

The Constitutional Law of German Unification

Peter E. Quint

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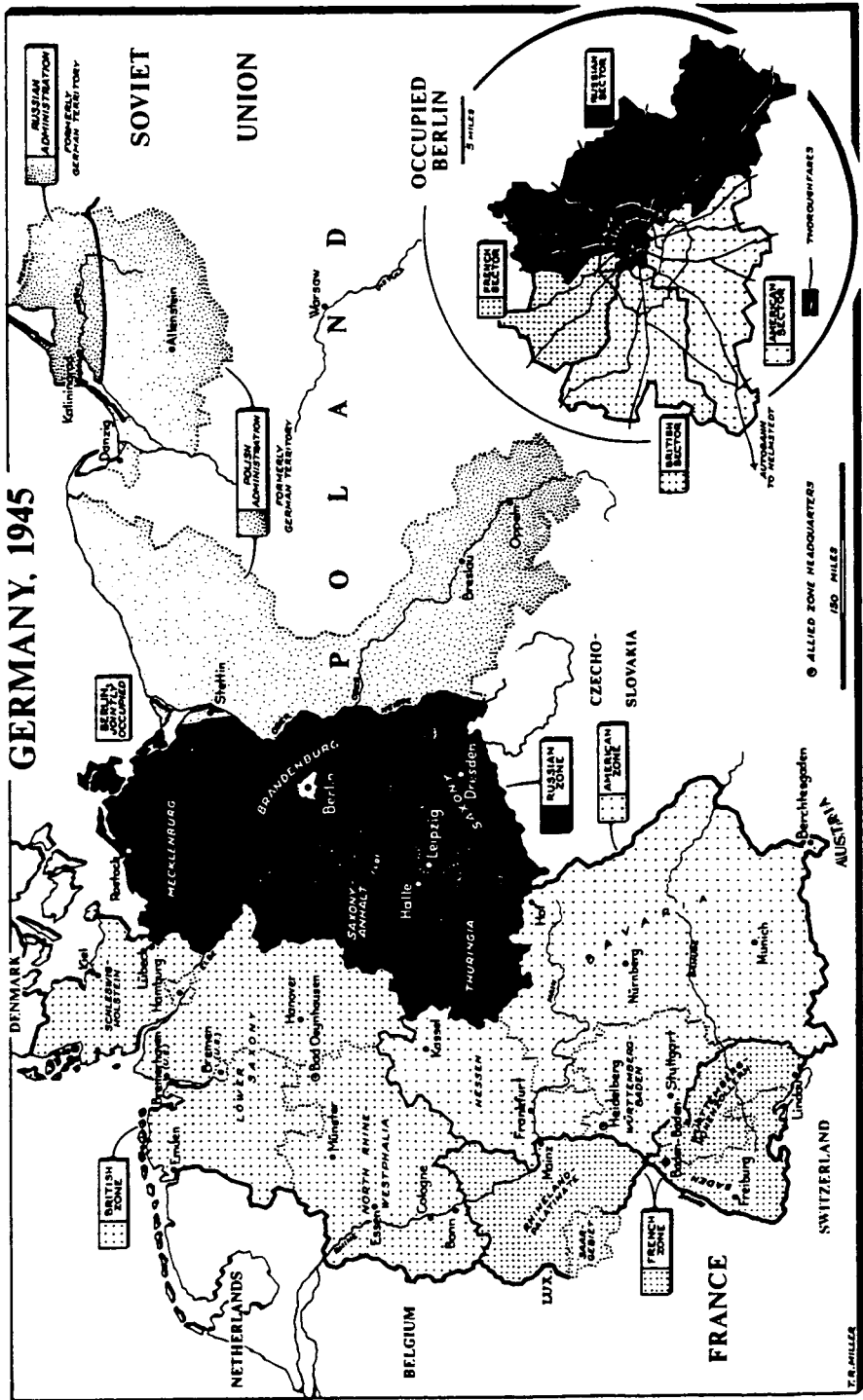
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Articles

THE CONSTITUTIONAL LAW OF GERMAN UNIFICATION

PETER E. QUINT*

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INTRODUCTION

In the mid-summer of 1989 the German Democratic Republic—known as the GDR or East Germany—was an autocratic state led by an entrenched Communist Party, a loyal member of the Warsaw Pact and, in many ways, a haughty counterpart of the Federal Republic of Germany (West Germany), which it confronted with a mixture of hostility and grudging accommodation across the divide created by the Cold War. Over the following year and a half, a dra-

matic process of change transformed the political system of East Germany and culminated in the GDR's "accession" to the Federal Republic itself. At the same time, the division of Europe, which the division of Germany came to symbolize, had largely ceased to exist.

Viewed as a social and economic process, German unification was by no means completed when the GDR acceded to the Federal Republic on October 3, 1990. The two economic systems remain distinctly—even startlingly—different, and the sharp psychic divisions of four decades, which some Germans refer to as the "Wall in the head," will probably continue to divide the two regions for years to come.

