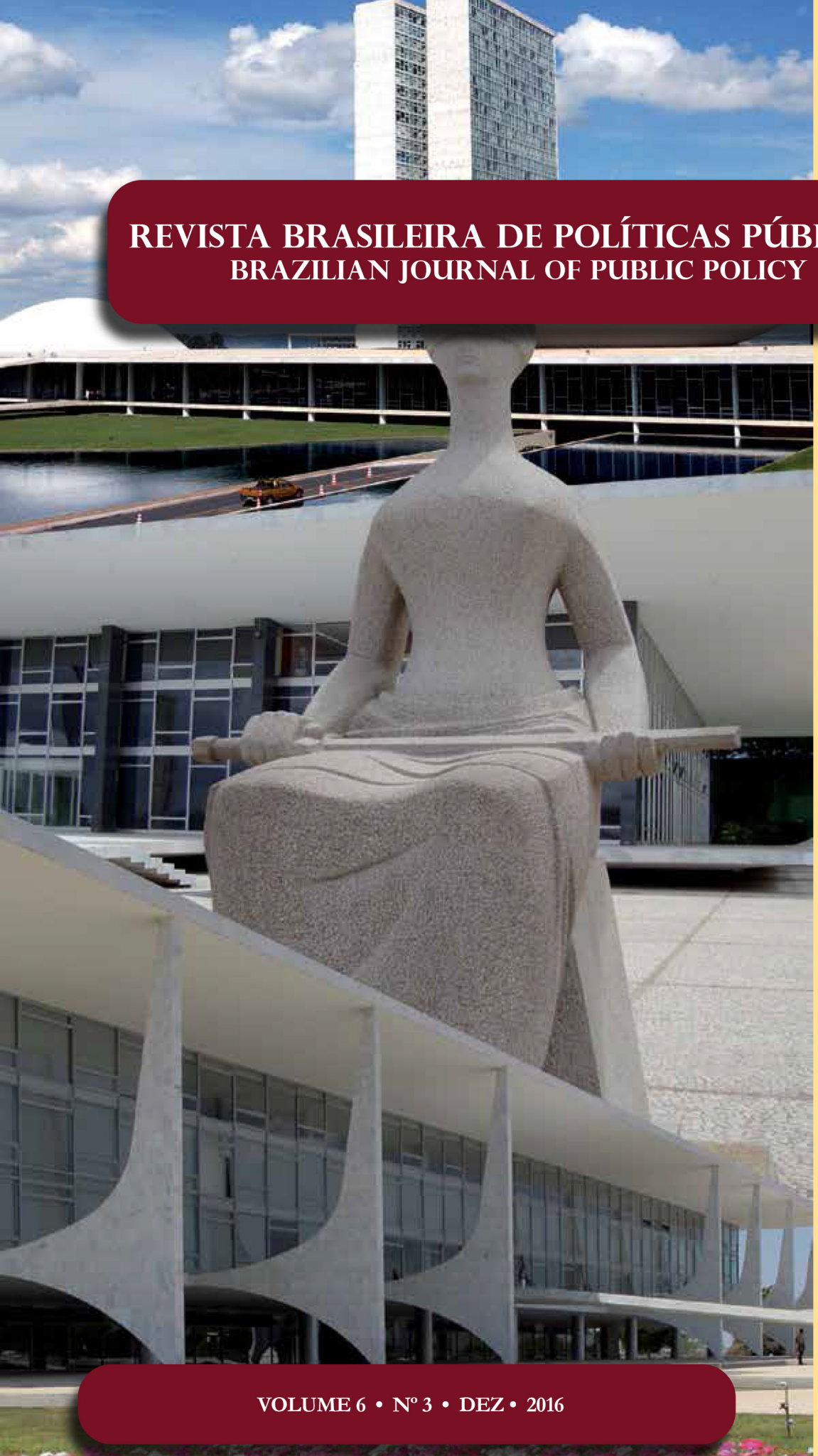

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The end of the world as they knew it: should former judges be denied admission to the bar after the transition to democracy?

