

**Rehabilitation and Compensation
of Victims of Human Rights Violations
Suffered in East Germany (1945–1990)**

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I. INTRODUCTION

The systematic violation of human rights by the Government of the German Democratic Republic (GDR) and the communist party behind it, in particular the right to freedom of opinion and expression, the right to freedom of thought, conscience and religion, and the right to freedom of peaceful assembly and association, was a major reason for the revolution which took place in East Germany in the fall of 1989 and for the eventual reunification of Germany a year later. The fall of the communist regime was accelerated by a mass flight of East Germans in August and September 1989 who escaped from the GDR via Hungary, Czechoslovakia and Poland, thus claiming a right, promised by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, they had been denied since the foundation of the GDR in 1949 – the right to leave any country, including one's own.¹

However, the question how to deal with these human rights violations in the reunified Germany turned out to be a divisive issue. Those who called for a remedy as comprehensive as possible were opposed by others who recommended 'to leave the past alone', and also by open or secret supporters of the vanished regime. When it was realized that billions of dollars would be needed to create living conditions in East Germany comparable to those in the

¹ See Art. 13, no. 2, of the Universal Declaration, and Art. 12, para. 2, of the Covenant. The Covenant was signed by the GDR on March 3, 1973 and ratified on Nov. 2, 1973 (Gesetzblatt der DDR 1974 II, 57). It became binding on the GDR on March 23, 1976 (Gesetzblatt der DDR 1976 II, 108). However, the Covenant was not confirmed by the *Volkskammer* (Parliament) by way of legislation in accordance with Art. 51 of the GDR Constitution (as amended 1974); see Entscheidungen des Bundesgerichtshofs in Strafsachen, vol. 39, at 1, 16-17 (1994) ('*Schüsse an der Berliner Mauer*' case). It was the official view of the GDR that the Covenant was not part of the domestic law of East Germany and could not be directly invoked by GDR citizens. See B. Graefrath, *Menschenrechte und internationale Kooperation*, 1988, 55 et seq., and S. Mampel, *Die sozialistische Verfassung der Deutschen Demokratischen Republik*, 3d ed. 1997, 937.

Western parts of the country, the financial capacity of the Federal Republic became an important aspect of the debate. Until today, public discussion is dominated by the problem of a restitution of property, whereas comparatively little attention has been paid to a reparation of violations of other, and arguably more fundamental, human rights like the right to life and liberty, the right to freedom from inhumane or degrading treatment or punishment, or the right to a fair trial.

Germany had faced a similar problem once before, after World War II, when the victims of the Nazi regime claimed rehabilitation and compensation for the outrageous wrongs committed against them between 1933 and 1945 in Germany and territories occupied by Germany. However, the complex legislation enacted to make good this injustice² did not play an important role in the public discussion of 1989-90 and the following years. It seems that, more than fifty years after the end of World War II, this legislation is largely forgotten. Also, had the new laws simply copied the old, parliament could have been misunderstood as taking sides in the difficult controversy of the historical uniqueness of the Nazi atrocities.

II. THE LEGAL RESPONSIBILITY OF THE FEDERAL REPUBLIC OF GERMANY FOR HUMAN RIGHTS VIOLATIONS IN EAST GERMANY

In view of the political controversy about the kind and range of reparation for human rights violations committed in the territory which today is called East Germany³ first in the time of Soviet military occupation (1945-1949) and then during the existence of the GDR (1949-1990), it is not astonishing that the Federal Government, learned authors and courts in Germany supported a legal construction of State responsibility which would leave room for political manoeuvre and compromise.

The line of reasoning is simple. As regards measures taken by the Soviet Military Government or, with its explicit or just tacit approval, German

² For a comprehensive official account, see Federal Ministry of Finance & W. Schwarz (eds.), *Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland*, 6 vols., 1974-1987 (vol. 7 forthcoming). For recent summaries, see W. Schwarz, 'Zur Einführung: Das Recht der Wiedergutmachung und seine Geschichte', *Juristische Schulung* 1986, 433 et seqq., W. Tappert, 'Die Wiedergutmachung von Staatsunrecht im 20. Jahrhundert', *Die Friedens-Warte* 70 (1995), 211, 220-231, and L. Wiegand, 'Kriegsfolgensgesetzgebung in der Bundesrepublik Deutschland', *Archiv für Sozialgeschichte* 35 (1995), 71, 72-77. The reparation of judicial injustice is dealt with by R. Vogl, *Stückwerk und Verdrängung: Wiedergutmachung nationalsozialistischen Strafrechts in Deutschland*, 1997.

³ In the past, the term generally designated the Eastern provinces of Germany (Pomerania, Silesia, East Prussia) which were placed under Polish and Soviet administration by the Potsdam Agreement of 1945 and finally ceded by Germany in 1990.

authorities before the proclamation of the GDR on October 7, 1949, they are declared acts of a foreign State not attributable to the Federal Republic. With regard to measures taken afterwards by GDR authorities, it is similarly argued that the Federal Republic cannot be held responsible for them because the exercise of governmental authority of the Federal Republic was *de facto* and *de jure* limited to the West German territory, and the GDR Government was not a government constituted under the 1949 Constitution of the Federal Republic (the 'Basic Law'). A responsibility according to the international law of State succession has also been denied.⁴ The Federal Republic is said to have been entitled to reject the concept of a 'general succession' (*Universalsukzession*) and instead to accept only 'certain' (i.e., almost all) rights and 'certain' (i.e., very few) obligations of the extinct GDR. These obligations do not include commitments of the GDR arising from governmental tortious acts.⁵ This construction has also led to an impairment of the legal position of victims of GDR injustice who had fled to West Germany, for as long as the GDR existed they could claim diplomatic protection of the Federal Republic in their efforts to obtain reparation.

It is a different question whether, after reunification, the Federal Republic's own constitution called for an annulment of at least certain GDR measures or a reparation for human rights violations, regardless of their legality under East German law. In principle, this question was answered in the negative. The argument goes as follows: In East Germany, the Basic Law entered into force only after reunification on October 3, 1990. The human rights guarantees of the Basic Law have no retroactive effect. Therefore, they are not applicable to measures taken by the Soviet occupation power or GDR authorities before reunification, and no reparation claims can arise because of an incompatibility of such measures with the provisions of the Basic Law. Consequently, the Federal Constitutional Court decided that the legislature has a particularly broad leeway when dealing with a possible reparation of damage caused by such measures.⁶ Only in very exceptional cases may the German *ordre public*

⁴ Such responsibility could only arise with respect to violations of GDR law or international law because otherwise there is no obligation which could possibly devolve on the Federal Republic as a successor State. For the liability of a State under customary international law for human rights violations, and the entitlement of a German citizen to claim reparation for such a violation by Germany before German courts, see Michael Trassl, *Die Wiedergutmachung von Menschenrechtsverletzungen im Völkerrecht*, 1994, 53-105, 125-141 (summaries at 104 and 140).

⁵ For a concise statement of that position, see the joint letter of the Federal Ministries of Justice and the Interior, Dec. 3, 1992, reprinted in: *Deutsch-Deutsche Rechtszeitschrift* 1993, 115. See also S. Leutheusser-Schnarrenberger, Federal Minister of Justice, 'Das Zweite Gesetz zur Bereinigung von SED-Unrecht', loc. cit. at 162, 163.

⁶ See Entscheidungen des Bundesverfassungsgerichts (hereinafter BVerfGE) vol. 84, at 90, 126 (1991) (*Bodenreform*). See also J. Isensee, 'Rechtsstaat – Vorgabe und Aufgabe der Einigung

require that an East German measure is denied legal effect. The Court went back to its jurisprudence regarding the reparation of war damages and violations of rights by the National Socialist regime, where it had similarly left it to legislative discretion to provide for reparation according to the financial capacity of the State.⁷ A respective obligation of the legislature may only stem from the constitutional definition of Germany as a social State (*Sozialstaatsprinzip*, Article 20, para. 1, of the Basic Law) and the constitutional right to be treated equally by the State (Article 3). The former principle may require to mitigate extreme hardships suffered because of human rights violations in East Germany, while the latter right prevents the legislature from discriminating against certain groups of citizens, i.e., if one group has been granted a claim for compensation, another group with similar traits may not arbitrarily be denied such a claim.⁸ However, as far as our issue is concerned, both rules have not effected a restriction of the freedom of the legislature.

This reasoning, consistent and in line with the way the Federal Republic dealt domestically with Hitler's legacy, can hardly be challenged from a legal point of view. After 1949, the Federal Republic insisted that, as a 'new' and democratic Germany, it could not be held responsible for violations of rights committed by the Nazi regime in the same way as if it had committed them itself, although as a legal person it asserted to be identical with the *Reich* founded in 1867-1871. It was only with regard to violations suffered by foreigners that it had to accept full responsibility in accordance with international law.⁹ If a constitutional change was deemed sufficient to deny claims

Deutschlands', in: J. Isensee & P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. IX, 1997, 3, 87-90; H.-J. Papier, 'Vergangenheitsbewältigung: Abwicklung, Ahndung, Entschädigung', loc. cit. at 587, 606-608.

⁷ See BVerfGE vol. 27 (1970), 253, 270, 283-286 (*Besatzungsschäden*), and vol. 41 (1976), 126, 150-154 (*Reparationsschäden*). See also Basic Law Art. 135a, para. 1, and G. Ress, 'Grundlagen und Entwicklung der innerdeutschen Beziehungen', in: *Handbuch des Staatsrechts* (supra note 6), vol. I, 1987, at 449, 541 et seq. In spite of this legal construction, the Federal Republic granted German victims of Nazi injustice and their dependants substantial compensation, regardless of whether they resided in the Federal Republic or not. It is estimated that a total of D-Mark 90 to 100 billion (90,000 to 100,000 million) has been redistributed to victims since 1947, 80 percent of which have gone to victims living abroad. See W. Schwarz, 'Zur Einführung' (supra note 2), at 433, 437.

