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German Unification: Expectations and Outcomes

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The constitutional framework of German unification – the simultaneity of enabling and constraining conditions

The fall of the Berlin wall on 9 November 1989 marks a truly secular break in modern history. It was the first step in a series of events which entailed a profound redrawing of the global political map. Arguably, the dissolution of the Soviet Union in December 1991 was the single most important consequence of the fall of the wall. It ended the cold war between the then two super powers and their allies which had dominated politics, economics and cultural discourses of more than four decades after the end of World War II. With the end of Soviet rule, the dissolution of the European empires ended in principle. The world of nation states, based upon the principle of sovereign equality as it had been designed by the UN was now completed, with the new states emerging from the dissolution of the Soviet Union and Yugoslavia included. Thus, an originally European political construct, the “Westphalian System,” was finally established in the post-imperial area and legitimized by the United Nations.

In this context German unification seems to be the most “natural” event of pure and simple normalization of a situation of the division of a nation which had lasted more than forty years and which had been felt by many as perverted and pathological. Obviously this feeling had been widespread among the Germans at least in 1949 when the two German states – the Federal Republic of Germany [FRG] and the German Democratic Republic [GDR] – were established. Both constitutions, the Basic Law of the FRG and the constitution of the GDR, presupposed more or less explicitly the continued
existence of the German Nation as one political entity. Hence, German unification was always regarded and termed as re-unification. However, in the decades after 1949 this sense of belonging to one political nation faded gradually away especially among the younger generation; it was more and more supplanted by the perception of Germany as a cultural nation, divided into two states. This was certainly the case in the FRG, but I have the impression that this observation holds also largely true at least for the younger generation of the GDR. For instance, in the Monday demonstrations which on its heyday, on October 23, 1989 amassed several hundreds of thousands of protesters in the streets of Leipzig, the dominating slogan was “We are the people”, demanding democracy from the ruling communist elite, rather than “We are one people”, demanding national unification. The largest mass manifestation, which took place in East Berlin on November 4th, 1989 with more than half a million participants and which has been regarded by many participants (as well as by observers) as the turning point in the overthrow of the regime, called for the realization of two articles of the GDR constitution: the freedoms of speech and of assembly. They desired the same amount of freedom which the citizens of Western democracies enjoyed; actually, they wanted to become a variety of a Western democracy. At that time national unification was not on the top of their agenda.

However this may be, in other respects the project of German unification was by no means a political matter of course in the months after the fall of the wall. After all, formally Germany consisted of two independent states both of which had become members of the UN in September 1973; independent statehood and widespread international recognition as such constitute important institutional facts in the world of politics and of international law. Moreover, at the end of the eighties the development of the European Economic Community began to spill over into the field of politics, and the first signs of
Europeanization tended to relativize the importance of national unification. Last, but not least, the continuing common responsibility of the four Allies of World War II for Germany as a whole reminded the Germans of the truism that their national unification was not a domestic matter of the Germans alone, but an international affair which was of utmost concern in particular of their European neighbours. As is generally known, German unification was only possible because the two German states unambiguously declared in the Treaty on the Final Settlement with Respect to Germany of September 12, 1990 (the so-called Two Plus Four Agreement) that “The united Germany has no territorial claims whatsoever against other states and shall not assert any in the future” (Article 1 para. 3).

True, in some other respects German unification was only a further case of a general pattern, namely the pattern of transition from an authoritarian communist regime to a system of liberal democracy cum market economy which pertained to the East and Central European states formerly under Soviet domination. Thus, for forty years the GDR had been a member of the Council for Mutual Economic Assistance, the Comecon; it had shared the fate of the Soviet satellite states of economic neglect and mismanagement which had produced utterly underdeveloped and inefficient economies in all these states. In this respect the GDR is well comparable with the other post-soviet countries. However, on balance the GDR’s transition from communism to liberal democracy remains a special and unique case because it entailed the vanishing of this state through the merger with another state, the Federal Republic of Germany. [The opposite case has been the dissolution of Czechoslovakia into two separate independent states] Obviously the German case meant a clash of very different economic, political, legal, in part also cultural, and mental patterns within one state. It is this particularity of transition which renders German unification a special case worth studying. In
what follows, I have selected three aspects:

First, the institutional paradigm of unification – has German unification been founded upon a new social contract between the people of the two states or has it been based upon the shared sense of common belonging to the German nation? Obviously this question pertains to the relationship between the nation and the constitution as two different modes of political integration.

