Constitutional and Legal Problems of Privatization in Germany

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1. Principles and guarantees in constitutional law

Looking at the Constitution of the Portuguese Republic and at the German constitution, the Basic Law of the Federal Republic of Germany, there can be seen at the first glance a striking difference.

The constitution of Portugal, beyond a catalogue of rights, freedoms and safeguards in protection of individual liberty and political participation, encloses a comprehensive array of "Rights, freedoms and safeguards of the workers" and of "Economic, social and cultural rights and duties" and additionally a vast regulation and programme of "Economic organisation". Compared with this constitutional style and politics, the German Basic Law acquiesces in a short suite of fundamental liberties and in the rather vague directives, that Germany is a social state and that public finance must take into account the requirements of the equilibrium in the overall economic demand and supply ("gesamtwirtschaftliches Gleichgewicht"). Only in Art. 15, concerning socialisation and collective economic management ("Gemeinwirtschaft"), there is an enabling clause for a public property of the means of production, which could be introduced by law and against indemnization. On the federal level, there has never been an attempt to make use of this old socialistic memory sign.

Of course, this is not the place for a full scale comparative analysis of the constitutional law and policy in Portugal and in Germany, concerning economic organization. Anyhow it must be noted, that the outward disparity of the two constitutions is accompanied by substantial differences in the subject matter. Fundamental principles of the economic organization in Portugal are *inter alia* (1) co-existence of the public, the private and the cooperative and social sectors with respect to the ownership of the means of production, (2) collective ownership of means of production and land as required by the public interest, (3) collective ownership of the natural resources, and (4) democratic planning of the economy. These principles may include a broad margin of legislative decision and discretion. But they give public property and political direction and intervention in the shaping of economic organisation a conspicuous stress. This is quite divergent from the constitutional situation in Germany. To say more or even to go to an evaluative comparison would require a consideration of the different social situation and development in both countries. This goes far beyond the scope of my task and my possibilities. It is in the last resort an agendum of the European Economic Community. The principles of the European Economic Community demand an approximation of economic and social conditions in the Common Market, but they respect the different national economic organisation. The Treaty of the European Economic Community does not touch on

the property order in the different member states (Art. 222 EEC--Treaty).

The scarcety of explicit clauses on economic policy and economic organisation in the German Basic Law has been, from the beginning, a field of dispute. The Bundesverfassungsgericht very early has laid down the key thesis, that constitutional law does not fix a certain economic organization and does not prescribe a certain economic policy. Economic liberty, protection of property, free enterprise and market economy under social limitations are constitutional cornerstones. But the constitution leaves an open way for an economic policy and a change of economic policy in the frame, the constitutional law sets for legislation[1]. In this understanding the Basic Law is economically neutral ("wirtschaftspolitisch neutral"). Therefore the constitution encloses no precise directive for the delimitation of the public sector of economy and for the grade or dimension of public enterprise and public property. There is no constitutional precept that public property which is not necessary for administrative tasks or for welfare policies should be transfered into private ownership. Equally there is no principle that the State should participate in the economy especially in the sphere of production or services only if there is a special or prevailing public interest. This is — apart from intervention into existing rights and from expropriation — a matter of convenience and appropriate policy. Privatization might be, in general or in single cases, a reasonable policy, as the programme of the present German gouvernement proclaims[2] and its practise shows. It is constitutionally possible, but not a constitutional necessity. A divergent estimation must take place for the special and singular case of the enterprises in the former German Democratic Republic which are administered by a trusteeship agency. Here privatization, including reprivatization, is part of transforming a socialist economy into a privately managed market economy.

The constitutional problem of privatization has been the subject of a famous lawsuit at the Bundesverfassungsgericht, thirty years ago[3].

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[1] BVerfGE 4, 7/17; 50, 290/338.

[2] Der Bundesminister der Finanzen, Gesamtkonzept fur die Privatisierungs- und Beteiligungspolitik des Bundes, Zeitschrift fur öffentliche und gemeinwirtschaftliche Unternehmen (ZögU) 8, 1985, p. 203.

