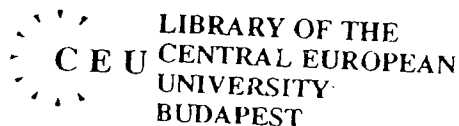


# The Imperfect Union

## CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION

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### Confronting the Past: The Stasi Files

BEHIND MANY important issues of German unification loomed the gigantic and mysterious specter of the enormous files of information amassed over four decades by the GDR Ministry for State Security—the Stasi. With a headquarters complex covering many square blocks in Berlin, and numerous branches throughout the country, the Stasi had approximately 100,000 full-time employees out of a total population of approximately 16 million.<sup>1</sup> In addition, the Stasi enlisted hundreds of thousands of “unofficial collaborators” (*inoffizielle Mitarbeiter* or IMs) drawn in secret from the population of the GDR.<sup>2</sup>

This elaborate system of surveillance permeated the society of the GDR. Indeed, as a well-known East German writer remarked, “Hardly ever in the history of a country has a period been so comprehensively and thoroughly documented as these forty years of the GDR through its secret police.”<sup>3</sup> But the Stasi was not an information-gathering agency alone: it also undertook covert activities against internal critics and other “enemies” of the regime. Indeed, following the Soviet model, the Stasi served generally as “shield and sword of the party.”<sup>4</sup>

The agents of the Stasi recorded their activities in obsessive detail in dossiers that eventually came to occupy approximately 180 kilometers of shelf space in a windowless nine-story concrete building in Berlin, as well as secret locations elsewhere. Of the six million files containing personal data, four million concern citizens of the former GDR, while two million relate to citizens of the old Federal Republic.<sup>5</sup> Because they contained volumes of damaging information, some files were destroyed in the last year of the GDR. Yet, due in large part to the diligence of citizens groups, most Stasi files were preserved from destruction and accompanied the GDR into united Germany, representing an extraordinary storehouse of information as well as a significant problem.

#### THE DEBATE OVER THE STASI FILES

The question of what to do with these files, therefore, became a question of great moment as unification approached in 1990. Most agreed that the files should be available to government agencies for certain criminal investigations and the review of former GDR officials for continued employment. More difficult questions, however, concerned the extent to which the files should be available to ordinary citizens and to researchers and the press.

Vigorous arguments were urged on both sides of this issue. Some maintained that the mistakes that were made at the end of the Nazi period should not be repeated, and therefore information about the nature and activities of the GDR regime should be opened to the broadest scrutiny. Such a program would enhance a historical understanding of the GDR as state and society,<sup>6</sup> it would also allow victims of the Stasi to comprehend the reality of their individual pasts and further a sense of self-understanding and liberation:

The goal is that people who were long oppressed should be able to carry forward the liberation that they dreamed about and struggled for in the streets—through a process of memory and encounter and coming to terms [with the past]. People who were previously oppressed and deprived of autonomy should take possession of their former rulers' knowledge. They should become [active participants in shaping their own understanding] and—in this way—come more to find themselves. They should become more free, for the tasks of tomorrow.<sup>7</sup>

Under this view, destroying the files or keeping them secret would have been equivalent to constructing the new east German society on a kind of lie: the perpetuation of massive deceptions of the past. Opening the files could also hinder former Stasi employees from capitalizing on what would otherwise be their unique (past) access to the files and recollections of what the files contained.<sup>8</sup>

Others, in contrast, feared that a widespread opening of the Stasi files would cause rifts in the society of eastern Germany that would outweigh any benefits gained from such a course. Still others asserted that the files were inherently unreliable and that there was no method of determining the accurate entries from the false—with the result that the Stasi could “continue to carry out its deplorable activity with the legacy of these files.”<sup>9</sup> Finally, some argued that the massive invasion of privacy represented by the files would be perpetuated by opening them to any extent—unless accompanied by a comprehensive program of review designed to protect privacy and to weigh the gravity of an individual's acts of collaboration against possible mitigating circumstances.<sup>10</sup>

As a personal matter, the decision to examine one's own Stasi file risked its own serious consequences. A clear understanding of the past could destroy relationships of decades if a friend, relative, or even a spouse had been a Stasi agent.<sup>11</sup> Indeed, even if no close friend was revealed as a Stasi agent, just the act of reading—and for the first time really understanding—how closely everyday activities had been observed and recorded, and seeing the perverse constructions that could be imposed on innocent actions, could lead to a profound shock.<sup>12</sup> The implications of this widespread psychological destabilization, together with other massive personal traumas attendant upon unification, have yet to be fully evaluated.

Yet, in the circumstances of the post-unification period, access to the files could also have benefits for an individual's personal life. For example, the files could yield evidence of political discrimination by the GDR state that

could give rise to a claim for rehabilitation and compensation.<sup>13</sup> Moreover, a person wrongly suspected of collaboration with the Stasi might be able to prove his innocence through access to the files.<sup>14</sup> In sum, opening the Stasi files could have important implications for legal actions taken against the oppressors of the GDR regime, and also significant implications for actions to be taken to benefit the oppressed.

