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the FORMER EAST GERMANY, with COMPARISONS to
OTHER FORMER SOCIALIST STATES**

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RESTRUCTURING JUSTICE AND STATE LEGITIMACY IN THE FORMER EAST
GERMANY, WITH COMPARISONS TO OTHER FORMER SOCIALIST STATES

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Abstract

Since 1989, the Rechtsstaat (roughly translated as the rule of law) has been introduced into every former socialist state of central and eastern Europe. The Rechtsstaat, understood as a set of norms and institutions; along with democracy, understood as a process and set of *liberal* institutions; is considered necessary to transform former socialist countries into stable nation-states of the West European/American type. This research describes and analyzes the introduction and institutionalization of the Rechtsstaat in the former German Democratic Republic (GDR) from 1990 to 1994, and makes pointed comparisons with this introduction in the Czech Republic, Poland, Hungary, and Russia. It proceeds ethnographically, focusing primarily on the effects of this introduction in three unrelated fields of conflict: governmental criminality, privatization and restitution of property, and rehabilitation and vindication. Finally, it attempts to draw from the empirical cases examined some theoretical conclusions about the process of re-establishing legitimacy and authority in the post-Cold War order.

The author argues that the "rule of law," which originated in the specific historical circumstances of the nineteenth century as a way to discipline a growing state authority in the interests of those who were subject to it, is being asked to address a different set of problems in each of the countries examined. Its significance in the transition from "socialism" varies by country and domain of justice. The author concludes that the rule of law is particularly important to protect the interests of a relatively affluent middle class, but that this middle class is at best just emerging in all those countries. He argues that in these changing circumstances, more attention should be paid to the cultural and historical particularities of power structures, of the kinds of social groups emerging, and of the range of interests considered expressible and of those already expressed. It is his opinion that the role of the judicial system and the "rule of law" in legitimating these new states will continue to vary in significance and that its stable institutionalization will take decades.

RESTRUCTURING JUSTICE AND STATE LEGITIMACY
IN THE FORMER EAST GERMANY, WITH COMPARISONS
TO OTHER FORMER SOCIALIST STATES

JOHN BORNEMAN

I. The Former GDR

1. Statement of Problem

For the last two centuries, the *Rechtsstaat* stands in a relation to German social order much as, for Freudian theory in the last century, the phallus stands in relation to human desire. The *Rechtsstaat* entails a form of constitutional authority with a Constitutional Court. Its authority rests on a fixed standard: it is part of a system of authority which measures truth or ascribes value but itself stands above or apart from all measure. Since the end of the Cold War and the collapse of socialist states in Central-Eastern Europe, there has been a massive acceleration in the dissolution of systems of authority, both in the East and the West. There is, however, one interconnected ideology and institution that has maintained its hegemony, its claim to privileged form as a universal equivalent, and, since 1989, has either replaced or has been considered essential to transform former socialist regimes: that is, the *Rechtsstaat* (roughly translated as the rule of law) and democracy. Indeed, with missionary zeal, legal authorities, politicians, and political scientists have pursued two goals in every former socialist state: to install the *Rechtsstaat* (as a set of norms and institutions) and to democratize (as a process and set of *liberal* institutions). These experts, some of whom are indigenous to the countries being transformed and others who are from Western Europe and the United States, have acted much like economic development gurus, assuming both the under- or un-developed nature of democracy and legality in these states and the ability to transform former socialist countries into nation-states of the West European/American ilk. The assumption motivating their work has been that only the *Rechtsstaat* and democracy can stabilize and legitimate the political systems of the post-socialist states. Many, though not all, of these experts also assume that this transformation is necessary for the continued stability of the Western European/American states.

This research describes and analyzes the introduction and institutionalization of the *Rechtsstaat* in the former German Democratic Republic (GDR) from 1990 to 1994. It examines the relationship of the *Rechtsstaat*, and, to the extent possible in this short report, democracy, to state legitimacy during this "period of transition," as it is frequently called, and it makes some pointed comparisons of this relationship with that in other East-Central European states.

It proceeds ethnographically, focusing more on the effects and results of this introduction than on the virtuosi who are introducing the new order. It takes as empirical base case studies of three unrelated fields of conflict where Rechtsstaatlichkeit is being ceremonially performed: governmental criminality, privatization and restitution of property, and rehabilitation and vindication. Finally, it attempts to draw from the empirical cases examined some theoretical conclusions about the process of re-establishing legitimacy and authority in the post-Cold War order.

2. The Rechtsstaat and Democracy in Germany, 1949-1990

Because of the universally ascribed illegality of the Nazi regime, establishing "just rule" and "democracy" were perhaps the central preconditions to legitimacy in both the domestic politics and foreign affairs of the two postwar German states. During the Cold War both German states contested each other's definitions of "just rule" in a fight whose stakes were everyday acceptance by the citizens of the legitimacy of rule as well as international recognition of this rule by other states. While the FRG appealed to the bourgeois-liberal principles of Rechtsstaatlichkeit and parliamentary democracy, the GDR distanced itself from these principles, instead appealing to, in Walter Ulbricht's words, "the sense of actual justice and deep humanity" of its social order, whose legality was not in service of the Rechtsstaat but of "socialist relations of production" and a "socialist society" (cited in Müller 1992: 282).

The FRG initially stressed the formal aspects of the Rechtsstaat, but it quickly incorporated substantive norms (embodied in what is colloquially called "the welfare state") into the legal system and the Constitution. The GDR, on the other hand, building on the radical reforms carried out by the Soviet Union under the mandate of the Potsdam Accords of 1944, stressed the substantive aspects of the Rechtsstaat, or, in other words, issues of substantive justice. Accordingly, GDR legal experts eventually rewrote the civil and criminal codes inherited from the Wilhelmene and Nazi states, which were then submitted to popular (and usually contrived) referendums. Throughout the 1950s and 1960s the FRG refused to recognize the East German regime as a legal state, most often on the grounds that it was not a Rechtsstaat. But a warming trend in German-German relations accompanied the period of international "detente" in the 1970s. By the mid-1980s, mutual contestation began to look more like mutual cooperation and assistance, and most citizens in both states seemed to have made

accommodations with their regimes.¹ As part of this mutual recognition phase, GDR State and Party Chairman Erich Honecker flew to Bonn to meet FRG Chancellor Helmut Kohl in September 1987, the first-ever meeting between the heads of the two postwar states on West German soil. The meeting did not entail full diplomatic recognition of the GDR by the FRG, but at the time it was taken to signify an implicit acceptance of the legality of the East German state.

After the opening of the Wall in November 1989, and continuing through formal state unification a year later, the question of the Rechtsstaatlichkeit of the GDR, and its reformability, became a central issue of debate. Often the question was posed so that the GDR was either a Rechtsstaat or an Unrechtsstaat, with no consideration of an alternative classification. If the latter, then it was comparable to the Nazi regime, in which case the entire East German social order of the last forty years would be delegitimated and, much as the Western Allied occupation after WWII was necessary for West Germany, now a form of West German oversight or occupation of the GDR would be called for. It may help to clarify what is at stake here by comparing the history of the German concept of the Rechtsstaat with the English concept of rule of law. All of the former socialist states in East-Central Europe have adopted the principles of the German Rechtsstaat model.