[3] Bundesverfassungsgericht, sentence from Mai 17th, 1961, BVerfGE 12, 354.- R. Schmidt, Öffentliches Wirtschaftsrecht, Allgemeiner Teil, 1990, pp. 144 sqq.

A part of the shares of the Volkswagenwerk, a limited liability company, originally belonging to the Reich, later owned by the Bund, had been transferred into private ownership by a law from July 21th, 1960 (BGBl. I p. 585). The employees of the enterprise had been given a preference in the acquisition of the new company with mixed public and private ownership. The law has been constitutionally contested in several regards. One point of censure was that this act of privatization would run against Art. 15 GG. This constitutional clause says: Landed property, natural resources and means of production can for the purpose of socialization be transferred into public property or other forms of collective public management, by a law which adjusts kind and amount of indemnization. The constitution acknowledges the substantial difference of expropriation, which is a way of providing a specific object, especially a piece of land, for a defined public purpose, and socialization, which is a key procedure in transforming private market economy into some form of collective production with participation of the employees and a non-profit guideline. Notwithstanding this difference, the Art. 15 GG does not say, socialization should be accomplished, but only that it could be realized, and the clause lays down the duty of indemnization.

The Bundesverfassungsgericht ruled that the constitution does not include a norm which would generally inhibit the selling of enterprises in the ownership of the Bund and without any public purpose. Especially could Art. 15 GG not be construed as containing such an inhibition. This clause contains no mandate for socialization, but only an enabling for the legislation; beyond this it includes no precept to abstain from any act which might impede a future socialization. These sentences conform with the mentioned keynote of the Basic Law to prescribe no definite economic policy. In the merits of this decision we find the following evaluation of a privatization policy which shall conclude my assessment of the constitutional framework: "The idea (of privatization) conforms to the leading picture of a market economy which rests on the free competition of private enterprises and refuses the State as entrepreneur insofar as it does not pursue acknowledged public tasks. Connected with this is the specific social and basic policy aim of a "broad spreading" of property rights, stemming from privatization by which could be contributed to the building up of property in groups of persons who had until now a living only from a salary".

2. Politics and legal framework of privatization in Germany

a) Deregulation and privatization as a legal problem of economic policy

The debate on privatization is part of the political and legal debate on the role of the State and the democratic political forces in the organization and functioning of economy. The liberal constitution followed the guideline, that economic production and distribution is a matter for private action, initiative and enterprise. The State must set the legal framework of the economic prccess, must intervene to secure the public interest and to protect the individual against economic power and abuse and, lastly, must operate certain public services which cannot be left to the market forces of demand and supply, for instance public transport, postal services or communal services. The borderline between State intervention and public enterprise and, on the other side, private and market economy has a different topography from country to country. For a long time in this century the trend was for a steady enlargement of the public sector, under the scope of welfare state politics and somewhere with a strong emphasis on socialist programmes. The last decennium, in Germany and elsewhere, has brought a shift of the evolution. The insight into the defectiveness of a planned economy with crippled private action and private autonomy has grown, the causes of the wealth of nations are reconsidered.

A battlecry of the new economic politics is the concept of "deregulation". This means, in a narrower sense, a loosening of regulations concerning the market competition and the fixing of prizes and trading terms by the way of demand and supply. In a broader sense, the deregulation debate covers the question, in what scale the production and supply of goods and services shall be effected by private enterprise, without influence or impeding through public intervention or regulation[4]. A part of this deregulation debate is the question of privatization. To look at privatization from the angle of deregulation shows the context with the problems of a reduction of the public debt and of a retrenchement of subventions. The operating of a public enterprise which is economically not successful is in substance equi-

[4] R. Schmidt, op. cit., pp. 48 sqq.

valent to subventioning a private enterprise which does not earn its costs of production. This might be, for a limited time and under clear reasons of structural policy, a justified action of public interest. In a certain core of services of public necessity this course of action even is unevitable. But outside such fields of plain and strong public interest the operating or subventioning of a deficit enterprise is a waste of public funds and a mismanagement in the employment of economic means and of labour.