Secondly, I will discuss the tension, alleged or real, between the Basic Law’s simultaneous commitment to supra-national integration and to the German nation state.

Thirdly and finally, I will deal with the thorny issue of "transitional justice" as one of the most haunting problems of all post-communist societies.

I. The institutional paradigm of unification

As we know, from a purely technical point of view there was no need to create a new constitution for the united Germany because the political leaders of the post-communist GDR had decided to join the Federal Republic by accession and, as a consequence, to have the Basic Law extended over what had been the GDR. This option was offered by the then Article 23 of the Basic Law which defined the territorial scope of the Basic Law and stipulated that it had to be put into force “in other parts of Germany on their accession”. Thus, for many problems which the other post-communist transition countries had to solve on their own and from scratch, ready-made patterns of solutions were provided by the proved and tested legal order of the Federal Republic. However, the availability of a successful constitution per se did not provide the answer to the question of how to adapt the basic parameters of the order of the GDR to the requirements of the Basic Law. Even more importantly, the desire of the majority of the populace of the GDR to accede to the Federal Republic was not a guarantee that their mental state was attuned to the implicit values and assumptions of the Basic Law and to the mental
state of those who had lived under it for forty years. Empirical research suggests that democratic constitutions tend to be the more stable the more their "authority pattern is congruent with the other authority patterns of the society of which [they are] a part". Of course, in free societies one will never find a congruence in the strict sense of identity of public and societal authority patterns; what is required is "a pattern of graduated resemblances" which allows mutual responsiveness between the formal authority patterns of state and of civil society within a country. It was doubtful whether such a resemblance between the institutional solidifications and mental formations of the GDR and the structural requirements of the Basic Law in fact could exist. For it could be expected that forty years of communist rule (not to mention the impact of the preceding twelve years of Nazism) had left mental traces in terms of world views, expectations, habits and attitudes which were discordant with essential premises of the Basic Law. After all, also the West Germans had needed two decades before they were able to fully internalize the innovative force of the Basic Law. In one word, the implantation of a ready-made constitution into a society which lacks experience in its operation, corresponding institutions and responsive value orientations, was probably a more difficult project than the challenge imposed on the other East and Central European states which had to manage the transition of a non-democratic into a democratic society solely with the help of their own resources.

Let me briefly explain the implications of the – at a first glance so easy – GDR’s path of transition through merger with the other German state.

The accession of the GDR to the FRG was formally a unilateral act of the ‘Volkskammer’ (parliament) of the GDR. Neither the government nor the people of the Federal Republic were allowed to participate in this decision, much less to reject the accession. However, it was admissible and in fact necessary that the terms of

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the GDR’s accession be specified in a mutual agreement of the two governments which was codified in the Unification Treaty of August 31, 1990 (two months before unification). Concerning the bargaining power of the two sides this treaty was clearly asymmetrical as the desire of the GDR to unite with the Federal Republic was unconditional. The situation was paradoxical: whereas the West Germans had no say in the decision of the East Germans that they wanted to form a common state with the West Germans, the East Germans had no say in the determination of the conditions under which they would live together with the West Germans, and after the implementation of their decision their state would fade away, whilst the Federal Republic would continue to exist. Once the Easterners declared their accession to the Federal Republic, the quasi-self-operating extension of the Basic Law over their country would be the immediate consequence. This constitutional construction did not look very much like the foundation of a new common polity by way of the fusion of the two partners into a new polity.