After very difficult negotiation and debate, the files were opened to a significant extent, in an action that probably has no parallel in history. The existence and availability of these files was one of the major social and political factors in eastern Germany after unification and profoundly affected a broad range of political and constitutional problems, as well as the relationship between west and east Germany.

The opening of the Stasi files was preceded and followed by prolific revelations of the collaboration of significant GDR figures with the Stasi, including some individuals who had been active in opposition movements. In this way the opening of the files may have impaired the political force of the east by diminishing the power and authority of some of its leading figures. More generally, these revelations of widespread collaboration could be used to label those in the east as second-class citizens who were not fully worthy of democracy—a view quite contrary to the appreciation of the democratic strength of the demonstrators in Leipzig and Dresden, and other portions of the East German populace, at a slightly earlier period.<sup>15</sup>

The contemporary problems and importance of the Stasi files must be understood against the background of the profound role that these files—and the entire question of the dissolution of the Stasi—played during the period of the East German revolution and shortly thereafter.

#### THE STASI FILES UNDER MODROW AND DE MAIZIÈRE

Certainly the extraordinary degree of internal surveillance undertaken by the Stasi was one of the primary characteristics of the GDR. Moreover, through secret ownership of property and enterprises as well as the secret placement of its own officers in important political and economic positions, the Stasi exerted a significant influence on the entire structure of the GDR state.<sup>16</sup> By the time of the revolution in 1989, therefore, the GDR was governed to a significant extent by a secret agency whose activities were outside of the official line of governmental control.

In the revolution of 1989 the activities of the Stasi were a particular focus of political attack, and anxiety arose among the reform groups that the files of the Stasi, which recorded forty years of its misdeeds, might be altered or destroyed. Indeed, “alarmed by black clouds of smoke” rising from the inner courtyards of Stasi complexes, citizens committees began to occupy Stasi offices around the GDR in late 1989, in order to assure that the Stasi records would be preserved.<sup>17</sup>

In the culminating act of this effort, raucous demonstrators burst into the central Stasi headquarters on the Normannenstrasse in Berlin on January 15, 1990. Although the precise origin of this turmoil remains unclear, many now believe that it was intentionally provoked, as a diversionary tactic, by the Stasi itself.<sup>18</sup> In any case, this event led to the creation of a central "Citizens Committee Normannenstrasse," which sought to assure that the Stasi was actually being dissolved and that its records would be preserved.<sup>19</sup>

In addition, the GDR Round Table decided that the Stasi files should be sealed off from access, and the GDR Council of Ministers ordered this measure by a resolution of February 8, 1990.<sup>20</sup> Indeed, dissolution of the Stasi and the preservation of its files were major preoccupations of the GDR Round Table during the Modrow period—amid strong suspicion that the Modrow government was actually working against both goals.<sup>21</sup> During the same period, the Stasi scored a major coup when it convinced the GDR reformers to destroy the files of the Stasi espionage section, as well as a central electronic index of the Stasi files.<sup>22</sup> The reformers later bitterly regretted this astonishing lapse of vigilance.

With the democratic election in March 1990 and the formation of the de Maizière government, the role of the citizens committees—which ultimately rested on the acclaim of the streets—became considerably less secure. In his acceptance speech (*Regierungserklärung*) of April 19, 1990, Minister-President de Maizière praised the "meritorious work" of the citizens committees, but announced that a government commission would henceforth guide the dissolution of the Stasi and the investigation of its activities.<sup>23</sup> Established in May 1990, the government commission contained well-known figures from GDR reform circles such as the author Stefan Heym and the early GDR dissident, Walter Janka.<sup>24</sup> Yet the reformers came to view the new government commission, with its eminent members, as a useless fig leaf.<sup>25</sup> Much of the real work continued to be performed by a somewhat shadowy "state committee" whose structure and personnel had been inherited from the Modrow period. The reformers had reason to believe that this "state committee" was thoroughly infiltrated by the Stasi itself.<sup>26</sup>

Indeed the entire de Maizière period was marked by tension between the GDR reformers and Interior Minister Peter-Michael Diestel over the process of dissolving the Stasi and preserving its records.<sup>27</sup> Diestel had reduced the role of the citizens committees and had proposed the destruction of the Stasi records. For the ostensible purpose of understanding the structure of the intelligence agency, Diestel also worked closely with former Stasi officers—a technique that evoked the deep suspicion of the citizens committees.<sup>28</sup> For his part, Diestel acknowledged that the citizens committees had performed an important service by securing the Stasi records but argued that, with the democratic election of March 18, 1990, legitimate political authority had passed to the parliament and government.<sup>29</sup>

During the same period, the GDR Volkskammer formed its own committee for the purpose of supervising the dissolution of the Stasi. The committee's

chairman was Joachim Gauck, a pastor from Rostock and parliamentary representative of Bündnis 90.<sup>30</sup> In the struggles to dissolve the Stasi and preserve its records, the parliamentary committee supported the GDR reformers against the perceived obstructionism of Diestel and the "state committee" inherited from the Modrow period. The choice of Joachim Gauck as chair was a fateful decision. Gauck would later lead the huge agency charged with management of the Stasi files after unification.