The unification of October 3, therefore, represented primarily an achievement in the realm of politics and law—the culmination of a series of agreements and legislative provisions developed within a highly articulated constitutional framework that was drafted more than forty years ago with such an occurrence in mind. In the rapid events of 1989-90, the legal and constitutional development seemed to be one aspect of the process of unification that—unlike more unruly economic and social phenomena—was subject to a measure of deliberation and rational control.

The constitutional structure that emerged reflected both anxiety and optimism; its drafters sought to diminish baneful legacies of the past while opening opportunities for future social, political, and economic development. Like many great constituent acts, this constitutional structure will provide guidelines for the development of more complex and difficult social processes, and one measure of its success will be whether it can channel and guide those processes or whether, in the end, it will be overwhelmed by them.

This Article seeks to explain the major events of German unification from the constitutional perspective. In this overview, constitutional law will be understood in a broad sense—including not only the interpretation of constitutional texts by courts, scholars, and governments, but also extending to important international arrangements that help define the nature of a state, as well as certain central statutes, regulations, and practices that give concrete meaning to the underlying principles of a constitutional system.

Although this review will outline the developments of 1989-90, it will also illustrate how the issues of unification once again raised critical disputes between left and right that have been present throughout the history of the Federal Republic and even, in several cases, have their roots in earlier German history. In many instances these political issues were not resolved upon unification. Indeed

they remain—along with numerous economic and social problems—as part of the continuing program of political debate for coming years. Longstanding political disputes in Germany have affected the course of unification, but the fact of unification itself—and the terms upon which it was accomplished—will have its own substantial impact on the further development of these important political issues.

I. UNION AND DISUNION IN GERMAN HISTORY

Unification is one of the great themes of modern German history. Unlike England and France—which had formed unified nation-states in the Middle Ages—Germany came into the nineteenth century a variegated collection of kingdoms, duchies, city-states, and other principalities, loosely held together in the political league of the Holy Roman Empire. The Empire was dissolved in 1806 at Napoleon's order and, following the Congress of Vienna and Napoleon's final defeat in 1815, the "Germanic Confederation" arose in its place. Like the Holy Roman Empire, however, this was more in the nature of a treaty community (*Staatenbund*) than any sort of real political union. But it and the early nineteenth century Customs Union were steps in that direction.

In the early nineteenth century—in sharp contrast with twentieth century movements—political progressivism and nationalism were often allied in Germany. A first attempt at an all-German constitution was the Paul's Church Constitution of 1849, drafted under the impetus of the 1848 Revolution. Although this document never went into effect, it reflected the view that basic rights and a measure of popular control could be more readily expected from a unified Germany than from the absolutist monarchs and princes who controlled most of the smaller political subdivisions. Yet when unity did finally come in 1871, it was not the result of progressive movements but rather the product of unification from above, through war and Bismarck's political finesse. The German Empire formed by Bismarck under Prussian control in 1871 excluded Austria—thus accepting the "small" German solution. Yet the political structure of Bismarck's German Empire extended far to the east—beyond the East Prussian city of Königsberg (now Kaliningrad) in the north, and as far as Silesia in the southeast and the newly annexed provinces of Alsace and Lorraine (including Straßburg) in the west. This broad empire dominated central Europe politically, militarily, and economically from 1871 until 1918.

With the end of World War I, however, the dismemberment of Bismarck's ill-fated empire began. A large section of eastern Ger-

many was detached in order to form part of the newly refounded state of Poland. Part of the formerly German territory constituted the "Polish Corridor" which gave Poland access to the Baltic Sea. Even after World War I, however, substantial territory east of the Oder and Neißé Rivers remained within the German Empire, including not only Silesia and parts of Brandenburg and Pomerania, but also part of East Prussia east of the Polish Corridor.

The end of World War II resulted in further contraction of the territories of Germany. Although Germany and the Soviet Union had signed a non-aggression pact in August of 1939 (a pact that led to the invasion of Poland), German forces attacked the Soviet Union in June 1941. At the end of the war, the Red Army occupied much of the eastern part of Germany, and the Soviet Union annexed the northern part of East Prussia, including the territory around Königsberg. At the same time, the Soviet Union also annexed territory in the eastern part of Poland lying on the Russian side of the so-called "Curzon" line.

In order to compensate Poland for this loss, the Soviet Union argued at the Potsdam Conference that all German territory east of a line formed by the Oder and Western Neißé Rivers should be transferred to Poland. At Potsdam the English Prime Minister and the American President were unwilling to agree that this territory should be permanently transferred to Poland but did provide that it would remain under Polish administration pending a final resolution to be adopted in a peace treaty. The peace conference contemplated at Potsdam was never held, and the territory east of the Oder-Neißé line—which, as a practical matter was soon treated as a part of Poland—remained a constant problem of postwar German politics. This shifting of borders was accompanied by the expulsion or flight of millions of German-speaking people toward the west.