This constitutional construction of the unification is not a mere technicality of constitutional law; it is of great political significance. It implies the unification of two states, not necessarily the formation of one political nation. The former – the unification of two states – requires the smooth technical operation of the institutions of public authority, the latter – the formation of one political nation – envisions the fruition of a shared understanding of why people want to live together in a common polity. It was this latter path to unification which the framers of the Basic Law had in mind in 1949 when they stipulated in its final article – Article 146 – that the Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force. Given the expectation of the framers that a united German nation state would soon be reestablished, the transitory constitution of a transitory state – the Federal Republic – lost its raison d’être once the whole German people was able to re-constitute itself as one polity. Against their hopes and expectations this condition materialized only forty years
later.

Unsurprisingly, the conditions which the framers had envisioned when they devised Article 146 had fundamentally changed until 1989. Now, more than one generation later, the constituent power of the German people which Article 146 presupposed as a matter of course comprised individuals who had been brought up and socialized in two very different social orders. Hence, despite the unequivocal will of the great majority of the GDR-Germans to unite with the FRG it was far from clear whether the peoples of the two German semi-states shared the same ideas about the character and the objectives of their forthcoming common polity. On this view Article 146 could turn out as an ambiguous legacy of the founding men and women of the Basic Law. For Article 146 authorized the constituent power to put an end to the Basic Law and to replace it with a completely new constitution without being bound by any preceding procedural or substantive rules. After the East Germans had overthrown the communist regime and opted for unification with West Germany, obviously the situation had eventuated which the framers of the Basic Law had envisioned in 1949 and which endowed the whole German people with its original constituent power to create a new polity. But, as I observed, it surfaced with a delay of more than one generation, and this might have corroded the underlying premise of a persistent common understanding of how the united nation of the Germans should look like in its political setup. The stakes were high at least for the West Germans. After all, essential constitutional and extra-constitutional achievements of the West German state, particularly its integration into the inter- and supranational organizations of the West, could have been withdrawn by the constituent power of the whole German people.

Given the desperate desire of the vast majority of East Germans to accept the West German model of society almost unconditionally, this potentiality seemed to be a purely theoretical concern. Still, these concerns did exist in some West German circles, and they played a role in the strategy to discard the path to unification
predetermined by Article 146 and to opt for the alternative of Article 23 which allowed a mere unilateral accession of the GDR to the Basic Law. These concerns may not have been fully futile. For it could not be totally excluded that, once the constituent power of the people was released, the process could assume a dynamic resulting in highly unpredictable outcomes. New alliances and societal coalitions between FRG people and GDR people could produce new majorities with respect to some important constitutional issues and hence create constitutional facts which might diverge considerably from those embodied in the Basic Law. We can find examples when we look at the constitution which was drafted by a subcommittee of the Round Table and sanctioned by the Round Table shortly before its dissolution end of March 1990. As you know, the Round Table consisted of representatives of the old regime and of the different organizations and initiatives of the citizens’ movement and hence can be regarded as the political representation of the GDR in the period between the beginning of December 1989 and the formation of the first democratically elected government at the beginning of April 1990. Although the Volkskammer - the parliament of the GDR elected on March 18, 1990 – refused to discuss this draft constitution because the deputies feared that a new constitution for the GDR could become an instrument for the continuation of the GDR as an independent state, its content may well give hints about what the GDR people might have considered as necessary elements of a common constitution. For instance, the draft constitution of the Round Table contained a list of economic and social rights (such as the rights to an appropriate lodging, to labor, and to education), a tough public control over the natural resources, and a system of state financing of political parties which differed considerably from the system of the FRG.

The details are no longer important, as obviously the political elites of the two German states dismissed the option of invoking the constituent power of the German people as a whole and chose instead the alternative offered by Article 23. This quasi-administrative solution promised a more even process of unification than
the political path since it clearly enhanced its rapidness. Given the risk that the window of opportunity which had been opened in November 1989 could close at any time in view of the uncertain situation in the Soviet Union, there were good reasons for this choice. On the other hand it must not be forgotten that a revolutionary process triggered in Germany at another 9th of November, namely November 9, 1918, entailed the election of a constituent National Assembly and the enactment of a new constitution no later than in the following August of 1919. In other words, this process required less time than the seemingly smooth process of German unification seventy years later. However, it is idle to speculate how a similar method of re-constitution of the German nation might have looked like in 1989 and 1990. Still, it must not be ignored that a price had to be paid for the non-utilization of Article 146. I will turn to this point shortly.