The German concept of the Rechtsstaat differs fundamentally in its historical-political semantics from the English concept of "rule of law." Both concepts were initially political in nature, intricately tied to processes of democratization, and only later (in Germany not until the 19th century) did the concept gain legal content. In Germany the Rechtsstaat originated as a norm to discipline the absolutist authority of the state. Under the doctrine of the absolutist state, the "state" was not constrained by law, nor checked by the people, but considered "außerrechtlich." The Rechtsstaat was conceived as a solution to this unchecked power of the sovereign state, the solution being a new absolutism: the omnipotence of (statute) law guaranteed by a rigid, written constitution (Verfassung). By contrast, the rule of law in England is guaranteed not by a constitution (there is none) but by the Parliament, whose

¹The GDR's domestic and international success in the mid-1980s was severely tested, initially only domestically, by Gorbachev's rise to power in the Soviet Union. For Gorbachev's reforms emboldened a small group of critics in the GDR, who then were arrested, jailed, and either temporarily sent into exile or denied citizenship. A Soviet Union that no longer maintained its legitimacy through Cold War confrontational tactics was greeted by some of the other East bloc countries, who used this climate to claim more sovereignty for themselves. The opposite was true for the GDR, whose leaders saw their sovereignty dependent on a continuation of the Cold War's bi-polar model. Internationally, the GDR reached the apogee of its legitimacy in 1987 when Honecker was greeted as a "head of state" by Chancellor Kohl in West Germany.

function has been to protect the rights of those whom it represents. Thus parliamentary sovereignty, fusing both individual and political freedom, is the highest directing normative principle. This check on the power of the King (or the executive branch) did not imply, however, that the King or officials of his administration could be sued, whereas the Rechtsstaat idea implied that even the executive organs were subject to the constitution (or what is now the Verfassungsgericht, constitutional court).

In the evolution of the Rechtsstaat concept, especially in reaction to the collapse of the Weimar Republic (1918-1933) and the perversions of the National Socialist regime (1933-1945), the Federal Republic was set up as a constitutional order (in Art 20(1), read with Art 28(2) of the Grundgesetz or Constitution of 1949) that is (1) a democratic state; (2) a Rechtsstaat, and (3) a welfare state. Perceived weaknesses and abuses of a merely formal understanding of the Rechtsstaat were supplemented by material (or substantive) aspects, often referred to as *Grundsätze*, higher judicial norms, to prevent the formal framework of legality from being turned against the Western humanitarian tradition or proper ethical norms, as was the case with the Nazis. Finally, the distinction between the Rechtsstaat and political form (e.g., monarchy, democracy) has been maintained, the Rechtsstaat being an unchanging, perfect order while political form remains variable and imperfect. In sum, the English rule of law fuses individual and political freedom in the practice of representation of the people in *a parliament that is sovereign*. By contrast, the Rechtsstaat, while considering the liberal democratic state and its representatives (the political) central to the constitutional order of the FRG, separates the political from the Rechtsstaat itself, and in a sense situates the political below or beneath the Rechtsstaat, since *the Constitution itself is the sovereign*.

In the historical context of the impending unification of the two German states, the issue of the Rechtsstaatlichkeit of the GDR became a heated issue. Unification occurred through Article 23 of the Constitution instead of Article 146, which would have required steady negotiation followed by citizen ratification and would have resulted in an incremental fusing, Article 23 required a negotiated treaty, a single parliamentary vote, and quick accession into the FRG. Thus, after 3 October 1990, the West German Rechtsstaat and liberal democracy became the single referent and arbiter of value for both East and West. And according to the principles of Rechtsstaatlichkeit (again, unlike the "rule of law"), members of the former ruling Politburo along with other state officials were not considered above the law but were to be prosecuted by the new Rechtsstaat itself acting as the sovereign, to protect the people from abuses of executive and legislative power and bring about justice. This protection and search for justice was not the province of the parliament, but the Ministry of Justice, which soon

created and was prosecuting in a domain of crime called *Regierungskriminalität*, governmental criminality. Two other conflict areas on which this project focuses, also became important and reveal other aspects of the functioning of the Rechtsstaat: compensation for injustice suffered under GDR rule and disputes about privatization and the return or restitution of expropriated property.

While scholars are not agreed on the desiderata that would define the Rechtsstaat, some of its essential characteristics include: (1) separation of powers within a state, in particular, the separation of the executive from the judicial branch, (2) the principle of legality (formelles Gesetz), implying that a) the people's representatives adopt the law, b) statutes find general application, c) the legislature itself is bound by the legislation, (3) sovereignty of (statute) law, (4) the prohibition of excesses of state authority (Übermaßverbot), or a principle of proportionality, (5) an independent judiciary, (6) state action must be predictable in order to facilitate legal certainty, therefore retroactive legislation is forbidden, (7) the principle of trust in the legal system based on the idea of the Rechtsstaat. When applied to the GDR, it is clear that the socialist state did not meet these formal criteria. For example, its parliament was not sufficiently independent of, or did not adequately check, the executive, and the judicial branch often explicitly functioned as an arm of the executive, in several spectacular cases submitting to political pressure to put on show trials and to impose excessive fines; the state defined itself as a dictatorship of particular class interests (the working class and its allies). The debate about whether the GDR was a Rechtsstaat ultimately had little direct effect on legal prosecutions, since in any case the new state was obligated by the unification treaty to use GDR law (unless FRG law was milder) for pre-unification crimes. This public discussion and dispute over naming did, however, have tremendous polemical and political effects in polarizing the East and West, under the motto, "Everything that the Rechtsstaat (the FRG) does is Recht (legal, correct); everything that the Unrechtsstaat (the GDR) does is Unrecht (illegal, incorrect)."

3. Organizational restructuring of the Rechtsstaat in East Germany

German unification presents an extreme case of the transformation of an "actually existing socialist" state into a Rechtsstaat and a liberal democracy, for, after a transition regime of approximately one year, the GDR acceded into the Federal Republic of Germany on October 3, 1990. Unlike the other socialist states, it was not transformed into a Rechtsstaat and liberal democracy, but in effect formally eliminated and replaced by an alien one, which was further complicated because this new state had continuous historical ties and claims to the territory and people of the GDR. This accession, though democratically agreed upon by the

former GDR parliament and negotiated in a formal unity treaty signed by representatives of the two governments, did not simplify establishing legitimacy for the Rechtsstaat of the Federal Republic. For, in order to avoid the retroactive application of law, the unity treaty itself compelled the FRG to apply different legal registers--e.g., GDR law, Soviet Occupation Law--to specific areas of conflict and crime that were the result of actions prior to October 3, 1990.

Thus, although the Federal Republic has expanded its judicial, administrative, and political organs into the former GDR, its legal norms were not devised to deal with the situation at hand: the absorption into its own corpus of laws of another (socialist) state with its own concepts of legality along with a unity treaty signed between it and this other (now non-existent) state. General agreement on the judicial framework has not directly translated into agreement on the application of laws, for contradictory legal registers and contending interpretations have unavoidably politicized many legal decisions. Therefore, this transition period has been marked by a slow and contradictory "resolution" of conflicts, with much disagreement about the interpretation and jurisdiction of legal norms, and with much confusion about whether justice was at all being served in the application of the law. Experience with the Rechtsstaat has yielded differing opinions about whether its introduction has brought about a more just regime than before; especially, many victims of the GDR's justice system have been disappointed in (and publicly critical of) the performance of the Rechtsstaat. Before describing the application and effects of *Rechtsstaatlichkeit*, I will first offer a brief summary of changes in structure and personnel.