⁸ Art. 26 of the International Covenant on Civil and Political Rights has never been mentioned in this context. The Human Rights Committee has held that if a State party repairs a violation of rights by a restitution of property or monetary compensation, it has to extend these benefits to all victims, without discriminating against any group or person (irrespective of whether the violation occurred before the entry-into-force of the Covenant and the Optional Protocol, and notwithstanding the fact that the right to property, as such, is not protected under the Covenant). See *Alina Simunek et al. v. the Czech Republic*, Communication No. 516/1992, Views adopted by the Human Rights Committee on 19 July 1995, paras. 4.3-4.5, 11.3, UN Doc. CCPR/C/57/1.

⁹ See Art. 5, paras. 2 and 3, and Appendix A of the London Agreement on German External Debts of Feb. 27, 1953; Bundesgesetzblatt (hereinafter BGBI.) 1953 II, 333, 340, 473. Annex

based on events that had taken place under the 'old order', then all the more the extinction of a State which seceded from, or tried to secede from, Germany as a whole. Germany could also refer to a rule of international law supported, as the ninth edition of Oppenheim's treatise puts it, by 'good authority', saying that a State does not become liable for unliquidated damages for the torts or delicts of the extinct State which it has absorbed.¹⁰ That the Basic Law does not require the Federal Republic to repair acts which were lawful under the law of the GDR as well as international law, is also an opinion not open to serious doubt.

And yet, one feels somewhat uneasy about the resolvedness with which the reunited Germany draws a dividing line between itself and the East German State. The way it now treats the GDR government as a foreign power contrasts sharply with previous efforts, in particular of the Constitutional Court, to emphasize a 'special legal proximity' of the Federal Republic and the GDR. This proximity was said to arise from the fact that both States were parts of a still existing all-German State with a single people.¹¹ 'The German Democratic Republic', the Court ruled in the case concerning the 1972 Basic Treaty between the two German States, 'belongs to Germany; in its relationship with the Federal Republic of Germany it cannot be regarded as a foreign State'.¹² In a way, the former West German *Alleinvertretungsanspruch* (the claim to be the only legitimate representative of Germany as a whole) is now continued: Between 1945 and 1990, the 'true' Germany, a Germany responsible for its acts, resided only in the West. One could also say that now, eventually, the GDR, which since the sixties claimed to be a completely independent State, is taken at its word. In consequence, the East Germans including those who had fled to the West between 1949 and 1990 lost their debtor in 1990.

One could certainly be less critical of this policy if the legislature had used its more or less unrestrained freedom to deal with East German human rights violations in a more generous way. Instead, it limited reparation to a few

VIII of the agreement (id. at 463) was interpreted as excluding the compensation of individual victims of Nazi injustice from the moratorium provided for in Art. 5. See H. Rumpf, 'Die deutschen Reparationen nach dem Zweiten Weltkrieg', in: B. Willms (ed.), *Handbuch zur Deutschen Nation*, vol. 1, 1986, 333, 345-346 (with a list of German compensation payments to foreign States at 358-359).

¹⁰ See R. Jennings & A. Watts (eds.), *Oppenheim's International Law*, 9th ed., 1992, vol. 1, pt. 1, 218. See also A. Verdross & B. Simma, *Universelles Völkerrecht*, 3d ed., 1984, 633 et seq. To me, it seems that a successor State which has taken over all the assets of its predecessor, is at least obliged to repair grave violations of human rights committed by the latter. See also I. Seidl-Hohenveldern, Book Review, *Zeitschrift für öffentliches Recht* 53 (1998), 129, 131 (the Federal Republic is liable to render compensation for measures of expropriation which violated international law on grounds of unjustified enrichment).

¹¹ See BVerfGE vol. 36 (1973), 1, 15-17 (*Grundlagenvertrag*).

¹² See id. at 17.

narrowly defined categories of wrongs, and what it granted the victims was rather little again.

III. REHABILITATION OF VICTIMS OF INJUSTICE IN EAST GERMANY AND THE COMPENSATION OF THEIR LOSSES

1. *The Unification Treaty*

The law concerning the rehabilitation and compensation of victims of injustice in East Germany is fairly complicated. Earlier statutory law promulgated shortly before reunification by the first freely elected GDR parliament was superseded by agreements concluded between the two German States and later by all-German legislation. This legislation often refers to statutes enacted in West Germany for the benefit of other groups of persons, in particular victims of World War II.

In Article 17 of the Treaty Between the Federal Republic of Germany and the GDR on the Establishment of the Unity of Germany (Unification Treaty) of August 31, 1990¹³ the parties stipulated the following:

The High Contracting Parties confirm their intention promptly to create a statutory basis for a rehabilitation of all persons which have become victims of politically motivated criminal prosecution or any other judicial decision inconsistent with the rule of law or the constitution. Rehabilitation of these victims of the SED regime of injustice (*SED-Unrechts-Regime*) shall entail compensation which is *angemessen* (appropriate or adequate).¹⁴

The provision is an exception to the rule laid down in Article 18 of the treaty, according to which the decisions of GDR courts were to remain in force.¹⁵

A second exception can be found in Article 18, paragraph 2, which accorded someone convicted by a GDR criminal court an individual right to seek cassation of the respective decision.¹⁶ The device of cassation, imported

¹³ *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands (Einigungsvertrag)*, BGBl. 1990 II, 889. For the history and background of the treaty, see, e.g., P.E. Quint, *The Imperfect Union: Constitutional Structures of German Unification*, 1992, 103-123.

¹⁴ Translations of the agreements between the two German governments and German statutes quoted in this article are provided by the author. The abbreviation SED stands for *Sozialistische Einheitspartei Deutschlands* (Socialist Unity Party of Germany), which was the ruling communist party in the GDR.

¹⁵ For a criticism of that scheme of rule and exception, see F. Haft, 'Die "Bereinigung" des SED-Unrechts', *Deutsch-Deutsche Rechts-Zeitschrift* 1994, 258, 259.

¹⁶ The Code of Criminal Procedure was amended accordingly. See Unification Treaty attachment I, ch. III(A), para. III(14)(h).

from Soviet law, had ordinarily been used in the GDR as a method of exercising party control over the judiciary, by allowing the Attorney General or the President of the Supreme Court to petition for a change in a judgment even after it had become final.¹⁷ After the GDR Code of Criminal Procedure had been liberalized in June 1990, cassation operated in favor of the defendant only.¹⁸ While until the effective date of the Unification Treaty cassation required that the challenged decision had gravely violated GDR law, or that the sentence was grossly wrong, the Treaty introduced as a second ground the 'incompatibility of a decision with the standards of the rule of law (*rechtsstaatliche Maßstäbe*)'.¹⁹ This was clearly necessary because in order to do justice to the political victims of the communist regime the previous procedure had to rely on an interpretation of GDR statutes 'quite unlike anything that the courts of the old regime would actually have done'.²⁰

The method of cassation was only applicable to final and non-appealable decisions of GDR criminal courts. For convictions which still remained to be enforced at the moment of reunification, it was stipulated that there would be no enforcement if, on request by the person convicted or the State prosecutor, a court decided that the conviction did not conform to the principles of the rule of law, or that the penalty was not appropriate.²¹

According to Article 19 of the Unification Treaty, administrative acts of the GDR would remain in effect, unless they were inconsistent with the treaty itself or 'with principles of the rule of law'.

From the wording of Article 17 of the Unification Treaty as quoted above it appears that, apart from the special case of cassation, final regulation of the issue of rehabilitation was left to the future all-German parliament because the views of the two sides diverged. As Professor Peter Quint put it, 'the GDR sought broad coverage and substantial compensation while the negotiators of the Federal Republic, conscious of the soaring costs of unification, sought a more modest solution'.²² Even the general standard of financial compensation

¹⁷ See sec. 312, para. 1, of the Code of Criminal Procedure of the GDR (as amended Dec. 19, 1974), *Gesetzblatt der DDR* 1975 I, 61, 98. Para. 2 constitutes a special rule for decisions of district courts (*Kreisgerichte*).

¹⁸ See sec. 31 I, para. 2, cl. 1, of the Code of Criminal Procedure of the GDR (as amended June 29, 1990), *Gesetzblatt der DDR* 1990 I, 526, 537.

¹⁹ See Unification Treaty attachment I, ch. III(A), para. III(14)(h)(hh) (inserted by Art. 4 of the Agreement on the Implementation and Interpretation of the Unification Treaty of Sep. 18, 1990; see *BGBI.* 1990 II, 885, 934, 1239, 1243).

²⁰ See Quint (*supra* note 13), at 217. For a detailed analysis of the rules of cassation, see M. Amelung et al., *Rehabilitierung und Kassation: Beseitigung von Justizunrecht in der DDR*, 1991, 139-201.

²¹ See Unification Treaty, attachment I, ch. III(A), para. III(14)(d).

²² Quint (*supra* note 13), at 219.

remained ambiguous because the German word 'angemessen' can mean 'appropriate' as well as 'adequate'.

2. The 1990 GDR Rehabilitation Law

However, the members of the East German Parliament (the *Volkskammer*), which had been freely elected for the first time in the history of the GDR on March 18, 1990, were anxious to shape the future all-German legislation. Shortly after the Unification Treaty had been signed, they enacted a comprehensive 'Rehabilitation Law'.²³ The law sought to rehabilitate all persons 'prosecuted, discriminated against, or otherwise seriously disturbed in the enjoyment of their rights, contrary to the fundamental and human rights guaranteed by the Constitution' (preamble). At the beginning of the part on criminal rehabilitation, the law set out that 'individuals will be rehabilitated who were sentenced because of an act by which they exercised constitutional political rights'. Thus, a bill of rights was taken as a yardstick for rehabilitation which, though included in the GDR Constitutions of 1949, 1968 and 1974, had never been judicially enforceable but instead had often been ignored by statutory law. In the preamble, rehabilitation was defined as an act by which a person is freed from 'the stigma of criminal prosecution or other discrimination'.²⁴ In other words, the State officially declares that its previous judicial or administrative decision was wrong and shall no longer have any legal effect. The law granted those persons rehabilitation who had been unconstitutionally convicted by a criminal court, as well as those who had been victims of politically motivated administrative decisions or disadvantages in employment. It also provided for rehabilitation of persons arbitrarily arrested by 'the Allied Powers of Occupation or their agencies' (sec. 18, para. 1). Section 3 of the law, dealing with rehabilitation for criminal prosecution, specifically mentioned persons convicted because they had opposed the communist regime for political reasons in word and writing, peaceful demonstrations or associations, or had left the GDR or had tried to do so, or had contacted governmental agencies, organizations or private persons outside the GDR. Section 21 particularly described as victims of administrative injustice those who, for political reasons, were deprived of their property or GDR citizenship, or forced to leave their homes in the vicinity of the border

²³ See *Rehabilitierungsgesetz* of Sep. 6, 1990, entered into force Sep. 18, 1990; *Gesetzblatt der DDR* 1990 I, 1459. Reprinted in: W. Pfister & W. Mütze (eds.), *Rehabilitierungsrecht: Kommentar*, 1994, part E 10.1. For a detailed discussion of the rules of criminal rehabilitation, see Amelung et al. (supra note 20), 33-138.

