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Transitional Criminal Justice after German Unification*

Giustizia penale di transizione dopo l'unificazione tedesca

Justicia Penal transicional luego de la unificación Alemana

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Abstracts

This article deals with the prosecution of systematic crimes committed in the German Democratic Repub-lic (GDR). The prosecution of these crimes already started in 1990, in the final days of the GDR. After German unification on October 3rd 1990 the courts of the Federal German Republic continued to con-duct trials until 2005. After clarifying the historical and political background, we will explain the legal framework of these trials and analyze the case law. The question of retroactivity will be dealt with, and some basic principles of the prosecution of GDR-state criminality will be identified. In addition, we will discuss strengths and weaknesses of the criminal trials in establishing the truth on the GDR-past.

L'articolo tratta della persecuzione penale dei crimini sistematici commessi nella Repubblica Democratica Tedesca (RDT). Tale persecuzione è iniziata già nel 1990, negli ultimi giorni della RDT. Dopo l'unifica-zione tedesca, il 3 ottobre 1990, i tribunali della Repubblica Federale di Germania hanno continuato a celebrare processi fino al 2005. Dopo aver chiarito il background storico e politico, si spiegherà il quadro giuridico di questi processi e se ne analizzerà la giurisprudenza. Sarà affrontata la questione della retroattiv-ità e verranno identificati alcuni principi di base del perseguimento della criminalità di stato della RDT. Inoltre, si discureranno i punti di forza e di debolezza dei processi penali nello stabilire la verità sul passato della RDT.

El presente articulo aborda la persecución penal de los crímenes sistemáticos cometidos en la República Democrática Alemana (RDA). La persecución de estos delitos comenzó en 1990, en los días finales de la RDA. Luego de la reunificación alemana, el 03 de octubre de 1990, las cortes de la República Federal Alemana continuaron realizando procesos penales hasta el 2005. Tras clarificar el contexto histórico y político, se explicará el derecho aplicable a tales juicios y se analizará la jurisprudencia. Se afrontará la cuestión sobre la retroactividad y se identificarán algunos principios básicos de la persecución de delitos en la RDA. Además, se discutirán las fortalezas y debilidades de los juicios penales en el establecimiento de la verdad sobre el pasado de la RDA.

* The chapter is based on the research project 'Criminal Law and the East German Past', which has been carried out jointly by Gerhard Werle and Klaus Marxen at Humboldt-Universität zu Berlin. The project has evaluated all the criminal proceedings that involved acts related to the East German regime. In addition to several doctoral dissertations, the project published a seven-volume series [MARXEN and WERLE (2000-2010) that was supplemented with an overview MARXEN and WERLE (1999), a second edition of this volume will be published in 2019] as well as a brochure with a short summary of the relevant data [MARXEN, WERLE and SCHÄFTER (2007)]. This chapter follows up the ideas developed in these publications and in POPOVSKI AND SERRANO (2012), p. 298 et seq.

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On November 9, 1989, the border that had divided Berlin for decades was opened. Less than a year later, on October 3, 1990, East and West Germany were officially united. In confronting systematic crimes committed under the East German regime, various tools of transitional justice were used to a greater or lesser extent. This chapter focuses on the prosecution of GDR state criminality, which played a center role, especially in the public perceptions.

1. Historical and Political Background.

After the end of World War II, the Allies reduced the size of the former German state and divided it into four zones of occupation, one of which was administered by each of the victorious powers.[1] The eastern occupied zone was administered by the Soviet Union. The establishment of a socialist state on eastern German territory had at this point, shortly after the end of the war, not yet been planned by the Soviets, at least not for the near future.[2] However, key positions in the government and judiciary of that zone were immediately filled by loyal members of the German Communist Party (*Kommunistische Partei Deutschlands – KPD*), and the KPD itself merged with the Social Democratic Party of Germany (*Sozialdemokratische Partei Deutschlands – SPD*) to form the Socialist Unity Party of Germany (*Sozialistische Einheitspartei Deutschlands – SED*). Private industries were nationalized and a planned economy introduced.

As the Cold War worsened, the interest of the western Allies in unifying their 'trizone' into a West German state grew. One function of such a state was seen to be the creation of a 'bulwark against communism', that is, against the Soviet Union's claims to power. The road to the establishment of the Federal Republic of Germany in 1949 was taken with the merging of the western zones of occupation. A few months later, the GDR was established in response.