O fim do mundo como eles sabiam: a admissão à advocácia deve ser negada a antigos juízes após a transição para a democracia?

Stefan Kirchner

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Sumário

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Stefan Kirchner**

Abstract

Societies which are in transition from one political system to an other, for example from Dictatorship to Democracy, are often faced with the problem of which role legal professionals who played a political role in the old regime can play in the new system. On one hand will the society require lawyers, on the other hand will it often be necessary to limit the role of those who played a role in the old system in the new system. This article will deal with the requirements for the admission to the bar in Germany. Particular emphasis will be given to prior convictions and good morals. In a second step, we will look at the effects of the German reunification in 1990 on the legal profession in those parts of Germany which used to be under Socialist rule. A key question is how a society in transition can make use of their expertise without condoning the crimes of the past. Or does the experience of a lawyer gained under communism not count as expertise in a democratic legal system? Apparently it cannot be completely useless because there are some skills that lawyers around the world have to master in any case. Yet, under German law, attorneys are not merely commercial actors but serve the judicial system as a whole. This requires attorneys to be willing to defend the constitutional order at all times. There might be doubts whether lawyers who served the Communist regime in East Germany can guarantee that they will defend the constitutional order of the Federal Republic. While this limits who can become an attorney, the freedom of profession in turn limits the state's ability to limit access to the legal profession. Based on a case study involving a former East German judge who seeks to be admitted to the bar in Germany, we will look at the balance between these diverse interests.

Keywords: bar admission, judge, attorney, East Germany, German Democratic Republic, Communism, transition, *Wende*, West Germany, Federal Republic of Germany, perversion of justice.

Resumo

As sociedades que estão em transição de um sistema político para outro, por exemplo, da ditadura para a democracia, muitas vezes enfrentam o pro-

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blema de saber qual função os profissionais do direito, que desempenhavam uma função política no antigo regime, podem exercer no novo sistema. Por um lado, a sociedade exigirá advogados, por outro lado será muitas vezes necessário limitar o papel daqueles que desempenharam um papel no sistema antigo. Este artigo tratará dos requisitos para admissão à advocacia na Alemanha. Será dada ênfase às antigas convicções e aos bons costumes. Em uma segunda etapa, examinaremos os efeitos da reunificação alemã em 1990 sobre a profissão do advogado naquelas partes da Alemanha que costumavam estar sob o domínio socialista. Uma questão-chave é como uma sociedade em transição pode fazer uso de seus conhecimentos sem tolerar os crimes do passado. Ou a experiência de um advogado obtida sob o comunismo não conta como experiência em um sistema legal democrático? Aparentemente, não pode ser completamente inútil, porque há algumas habilidades que os advogados de todo o mundo têm de dominar, em qualquer caso. No entanto, de acordo com a lei alemã, os advogados não são meramente agentes comerciais, mas servem o sistema judicial como um todo. Isso exige que os advogados estejam dispostos a defender a ordem constitucional em todos os momentos. Pode haver dúvidas se os advogados que serviram ao regime comunista na Alemanha Oriental podem garantir que defenderão a ordem constitucional da República Federativa. Enquanto isso limita quem pode se tornar um advogado, a liberdade de profissão, por sua vez, limita a capacidade do Estado de limitar o acesso à profissão de advogado. Com base em um estudo de caso envolvendo um ex-juiz da Alemanha Oriental que pretende ser admitido como advogado na Alemanha, verificaremos o equilíbrio entre esses diversos interesses.

Palavras-chave: Advogado, Alemanha Oriental, República Democrática Alemã, Comunismo, transição, *Wende*, Alemanha Ocidental, República Federal da Alemanha, perversão da justiça.