Legally, privatization is the transfer of public tasks or of public means, mainly of public enterprises, from the State or another public entity to the disposition of a private subject, generally a private corporation. An essential distinction is necessary in the following way. The privatization can consist — first — in the establishing of an enterprise in the legal form of the private company law, for instance a joint-stock company, with all shares or the majority of the shares remaining in public ownership. This we would call a "formal" or "organizational" privatization. The State or another public entity in this case uses the advantages of the private law organization for a special task. For instance a municipality operates the communal traffic, or other public utilities by a limited liability company or a public broadcasting service produces the advertising spots by a private affiliate company.

In the case of organizational privatization the public shareholder remains in charge of the public task. The private law organization is only instrumental, though, under German law of joint-stock companies, the purpose of the enterprise and not the interest of the dominating shareholder is the guideline of the management. To a certain degree, the use of private company law slackens the influence of the public shareholder.

Privatization can — secondly — transfer a public task or a public enterprise to a privately owned or privately dominated company. This we would call a "material" or "substantial" privatization. Here a real change in the operation of a former public task or enterprise takes place. A presupposition for such a proceeding will, of course, be that private capital is at large and that the object of the transaction is of sufficient interest for a private investor. A public enterprise without a good prospect in the market might not be a suitable object of privatization. A special case is the reprivatization, that is the restitution of a former private piece of land or enterprise to the original

owner or his legal successors. A dominant problem of the reconstruction of a market economy in Eastern Germany is the possible conflict between the claims of former owners, who want reprivatization, and the public interest for a speedy privatization by a selling to the fittest investor.

b) Policy of privatization in Germany

After this general and conceptual outline of the legal questions of privatization, I shall give a sketch of the actual development and practice in Germany. I distinguish three different areas:

— The intensified and programmatic policy of privatization of the Bund after the change of government 1982;
— the efforts of a privatization in the field of public utilities, especially in the realm of municipal services and of railway, postal services and telecommunication;
— the economic reconstruction in the former German Democratic Republic (DDR) under the guidance of the Treuhandanstalt (trusteeship agency).

The coalition government which came into power after the fall of the social-liberal coalition is a strong advocate of a social modified market economy, based on private initiative and enterprise. "In the years of the eighties privatization is part of the embracing question, which goods and services are to be offered by the State. This policy goes into the direction of a limitation of public production, of a lowering of the public quota of the national product, of a reducing of public tasks, of less State"[5]. After the stating of principles, a process of privatization of industrial assets has started, most prominent the privatization of the vast VEBA combine[6]. In 1985 a "General concept for the policy of the Bund concerning privatization and share-holding" has been published[7]. The public share-holding in the area of entre-

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[5] K. König, Entwicklung der Privatisierung in der Bundesrepublik Deutschland — Probleme, Stand, Ausblick —, Verwaltungs-Archiv 79, 1988, p. 241/242.

[6] J. Esser, 'Symbolic Privatisation': The Politics of Privatisation in Western Germany, West European Politics 11, 1988, p. 61; K. König, op. cit., pp. 251 sqq.

[7] Bundesminister der Finanzen, op. cit.

preneurial activities is to be checked with the criterion, if public interest justifies a further public engagement. To understand this, it must be added that the greater part of public shareholding is an inheritance from the Reich and from Prussia. An assessment of the costs and profits out of this conglomerate public property produced the result that in all the budget of the Bund had to carry a loss of several billions in the period from 1970 to 1982. The mentioned "general concept" states the precedence of private initiative and private property as policy guideline, demands privatization in those cases, where a sufficient public interest of the share-holding is not or not any longer justified, and requires the creation of the conditions for a privatization, where a share is unfit for privatization, for instance for want of sufficient returns.