Unification of East and West entailed a redistricting of the GDR according to pre-1949 territorial boundaries. As part of this new political geography, each of the "five new Bundesländer," in official terminology, was advised in bureaucratic and political restructuring by personnel from one of the "old Bundesländer," meaning those in the old Federal Republic. Given the decentralized federal structure of the West German state, new and various patronage relationships between East and West were established which, in turn, produced different policies in each of the new states. Here I will concentrate on East Berlin, which was restructured by West Berlin. Restructuring the judicial system was much more immediate and radical in Berlin than in the other new states, made both possible and necessary due to Berlin's anomalous situation: East Berlin was too near geographically to West German personnel to make practical an incremental transformation of the East or fusion of the two systems.

On the day of political unity, October 3, 1990, all courts and state judicial organs in East Berlin were closed, unlike in the rest of the former GDR, where a process of evaluation and

firings, dismissals, and closures first began on this date.² By the end of 1992 committees to review judges (Richterausschüsse) had evaluated over 160,000 individual decisions of judges throughout the former GDR. Let me review the process for Berlin alone. From October 3, 1990 through February 23, 1993, 347 judges and state prosecutors were appointed, with only 43, or 12%, coming from the East. (In the rest of the former GDR, approximately 50% of personnel were retained.) Of these 43 new appointees, 73% were women, reflecting both the high percentage of women in the East and a proactive policy by the West Berlin Ministry of Justice to be sensitive to gender as a criterion of selection. In West Berlin, fewer than 20% of the judges are women, though the West Berlin Minister of Justice at that time, Professor Jutta Limbach, is a woman. By mid-1993, 13 people from the East were working as judges in civil courts, none in criminal courts. In the legal staff (Amtsanwaltschaft) of the Berlin Ministry of Justice, 32.7% of the new appointees have come from the East, most of whom will soon become permanent civil servants (Beamten) In addition, another 300 legal personnel work in commercial divisions of the Ministry.

Since unification, the West German Rechtsstaat has had to cope with many unanticipated problems. Judicial personnel have been acting under added pressures due to (1) a shortage of qualified personnel, (2) a rationalization of the justice system that has meant working within a smaller budget, (3) an expansion of the categories of "criminality" to new kinds of acts, and (4) increases in the incidence of a number of old categories of criminality. For example, the number of state prosecutors has increased ten-fold to address a growth in organized criminality. Activism by rightwing organizations along with racist or xenophobic-motivated attacks has meant a shifting of judicial attention -- meaning a reallocation of personnel, not an increase in absolute number (Jutta Limbach, "Justizpolitik in Berlin nach der Einheit," Berliner Anwaltsblatt, Heft 4, 1993, pp. 97-102). Moreover, there are currently 6000 prosecutions underway of former judges and state prosecutors by the Ministry of Justice in Berlin ("DDR Rechtsbeugung: "Wir ermitteln weiter," Der Tagesspiegel (December 15, 1993), p. 10).

²The criteria used for this evaluation varied from province to province. Membership in the former Communist Party (SED) was not used, since approximately 80% of all judges and state prosecutors were party members. In all provinces, individuals were dismissed if they had worked for the Staatssicherheitsdienst (East Germany's secret police), though less than 10% were found to have been active. Among other criteria applied were conformance with norms of legality or not having given penalties in excess of those called on by the law.

4. Governmental Criminality (Regierungskriminalität)

In the immediate months preceding the opening of the Wall, most citizen dissatisfaction in the GDR revolved around lack of freedom to travel, an aging and out-of-touch leadership, a collapsing infrastructure, shortages in consumer goods, and over-regulation of public life. One heard more frequently demands for a "better socialism" than for more justice. Certainly demands for the Rechtsstaat were not foremost among the criticisms voiced by the most active opponents of the regime. Their arguments supplemented but were not opposed to the discourse of the East German state, which claimed legitimacy because of the security its welfare state offered: it was a more just society than the FRG, with a more just distribution of land, goods, and opportunities. If the citizen rights movements in the East cohered around any particular demand, it was a call for more citizen participation in and democratization of governmental organs, in other words, for more sovereignty of the people--and not for Rechtsstaatlichkeit, the principle of the sovereignty of the constitution.

Within days of the collapse of the "old regime" the themes of democracy (understood not primarily in terms of free elections but as more citizen participation) and justice, or perceived injustice, became a public obsession. Initially, most public attention was motivated by a sense of having been wronged and a desire for rectification, if not for revenge, directed toward what has since become known as crimes of the regime (Regierungskriminalität). East German media, freed from years of state censorship, used its freedoms to engage in first-class investigative reporting. Above all, they revealed suspected criminal activities of former leaders and the state security (Stasi). The GDR's criminal justice system also quickly became involved in rehabilitation, declaring invalid certain sentences passed in the preceding forty years, often restoring the good name of people who, in pursuit of justice had been instead convicted of violating East German law.

Additionally, the West Berlin justice system was immediately besieged with relatives of individuals who had been shot at the German-German border. These people demanded prosecution of the East German border guards and other officials responsible for shooting people who had been "fleeing the republic," a crime under East German law. On the West German side of the border, former property owners and prospective ones immediately began organizing to recover their property, now in the hands of either East Germans or the GDR. The difficulties encountered in gathering evidence, in investigating and assessing the responsibilities of the political elite, and the confusion in GDR property relations highlighted both the limitations of the competence of the "Rechtsstaat" in dealing with crimes committed outside its territorial jurisdiction, along with its inability to acknowledge alternative property

forms, but also these difficulties made apparent the nature and weaknesses of the legal system in the GDR.

After formal unification, both the Federal prosecutors and the West Berlin Ministry of Justice began adumbrating the domain of *Regierungskriminalität*. Most of the investigation and prosecution fell to the Ministry in West Berlin, led by Jutta Limbach (who in September 1994 was appointed head of the Constitutional Court). The Ministry proceeded to go to court in four highly publicized criminal areas, which were all taken up nearly at the same time, but, due to the difficulties of organizing evidence, were not simultaneously prosecuted: (1) violence at the Wall (including the trials of border guards, the military and politicians, members of the National Defense Board [including politburo leaders Honecker, Mielke, Tisch, etc.]), (2) election fraud; (3) economic crime and illegal methods of the State Security [Stasi] (primarily prosecuting the GDR's number one middle-man A. Schalck-Golodkowski; (4) criminality perpetrated by the GDR's justice system, including that of former judges.