The choice of Art. 23 as the path to unification had the implication that only few amendments of the Basic Law were considered necessary and in fact enacted as a consequence of the accession of the GDR. Rather, the law of the GDR had to be adjusted to the normative requirements of the Basic Law. As to the Basic Law, a new Article 143 was inserted which in its para. 1 established a time period of 27 months for the adjustment of law of the former GDR to the requirements of the Basic Law. A prominent issue was the abortion law of the GDR which diverged from that of the FRG in that it permitted the free choice of the woman to perform an abortion in the first three months of pregnancy. This interim period of two different abortion regimes in Germany lasted until June 1993 when the more restrictive regime determined by the rules of the Basic Law became binding in the whole country.

Another implication of the path of Article 23 is worth mentioning, although it is less tangible. It has to do with the price which had to be paid for the smooth path to unification. Since the Germans in the East and the West lacked the experience of a joint venture to discuss with each other, to listen to each other, to argue and to
compromise with each other and finally to establish a shared constitutional fundament for their future common polity feelings of mutual misunderstanding, distrust, and cultural alienation have played a considerable role in the last twenty years of the united Germany. In some parts of the population both in the East and the West these feelings persist and may even transferred into the next generation. The desire to rely upon the common national heritage in terms of our common language and culture which prevailed on both sides could not fully overcome the persistence of the different mental imprints which forty years of division and of the experience of quite disparate social orders had created and which might have been reduced in the common experience to generate a political union among them.

II. The Basic Law's simultaneous commitment to supra-national integration and to the German nation state

As mentioned, the Basic Law was supposed to be the temporary constitution of an incomplete and transitory state -- that is why it was called 'Basic Law' rather than 'Constitution'. Its life-span was expected to be short: no more than a few years until unification came about with the Eastern parts of the country then controlled by the Soviet Union and its German communist affiliates. This was the main reason why the founders refrained from two elements that they themselves actually thought necessary for a full-fledged constitution and which therefore they put off for the definitive constitution of a re-united Germany. First, they eschewed the design of a basic structure of the social and economic order (as laid down in all 'Laender' (state) constitutions which were created after 1945 and prior to the Basic Law) and, second, they made no effort to sanction the Basic Law by a plebiscite.

After forty years of West Germany's continual progress to becoming a major economic power, a viable democratic society, and a respected member of the international community of nations, almost everybody inside and outside West Germany was convinced that time had made permanent the once self-proclaimed
temporary and transitory character of the state and its Basic Law. Though the official state goal of re-unification was never abandoned – not least due to the jurisprudence of the Federal Constitutional Court which insisted that the other state organs stuck to this constitutional objective – there emerged a more or less tacit understanding that the Federal Republic was a full-fledged state with a full-fledged constitution that did not deserve any longer to be regarded and treated as a transitional phenomenon. This development was corroborated by another constitutional commitment of the Basic Law which seemed to point into a direction opposite to the objective of national unification. In was laid down in Article 24 para. 1 and stipulated that “the Federation may by legislation transfer sovereign powers to international organizations”. Note that according to traditional constitutional and state law the transfer of sovereign powers of a state always required an explicit authorization through constitutional amendment – in the case of Article 24 no more than a mere statute was required which could be enacted with simple parliamentarian majority. By lowering the constitutional hurdles of a transfer of sovereignty the framers of the Basic Law intended to emphasize the seriousness of the Federal Republic's openness to the international community and its commitment to new forms of international cooperation.

In fact, Article 24 Basic Law became the constitutional fundament of West Germany’s integration into the European Communities in the fifties of the previous century. There was an obvious tension between the goal of national unity and the goal of international integration which became a key matter of political conflict in West German politics in the 1950s. During those years chancellor Adenauer pushed towards West Germany’s integration in the West, including NATO, against the vigorous resistance of considerable parts of the population, represented politically by the Social Democratic Party. The Social Democrats presumed that international integration would necessarily endanger or definitively frustrate national reunification. Even after the Social Democrats had finally come to accept West Germany's
international integration into Nato, the EEC and other European supranational institutions, it was still widely held that national unification and international integration were ultimately incompatible under the given circumstances of the cold war. Nobody could imagine that the Soviet Union would ever be prepared to permit unification without demanding in return that a united Germany abandon its integration into the different Western inter- and supranational organizations. It is not by accident that the West European allies of the Federal Republic were much less enthusiastic about German unifications than most of the Germans themselves.