While these border adjustments were being made, the victorious Allies, meeting at the Yalta and Potsdam Conferences, divided German territory into zones of occupation—a Russian zone in the east and an American and a British zone in the west. Subsequently, the two western zones were further subdivided, and a portion was placed under control of the French government.¹

Thus, beginning with the "unified" empire of Bismarck's time

1. Although France was not represented at Yalta or Potsdam, the French government acceded to relevant portions of the agreements. See 5 Entscheidungen des Bundesverfassungsgerichts (Decisions of Constitutional Court) [BVerfGE] 85, 114 (1956) (KPD Case). The decision to divide Germany can be traced back to preparatory agreements signed by the Allies in late 1944. See v. Goetze, *Die Rechte der Alliierten auf*

extending from Straßburg to Memel, German territory was first substantially contracted at the end of World War I and again at the end of World War II—although part of the latter contraction may have been in theory provisional only. Moreover, the remaining German territory was divided into four occupation zones.

At Potsdam, the Allies contemplated that the four occupation zones would be administered in a cooperative manner and that Germany would eventually coalesce into a single political unit. Although the advent of the Cold War and bitterly hostile relations between the Soviet Union and the West prevented accomplishment of this plan, the western Allies continued to support the principle of German unification. In this sense, however, “unification” was not intended to include any of the territories transferred from Germany at the end of World War I or, most likely, the Oder-Neiße territories placed under Polish administration at Potsdam—although the latter territories did play some role. Rather, the question of German unification referred to the proposed consolidation of the two German states created from the occupation zones at the end of World War II.

II. THE LEGAL STATUS OF GERMANY, 1945-1989

As a result of irreconcilable political differences between east and west—differences that led to an independent western currency reform and the Russian blockade of Berlin—two German states were created in the remaining territory of Germany in 1949. The territory of the three western occupation zones coalesced to form the Federal Republic of Germany, under a Basic Law (constitution) adopted in May 1949. Shortly thereafter, the Soviet occupation zone was re-established as the German Democratic Republic (GDR), also under a constitution adopted in 1949.

As a matter of theory, the framers viewed the West German Basic Law as a temporary or provisional document, pending subsequent unification with the territory in the east. Under the prevailing doctrine, moreover, the government was constitutionally required to work to achieve unification. A number of provisions of the Basic Law were invoked for this position. The Preamble, for example, stated that the “German people remain challenged to achieve the unity and freedom of Germany in free self-determination” and specifically referred to the Basic Law as providing a constitutional order

“for a transitional period.” Moreover, article 23 contemplated the possibility that “other parts” of Germany would join the Federal Republic, and article 146 provided that the Basic Law would lose its effectiveness when a constitution “chosen by the German people in a free decision” came into effect. Furthermore, according to article 116, the term “German” was defined to include persons living in the GDR, among others. Although the Basic Law did not claim to be effective outside of the borders of the Federal Republic, all “Germans”—including residents of the GDR—could claim rights under the Basic Law as soon as they came within the territory covered by the document.²

The constitutional theory that supported the Federal Republic’s position on unification may have been subject to conceptual and historical problems, but it was a view that was accepted (in part at least) by the western Allies.³ According to this view, the “German Reich” never ceased to exist as a single state at the end of World War II. The “Reich” maintained this ghostly existence because, at the end of the war, only the German army (and not the government) officially surrendered to the Allied forces. Moreover, the Allies made clear in the Berlin Declaration of June 1945 that by their occupation they did not intend to annex German territory. According to this theory, the founding of the Federal Republic was not the creation of a new West German state, but rather the “reorganization” of a part of the still-existing “German Reich.” Indeed, the Federal Republic was identical with the “German Reich” although—and here the theory rested on a distinction of some metaphysical subtlety—its actual practical power extended only over a part of the territory and population of the “Reich.” Since the Federal Republic was the only legitimate, democratically organized state on that former territory, it bore a degree of responsibility for all Germans—including those who resided beyond the reach of the Basic Law. In any event, the Federal Republic was constitutionally required to seek unification with the other parts of that territory.⁴

2. See 36 BVerfGE 1, 30-31 (1973) (Basic Treaty Case). Rights under the Basic Law could also be claimed by GDR citizens who reached embassies or consulates of the Federal Republic in third countries.