²⁴ See also sec. 2, para. 1: 'Rehabilitation has as its object a political and moral satisfaction (*Genugtuung*) of the person concerned.'

separating East Germany from West Germany or West Berlin, or subjected to treatment in psychiatric hospitals.

However, this statute 'was too sweeping for the government of the Federal Republic, whose taxpayers would be paying most of the bills'.²⁵ Accordingly, in an agreement of September 18, 1990 amending and supplementing the Unification Treaty, the two governments agreed that only the sections of the statute providing for rehabilitation for criminal prosecution and incarceration in mental hospitals would remain in force in the united Germany.²⁶ The all-German parliament would have to decide how to deal with administrative discrimination and discrimination in employment, as well as with arbitrary detention of persons by the Soviet Occupation Power.

What were the legal consequences of rehabilitation for criminal prosecution according to that amended statute? The most important consequence was the revocation of the judgment. This revocation would 'eliminate the legal effects of the judgment' (sec. 4). Any execution of a punishment must be ended, and the respective entries in the register of convictions be deleted (sec. 5). According to section 6, a later law would deal with the issue of reimbursement for fines and fees paid by the convicted. Section 7 determined that in case of detention rehabilitation gives rise to a right to social benefits as a compensation for a loss of health and financial or other disadvantages. For the kind and extent of benefits, the law referred to the law of the Federal Republic on assistance for persons detained for political reasons outside of the Federal Republic of Germany.²⁷

3. The 1992 Law on Rehabilitation and Compensation for Criminal Prosecution

It took more than two years until the all-German parliament, the *Bundestag*, was able to agree on a new 'Law on the Rehabilitation and Compensation of

²⁵ See Quint (supra note 13), at 220.

²⁶ See *Vereinbarung zur Durchführung und Auslegung des Einigungsvertrages*, BGBl. 1990 II, 1239, Art. 3, no. 6a. The GDR law entered into force on Sep. 18, 1990, its amendment, agreed upon by the two German governments on the same day, became effective with reunification on Oct. 3, 1990. Accordingly, there was a short period in which the rules of the GDR law on compensation for administrative and employment discrimination were in force. However, rehabilitation decisions made before Oct. 3, 1990 have not become known. See W. Pfister, 'Die Aufhebung von Willkürurteilen', in: J. Weber & M. Piazzolo (eds.), *Eine Diktatur vor Gericht: Aufarbeitung von SED-Unrecht durch die Justiz*, 1995, 181, 184.

²⁷ See *Gesetz über Hilfsmassnahmen für Personen, die aus politischen Gründen ausserhalb der Bundesrepublik Deutschland in Gewahrsam genommen wurden (Häftlingshilfegesetz)*, as amended Dec. 19, 1986 and Dec. 22, 1989, BGBl. 1987 I, 513, 1989 I, 2398, 2401. For the version presently being in force, see BGBl. 1993 I, 839, 1994 I, 1214.

Victims of Measures of Criminal Prosecution Taken Contrary to the Rule of Law'.²⁸ The law, enacted as part of the (first) 'Statute for the Correction of SED Injustice',²⁹ repealed the amended GDR law of 1990, according to which applications for rehabilitation had been dealt with in the meantime.³⁰ It also abolished the alternative procedure of cassation³¹ which had followed different rules and had been taken care of by different panels of judges.

Section 1 of the statute provides that a criminal conviction by a German court in East Germany, between May 8, 1945, the day of the unconditional surrender of the German armed forces, and October 2, 1990, the day before reunification, will be declared a violation of the principle of rule of law and annulled (this declaration and the annulment together constitute the rehabilitation) to the extent that it is 'inconsistent with the essential principles of a free order [based on] the rule of law'.³² In particular, this requirement – much more narrowly formulated than Article 17 of the Unification Treaty – will be met if the conviction served the purpose of political persecution, or if the penalty was grossly disproportionate to the offense.³³ By listing, in a non-exhaustive way, a number of offenses under the GDR Constitution and Criminal Code,

²⁸ See *Gesetz über die Rehabilitierung und Entschädigung von Opfern rechtsstaatswidriger Strafverfolgungsmaßnahmen im Beitrittsgebiet (Strafrechtliches Rehabilitierungsgesetz)* of Oct. 29, 1992, entered into force Nov. 4, 1992; BGBl. 1992 I, 1814. The statute was amended by Art. 2 of the law of June 8, 1994 (BGBl. 1994 I, 1214), Art. 6 of the law of June 23, 1994 (BGBl. 1994 I, 1311, 1320), Art. 1 of the law of Dec. 15, 1995 (BGBl. 1995 I, 1782), and Art. 3 of the law of July 1, 1997 (BGBl. 1997 I, 1609, 1611). A consolidated version was published in BGBl. 1997 I, 1614. For a quasi-official interpretation, see L.-W. Keck et al., 'Das Strafrechtliche Rehabilitierungsgesetz im Überblick', *Deutsch-Deutsche Rechts-Zeitschrift* 1993, 2 et seq.; for a section by section analysis, see M. Bruns et al., *Strafrechtliches Rehabilitierungsgesetz: Kommentar*, 1993, and J. Herzler (ed.), *Strafrechtliches Rehabilitierungsgesetz: Potsdamer Kommentar*, 1993.

²⁹ *Erstes Gesetz zur Bereinigung von SED-Unrecht (Erstes SED-Unrechtsbereinigungsgesetz)*, Oct. 29, 1992, BGBl. 1992 I, 1814. See supra note 14.

³⁰ See also sec. 1, para. 6, of the 1992 Rehabilitation Law (supra note 28), according to which an application under the law is inadmissible if after Oct. 2, 1990 a court has conclusively decided about an application for rehabilitation or cassation based on the same facts and circumstances. However, a new application is admissible if the applicant can demonstrate that the former application would have been successful under the 1992 law.

³¹ See supra text accompanying note 16 et seqq.

³² Translation by Quint (supra note 13), at 220 et seq. For the meaning of the notion of *Rechtsstaat* in the context of reparation of GDR injustice, see C. Starck, 'Der Rechtsstaat und die Aufarbeitung der vor-rechtsstaatlichen Vergangenheit', in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* no. 51, 1992, at 11-20.

³³ Thus, the point of reference for rehabilitation was shifted. While under the GDR law it was the exercise of political rights, i.e. an activity of the individual, it is now the political persecution of an individual by the State. See Keck et al. (supra note 28), at 3 et seq. The GDR law resembled postwar legislation providing for the annulment of certain penal judgments passed between 1933 and 1945. This legislation had also referred to the motivation of the convicted person. See Tappert (supra note 2), at 222 et seq.

a statutory presumption was established that such convictions had been politically motivated. The listed offenses include: Transfer of nonsecret information to foreign States or organizations (*landesverräterische Nachrichtenübermittlung*, sec. 99 of the Criminal Code),³⁴ rendering assistance to persons trying to flee the GDR or to stay abroad (*staatsfeindlicher Menschenhandel*, sec. 105), agitation inimical to the State (*staatsfeindliche Hetze*, sec. 106), contacting organizations or persons opposing the public order of the GDR (*ungesetzliche Verbindungsaufnahme*, sec. 219), illegal crossing of the border (*ungesetzlicher Grenzübertritt*, sec. 213), boycott agitation (*Boykotthetze*) against democratic institutions and organizations (Art. 6, para. 2, of the 1949 GDR Constitution), refusal to serve in the armed forces (*Wehrdienstentziehung and Wehrdienstverweigerung*, sec. 256 of the Criminal Code), and treason and espionage (secs. 96-98, 100, 108) if committed for the Federal Republic of Germany or one of its allies. Another offense often misused to punish persons who wanted to leave the GDR was the so-called disturbance of the work of the government (*Beeinträchtigung staatlicher oder gesellschaftlicher Tätigkeit*, sec. 214).³⁵ Today it is estimated that between 1949 and 1990 GDR criminal courts convicted as many as 200,000 men, women and young persons for political reasons.³⁶

Section 2 (as amended in 1994)³⁷ declares that the law analogously applies to administrative or judicial decisions imposing a deprivation of liberty, in particular decisions to lock up persons in mental hospitals for the purpose of

³⁴ For illustrative examples of convictions for that offense, see Katharina Gelinsky, 'Karlsruhe billigt Verurteilung wegen Rechtsbeugung', in: *Frankfurter Allgemeine Zeitung*, April 23, 1998, at 4. The *Stadtgericht* (Municipal Court) of Berlin gave a couple a prison sentence of more than two years for having given a copy of its application for permission to leave the GDR to the Office of the Permanent Representative of the Federal Republic of Germany in East Berlin. Another person was convicted to two years of imprisonment for having consulted the same office about ways to obtain a permission to leave East Germany.

³⁵ For an analysis of the political misuse of the administration of criminal justice in the GDR, see, e.g., Pfister (supra note 26), at 186-196 (with an overview of rehabilitation cases); K.W. Fricke, *Politik und Justiz in der DDR: Zur Geschichte der politischen Verfolgung 1945-1968*, 2d ed. 1990; W. Schuller, *Geschichte des politischen Strafrechts der DDR bis 1968*, 1980; Landesjustizverwaltungen der Länder Berlin, Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt und Thüringen (eds.), *Politische Straffjustiz in der früheren DDR, dargestellt an ausgewählten Einzelschicksalen*, 1997; G.M. Kraut, *Rechtsbeugung? Die Justiz der DDR auf dem Prüfstand des Rechtsstaates*, 1997, 150-226; F. Werkentin, *Politische Straffjustiz in der Ära Ulbricht*, 1995; R. Beckert, *Die erste und letzte Instanz: Schau- und Geheimprozesse vor dem Obersten Gericht der DDR*, 1995. See also the material assembled by a Bundestag commission of inquiry: *Materialien der Enquête-Kommission 'Aufarbeitung von Geschichte und Folgen der SED-Diktatur in Deutschland'* (12. Wahlperiode des Deutschen Bundestages), vol. 4: *Justiz und Polizei im SED-Staat*, 1995.