Following the establishment of the GDR in 1949, and more so after 1952,[3] the construction of a socialist state was pursued in East Germany, under the leadership of the First Secretary of the Central Committee of the SED, *Walter Ulbricht*. Political opposition was ruthlessly suppressed. This repression showed its most brutal face in the bloody suppression of the uprising on June 17, 1953. Everyday life of East German citizens was systematically kept under surveillance by the Ministry for State Security (*Ministerium für Staatssicherheit – MfS*),[4] created for this purpose. A result of this measure was a wave of immigration to West Germany by East German citizens. In this situation, the SED leadership decided, in 1961, to seal off the border with West Germany and build the wall in Berlin.

In the following 28 years, from 1971 under the leadership of *Erich Honecker*, the regime clung to its bureaucratic, dictatorial system, which did not tolerate political opposition and treated dissidents and those trying to escape harshly. Even when, in the nineteen seventies, the politics of détente, brought into being above all by West German Chancellor *Willy Brandt*, led to a rapprochement between the two German states, this had no significant influence on the persecution of critics of the East German regime. Critics continued to face persecution and arrest.

Not until the collapse of the Soviet Union, the peaceful revolution in East Germany, and the fall of the Berlin Wall in 1989 did the situation change. SED General Secretary *Erich*

[1] On the historical context, see Weber (1993); Schaefgen (2006), pp. 15 et seq.; Wehler (2008); Zimmermann (2000), pp. 3 et seq.; Winkler (1994), pp. 107 et seq.
[2] Weber (1993), p. 4; Zimmermann (2000), p. 3.
[3] On 9 July 1952, the 'construction of socialism' on the Soviet model in East Germany was formally decided upon at the Second Party Congress, Zimmermann (2000), p. 7.
[4] In the roughly 40 years that the Ministry of State Security existed, it formed an extensive and highly hierarchical structure, with almost 90,000 full-time staff by the end; see Marxen and Werle (1999), p. 228.

Honecker resigned first, and shortly thereafter, the entire GDR government followed suit. On March 18, 1990, the first free elections were held in the (officially still existing) GDR. And in the same year, on 3 October, the GDR officially joined the Federal Republic on the basis of the Unification Treaty.[5]

2. Prosecution of GDR State Criminality.

Confronting the crimes committed by the SED dictatorship using criminal law had already begun in the final days of the German Democratic Republic, that means after the fall of the Berlin wall, but before unification.[6] Under pressure from the public and media, even before the first free elections, investigations were begun, under the successor government, of members of the East German political leadership ('Politbüro members') and high-level officials of the old regime. These investigations were continued and expanded after the free elections in East Germany on March 18, 1990. Substantively, these investigations mainly dealt with electoral fraud, abuse of power, and corruption – crimes that particularly upset the East German population at that time. In united Germany, systematic criminal prosecution of government crimes committed under the SED dictatorship began in October 1990 and continued into 2005.[7] The prosecutorial authorities of the Federal Republic conducted investigations into approx. 75,000 of cases; approx. 1,000 trials were opened.[8]

2.1. *Forms of State Criminality.*

In the years of the SED dictatorship, numerous forms of state criminality could be observed in various sectors.

At the center of public, and later legal, interest were the crimes at the inner-German border,[9] especially the shootings by border guards of East German citizens attempting to flee to West Germany. At least 264 people were killed at the inner-German border by firearms, mines, and self-firing machine guns.[10]

Apart from the border guard trials, prosecutions related to the following forms of state criminality:[11]

- Perversion of justice by party-line judges, prosecutors, and members of the Ministry of Justice.
- Electoral fraud that was centrally initiated, through purposely camouflaged instructions from the party leadership.
- Crimes by official and unofficial informers for the Ministry for State Security, such as tapping telephones, entering homes, removing money from letters and directing it to the state budget, revealing information from confidential job-related relationships, committing reprisals against people who had applied to emigrate, and kidnapping.[12]
- Doping methods that were systematically and broadly employed in East German athletics, often without the athletes' knowledge.[13]
- Abuse of prisoners, in particular political prisoners, by politically indoctrinated guards.
- Illegal enrichment and other economic crimes committed by politbüro members.[14]
- Espionage against the Federal Republic by the Ministry for State Security's intelligence service and the National People's Army.[15]