1. Introduction

Societies which are in transition from one political system to an other, for example from Dictatorship to Democracy, are often faced with the problem of which role legal professionals who played a political role in the old regime can play in the new system. On one hand will the society require lawyers, on the other hand will it often be necessary to limit the role of those who played a role in the old system in the new system. In the context of the transition to democracy in Eastern Europe after the collapse of Communism, the issue of lustration has been a major political and legal issue. When attempting to create democratic states, it was often felt that those who had been in power during the time of the Communist regimes were unfit for public office in a democracy. Without going into the details, benefits and downsides of this approach, one issue is particularly interesting from the perspective of lawyers: how does a democratic society deal with those who enforced the will of the state through their professional legal work? While it might be easy to understand that the continuation of the work of judges who had served an undemocratic state is difficult to imagine in a democratic society, the rights and interests of these judges cannot be completely ignored and many former judges have turned to the practice of law as attorneys. While the legal qualification in less political fields of law, such as general contract law, might be not so much of a problem, the question can, and must, be asked if former judges should be admitted to the bar in the first place — after all, society at large has a valid expectation that attorneys are actually committed to fundamental legal principles in democratic states, such as the rule of law and respect for human rights.

This article will deal with the requirements for the admission to the bar in Germany, which is a special case in that there were already democratic institutions in West Germany which were in principle expanded to the formerly Communist East. Particular emphasis will be given to prior convictions and good morals. In a second step, we will look at the effects of the German reunification in 1990 on the legal profession in those parts of Germany which used to be under Socialist rule. The reunification led to an influx of lawyers from Western Germany to the East but there was a need for lawyers which required that lawyers trained

in the former East Germany had to find a way into the legal system of reunited Germany. Many of those who worked in legal professions in the former East Germany, though, were closely related to the former regime. A key question is how a society in transition can make use of their expertise without condoning the crimes of the past. Or does the experience of a lawyer gained under communism not count as expertise in a democratic legal system? Apparently it cannot be completely useless because there are some skills that lawyers around the world have to master in any case. Yet, under German law, attorneys are not merely commercial actors but serve the judicial system as a whole. This requires attorneys to be willing to defend the constitutional order at all times. There might be doubts whether lawyers who served the Communist regime in East Germany can guarantee that they will defend the constitutional order of the Federal Republic. While this limits who can become an attorney, the freedom of profession in turn limits the state's ability to limit access to the legal profession. Based on a case study involving a former East German judge who sought to be admitted to the bar in Germany, we will look at the balance between these diverse interests.

European attorneys still face high hurdles when it comes to the provision of legal services outside the national jurisdiction in which they have been admitted to the bar initially. The different legal regimes in the EU's 28 member states and the need to secure a high quality in legal services leads to a need for supervision on the part of the relevant national authorities. De facto, the way in which this happens is not supervision but prevention with exceptional permissions. EU law[1] allows attorneys who are admitted to the bar in one EU member state to practice EU law and international law in the other member states, provided they designate their qualification precisely and in the original language. A French avocat who works in Spain as a European lawyer is therefore not to be confused with an abogado who is permitted to actually practice Spanish law. There are similar possibilities for attorneys under the law of the World Trade Organization (WTO)[2] and today many states allow foreign lawyers to practice the law of their home jurisdiction on their soil. In all such cases, an attorney who wishes to expand the geographical reach of his or her work as to overcome some hurdles before he or she can enter a new legal system.

From the perspective of European integration, this is undesirable since it deprives an important economic group - attorneys - from the possibility to fully realize the freedom to provide services across the entire Union. However, while a surgeon can do her job as well in Finland as in Lithuania or Spain, once familiar with the language and local procedures (which might differ slightly from one hospital or an other anyway but which will always be framed by the medical dimension of this work), an attorney from Malta, even armed with the necessary language skills, will not be able to handle a case in Latvia without any training of Latvian law. While many legal rules are already harmonized across the European Union, many rules are still national (or sub-national) in character. Therefore safeguards are necessary to protect those who are seeking legal help from potentially unqualified attorneys. This does not mean, however that lawyers from EU member states would be completely restricted to their home jurisdictions. Under EU law[3] as well as under WTO rules[4], attorneys can work in other States as long as they comply with certain restrictions which are aimed at securing that they practice only law in which they are actually trained.[5] Such safeguards are nothing out of the ordinary if one takes into account the need to protect clients. In fact, such a restriction is not only compatible with EU law but might also be seen as a reflection of the European Union's often paternalistic approach.