The function of these prosecutions was not only, or perhaps not primarily, to secure convictions nor to penalize the guilty, but rather, as Professor Limbach stated in an interview I conducted with her in 1994, for "an educational function (*Aufklärungsfunktion*), a symbolic function, a stigmatizing function." Indeed, in most of these criminal areas, the obstacles for the prosecution were formidable, first, in proving that single individuals were responsible for the crimes, and second, in not violating the sixth principle of the *Rechtsstaat*, outlined above, that strictly forbids retroactivity (accusation of a crime that wasn't a illegal at the time of the deed). Therefore, in the prosecution of the border guards, the fourth principle of the *Rechtsstaat*, also outlined above, the prohibition of excesses of state authority (*Übermaßverbot*) or a principle of proportionality, was used to convict the guards of *excessive* violence at the Wall. The state prosecutor has initiated 40 processes against guards and their officers. Of the 18 completed cases, only two guards have received suspended sentences and were freed on probation. Trials against the members of the military or heads of the border guard troops who ordered the shooting have stalled (though investigations continue) because of difficulty in finding direct evidence linking the death of someone at the border, or of other actual illegal deeds, to an order by a superior.

In the trial for "inciting to instigate the falsification of the election results" of March 1989 in the GDR, of Wolfgang Berghofer and Hans Modrow, two of the GDR's most progressive reform politicians, both men were convicted but set free on probation. One of their defenses, that the GDR's election was not an "election in the sense of the law" (meaning West German law, Art 103Abs.2 Grundgesetz), was rejected on appeal by the *Bundesgerichtshof*. In the court's judgment, GDR law had been applied correctly, as prescribed by the unity treaty.

and the appropriate West German law on election fraud (which had milder penalties than the GDR law and therefore was used for sentencing) was comparable because in many domains of the two legal systems there was "minimal agreement on essential components." However, the trial did highlight the difficulty of the Rechtsstaat in maintaining its own principles under the circumstances of unification, primarily its difficulty with the ban on applying retroactive legislation and its necessary violation of the principle of trust and continuity in the legal system. This trial was less important in that it secured convictions of the defendants than in its symbolic effects—emphasizing the way in which the Rechtsstaat and its independent norms are a necessary protection for democracy, and prioritizing the link between democracy and free elections.

Prosecution of former GDR judges has resulted in several convictions (with cases still being tried). This contrasts with the lack of a single prosecution of a Nazi judge by the West German authorities after World War II. Finally, prosecution of economic crimes has been hampered by several conditions, including that many of these kinds of illegal transactions occur in West Germany also, that economic crimes are extremely difficult to research and prove, and that in many cases most of the profit from these transactions went to the government itself and not into private hands. For example, the man who became the key symbol of this area of criminality, Schalck-Golodkowski, still has not been arrested. In the words of Professor Limbach, who has been under great pressure to arrest Schalck-Golodkowski: "Propping up the economy of a dictatorship is not a criminal act."

The prosecution of Regierungskriminalität often united people in East and West around issues of corruption and abuse of power. It addressed a justifiable desire for retribution and revenge. Contrariwise, the issue of returning property to former owners was extremely contentious and tended to divide, or make transparent, already existing divisions between East and West German interests. The principle at stake in property fights was not retribution but the (re)establishment of a legitimate hierarchy. Yet, both conflicts over property and over prosecution of the political elite share in common a concern with using legality and the justice system to obtain justice. Both issues prioritize past concerns or conditions over present ones, explicitly basing demands for justice on perceived past harm independent of present conditions.

5. Privatization and Restitution of Property

In the case of restitution of private property, the principle applied in the GDR differed from that in all other former socialist countries. In the former GDR, *Rückgabe vor Entschädigung*, return before compensation, was the principle decided upon, whereas

indemnification was favored over return of property in all the other former socialist states. This principle, by stressing the legitimacy of the old social hierarchy (favoring former property owners) over the effects of the GDR's redistribution (which favored new property owners and non-private forms of property), reversed the tenets of just rule that were written into GDR law; it reaffirmed the legality and legitimacy of pre-war hierarchies, favoring owners over users and old owners over new ones. In addition, the dissolution of East Germany removed legal restraints on private profit. Former nomenklatura quickly reestablished networks, often with the help of West German colleagues and now protected by West German law, to maintain and extend the privileges they had enjoyed under the former system of rule.

However, in practice three major exceptions to this principle were established: (1) As stated in the Unity Treaty, the owners whose property was expropriated by the Soviet Union during occupation from 1945-1949 would not receive their property back. This exception had been understood and accepted as a condition made by Soviet authorities to obtain their agreement to allow unification. In fact, this justification was part of the reasoning used by the Constitutional Court in 1991 when it ruled that Soviet expropriations from 1945-1949 were legal, and that the unequal treatment of this group of expropriated property owners was justified in the name of a higher good (for the purposes of unification). However, in September 1994, first Mikhail Gorbachev and then Helmut Kohl claimed that they never discussed the issue, that this had never been a condition of the U.S.S.R. Apparently, it was dealt with directly only at lower levels of authority, in negotiations between the Soviets and GDR authorities, and then between GDR and FRG negotiators. In any case, this exception still holds, though it continues to be fought in court by potential heirs to former large landholders in the East. (2) If, during the life of the GDR, the property had been acquired in good faith, the new owner could retain the property. (3) If, in the course of privatization, a new bidder on the property proposes a better investment plan (e.g., to meet investment targets, modernize, protect jobs) than the old owner, the old owner will be compensated rather than receive his/her property back.

There have been disputes involving some 40% of all property in the former GDR. Of this 40%, 10% were already regulated by the Unity Treaty and thus not contestable. This "open" category includes 200,000 apartment houses, 12,000 companies, 70,000 commercial buildings, along with agricultural cooperatives, communal land and real estate, the property of political parties, tens of thousands of dachas (country homes), and other personal items. After unification, a Treuhandanstalt (parapublic trust) was charged with privatizing East German state- or party-owned enterprises, which also meant making up lists of what these companies were, breaking them up into smaller, economically viable units, etc. The controversial work of

the Treuhand was more or less completed by September 1994. Of the approximately 14,000 companies to privatize, only 130 (less than 1%) remained as of that date to sell.

In my own research I have followed one case, of Henschel Verlag, a small publishing house for drama. Henschel has a very complicated history, and my analysis is not yet complete. The company was initially established and owned by a wealthy Jewish man with Communist ideology who was expropriated during the Third Reich, received the company back after 1949, but then gave the company to the GDR in the 1950s. In March of 1990, it broke off from its parent company, which had been property of the SED, the ruling communist party, and then reorganized itself as a private Autorenverlag, author's publishing house, into the same property form as a West German publishing house.

The Treuhand suspected the motives of Henschel Verlag, as it had been attached to the SED, and thus for the first two years of its existence as a private company, the Treuhand blocked its ability to control its own operations. This resulted in a court case, which Henschel eventually "won." The Treuhand insisted, among other things, that the company had not adequately transformed itself into a private business because (a) it had changed the property form but personnel remained the same, (b) the property remained improperly connected to its parent company, which, as Volkseigentum (either state or party owned), now belonged to the Treuhand. The two year period in which the company was not allowed to establish itself on the new pan-German market put it at a severe disadvantage with respect to other publishers. It barely survived, and has had to cut its employees by a third.

This case illustrates some aspects of the relation of the Rechtsstaat to property forms. Although the Rechtsstaat allows many different forms of ownership, in its initial introduction into eastern Germany it destroyed most already-existing forms of property, trying instead to re-create them within its own system of images, even preferring a single form among the many that it officially tolerates. Yet, Henschel Verlag ultimately prevailed in its survival due to its ability to persist in the courts, which have consistently interpreted the law in ways that do not disadvantage former GDR citizens and companies.