³⁶ See K.W. Fricke, 'Gefängnisregime und politische Verfolgung unter totalitärer Herrschaft', *Deutschland Archiv* 31 (1998), 650, 651.

³⁷ See Art. 6, no. 1, of the *Zweites SED-Unrechtsbereinigungsgesetz* (supra note 63).

political persecution or for other 'irrelevant' (i.e. non-medical) reasons. Life under conditions similar to imprisonment, and forced labour under such conditions are considered as imprisonment.

Sections 3 to 6 and 16 to 25 deal with the legal consequences of a rehabilitation. The enforcement of the respective judgment must be ended (sec. 4), the annulled decision is deleted from the federal register of convictions (sec. 5, para. 3), and fines and fees paid by the convicted, including the costs of the original trial, are refunded (sec. 6).³⁸ If the conviction included a confiscation of property, restitution would take place (or not take place) according to the 'Statute concerning the Settlement of Open Property Questions' ('Property Statute')³⁹ and the 'Statute concerning Special Investments in the GDR' ('Investment Statute')⁴⁰.

According to section 16 et seqq., a rehabilitated person who suffered disadvantages from imprisonment⁴¹ has a right to special social benefits. First, such a person, or his or her heirs, will receive D-Mark 300 (i.e. approximately US \$170) for each month of imprisonment.⁴² An additional D-Mark 250 (US \$140) will be paid to those who resided in the GDR until November 9, 1989, the day the Berlin Wall was opened (sec. 17). 'The additional amount represents compensation for the stigmatization to which political convicts who remained in the GDR were often subjected; they confronted a harder fate than those whose freedom was purchased by the Federal Republic or who otherwise succeeded in reaching the West after their imprisonment.'⁴³ The Federal Government had proposed an additional amount of only D-Mark 150 (US \$85) per month, but critics pointed to the fact that persons wrongfully imprisoned

³⁸ For two GDR marks originally paid, a person is refunded one D-Mark. This is the same exchange rate as it was applied to claims and liabilities (with the exception of wages, salaries, grants, pension, rents and leases, where the rate was one to one) when the West German currency was introduced into the GDR on July 1, 1990. See Treaty Establishing a Monetary, Economic and Social Union ('State Treaty') of May 18, 1990, Art. 10(5), BGBl. 1990 II, 537, 538. For an English version, see ILM 29 (1990), 1108, 1126.

³⁹ *Gesetz zur Regelung offener Vermögensfragen (Vermögensgesetz)* (see infra note 88). The 1992 Rehabilitation Law referred to the version of July 14, 1992, BGBl. 1992 I, 1257.

⁴⁰ *Gesetz über besondere Investitionen in der DDR (Investitionsgesetz)*, see infra note 89.

⁴¹ For a description of the fate of political prisoners in GDR jails, see K.W. Fricke, *Zur Menschen- und Grundrechtssituation politischer Gefangener in der DDR*, 2d ed. 1988; Gedenkstätte für die Opfer politischer Gewalt Moritzplatz Magdeburg (ed.), *'Die Vergangenheit lässt uns nicht los ...' Haftbedingungen politischer Gefangener in der SBZ/DDR und deren gesundheitliche Folgen*, 1997.

⁴² For orientation, the legislature had looked at the amount fixed for victims of the Nazi regime. According to sec. 45 of the *Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung (Bundesentschädigungsgesetz)* (Federal Compensation Law) (BGBl. 1956 I, 562, 570) they had received D-Mark 150 (US \$85) for each month of imprisonment. See Keck et al. (supra note 28), at 3, 7.

⁴³ Quint (supra note 13), at 223.

in the Federal Republic (i.e., before October 3, 1990, in West Germany) receive compensation of D-Mark 600 (US \$340) per month.⁴⁴ The total amount of D-Mark 550 (US \$310), which the *Bundestag* eventually determined, still remains lower than that.⁴⁵ Also, only a few of the entitled would receive immediate payment. In view of the difficult budgetary situation, payment could be deferred until December 31, 1999.⁴⁶

Formerly imprisoned individuals who today are in particular economic distress may receive additional financial assistance (see sects. 18 and 19), but it is largely left to the discretion of the respective agencies whether and to which extent such assistance is provided.⁴⁷ Persons whose health has been impaired because of imprisonment are entitled to benefits according to the provisions of the Federal Statute concerning Care for War Victims (sec. 21).⁴⁸ These benefits may include reimbursement for medical expenses, grants supporting the education of children, and a disablement pension.⁴⁹ The time of imprisonment and a subsequent time of inability to work or unemployment is taken into account in the computation of pensions.⁵⁰ If a person died in

⁴⁴ See sec. 7, para. 3, of the *Gesetz über die Entschädigung für Strafverfolgungsmassnahmen* (Law on Compensation for Measures of Criminal Prosecution and Penalties) of March 8, 1971, BGBl. 1971 I, 157, 158, as amended May 24, 1988, BGBl. 1988 I, 638 (D-Mark 20 for each day of imprisonment).

⁴⁵ On the other hand, victims receive considerably more than according to sec. 7, para. 2, of the 1990 GDR Rehabilitation Law which referred to the West German *Häftlingshilfegesetz* (see supra note 27). Secs. 9a-9c of that law provided for a *Eingliederungshilfe* (integration assistance) of D-Mark 80 (US \$45) per month of imprisonment, and there was no such financial assistance for an imprisonment suffered before Jan. 1, 1947.

⁴⁶ See sec. 1 of the *Verordnung über die Gewährung der Kapitalentschädigung nach dem Strafrechtlichen Rehabilitierungsgesetz* (Ministerial Order on the Granting of Compensation by Capital Payment according to the Criminal Rehabilitation Law), March 19, 1993, BGBl. 1993 I, 362. Sec. 2 establishes the order in which payment is made. Persons aged 70 or more are first considered. According to the Federal Minister of Justice, approximately D-Mark 400 million were paid to former political prisoners until July 31, 1994. The Federal Government anticipates a total amount of D-Mark 2 billion (2,000 million). See S. Leutheusser-Schnarrenberger, 'Bewältigung der rechtlichen Probleme der Wiedervereinigung', *Deutsch-Deutsche Rechts-Zeitschrift* 1994, 290, 291.

⁴⁷ Benefits according to sec. 18 are granted by the 'Foundation for Former Political Prisoners' established by sec. 15 of the *Häftlingshilfegesetz* (supra note 27). See also *Richtlinien für die Gewährung von Unterstützungsleistungen nach § 18 des Strafrechtlichen Rehabilitierungsgesetzes* (Guidelines for Payments According to Section 18 of the Criminal Rehabilitation Law), Jan. 26, 1993, Bundesanzeiger 1993 No. 143, p. 7141, reprinted in: Pfister & Mütze (supra note 23), part A 58.

⁴⁸ See *Gesetz über die Versorgung der Opfer des Krieges* (*Bundesversorgungsgesetz*) of Dec. 20, 1950, BGBl. 1950, 791, as amended, BGBl. 1982 I, 21.

⁴⁹ For a catalogue of benefits, see secs. 9 and 25b of the *Bundesversorgungsgesetz*.

⁵⁰ See *Sozialgesetzbuch, Sechstes Buch: Gesetzliche Rentenversicherung* (Federal Public Welfare Code, Book 6: Social National Pension Insurance) of Dec. 18, 1989, sec. 250, para. 1, no. 5a; BGBl. 1989 I, 2261, as amended July 25, 1991, BGBl. 1991 I, 1606, 1620.

consequence of an impairment of his or her health that occurred because of imprisonment, surviving dependants can claim benefits under the same War Victims statute (sec. 22). The same applies if a death penalty, imposed by a decision meeting the requirements of section 1, was executed.⁵¹

The capital payment (sec. 17), but not the benefits provided for in sections 21 and 22, can also be claimed by persons imprisoned in East Germany 'in connection with the establishment or maintenance of the communist tyranny' without having been sentenced by a German court (sec. 25, para. 2, no. 2). Thus, persons imprisoned by the Soviet Occupation Power (in particular in consequence of trials before Soviet military tribunals)⁵² can receive financial compensation although they cannot apply for rehabilitation under the statute. While the original 1990 GDR Rehabilitation Law had included this group of people,⁵³ the Federal Government argued that rules of international law prevented Germany from granting rehabilitation for acts of a foreign State.⁵⁴ In 1992, the Russian 'Law on Rehabilitation of Victims of Political Repression' was amended to include persons sentenced by Soviet courts outside the Soviet Union.⁵⁵ It has been criticized that so far decisions under that law have only been made according to the record (which often is missing, incomplete

⁵¹ According to latest figures, German courts in the Soviet Zone of Occupation (1945-49) inflicted capital punishment in 142 cases; in 47 cases the death penalty was executed. After 1949, GDR courts imposed the death penalty 230 times; the penalty was executed in 159 cases. The death penalty was abolished in East Germany in 1987. See Peter Jochen Winters, 'DDR-Juristen wegen Totschlags und Rechtsbeugung verurteilt', *Frankfurter Allgemeine Zeitung*, July 3, 1998, at 2.

⁵² For figures of the persons imprisoned in Soviet internment camps in East Germany between 1945 and 1990, see statement of the Federal Government of June 15, 1992 in reply to an interpellation of Mr. R. Schwanitz, member of the *Bundestag*; Bundestagsdrucksache no. 12/2864, at 7 et seq. (according to Soviet sources, 123,000 Germans were imprisoned, 43,000 of which died during the time of imprisonment. 45,000 are listed as having been released, and 13,000 as deported to the Soviet Union).

⁵³ See *supra* text following note 24.