The implementation of this ambitious programme has made some progress[8], but will not lead to a substantial cut in public enterprises. A fair evaluation must regard the interdependence of privatization policies with the cutting of subventions and with the complex endeavours of deregulation. The Federal Gouvernment stresses the necessity of strengthening the market competition and of removing impediments for the approach to the market. This policy is in accordance with the requirements of European Law, in part even a realization of demands of the European Community. Sometimes it has been spoken of the "timidity" of the privatization process in Germany. But this judgment has been fairly accompanied with the reasons of this peculiarity: "In summing up the reasons for the slow privatization process in West Germany it is important ... to note that public ownership of industrial corporations is relatively insignificant. All those industries and corporations which are in the long run strategically important for the maintenance of key positions in world markets are privately owned. Private capital is the foundation and the driving force of German economy ... Equally the private banks occupy a vital role in this process (of structural adaptation to the new competitive international environment)...The debate on privatization of public assets has ...

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[8] Jahreswirtschaftsbericht 1990 der Bundesregierung, Bundestag Drucksache 11/6278, p. 19. — The Federal Gouvernment in 1990 has decided on a new comprehensive concept for the privatization and share-holding policy of the Bund. The public interest in all assets of the Bund shall be scrutinized anew, ussig a critical criterion; some public assets are enumerated in this new programme from November 28th, 1990, as primary objects of a privatization. S. v. Jahreswirtschaftsbericht 1991 der Bundesregierung, Bundestag Drucksache 12/223, pp. 23 sq.

focused on a few companies which, for historical reasons, were publicly owned and have become profitable in the post-war era: Preussag, VW, Veba, Lufthansa and some state-owned banks. The disputes over whether and when to privatize, and how much to privatize, were inspired by fiscal, distributional and industrial policy concerns, and supplemented by the interests of a small group of rich investors who wished to expand their portfolios.... Public assets will not be privatized if they are considered indispensable for regional and industrial policy"[9]. All this, of course, does not apply to the necessary privatizations in Eastern Germany. The extraordinary situation of public management of the former socialist means of production can only last for a limited period and is strictly bound to the final purpose of creating a market economy, based on private enterprise. The present public operation of those enterprises shall not issue into a permanent establishment of new enterprises of the Bund. Only for a time of transition, the public finance can give subventions to enterprises which are in principle fit for privatization, that means, have the prospect to become profitable participants in market competition. I shall recur later to this special privatization problem.

A second area to be contemplated are the efforts of a privatization in the field of public utilities, especially in the realm of municipal services and of railway, postal services and telecommunication. There is no dispute that the key positions of transport, communication, communal services and energy supply cannot be operated alone by private business. In the contrary, here the public management must prevail, at least by a strong supervision and even, if necessary, by subventions. Anyhow, there are many sectors of communal activities, that could be objects of privatization and would possibly perform better and even cheaper services, if privately operated, as cultural establishments, hospitals, touristic services, cleaning services etc.[10]. The opinion on the usefulness or desirability of privatization in these cases will vary, according to the general political outlook. The profit-orientated operation of services tends to neglect those branches of performance which are expensive, but — on the other hand — offers the only reliable criteria to measure costs and efficiency.

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[9] J. Esser, 'Symbolic Privatisation', op. cit., pp 70 qq.

[10] W. Graf Vitzthum, Gemeinderechtliche Grenzen der Privatisierung kommunaler Wirtschaftsunternehmen, Archiv des öffentlichen Rechts 104, 1979, p. 580; K. König, op. cit., pp. 260 sqq.

The reform in the field of public utilities does not look alone at the instrument of a transfer of services to private enterprises. Another means of deregulation is the opening for competition, especially in the case of services which until now are protected by public monopolies. Two important examples in Germany are the broadcasting system and the postal services. From the beginning, the broadcasting, including television, was only in the hands of public institutions. This situation was not constitutionally necessary. The constitutional liberty of broadcasting can be safeguarded in the forms of public law, which is difficult, but equally difficult in the case of private broadcasting corporations. In the last ten years there has developed a dual broadcasting system and meanwhile we find a sometimes refreshing journalistic and economic competition of the old public institutions and the new private corporations.

A development of great significance also is the opening of the telecommunication market by the reform law of 1989[11]. The monopoly of the Bund has been restricted to the operation of the telecommunication net, the wireless installations and the telephon service. But even in these monopoly areas the government can allow single private market participation. The public services are maintained, but they must suffer private competition, as in the case of mobile wireless service.

