

# THE QUARREL OVER THE STASI FILES

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The struggle for access to the Stasi files dates back to the peaceful revolution in East Germany in the autumn of 1989. In November 1989, the Ministry of State Security (MfS) was transformed into the Office of National Security (Amt für Nationale Sicherheit, ANS), with the hidden purpose of securing secret police structures and documents for the post-dictatorial era. This attempt failed, and the people responded with the “storming of the Normannenstraße,” Mielke’s stronghold in Berlin, in order to stop Stasi agents from destroying evidence. The storming was successful; it represented a victory for the people and for civil rights.

In the end, the “Round Table” decided to destroy the files of Markus Wolf’s intelligence branch, but the majority of the documents concerning the internal activities of the MfS could be saved. In May 1990, the East German People’s Chamber appointed a special committee under the chairmanship of Joachim Gauck to control the dissolution of the MfS/ANS. Then in September 1990, the German Unification Treaty obliged the Bundestag to entrust MfS records to a Special Commissioner of the Federal Government (later Federal Commissioner) for the files of the former State Security Service, the so-called Gauck Agency, which began operations with fifty-two employees. In December 1991, according to the same provision of the Unification Treaty, the Bundestag approved the “Stasi Records Law,” which granted the access to the records. The law was passed by a broad coalition of CDU, FDP, and SPD deputies, with abstentions from the PDS and the Green Party. Its famous Paragraph 32 regulates the unlimited access to “documents without personal information” and to “copies of documents with personal information rendered anonymous.” The other personal information that the Gauck Agency was allowed and obliged to release can be divided into three categories: documents with written consent of the person concerned, documents with personal information about employees and beneficiaries of the MfS, and “information about persons of contemporary history or holders of political office, as far as they are not directly or indirectly affected persons.” This curious, obscure definition distinguishes between guilty parties, who were not supposed to benefit from the law, and three categories of victims: “persons directly affected,” i.e., those deliberately targeted by the MfS, “indirectly affected persons,” i.e., those mentioned secondarily in a Stasi investigation, and finally a group with little claim to secrecy because of their prominent public role—the people of contemporary history. In

1996, the law was amended to insure that “the secrecy of mail, correspondence, and telecommunications [would] be limited due to this act.”

In the ten years that followed, millions of applicants gained access to the Stasi files through this law. The Gauck (now, Birthler) Agency today has thousands of employees organizing the access to the Stasi files, which are located in the central archives of the former MfS in Berlin and in various regional archives. A special department (“Research and Education”) pursues scholarly research, organizes conferences, and publishes monographs; Mielke’s state security apparatus has thus become one of the best investigated parts of the former dictatorship. The Stasi records, encompassing more than 500,000 feet of documents, are in principle open to all interested researchers. The public became used to the flood of revelations that emerged from the reading of the Stasi files by former victims and journalists; thousands of the Stasi’s “unofficial employees” were exposed. The law proved to be one of the rare legacies of the East German grassroots citizens movement that survived reunification—it turned out to be a tremendous success.

But at the end of ten years, the very same law was widely criticized. This unexpected situation arose when, through a series of legal moves, former chancellor Helmut Kohl forced the Federal Commissioner to seal all Stasi documents relating to him and his political role. The law underwent a series of transformations that restricted the access to the Stasi documents, thereby undermining the basis for public information about the GDR. Henceforth, scholarship on the MfS and other facets of the “second German dictatorship” could not reach the standard of former investigations for lack of source material. How can this unexpected turn be explained, especially since it occurred at the same time a general interest in coming to terms with the past—from the Herero massacre to the Holocaust—stood out as a phenomenon in Germany and elsewhere?

The first explanation is the political background to the quarrel. It began at the end of 1999, just when the donation scandal of the CDU rattled the political sphere like an earthquake. For weeks it threatened to split the conservative party. The coincidence was no accident. In the slow process of sifting unknown material in the files of the MfS, the Federal Commissioner had come across protocols of “bug activity” and recordings of telephone calls emanating from the inner circles of the West German government in the 1970s and 1980s. This material seemed to contain some evidence of the attitude of CDU leaders in the party donation case and therefore drew unusual attention. Once it was made public, it led to critical questions from journalists and from the Ministry of the Interior under Otto Schily. These critics were concerned that the effort to come to terms with the GDR legacy interfered with politics in the Federal Republic. Gauck retreated a bit and made his position on the law and files more

precise: the agency would no longer make public any original protocols of the “illegally” bugged conversations but would still make the Stasi summaries accessible. In April 2000, Kohl applied to inspect his personal files. In November, he demanded that the agency withhold any material that concerned him until he had personally reviewed it.

Personal factors also must have played an important role. No one involved in the matter appeared open to compromise, and all acted with remarkable stubbornness. For Gauck’s successor Marianne Birthler, the situation was extremely difficult. As a newcomer, she had to prove she was capable of replacing the hero Gauck and managing the crisis. The quarrel enabled Kohl, who had lost political power and now risked tarnishing his personal reputation, to distract public attention from the central issues of the donation scandal. For his part, Otto Schily had the opportunity to return to his roots as a state defense lawyer.