The political sensitivity of the issue of Stasi affiliation was so great that the GDR Volkskammer under de Maizière also established a committee to investigate whether any of its members had been informants. The work of the committee resulted in dramatic moments in the Volkskammer, and at least one resignation.<sup>31</sup> Evidence had not yet emerged, however, that de Maizière himself may have been a Stasi collaborator.

#### THE UNIFICATION TREATY AND THE STASI FILES

Reflecting the difficulty and sensitivity of the problem, debate over the handling of the Stasi files raised serious issues up to the signing of the Unification Treaty and beyond. Fearing the possible misuse of information, the drafters of the treaty wished to grant custody of the Stasi files to the federal archivist, with strict limitations on their use—at least for a transitional period.<sup>32</sup> But on August 24, 1990, the GDR Volkskammer issued quite a different statute.<sup>33</sup> Enacted under the time pressure of approaching unification, the Volkskammer statute "was presumably driven by the desire to regulate a fundamental 'GDR matter' before the accession."<sup>34</sup> The Volkskammer's view was that control of the files should be a state, not a federal, matter and that broad access should be granted to eastern—but not to western—citizens. Accordingly, the GDR statute of August 24 provided that custody of certain files should be divided among the Länder instead of being placed under the central control of the federal archivist. Moreover, in a provision that raised many eyebrows in Bonn, the statute provided that the interests of other nations, presumably including the Soviet Union, should be taken into account in deciding when to deny individual access to the files.<sup>35</sup>

For these and other reasons, the GDR statute encountered the disapproval of the treaty's architect, Wolfgang Schäuble, as well as the GDR negotiator, Günther Krause, and the statute was not included in the Unification Treaty.<sup>36</sup> Rather, the treaty adopted a more limited transitional plan which did, however, concede some authority to the east in this essentially eastern matter.<sup>37</sup> The treaty mandated central control of the Stasi files by an independent federal official—a "special commissioner" to be proposed by the GDR Council of Ministers with approval of the Volkskammer. Moreover, the treaty required that the files be kept in eastern Germany and allowed access to the files for certain specified purposes—although, in general, use or disclosure of the information was permitted only in cases of exigent need. A comprehensive

regulation of the Stasi files was to be undertaken by the all-German parliament but—in another concession to the GDR Volkskammer and the citizens committees—the treaty recommended that the parliament take into account the principles of the Volkskammer law of August 24.<sup>38</sup>

This fragile compromise was threatened, however, when shortly after the Unification Treaty was signed, the GDR citizens groups were stung by rumors that the Stasi files were to be moved from eastern Germany to a central archive in the western city of Koblenz. Protesting the feared move, demonstrators again occupied the central Stasi building in the Normannenstrasse; the demonstrators also called for access to their Stasi files.<sup>39</sup>

Whether or not these fears were justified, the demonstrations and related pressures seemed to imperil ratification of the Unification Treaty.<sup>40</sup> Accordingly, on September 18, 1990, the two German states entered into a supplemental agreement that made some concessions to eastern demands. This agreement stated once again—but this time more strongly—that a later parliamentary regulation of the Stasi files would observe the principles of the Volkskammer law of August 24. Although the files would still be centrally controlled, the agreement did provide that special state commissioners could play an important role in advising the central agency on the files. Finally, the agreement made an important concession to the views of the citizens groups in conceding that persons affected by Stasi files should have a right to know what was in those files, as long as the interests of third persons were preserved.<sup>41</sup>

Immediately upon unification, Joachim Gauck, chair of the Volkskammer's special committee on the Stasi, was appointed federal commissioner to take custody of the Stasi files. The agency under his direction, which continues to manage most matters relating to the files, came swiftly to be known as the Gauck Agency.

#### STATUTORY REGULATION OF THE STASI FILES: THE STASI RECORDS LAW OF 1991

The comprehensive statute called for in the Unification Treaty, and in the last-minute supplemental agreement of September 1990, was finally enacted in December 1991.<sup>42</sup> Known as the Stasi Records Law, it was enacted under pressures of time against the background of urgent demands from eastern delegates whose constituents sought a comprehensive regulation and access to the Stasi files as soon as possible.<sup>43</sup>

The Stasi Records Law reflects an attempt to comply with demands of the GDR citizens groups for broad individual access to the files while also according respect to individual rights of privacy.<sup>44</sup> The statute is also intended to further the historical, political, and judicial "working through" (*Aufarbeitung*) of Stasi activity and the GDR state—including scholarly research as well as the use of Stasi files for criminal prosecutions and for evaluation of individu-

als for the public service.<sup>45</sup> The statute was supported by the major parties, but in the end it was opposed by Bündnis 90/Greens, including the remnants of the GDR reform movement, because the files were to be administered by a central agency instead of the individual eastern states.<sup>46</sup> The eastern reform groups also objected to provisions allowing the secret services of Germany and its allies broad access to the Stasi files.<sup>47</sup>