Another element of the Bundespost-reform consisted in the separation of the political and administrative powers, which are in the competence of the ministry, and the entrepreneurial and management tasks, which now are in the hand of public enterprises, regulated by the law. The government is on the way to frame a further step of reform, which would alter the organizational form of the postal enterprises into a private law corporation, i.e. a joint stock company. This would be a partial privatization. Private shareholders could enlarge the financial basis of such new corporations. The majority position of the public assets shall not be touched, so that there would be only an organizational and not a substantial privatization[12]. A progress of this reform idea is not only a matter of legislation, but presupposes an amendment of the constitution. By virtue of Art. 87 paragraph 1 of the

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[11] Gesetz zur Neustrukturierung des Post- und Fernmeldewesens und der Deutschen Bundespost (Poststrukturgesetz), June 8th, 1989 (BGBl. I p. 1026).

[12] G. Krupp, Postreform — zweite Stufe, Frankfurter Allgemeine Zeitung, Dec. 4th, 1991.

Basic Law the organization of the postal services is in principle determined by public law and must be a component of the administration of the Bund. This organizational chain must be loosened and a new constitutional clause must empower the legislator to choose for the Bundespost the organizational structure of a private law corporation.

3. The economic reconstruction in the former German Democratic Republic (DDR) under the guidance of the "Treuhandanstalt"

a) Legal basis and political conditions

The political unification of Germany must be completed by a reconstruction of the economy in the new Eastern Länder and an adaptation of the economic and social conditions of living, work and production. The legal conditions have been created by the two fundamental treaties, the Treaty on the Creating of a Currency-, Economy- and Social Union between the Federal Republic of Germany and the German Democratic Republic from May 18th, 1990, and the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishing of the Unity of Germany ("Einigungsvertrag") from August 31th, 1990. The Einigungsvertrag, notwithstanding a plenty of transition regulations, has set up a unified legal order on the basis of the law and constitution of Western Germany. Anyhow, the restoring of an efficient and just economy in the former DDR will be a process of a few years.

The economy of the DDR was based on the socialist property of the means of production. The economy was steered and planned by instruments of socialist planned economy management and of a socialist economy law. The organizational units of the economy were state-owned combines and enterprises. The certain autonomy of these units of "people's property" in the framework of planned economy remained a reflex of the thorough-going central steering and planning of the economic process. Agriculture, trade and craft also were organized in forms of people's property; they operated collectivated in cooperatives, apart from an insignificant sector of small private shops.

Under these conditions, privatization in connection with the reunification of Germany is only an element in the allembracing process of transformation from socialist economy without any substantial

private enterprise and production into a market economy based on private initiative and property. This abrupt structural change of the social and economic system was connected with heavy cuts in production and employment. It has laid open fundamental deficiencies of productivity and distribution ingrained in the socialist economic system. Large sectors of the East German industry are unable to supply the market with goods and services, which could find a customer. Additionally, the former trade relations with the Soviet Union and the other Comecon countries could not continue[13]. All this demonstrates the singularity of privatization policy as a part of economic reconstruction after the fall of the socialist system.

The first step of reorganization, effectuated under the old regime, was the transformation of the state-owned combines and enterprises into private law companies, joint stock companies or limited liability companies[14]. The second step, also under the old regime, was the creating of an agency for the administration of the people's property on a trusteeship basis ("Treuhandanstalt") by a resolution of the Volkskammer from March 1st, 1990. The first unification treaty from Mai 18th, 1990 stated: It will be carried through an inventory of the people-owned assets. The people-owned assets are to be used predominantly for the structural adjustment of the economy and for the establishment of sound conditions of the State budget (Art. 26 par 4). The operation of the Treuhandanstalt was regulated by the Law for the Privatization and Reorganization of the people-owned assets ("Treuhandgesetz") from June 17th, 1990 (GBl. I p. 300). The target of the law is, to reduce the enterpreneurial activity of the State by the privatization of the people-owned assets, as speedily and as far as possible. Certain parts of these assets can be given to the Länder or to municipal corporations. The Treuhandanstalt is a public institution under the supervision of the prime Minister with the task to privatize and utilize people-owned assets, according to the principles of social market

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[13] Wirtschaftsförderung in den neuen Bundesländern, in: Monatsberichte der Deutschen Bundesbank 1991, Nr. 3, p. 15; Jahreswirtschaftsbericht 1991 der Bundesregierung, op. cit., pp. 12 sqq.