⁵⁴ See the draft law of Nov. 15, 1991: *Entwurf eines Ersten Gesetzes zur Bereinigung von SED-Unrecht, Einzelbegründung zu § 25 Abs. 2 (Nr. 5) Strafrechliches Rehabilitierungsgesetz*; Bundestagsdrucksache 12/1608, at 29, reprinted in: Pfister & Mütze (*supra* note 23), part D 10.1, 46.

⁵⁵ See Tappert (*supra* note 2), at 233-36, and W. Seiffert, 'Das russische Rehabilitationsgesetz und seine Auswirkungen auf deutsche Staatsangehörige', *Recht in Ost und West* 42 (1998), 26-29. For a German translation of the law (as amended), see *Recht in Ost und West* 42 (1998), 36-40. According to the Russian Judge Advocate General, Jurij Djomin, 13,000 applications for rehabilitation filed by foreigners (11,000 of which were filed by Germans) have been decided since 1992. About 7,100 Germans have been rehabilitated. In comparison, the number of Germans convicted by Soviet military courts is estimated at 200,000. The Russian law is unclear about persons imprisoned and expropriated without judicial proceedings (the so-called *administrativ Verfolgten* or 'persons persecuted by administrative measures'). See Markus Wehner, 'Djomin: Die Bundesregierung hat keinen Einfluß ausgeübt', *Frankfurter Allgemeine Zeitung*, July 7, 1998, 4.

or only consisting of a confession obtained by coercion); neither the victim nor witnesses are heard. In view of this procedure it is indeed questionable to make restitution of property expropriated in East Germany between 1945 and 1949 dependent on a Russian rehabilitation decision.⁵⁶

An application for rehabilitation under the German 1992 statute can not only be filed by the victim, but also by his or her spouse, certain close relatives, and persons having a legitimate interest in the rehabilitation. The State prosecutor is entitled to make an application if the victim does not disagree (sec. 7). Originally, the deadline for applications was December 31, 1994. The respective period has been prolonged twice; the deadline is now December 31, 1999.⁵⁷

Two other points are worth mentioning. First, according to section 16, para. 2, of the 1992 Rehabilitation Law benefits for disadvantages suffered from imprisonment are not granted if the convicted person 'violated the principles of humanity or the rule of law, or misused his position to his own advantage or to the disadvantage of another, in a serious manner'. The first exception is modelled on similar provisions in other statutes for the benefit of refugees and expellees and political prisoners.⁵⁸ To concretize the phrase 'principles of humanity', courts have relied on international human rights instruments, in particular the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵⁹ The provision mainly aimed at convicts who in jail spied on other inmates and delivered information to the GDR 'State security service' (*Staatssicherheitsdienst*), or, tragically, obtained an abridgment of their sentence by promising that they would work for the secret police after having been released from prison.

Second, section 9, para. 2, of the 1992 Rehabilitation Law prohibits a person who has been a judge or State prosecutor in the GDR from hearing rehabilitation cases unless he or she has passed all screening processes and has received a new judicial appointment. At any rate, not more than one former GDR judge or prosecutor may sit on a three-judge rehabilitation panel.

⁵⁶ See *infra* text accompanying note 110.

⁵⁷ Until April 1994, approximately 100,000 rehabilitation cases had been decided; 19,000 applications were still pending. See Leutheusser-Schnarrenberger (*supra* note 46), at 291.

⁵⁸ See *Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge* (*Bundesvertriebenengesetz*) of May 19, 1953 (BGBl. 1953 I, 201, 204), secs. 3 and 11, no. 1; sec. 3, para. 2, as amended Jan. 2, 1993 (BGBl. 1993 I, 830, 831), and sec. 2, para. 1, no. 2 of the *Häftlingshilfegesetz* (*supra* note 27).

⁵⁹ See Mütze, Comment on sec. 16, para. 2, of the 1992 Rehabilitation Law, in: Pfister/Mütze (*supra* note 23), part B 10, 14 et seq.

On the same day the Criminal Rehabilitation Law was enacted, the *Bundestag* unanimously adopted a 'statement in defence of the honour of the victims of the communist tyranny'.⁶⁰

The German *Bundestag* acknowledges the hard fate of the victims and their families who have suffered from the injustice of the communist tyranny.

The men and women who suffered under communist despotism in many ways experienced injustice or arbitrariness. They were deprived of their freedom and kept imprisoned in conditions violating human dignity. Many died in prisons falling far short of humane conditions. They were tortured, tormented and killed. In their professional lives, they were disadvantaged, harassed, and discriminated against. They were deported. In disregard for elementary principles of humanity, they were turned out of their towns and villages, of house and home. Their property and assets were hurt.

The German Parliament bows before all the victims of communist injustice. It shows its profound respect and gratefulness to all those whose sacrifice helped reuniting in freedom the divided Germany after more than forty years.

As much as the *Bundestag* must be commended for having spoken these clear words, one cannot help feeling that they were meant to make up for a law which would repair only little of the listed wrongs.

4. The 1994 Administrative Rehabilitation Law

The 1992 law described in the preceding section excluded administrative discrimination in the GDR as well as discrimination in employment for political reasons – two forms of discrimination which the original 1990 GDR Rehabilitation Law had sought to regulate,⁶¹ and which indeed were encountered by many more East Germans than measures of criminal prosecution. Covering a wide range of possible cases and injuries of greatly varying intensity, typical cases included, as Professor Quint wrote, 'dismissal from employment in retaliation for filing an application to leave the GDR, or exclusion from an advanced high school (*Oberschule*) on political grounds with the resulting inability to attend university and pursue a professional career. In many of these cases the problems of proof, as well as the difficulties of measuring the ultimate consequences of the claimed discrimination, were daunting. Moreover, it would be impossible to undo the effects of these

⁶⁰ *Ehrenerklärung für die Opfer der kommunistischen Gewaltherrschaft*, June 17, 1992; Verhandlungen des Deutschen Bundestags, 12. Wahlperiode, Stenographische Berichte, vol. 162, 97. Sitzung, 7953, reprinted in: Pfister & Mütze (supra note 23), sec. D 10.2. On June 5, 1998, the Bundestag adopted a 'Law on the Establishment of a Foundation for a Critical Reappraisal of the SED Dictatorship' (*Gesetz über die Errichtung einer Stiftung zur Aufarbeitung der SED-Diktatur*); BGBl. 1998 I, 1226. *Inter alia*, the foundation shall 'support the counselling of, and care for, victims of the Soviet Occupation Power and the SED dictatorship' (sec. 2, para. 2, no. 2).

⁶¹ See supra text following note 258.

discriminations, and many asserted that any attempts to provide real compensation for their effects would be quixotic and beyond the resources of the treasury of the Federal Republic'.⁶²

After a long and intense debate, the *Bundestag*, almost four years after reunification, finally passed the 'Second Statute for the Correction of SED Injustice'.⁶³ As an umbrella law, it included two statutes, the Administrative Rehabilitation Law⁶⁴ and the Employment Rehabilitation Law⁶⁵.

Section 1 of the Administrative Rehabilitation Law provides that an administrative decision of a German public authority, agency or body, made between May 8, 1945 and October 2, 1990, which has led to a health defect, a property loss or a disadvantage in employment, can be revoked at the victim's request, 'if it is absolutely inconsistent with leading principles of a State based on the rule of law, and its consequences directly continue into the present in an onerous and unacceptable manner'.⁶⁶ Section 2 further explains: 'Absolutely inconsistent with leading principles of a State based on the rule of law are measures which have seriously violated principles of justice, legal security, or proportionality, and have either served the purpose of political persecution or constituted arbitrary action in the individual case.' As an example of such measures, section 3 mentions the compulsory resettlement of persons living close to the western border of the GDR. The law does not apply to administrative decisions in tax matters, which were dealt with in separate regulations,⁶⁷ nor to acts of expropriation carried out by German authorities

⁶² See Quint (supra note 13), at 224.

⁶³ *Zweites Gesetz zur Bereinigung von SED-Unrecht* (*Zweites SED-Unrechtsbereinigungsgesetz*), June 23, 1994, BGBl. 1994 I, 1311. For the first statute, see supra note 29.

⁶⁴ The full title is *Gesetz über die Aufhebung rechtsstaatswidriger Verwaltungsentscheidungen im Beitrittsgebiet und die daran anknüpfenden Folgeansprüche* (*Verwaltungsrechtliches Rehabilitierungsgesetz*) (Law on the revocation of administrative decisions in the area [East Germany] inconsistent with the rule of law and claims following therefrom (Administrative Rehabilitation Law)). The statute was amended by Art. 1, para. 2, of the law of Dec. 15, 1995 (BGBl. 1995 I, 1782), and again by Art. 2 of the law of July 1, 1997 (BGBl. 1997 I, 1609). A consolidated version was published in BGBl. 1997 I, 1621. For a systematic analysis, see Klaus Wimmer, *Verwaltungsrechtliches Rehabilitierungsgesetz: Kommentar*, 1995.

⁶⁵ The full title is *Gesetz über den Ausgleich beruflicher Benachteiligungen für Opfer politischer Verfolgung im Beitrittsgebiet* (*Berufliches Rehabilitierungsgesetz*) (Law on the compensation of victims of political persecution in the area [East Germany] for employment disadvantages (Employment Rehabilitation Law)). The statute was first amended by Art. 1, para. 3, of the law of Dec. 15, 1995 (BGBl. 1995 I, 1782), and again by Art. 1 of the law of July 1, 1997 (BGBl. 1997 I, 1609). A consolidated version was published in BGBl. 1997 I, 1626.

⁶⁶ Cf. sec. 21 of the original 1990 GDR Rehabilitation Law (supra note 23): 'Persons will be rehabilitated who suffered considerable disadvantages because of administrative measures which violated or inadmissibly restricted basic rights guaranteed in the constitution, and were meant to accomplish political goals.'

⁶⁷ See the draft law of May 19, 1993: *Entwurf eines Zweiten Gesetzes zur Bereinigung von SED-Unrecht, Einzelbegründung zu § 1 Abs. 1 (Nr. 8) Verwaltungsrechtliches Rehabili-*

between 1945 and the proclamation of the GDR in 1949, which are attributed to the Soviet Occupation Power (sec. 1, para. 1, second and third sentence).⁶⁸ On the other hand, the law analogously applies to acts of the ruling communist party, the *Sozialistische Einheitspartei Deutschlands* (SED), and other parties and organizations controlled by it (sec. 1, para. 6).