The Stasi Records Law perpetuates the role of the agency under commissioner Joachim Gauck as controller of the files.<sup>48</sup> Indeed under the statute, the so-called Gauck Agency has grown into a massive institution, with over three thousand employees, principally engaged in arranging and cataloging the Stasi dossiers and screening documents in preparation for their release to government agencies or individual applicants.<sup>49</sup> As such, it was comparable in size to the Treuhand, the other great federal organ of German unification. Indeed, some maintain that it joined the Treuhand as an agency that perpetuated the control of the west over the east through the systematic weakening of eastern structures and institutions.

At the core of the Stasi Records Law is the right of any individual—whether from the GDR or elsewhere, and whether "victim" or Stasi "perpetrator"—to learn whether information about him exists in the files and, in many cases, to receive access to that information.<sup>50</sup> Yet, for the purpose of determining how much information the individual will receive, the distinction between victim and Stasi perpetrator is a crucial one. If the individual was the "subject" (*Betroffener*) or victim of a Stasi investigation, he or she can read the complete file and receive copies.<sup>51</sup> Thus the applicant can follow the entire history of the Stasi's investigation through files that sometimes encompass hundreds or even thousands of pages and numerous volumes.<sup>52</sup>

The identities of other victims and third persons mentioned in the file are to be rendered anonymous, but the victim has the right to learn the identity of Stasi officials and collaborators who provided information—if the identity of such persons can be clearly determined—as well as the name of any person who filed a written denunciation against the victim to his or her detriment.<sup>53</sup> In contrast, Stasi agents and individuals benefited by the Stasi, such as party officials receiving reports from the agency, have only limited rights to seek the information in their files.<sup>54</sup> The drafters of the statute feared that former agents, with memories refreshed by the files, could use the information to the detriment of their former victims.<sup>55</sup>

Under the statute, victims' names might remain in the files for a limited period only. Commencing on January 1, 1997, victims and third persons may have the right to erase their identities from the files or, if that is not possible, to have the relevant files destroyed; this provision reflects the high status accorded to interests of privacy in the German constitutional system. The files will be preserved, however, if there is a clearly superseding interest of another individual in keeping the files intact or if the files are required for subordinating needs of political or historical research.<sup>56</sup> Historians and researchers have naturally expressed considerable concern about this provision.<sup>57</sup> But an

official of the Gauck Agency maintained that provisions favoring political or historical research will provide adequate protection and, in any case, "a mass destruction [of the files] is not to be expected."<sup>58</sup>

Yet access to the files—even files containing personal information—is not limited to the victims. A wide range of public and private organs or groups can also obtain access for specified purposes. In particular, access can be obtained to determine if officials or certain private individuals—such as government ministers, members of the public service, notaries, lawyers, or high corporate officials—have collaborated with the Stasi.<sup>59</sup> Accordingly, this provision furthers the exclusion of former Stasi officials not only from government offices but from some professions and high offices in private industry as well. In most cases, however, this right of access elapses after fifteen years. This resolution apparently reflects a judgment that, after such a period, the relevance of earlier activity may be so tenuous that it no longer outweighs the privacy rights of the individuals concerned.

Personal information in the Stasi files can also be used for the prosecution of certain serious offenses. Indeed, in such cases, personal data in the files may be used against a Stasi victim or a third person, as an exception to the general rule of the statute that personal data in the files may not be used to the detriment of such persons.<sup>60</sup> Finally, in some cases even files containing personal information can be made available to secret intelligence services of Germany and its allies—a point that evoked sharp criticism from Bündnis 90/Greens, which viewed all intelligence services as conspiratorial and undemocratic.<sup>61</sup>

The most bitterly disputed sections of the statute, however, were those concerning the use of Stasi files for political and historical research and publication by the press. On one side, the asserted privacy rights of individuals named in the files favored extensive limits on publication. On the other side, the interest in freedom of the press, including concerns that the files not continue to be the subject of official censorship, militated against such restrictions. On both sides, constitutional concepts of the Basic Law—which seeks to protect both privacy and freedom of the press through an elaborate process of balancing—played an important role.<sup>62</sup> In the final stages of parliamentary consideration, the press conducted a vigorous campaign against what it saw as unduly strict limitations on publication in the statutory draft—such as a requirement that any use of the Stasi files be subject to prior approval by the Gauck Agency.<sup>63</sup> In response, the restrictions on publication were significantly relaxed in the final version.<sup>64</sup>

The result was an elaborate compromise, but one that somewhat favored the press. The press will ordinarily have a right of access to Stasi files that do not contain personal information and files in which personal information has been made anonymous. Material from those files may be freely published.<sup>65</sup> If the files refer to named persons, however, rights of access and publication are available only if the persons consent, or if they are public or political figures or officials who are not themselves Stasi victims or "third persons," or if they were Stasi collaborators or persons favored by the Stasi. In all of these cases,

however, the files may not be published if a "subordinating protectable interest" of a named person would be infringed.<sup>66</sup> Although the requirement of a judicial balancing of countervailing interests may raise difficult questions, this provision has one major result: any well-known individual who was an official or unofficial collaborator of the Stasi may ordinarily have his name revealed to the press and legally published.