3. See, e.g., 77 BVerfGE 137, 158 (1987).

4. For important earlier statements of this theory, see 36 BVerfGE at 15-17; 5 BVerfGE at 126-27. For an extremely detailed exposition of the theory, see 77 BVerfGE 137 (1987). For general discussions of the constitutional status of the two German states, see Piotrowicz, *The Status of Germany in International Law: Deutschland über Deutschland?*, 38 INT’L & COMP. L.Q. 609 (1989); Simma, *Legal Aspects of East-West German Relations*, 9 MD. J. INT’L L. & TRADE 97 (1985); Note, *German Reunification: Historical and Legal*

Under this theory the Federal Republic at first refused to grant any form of recognition to the GDR as a state and, under the so-called "Hallstein doctrine" of the mid-1950s, threatened to break diplomatic relations with any third government that recognized the GDR. Meanwhile, in a treaty that took effect in 1955, the western Allies returned to the Federal Republic much of the sovereignty that they had exercised during the occupation. At approximately the same time, the Soviet Union also returned a degree of sovereignty to the GDR. The construction of the Berlin Wall in 1961 suspended normal traffic between east and west and further exacerbated the hostility between the two German states.

The period of unrelieved mutual hostility came to an end in 1972 when the Social Democratic government of Willy Brandt—as part of a new eastern policy that also included relaxed relations and agreements with Poland and the Soviet Union—entered into the "Basic Treaty" with the GDR, with the intention of providing closer relations and solving certain urgent problems such as those relating to traffic to and from Berlin. This treaty could well have been viewed as a rejection of the theory that the Federal Republic was acting for all of a continuing "German Reich," because it could have been seen as the recognition of the GDR as a separate state. Indeed, the Treaty and its ratifying statute were challenged on those grounds in the Constitutional Court of the Federal Republic of Germany.⁵ The Court ultimately upheld the Treaty, but interpreted it very narrowly and also firmly reasserted the theory of the continuing "German Reich." In so doing, the Court's opinion may have significantly limited the benefits and opportunities for cooperation that the Brandt government hoped would flow from the Treaty.⁶ Yet even the Constitutional Court seemed to acknowledge the reality of the German Democratic Republic as a separate state and confirmed

Roots of Germany's Rapid Progress Towards Unity, 22 N.Y.U. J. INT'L L. & POL. 253, 257-67 (1990).

5. See 36 BVerfGE 1 (1973); Simma, *supra* note 4, at 105-08. The Constitutional Court is a special judicial organ created in the Basic Law principally for the purpose of deciding constitutional questions. See BASIC LAW [GG] arts. 92-94. In the four decades of its existence, the Court has come to occupy a role in the political life of the Federal Republic that is not unlike that of the Supreme Court in the United States—although there are also many important differences between the two courts in jurisdiction, procedure, and composition. See D. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT* (1976); see also Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 248-49 & n.4 (1989).

6. See Simma, *supra* note 4, at 115. In his memoirs former Chancellor Brandt refers to the "astonishing argumentation" of parts of the Court's opinion. See W. BRANDT, *ERINNERUNGEN* 233 (1989).

the legal effectiveness of its constitution.⁷

The views of the Soviet Union and the GDR on the legal status of Germany developed in a somewhat different manner. At the outset, the eastern position resembled that of the west in viewing the two German states as part of a larger entity, or at least as seeing unification (as contemplated by the Potsdam Agreement) as an ultimate goal.⁸ At this early period, the east presumably foresaw the possibility of unification under its own political terms. In the mid-1950s, however, the Federal Republic became a member of the western military alliance, and the eastern position changed so that the Federal Republic and the GDR were now viewed as two separate, independent states.⁹ Although the GDR Constitution of 1949 was originally intended as an all-German constitution, a revised constitution of 1968—as further amended in 1974—emphasized the special nature of socialist political organization and, in unambiguous passages, emphasized a close, “irrevocable” relationship between the GDR and the Soviet Union.¹⁰

Thus by the mid-1950s, the governments of the Federal Republic and the GDR maintained inconsistent and irreconcilable positions on the question of the legal status of Germany. Although relations between the governments were later improved to some degree by Brandt’s eastern policy, including the Basic Treaty, the two states continued to maintain an uneasy relationship of mixed hostility and accommodation until the revolutionary events of autumn 1989 in the GDR.

III. POLITICAL REVOLUTION IN THE GDR, 1989-1990

From the beginning days of the Soviet Occupation Zone and the GDR, emigration to the western part of Germany was a continual problem for the eastern authorities. The pace of emigration often reflected economic conditions, diminishing during periods of prosperity in the GDR and increasing in times of economic difficulty.

In 1961, during a period of increased emigration, the East Ger-

7. See 36 BVerfGE at 22, 29; 3 GRUNDGESETZ-KOMMENTAR, art. 146, No. 3 (I. v. Münch 2d ed. 1983) (Michael Kirn). See also Note, *supra* note 4, at 267-71 (“[o]verall, the treaty’s text did a great deal more to bolster the GDR’s claims to sovereignty and independence than it did to further the Basic Law’s reunification commandment.”).