[5] The possibility of merger was established by Article 23 of the Basic Law. After the Basic Law went into effect in 1949, the article 'for now' established its scope of applicability over the western Federal states, but provided that it 'would go into force after the merger […] in other parts of Germany'. Jain (1999); Kocka (1994).
[6] On confronting the past during the final year of the East German state, see Bock (2000).
[7] On the trials, see McAdams (1997).
[8] For statistics on the prosecution of GDR-related crimes see Marxen, Werle and Schäfter (2007).
[9] For more details, see Rummler (2000); Vest (2006), pp. 7 et seq.
[10] Rummler (2000), p. 1.
[11] On these forms of state criminality see the series Marxen and Werle (2000-2010).
[12] On the activities of secret police informers, see Engel (1994), pp. 79 et seq.; Gauck (2004).
[13] Marxen and Werle (1999), pp. 102 et seq.
[14] On the entire issue, see Fahnenschmidt (2000).
[15] Thiemrodt (2000); Marxen and Werle (1999), pp. 124 et seq.

2.2. The Legal Framework.

Prosecutions before unification were based on the criminal law of the German Democratic Republic alone. After the coming into force of the Unification Treaty on October 3, 1990 the legal framework for the punishment of crimes committed under the SED regime changed. The new framework was established in Article 315(1) of the Unification Treaty.[16] This clause refers to § 2 of the West German Criminal Code, which regulates the temporal applicability of West German criminal law. It provides that, in principle, the law in force at the time of the commission of the crime is applicable unless it was changed before the decision; in that case, according to § 2 of the Criminal Code, the more lenient law is applicable.[17] The extensive substitution of the West German criminal code for East German criminal law after East Germany joined the Federal Republic was therefore equated with a national change in laws between the time of the crime and the conviction. The question of criminal liability for East German crimes thus became subject to the so-called most favorable principle.[18] This meant that courts first had to establish that a crime was punishable under GDR law. If this were not the case, there would be no criminal liability, since that was the more lenient option, even if liability could be shown under Federal Republic law. Only if criminal liability was found under GDR law would a second step be necessary, which would consider criminal liability under the law of the Federal Republic and determine the more lenient law on this basis.

2.3. The Retroactivity Question.

With this so-called two key approach, the provisions of the Unification Treaty provided only a broad framework for applying criminal law. They did not provide more precise guidelines, for example regarding the prohibition on retroactivity. Particularly at the 'border guard trials' the question was raised of the criminal liability of those border guards under East German law. The crucial question was whether convicting East German soldiers violated the prohibition on retroactivity – a highly controversial issue in the German legal debate.[19]

Under West German law, intentional homicide would be easily found. According to the law of the Federal Republic, justificatory grounds for the killing of escaping East German citizens obviously could be ruled out. However, criminal liability under East German law was doubtful. Of course, East Germany also criminalized intentional homicide. But the killing of people trying to escape was always seen as justified if the killing was committed as a last resort to prevent 'fleeing the Republic (*Republikflucht*)'. Under § 27(2) of the State Borders Act,[20] the use of firearms was justified 'to prevent the imminent commission or continuation of an offense (*Straftat*) which appears in the circumstances to constitute a serious crime (*Verbrechen*)'. § 27(5) of the State Borders Act provided that, 'when firearms are used, human life should be preserved *where possible*'.

As a result, this provision had a clear meaning in East German practice: 'No one may get through!' – that was the first commandment.[21] This goal of preventing border crossings at all costs was assumed in every examination of proportionality within the framework of East German law. If a warning was unsuccessful, those fleeing were to be rendered incapable of flight through shooting. If that did not work, killing was permissible as a last resort. Thus, the killings were not followed in East Germany by criminal prosecution, but by recognition by government authorities: certificates, medals, monetary bonuses, special vacations, and promo-

[16] For details, see Marxen and Werle (1999), pp. 3 et seq.
[17] § 2(3) Federal German Criminal Code: 'If the law in force upon the completion of the act is amended before judgment, then the most lenient law shall be applicable'.
[18] The so called 'Meistbegünstigungsprinzip', or principle of the application of the most lenient law.
[19] An overview of writings on this, which are now almost too numerous to list, can be found in Lackner and Kühl (2007), § 2, marginal no. 16 a.
[20] The official title of the law was 'Law on the Borders of the German Democratic Republic' of 25 March 1982. Previously, the use of firearms against fleeing citizens was governed by a network of regulations, instructions, and orders. But even after the adoption of the border law, unofficial instructions on the use of firearms remained, see Marxen Werle (1999), p. 224, Rummler (2000), pp. 157 et seq.
[21] Werle (2001), p. 3001, p.3004. In its decision BGHSt 39, 1 (11), the Federal Supreme Court came to the conclusion that the motto was, 'Better the escapee is dead than the flight succeeds'.

tion for the soldiers who had fired the fatal shots.[22]

Accordingly, at first glance the situation was completely clear: domestic law in East Germany allowed killing as a last resort to prevent border crossings. Within this framework, East German law granted a license to kill. If one understands East German law in its historical sense, here as in other areas, state-organized violence was domestically legal.