Moreover, in a significant victory for the press, criminal penalties for improper publication are essentially limited to word-for-word-quotations, and the paraphrasing of a document will not lead to criminal prosecution.<sup>67</sup> This provision, which allows substantial leeway to the press to publish the substance of files that it may have received in any number of ways, was apparently the legislative response to the energetic campaign conducted by the press in the last stages of the legislative process.<sup>68</sup>

#### EXPERIENCE WITH THE STASI FILES: REVELATIONS AND RESPONSES

It is clear that the opening of the Stasi files has had a profound effect on the society of eastern Germany. The opening of the files has significant implications for Stasi officials and their collaborators, as well as for the victims of the Stasi.

For Stasi officials and collaborators, the opening of the files can reveal a pattern of deception that may have persisted for years. These disclosures can result in public disgrace. They can also mean exclusion from public or private employment or the legal profession—and even in some cases criminal conviction and punishment.

For the victims, material in the files may yield valuable evidence for a claim for rehabilitation; in some instances it may even furnish the basis for a civil suit against an informant who collaborated with the Stasi.<sup>69</sup> For the first time, moreover, those subject to spying by the Stasi now have the opportunity to understand the full extent of this surveillance and to glimpse the political structures that lay behind it. Ironically the files also present a matchless documentation of the GDR dissident movement itself.<sup>70</sup>

From this massive Stasi archive, published collections of material illustrate the goals and methods of the Stasi in particularly sensitive cases. The Stasi files of poet Reiner Kunze and novelist Erich Loest, both of which were received in mysterious ways before the Stasi archive was officially opened, have proved particularly illuminating. After he had written poems critical of the GDR, Kunze was subjected to elaborate surveillance: his telephone was tapped, his mail opened, and his neighbors enlisted in a minute documentation of his life, which remains recorded in the Stasi files.<sup>71</sup> Some of Kunze's friends were "unofficial collaborators," and they furnished prolific memoranda of personal and political conversations with the poet. Kunze's contacts with other critics of the regime, such as Wolf Biermann and Robert Havemann, were a particular source of fascination to the agency.

In addition to the passive recording of detailed intimate information, the Stasi took active steps to impair Kunze's life and work. The agency sought to prevent Kunze's poems from being published in the Soviet Union and tried to discourage him from accepting membership in a western literary society (and, when he refused to comply, apparently threatened his life). The agency also went to elaborate lengths to steal copies of Kunze's medical records, and enlisted neighbors in a campaign of criticism.<sup>72</sup> Indeed, attempts to discredit Kunze continued even after he left the GDR for the Federal Republic in 1977.<sup>73</sup> Techniques of this sort were commonly employed by the Stasi against persons whom it considered critical of the regime.<sup>74</sup>

An examination of this massive archive can retrospectively cast a new and inevitably more depressing light on even the aspects of the GDR that seemed tolerable. This is certainly the response of some former GDR citizens upon reading their files. For example, the GDR reformer Bärbel Bohley remarked: "One is most shaken by the destruction and breakdown of human feelings. What is rewarded here is treachery, lies, disloyalty, secrecy, haughtiness, arrogance, the lust for power, cravenness, anxiety, and cowardice. . . . For a long time I thought that the GDR could be reformed. Examination of my files finally freed me from these dreams. A state that relies increasingly on the bad qualities of people as the basis of its existence is doomed to extinction."<sup>75</sup>

Problems also came quickly for those who had had some contacts with the Stasi as unofficial informants. Even before the files were officially opened, some prominent eastern politicians were accused of collaboration with the Stasi. As a result of such disclosures, for example, Ibrahim Böhme resigned his position as leader of the eastern SPD. Wolfgang Schnur, the first leader of the reform group Democratic Awakening, met a similar fate.<sup>76</sup> Most notably, Lothar de Maizière, the only freely elected minister-president of the GDR, was accused of collaboration with the Stasi and eventually resigned his position in the hierarchy of the CDU after unification.<sup>77</sup>

After the files were opened, Manfred Stolpe, SPD minister-president of Brandenburg, acknowledged that he had had numerous contacts with the Stasi in his prior role as an official of the Evangelical Church in the GDR. These revelations evoked bitter attacks—but also support from leading political figures. The Gauck Agency eventually issued a report finding that Stolpe, "according to the criteria of [the Stasi]," had been an important "unofficial collaborator" for over twenty years—a conclusion that evoked renewed calls for Stolpe's resignation.<sup>78</sup> But defenders claimed that Stolpe had the task of representing the interests of the church in its relations with the GDR government, a task that necessarily required numerous contacts with the Stasi.<sup>79</sup> In this view, the question was whether Stolpe had become closer to the Stasi than was necessary to perform this function.<sup>80</sup>

The Stolpe case has also come to symbolize tensions between those who sought accommodation with the SED government and the citizens groups who opposed any collaboration.<sup>81</sup> This tension, which has continued on into the post-unification period, has the ironic effect of pitting the eastern reformers against political forces whose social and political goals are otherwise quite

similar. In the Stolpe case, the citizens groups are in effect aligned with the conservative forces of the CDU against Stolpe's SPD government in Brandenburg which, in many of its political positions, is rather close to those of the remnants of the GDR reformers.