Birthler remained firm. She stated that the agency was obliged to release requested material according to the law and that she could not grant individuals the privilege of personally vetting these materials as this would affect the access rights of historians and the media. As expected, Kohl appealed to the Administrative Court on November 27 to prevent any release of documents concerning him. Birthler, in return, decreed that those concerned would be informed before “their” documents were made accessible to allow them to object. But this half-hearted move did not help. In July 2001, Kohl was handed a full victory in court; his files had to be kept secret. The court ruled that “persons of contemporary history” are also protected.

Days later, Otto Schily came forward with an unusual measure, the “high noon ultimatum”: He would take legal action against the Federal Commissioner if she continued to release documents to the public. When an appeals court, the Federal Administrative Court, upheld the earlier ruling that restricted personal information about Kohl and, consequently, every concerned individual who had not been a Stasi member, Birthler changed her tactics. She closed all exhibitions, all information and documentation centers about the Stasi, shut down the agency’s web site, and denied nearly all applications for historical research. Her actions elicited a protest from the Simon Wiesenthal Center in Jerusalem, which accused the authorities of blocking access to Nazi-related documents in the MfS archive. The scholarly community also reacted with dismay when Birthler stated in April 2002 that most of the 2,000 current requests for research had to be postponed or refused in the wake of the Kohl decision. In an article, Birthler explained that henceforth “historical research using Stasi documents is possible only within narrow limits.”<sup>1</sup> Experts criticized the drastic and far-reaching restrictions on scholarly work, which prompted the Bundestag to amend the law. In July 2002, the Bundestag

approved the amendment with the SPD, Greens, and FDP voting against the CDU.

In September 2003, the Berlin Administrative Court approved a petition by the Birthler Agency to make the Kohl documents public, in principle, without violating his constitutional rights. But even this seemingly clear ruling was not the last word. Kohl lodged an appeal and, in June 2004, the Federal Administrative Court reached a final compromise on Stasi material relating to individuals of contemporary history. The court ruled that no information concerning the private lives of these persons could be made public. The court extended this limitation to all tapes and verbatim protocols of illegal listening in private or official rooms and—this was new—to all internal Stasi reports, analyses, and interpretations based on such protocols; all information collected through spying was restricted. Moreover, the court tightened limits on who could apply to see the information: only scholars working on the history of the Stasi could request information, and they had to insure that this information would neither be published nor communicated to others. Personal information could no longer be released for educational purposes or to the media without the written consent of the person concerned.

It is difficult to decide who finally won the quarrel over the Stasi files, Kohl or Birthler. Both declared victory. The court assigned one third of the costs to Kohl and two thirds to Birthler. Newspaper editorials and the German Journalists Union deplored the consequences for historians of the GDR. Birthler declared that the ruling would undermine many scholarly projects but would still allow for the release of most of the Kohl papers. In order to decide the question of victory, we have to dig a little bit deeper. The *dynamics* of the quarrel may be explained by the transformation of an administrative conflict into a highly personal struggle between Kohl and Birthler, but this obscures the broader cultural implications of the conflict as an indicator of the state of affairs since reunification.

Taking a closer look, the original statute opened “access to the records of the Ministry of State Security of the former GDR to the public and to individuals in order to clarify and illuminate the practices of State Security,”<sup>2</sup> in other words, to delegitimize the SED dictatorship and to educate the population. Here, the basic tension between a presumed public interest and the sphere of individual rights, a conflict between the demands of historical appraisal and the protection of personal data as required by law, is already apparent. The customary declassification waiting period of thirty years was not implemented for East German archives, with the interesting exception of the documents of the GDR Ministry of Foreign Affairs. The Stasi files were not considered part of the “ordinary” political heritage which should belong to the public after the

end of the ordinary time limit. Therefore, the use guidelines always followed political rather than legal or archival considerations.

General restrictions had always existed regarding access to the documents of supranational organizations, foreign countries, and files relating to intelligence gathering, counter-intelligence, and terrorism. Additionally, the original law for the Stasi files included the rights of affected persons to demand the redaction of information that concerned them. For the same reason, users were never granted access to any index or file card. All along, it was only the Gauck/Birthler Agency that could retrieve, classify, and present material—often in a revised version with names and sequences blacked out due to the privacy exemption. The employees of the Gauck/Birthler Agency enjoy unrestricted access. Although they are pledged to secrecy and subject to the directives of the authorities, they can nevertheless use their privileged knowledge of names and code names for more precise research, even in non-classified documents. They have a lead on sources and interpretations which cannot be entirely controlled by the scholarly community.