While it appeared that in the fifties the majority of West Germans were still ready to pay a price of this sort for their national unity, it became evident in the seventies that such a majority no longer existed. The generation born after World War II in particular could hardly imagine that there could be a potential tension which would force them to a painful choice in a “moment of decision”. In other words, among the three principal strategic options of West Germany’s politics -- namely, (1) national unification at the expense of international integration into the West; (2) international integration into the West at the expense of national re-unification; and, (3) national unification and at the same time international integration --, only the second seemed realistic and, given the circumstances, also desirable at least for most West Germans of the younger generation. The first alternative was disagreeable on several grounds; it could jeopardize the political and military stability of Europe and, moreover, if pursued, would probably provoke the resistance of the three Western allies. The third alternative seemed ideal for many, but hopelessly unavailable. And yet, in the end, it was just this alternative, which nobody except some political dreamers had anticipated, that materialized and finally resolved the tension between these two main goals of the West German constitution. As you know, the European currency Union introduced by the Maastricht Treaty, signed on February 7, 1992 and entered into force on 1 November 1993, was Germany’s major pledge that it would stick to and develop its integration into the institutional framework of
the West. After all, it entailed the end of the Deutschmark in which many Germans took so much national pride.

It is worth mentioning here that at the beginning of the 1990s a reversal of the political frontlines of the 1950s surfaced in the Federal Republic. Although the majority of the Social Democrats and their candidate Oskar Lafontaine did not flatly oppose German unification, in 1990 they argued for slowing down the process. Such caution was necessary because they unequivocally gave priority to West Germany's roots in and commitments to the West European inter- and supranational organizations. Given Chancellor Kohl's and the CDU's credibility in their fidelity to Germany's integration in the West and Kohl's simultaneous successful push towards unification, the Social Democrats' position, asserting that these two claims were incompatible or that there was at least a serious tension between them, appeared a bit outdated to many German voters. Consequently the SPD lost the first all-German elections in December 1990 by a wide margin.

All this sounds very much like a happy end. However, the story is not yet over. Given the huge economic burdens which Germany, and most prominently the West German economy, had and still have to shoulder in order to establish "legal and economic unity, especially uniform living conditions" in the united country (see Article 72 para. 2 Basic Law) many Western governments, the EEC, and the international economic community at large were concerned that Germany might shift both its economic resources and its political attention to the reconstruction of its eastern states. They feared that Germany might become more unable and more reluctant to further the process of economic and political integration of (Western) Europe. Chancellor Kohl did not fully realize this problem, or, when he realized it, he minimized it. He contended that neither West German taxpayers nor the EEC would suffer from his drive to immediate German unification. It may be the case that national unification could only be achieved because political leaders simply neglected its economic implications. Given the more than twelve billion
Deutschmarks which had to be paid to the Soviet Union in order to buy the approval of its leaders, and given the more than hundred billions which had to be transferred in order to create approximately equal economic and social conditions in the old and the new 'Laender', it is not surprising to observe that the German economy has been under considerable stress in the last twenty years. Unsurprisingly, the red-green government which came to power in 1998, was the first German post-war government which, albeit moderately, played the card of economic patriotism vis-à-vis the European Union. And it is not by accident that the only German party represented in the Bundestag which rejects the Lisbon Treaty is Die Linke, basically the renamed GDR regime party SED which is deeply rooted in the new Laender. Ironically, its president is Oskar Lafontaine who left the SPD shortly after the red-green government under Schröder took office and joined (and reshaped) the Linke.