It would be too lengthy to go into other decisions of the courts in property cases, but on the whole, in disputes about restitution the courts have been sensitive to different interests, including those of GDR property users who had no title, and no single generalization can be made to account for the various outcomes of property disputes.

6. Vindication, Rehabilitation

The third area of justice examined involves the work of a commission of vindication. It is unlike the other two areas of restructuring in that it has operated independent of powerful interest groups and, until April 1994, outside state legality. The deliberations of the commission are not adversarial, but take the form of an open but limited inquiry into the nature of the harm, the plausibility and veracity of the claims, and the possibility to procure remedies. The primary need expressed in the work of these commissions is for the restoration of a lost dignity, for social recognition of past injustices suffered in the workplace—not primarily for property, status, retribution, or other claims that the legal system has felt compelled to address.. The unification treaty obligated the parliament to pass a law regulating the work of these commissions, but the parliamentary committees of the federal government responsible for this law initially could not agree on a proposal, claiming (unofficially) that the costs of addressing past injustices would be too high. My research seems to indicate that when victim groups are either not backed by powerful lobbies, or do not cohere around material harm or demands for monetary damages, the legal and political systems have a difficult time addressing the demands for justice.

Since 1990, I have been following the work of the commission of vindication of the television and radio, the last existing such commission in the GDR. It is primarily concerned with Berufsschaden, damage suffered during employment in this firm. To date, approximately 100 people have come before the commission, and approximately 75 have been vindicated. Vindication means, in most cases, a document issued by the commission stating that this person was harmed through a particular violation of GDR law. The commission then proposes a remedy for this harm, most often that pensions be adjusted for periods of lost employment, but also that the harmed individuals be given priority in employment elsewhere, or also that the legal system has an obligation to address this harm. If the first two of these remedies are proposed, the commission itself tries to procure the remedy.

In September 1993, I, together with my German partners, Michael Weck and Ilona Stolpe, sent a questionnaire to each person who has gone before the commission. Herr Grollnitz, the head of the commission, had provided us with the addresses of all those who had appealed for vindication. By the end of 1993, we received responses from 23 of the 100 persons contacted, and these responses indicated a wide range of reactions to the work of the commission and to the Rechtsstaat. Also, since the parliament only recently passed the bill defining the legal competence of findings of the commission and addressing the remedies

available to those who had been harmed in ways not involving property or material claims, the resolution of some of these cases will undoubtedly change.

However, the work of the vindication commission highlights another dimension of the Rechtsstaat when contrasted with the other two domains examined. "Governmental criminality" displays the Rechtsstaat's attempt to define the legal limits of state-sponsored action, the point at which the state itself becomes criminal. In other words, is the Rechtsstaat needed to function as a sovereign to protect the people from governmental abuses of power? By placing criminality in the center of government itself, the West German Rechtsstaat justifies the conceptualization of the Rechtsstaat as a protector of the people from abuses by the executive or the parliament, or by a justice system that does not adhere to the principles of Rechtsstaatlichkeit.

"Privatization" and restitution display the Rechtsstaat's relation to property form and reveals its prolific protections for victim categories based solely on material wealth. By contrast, vindication/rehabilitation concerns attempts by victims to redress harms suffered under the GDR regime that are not primarily material- or property-based. It presents an altogether different picture of the relation of justice to legality and state legitimacy because in this domain neither retribution/protection from (as in Regierungskriminalität) nor hierarchy (as in property fights) were the major principles at stake. Instead, the work of the Rehabilitierungskommission revolves around the restoration of the dignity of the person, independent of the social position or material wealth of the harmed individual. In this sense, it is closer to the domain of "human rights" than "national rights," and reveals something about the priorities and the limited competency of the Rechtsstaat.

7. The Problem of Legitimacy

The problems addressed in this research are intended partly to correct work by political and legal theorists, as well as by philosophers, who deal with normative concepts like the idea of the Rechtsstaat and democracy without looking at their concrete empirical effects. The Rechtsstaat and democracy are neither self-regulative behaviors, nor in themselves practices, nor are they to be mistaken for fundamental human rights; they are norms that originated in specific historical circumstances to discipline a growing state authority in the interests of those who were subject to it, particularly the interests of a relatively affluent middle class. In other places where these norms and institutions are introduced, the historical circumstances and problems are unlikely to be the same as in, for example, 19th century Europe. The differences may in fact be so great--especially the absence of a middle class along with the creation of a

large underclass--that these norms will prove inadequate as solutions to the problems they are intended to correct. That they may prove inadequate does not, however, indicate their uselessness or even non-necessity. In changed circumstances, more attention should be paid to the cultural and historical particularities of power structures, of the kinds of social groups emerging, and of the range of interests considered expressible and of those already expressed.

It is my opinion that long-term legitimation of any form of political authority will require some form of Rechtsstaatlichkeit and democracy, but that this form will vary and its stable institutionalization will take decades. This research also addresses empirically a fundamental disagreement among philosophers as to the theoretical meaning of the relation of the Rechtsstaat to state legitimation. For example, Jürgen Habermas (1988: 277) argues that the Rechtsstaat "draws its legitimacy from a rationality of legislative and judicial procedures guaranteeing impartiality." In this definition, he argues for a constitutional order "in which a moment of indisponibility and a structure removed from the grips of contingency can be secured for positive law" (1988: 278). This claim is much like his attempt to define Germans as *Verfassungspatrioten*, patriots to the Constitution, instead of as a cultural group, or as ethno-national patriots or state patriots. His argument is first, too abstract to matter, as it does not consider people's actual and unavoidable loyalties to their lived cultural and historical reality; second, it is not cognizant of the conditions and conflicts under which East Germans (and citizens in other former Warsaw bloc countries) are now asked to work under the norms of the Rechtsstaat, conditions which often entail a decline in living standard accompanied by homelessness, joblessness, and poverty. Loyalty to a constitution, however admirable and rational, can not therefore realistically be expected to be the measure of a group identity, though, on the other hand, it may be a useful part of that identity. By contrast, Jacques Derrida (1992: 10) maintains that the law "cannot become justice legitimately ... except by withholding force or rather by appealing to force from its first moment." In this statement, he foregrounds the moment of violence (e.g., expropriations, dis-entitlements) that accompanies the introduction of the Rechtsstaat. As I hope to have shown, both arguments have their place.

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II. COMPARISON OF THE CZECH REPUBLIC, POLAND, HUNGARY, RUSSIA

1. Reorganization of justice; disqualification/prosecution of former governmental officials; the place of the Constitutional Court, and the principle of the Rechtsstaat or rule of law in the post socialist state

THE CZECH REPUBLIC

The present state in the Czech Republic represents perhaps the most radical break, with the exception of the now dissolved GDR, with the former socialist state, marked by a change in personnel and structure in November 1989, and then a divorce from the Slovak part of the state January 1, 1993. From 1989 to 1993, the judicial system suffered a general delegitimation so that judges today speak of a common attitude of disrespect and insolence in this period. This disrespect was expressed toward judges in both criminal and civil courts, even though the latter had nothing to do with enforcing illegalities or disciplinary measures of the former state. Under the pressure of an increased case load and this general loss of authority, one female judge even committed suicide. The fear and danger of a collapse of the judicial system therefore influenced the review of judges, and later state prosecutors. One response to stabilize the judiciary was to raise wages by two or three fold in order to compensate some for the disparity with the private sector, where lawyers after 1989 were earning 100 percent more than before. Because of this pay differential, many judges also voluntarily moved into private practice, making it impossible to ascertain accurately who left for political and who for commercial reasons. Moreover, since judges were initially reelected and not reappointed, some judges chose not to seek reelection rather than be subject of review. Thus the effect of the official review and disqualification policy is impossible to determine when applied to individual cases.