Similar to what the 1992 Law on rehabilitation for criminal prosecution says, persons whose health has been impaired because of an administrative act are entitled to benefits according to the provisions of the Federal Statute concerning Care for War Victims (sec. 3). If the victim died in consequence of an impairment of his or her health, surviving dependants can claim benefits under the same statute (sec. 4). In case the administrative measure included confiscation of property, the victim can claim restitution in accordance with the 'Property Statute'⁶⁹ and related statutes (sec. 7). For employment discrimination in consequence of the administrative measure, section 8 refers to the Employment Rehabilitation Law.⁷⁰ All these claims are excluded if the victim 'violated the principles of humanity or the rule of law, or misused his position to his own advantage or to the disadvantage of another, in a serious manner' (sec. 2, para. 2).⁷¹

An application for rehabilitation under the law can be filed by the victim or, after his or her death, by anyone having a legal interest in the rehabilitation of the victim (sec. 9). Originally, an application had to be filed before December 31, 1995; the period was later extended twice, so that the relevant date is now December 31, 1999.

It is true that the law, by requiring an extraordinarily severe form of injustice before rehabilitation will be triggered, promised few tangible benefits to the politically oppressed of the former GDR.⁷² It is also true that it deviated from the Unification Treaty which defined those entitled to rehabilitation and compensation as 'victims of a ... judicial decision inconsistent with the rule of law or the constitution'⁷³ without further qualifications. However, the restriction introduced by the law was what the legislature had intended. When submitting the bill to parliament, the Federal Government declared:

tierungsgesetz; Bundestagsdrucksache 12/4994, at 22, reprinted in: Pfister/Mütze (supra note 23), part D 20.1, 19.

⁶⁸ For a further exclusion of claims, see sec. 2, para. 3.

⁶⁹ See supra note 88.

⁷⁰ See infra text following note 78.

⁷¹ See supra text accompanying note 58 et seq.

⁷² See the critique by Quint (supra note 13), at 224. See also H. Kaschkat, 'Die Haftung für DDR-Unrecht und der Entwurf des 2. SED-Unrechtsbereinigungsgesetzes', *Deutschland Archiv* 26 (1993), 598, 601.

⁷³ See supra text accompanying note 14.

So many measures of injustice have been discovered that not all of them can be covered by this law. It is impossible to make good forty years of GDR injustice. In addition, the economic situation of the new *Länder* requires such self-restraint. It must be the primary goal further to support the economic upturn in East Germany; governmental manpower and financial means must primarily serve that task. Therefore, as far as rehabilitation is concerned, all that can be done is to take up and, if possible, make good grave violations of leading principles of the *Rechtsstaat*... In the interest of legal security, and for financial reasons, only the most blatant violations of the rule of law will be taken up.⁷⁴

Even before the enactment of the law, it was criticized that the legislature's objective not to overstrain the State budget could not only have been achieved by such narrowly defined tests of eligibility but also by a distinction between rehabilitation as such (a formal statement that an administrative measure was inconsistent with rule of law-principles) and compensation, in a way that someone was entitled to only the first and not the second.⁷⁵ It was argued that if such a distinction had been made, the conditions of rehabilitation could have been less strict, and a far greater number of people would have enjoyed some moral satisfaction. In 1997, the legislature finally half-heartedly responded to this criticism by inserting a new section 1a into the law. It set out that an addressee of an administrative measure (or, after his or her death anybody having a legitimate interest in the rehabilitation of the deceased) can apply for a statement saying that the measure was inconsistent with principles of the rule of law, even if there was no violation of health or property, or an employment discrimination (see sec. 1), provided that the measure 'is absolutely inconsistent with leading principles of a State based on the rule of law and led to a serious disparagement of the person concerned in his or her personal sphere'.⁷⁶ No further claims can be based on such a statement.⁷⁷

⁷⁴ See the draft law of May 19, 1993 (supra note 67), *Begründung Allgemeiner Teil*, at 16, 18. Reprinted in: Pfister/Mütze (supra note 23), part D 20.1, 11, 14.

⁷⁵ See, e.g., G. Saathoff et al., 'Kritik am Entwurf der Bundesregierung für ein 2. SED-Unrechtsbereinigungsgesetz', *Deutschland Archiv* 26 (1993), 603, 607.

⁷⁶ See *Gesetz zur Verbesserung rehabilitierungsrechtlicher Vorschriften für Opfer der politischen Verfolgung in der ehemaligen DDR*, July 1, 1997, Art. 2, no. 1, BGBl. 1997 I, 1609, 1610. For a short explanation of the law, see Gerlinde Bürger, 'Gesetz zur Verbesserung ...', *Deutsch-Deutsche Rechts-Zeitschrift* 1997, 342.

⁷⁷ In July 1998, the Humboldt University in Berlin, which was located in the Soviet sector of the city, declared as 'immoral and void' the acts of the period 1945-1990 by which it had deprived former students of their academic titles because they had politically opposed the communist regime or illegally left East Germany. See M. Vec, 'Aberkennung aberkannt', in: *Frankfurter Allgemeine Zeitung*, July 11, 1998, 42.

5. The 1994 Employment Rehabilitation Law

This law⁷⁸, which like the Administrative Rehabilitation Law was passed as part of the 'Second Statute for the Correction of SED Injustice',⁷⁹ is perhaps the most disappointing of the three rehabilitation laws. Its provisions are far from keeping the promise of its title, even if it only speaks of *Ausgleich*, which in German legal terminology is less than full or adequate compensation (*Entschädigung*). Instead, the law only applies to an extremely narrowly defined group of politically persecuted persons, and gives them little more than some benefits regarding pension payments.

When submitting the bill, the Federal Government explained:

Compared to those classes of persons especially supported by the communist system, and also the West Germans, the majority of the GDR population experienced disadvantages in education and employment. In the GDR, there was no free choice of profession. The entire education system, in particular higher education, was orientated to the anticipated labor requirements, and subjected to intense, ideologically motivated regulation. Therefore, it was the fate of a large part of the East German population not to receive the desired education or professional training, or not to have the desired occupation. Success in professional life did often not depend on individual qualification or performance. Again and again, people encountered limits set not by their own abilities but the political system. ... Such general East German fate cannot lead to claims for compensation ...⁸⁰

In section 1 of the law, the group of 'politically persecuted persons', which may receive compensation under the statute, is defined as those people who in the time between May 8, 1945 and October 2, 1990, because of an act of political persecution, in particular imprisonment, could, at least temporarily, not follow the profession they had practised before, they had learned or provably aspired to. In the same words as those used by the other two rehabilitation laws, compensation is excluded if the person in question 'violated the principles of humanity or the rule of law, or misused his position to his own advantage or to the disadvantage of another, in a serious manner' (sec. 4).⁸¹ Section 5 limits claims based on political discrimination in employment and education to those set out in the statute under discussion.

In sections 6 and 7, the statute grants some financial assistance in re-education or further education in the claimant's area of specialization. This, and only this assistance can also be claimed by former students who for political reasons were not admitted to high school or an institution of higher

⁷⁸ See supra note 65. For analysis, see W.-J. Lehmann et al., 'Das Zweite Gesetz zur Bereinigung von SED-Unrecht (Teil 1)', *Neue Justiz* 1994, 350 et seqq.

⁷⁹ See supra note 63.

⁸⁰ See the draft law of May 19, 1993 (supra note 67), *Begründung Allgemeiner Teil, II. Leitlinien der beruflichen Rehabilitierung*, at 18. Reprinted in: Pfister/Mütze (supra note 23), part D 30.1, p. 14.

⁸¹ See supra text accompanying notes 58 et seq. and 71.

education (sec. 3). According to section 8, persecuted persons whose present economic situation is particularly bad, and who probably in the future will have an income lower than that necessary to cover the basic cost of living (as defined by social welfare legislation), are entitled to a monthly payment in addition to normal social welfare benefits. However, persons who left the GDR before October 2, 1990 can only receive this payment if their persecution (normally imprisonment) lasted longer than three years (sec. 2, sec. 8, para. 1). Originally, the amount was D-Mark 150 (US \$85), and payments were only made until the claimant would receive a pension. In July 1997, the amount was doubled, and payments of D-Mark 200 (US \$115) per month extended to pensioners.⁸²

In its central part (secs. 10-16), the statute attempts to adjust pension payments so that they would resemble the payments that would have been received if the individual had not been subjected to political discrimination. In other words, the law treats the individual as if he or she had regularly made contributions to the public pension insurance fund during the time of political persecution at a level of those made at the time by an average worker or employee in the respective profession. It does not matter whether somebody would have been particularly capable and successful or not. In retrospect, everybody is treated like the average worker in the respective field; and it is indeed hard to see how the law could have justly differentiated in that respect. No provision is made for the recovery of a position from which an individual was excluded, or a payment of lost wages, or a preferential treatment with regard to employment in the public service. It is true that thus 'substantial compensation for employment discrimination is deferred until retirement, and limited by the period of time that the claimant receives a pension'.⁸³

According to the original wording of section 20, an application for an official statement declaring that someone was entitled to compensation under the statute had to be filed before December 31, 1995. As in the case of the Administrative Rehabilitation Law, the period was twice prolonged, and is now going to end on December 31, 1999.⁸⁴ Even after the death of a victim his surviving dependants can ask for such a statement.

⁸² See law of July 1, 1997 (supra note 76), Art. 1, no. 3.

⁸³ See Quint (supra note 13), at 226.

⁸⁴ Applications for the compensation itself must now be filed before December 31, 2000 or, in case of the monthly payment supplementing the pension, within half a year after pension payment has begun.