8. See, e.g., Simma, *supra* note 4, at 98-100.

9. See, e.g., Piotrowicz, *supra* note 4, at 620-21.

10. See Rauschnig, *Deutschlands aktuelle Verfassungslage*, 1990 DEUTSCHES VERWALTUNGSBLATT [DVBl] 393, 394.

man government (with the agreement of the Warsaw Pact leaders) closed the border of East Germany and built the wall separating East and West Berlin.¹¹ From that point on, the closed borders and "the Wall" symbolized the East German government for those in the west. For most citizens of the GDR, travel to the west became almost impossible. With few exceptions, only those who had reached retirement age were allowed to travel because their loss would no longer impair the productive capacity of the nation.

During the tenure of Communist Party chief Erich Honecker (1971-1989), the government of the GDR was maintained by physical barriers and by an elaborate system of internal security measures operated primarily by the notorious Ministry for State Security (Stasi). Behind this apparatus lay the power of the Soviet army which demonstrated in Czechoslovakia in 1968 that significant liberalization of the existing system would not be tolerated.

In retrospect it seems clear that the advent of Gorbachev's policies of perestroika and glasnost led to the downfall of the Honecker regime.¹² The state system could be fatally impaired by a massive outflow of citizens, and the GDR was dependent on its Warsaw Pact neighbors to do their part in keeping the population of the GDR within the boundaries of the East Bloc. But under the impact of Gorbachev's policies, the Warsaw Pact nations—and the Soviet Union itself—no longer became reliable guarantors of the borders of the GDR, and the power of the regime over its citizens quickly disintegrated.¹³

In 1989, the government of Hungary, which along with Poland had sought most fully to adopt the new Soviet policies, refused to maintain its closed border with Austria.¹⁴ As early as May, part of

11. See H. WEBER, *GESCHICHTE DER DDR* 321-26 (1985). It is estimated that by 1961, 2.5 million residents of the GDR had emigrated to the west. See Geck, *Germany and Contemporary International Law*, 9 *TEX. INT'L L.J.* 263, 265 (1974).

12. See Hacker, *Das unaufhaltsame Ende der DDR*, *Frankfurter Allgemeine Zeitung* [FAZ], Sept. 26, 1990, at 14, col. 1.

13. See Kaiser, *Germany's Unification*, 70 *FOREIGN AFF.* 179, 182-84 (1990/91). These events were foreshadowed by a joint declaration, signed by the Soviet and West German governments in June 1989, which referred to a universal right of political self-determination. *Id.* at 183.

14. For useful summaries of the events described here, see, e.g., M. WIMMER, C. PROSKE, S. BRAUN & B. MICHALOWSKI, "WIR SIND DAS VOLK!": DIE DDR IM AUFBRUCH (1990) [hereinafter *WIR SIND DAS VOLK*]; NEUES FORUM LEIPZIG, *JETZT ODER NIE-DEMOKRATIE: LEIPZIGER HERBST '89*, at 313-42 (1990). See also B. ZANETTI, *DER WEG ZUR DEUTSCHEN EINHEIT* (1991); Stern, *Der Staatsvertrag im völkerrechtlichen und verfassungsrechtlichen Kontext*, in 1 K. STERN & B. SCHMIDT-BLEIBTREU, *VERTRÄGE UND RECHTSAKTE ZUR DEUTSCHEN EINHEIT* 23 (1990).

the wire fence along the Hungarian border had been dismantled, and by the end of August thousands of citizens of the GDR (who generally had been permitted to travel to Hungary and other East Bloc countries) had made their way into Austria. During the same period, hundreds of GDR citizens sought refuge in the Federal Republic's embassies in Prague, Budapest and Warsaw, and in desperation the GDR announced that it would permit citizens in the embassy in Prague to travel through the GDR into the Federal Republic in sealed trains.

In the GDR, meanwhile, there were stirrings of organized political opposition, culminating in the founding of the first opposition group "New Forum" in September,¹⁵ followed shortly thereafter by other reform groups, "Democracy Now"¹⁶ and "Democratic Awakening." Also in September, regular Monday night demonstrations began to take place in Leipzig after prayer meetings in the Nikolai Church, which had become a center of organized opposition. In the coming months these demonstrations would grow to enormous size—with hundreds of thousands of participants—and would become an important factor in the political life of the GDR.¹⁷

In the midst of these great changes, the GDR celebrated the fortieth anniversary of its founding. Notwithstanding tight security measures, many citizens of the GDR engaged in protest demonstrations which were brutally suppressed by police. Arriving at the celebration, Gorbachev warned Honecker that "life will punish those who come too late," an indication that the GDR could expect no Soviet military help in repressing reforms.¹⁸

15. See selections from the founding proclamation of "New Forum," Sept. 10, 1989, reprinted in *WIR SIND DAS VOLK*, *supra* note 14, at 28-30.

16. See *WIR SIND DAS VOLK*, *supra* note 14, at 35-37.

17. For a first-hand account, see R. TETZNER, *LEIPZIGER RING* (1990). A significant turning point was apparently reached at the great Leipzig demonstration of October 9. The East German Communist party leader, Erich Honecker, was reportedly prepared to dissolve the demonstration by force of arms, but was prevented or dissuaded from doing so. Such a resolution—resembling that imposed by the Chinese government in Tiananmen Square in 1989—could have had incalculable consequences.