III. The issue of transitional justice

The fusion of East Germany with West Germany did not mean that the problems which burden a society in transition from communist rule to a regime of liberal democracy were, as it were, absorbed in the new German state. They were as difficult and the solutions were as contested as they were in the other post-communist countries of East and Central Europe. The transition from authoritarian regimes to liberal democracies (as they have occurred in Latin America and Latin Europe after 1974 and in Central East Europe and elsewhere - Korea, South Africa - after 1989) pose not just, after the rupture, the "forward-looking" problems of creating a new political order and promoting its consolidation. They also pose the "backward-looking" problem of "transitional justice". I define transitional justice "as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes"². Transitional justice provides criteria for answers to the question of how to deal with the persons, events, and rights violations that occurred under the old

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regime whose political, military, administrative, academic etc. elites are still around. These answers range from attempts to "draw a thick line" through amnesty and amnesia to practices known as "memoralization", criminal prosecution of perpetrators, administrative purges (vetting, "lustration"), restitution, compensation and rehabilitation of victims, ban of organizations and media, confiscation of property, apologies, and acts of "political" and "administrative" (as opposed to "legal") justice.

The East Germans shared and share these problems with the other post-communist societies of East and Central Europe, but they enjoy the unique advantage of not having to solve them all by themselves. However, some of these problems may have been aggravated rather than mitigated by the fact that overcoming the heritage of communist rule has to be managed within the framework of national unification under the aegis of the Basic Law. This applies particularly to the issue of the privatization of a vast amount of state property which I will address first. After that I will briefly turn to the field of reparations, restitution, and compensation for regime injustices which caused damages in of a more immaterial kind.

The privatization of state-owned property, both real estate and businesses, presents one of the most serious difficulties in all post-communist countries. The problem is not only one of developing adequate procedures for the transfer of huge assets to private owners and to prevent wild privatizations through large-scale theft of the old regime elites. An even more difficult problem is the protection of the legal acquirers of property against claims from former owners or, to put the problem the other way round, to satisfy the claims of former owners without deterring potential investors.

The Unity Treaty made the important distinction between expropriations that had been conducted between 1945 and 1949, i.e. before the existence of the GDR and hence under the auspices of the Soviet Union, and expropriations under the aegis of the GDR. The former were declared irreparable in the Unification Treaty. During the unification negotiations, the irreversibility of those expropriations was one of the
essentials urged by the Prime Minister of the GDR, strongly supported by the Soviet Union. Interestingly, the Joint Declaration of the two German governments concerning the Regulation of Open Property Questions, states that the Soviet Union and the GDR see no possibility of revising the measures taken between 1945 and 1949, while the Federal government limited itself to the statement that "it takes note of this result in light of the historical development". The immunity of this category of expropriations from restitutions is now protected by an amendment which incorporates their irreversibility into the constitution (Article 143 para. 3). In April 1991, the Federal Constitutional Court acknowledged this amendment as constitutional; but the Court insisted that within this framework some kind of compensation has to be provided. In 1995 the Bundestag enacted a law which fulfilled this requirement and regulated the details of a compensation for the victims of the expropriations under the auspices of the Soviet Union. Until our days it is a matter of dispute whether in fact the irreversibility of those expropriations was a strict and non-negotiable condition of German unification. Still, the German Federal Constitutional Court has repeatedly confirmed its opinion that Article 143 para 3 – i.e., the irreversibility of the expropriations between 1945 and 1949 – does not violate the essential principles of the Basic Law as codified in Article 79 paragraph 3. Although this is now definitively res judicata, the political conflict over this issue persists; the affected persons have a quite strong lobby.

In contrast, expropriations by the formerly sovereign authorities of the GDR must be undone. Attachment III to the Unification Treaty, a Joint Declaration of the governments of the FRG and the GRD of June 15, 1990 established the principle that restitution of property to the former owners or their heirs had priority over

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6 See the detailed account of the arguments pro and con in BVerfGE 94, 12 [34 et seq.].
compensation. Only if a return of the former property is not possible -- e.g. if the property has been assigned to public functions or dissolved into larger business units -- compensation had to be paid instead of restitution. After unification huge numbers of restitution claims were filed, especially with respect to real estate, and most of them came from the citizens of the former Federal Republic. Obviously this created uncertainty and delayed urgently needed investment. Several laws were enacted which aimed at mitigating this situation, but the burden of proof for the potential investor remained rather heavy. Together with other circumstances this contributed to quite low rate of investment in the new Länder.