[14] D. Maskow, Die Umwandlung von volkseigenen Betrieben in Kapitalgesellschaften, Recht der Internationalen Wirtschaft, 1990, Beilage 5, p. 1. — Verordnung zur Umwandlung von volkseigenen Kombinaten, Betrieben und Einrichtungen in Kapitalgesellschaften vom 1.3.1990 (GBl. I p. 107).

economy. The Einigungsvertrag has maintained the Treuhandanstalt and — with small adaptations — the Treuhandgesetz (Art. 25)[15].

The privatization task of the Treuhandanstalt and the economic reconstruction in Eastern Germany as a whole are overshadowed by the complex and difficult problem of the restitution of property which has been confiscated or expropriated by the Soviet occupation authorities or the German socialist regime. The State-owned landed property and the State-owned enterprises stem to a very large part from former private owners, who have lost their property against their will. Legally those confiscations or expropriations, arbitrary and unjust as they were, can not be measured by the rules and standards of the Basic Law. They happened out of the area of applicability of the Basic Law. On the other hand, these assets and this property now, by virtue of the reunification and mediated by the Treuhandanstalt, are under the disposition of the Federal Government. Therefore it is a necessity of justice and a demand of the constitutional guarantee of property to find a fair adjustment between the concerns of former owners, the rights of new private owners and the public interest in a speedy reconstruction and recovery with the engagement of private investors. The solution, which can only be outlined here, is not yet completed[16].

The decisive advance has been the Joint Declaration of the Gouvernments of the Federal Republic of Germany and of the German Democratic Republic concerning the Settlement of Open Property Questions from June 15th, 1990. The Declaration states that the confiscations between 1945 and 1949 cannot be revoked, notwithstanding a compensation by the State on the basis of a future law. Landed property shall be returned to the former owners or their heirs with the exception of pieces of land with a new usage of public interest or of an otherwise irrevocable new usage, and with the exception of pieces of land which have been honestly purchased by a third party. The former owner gets an indemnization if the restoration is excluded or if he

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[15] W. Möschel, Treuhandanstalt und Neuordnung der früheren DDR-Wirtschaft, Zeitschrift fur Gesellschaftsrecht 1991, p. 175.

[16] B. Czerwenka, Rückgabe enteigneter Unternehmen in den neuen Bundesländern, 1991; S. Jung/M. Vec, Juristische Schulung 1991, p. 714; D. Weber/A. Wilhelm, Die Enteignungen unter sowjetischer Besatzungsherrschaft und ihre Behandlung im Einigungsvertrag, Betriebs-Berater, 1991, Beilage 3, p. 12; P. Badura, Der Verfassungsauftrag der Eigentumsgarantie im wiedervereinigten Deutschland, Deutsches Verwaltungsblatt 1990, p. 1256.

chooses indemnization instead of restoration. Enterprises and shares which have been transferred into people's property by confiscation between 1949 and 1972 are returned to the former owner, if he does not take indemnization instead of restoration; the development of the value of the asset is taken into account.

This Joint Declaration has been incorporated into the Einigungsvertrag (Art. 41). Additionally the Federal Republic has undergone the obligation to set no law in contradiction to the said Joint Declaration. As a supplement the Einigungsvertrag has opened the possibility, to exclude the restoration of landed property if this should be required for urgent purposes of investment. To carry out those basic regulations in Art. 41, into the Einigungsvertrag have been inserted as an annexe two laws: the Law concerning the Settlement of Open Property Questions and the Law on Special Investments in the German Democratic Republic. If you set aside the cases between 1945 and 1949 the basic ideas of the settlement can be stated in two slogans: "Restoration goes befor indemnization" and "Right of way for investments". The better and speedier investor has in the process of privatization a better right than the former owner, who demands reprivatization. This rule has even been strengthened by amendments which have been effectuated through the Law for the Removal of Impediments in the course of Privatization of Enterprises and for the Furthering of Investments from March 22th, 1991 (BGBl. I p. 766).