2.4. *Case Law.*

Therefore, it was not surprising that the indicted border guards referred to the domestic legality of their conduct. They admitted to intentionally shooting at the fleeing people and thus willfully risking their death. But they pointed out that this was allowed under East German law, and in fact was praised as particularly dutiful behavior. The defense lawyers asserted that convicting the border guards for the killings would violate the prohibition on retroactivity, because the act was not forbidden under East German law at the time it was committed. This would also represent a violation of the Unification Treaty and rule of law principles.[23]

However, in their decisions, the German courts did not adopt this argument, but instead employed a two-track approach that on the one hand undertook a human rights-friendly interpretation of East German law, and on the other made recourse to the 'Radbruch formula', applied in accordance with international law. As a result, the Federal Supreme Court (*Bundesgerichtshof – BGH*) was of the opinion that the border guards had violated not only West German but also East German law, which then left no obstacles to conviction.

a) Human Rights Friendly Interpretation of East German Law

The Federal Supreme Court decision that the border guards had violated East German law surprised many. No wonder; law in East Germany was not understood by the Federal Republic's judiciary as it in fact existed. Instead, the Supreme Court asked: Was it possible or even necessary to interpret East German law in such a way that it favored human rights? In other words, what would a GDR judge influenced by the spirit of human rights have derived from the East German legal texts? Would such a human rights-friendly judge have been able to find the killings on the border illegal, and to declare them criminal, even in East Germany?

The Federal Supreme Court held that such a human rights-friendly interpretation of the East German border law was indeed called for. The East German constitution, it pointed out, also recognized the protection of life and the principle of proportionality; that is the light in which one could and should have limited the interpretation of the border law. In this interpretation, shooting to kill unarmed people could not have been allowed.[24]

This means that even under East German law, if interpreted in a human rights-friendly way, the shootings at the Wall were illegal. This seems to be a slick legal solution: criminality existed even under *correctly interpreted* East German law. Both keys, West German and East German law, fit and opened the gates to criminal liability. The prohibition on retroactivity was not involved, for East German law itself provided for criminal liability for the killings on the border.[25]

One cannot deny this solution's legal elegance and subtle irony. The Federal Supreme Court turned repressive East German laws against those who had enacted and implemented them. It must also be granted that the interpretation of written East German law developed by the Federal Supreme Court was possible from a purely textual perspective. In addition, East Germany, quite unlike, for example, Nazi Germany, had professed regard for human rights to the outside world.

In general, however, the human rights-friendly interpretation of laws that violate human rights is still subject to some reservations. The essence of the dictatorship, a legality that *violated* human rights, was interpreted out of existence. GDR law as it existed in reality was not conceived of as instituting limitations that protected human rights, but as a tool of politics. Basic rights did not serve to fend off intrusions by the state, but were understood as freedom

[22] Werle (2001), p. 3001, p. 3004.
[23] Werle (1995), pp. 79 et seq; see also Geiger (1998), p. 543; Herdegen (1995), p. 591, p . 596.
[24] BGHSt 41, 101 (110); Geiger (1998), p. 540, p. 543; Herdegen (1995), p. 591, p. 596.
[25] For a summary of this line of reasoning see Rummler (2000), pp. 330 et seq., with cites mainly to skeptical sources. For details, see also Vest (2006), p. 71, pp. 87 et seq.

to have a state;[26] the primacy of the socialist order prevailed over the rights of the individual. The Party's leading role was a central constitutional principle in East Germany, and the party also led in implementing socialist law. Every interpretation was therefore bound to the will of the Party and state leadership. The human rights-friendly interpretation by the Federal Supreme Court masks this context, to a certain extent rehabilitating written East German law, and thus abets legal and historical misunderstanding.[27] In addition, the method of human rights-friendly interpretation fails if a law formulated with brutal clarity is not amenable to a human rights-friendly interpretation.[28] Should such a law be a bar to prosecution? Should the later accountability of rulers and their henchmen depend on how dictatorial laws are formulated? Are verbal niceties ultimately decisive, rather than the societal reality of serious abuses of human rights?