The underlying constitutional problem in this area resides in the imperfect connection between the economic function of property and justice. The economic function of private property does not necessarily coincide with those principles of justice embedded in the principle of restitution. In a dynamic capitalist economy property is best allocated to those who will make the most efficient use of it in the future, that is, to those who invest. In contrast, the principle of restitution is devoted to the goal of justice; property is assigned to those who deserve it because they or their families suffered injustice in the past. If the rectification of past injustice enjoys priority over the principle of allocation to potential investors, economic efficiency is likely to be severely restricted. It is one of the characteristics of all the East and Central European revolutions that they aimed simultaneously to achieve justice and to introduce a market economy. Now they must deal with the reality that the implementation of both principles simultaneously is not possible. Again, what at a first glance seemed to be a particular advantage enjoyed by the East Germans in comparison with the other post-communist countries -- namely their accession to the Federal Republic and their incorporation into an established economic, legal, and political order -- may have made their problems even more difficult. The East Germans did not have the possibility of arriving at a pragmatic solution to the problem of restitution, because those who would be hurt by pragmatism -- West
Germans -- were able to force the Easterners to adhere to those constitutional standards that embody a rigorous and conventional concept of property.

In retrospection, in the field of transitional justice the protection of property was clearly the predominant element. This becomes manifest if we compare the politics of property restitutions with the compensations afforded to the victims of injustice who did not lose property but rather immaterial goods like freedom, health, the opportunity for a higher education or a professional career according to their talents and skills. Article 17 of the Unification Treaty promised the legal regulation of the rehabilitation of those individuals who under the communist regime had become victims of arbitrary court decisions. This was a rather restrictive concept of rehabilitation, because victimization was not carried out primarily by the courts but by administrative institutions or by state-owned enterprises. After unification the Bundestag took that into account and enacted laws which grant compensation also for victims of serious acts contrary to rule of law committed by administrative agencies, in cases like, for instance, forced evacuation out of the border area, or the refusal of appropriate and available medical treatment\(^7\). The Employment Rehabilitation Act established the right to compensation for those former residents of the GDR who had suffered serious discrimination and disadvantages in their professional career, such as prohibition to attend a university or to continue a career in the field of vocational and professional specialization. In both cases the amount of compensation has remained quite modest, including the amount of the rights to old age pension which the Employment Rehabilitation Act affords.

IV. Concluding remark

German unification has been a uniquely huge social experiment. In contrast to scientific experiments, its effects cannot be confined to a laboratory. The transition from an authoritarian political regime and its concomitant command economy to a liberal democracy and a market economy is as unprecedented as the short-term

\(^7\) VerwaltungsrehabilitierungsG [Administrative Rehabilitation Act] of June 23, 1994
integration of two extremely different societies -- one liberal-capitalist, one authori-
tarian-socialist -- into one nation state. There is no constitutional pattern for either of
these processes, much less so for the management of both simultaneously. Of
course, in a way every historical situation is unparalleled, and it would be naive to
expect any concrete conjuncture to fit into our traditional, accumulated wisdom.
However, modern societies have developed a method for coping actively with the
unexpected emergence of new experiences: namely the creation of constitutions.
Constitutions symbolize the foundation of a new polity; they contain the founding
generation’s reflection of new social and spiritual experiences; and it is through
constitutions that the distinctiveness of a historical situation is transmitted to
succeeding generations. In this respect, the constitutional aspects of German
unification are somewhat tedious in view of the exciting and inspiring historical
singularity of the events which opened the window for Germany’s unification in the
first place. The procedure of unification was treated with utmost professional-
administrative expertise and competence embodied in a sophisticated treaty
between two states – but nothing in that treaty betrays the joyfulness of millions of
people who for the first time since almost sixty years could proudly say: “We, the
people establish a democratic polity”.