More recently, revelations of collaboration with the Stasi have impaired the reputations of two of eastern Germany's most important writers. First, it was disclosed that Heiner Müller—perhaps the GDR's most eminent dramatist and a writer whose critical works had sometimes been banned in the GDR—had been an unofficial collaborator.<sup>82</sup> Then Christa Wolf, the GDR's most famous novelist, revealed that for a short period in the late 1950s and early 1960s she had written reports on fellow writers for the Stasi, using the code name Margarete.<sup>83</sup> Even though Wolf was later the subject of intense surveillance by the Stasi, these revelations of complicity seem to have cast a pall over her reputation and career.<sup>84</sup>

#### EXPERIENCE WITH THE STASI FILES: LITIGATION

In many cases these revelations from the Stasi files were accepted by the named collaborators without resistance. But in some instances, the suspected collaborators have attempted to pursue remedies in court. Although release of information from the Stasi files receives the constitutional protections of speech and press, it must also confront very strong constitutional rights of privacy and personality that can work against disclosure. This tension lay behind disputes over the Stasi Records Law and has persisted in judicial decisions and vigorous public debate.

Indeed, concern about rights of personality has evoked general criticism of procedures employed by the Gauck Agency in releasing information from the files. The agency has transmitted information about individuals to government offices—together with its judgment on whether an individual was a Stasi informant—without any sort of hearing on the question. The Stasi Records Law permits these transmittals, but many fear that the risk of error is nonetheless substantial.<sup>85</sup> These concerns are heightened by the extraordinary credibility that the official opinions of the Gauck Agency, based on the files, are generally accorded; indeed, as a practical matter, the agency has taken on the role of a final tribunal instead of a fallible government agency.<sup>86</sup>

Certain practices of the Gauck office were challenged in litigation arising from the Stolpe affair. In 1992, the Gauck office complied with requests of a parliamentary investigating committee in Brandenburg and delivered detailed reports on "IM Sekretär" (thought to be Stolpe) along with its opinion that "Sekretär" had been an "important" Stasi collaborator. A Berlin administrative court rejected Stolpe's challenge to this action. The court found that the Gauck Agency's opinion did indeed involve an incursion into Stolpe's constitutional right of personality, but it concluded that the statement, in this context, was authorized nonetheless. The court emphasized that the statement was useful in informing the public about the structure and methods of the Stasi and

that Stolpe had been a public figure in the GDR. In the report to the parliamentary committee, it would have been difficult to separate statements of "fact" from "opinion."<sup>87</sup>

On the other hand, the court held that Gauck was not authorized to state in a television interview that Stolpe had been an important Stasi collaborator, especially since the parliamentary investigation was not yet concluded. According to the court, that sort of public statement directed to a specific case went beyond what was necessary for the purpose of reporting on the Stasi's structure and methods.<sup>88</sup> The court also disapproved Gauck's public remark that in some Länder—Saxony, for example—the information against Stolpe in the Stasi files would have been sufficient to remove him from office.<sup>89</sup> Such speculation also went beyond Gauck's authorized role.

Rights of personality were also stressed in a case from Halle, in which the citizens group New Forum made available at its office a list of 4,500 persons identified as Stasi informers. An individual on the list sued, and the court ordered that his name no longer be released. Although the plaintiff did have a dossier as a Stasi informant, it was not clear that he had actually undertaken that activity or had even agreed to do so. But even if he was an informant, the court would have issued the injunction: it might be permissible to expose a person's Stasi activity, but only after weighing the individual circumstances and the extent of the activity; that sort of weighing had not been undertaken with respect to the list. The court also found that making the list available violated the intent of the Stasi Records Law.<sup>90</sup>

Finally, two cases involving the GDR author Hermann Kant further illustrate the care with which the German courts are approaching publication of material derived from the Stasi files. Although Kant had been a strong supporter of the GDR regime and the president of the official writer's union, a court in Hamburg enjoined the magazine *Der Spiegel* from calling him a "helper of the Stasi." The available files did not provide adequate support for this conclusion, although a different question might have been posed if *Der Spiegel* had said he was *suspected* of such a role.<sup>91</sup> Thereafter, Kant also won a partial judgment against the GDR opposition poet, Reiner Kunze. In the book documenting his harassment by the Stasi, Kunze published a section of a Stasi file in which Kant was quoted as saying "that it was time to expel Kunze from the GDR." Kant denied that he had ever made that remark, and the court ordered that Kant's denial (along with the supporting testimony of a witness mentioned in the file) be included in further editions of the book.<sup>92</sup>