Despite these reservations, the European Court of Human Rights (ECHR) endorsed the Federal Supreme Court's approach without reservation, and thereby denied that it violated the European Human Rights Convention's ban on retroactive punishment (Article 7(1)).[29] The Court emphasized the right of democratic successor states to change the interpretation of old laws to comport with rule of law, saying that one could not reproach the courts of a successor state for applying and interpreting the laws in force at the time of the crime in the light of rule-of-law principles. The Court considered it legitimate, in particular, to take the superficial appearance of rule of law created by repressive states seriously and to reinterpret domestic laws.[30] The 'human rights-friendly interpretation' elaborated by the Federal Supreme Court was thus explicitly recognized as a permissible – and most effective – tool of post-dictatorship justification of criminal liability.

b) Limitation on the Prohibition of Retroactive Punishment for Violations of the Right to Life

The Federal Supreme Court's second line of argument was oriented around the 'Radbruch formula'. The German legal philosopher and justice minister during the Weimar Republic Gustav Radbruch elaborated this formula in 1946. Its core element was Radbruch's idea that a judge facing the conflict between positive law and substantive justice must decide in such a way that 'the positive law […] has primacy even when its content is unjust and improper. It is only when the contradiction between positive law and justice reaches an intolerable level that the law is supposed to give way as a "false law" to justice'.[31] West German courts had already had recourse to the 'Radbruch formula' in dealing with the crimes of the Nazi dictatorship. There the issue was the extent to which certain Nazi rules and laws could be binding on the jurisprudence of the Federal Republic in prosecuting crimes committed during the Nazi dictatorship. The question arose, for example, whether the far-reaching shoot to kill orders by the Nazi leadership justified the killing of deserters by soldiers.[32] The Federal Supreme Court and the Federal Constitutional Court consistently advocated the view, within the meaning of the 'Radbruch formula', that Nazi legislation that was evidently unjust, at least, did not have to be taken account of in Federal Republic jurisprudence.[33]

In dealing with East German crimes, the Federal Supreme Court again applied the 'Radbruch formula', but this time alongside international law. It advocated the view, affirmed by the Federal Constitutional Court, that the development of human rights since 1946 had led to the need to refuse recognition of human rights-violating justificatory grounds for government-instigated killings.[34]

[26] See, for example, Mampel (1997), Article 19, marginal nos. 12 et seq.
[27] Geiger (1998), p. 540, p. 546.
[28] BGHSt 41, 101 (112).
[29] Those who were prosecuted included, among others, the last head of the East German Council of State, Egon Krenz, against whom, as well as against other members of the political and military leadership, a sentence of several years' imprisonment had been imposed for homicide committed as a perpetrator by means. On the judgments of the EHCR see Kreiker (2002); Vest (2006), pp. 78 et seq.; Miller (2001).
[30] ECHR, judgment on March 22, 2001 – 34044/96, 35532/97 and 44801/98 (*Streletz, Kessler, and Krenz v. Germany*), published in *International Legal Materials* (ILM), Vol. 40, 2001 pp. 811 et seq.
[31] Radbruch (1946), p.105, p. 107.
[32] BGHSt 3, 94 (107).
[33] However, criticism of the 'Radbruch formula' is often expressed in legal doctrine. Among other things, it is criticized because it is not possible to clearly determine when an 'unjust law' in the sense of the formula is present, and because it ultimately acts as a covert circumvention of the prohibition on retroactivity. On the 'Radbruch formula', see Saliger (1998); Kaufmann (1995); Ott (1988); Dreier (1997); Amelung (1996).
[34] Geiger (1998), p. 540, pp. 547 et seq.; Vest (2006), p. 71.

This further development of the Nuremberg principles should meet with approval. The right to life is recognized under international law. In addition, the fundamental criminality of intentional killing is provided for in all legal systems. The only thing that can be questioned, therefore, is whether and under what conditions state intrusion on the right to life can be justified. In principle, such intrusions are possible. Thus, killings in the course of military conflicts are permitted by international law. Further, international law considers the imposition of the death penalty for serious crimes a permissible limitation of the right to life. The question is whether killings to prevent leaving one's own country can be justified. According to the accepted view, the proportionality of means and ends is not present here; the killing of a defenseless person for the purpose of preventing him from leaving the country is an absolutely impermissible means. Such a limitation on the right to life is arbitrary. And arbitrary government killings are always incompatible with human rights and basic rights. It was therefore correct that the German courts refused to recognize attempts to legalize arbitrary state killings. The prohibition on retroactivity does not stand in the way of accountability in such cases.