The Settlement of Open Property Questions by the Joint Declaration from June 15th, 1990, and by the Art. 41 Einigungsvertrag has been constitutionally secured by amendments of the Basic Law which have been enacted as a part of the Einigungsvertrag itself (Art. 4 Nr. 4, 5). The new Art. 143 par. 3 GG says that Art. 41 Einigungsvertrag and regulations in pursuance thereof are of lasting duration insofar as they provide that encroachments on property are not revoked. The new Art. 135 a par. 2 GG states that the assessement of indemnizations in this respect which has to be regulated by law may determine that the indemnization obligations by the State under certain conditions must not be fulfilled or must not be fulfilled completely. Insofar as these constitutional amendments cover the confiscations between 1945 and 1949, they have been attacked before the Bundesverfassungsgericht. In its sentence from April 23rd, 1991, the court has rejected the reproach of unconstitutionality and has given some hints for the assessement of the due compensation.

The assessement of compensation in the case of the confiscations between 1945 and 1949 and equally the regulation of the indemnization in the cases between 1949 and 1972 when the former owner has no right of restoration or chooses indemnization instead of restoration, has proved very difficult and controversial. The rules for compensation and for indemnization must follow the same basic criteria. Insofar there can be no difference between the years before and after 1949. Futher, equal treatment must be secured for those, who get their land or enterprise back, and those who only get an indemnization. Therefore the title of restoration is onerated with a charge to compensate the advantage of the restoration value. Recently the main lines of a draft for the necessary law have been published which has been prepared in the Ministry of Finance [17]. The compensation or indemnization for confiscations or expropriations shall generally be fixed at 1,3 times the assessed standard value of 1935, reduced by formerly paid compensations. In the case of restoration the owner shall pay a charge of 30 percent of the restored value, measured by a defined standard assessment.

b) The Treuhandanstalt and its practise

The Treuhandanstalt now is a public law institution of the Bund under the supervision of the Minister of Finance and with the mandate, to give the former people-owned enterprises a structure fit for competition in the market economy and to privatize those enterprises [18]. It is empowered to borrow funds until a fixed amount. The returns of privatizations may only be used for measures concerning the economy in the former DDR.

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[17] Rückgabe beweglicher Guter nicht vorgesehen, Frankfurter Allgemeine Zeitung, 5.12.1991.

[18] Bundesministerium der Finanzen, ed., Die Tätigkeit der Treuhandanstalt, November 1991; R. Schmidt, Aufgaben und Struktur der Treuhandanstalt im Wandel der Wirtschaftslage, in: P. Hommelhoff, ed., Treuhandunternehmen im Umbruch, 1991, p. 17; R. Weimar, Treuhandanstalt und Privatisierung, Der Betrieb 1991, 584.- The decisions of the Treuhandanstalt, by which the title of restoration is overruled in favour of an investor is an administrative act (s.v. § 3 a par. 3, 4 Vermögensgesetz). R. Weimar, Handlungsformen und Handlungsfelder der Treuhandanstalt — öffentlichrechtlich oder privatrechtlich? Die öffentliche Verwaltung 1991, p. 813.

The Treuhandanstalt is organizationally an agency, a public institution ("bundesunmittelbare Anstalt des öffentlichen Rechts"), but in substance a gigantic combined enterprise.

It operates with a businesslike management and in the forms of private law[19]. Anyhow it fulfills a public task and is bound to the public concerns which are laid down in the law. The contracts of the Treuhandanstalt and the purchasing parties are subjected to the requirements of competition and cartel law. The resulting enterprise structure and market conditions must conform to the rules of market competition; privatization enjoys no priviledges or favoured positions. Further, the Treuhandanstalt operates under the rule of budget law and is supervised by the budget committee of the Bundestag which has installed a subcommittee for the matters of Treuhand enterprises. To facilitate Treuhandanstalt privatization the procedure of budget law allowance in the case of share selling has been modified.

