determined case by case, not for a whole category of persons; and the only factors that could properly be weighed against the interest in security were a diminished degree of blameworthiness and the possibility that sanctions might no longer serve their purpose.³⁴ And of course the dissenters added that the majority had not given sufficient deference to the views of the political branches.³⁵

My own reading of earlier proportionality cases in the Constitutional Court does not suggest any very high degree of deference to legislative or executive conclusions.³⁶ Nor does there appear to be any shortage of precedent for the Court's authority to find that political decisions offend the proportionality principle as to whole classes of people.³⁷ As a historical matter there seems to be more to the dissenters' objection that extraneous factors such as the effect of spy prosecutions on the integration process ought not to be considered, for conventional statements of the proportionality principle speak of balancing the interests served by a challenged measure against the burden it places upon the complaining parties.³⁸

It is typical of judges to discover that constitutions that appear to be silent on the subject give them power to strike down unreasonable legislative or executive

actions. It is also typical for them to look for formulas that limit, or ostensibly limit, the discretionary nature of their decisions. Thus the US Supreme Court in administering its homemade doctrine of substantive due process tends to hedge it about with legalistic categories like "fundamental rights" or businesses "affected with a public interest,"³⁹ and the Constitutional Court divides proportionality into three parts, the last of which the dissenters in the spy case insisted should be interpreted narrowly. For, as the dissenting justices observed, the more open-ended the constitutional standard becomes, the harder it is to distinguish what the judges do from that which is done by those to whom the Constitution entrusts the task of making policy; and the harder it is to explain why it is appropriate for it to be done by politically irresponsible judges in a democracy.

The difficulty is compounded when, as is the case with substantive due process in the United States and proportionality in the Federal Republic, the judges are applying principles that they themselves have read into the Constitution. For what Justice Byron White said not long ago about the Supreme Court of the United States is equally true of courts in other countries blessed with a republican form of government: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."⁴⁰ The East German spy decision was by no means the first to raise this question in Germany, and it will surely not be the last. But one may perhaps be forgiven for wondering whether, whatever good it may have done in the individual case, such a decision will serve in the long run to strengthen or to weaken the crucial institution of judicial review.

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Notes:

1. BVerfG, Decision of May 15, 1995, Case Nos 2 BvL 19/91 et al (not yet officially reported).

2. See *New York Times*, June 6, 1995, Section A, p 11. Treason is commonly limited to betraying one's own country, but the German definition

extends to anyone who reveals state secrets to a foreign power, § 94.1 StGB (the criminal code). The charges against Wolf and against the parties to the cases before the Constitutional Court also included violations of § 99.1 StGB, which forbids espionage against the Federal Republic on behalf

of any foreign power. Wolf himself was not a party to those cases; his appeal to the Federal Court of Justice was pending at the time of the Constitutional Court's decision. See *Süddeutsche Zeitung*, May 26, 1995, p 4.

3 See dissenting opinion of Justices Klein, Kirchhof and Winter at 14-15.

4 6 Richardson, *Messages and Papers of the Presidents* 708 (Dec 25, 1868). See generally Jonathan Truman Dorris, *Pardon and Amnesty Under Lincoln and Johnson* (North Carolina, 1953).

5 See slip opinion at 11-13; dissenting opinion at 1.

6 Arguably this provision permits prosecution for acts that violated generally accepted principles of international law, which Art. 25 makes a part of German law; but spying is not an offense against international law. See slip opinion at 66.

7 See *id.* at 60-63; §§ 5.4, 9.1, 94.1, 99.1 StGB.

8 See 20 BVerfGE 323, 330-36 (1966); 45 BVerfGE 187, 228 (1977). See also slip opinion at 66: "Generally the state imposes criminal sanctions on activities that fall short of an ethical minimum."

9 *Id.* at 51-53. See also 57 BVerfGE 250, 262 ff (1981); 28 BVerfGE 175, 183 ff (1970).

10 Slip opinion at 63. These principles are conventional learning in the United States. See Restatement Third, Foreign Relations, § 402.c (1987) (affirming that, subject to certain exceptions, a state has legislative jurisdiction with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory"); cf Restatement, Conflict of Laws, § 377 (1934): "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

11 See slip opinion at 22-23. See also the argument of counsel in *id.* at 31-32.

12 "All persons shall be equal before the law."