These developments were accompanied by the beginnings of reform in the former "bloc parties"—groups that had been founded in the immediate postwar period and had been permitted to continue in existence as docile adjuncts of the Communist Party (SED) government. These bloc parties included the CDU (Christian Democrats), LDPD (Liberals), NDPD (National Democrats), and the German Farmers Party. (For an enlightening description of the previous relations between the SED and one bloc party, the CDU, see *FAZ*, Nov. 9, 1990, at 14, col. 2.) Moreover, in October 1989, a new Social Democratic Party (SDP, later SPD) was founded in East Germany, replacing the former SPD that had merged with the Communist Party in the east to form the SED in 1946.

18. See Hacker, *supra* note 12.

In the face of the continued departure of thousands of citizens and massive antigovernment demonstrations in Leipzig, Erich Honecker resigned on October 18 as General Secretary of the Central Committee of the Communist Party (SED), a post that he had held since 1971.¹⁹ His replacement was Egon Krenz, an old-line party functionary, who immediately announced relaxed travel policies for citizens of the GDR.

On the evening of November 9, the government of the GDR opened the Wall, precipitating historic scenes of jubilation in Berlin. Shortly thereafter, numerous additional border crossings were established. On November 13, Hans Modrow, who had established his reputation as a Communist Party reformer in Dresden, was elected Prime Minister. Recognizing that fundamental change had become inevitable in the GDR, the Volkskammer (Parliament) established a committee to undertake constitutional reform.

The government of the Federal Republic had been observing these events carefully, and on November 28—without consulting the western Allies—Chancellor Kohl proposed a ten-point plan for cooperation between the two German states.²⁰ Welcoming a proposal for a “treaty community” put forth by Prime Minister Modrow, Kohl went further to propose a confederation with unification as the ultimate goal. Before such steps could be taken, however, Kohl insisted on basic reforms in the political and economic system of the GDR. At the same time great popular outcry arose in the GDR over revelations of luxurious villas and hoards of western consumer goods enjoyed by former leading members of the SED and government.

At the beginning of December, reform in the GDR accelerated swiftly. The Volkskammer amended the 1974 Constitution to delete the reference to the leading role of the Communist Party and voted to apologize for the GDR’s participation in the invasion of Czechoslovakia in 1968. Reformer Gregor Gysi replaced Egon Krenz as leader of the SED.²¹ The CDU and other parties left the “Democratic Bloc,” which had faithfully supported the Communist Party for forty years. On December 7, a “Round Table” composed of seven opposition groups, as well as the SED and the former bloc

19. On November 7 the entire government of the GDR resigned, followed on November 8 by the resignation of the entire politburo of the SED.

20. For Kohl’s plan, see *WIR SIND DAS VOLK*, *supra* note 14, at 182-89.

21. Later in December the SED sought to confirm its status as a reformed party by changing its name to SED-PDS (Party of Democratic Socialism). Thereafter, the initials SED were dropped entirely, and the party became simply the PDS. See Note, *supra* note 4, at 253 n.4.

parties, began its deliberations as an unofficial but extremely influential organ exercising a degree of practical control over the actions of the government.²²

In the middle of December the government announced that the hated Office for National Security (successor to the Stasi) would be dissolved, but the actual process of dissolution was a slow one. Although Kohl and Modrow agreed on a series of treaties that would build a "treaty community," calls for actual unification of the two countries began to intensify in popular demonstrations in Leipzig and other cities. Yet in December and January there still seemed to be a substantial possibility that the GDR would continue—for some time at least—as an independent country. Accordingly, numerous local groups, often composed of representatives of the reform political parties, began to work on drafts of a new democratic constitution for the GDR, to be submitted as proposals to the Round Table's constitutional drafting committee. The most frequently mentioned constitutional reforms included re-creation of the historical states of the GDR, establishment of a constitutional court and actual judicial review, insulation of the independence of the judiciary, and some form of mixture of private and socialist property.

The tide turned away from a possible continuation of the GDR at the beginning of February, however, when Prime Minister Modrow acknowledged the likelihood and desirability of unification with the Federal Republic.²³ President Gorbachev also conceded the likelihood of unification and seemed not to raise serious objections to such a goal in principle, although a number of specific reservations no doubt remained.²⁴ In light of a continued stream of emigration from the GDR, the first free election for the GDR Volkskammer was moved forward from May 6 to March 18. In that election a surprisingly strong vote for the CDU and its conservative Alliance for Germany made clear that the majority of citizens in the GDR sought unification as soon as possible. A desire to belong to the west and to share in its economic prosperity had been a powerful motivating factor.²⁵

22. See generally VOM RUNDEN TISCH ZUM PARLAMENT 23-26 (H. Herles & E. Rose ed. 1990).

23. See, e.g., Schäuble, *Der Einigungsvertrag—Vollendung der Einheit Deutschlands in Freiheit*, 1990 ZEITSCHRIFT FÜR GESETZGEBUNG 289, 291.