1 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. *Official Journal 1998 L 077*, 14 March 1998, p. 36-43. Available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0005:EN:HTML>. Access on: 22 Mar. 2014.

2 HILF, Meinhard; SALOMON, Tim-René. Das Streitbeilegungssystem der WTO. In: HILF, Meinhard; OETER, Stefan. *WTO-Recht – Rechtsordnung des Welthandels*. 2nd ed. Baden-Baden: Nomos, 2010. p. 165 et seq., at p. 185.

3 Directive 98/5/EC, supra, note 3.

4 General Agreement on Tariffs and Trade (GATT), 1947. Available at: <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf>. Access on: 22 Mar. 2014. included in Annex 1A of the WTO Agreement. Available at: <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf>. Access on: 22 Mar. 2014.

5 HILF, Meinhard; SALOMON, Tim-René. Das Streitbeilegungssystem der WTO. In: HILF, Meinhard; OETER, Stefan. *WTO-Recht – Rechtsordnung des Welthandels*. 2nd ed. Baden-Baden: Nomos, 2010. p. 185.

But what if it is not the lawyer's choice to work in a different legal system, that is, what if it is not the lawyer who is moving abroad but the legal system which is changing fundamentally – in fact so fundamentally that the lawyer in question finds herself in a different state without ever leaving her hometown? This is the problem faced by lawyers in transition societies, in particular in Eastern Europe after the end of the Cold War and the dissolution of the USSR. While Lithuania regained independence, the so called German Democratic Republic (GDR) disappeared from the map altogether. Overnight, the legal knowledge of many lawyers dramatically lost value. Just how much of a shock this change has been for many who lived under Communist rule is highlighted already by the title of Alexei Yurchak's 2005 book, Everything Was Forever, Until It Was No More: The Last Soviet Generation.[6]

Maybe more than any other profession, apart from the leadership in government, lawyers' knowledge is devalued in case of a change not only of a regime but of the fundamental political system. What was always true becomes false - or is revealed as having been false all along. What was certain, disappears. What was familiar, was now gone. In a sense, on 3 October 1990 millions of East Germans might as well have been teleported into an other country. A quarter of a century later, it is almost hard to imagine that there was a time when the iron curtain separated Europe in two halves. There were a number of rules which survived the reunification in 1990 for a limited period in the newly formed federal states in what used to be East Germany, but by and large the GDR's legal regime came to an end. The fact that laws can change places an inherent limit on the value of legal knowledge and emphasizes the importance of legal skills. That is why we do not want our students to simply learn by heart but to be able to solve cases. Law students not only have to learn how to apply their knowledge but also have to develop the skills they require to solve problems which are unknown to them, indeed, problems which they cannot even imagine today. Such legal skills last much longer than legal knowledge. Therefore it comes as no surprise that lawyers in transition societies might find themselves in a situation in which their knowledge is next to worthless while their skills are in high demand due to the fact that there is a new legal system which needs lawyers to implement it. In the case of Germany this situation led to massive influx of young lawyers – attorneys, judges, prosecutors, law professors – from West to East Germany in the early 1990s. What then happened to those who already had practiced law in East Germany? Many attorneys, in particular in the field of private law, adapted quickly, took classes, studied up on the West German law which then applied to all of Germany and hit continued their work. After all, the law itself was not really new, it had been taught at West German universities for some time and there were plenty of textbooks available and the differences were not that great. In public and criminal law, the situation was more difficult. In particular when it came to those lawyers who had served the Socialist regime, for example as judges. It was inconceivable to let judges continue to work in this position if they had been part of the regime, who had sentenced those to prison terms who simply had spoken out against the East German government or who tried to flee the GDR for a better life in the West. The obvious question then was whether somebody with high legal skills who could not work as a judge or public official of any kind and who lacked the knowledge to teach law could be admitted to the bar and be allowed to practice law and to put his or her skills at use.