2.5. *Basic Principles of Criminal Prosecution.*[35]

Apart from the question of retroactivity, there were, of course, plenty of other legal challenges arising during the prosecution of GDR state criminality. However, if we analyze the procedures of German courts in dealing with East German crimes through criminal law, it becomes clear that arguments similar to those used in regard to the border guard trials can be found for other sets of offenses.

Criminal behavior that violated human rights under international law in obvious and serious fashion was penalized across the board. The requirement of a serious human rights infringement acted both to legitimize and to limit punishment. This was true not only of the already-discussed cases of violence at the inner-German border the requirement of a serious human rights violation was also applied to perversion of justice.[36] In the trials for perversion of justice, the lack of a serious violation of human rights in this area led to numerous acquittals or case dismissals. The result was that prosecution concentrated on convictions by East German courts in which, in a grave violation of human rights, the death penalty or a longer prison sentence had been imposed. The same is true for criminal prosecution of denunciations. Here, too, the result was that the only denunciations that were prosecuted as political suspicions (*politische Verdächtigung*) were those that created the risk of a public, grave violation of human rights through the threat of a criminal trial. The Supreme Court further extended this requirement to the penalization of deprivation of liberty committed in connection with political suspicions. The treatment of other types of cases fits within the pattern of focusing criminal prosecution on serious violations of human rights. Thus, in prosecuting abuse of prisoners and doping carried out without the subject's permission, serious human rights violations were assumed to exist due to the massive intrusion upon the victims' physical health. The criminal liability of Ministry for State Security staff (for example in tapping telephones or secretly entering homes) was often negated because it lay below the threshold of a *serious* violation of human rights.[37]

Another basic principle of criminal prosecution lies in the continuity of the prosecutions (*Verfolgungskontinuität*). If we consider the statistics on criminal trials involving East German crime, it is apparent that a large number of trials that ended with convictions dealt with abuse of power, corruption,[38] and electoral fraud.[39] These offenses were not characterized by serious human rights violations. Rather, criminal proceedings in this area were oriented according to the guiding principle of continuity of prosecution, which represents the second basic pillar of transitional criminal justice in Germany: Almost all trials for abuse of power and corruption, as well as numerous trials for electoral fraud, had already been initiated in East Germany

[35] The following ideas have been developed in Marxen and Werle (1999), p. 239 et seq.
[36] On the criminal prosecution of East German jurists, see Hohoff (2001).
[37] The guiding principle of the prosecution of serious violations of human rights also governs trial practice from the quantitative perspective. Thus, two types of cases, killings at the border and perversion of justice, which are areas most influenced by the idea of human rights protection, made up the overwhelming majority of investigations.
[38] On prosecutions for abuse of office and corruption in East Germany's final year and after reunification, see Fahnenschmidt (2000).
[39] Marxen and Werle (1999), pp. 240 et seq.

under the government that succeeded Honecker. The transformed East German judiciary achieved a not-insignificant number of convictions. The Federal Republic's criminal justice system continued these criminal prosecution activities. This was in accordance with the will of the East German people, which they expressed unmistakably in the final days of the German Democratic Republic.

3. Assessment of the Process of Prosecutions.[40]

It could already be predicted at the beginning of the process that many trials, however they might end, would remain legally and politically controversial. Given the difficulties of the subject, it was not surprising that there would be contradictions in the case law, and that legal justifications in some areas would be vulnerable to attack.

3.1. *Strengths.*

a) Accountability for Serious Violations of Human Rights

The deciding factor in a positive overall assessment comes above all from the central result of the use of criminal law: concentrating criminal prosecution on serious violations of human rights. Impunity for serious human rights violations is one of the most important causes of their repetition. This is true not only of the worst human rights violations, such as genocide, but of all serious human rights violations, such as arbitrary and serious assaults, deprivation of liberty, and killings. The situation in numerous countries provides unfortunate confirmation. Thus, in the international debate on how to deal with serious violations of human rights, the view has prevailed that a 'culture of impunity' favors the repetition of these violations. The German trials sent the right message. The trials contributed to establishing respect for basic human rights.