All of these unique customs and guidelines point to the same basic problem. In the case of Stasi files, two different cultural norms and value systems meet. On the one hand, the broadly acknowledged principle of historicization—a social consensus that “the truth will heal”—urges us to uncover the Stasi files without distinction to help shed light on the past: “*Quod est in actis, est in mundo!*” By contrast, our democratic and legal culture recognizes the individual’s right to control the use of personal data. In that respect, it is of decisive importance how any information to be released was obtained. It goes without saying that the Stasi’s operations would have been considered illegal in the West. Scarcely any Stasi report could ever be admitted in a Western court of law because it does not conform to the legal order of a constitutional state. Here, historicization cannot be reconciled with the rule of law. To release documents would, in a sense, prolong the dictatorship and revictimize those injured by Stasi espionage, but to withhold the documents might be seen as minimizing or protecting the dictatorship.<sup>3</sup> That is why the former agency chief Joachim Gauck angrily commented on the first ruling in the Kohl case that the court had disregarded the rights of a formerly oppressed people.<sup>4</sup> Even after the final court decision, these issues persist; it is still possible that an endless series of questionable compromises will cause the Administrative Court to revisit them on a regular basis.

The Stasi documents law and the establishment of the Gauck Agency bore a Janus face. The totalitarian heritage of a state based upon surveillance was incorporated into the political culture of a liberal constitutional state that functions according to the rule of law. The Stasi documents law created an exceptional situation in the service of a moral purge and the

education of the public. The millions of requests for access are proof that the strategy succeeded and met with the approval of the vast majority of East and West Germans after 1990.

Why, then, did this conflict emerge so late? Marianne Birthler was quite right when she reminded the court that her “practice of releasing documents was never objected to by the Bundestag, which receives the annual report of the agency, nor by the federal government, which is legally in charge of the agency.”<sup>5</sup> During the transition period from spring to autumn 1990, there was no awareness of the incompatibility of a moral/psychological purge and the prevailing privacy laws; the Bundestag nearly unanimously adopted the Stasi files law passed by the GDR Volkskammer in 1990. As the unification process got underway, the difference between formal and material justice quickly became visible. Bärbel Bohley, one of the most famous voices of the civil rights movement in East Germany, declared, “We hoped for justice, and what we got was the law.” Some employees of the Gauck Agency tried to use their privileged knowledge politically, attempting, for instance, to shoot down the last GDR prime minister Lothar de Maizière by denouncing him as Stasi informer “IM Cerny.” But such attempts remained exceptions, and it took years for this conflict to embroil the entire Stasi file complex.

There are at least three reasons for the lag. First, the documents mostly concerned East Germans, who were not primarily concerned with the problem of protecting their personal rights but with uncovering their treatment by the Stasi. Secondly, the groups of readers who were not personally involved—scholars, journalists, employers—were interested in open access to the files, whereas those groups with a great interest in restricting access—Stasi employees and collaborators—had lost their legitimacy in the public sphere and had little opportunity to articulate their views. Thirdly, access to the Stasi files was perhaps the only truly revolutionary act during the collapse of the SED regime. In contrast to the peaceful demonstrations and demands for legal travel to other countries, the storming of the Stasi offices and the seizure of the files was an act of open revolt, justified only by the power of the people as a natural social force which itself establishes the law. Thus, the files became a revolutionary symbol, an historical act of civil courage that became a point of pride for East Germans and a legacy for a new, unified Germany—that is, until the files went from marking Eastern assimilation to Western values to challenging Western integrity.

From this point of view, the ongoing debate over the Stasi files is a late product of the “crisis of unification” which emerged in the mid-1990s. It reflects an ongoing battle between historicization and individualization as leading social values. The conflict refutes any naïve belief in a fast and harmonious reunification of Germany and demonstrates that a

democracy cannot easily absorb the legacy of a dictatorship. In my opinion, however, when this diagnosis is compared with the scandalous way postwar Germany treated the National Socialist past in the 1950s—either with silence or a facile coming to terms—it offers more light than shadow, even for historians, who suffer most from the new legal status of the partly sealed Stasi files.

## Notes

<sup>1</sup> Marianne Birthler, "Stasi-Unterlagen für Forschung und Medien—zum Rechtsstreit um den Aktenzugang und zur Novellierung des Stasi-Unterlagen-Gesetzes," *Der Archivar* 55, no. 4 (2002): 298.

<sup>2</sup> Marianne Birthler, "Der Zugang zu den Unterlagen des Ministeriums für Staatssicherheit der DDR für Forschung und Medien," *Deutschland Archiv* 36 (2003): 376.

<sup>3</sup> See Birthler's arguments in Birthler, "Stasi-Unterlagen für Forschung und Medien," 299.

<sup>4</sup> See Constanze von Bullion, "'Dieses Urteil ist ein Schritt zurück'. Der frühere Behördenchef Joachim Gauck zeigt sich enttäuscht, die meisten Politiker in Berlin aber sehen ihre Auffassung bestätigt," *Süddeutsche Zeitung*, March 9, 2002.

<sup>5</sup> *Ibid.*