2. The attorney in the German legal system

This approach would make the profession of the attorney a second best choice – and indeed for many law students at least in my home country this is the case: judges are appointed for life and have practically little if any obligations in terms of the choice of when to work and how – while enjoying a salary which is above the average salary of attorneys. To a lesser degree, the same applies to public officials, at least to

6 YURCHAK, Alexei. *Everything Was Forever, Until It Was No More*: The Last Soviet Generation. Princeton: Princeton University Press, 2013.

the few enjoy lifetime positions. Attorneys on the other hand seem to come only in two brands: those who work had for themselves and earn little and those who work even harder for a big law firm and earn a lot but without any sense of a functioning work-life balance. Of course these are two extremes but they are in the minds of many young lawyers. One reason may be that boutique law firms play hardly a role in legal education because they require a level of specialization which goes far beyond the ability of law school. All attorneys in Germany, however, fall under the Federal Lawyers' Act, the Bundesrechtsanwaltsordnung (BRAO).[7]

While the standing attorneys enjoy among law students is varied, the perception of the general public may be even worse. The commercialization of legal services has contributed to the emergence of stereotype of the wealthy lawyer who is primarily interested in money. Not only is this image far from the truth, it is also incompatible with how the German law understands the profession of the attorney. The attorney is not merely a commercial actor but an organ of the justice system as a whole.[8] An attorney is to serve not two, but three, masters: first, the justice system – provide legal services even if the client cannot pay and even if the amount paid by the state if the client receives legal aid[9] is not nearly sufficient to cover the costs incurred by being forced[10] to provide almost free legal aid. Second, his or her client. We are supposed to do what is best for our client. But which way will we go if we are to choose between a solution which may not be ethical but still legal enough to ensure that one is not disbarred right away and a solution which is ethical but less beneficial to the client? Can attorneys afford ethics? This question brings us to the third master, not money but one's law firm, the employees, ourselves and our families. An attorney who runs a law firm has a responsibility for one's employees. What matters more – the employees or the clients? Ethics or taking care of one's family? The abstraction of the justice system as a whole or the bills your employees need to pay? These are decisions attorneys will have to make and they cannot simply elevate the commercial aspects of their work to the detriment of their service to justice. This requires attorneys to be mature and responsible individuals who are capable of thinking for themselves. It is no coincidence that the German system requires two years of practical work after graduating from university and that there are strict limitations with regard to the admission to the bar.[11] Now contrast this with the work experience of a judge in an undemocratic regime: it it is not the law which rules, let alone justice, but the party. How can somebody who has given up his or her professional integrity to serve a regime which denies the rule of law now be expected to serve justice?

3. Barriers to the admission to the bar in Germany

Among barriers to the admission to the bar in Germany are previous convictions, provided that the delict in question is of a sufficient degree of severity[12] and the issue of lacking the character necessary to serve as an attorney.

One potential crime for which East German judges might be prosecuted and sentenced and which could prevent them from being admitted to the bar in Germany is perversion of justice. This is not a case of victor's justice in that Western laws were imposed on East Germans after the fact. Rather, perversion of justice was also a crime under the laws of the German Democratic Republic. The fact that it happened practically on a daily basis and was sanctioned, even demanded, by the political leadership, does not change the fact that is was indeed a crime under East German law. Accordingly, there have been cases in which the

7 Bundesrechtsanwaltsordnung (BRAO, the German Federal Lawyers' Act, of 1 August 1959, Bundesgesetzblatt (Federal Gazette) 1959 III no. 303-8. Available at: <http://www.gesetze-im-internet.de/bundesrecht/brao/gesamt.pdf>. Access on: 22 Mar. 2014

8 § 1 BRAO; PEITSCHER, Stefan. *Anwaltsrecht*. Baden-Baden: Nomos, 2013. p. 42.

9 PEITSCHER, Stefan. *Anwaltsrecht*. Baden-Baden: Nomos, 2013. p. 224.

10 PEITSCHER, Stefan. *Anwaltsrecht*. Baden-Baden: Nomos, 2013.

11 § BRAO; PEITSCHER, Stefan. *Anwaltsrecht*. Baden-Baden: Nomos, 2013. p. 51.

12 § 7 Nr. 5 BRAO; PEITSCHER, Stefan. *Anwaltsrecht*. Baden-Baden: Nomos, 2013. p. 54.