The committee that reviewed judges was composed of a majority of people who had been outside the state, including several individuals who had been unjustly imprisoned. In his opening State Of The Nation speech in 1990, Vaclav Havel stressed the fact that all citizens were complicitous in the regime, and therefore a kind of collective guilt was assumed. If all judges were guilty, so goes the extension of this logic, then perhaps the system was at fault--and it became difficult to single out particular individuals as more responsible than others. Some members of the review committee wanted to disqualify all judges, but the committee finally agreed to approve 90 percent of those on the list. However, in 1993 the Vaclav Klaus government, which replaced the first post-socialist government, approved a majority of those judges dismissed under the first review, so that today most former judges who desire to can,

and are, again active. A full Constitutional Court first began meeting this year, and it has not yet played a significant role in the transition. Rather, political conflict has centered around the separation of the Czech state from Slovakia along with the shape of the executive branch and the division of powers between regional and federal administrations.

After June 1992, state prosecutors were subject to a review similar to that of judges. However, after 1989, the structure and powers of the state prosecutors had been substantially changed so that the abuses under the former system were thought no longer possible under the new structure. After the review some prosecutors were disqualified, meaning demoted and given positions of lesser authority. None have been fired. Several are being prosecuted on various charges of illegality (e.g., drunkenness, breach of state security, money laundering).

A "screening law" or "lustration act" was passed by Parliament in October 1991 intending to disqualify former members of the state security from working in state agencies. This law differed substantially than the initial draft, and was not supported by many members of government, including President Havel. As in all of the former socialist states, individuals in the private sector are largely or wholly unaffected by this review. If the Ministry of Interior determined someone had been an agent of the state security (with no differentiation made as to degree of complicity), that person was immediately to be removed from his or her position of authority and relegated to a lesser position. This law could potentially apply to up to a million persons. Approximately five hundred of the demotions resulting from evaluations by the Ministry have been appealed. This lustration act itself was appealed to the governing body of the International Labour Office in Geneva, which recommended substantial revisions, especially a strengthening of due process guarantees, and it was reviewed by the Czech constitutional court, which also amended the law. In addition, a special Parliamentary committee was set up in 1990 to investigate the crimes of the state security. These investigations have resulted in fewer than ten prosecutions, with no convictions.

POLAND

The present states in Poland and Hungary are the result of sequential changes of state form, largely realized by reformers within the former ruling socialist part. There was no radical break in 1989 within either country, in neither personnel nor institutions. However, in Poland, two major reforms in the early 1980s set in motion the possibility for realizing the more radical reforms proposed by the Roundtable discussions after 1989: the establishment of a Supreme Administrative Court in 1980 to engage in judicial review of the legality of legislative acts, and of a Constitutional Court and a Tribunal of State in 1982, the latter to judge on the legality of high-ranking government officials (see below). These courts had very limited and in

a sense merely formal powers. The Constitutional Court, for example, has jurisdiction only over acts after 1982, its decisions are considered not judgments but "opinions," which can be rejected by a two-thirds majority of the large chamber of the Sejm. First in 1989 an Independent Council of Judiciary was set up, elected by judges and representatives of the Ministry of Justice, the Supreme Court, the Bar, and the President of the Republic. In 1991 a clear separation of powers was written into the constitution, though in practice the balance of powers has been volatile, especially between the President and the Sejm. Although the Constitutional Court has been active in reviewing and often ruling unconstitutional decisions of the Sejm, the Sejm itself has been able to vote to overrule these opinions, again limiting the authority of the Court.

After the Roundtable discussions of 1989, a review of state prosecutors occurred, with some dismissals, early retirements, and even prosecutions. No review of judges occurred, however, and therefore no disciplinary procedures have followed, though such a review has been periodically proposed. Some judges have voluntarily retired or left their posts to engage in private practice, but these decisions were sometimes due to the poor pay and not to questions of competency. The reason most often given for resisting a review of judges has been that it would compromise the independence of the judiciary, one of the basic principles of the rule of law.

A Tribunal of State was set up within the parliament in 1982, and became operative in 1985, to investigate suspected criminality of members of the executive branch of government. All cases taken up before 1989 have been either dropped, dismissed for lack of evidence, or the accused has been acquitted. After 1989, the number of cases being investigated increased, and currently two motions to start proceedings against 12 government officials are being considered, with a minimal chance of conviction. All cases to date have dealt with political and not economic crimes. Although no convictions have resulted from the investigations of the Tribunal, several cases are still pending. It should be added here that the different oppositional groups have had difficulty prosecuting members of the former government, or even defining an area of possible governmental illegality, because those former officials initiated the reforms in the political system that enabled the participation of the opposition, and because many former socialists still sit in the government and its ministries.

HUNGARY

1989 marked a formal symbolic break with the socialist state in Hungary, but it was the result of two decades of reform. Moreover, Hungarian scholars tend to argue that except for some singular cases of illegality (such as the 1922 law dispossessing Jews), the period of a fascist government from 1944-45, or the two weeks in the fall of 1956, Hungary has a 1000 year history of constitutional rule. The most important changes resulting from the Roundtable discussion in 1989 were a multiple party system (substantive liberal democracy, with a freely elected Parliament in mid-1990) and a Constitutional Court (which commenced its functions on January 1, 1990) with expanded jurisdiction, including a broad right of judicial review of legislative acts. The Constitutional Court itself has assumed legal continuity with the previous regime. It has also tried to assert a position of moral authority in the post-socialist state, meaning that it has tried to remain apart from partisan political decisions. From this perspective, it has tried to strengthen and not weaken the legitimacy of the other branches of government in their obligation and right to make political decisions, even as it has ruled on the constitutionality of enacted law and thus necessarily limited the power of the other branches.

The post 1989 government has reviewed neither judges nor prosecutors, and there have been no disqualifications in these occupations. However, parliament passed a bill controlling and disqualifying from responsible positions those who had worked with the secret police, and this process of review and disqualification is administered by a three judge panel. This law is currently being reviewed by the Constitutional Court. About half of all those individuals in leading positions in the various ministries of government were initially subject to demotions, with only a few dismissed. However, about half those dismissed have already returned to work in the government.

In contrast to the other former socialist states, the kinds of injuries resulting from arbitrary exercise of political power were relatively rare in Hungary. The attempted revolution in 1956 resulted in some immediate discrimination against the participants, but the Kadar regime sought cooperation from the people, not belief or subordination. This strategy, even though not democratic-participatory, resulted in a legitimate rule. There has been a general *rehabilitation of participants in the 1956 uprising (see below)*, and there are several prosecutions of those involved in its repression. But because of problems with finding evidence and of contradictory testimony by participants who are now relatively old, only soldiers and other low-ranking individuals are being prosecuted; no high-ranking persons from that time are being prosecuted.

