Criminal Justice in East Germany after the Reunification[1]

By Judge Michael Bohlander

1. In this article I will give an account of what is happening in East Germany with regard to putting the criminal justice system back on an even keel.

I am a judge in two criminal divisions of a court on the Landgericht level in Thüringen in East Germany. The first division deals with heavy crime from bank robbery, and rape up to murder, and is also a special juvenile court, which hears appeals against judgments of a court at first instance in minor cases. In this court I sit with another professional judge, and with two lay assessors.

The second division is a court of cassation. In this court we sit with three judges. It deals with the reversion of sentences of GDR tribunals in criminal matters where the law of the GDR was applied incorrectly or if the sentence was excessive or in conflict with the basic principles of the rule of law.

So I think I may safely say that I get a fair overview of the legal problems involved in the process of integrating East Germany into the legal order of the Federal Republic.

I will try to give an outline of the four major fields in which the situation at an East German court differs from that in West Germany.

These fields are

— rehabilitation and cassation of GDR-sentences;
— political crimes by the representatives of the government and the party;
— selection of judges and prosecutors;
— transitional problems with regard to the criminal law.

2. On the 3rd October 1990 the two former German states, the Federal Republic of Germany and the German Democratic Republic, merged together, thus bringing about the long-awaited reunification. The treaty of unification made provision — amongst other things — for reversing unjust and oppressive sentences by the criminal courts of the former GDR.

[1] The article is based on a lecture given by Judge Bohlander at Uppsala University on the 19th May 1992. Judge Bohlander, has his law degree and doctorate from the University of Saarland, Saarbrücken.

We talk of *rehabilitation* when a person was sentenced for exercising his or her political fundamental rights like freedom of expression etc. The cases we encounter here range from those of people listening to radio stations from the "imperialist empire of the West", to those who publicly denounced the state, to — most prominently — the cases of unlawful crossing of the border according to section 213 of the GDR's criminal code.

As you surely can imagine the punishments meted out by the courts for any such activity were more than draconian. The GDR even went as far as incorporating a criminal offence in its constitution — the notorious article 6 subsection II. This provision was to apply — amongst other things — to everybody who spoke out against democratic institutions or mass organisations of the GDR. In practice that meant that any comment which contained as much as a hint of criticism could easily be turned into a criminal offence. It is no rare thing to find sentences of three and more years imprisonment for nothing more but a political joke told in a pub.

Along with these harsh sanctions went the possibility of completely expropriating a defendant. Those expropriations had effect even on questions of inheritance i.e. for example, if somebody's house was confiscated his heirs could not claim that house back after the death of the defendant. It had become the permanent property of the State. Put in operation on a wholesale basis, this procedure would very often deprive a defendant of his livelihood.

In cases where somebody was convicted of a prima facie non-political offence like murder or robbery there was still the possibility that he was punished more severely than he deserved for political reasons. These cases we find very often with persons who had already lived under the Nazi regime and were considered "old fascists", or with people who possessed a big and profitable enterprise like a factory or a large farm. In order to facilitate their expropriation in favour of the state, they were indicted for petty offences and punished out of proportion. These cases you find mostly in the 1950's and 60's when it was necessary for the regime to get hold of important parts of the economy in order to gather everything under the centralist planning rules.

For such cases, where nonpolitical offences are concerned, we have the so-called procedure of cassation, a word derived from the French *cassation* and which means an appeal on points of law only.

Under this procedure the court is not allowed to hear any fresh evidence as to allegations made in the former trial, but may only quash the sentence if the substantive or procedural law had been

applied wrongly, or if the punishment was grossly unjust or incompatible with the basic elements of the rule of law.

This fact has very often appeared quite unsatisfactory to my colleagues and myself, especially in proceedings where the state security police, the *Stasi*, was involved. It is almost certain that the Stasi mistreated defendants in order to get confessions, but they were experts in their field and left no traces in the files. So even if an applicant submits that his confession was only made on the ground of his being beaten or otherwise tortured, we cannot reverse the sentence if there is nothing in the files which may give us any hint as to the truth of that submission.