24. Rauschning, *supra* note 10, at 394-95; Kuppe, *Modrow in Bonn*, 1990 DEUTSCHLAND-ARCHIV [DA] 337.

25. See Bertram, *The German Question*, 69 FOREIGN AFF. 45, 47-48 (1990); see generally Note, *supra* note 4, at 285-95 (discussion of factors favoring swift unification).

IV. CONSTITUTIONAL REFORM IN THE GDR, 1989-1990

The stirring political events of 1989-1990 in the GDR were accompanied by a profusion of constitutional developments—including amendments of the existing GDR constitution as well as proposals for an entirely new basic document. An understanding of the role that constitutional reform in the GDR played in the course of unification must begin with an understanding of the existing constitutional system in the GDR at the point at which the revolutionary developments of 1989 began.

A. Background: The 1968/74 Constitution of the GDR

The constitution in effect in the GDR in 1989 had been adopted in 1968 and significantly amended in 1974. Although it was adopted long after Stalin's death, it was more clearly Stalinist in its nature than the earlier 1949 Constitution (adopted in Stalin's lifetime), which originally guaranteed federalism and certain individual rights and possessed certain other traits of a liberal western constitution. Indeed, the 1968/74 Constitution reflected the reality of government and life in the GDR much more accurately than did the 1949 Constitution.²⁶

1. *Basic Principles.*—The two great principles of the GDR Constitution as amended in 1974 were the establishment of Marxism-Leninism and friendship with the Soviet Union. According to the 1974 version, "the German Democratic Republic is a socialist state of workers and peasants. It is the political organization of working people in city and country under the leadership of the working class and its Marxist-Leninist party."²⁷ Moreover, "the sovereignty of the working people, realized on the basis of democratic centralism, is the basic principle of the structure of the state."²⁸ Thus, the leading factor in the state was the Communist Party, which governed through the technique of democratic centralism—a doctrine that allowed certain differences of opinion within the leadership circles of the Party but required that all leadership decisions be carried out in a uniform manner throughout the government and society, once

26. See M. McCauley, *THE GERMAN DEMOCRATIC REPUBLIC SINCE 1945*, at 143 (1983). For an English translation of the 1968/74 Constitution of the GDR, see 5 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD—GERMAN DEMOCRATIC REPUBLIC* (A. Blau-stein & G. Flanz ed. 1986).

27. *CONSTITUTION OF THE GDR [VERF. DDR]* (1974) art. 1. Unless otherwise indicated, all translations in this Article are those of the author.

28. *Id.* art. 47, § 2.

those decisions were made. Finally, "the economy of the German Democratic Republic is a socialist planned economy."²⁹

The second major theme in the 1974 Constitution was close friendship with the Soviet Union. According to article 6, "the German Democratic Republic is forever and irrevocably bound together with the USSR. The close and brotherly alliance with [the USSR] guarantees the people of the German Democratic Republic further progress on the path of socialism and peace. The German Democratic Republic is an inseparable part of the socialist community of states"³⁰ Moreover, "in the interest of preserving peace and the security of the socialist state, the National People's Army [of the GDR] preserves close brotherhood of arms [enge Waffenbrüderschaft] with the armies of the Soviet Union and other socialist states."³¹

2. *Property Rules.*—The definition of property relationships lay close to the heart of the 1968/74 Constitution. In order to carry out the "socialist planned economy," article 10 set forth three forms of socialist property: "People's Property," "Collective Property," and property of social organizations. These forms of property were to be protected and increased by the state.

Of these forms of socialist property, People's Property—state-owned nationalized property—was clearly the most important. According to article 12, People's Property included the basic means of production—for example, minerals, mines, power plants, dams, in-

29. *Id.* art. 9, § 3.

30. *Id.* art. 6, § 2.

31. *Id.* art. 7, § 2. The emphasis on friendship with the Soviet Union is considerably more pronounced in the 1974 amendments than in the 1968 Constitution itself; its increasing prominence in the 1974 version replaces the more nationalist emphasis of the 1968 Constitution. See generally Zieger, *Die Verfassungsänderung in der DDR vom 7.10.1974*, 1975 NJW 143. Indeed, the most "national" constitution was the original document of 1949 which had been intended to cover all of "Germany." See *infra* note 103.