6. Restitution of Property and Compensation for Loss of Property

The systematic expropriations which took place in East Germany during the time of Soviet military occupation and after the GDR had been established can be regarded as a human rights violation in and by itself, therefore to be considered in this paper. In addition, for property losses suffered because of political persecution, the criminal and the administrative rehabilitation statute both refer to the legislation regarding the restitution of property. For these reasons, it seems necessary briefly to describe this legislation. A comprehensive discussion of the many intricate problems in this area, which keep a flourishing branch of legal scholarship and practice occupied, is not intended.⁸⁵

Article 41, para. 1, of the Unification Treaty incorporated the 'Joint Declaration on the Regulation of Open Property Questions' of the Governments of the Federal Republic and the GDR of June 15, 1990.⁸⁶ An additional paragraph dealt with property to be used for investment. Article 41 was given constitutional rank by Article 4, paragraph 5, of the Unification Treaty, which inserted a new Article 143 in the Basic Law: 'Article 41 of the Unification Treaty and rules enacted for its implementation are constitutional even in so far as they provide that measures of expropriation in the area described in Article 3 of that treaty (i.e. East Germany) are not to be repaired.' The Unification Treaty⁸⁷ also put into force two laws passed by the GDR *Volkskammer* shortly before reunification, namely the 'Property Statute'⁸⁸ and the 'Investment Statute'.⁸⁹ In 1992, the latter was repealed and replaced by the 'Investment Preference Statute'.⁹⁰

⁸⁵ For an instructive overview, see Quint (supra note 13), at 124 et seqq.

⁸⁶ *Gemeinsame Erklärung der Regierungen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen*, *Bulletin des Presse- und Informationsamtes der Bundesregierung* no. 77, June 19, 1990, 661; attachment III of the Unification Treaty, BGBl. 1990 II, 1237.

⁸⁷ See Unification Treaty (supra note 13), attachment II, ch. III(B), para. I(4) and (5).

⁸⁸ *Gesetz zur Regelung offener Vermögensfragen*, Gesetzblatt der DDR 1990 I, 1899. The statute, adopted by the GDR Volkskammer on Sep. 23, 1990, was put into force by the Unification Treaty (supra note 13), attachment II, ch. III(B), para. I(5), and later repeatedly amended. On Aug. 4, 1997, a consolidated version was published in BGBl. 1997 I, 1974. For an extensive loose-leaf collection of legislative acts and judicial decisions concerning the restitution of property in East Germany, see A. Brandt & H.-D. Kitke, *Rechtsprechung und Gesetzgebung zur Regelung offener Vermögensfragen (RGV)*, 1993-98. For a systematic explanation of the Property Statute, see W. Fricke & K. Märker, *Enteignetes Vermögen in der Ex-DDR*, 1996.

⁸⁹ *Gesetz über besondere Investitionen in der Deutschen Demokratischen Republik*, Gesetzblatt der DDR 1990 I, 1867. The statute, adopted by the GDR Volkskammer, was put into force together with the Property Statute by the Unification Treaty (supra note 13), attachment II, ch.

The Joint Declaration of 1990 embodied two equally controversial decisions which were retained by later legislation. The first was that expropriations 'on the basis of occupation law or occupation authority' – that is, the expropriations of 1945-49 – are not to be undone.⁹¹ This meant that the bulk of land and industrial property expropriated in East Germany between 1945 and the moment of reunification would not be returned to the former owners.⁹² The official reasoning for this decision (and the justification for the implied departure from the constitutional principle of equal treatment)⁹³ was that the 'inviolability' of the 1945-49 expropriations had been 'a non-negotiable precondition' for the consent of both the Soviet and the GDR Government to the unification of Germany.⁹⁴ It is debatable whether this contention is true.⁹⁵ It seems that the Federal Government was actually rather yielding to what appeared to be the position of a majority of GDR citizens (and future voters in the reunited country), who, quite in line with the communist propaganda of forty years, believed in the land reform as a 'historical achievement' and abhorred the idea of a 'return of the Junkers'. In addition, the Federal

III(B), para. I(4). It was amended by Art. 2 of the law of March 22, 1991, BGBl. 1991 I, 766, 774.

⁹⁰ *Gesetz über den Vorrang für Investitionen bei Rückübertragungsansprüchen nach dem Vermögensgesetz (Investitionsvorranggesetz)*, July 14, 1992, BGBl. 1992 I, 1257, 1268, 1993 I, 1811. After further amendments, a consolidated version was published on Aug. 4, 1997 in BGBl. 1997 I, 1996.

⁹¹ Joint Declaration (supra note 86), no. 1. See also sec. 1, para. 8 a), of the Property Statute (supra note 88). For an extensive analysis and critique of this decision, the legislation implementing it and the Constitutional Court rulings upholding it, see G. Biehler, *Die Bodenkonfiskationen in der Sowjetischen Besatzungszone Deutschlands 1945 nach Wiederherstellung der gesamtdeutschen Rechtsordnung 1990*, 1994; W. Graf Vitzthum & W. März, *Restitutionsausschluss: Berliner Liste 3, Verfahrensbeteiligung, Entschädigungs- und Ausgleichleistungsgesetz*, 1995; J. Wagner, *Rückgabe und Entschädigung von konfisziertem Grundeigentum: Aktuelle Verfassungsrechtsfragen der Bodenreform in der SBZ*, 1995.

⁹² The Soviet Military Government expropriated essentially all large business enterprises of the East. The so-called *Bodenreform* or land reform resulted in an expropriation of approximately 35 percent of the agricultural land in the Soviet zone. See Quint (supra note 13), at 125, and the *Bodenreform-Urteil* (supra note 6), at 96-102. For further statistical information about expropriations in the Soviet Zone of Occupation and the GDR, see Fricke & Märker (supra note 88), at 9-23, and Leutheusser-Schnarrenberger (supra note 46), at 293.

⁹³ Art. 3 of the Basic Law; see supra text following note 7.

⁹⁴ See *Bodenreform-Urteil* (supra note 6), at 109 et seq., and the decision of the Constitutional Court of April 18, 1996; BVerfGE vol. 94 (1997), at 12, 29 et seq.

⁹⁵ For the arguments of those who hold that there was no such precondition, see the decision of April 18, 1996 (supra note 94), at 23-25. The Court itself cautiously concluded that it was the responsibility of the Federal Government to determine whether indeed reunification depended on the consent of the Federal Republic to an exclusion of a restitution of the respective property, and that, making this determination, the Government had broad discretionary powers. The assessment of the situation by the Government could not be regarded as a 'violation of duty'. See id. at 35 et seq.

Government hoped to finance at least a substantial part of the cost of unification by selling 'socialist property' which would come under its control.

In contrast, the Declaration set out that, as a rule, real property expropriated by the GDR, or placed under State administration, must be restituted. The Property Statute specified that the expropriation must have been effected without compensation or with a compensation lower than that GDR citizens were entitled to claim (sec. 1, para. 1). At the same time, it provided for a restitution of all property assets, not just real property.

However, the Declaration and Article 41, para. 2, of the Unification Treaty provided for a number of exceptions. According to the first, and most important, a former owner can be denied a return of real property if that property is needed for urgent investment uses that would yield general economic benefits in East Germany. This exception is the subject of the investment statutes referred to above. Secondly, the Declaration excluded the return of property if such return is practically impossible because, for instance, pieces of land have been merged to build a large apartment complex.⁹⁶ Thirdly, a return does not take place if property has been acquired *bona fide* (*in redlicher Weise*).⁹⁷ The Property Statute introduced further exceptions from restitution for business property.⁹⁸ In all these cases, a claim to some monetary compensation arises which remains far below the actual trade value of the property.⁹⁹ Of particular importance in that respect is section 7 of the Compensation Law which provides for a progressive reduction of compensation payments exceeding the amount of D-Mark 10,000 (US \$5,700). If the amount exceeds D-Mark 30,000 (US \$17,100), there is a reduction by fifty percent; if the amount exceeds three million D-Mark (US \$1,710,000), the payment is reduced by ninety-five percent. Compensation is not rendered by cash payments but by an allocation of transferable bonds which fall due only in 2004. Before that date, they also do not yield interest.

It was only in September 1994 that the German Parliament reluctantly passed the 'Equalization Payments Law' providing for a compensation of individuals¹⁰⁰ for expropriations of the 1945-49 period.¹⁰¹ Parliament thus

⁹⁶ See also secs. 4 and 5 of the Property Statute (supra note 88) (as amended).

⁹⁷ See sec. 4, paras. 2 and 3 of the Property Statute (supra note 88). From these provisions it follows that the condition is usually met whenever the transaction was legal under GDR law.

⁹⁸ See secs. 4 and 6 of the Property Statute (supra note 88).

⁹⁹ See sec. 16 of the Investment Preference Statute (supra note 90), sec. 9 of the Property Statute (supra note 88), and the *Gesetz über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen (Entschädigungsgesetz)* (Compensation Law) of Sep. 27, 1994; BGBl. 1994 I, 2624, 1995 I, 110. For an analysis of the latter statute, see H.-J. Rodenbach & O. Löffler, *Entschädigungen und Ausgleichsleistungen für Vermögensverluste in der ehemaligen DDR und der SBZ*, 1995, 65-109.

¹⁰⁰ In contrast, compensation according to the Compensation Law (supra note 99) can be claimed by natural and juridical persons alike.

reacted to a controversial judgment of the German Federal Constitutional Court of April 23, 1991, which had upheld the provision of the Unification Treaty that the 1945-49 expropriations would remain permanent, but had also declared that the constitutional principle of equality (Article 3 of the Basic Law) required some degree of compensation of the former owners.¹⁰² As explained above, a restitution of real property is excluded even if it is presently owned by the Federal Republic, a State (*Land*) or a municipality. In contrast, movable property is to be returned as long as it is not connected to real property, or has been acquired 'in an honest manner', or constitutes cultural property meant for public exhibition.¹⁰³ In principle, compensation is granted according to the Compensation Law, but further restrictions and exceptions apply.¹⁰⁴ In particular, so-called reparation losses arising from a removal or destruction of economic goods by the Soviet Occupation Power are not compensated for. As regards farmland and forests presently owned by the State, former owners are entitled to repurchase a limited expanse at favorable prices, but a present lessee of the property, including a former collective farm,¹⁰⁵ has a prior right of purchase.¹⁰⁶

Claims under the Equalization Payments Law are generally barred if the expropriated person or his or her heir, or an expropriated corporation 'violated the principles of humanity or the rule of law, or misused his position to his own advantage or to the disadvantage of another, in a serious manner, or substantially supported the national socialist or the communist system' in East Germany.¹⁰⁷

According to section 1, para. 7, of the Property Statute, the statute also applies to a restitution of property 'in the context of an annulment of criminal or administrative law decisions inconsistent with principles of the rule of law, which has been effected in accordance with other provisions'. These 'other provisions' are the 1992 Criminal Rehabilitation Law¹⁰⁸ and the 1994

¹⁰¹ *Gesetz über staatliche Ausgleichsleistungen für Enteignungen auf besatzungsrechtlicher oder besatzungshoheitlicher Grundlage, die nicht mehr rückgängig gemacht werden können (Ausgleichsleistungsgesetz)* (Equalization Payments Law), Sep. 27, 1994, BGBl. 1994 I, 2624, 2628. See generally M. Schmidt-Preuss, *Neue Juristische Wochenschrift* 1994, 3249-3256; B. Zimmermann, 'Wiedergutmachung zwischen materieller Gerechtigkeit und politischem Kompromiss', *Deutsch-Deutsche Rechts-Zeitschrift* 1994, 359-362; Rodenbach & Löffler (supra note 99), at 111-154; and Quint (supra note 13), at 141-144.