In one of the more recent judgments (order of January 27th, 1992 — BSK 33/91 re Rudolph) the court considered this issue in the light of the constitution, the Basic Law. The applicant had been sentenced to five years' imprisonment for theft, fraud and other offences by the court of first instance, the Kreisgericht. His appeal against sentence only to the Bezirksgericht was dismissed summarily withourt oral hearing. So we had to infer from this fact that the law had been applied correctly, but that he had simply considered the sentence too stiff. But in the application for cassation the defendant submitted that the pre-trial investigation had been conducted by the Ministry for State Security, and that he had thus intrinsically been denied a fair trial, because all his confessions and admissions had been exerted under psychic pressure and threats of reprisals.

There were, of course, no hints whatsoever as to the truth of this submission to be found in the files. Yet everybody strongly suspects that those proceedings in which the Stasi had had a hand were not exactly conducted strictly according to the book. There was thus a strong doubt in favour of the applicant. But the law demands positive proof of any unlawful acts of the courts.

So we had to ask ourselves the following two questions: 1. Does the mere submission that the Stasi conducted the investigations provide a ground for cassation? and 2. If not, is the present law which does not make a difference between ordinary trials and "Stasi trials", unconstitutional?

The first question had to be answered in the negative after what I have just said. The second one involved the issue of equality before the law under article 3 I of the Basic Law, in connection with the State's duty to provide and guarantee a maximum of judicial protection of its citizens' rights. The GDR cassation procedure according to the amendments made to it by the Treaty of Unification is meant to facilitate remedying the gross injustice

done to citizens of the GDR by the judiciary. There is substantial doubt as to whether the Stasi carried out the investigation according to the rules and consequentially, those — mainly political — cases figure amongst the ones where the injustice committed is greatest. Yet the defendants in such trials will almost never be able to prove they had been mistreated or even tortured. All the allegations had been very carefully and diligently made up and concocted, much more so than in ordinary criminal proceedings. Therefore the defendants in the Stasi trials are at a disadvantage in comparison to "normal" defendants. How could this be justified? Should there not have been an additional shift of the burden of proof just in these cases, requiring not the full proof, but declaring reasonable doubt as sufficient?

But then — not all the trials based on Stasi investigations were unfair, and how do you distinguish which allegations are true and which are not? On the other hand, easing the burden of proof would have resulted in an avalanche of applications and might have drowned the developing criminal justice administration in files when the energy of the judges and prosecutors is needed for the present problems. So one could simply view it as a matter of how to allocate the resource "administration of justice".

The German Parliament decided to remedy only the cases where full proof was available (if the problem had ever been noticed at all during the treaty negotiations!) ruling out cassation on the grounds of mere doubt. And there is an argument from constitutional law which might render this solution acceptable: German constitutional theory knows the concept of judicial self-restraint in highly political matters. This concept was copied by the Bundesverfassungsgericht from legal theory in the United States of America (BVerfGE 36, pp. 14-15) where the so-called "political question doctrine" was developed towards the beginning of the 19th century (if only in a somewhat modified form; see Erichsen, Staatsrecht und Verfassungsgerichtsbarkeit I, Munich, 1982, pp. 15-16). In such highly political cases the legislature has a kind of discretionary prerogative not accessable to scrutiny by the courts. This prerogative prevails especially with international treaties of a political nature. Leaving aside the question of what was the constitutional nature of the relationship between the two German states from the FRG's point of view, the Unification Treaty is *the* political international treaty of the century, as far as Germans are concerned. So according to the theory of judicial self-restraint the courts must be very careful when judging upon the decisions taken by the Parliament in connection with the German reunification.

By applying this theory of political judicial self-restraint we dismissed the application. Still, we hope that judgments of that kind may serve as an incentive to the government to rethink its position and find better ways of doing justice to the East German citizens and to remedy at least part of their grievances.

The Federal Government is actually working on a draft law which is designed to allow for new evidence to be considered, but in connection with this the Minister of Finance and the Ministry of Justice are still arguing about the sums to be paid in compensation to persons unlawfully imprisoned. It is an embarassing fact for the West Germans that it should be possible to have a dispute over relatively small sums of money when compensation for a ruined life is what we are talking about.

3. The second big issue at the moment is the clearing-up of party and state criminality. In this area we encounter the limits of what can be done by the administration of justice to do honour to its name.

It is fairly obvious that the East German people demand the unrelenting prosecution of their oppressors. Yet one must always keep in mind that we are living in a "Rechtsstaat", that is a state governed by the rule of law. One of the basic elements of the rule of law is the prohibition on retrospective punishment. In practice this means that when prosecuting former officials we must apply the law of the GDR, not our own.