#### REACTIONS AND PROPOSALS FOR ALTERATION OF THE STASI RECORDS LAW

The profound social and personal distress evoked by the opening of the Stasi files has led some well-known figures in Germany to propose that the files be closed or even destroyed. For example, shortly after the opening of the files

Golo Mann, son of the great novelist Thomas Mann and himself an important German historian, indicated that the Stasi records should be destroyed or closed.<sup>93</sup> In contrast, a group of political figures from eastern Germany—some from the 1989 reform movement—issued a manifesto calling for the strengthening and expansion of the work of the Gauck office to enhance the examination of the Stasi files and to further the (at least temporary) exclusion of those who knowingly worked for the Stasi from positions of confidence in such central areas as law, medicine, politics, education, and the church.<sup>94</sup>

At the same time Peter-Michael Diestel, who had played a controversial role in the history of the files as GDR interior minister under de Maizière, re-entered the fray. Diestel defended the "unofficial collaborators" of the Stasi—many of whom, in Diestel's view, acted as "guarantors of internal peace." According to Diestel, the "pitiless witch hunt [arising from the opening of the Stasi files] is completely mistaken." Diestel argued that "unofficial collaborators" of the Stasi should not lose their jobs unless it could be shown that they actually betrayed individuals. Diestel also criticized Gauck's performance as director of the agency, and argued that de Maizière should be fully rehabilitated.<sup>95</sup> At a later point, Diestel regretted that more Stasi documents had not been destroyed and declared that all "politically capable East Germans are being destroyed" by the Stasi debate—a development that necessarily alienated East Germans from democracy.<sup>96</sup>

Indeed it seems likely that there will always be calls for the closing of the Stasi files—sometimes depending upon whose interests are affected at the moment. In November 1993, for example, Chancellor Kohl—apparently stung by information about western politicians that was emerging from the files—suggested that the files should be destroyed.<sup>97</sup> At about the same time, similar views were advanced by important members of the eastern SPD, such as Brandenburg Social Minister Regine Hildebrandt who complained that the files were being accorded undue weight and had been written by people who had an ax to grind.<sup>98</sup> Indeed, civil rights leader and SPD member Friedrich Schorlemmer proclaimed that the files should be consumed in a "fire of joy" at the beginning of 1996.<sup>99</sup>

These surprising proposals encountered a bitter reaction from some members of the former GDR opposition. Steffen Heitmann, justice minister of Saxony, declared that there would be an uprising in eastern Germany if the files were destroyed and indicated that destruction of the files would be a repudiation of the revolution of 1989.<sup>100</sup> Perhaps the most passionate response came from singer and writer Wolf Biermann, hero of the GDR opposition, whose expulsion from the country in 1976 marked an important stage of artistic repression in the GDR.<sup>101</sup> Declaring that the files should not be destroyed just because of the fears of a few western politicians, Biermann emphasized their historical importance and their significance for those who had been spied upon. In his own files, for example, Biermann found stolen or intercepted items such as correspondence of his parents and a forgotten poem he had written in the 1960s; in the file he also discovered that some citizens had

resisted the state, and he also had the opportunity to learn about the organization of protests against his expulsion. "In these files are life documents of the victims [such as] private photos; there are also official [judicial] judgments which never reached the hands of the convicted persons, but now will be helpful in the victims' claims for rehabilitation and compensation."<sup>102</sup> All of these items, and much more, would be consumed in Schorlemmer's "fire of joy."

Proposals for the destruction of the Stasi files have apparently led to an increase in the number of citizens submitting applications to see their files. By July 1994 approximately 730,000 persons—most of them eastern citizens—had applied to examine their files, and the Gauck Agency had been able to satisfy about one-half of those requests. The administration of the remaining applications may proceed more quickly as the agency has essentially finished responding to 1.4 million requests from government agencies for Stasi files relating to persons applying for the public service.<sup>103</sup>

Yet these debates have had some parliamentary consequences. Indeed, furor over public release of Stasi files, and particularly over the publication of telephone transcripts of western politicians, led to an amendment of the Stasi Records Law in 1994. The original statute required any person who was in possession of Stasi files to notify the Gauck Agency and, in many cases, to surrender the material to the agency upon demand.<sup>104</sup> Although photocopies and other duplicates were generally included in this requirement, they were not covered by the section imposing a penalty on failure to deliver material to the agency.<sup>105</sup> The statute was therefore amended in summer 1994 to impose a penalty of up to DM 500,000 for a failure to surrender duplicates also.<sup>106</sup> This change may raise serious constitutional problems because it apparently requires surrender of journalists' transcriptions of the files and other copies possessed by journalists, editors, and researchers, whose materials ordinarily receive strong constitutional protection.<sup>107</sup> In another measure that may dampen journalistic investigation of Stasi material, the amendment increased the fees charged for examining and copying the files. This measure has been attacked as an unconstitutional infringement on the government's obligation to provide broad access to the files for journalists and scholars.<sup>108</sup>