By the Treuhandanstalt the Bund holds the shares of the former socialist enterprises. Privatization is carried through by private law contracts with the new owner. In those contracts the Treuhandanstalt includes clauses by which the purchasing party is bound to effect an agreed amount of investments in a fixed time and to keep the employees of the privatized enterprise for a fixed period. These investment and employment commitments influence the value of the purchased enterprise and, of course, reduce the price the Treuhandanstalt can obtain. By those commitment clauses the Treuhandanstalt can follow up some kind of structural policy. But it should be noted that the Treuhandanstalt has no mandate and powers for a full scale structural policy. It is no new steering and planning agency; its function is limited and transitional, with 1995 as projected deadline.

Neither is it the principal task of the Treuhandanstalt to rehabilitate enterprises by establishing sound conditions and granting of subventions. In accordance with the guideline of the Federal Gouvernement it has firmly opposed the demands of the opposition parties and the trade unions to rehabilitate enterprises which have no foreseeble future in the market competition. If an assessement shows that an enterprise can be made fit for privatization this possibility has to be used and insofar the enterprise will be rehabilitated and kept alive.

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[19] S. v. Antrag der Fraktion der SPD, Bundestag Drucksache 12/615; Beschlußempfehlung und Bericht des Haushaltsausschusses, Bundestag Drucksache 12/1204.

Similarly such an enterprise will be freed of debts or encumbrances. Old debts are widely a result of arbitrary allotments of the socialist planning bureaucracy. They should not impede an otherwise successful rehabilitation and privatization of an enterprise with a future [20]. But here as anyway the Treuhand-policy cannot follow the target to maintain an industrial structure which — due to the fundamental miscarriage of the socialist economy — is inefficient and without prospect under market conditions. Privatization and investments with calculated market success are the only promising way of reconstruction in Eastern Germany which cannot remain a zone of continuated economic weakness [21].

The operation of the Treuhandanstalt has been quite successful, under the given circumstances. Until the end of October 1991 about 4.000 cases of privatization have been dealt with. An amount of 85 billion DM commitments of investments have been secured. In the course of privatization the Treuhandanstalt had to reform the structure of the industry units, especially by deconcentration and decartelization of the about 8.000 combines and enterprises which had originally come into the portfolio of the Bund. The former stateowned property did, of course, not only consist of means of production. Insofar as it has an administrative or municipal purpose, it does not belong to the fonds for privatization, but must be allotted to the respective public entities, mainly the new Länder and the municipalities. The definition and allotment of these objects is regulated by the Einigungsvertrag (Art. 21, 22) and additional laws [22]. This also is a task of the Treuhandanstalt with a broad and complicated array of administrative and legal problems.

At the beginning, it had been estimated that the returns of privatization would produce a remarkable surplus. This estimation will not realize. The expenditure for economic and technical rehabilitation of the enterprises, the decharging of debts, the reduced proceeds of sales and the necessities of reprivatization accumulate to a substantial deficit of the Treuhandanstalt, amounting to about 30 billion DM per year.

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[20] Antwort der Bundesregierung auf eine Große Anfrage betr. Treuhänderische Verwaltung des volkseigenen Vermögens der DDR, Bundestag Drucksache 12/1207.

[21] Esp. Gesetz über die Feststellung der Zuordnung von ehemals volkseigenem Vermögen vom 22.3.1991 (BGBl. I p. 766, 784).

[22] S. v. Bundesministerium der Finanzen, op. cit. pp. 28 sqq.

This demonstrates that privatization policies as an element of the transformation of a planned public economy into an economy based on private ownership and enterprise inevitably is a policy of structural shaping and organization, to create the elementary conditions of private market economy. This limited aim is a contribution to the steady programme of reducing the State to the core of his public tasks, thereby securing the predominance of private initiative and private property in a free society.

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