Two categories of cases where this leads to utterly opposing legal arguments are the border killings and the prosecution of judges and prosecutors for perverting the course of justice.

There have until now been two trials of border guards who shot GDR citizens trying to climb the wall or the border fence in order to escape to the West. They were indicted for manslaughter but raised the defence that they were justified to shoot at fleeing citizens under the GDR's border laws, which even ordered them to prevent an escape by all means.

The counter argument runs along the lines that the prohibition to leave one's own country whenever one desired to do so, was contrary to the international law on human rights, or even contrary to some kind of superpositive or natural law. The Landgericht in Berlin has actually argued in one of the border guard cases that the superpositive law may in some instances render the positive law i.e. the written statutes etc. invalid. There can, of course, be no debate in cases where the guards went outside the limits prescribed by the GDR law itself.

Following in the wake of unsuccessful attempts to flee from the GDR's oppressive regime were the trials for unlawful crossing of the border according to the already mentioned section 213. The West German judicial authorities are now trying to bring the prosecutors and judges to trial for perverting the course of justice, who were involved in such trials. Again the argument is that section 213 was principally invalid because it collided with the natural law.

In my view, this argument is not sound (See Bohlander, Hexenjagd — oder: Rechtsbeungung durch Verletzung überpositiven Rechts?, Deutsche Richterzeiting 1991, pp. 445-448). On the one hand, we have to apply the GDR law, namely section 244 of the Criminal Code, which expressly states that the Criminal Code or a statute in general must have been applied incorrectly, and with direct intention to do so. But section 213 was a valid law under the GDR's constitution and for a number of reasons the situation at international law is not as clear cut as some of the West German lawyers would have it.

The constitution of 1974 stated in its article 32 that the citizens of the GDR were to have freedom of movement within the borders of the GDR *and* within the limits prescribed by law. Section 213 of the GDR's criminal code thus fitted quite easily into the framework set up by article 32. The courts therefore could not rely upon the constitution for support.

One the other hand, the much-cited CSCE Charter of Helsinki does not have any legally binding effect on the signatories. The other treaty which is adduced, article 12 subsection 3 of the International Pact on Political and Citizens' Rights of 1966 expressely makes the exception that every state was perfectly entitled to determine freely any matter relating to the security of its borders. This could therefore clearly be used and was in fact used by the GDR's international and criminal lawyers to justify statutes like section 213. It is difficult to prove to a normal soldier that he had a clear mens rea on such an unclear legal background.

Furthermore, as you may have thought yourselves, what is the exact shape and content of natural law (Bohlander, op. cit.)? Which philosophy of law is to be the binding one? We cannot have such nebulous concepts as the basis of punishment in a secular and democratic society. I personally believe that there is something like natural law — but then this is my own ideology or faith that I must not bring into the decision-making process when pronouncing sentence on a defendant.

Appealing as the concept of a kind of natural law may be, the consequences of its application are impossible to gauge. You may either use it to establish the criminal liability of a person by simply overriding the written laws at a given time which is what is happening to the border guards and the judges. Or you may employ it in order to justify a person's behaviour.

In one case of the second kind counsel for the defence actually tried to argue that acts of trespass and criminal damage committed during the riots on the 17th of June 1953 were justified by natural law. On that day a revolt against the government of the GDR took place in the major cities of the GDR, and was eventually crushed by military force. Counsel presented the opinion that a superpositive or natural right to resistance could be adduced in order to justify his client's behaviour, who had unlawfully entered the party building in his town and allegedly destroyed or damaged objects belonging to the Socialist United Party.

Bearing in mind that the 17th June was a national holiday, indeed called the "Day of Unity", in West Germany until the date of the reunification this argument seems difficult if not impossible to rebut for a West German lawyer without becoming politically embarrassed. Yet we decided that we could not accept such a theory because it ultimately meant taking the first step on the road to anarchy. This is hard and difficult to understand for the respective appellants, but the price we would have to pay otherwise is simply too high — that is if you do not subscribe to anarchy as a desirable form of ideology. It might seem a typically postitivist German approach to the problem, but cases like the one just mentioned show quite strikingly the difference between philosophical theory and legal practice. Somebody has said that the legal nature of a revolution is determined by its outcome: if it is successful, it will be considered from the viewpoint of the constitutional law — if it is not, then the criminal law will state the consequences (See Zippelius, Allgemeine Staatslehre, 10th ed., 1988, p. 141). This down-to-earth approach should always be kept in mind when reflecting upon concepts like the right to resistance, which, by the way, is part of the Basic Law in article 20 subsection 4 (quite a number of German constitutional lawyers, however, consider this provision meaningless for the above reason).