¹⁰² See the *Bodenreform* judgment (supra note 6), at 90, 128-31. The judgment was confirmed by a decision of April 18, 1996; BVerfGE vol. 94 (1997), at 12 et seqq.

¹⁰³ See sec. 5 of the Equalization Payments Law (supra note 101).

¹⁰⁴ See secs. 1, para. 3, and 2, paras. 2-7, of the Equalization Payments Law (supra note 101).

¹⁰⁵ *Landwirtschaftliche Produktionsgenossenschaft (LPG)*.

¹⁰⁶ See sec. 3 of the Equalization Payments Law (supra note 101).

¹⁰⁷ See sec. 1, para. 4, of the Equalization Payments Law.

¹⁰⁸ See supra note 28.

Administrative Rehabilitation Law,¹⁰⁹ as well as the Russian Rehabilitation Law.¹¹⁰ From this it follows that a person rehabilitated under one of these laws can claim the restitution of his or her property according to the provisions of the Property Statute. If restitution is excluded by these provisions, the person must be content with receiving compensation according to the 1994 Compensation Law.¹¹¹ As far as expropriated property is concerned, a victim of a politically motivated criminal judgment or administrative measure is thus not treated differently from any other person expropriated in East Germany. However, someone sentenced by a Soviet military tribunal in the years 1945 to 1949 who is rehabilitated in Russia can claim restitution or compensation under the Property Statute and the Compensation Statute and not just a payment according to the Equalization Payments Law.

IV. CONCLUSION

Assessing human rights violations in East Germany, the legislation and judicial practice of the united Germany generally referred to internationally recognized standards. The Federal Republic did not simply retroactively apply its norms to what had happened in the East of the divided country between 1945 and 1990. It did not do so in the field of criminal prosecution, where it meticulously sought to observe the guarantee of *nulla poena sine lege* (Article 103, para. 2, of the Basic Law).¹¹² When the Federal Republic had to decide which judicial and administrative decisions of the GDR it would set aside because they had violated, or continued to violate, fundamental rights and freedoms, it similarly applied standards reflecting an international consensus rather than West German law pure and simple. The 1992 Law on Rehabilita-

¹⁰⁹ See supra note 64.

¹¹⁰ See supra text accompanying note 55. For an official statement of the Federal Ministry of Justice of Oct. 14, 1996 on a recognition of Russian rehabilitation decisions for the purpose of a restitution of property, see *Deutsch-Deutsche Rechts-Zeitschrift* 1997, 49. See also K. Märker, 'Restitution besatzungsrechtlich enteigneten Vermögens bei russischer Rehabilitierung', *Zeitschrift für offene Vermögensfragen* 1997, 4-8, and B. Hoffmeister, 'Die letzte Chance für Eigentümer – Rückgabe des aufgrund Besatzungsrechts enteigneten Vermögens nach Rehabilitierung durch die Russische Föderation', id. at 76-78. While Germany attributes to the Soviet Union expropriations initiated or executed in East Germany by German authorities during the time of Soviet occupation, and therefore has excluded them from the scope of the Administrative Rehabilitation Law (see supra text accompanying note 68), the Russian Federation regards such expropriations as German measures to be repealed by German authorities. Thus, at present victims can seek rehabilitation neither in Germany nor in Russia.

¹¹¹ See supra note 99.

¹¹² See, in particular, the decision of the Federal Constitutional Court of Oct. 24, 1996 (*Killing of Refugees at the Border Between East and West Germany*), BVerfGE vol. 95 (1997), 96, 130-135.

tion and Compensation for Criminal Prosecution, for instance, refers to 'essential principles of a free order [based on] the rule of law'.¹¹³ Thus, one may say that the legal evaluation of the East German past followed broader, and therefore possibly more objective, principles. On the other hand, this internationalization of the controlling standards meant that a substantially higher number of GDR judicial and administrative decisions would remain effective than would have been the case if the higher standard of protection of the (West) German constitution had been applied.

While thus international law, and constitutional principles common to Western-type constitutional States, have to a certain extent governed the question whether there has been a violation of human rights, neither the German Government nor the legislative bodies considered themselves bound by any rules of international law when they provided for measures of rehabilitation and financial compensation. The only accepted legal standard in that regard was the German Constitution. This confirms the view that under customary international law a State is entitled to repair the damage which its own citizens have sustained on the part of its authorities or another State, but is not obliged to do so.¹¹⁴

Considering the respective legislative decisions after reunification, one cannot help thinking of the phrase 'too little, too late'. The West German political rhetoric, which for more than forty years denounced the East German regime as illegitimate and assured the East Germans of the solidarity of their 'brothers and sisters in the West', was not to be taken at face value. The German legislation on the rehabilitation and compensation of victims of human rights violations in East Germany since 1945 is the result of an attitude, prevailing in the East and the West of the reunited country, that it is less important and urgent to care for the victims of the past than to rebuild an economy for the future. Government and political parties were rather outspoken on this point. After the unification, it took the *Bundestag* two years to enact a new Criminal Rehabilitation Law, and four years had to pass before rehabilitation for administrative and employment discrimination was made possible. Different from the way one had dealt with the decisions of Nazi courts in the American and the British Zone of Occupation and, eventually, the whole of Germany,¹¹⁵ no general annulment of judgments was provided

¹¹³ See *supra* text accompanying note 32.

¹¹⁴ See Christian Tomuschat's contribution to this volume, *supra* at 1. See also A. Scheffler, *Die Bewältigung hoheitlich begangenen Unrechts durch fremde Zivilgerichte*, 1997, 201, 205-206, 219-220.

¹¹⁵ See Vogl (*supra* note 2), at 77-79, 104-117. After a long controversy, the *Bundestag* adopted on May 28, 1998 a law (*Gesetz zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege*, Bundestagsdrucksache no. 13/10848, BGBl. 1998 I, 2501) by which all convictions and sentences were annulled which 'were imposed after January 30, 1933 [the day

for. Instead, victims had to seek a case-by-case review. A limited financial compensation was only given to political prisoners. No provision was made for a repeal of decisions of civil and labour courts which violated human rights. Rehabilitation for administrative discrimination can only be requested for a measure 'absolutely inconsistent with leading principles of a State based on the rule of law', and the consequences of the measure must 'directly continue into the present in an onerous and unacceptable manner'. Persons who suffered a disadvantage in education and employment can receive some financial assistance in re-education or further education, provided they are not too old or sick, and their pension payments are adjusted to resemble those they would have received without the political discrimination.

In comparison, the financial compensation which was granted the victims of the Nazi regime exceeded in almost all respects that given to those who suffered under the communist system.¹¹⁶ The comprehensive reparation of Nazi injustice was an outcome of several factors, all of them missing in the case of GDR injustice.¹¹⁷ The victims were well organized, they were massively supported by the Occupying Powers, their concerns were recognized by a postwar political elite which had already been active in the Weimar Republic and was then pushed aside or even persecuted by the Nazis. Further, the reparation of Nazi injustice constituted an important part of the postwar German foreign policy; it directly served the reintegration of West Germany into the international community. In this situation, the complete bankruptcy of West Germany after World War II was no obstacle for a comprehensive and generous reparation policy. Conversely, the lack of such a policy after the fall of the East German State cannot be adequately explained with a lack of money.

Restitution of expropriated property was granted only with the greatest reluctance. An expropriation was regarded as valid if the former owner had received some compensation under GDR law even if the amount came close to nothing. If expropriated property was acquired by another East German, it will generally stay with that person. If the property was regarded as necessary for rebuilding the economy, the State could sell it to some investor. And even if someone was actually entitled to a restoration of his or her property rights, it was effected slowly and unwillingly by the local authorities of the eastern *Länder*. As to the expropriations of the years 1945 to 1949, it was a German political decision not to repair them. By cloaking this decision with pseudo-

Hitler was appointed Chancellor] for political, military, racial, religious or philosophical (*weltanschaulich*) reasons in order to establish or maintain the Nazi tyranny, and which violated elementary concepts of justice (*elementare Gedanken der Gerechtigkeit*)' (sec. 1).

¹¹⁶ See Tappert (supra note 2), at 228-231.

¹¹⁷ See Tappert (supra note 2), at 243-246.

legal reasons, law has been done a disservice. By excluding the respective property from restitution, the legal system of the Federal Republic of Germany has gone against one of its own fundamental principles. Respect for private property must be universal, and requires not to distinguish between politically welcome and unwelcome property. The long-term consequences of this decision for the attitude of the German society towards private property may be severer than the present political class is aware of.

Finally, one must deplore the overly complicated nature of the legislation reviewed in this paper. In this respect, nothing has been learned from the experience of the postwar laws in favor of the victims of the Nazi regime which were of a similarly diffuse character. Even a trained lawyer encounters many difficulties in understanding the various laws and their relationship, and so do apparently the authorities entrusted with their administration. Laws meant at least partially to repair governmental wrong of the kind committed by the communist regime in East Germany must be readily comprehensible by those for whom they were made – the victims. Otherwise, their main beneficiary will be the legal community.