13 See slip opinion at 66 (noting that international law draws no distinction between spying for good states and spying for bad ones.) Of course there may have been differences in the methods employed by East and West German spies that might justify differential treatment, but the charges before the Court were based on the generic act of spying. See *id.* at 23, 67-68.

14 See *id.* at 53-54.

15 See *id.* at 55-59.

16 See dissenting opinion at 26, 28-29 (understandably suggesting that this distinction itself raised a serious problem under the equality clause).

17 See slip opinion at 62.

18 *Allgemeines Landrecht für die Preussischen Staaten*, pt II, tit 17, § 10 (1794).

19 See, e.g., 2 BVerfGE 266, 280-81 (1953).

20 6 BVerfGE 32, 36-37 (1957) (*Elfes*). See David P. Currie, *The Constitution of the Federal Republic of Germany* 316-17 (1994).

21 See e.g., slip opinion at 62.

22 The constituent states (*Länder*), on the other hand, are expressly required to conform to the Rechtsstaat principle. See Art. 28.1 GG. For a more detailed look at the Rechtsstaat and proportionality principles see Currie, *The Constitution of the Federal Republic of Germany* at 18-20, 307-09 (cited in note 20).

23 See *id.* at 274-75, 305-21.

24 See slip opinion at 63.

25 *Id.*

26 See *id.* at 68-69 (noting that East Germany would not extradite its own spies and that the 1972 treaty between the two Germanies, by requiring each state to respect the autonomy of the other, forbade West German authorities to take action in East Germany).

27 "Durch so eine Strafverfolgung werden sie in besonderem Maße betroffen." *Id.* at 70.

28 *Id.* at 71.

29 *Id.* at 73. The balance of interests was different, the Court added, for those who had acted within the original Federal Republic or in a third state that did not protect their activities, for they could have had no expectation of immunity from apprehension and thus were more susceptible to deterrence. The permissibility of punishing them, the Court said, would have to be determined by balancing the competing interests case by case. *Id.* at 70, 75-77 (suggesting also that in some cases their offenses may have been more serious).

30 See dissenting opinion at 2, 11-12 (noting that it would also serve the interest in retribution for past offenses). On the other side of the balance, the dissenters added, with considerable force, the defendants' reliance on the continued existence of a separate East German state to insulate them from prosecution was not worthy of

constitutional protection. *Id.* at 6-7, 22-23.

31 *Id.* at 1, 14, 33.

32 *Dred Scott v Sandford*, 60 US 393 (1857); *Lochner v New York*, 198 US 45 (1905); *Roe v Wade*, 410 US 113 (1973).

33 49 BVerfGE 286 (1979); 7 BVerfGE 377 (1958); 55 BVerfGE 159 (1980).

34 See dissenting opinion at 3, 7-9. The dissenters conceded, however, that the consequences of unification might require some amelioration in applying criminal provisions to individual East German agents. *Id.* at 26-28, 31-32.

35 *Id.* at 24.

36 See Currie, *The Constitution of the Federal Republic of Germany*, chapter 6 (cited in note 20).

37 The famous falconry case, cited in note 33, is only one of many examples.

38 This is how it was put, for example, in the recent decision, 90 BVerfGE 145, 185-92 (1994), invoked by the dissenters at p. 8 of their opinion, in which the Court laid down criteria for determining when punishment for possession of small amounts of marijuana would impose a disproportionate burden. It is also consistent with the original formulation of the doctrine. See Carl Gottlieb Svarez, *Vorträge über Recht und Staat* 486-87 (Hermann Conrad & Gerd Kleinheyer, eds, 1960). Indeed the prevailing opinion in the spy case itself twice said the test was whether the means employed would lead to an undue intrusion upon the rights of the affected party. See slip opinion *id.* at 63, 64.

39 See *Roe v Wade*, 410 US at 154, 162-64; *Munn v Illinois*, 94 US 113, 126 (1887).

40 *Bowers v Hardwick*, 478 US 186, 194 (1986).