4. But let us turn now to another issue, that is the screening and selection of the judges and prosecutors who had already held office in the GDR, for their past conduct and involvement with the State Security Police.

The GDR in its last days had set up so-called selection committees to deal with the question of which lawyers could be taken over into the new legal order. These committees were first staffed by delegates from the *Volkskammer*, that is the GDR parliament, and, after the unification, by delegates from the district councils and East German judges who had been cleared before.

The committees are usually chaired by a West German lawyer, who has, however, no right to vote. The committee receives a proposal by the Ministry of Justice setting out the applicant's personal and professional history and a recommendation as to whether he or she is suitable to be taken over as judge or prosecutor. The committee, however, is not bound by this recommendation, nor is the minister bound by a positive vote of the committee. There is a binding effect only in cases where the committee refuses the application — then the minister must not appoint the applicant.

These committees suffer from the history of the political parties in the GDR and their West German counterparts, as well as from the narrow-mindedness of some of their chairmen. As I have said, they are staffed by delegates from East Germany. These delegates are of course almost all members of the political parties represented in the local or state governments. In Thüringen, where I work, the parties currently in power are the Christian Democratic Union (CDU) i. e. the Conservatives, and the Liberal Democrats (FPD), who have formed a coalition. Both parties — of GDR origin — have merged with their West German pendants and now each form a united German party. But under the GDR's rule, these parties where so-called "Blockflöten", a term which is difficult to translate, as the literal translation "recorder" does not bring out the pun in the name.

The CDU and the Liberals were so-called block parties, because they were part of a group or "block" of political parties beside the Socialist United Party, the SED. This block was conservative or liberal only by name. In fact, they were socialists as much as the SED. But people very often chose to become members of one of the block parties, some because they considered them a lesser evil, some because it was easier to make a career in them. The reason for this was their relatively small membership, and thus it was far easier for a member to become a functionary soon than in the mass organisation of the SED. This fact is forgotten regularly when politicians of the respective parties consider their past involvement with the GDR regime. What happened in those parties is seldom mentioned nowadays and the officials try to protect their newly

acquired members and functionaries from the East against too close scrutiny.

Given this explanation you will easily see the problems arising in the selection committeees. One of my colleagues has told me of a case where a former district party secretary of one of the block parties who is now a member of one of the selection committees criticised a GDR judge for his harsh sentencing practice under the former regime in one of the committees sessions. That same delegate had, however, complained about the too lenient sentencing of the same judge when he was still district party secretary. That the judge in our case will hardly have felt justly treated is fairly obvious. There is the general feeling amongst my colleagues and large parts of the population that the prosecution of state criminality is done according to the old saying "It's always the big fish that get away".

The same objection is sometimes heard in connection with the border guards under indictment for shooting at fleeing GDR citizens. They are sentenced because it was their finger on the trigger, while their superiors who gave the orders to shoot are acquitted on the questionable grounds that they did not have the final control over how the soldiers put those orders into practice.

I sometimes think that two different measures are applied with respect to how the West Germans go about clearing up the legal and ethical difficulties left behind by East Germany and Eastern Europe in general. We all remember the overwhelming reaction of the Western hemisphere to the policy of "perestroika" and "glasnost" initiated by Mikhail Gorbachev. There was a time when expressions like "Gorbimania" dominated the headlines of every newspaper and TV programme in Germany. Gorbachev was *the* political leader of the time, sometimes even more popular than George Bush or Ronald Reagan, the presidents of one of West Germany's main allies. But although everybody knew that Gorbachev had been a highranking KGB officer before he became party secretary, nobody ever really seems to have thought about the implications of that fact. How many more and worse crimes could Gorbachev have committed as a KGB officer than a lowly judge at a Kreisgericht could ever have done. — Can anybody believe that he could get to the top of the party without following its doctrines and enforcing them on political dissidents? — Yet no one of the political leadership has ever held that against him publicly. If he was to apply for a janitor's post in one of the buildings of the social security administration in Germany, he would not have the ghost of a chance to get employment because of his past. But the difference is, to put it bluntly, that he gets the movie offers, whereas a

54-year-old East German judge is dismissed into unemployment and left to the feeling that everything he has done in his professional life was worth nothing.