The one area of potential criminality prominent in Hungary is that of economic crime, mostly concerning what is called "spontaneous privatization" -- transforming state property into private without proper legal procedures (which in any case were not yet written). Indeed, a special unit of "economic police" has been created within the Hungarian police force to investigate such acts. But the actual or potential illegalities in this area are so widespread that only one person who worked for the privatization agency and who was caught taking a bribe has been successfully prosecuted.

RUSSIA

The Soviet Union began undergoing political, judicial, and economic reform under Gorbachev in the early 1980s, and this reform has continued through the formal break up of the Soviet Union into autonomous republics. Although the Russian federation adopted a constitution in 1993 that included all of the guarantees essential to the rule of law, including protection of basic human rights, the provisions of this constitution have not been observed. Even the Constitutional Court has violated these guarantees in a well-known case where it ruled on an oral decree by the president before the decree had been formally written much less adopted as law. The problem of implementation of constitutional provisions exists at all levels, with continuous and blatant violations by the President, the Duma, regional and local political authorities, and policemen. Moreover, the state has clearly lost its monopoly on the use of violence as well as its control of economic life, and organized extra-legal and criminal groups have stepped into this void, making "crime" and its control the number one political issue. These groups, often called "the Russian Mafia," are disparate and competing networks comprised of highly educated and often skilled former KGB officials, government workers, policemen, and others displaced by the dissolution of the Soviet Union and reorganization of the state. In the absence of a respected legal framework in which local political and economic activity can develop without fear of arbitrary violence, these new groups are creating the parameters of change and order if not often the actual agents. They are providing the minimal amount of security, and often capital, necessary for new businesses to establish themselves. Most businessmen apparently regard the state and its functionaries as the real hindrance to economic development, and not organized crime, since state monopolies (e.g., the post, transportation, energy) are interested in neither profit nor change. At the same time, of course, they are groups functioning outside any sort of democratic control and therefore a potential if not actual amoral and violent force that corrupts the local political process.

The judicial system, and in particular the Constitutional Court that was created in 1993 and has been dissolved for the last year (until the Duma confirms all 19 candidates), has not

been an important factor in the transformations to date, though in its brief period of activity it did enter the political fray. Neither judges nor state prosecutors have been reviewed for past illegalities, and therefore not a single judge or prosecutor has been accused of crime and dismissed. Over 90 percent of all former judges are still serving, with the rest having retired or moved to private business. Judges' pay is relatively low, judicial buildings are dilapidated and neglected in comparison to buildings of the executive or legislative branches. Moreover, in cases where state prosecutors or police have successfully built a case against some criminal activity, it is estimated that 80 percent are released within a day of the arrest. Judges *apparently fear becoming victims of organized crime (although it is journalists that have been murdered)*, and with no tradition of judicial independence, the majority of judges are also not known for their civil courage.

The new Constitutional Court expects to become active again before the beginning of 1995. It has a legal staff of 80, with a total staff, including secretarial, of 150. In the coming term the court has 50 to 60 cases pending, with about half inherited from before enactment of the new constitution. This makes up approximately 10 percent of all petitions received, with 90 percent considered inadmissible because they do not involve constitutional issues. Of the pending cases, approximately 70 percent involve individual complaints that challenge particular laws, approximately 20 percent involve petitions from government bodies asking for interpretation of the constitution and of demarcations between federal, regional, and local authorities, with the remaining 10 percent dealing with a range of other issues. Articles 7 and 13 of the constitution guarantee the autonomy of the Constitutional Court, for example, granting the judges immunity from prosecution. In addition, the material rewards for the judges are generous (e.g., high pay, state-owned apartments, country homes) and police protection is provided to secure the judges from the wrath and violence of individuals or groups against whom they decide.

In the future, it appears that an independent judicial system with moral authority will not be created until a relatively prosperous middle class develops which needs such a system. The current motors of change--e.g., political parties, organized crime--benefit too much from legal disarray to respect or encourage the development of an autonomous judiciary. *In light of the continued volatile antagonism between the executive and the parliament it is likely that the Constitutional Court will constantly be forced to choose sides or that its decisions will be understood as based on partisan politics.* Only when a large group of individuals comprising a relatively stable middle class has a stake in legal security and continuity--regardless of the content of any particular legal or political decision--will the Constitutional Court and the

principles of Rechtsstaatlichkeit, especially a consensual division of powers, achieve respect. The absence of such a consensus will tend to strengthen forces supporting a fascist political form (such as, for example, Milosevich in Serbia) that will eliminate chaos and guarantee order.

2. Rehabilitation of victims of injustice prior to 1989

THE CZECH REPUBLIC

In the Czech Republic rehabilitation for a narrow range of political prisoners and victims of communism (restricted to crimes against the state) was made possible in May/June 1990 through an out-of-court rehabilitation, by Law Number 87/1991, colloquially called Large Restitution. This had the consequence of making it difficult if not impossible to obtain rehabilitation or remedy for non-politically motivated but nonetheless extra-legally perpetrated harms suffered before 1989 (for example, for having committed "crimes" not covered by any particular law). Therefore some people were required to go individually to the courts to obtain remedy, and many are still waiting for decisions. Also, the widespread assumption of a general complicity with the old regime (see above) made it difficult for victims to find a public voice in seeking redress. The Parliament set a monetary remedy for those who suffered imprisonment; others were given certificates of rehabilitation.

POLAND

In Poland, four or five rehabilitation laws have been proposed, but none have passed both chambers of the government--and they are unlikely to be passed in the future. Nearly all of the claims for rehabilitation have to do with injustices from the 1950s, and an extraordinary appeal to the Supreme Court for remedy in such cases is possible. However, this appeal was already available in the 1970s, and therefore the issue has not been at the forefront of political issues after 1989. A special simplified procedure has been available since 1989, whereby individuals can appeal to the Ministry of Justice or the Supreme Court, or they can go directly to the court that initially convicted them.

There has also been no groundswell of support for redressing past harms at a public and/or state level, for harms such as discrimination in education or work, or unjust imprisonment. Most Poles claim that a substantial minority of people could make some sort of claim about injury suffered under the old regime, making the cost of redressing past harms prohibitive. Moreover, it was explained to me that, in contrast to Germany, "resistance" or "civil courage" in Poland is not considered an unusual achievement or behavior that deserves special rewards but an aspect of everyday life. If an individual goes to court to be

rehabilitated, s/he has to establish that the harm suffered was in violation of the law at the time the injury was suffered. The process of establishing in the courts this connection between harm suffered and the law at the time of injury is both costly and time consuming, which discourages the making of claims. Nonetheless, some individuals, supported by public pressure from an association for political prisoners as well as members of human rights groups, have been compensated in individual court decisions for unjust long-term imprisonment. Others have been unable to get any compensation nor have they been rehabilitated, not because present criminal law is inadequate but because of lack of witnesses, weak evidence, or a refusal of individual judges to support interpretations of the law that would recognize the harm.