East German law was applied by German courts after the reunification to deal with issues which occurred during the socialist rule in East Germany. Those responsible were held to their own standards – but in some cases could benefit from softer sentencing rules under the West German law which applied all over Germany at the time of the proceedings. Essentially judges who were found guilty of perversion of justice were found guilty of a violation of East Germany's own laws (which only existed on paper but which existed nevertheless) but enjoyed the benefits of a judicial system which is based on the rule of law.

Even if the sentence for perversion of justice would not cross the threshold established by the Bundesrechtsanwaltsordnung, a proven case of perversion of justice can be enough to prevent a former judge from being admitted to the bar. This decision has to be made on a case-by-case basis but in particular when perversion of justice in criminal law cases is concerned, former East German judges are unlikely to be admitted to the bar in Germany.

Which effect does this have on lawyers' understanding of legal ethics? At first sight, one might think that this issue might be limited to judges. In addition to judges, lawyers who work in public administration ought to take note as well. In these cases, there is a clear exercise of power by lawyers with regard to citizens. In the German legal system however, the work of attorneys, too, is considered to be more than a mere business. Rather, under German law, attorneys are not only part of the judicial process but are considered to be "Organe der Rechtspflege",[13] which literally translates as "organs of the care for the law", which describes rather well that attorneys, like notaries, serve not only the individual client in concreto but the law as such in abstracto. From this characterization follow certain legal consequences concerning the behavior of attorneys. But it does not need such a legal definition of the abstract service role of attorneys to create obligations regarding the behavior of attorneys. Lawyers of all professions, be they attorneys or prosecutors, notaries or judges, officials in public administration or in house lawyers, are working within a specific framework. This framework is the law.

From that it might follow that the law is the ultimate yardstick against which to measure the permissibility of the behavior of lawyers. But not all forms of unethical behavior might be illegal. This can be, because the law might not be concerned with the details of all potential lawyer behaviors – it might also be because the law itself is unethical and immoral. In the aforementioned German case, a judge had been denied admission to the bar in reunified Germany for violating (East German) law. This precedent does not answer the question of how to deal with judges (or other public officials), who not only adhered to but actively implemented the laws of an unjust regime. One potential dividing line between acceptable and unacceptable behavior under the old regime could be drawn in analogy to Radbruch's famous formula[14], according to which "the conflict between justice and legal certainty could be solved in that way that the positive [...] law also takes precedence when it is unjust and impractical, unless the contradiction of the positive law to justice has reached such an unbearable level that the [positive] law as 'wrong law' [15] has to give way to justice."[16] However, when "justice is not even aimed at, where the equality, which is the core of all justice, has knowingly been denied when positive law was made, there the law is not only 'wrong' law, rather, it completely lacks legal nature."[17] Why should this standard only be applied to lawmakers and not to those who actually give force to the law? After all, it is the judge who makes the final decision over a defendant's freedom or a claimant's rights. This

13 § 1 BRAO.

14 RADBRUCH, Gustav. Gesetzliches Unrecht und übergesetzliches Recht. In: *SÜDDEUTSCHE Juristenzeitung*. 1946. p. 105 *et seq.*, see also DOUGLAS, Lawrence. Was damals Recht war... *Nulla Poena* and the Prosecution of Crimes against Humanity in Occupied Germany. In: MAY, Larry; EDENBERG, Elizabeth. (Ed.). *Jus Post Bellum and Transitional Justice*. New York: Cambridge University Press, 2013. p. 44 *et seq.*, at p. 66.

15 The German term "*unrichtig*" would literally translate as "non-right" and seems to have been chosen deliberately in oder to create a contrast between the words "*unrichtig*" (wrong) and "*Recht*" (law) and to carry the echo of the word "*Unrecht*" (which means injustice but has an even stronger ring to it in German than the English term) with it. The latter word is commonly used in German to describe activities of the National-Socialist regime between 1933 and 1945 ("*NS-Unrecht*").