Further, the effects of individual accountability can be considered positive. Individual accountability illuminates the ways in which state-sponsored crime arises from the actions of particular individuals. Individualization gives perpetrators reason to comprehend their contribution to a system's crimes. It makes clear to a society that it was not an anonymous collective, but a specific group of people, who planned, organized, and carried out serious violations of human rights. This process in no way aims to obscure, let alone deny, societal responsibility. In the calculation of sentences, at the latest, the perpetrators' integration into the context of government action must be considered. Consequently, relatively lenient sentences have often been imposed. In particular, one might mention the numerous suspended sentences imposed on border guards. The unusual circumstance that an intentional killing would be penalized with a suspended sentence in fact shows quite clearly that the judiciary has carefully individualized guilt. This is clearly expressed by the fact that the case law views the border guards, who were quite low in the hierarchy, as in a sense also victims. Thus, it cannot be claimed that individuals were sacrificed as 'scapegoats'.

b) Taking Account of the Will of the East German Population

Significant arguments can be made against the prosecution of abuse of power, corruption and electoral fraud, in which the above-described 'continuity of prosecution' was the guiding principle. Serious human rights violations, in the sense of attacks on life, health, and freedom of movement, were not present in these cases, and it is also doubtful that criminal prosecution under the 'two key approach' was permissible here. The German judiciary could, in these areas, have rejected criminalization for understandable reasons. Still, the efforts to continue the trials begun in East Germany deserve approbation.

In 1989 and 1990, the transformed East German judicial system was serious about applying East German criminal law, and thus ended the privileging of government power holders under criminal law. The judiciary of the Federal Republic was acting with legal consistency when it took up the legal practice that had already changed in East Germany and continued

[40] The following sections are based on Marxen and Werle (1999), pp. 241 et seq.

already initiated investigations. The judicial system at the same time ensured that the clear political will of the East German people, which had manifested itself in the final phase of the German Democratic Republic in prosecutions, among other things, survived the transformations of unification. Thus, the prosecutorial continuity in the area of electoral fraud and certain economic offenses should also be commended. Admittedly, it cannot be overlooked that this development had its origins in the distinctive characteristics of the German unification process. Unlike the demand for prosecution of serious human rights violations, prosecutorial continuity in the areas of abuse of power and electoral fraud cannot be adopted by other countries.

c) Acknowledgment of Past Wrongs

Establishing the truth of and acknowledging past East German crimes is a further central achievement of the trials. Even if some of the courts' legal assessments will remain controversial, their decisions will influence German society's recollections of East Germany.[41] The facts determined in trials can claim a high degree of reliability. In addition to the punitive functions of criminal convictions, they fulfill truth-establishing and acknowledgment functions. In some trials, the emphasis can be more on the truth-establishing function, when for example the courts actually bring new facts to light. In other areas, the contours of the crimes were known; here, the acknowledgment function of court decisions is more central.[42]

In the trials based on the guiding principle of prosecutorial continuity (abuse of power, corruption, and electoral fraud), the truth-establishing function was most important. The suspicion of abuse of power and corruption, as well as electoral fraud, was an important motivation for the civil rights movement in East Germany's final months. The clarification and prosecution of crimes in this area thus had corresponding importance in East Germany in 1989 and 1990. If we consider the results, the electoral fraud trials revealed the structures and processes of electoral fraud in East Germany in exemplary fashion. The trials proved what had thus far only been suspected. Thus, for example, the 'negotiating' for percentage points in the election results that was confirmed by many witness statements provided impressive proof of cynical and systematic disregard of the voters' wishes. The meaning of the electoral fraud trials was reduced neither by the relatively low sentences nor by certain legal doubts about the applicability of the crime of electoral fraud in Federal Republic law. Like electoral fraud, behavior that had heretofore only been the subject of speculation was proven in the areas of abuse of power and corruption. It should not be forgotten how much of an influence these trials had on public consciousness during the period immediately following the fall of the Wall.

The acknowledgement function was most important for the killings on the inner-German border, which were especially important for public perceptions. The fact that killings were carried out on this border at government orders was known throughout the world. Nevertheless, the use of criminal law in dealing with these incidents had its own special value. In order to classify the acts of individual defendants, like the border guards, the trials revealed the entire system of border security in minute detail. It reconstructed the chain of command, reaching from the top of the political leadership to the simple border guard. The court decisions further made clear how the individual border guard was integrated into this system through instruction and indoctrination and how this led to the individual contribution to the crime. Overall, the trials revealed without doubt that killings were consciously used by the government as the ultimate means of preventing border crossings, and showed how this was done. This determination counters any attempt to play down the crimes on the border. The trials for perversion of justice demonstrated how the judiciary itself had become an instrument of serious violations of human rights. The prosecutorial investigations provided important insights into the organization and process of politically-controlled justice.