#### REFLECTIONS ON THE STASI FILES

The decision to preserve and open the Stasi files was one of the most controversial and important decisions made in the course of German unification. On the one side, it could be argued that the present legal use of the files constitutes yet another instrument through which the basic theoretical implications of article 23 GG are carried into reality—that is, another vehicle through which the political system and the general structure of the west has been transferred to the former GDR. Thus, an important use of the files has been to assist in the exclusion of eastern officials from the judiciary and the public service, includ-

ing the universities. In addition to the use of the files for these official exclusions, the "unofficial" use of Stasi files through publicly discrediting important political and intellectual figures in the east may play a similar role. In this context, the cases of de Maizière and Stolpe, among the politicians, as well as Christa Wolf and Heiner Müller, among artists of the former GDR, are only the most noteworthy. Thus it could be argued that a major use of the files is to continue the disintegration and exclusion of the eastern intellectual elite, whose democratic but often socialist views were displeasing to the SED hierarchy but also do not seem to be particularly congenial to the prevailing doctrines of the Federal Republic.

Although this argument has some force, the problem cannot be resolved so simply. For one thing, it was not predominantly the prevailing figures of conservative politics in the Federal Republic who sought the broad opening and use of the Stasi files. In his negotiations on the Unification Treaty, for example, Interior Minister Wolfgang Schäuble sought stringent limits on the use of the files; indeed, he privately believed that it would not be a bad idea if the files could be destroyed. Rather, it was the citizens committees of the GDR reform movement which insisted that the files be preserved and that individual victims be granted broad access; and it was essentially these groups that achieved that end through demonstrations in January and in September 1990.

Moreover, the descendants of the GDR reform movement continue to be among the firmest supporters of the Gauck Agency and the continued preservation of the files. They also remain among the most vigorous advocates of extensive removal of individuals with Stasi and related affiliations from positions of responsibility in government and elsewhere in public life. In a dramatic expression of this general point of view, Education Minister Marianne Birthler, a veteran of the GDR reform movement and a member of Bündnis 90/Greens, resigned from the government of Manfred Stolpe in Brandenburg because of Stolpe's handling of revelations of his numerous contacts with the Stasi.<sup>109</sup>

Indeed, the position of the reformers themselves seems to involve some contradictions. Certainly, the extension of the old system of the Federal Republic to the east, through implications of article 23, perpetuates political and social structures that are inconsistent in important ways with the ideas of the Round Table constitutional draft, as embodied—to some extent at least—in the new constitutions of the eastern Länder.<sup>110</sup> On the other hand, however, the oppressions documented in the Stasi files obviously represent the residue of a rigid and tyrannical system. The use of the files to undo that past to the extent possible—by excluding persons who had participated in the tyrannical system from present positions of power—seemed to be viewed by the reformers as an essential step in liberation of the individual and society from the residue of past tyrannical hierarchy. This view seems to assume that the future should belong to those whose own reliance on freedom was such that they did not cooperate extensively with the former system; those who did cooperate would, in positions of power today, perpetuate psychological attitudes of



obedience that could inhibit the development of a new free society. But since there are not, by a substantial extent, enough reformers (or other eastern applicants with untainted pasts) to fill the positions vacated by those implicated in the SED regime, the necessary result is that many of these positions will be filled by western applicants and thus the personnel and attitudes of the west may be extended in the east as a result of the use of the Stasi files. But, more important and prior in the views of the reformers, apparently, is the extirpation of the residue of the past.

That is at least one point of view. It has the peculiar effect—seen in other aspects of recent history in the east—of creating an alliance between conservative politicians in the west and the reformers in the east on some questions.<sup>111</sup> The alliance is only an occasional and temporary one, however, for the views of these groups on what should occur in politics and society after the residue of tyrannical politics and “subject personalities” are removed from power in the east are of course quite different.

Moreover, the process of understanding one's personal past, potentially furthered for each Stasi victim who reads his or her file, can be seen as another act of liberation from the (largely unseen, if suspected) tyrannical forces that influenced many lives over decades. This effect is most likely to be revealed in the experiences of countless more or less ordinary citizens whose careers and lives were changed by a forgotten political remark or an unknowingly dangerous friendship. Yet this sort of retroactive self-understanding is also well documented in recent memoirs of more prominent GDR citizens—like the poet Reiner Kunze and novelist Erich Loest—who have gained access to their files and, for the first time, can perceive the extent of the governmental measures taken against them. Moreover an understanding of the way the Stasi operated, and the numerous collaborators that it attracted, may be important as an educational process in creating a stronger open and democratic personality among citizens.<sup>112</sup> For people emerging from societies that had been built on “forgetting” the atrocities of the past, a new beginning could not be appropriately made by perpetuating this fatal habit.