16 Radbruch, *supra* note 15, p. 106. Translation by Stefan Kirchner.

17 Radbruch, *supra* note 15, p. 106. Translation by Stefan Kirchner.

problem is not limited to criminal law cases. After all there is a risk of abuses also in private law cases, in particular in countries which recently had a regime which used expropriations[18] for political purposes. Upholding an expropriation in court, denying a legal claim based e.g. on the claimant's religion is manifestly unjust. By making decisions which are as unjust as to essentially fail Radbruch's test (which was, strictly speaking, aimed at law-making rather than the application of law), judges choose the wrong side of the law.

But is it realistic to expect judges to go against unjust laws? Lawyers are often said to be easily led by authorities. Yet there are also notable examples of deliberate actions against unjust laws, also in Lithuanian history: During World War II, the city of Kaunas was the temporary home of two of the most remarkable public servants of the 20th century, Sugihara Chiune and Jan Zwartendijk. Mr Sugihara was vice-consul of the Empire of Japan here in Kaunas. In fact, he was not a lawyer but had studied literature. In 1940 he violated both his orders and the relevant regulations and issued thousands of Japanese transit visa to Jews who wanted to flee Lithuania and enabled many to flee through the Soviet Union.[19] Mr Zwartendijk, who has been awarded the life saving cross by the Republic of Lithuania posthumously in 2012,[20] was working for the Dutch company Philips but served as a part-time consular official in Lithuania and issued – de facto illegal – visa for Curacao.[21] The combination of visa for Curacao and transit visa for Japan allowed thousands of Jews to flee in time. While neither Sugihara nor Zwartendijk were lawyers, these two men show what is meant by good morals. As public officials, their functions were not much different from the functions lawyers who work as public officials might have today. Does that mean that lawyers are free to violate the law? As servants of the law, rebellion against the law does not come easy.

German law, however, as we will see in a moment, requires future attorneys to swear to protect not the law but the constitutional order, a reminder of the fact that compliance with the law is not always ethical. This is not asked too much. After all, all lawyers should be equipped with something for which there is a word for German but hardly in any other language, although it is universal in character: Judiz. Judiz is the single most essential quality which is required of everybody who is working in a legal profession and can be translated as the faculty of judgment in legal matters, the intuitive capability to make correct legal decisions,[22] a sense for the law.

4. Ethics matter

Therefore legal ethics and good morals do matter – in particular among lawyers because lawyers are supposed to have a sense for such issues. And good morals are more than the law. Our profession is one which often puts us in the spotlight. How do we act in the courtroom? How do we treat our clients? How do we treat our employees? Lawyers are bound to a higher standard because we serve more than our wallets and our clients. If necessary, lawyers need to stand up for others and speak truth to power, no matter what the price. Ultimately, lawyers might find themselves in a position in which they have to give up the adherence to the law in order to serve the higher good of justice itself. The question then is if those who failed to stand up against injustices should be allowed to serve the law after a change of the form of government. Not admitting to the bar those who violated the law and were unjust at the same time is the easy decision. Those who failed to stand up against injustice should be the burden of proof that they will be able to do so in the future. While the freedom of profession is an important human right, it is by no means an absolute right

18 On the legality of upholding Soviet-era expropriations with the European Convention on Human Rights see KIRCHNER, Stefan; GELER-NOCH, Katarzyna. Compensation under the European Convention on Human Rights for Expropriations enforced prior to the Applicability of the Convention. *Jurisprudencija,* v. 19, n. 1, p. 21, 2012.

19 PALDIEL, Mordecai. *Diplomat Heroes Of The Holocaust*. Jersey: KTAV Pub. Inc., 2007. p. 42.

20 PALDIEL, Mordecai. *Diplomat Heroes Of The Holocaust*. Jersey: KTAV Pub. Inc., 2007. p. 39 *et seq*.

21 PALDIEL, Mordecai. *Diplomat Heroes Of The Holocaust*. Jersey: KTAV Pub. Inc., 2007.

22 Lexexakt.de Rechtslexikon, "Judiz". Available at: <http://www.lexexakt.de/glossar/judiz.php>. Access: 22 Mar. 2014.

and ca be restricted.[23] Those who served an undemocratic legal system and who now wish to serve the law in a democracy will have to provide some guarantee that they are committed to do so. In fact, everybody who wishes to serve the law ought to show allegiance not just to the law as a text but to the fundamental principles on which free societies are based.