I may sound somewhat polemic but it is very difficult to keep to the official line of unrelenting punishment of the GDR's state and party criminals when you see the actual and personal day-to-day problems of your colleagues which you have got to know — as obvious and naive as it may sound — as human beings with human weaknesses. And above all there is always the question lurking in the back of your mind: What would *you* have done under the same circumstances? The separation of the questionable ethical blame from the alleged legal accusation is very hard to justify. Does it in the end all come down to a matter of raison d'état? Retribution is meted out because the wrath of the people demands that it be done?

One of my East German colleagues put it as follows:

"It is not the power of argument that rules, but the argument of power."

By now the selections are almost finished and about half of the applicants have been successful so far. Now this phase of accounting is over, we hope to be able to get to the more pressing problems of the future.

5. The last topic I want to talk about is the problem of the application of the criminal law in the five new Länder. The treaty of unification orders the courts to apply GDR law for offences committed until the date of unification, and after that date the FRG law is applicable. That is the principle — however, if the law of the FRG is more lenient than the GDR's, the former must be applied.

Determining which law is the more lenient one is often a difficult exercise. The Federal Court of Appeal, the *Bundesgerichtshof*, has held that there must be no mixture of the two criminal codes, so we always have to declinate the entire case under GDR-law and then under our own to see which one is more favourable to the defendant.

But what do you do when there is a continued offence that was started before the unification and finished after the 3rd of October 1990? Under German criminal law a continued offence committed with uniform mens rea counts as one offence, not several. In the first case in which I was involved we came on this problem and we solved it thus that we made the following decision: If an offence was begun before, but finished after the unification, the law of the FRG applies to all of the acts of the offence, even if 99 per cent of

them were committed under the GDR's rule. This is a decision which applies section 2 III of the FRG's criminal code, but the legal reasoning to justify its application took us some time. Section 2 III states that if the threatened punishment for an offence is changed during the time in which the offence is committed, the latter law must be applied. This of course originally only applied to West German laws. It was not applicable to laws of foreign countries, which the GDR in fact was, leaving aside the special attitude of West German constitutional theory. So we had to find a provision which prevented the following absurdity from happening:

A defendant had continually molested and raped a girl under the age of fourteen at least six times, starting in summer 1990 until November 1990. If the relevant provision of the Unification Treaty had been applied literally, he could have been convicted only of the acts after the 3rd October 1990, because that provision only speaks of acts or offences committed *before* the unification date. According to that section he would have been punished without any doubt if he had committed only the acts before the unification date. It cannot logically or legally be sound reasoning that if he commits more acts of a continued offence after the unification date, that the whole offence or at least those parts of it committed before would go unpunished.

We therefore construed article 315 of the Treaty, which is the provision in question, as covering also the single acts of a continued offence under GDR law, which anyway is only a fictitious combination of actually and really distinct acts to one offence for reasons of making prosecutions easier.

Another feature in the change of the criminal justice system is the development of the crime rate in East Germany after the unification. As under the socialist regime a high crime rate was ideologically not desirable and impossible in theory, the statistics must be viewed with some caution. Nevertheless it may be stated that there has been quite a dramatic rise in offences against property and violent crimes like bank robberies, for example. In our district the rate of sexual offences, mostly rape and sexual child abuse, has increased considerably, too. What the reasons are is hard to find out, certainly the relatively liberal new society will have played some part in causing this increase, allowing pent up emotions and tensions to erupt. But there is also a kind of "crime tourism" from the West: Especially in cases of bank robberies there has been quite a high proportion of West German offenders. For example, in the first six months of 1991, there had been 39 bank robberies in the

south of Thüringen — 38 of them were committed by West Germans.

There are many more things which would merit attention, like the problem of two different abortion laws and the issue of homosexuality, which had been depenalised in the GDR in 1990. But they cannot form part of a report on the experiences I have made as a West German and as a judge in East Germany. Still I hope that at least some of the main issues of the legal situation have been brought out with sufficient clarity.

The conditions in the administration of justice are far from normal, leave alone perfect , in East Germany. Yet I am happy to have the opportunity of being a part of the great process of change.