HUNGARY

In Hungary after 1989 a law concerning compensation for unjust imprisonment or damages due to state policy enabled approximately two to three thousand individuals to receive monetary compensation. All of these claims had to do with damages from the end of WWII through the 1950s, and thus concerned mostly prisoners of war who then were sent to work camps in the Soviet Union, or imprisonment due to political disfavor in Hungary. These two groups of prisoners formed a political lobby (*Union of Political Prisoners*) after 1989, and often members appeared on television. Those who fought in the uprising of 1956 also formed a union, and they have received apartments and pension adjustments. The names of people who had been murdered by the state, its secret service, or Soviet agents, were published in the press. The state rehabilitated in another way, by issuing official letters of apology, signed by the President. Finally, a new oral history institute was founded, whose initial work focused on documenting these particular people's lives.

RUSSIA

Rehabilitation in Russia entails compensating three generations of victims of various forms of political persecution since the 1917 Revolution. Such victims number around 100 million persons and include three generations of individuals, each persecuted under different laws though frequently imprisoned in the same institutions. Members of the first generation were persecuted between 1917 and 1945; of the second between 1945 and 1955 or to the death of Stalin, after which the "first perestroika" began under Khrushchev; of the third from 1955 to 1987, when Gorbachev released two to three hundred prisoners and the media began a public re-examination of Stalin's crimes. Thus, primarily for administrative reasons, rehabilitation has been restricted to individuals who were sent to work or prison camps and to those who were incarcerated in psychological wards.

People in Moscow who want rehabilitation need to apply to a special bureaucratic center, where the state prosecutors, who control the former KGB files, direct their special advisors to research the validity of claims. It takes minimally two to three months, or years if one encounters resistance among officials or if documents are missing, to process such a complaint through the various bureaucracies. Individuals at both the Memorial Society, and the Moscow Research Center for Human Rights stressed that the difficulty in being rehabilitated is due less to the state of the law than to lack of official political support (from someone like Yeltsin, for example) and resistance by bureaucrats and law officers in enforcing or respecting its provisions. Within Russia but outside of Moscow it is reportedly extremely difficult to be rehabilitated and some of the kinds of compensations offered to individuals in Moscow are not generally available elsewhere. Policy regarding rehabilitation in other former Soviet republics (Ukraine, Georgia, Belarus, Khazakhstan) is similar to the Russian federal policy, and former prisoners in these republics maintain contact with those in Moscow. In restoring the dignity of the victim, no compensation law goes so far as to allow prosecution and punishment of the perpetrator

The Russian federation policy calls for the issuing of an identification card that identifies one as a "disabled" person. It offers the following benefits: 1) a one-time compensation for imprisonment at approximately \$10.00/year imprisoned, 2) a 50 percent reduction in rent in a state-owned apartment, 3) free medical care without having to wait, 4) food bonuses on special holidays, 5) priority in the purchase of certain household appliances without having to wait, 6) a yearly state-sponsored health Kur. Additionally, in Moscow individuals are granted free public transportation within the city. Realization of these benefits varies depending on the discretion of the individual or office in charge of administering them. The two human rights groups mentioned above are continuing to push for organization of the different victim groups and for more benefits from the government that are geared to the actual needs and disabilities of victims.

3. Restitution of property

THE CZECH REPUBLIC

In the Czech Republic restitution of property to former owners has been opposed by current Prime Minister Vaclav Klaus as well as by most economists on the grounds that it would result in lengthy court cases and delay investment. Since the Czechoslovak state owned the highest percentage of property among all central-east European states, estimated at over 80 percent of the "productive" sector, changes in property law and ownership would have more

drastic results there than elsewhere. Nonetheless, extensive and radical restitution occurred in 1990 as part of a general so-called Small Restitution, Law No. 403/1990 on Relieving the Consequences of Some Property Injustices. It excluded most industrial assets but included most of the retail traded and service sectors as well as small factories, houses, and plots of land. It was perhaps the most radical restitution of all the former socialist states, with the exception of East Germany. However, the claims were limited to expropriations after February 25, 1948, primarily in order to avoid claims of the Sudetendeutsche to property expropriated immediately after WWII. Those claims would have resulted in a radical retransfer of property, with counterclaims on Poland and Germany by Czech citizens. Claims were also restricted by limiting the time in which they could be filed due to fear that lengthy adjudication would create uncertainty among potential investors. To get property back, people must return to the Czech Republic, have or (re)obtain Czech citizenship, and maintain a stable address. In the cities this return is considered extremely successful in generating a diverse retail trade and service sector. In the country people are skeptical about its success since breaking up agricultural cooperatives in order to return land to aristocrats or other formerly wealthy people has not immediately generated any new economic activity but rather resulted in a decline in agricultural production. Additionally, few former owners of agricultural property have been willing to return to the Czech Republic.

One open question remains whether to return or compensate for property taken from the Church, especially the Catholic Church, following WWII. Since popular opinion is overwhelmingly anti-clerical, such a return is considered politically destabilizing for the new democracy.

POLAND

A Polish restitution and/or compensation bill has not yet been passed, but one limited to compensation is expected soon. Individual cases of restitution have already been decided by the courts, frequently in favor of old property owners, but no overall principle has been enunciated by the courts. Moreover, restitution or compensation of property to former owners has not played a significant role in political debate nor in the transformation of property forms. Privatization of the retail trade and local cooperatives has been effected with minimal legal regulation and therefore less as part of a state liquidation process than as an unregulated process where existing special interests competed against each other in a decentralized fashion to transfer the real estate on which consumer businesses could operate. This privatization is generally recognized as the most successful within Central Europe in creating a market-driven consumer sector. The Ministry of Privatization responsible for liquidating state enterprises is

bureaucratized and cumbersome and will begin carrying out its obligations under a new law that goes into effect only in January 1995. Under this law, no privatization can occur unless workers themselves agree to the terms.

HUNGARY

The state owned approximately 70 percent of all property before 1990. In reviewing the privatization law regarding restitution or return of property to former owners, the Constitutional Court ruled in 1992 that although nationalization of property had been illegal, the policy of reprivatization (return of land to former owners) was not itself a constitutional principle. Thus, it ruled, the state has a moral obligation not to return but to compensate, and not for the original value of the property but for a just price. Moreover, compensation has had a very progressive feature in that those who had less to lose are compensated for a greater percent of their loss than those who owned a great deal of property.

RUSSIA

Privatization in Moscow as elsewhere in Russia has not turned most collective property into private but rather modified the forms of collective ownership. Although the Communist Party is illegal and its property has been "privatized," much of this property was simply given to individuals as gifts from President Yeltsin, or "sold" to powerful local figures or transformed into joint-stock or collective property forms. Nowhere has this privatization involved return or restitution of property to former owners. No law has been passed to encourage or demand return or restitution. People with whom I have spoken have unanimously agreed such a law would have disastrous consequences, for the initial large expropriations followed the Revolution of 1917 and thus lie more than 70 years in the past. A return or restitution to any single group of former owners at this date, it is argued, would open claims not only among three generations of Russians but also between Russian citizens and those in the new republics of the former U.S.S.R. Because the public does not generally support claims for compensation or the return of property, a policy to that effect would destabilize the political and economic situation even more than at present and possibly derail the entire attempt to transform the political and economic system.