In Germany, this is done immediately before the new attorney is admitted to the bar by swearing to uphold the constitutional order and to fulfill the duties of an attorney:

> "I swear to God the Allmighty and Allknowing, to uphold the constitutional order and to conscientiously fulfill the duties of an attorney, so help me God."[24] [The law allows for alternative, not religiously phrased, oaths, as well as for the possibility to avoid the word "swear"[25], the latter in consideration of the prohibition of oaths in the Bible.[26]

In contrast, judges only swear to exercise their office in accordance with the constitution and the law and without discrimination:

> I swear to exercise the office of judge according to the Basic Law for the Federal Republic of Germany and according to the law, to judge according to best knowledge and conscience, irrespective of the person concerned, and only to serve truth and justice, so help me God.[27]

The word "wahren", which I have translated here with the word "uphold", requires more than merely refraining from violating the constitutional order. While this dimension is also included in the word, synonyms suggested by the leading German dictionary include, among others, maintain, conserve, not change, protect, secure and defend.[28] The obligation therefore also has an active element, which also would require an attorney to speak out against violations of the Basic Law, including human rights. It is therefore already visible from the oath sworn by the attorney-to-be that the duty of an attorney under German law goes beyond the law itself. In the case of judges, the duty to follow the law, which follows from the rule of law itself,[29] yet the oath goes beyond the law and spells out that the judge does not serve the law but "truth and justice".[30]

5. Final conclusions

German law therefore presents formidable, but not insurmountable, hurdles for former East German judges who wish to work as attorneys in reunified Germany. How can this result be translated to other legal systems? The case of East Germany differs fundamentally from other post-Socialist countries. The East Germany was dissolved and the land and people joined the Federal Republic, until then referred to as West Germany. Some States regained their independence (for example the Baltic republics), others became independent for the first time in the modern era. Often this meant an absence of a tradition of a specific ethics of attorneys. Also, given that there will be a need for lawyers after a systematic change and taking into account that outsiders can only take up part of the slack and are more likely to play a role in the context of

23 For Germany see Article 12 para. 1 sentence 2 of the *Grundgesetz* (GG) of 23 May 1949, Germany's Federal Constitution, *Bundesgesetzblatt* (Federal Gazette) 1949, pp. 1 *et seq*., Available at: <http://www.gesetze-im-internet.de/gg/BJNR000010949.html>. Access: 22 Mar. 2014.

24 § 12 a I BRAO. Translation by Stefan Kirchner.

25 § 12 a I BRAO.

26 See Matthew 5:33-37, *e.g.* in United States Conference of Catholic Bishops, *New American Bible*, Matthew, Chapter 5. Available at: <http://www.usccb.org/bible/matthew/5>. Access on: 22 March 2014.

27 § 38 a I *Deutsches Richtergesetz* (DRiG), the German Judiciary Act, of 8 September 1961, promulgated on 19 April 1972, *Bundesgesetzblatt* (Federal Gazette) 1972 I 713. Available at: <http://www.gesetze-im-internet.de/bundesrecht/drig/gesamt.pdf>. Translation by Stefan Kirchner. Here, again, the religious phrase may be omitted.

28 Dudenverlag, Duden online, "wahren", available at: <http://www.duden.de/rechtschreibung/wahren>. Access on: 12 Mar. 2014.

29 See Article 20 para. 3 GG.

30 § 38 a I DRiG.

rule of law or human rights dialogues, many States which have just undergone such a sea change will hardly be in a position to be choosy when it comes to ensuring that legal services are actually available. However, the door is not completely closed and it should remain possible to undergo a transition to a free and democratic system without taking away the livelihoods of lawyers, although it might require a lot of retraining. In any case it will require a clear commitment to democratic values and to the rule of law. These values should be reflected in the everyday ethical professional behavior of all lawyers.

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