3.2. *Weaknesses.*

The following weaknesses of dealing with East German crimes through criminal law can be observed. The requirements set by the German legislature only provided a rough framework for transitional criminal justice. On substantive questions regarding the criminal law

[41] Wingenfeld (2006).
[42] On the educational function, see Bock (2000).

to be applied, the legislature was silent. It also left the organizational structure of criminal prosecution essentially unchanged. Promises that the staff of prosecutorial organs would be increased were not kept in their entirety. No central prosecutorial office was established, for example, that could have coordinated investigations and ensured uniform trial practice. In the political discussion, the serious general problems with the integration of East and West overshadowed the debate about transitional criminal justice. Sharp differences of opinion developed, in which demands for harsher prosecution collided with demands for amnesty.[43]

Thus, transitional criminal justice became a major legal experiment under difficult conditions. Its course was necessarily marked by the characteristics of justice that was mainly executed by the German states (*Länder*), and that offered a complicated, multi-level system of legal tools overseen by the constitutional court. Divergences inevitably emerged in the practice of prosecution, and only in a lengthy clarification process did guidelines emerge for judicial decision-making. Added to this was an insufficient revision of the statute of limitations that caused more harm than good.[44]

The courts, meanwhile, can be accused of not always sufficiently clarifying the two above-mentioned guiding principles (protection of human rights and continuity of prosecutions), sometimes offering a variety of arguments and making only tentative links with the bases of human rights protection in international criminal law. In addition, as shown, the human rights-friendly interpretation of East German law, as undertaken by the Federal Supreme Court, can be accused of distorting historical facts.

3.3. *Mistaken Criticisms.*

In the public debate in Germany, the accusation of 'victor's justice' has sometimes been leveled against the criminal prosecution undertaken by the judicial system of the Federal Republic. This meant that the 'victors' – the Federal Republic of Germany – sat in judgment over the 'losers' – former representatives and functionaries of the former German Democratic Republic. This criticism is mistaken. The prosecution of serious violations of internationally recognized human rights cannot be qualified as 'victor's justice'. The accusation of victor's justice is also refuted by the fact that sentences, even for convictions for killings, to a large extent remained extremely low. The courts took account of the fact that, for example, the border guards who fired the deadly shots were ultimately only 'small cogs in the machine' of state injustice.[45] In the areas of abuse of power and corruption, as well as electoral fraud, prosecution was, as shown, backed by the will of East German citizens, so that this accusation of (West German) victor's justice is also unjustified.

Others, especially members of the civil rights movements in the former East Germany, have criticized the judiciary for imposing penalties that were too lenient. Accusations of a 'camouflaged amnesty' have sometimes been made.[46] This criticism, too, should be rejected. The more lenient penalties were an expression of carefully balanced sentencing that took account of the individual situation of perpetrators, in their favor. This should be seen as a strength and not a weakness of the process.

4. Conclusion.

In assessing the process of dealing with East German history, it is significant that a comprehensive approach was taken. In addition to criminal law, essentially all the instruments of 'transitional justice' came into play. Despite unavoidable shortcomings, the victims' perspective was taken sufficiently into account. Criminal prosecution of East German crimes was a distinctive focus of the process. Here, in retrospect, it can be said that the judicial system developed a generally just and logical concept for dealing with the most important types of cases. Therefore, in Germany the process of dealing with East German state criminality can

[43] For an overview on the discussion see Rossig and Rost (2000).
[44] For more details, see Marxen and Werle (1999), pp. 248 et seq.
[45] For details see Marxen and Werle (1999), pp. 8 et seq.
[46] Hillenkamp (1996), pp. 179 et seq.

be considered, by and large, to have succeeded – quite contrary to the process of dealing with the Nazi past.

While the process of 'transitional justice' in Germany has been completed, this is not the case for society's reckoning with the past. The use of legal instruments is only a partial element of the process by which a society comes to terms with its history. Here, care must be taken that the efforts to acknowledge and illuminate past wrongs are not filed away and forgotten. The conclusions reached by the criminal justice system, in particular, are enormously useful to society's historical memory. They are important tools to prevent forgetting, denial, or trivialization of historical injustices.

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