On the other hand, the 1974 amendments to a substantial extent removed vigorous attacks on the west contained in the 1968 version. For example, the Preamble to the 1968 Constitution referred to the "historical fact that imperialism under the leadership of the United States, in concert with circles of West German monopoly capital, has divided Germany in order to construct West Germany as a basis of imperialism and the struggle against socialism—all of which contradicts the life interests of the nation." In the 1974 version this was replaced by a considerably more neutral passage. According to article 9 of the 1968 Constitution, also deleted in 1974, "[t]he socialist relations of production arise as a result of the fight against the monopoly capitalist economic system whose aggressive and adventurist policy has brought only misfortune to the German nation." On the other hand, the following passage from article 18, § 1 of the 1968 Constitution remains in the 1974 version: "[The GDR] combats imperialist non-culture, which serves the psychological waging of war and human degradation."

industries, banks, and insurance companies. Moreover, article 12 prohibited private ownership of these forms of property. As a practical matter, therefore, under the Constitution of 1974, there could be no private ownership of industrial organizations and other significant factors of production. Thus article 12 was one of the first constitutional provisions that had to be amended as the GDR began to shift toward a market economy in the months before unification.

In contrast, Collective Property was property of groups of farmers or other working people who were gathered together as collectives.³² Indeed, much of the agricultural property of the GDR had become Collective Property as a result of a two-step process. First, as discussed more fully below, vast areas of agricultural property were expropriated under the Soviet occupation regime between 1945 and 1949, and much of this land was distributed in small allotments (generally less than twenty-five acres) to individual farmers. Subsequently, in a movement that was completed in 1960, the government in effect required individual farmers to form collectives by contributing their property to groups of farmers in the area.³³ Since this property was devoted to the collective and was not owned by the state itself, it was different in form from People's Property. But even so, the use of Collective Property was subject to the directions of the centralized governmental plan.³⁴

3. *Basic Rights.*—The 1968/74 Constitution contained a full array of basic rights, including what appeared to be traditional defensive rights as well as affirmative rights to social welfare. Yet under socialist legal theory, constitutional rights were primarily intended to further the “harmony of social and individual interests” and create a “socialist personality,” and were only to a lesser extent conceived as providing protection of the individual against the state.³⁵ In any event, many traditional defensive rights were heavily qualified by a requirement that they be exercised “in accordance with the principles of this constitution,” or similar formulations.³⁶ These

32. See VERF. DDR (1974) art. 13.

33. See H. WEBER, *supra* note 11, at 314-18; VERF. DDR (1974) art. 46 (agricultural production collectives). Although the collective held the right to use the property, the legal title remained in the individual owner. S. MAMPEL, *DIE SOZIALISTISCHE VERFASSUNG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK* 361 (2d ed. 1982). There were also numerous collectives of workers engaged in the hand-working trades.

34. S. MAMPEL, *supra* note 33, at 361.

35. Brunner, *Das Staatsrecht der Deutschen Demokratischen Republik*, in *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 385, 433 (J. Isensee & P. Kirchhof ed. 1987).

36. See, e.g., VERF. DDR (1974) art. 27, § 1 (right to free expression of opinion “in

limiting principles presumably included the doctrines of Marxism-Leninism, the primacy of the Communist Party, and a rigorous adherence to democratic centralism. In a provision of wry candor, a right to travel was limited to a right to travel "within the boundaries of the German Democratic Republic."³⁷

In contrast with the Basic Law, which contains a general characterization of the Federal Republic of Germany as a "social" state, the 1968/74 Constitution of the GDR set forth a detailed list of "social" rights. These included rights of: employment;³⁸ education and training in a profession or calling;³⁹ free time and rest (including paid vacation);⁴⁰ protection of health, including sickness and accident insurance;⁴¹ care in old age and disability;⁴² living space "according to the economic possibilities and local conditions;"⁴³ as well as various special protections for single parents, families with many children, and pregnant women and small children.⁴⁴ On the other hand, in accordance with the nature of many socialist constitutions (which typically differ from liberal constitutions in seeking to govern broad aspects of individual life)⁴⁵, some of these social rights were accompanied by constitutional duties. The right to work was accompanied by a duty to work;⁴⁶ the right to learn an occupation was accompanied by the duty to do so;⁴⁷ and every citizen was obligated to engage in service for the defense of the GDR.⁴⁸

4. *Governmental Organs.*—Under the 1968/74 Constitution, the important governmental organs of the GDR were federal because, as will be discussed below, the East German Länder (states) were

accordance with the principles of this constitution"); *id.* art. 28, § 1 (right of assembly "in the framework of the principles and goals of the constitution"); *id.* art. 29 (right of association "in conformity with the principles and goals of the constitution"); *see also id.* art. 39, § 2 (churches and religious communities "order their affairs and exercise their activity in conformity with the constitution and the laws").

37. VERF. DDR (1974) art. 32.

38. *See id.* art. 24, §§ 1, 3.

39. *See id.* art. 25, §§ 1, 4.

40. *See id.* art. 34.

41. *See id.* art. 35.

42. *See id.* art. 36.

43. *Id.* art. 37, § 1.

44. *See id.* art. 38, §§ 2-3.

45. *See generally* Markovits, *Law or Order—Constitutionalism and Legality in Eastern Europe*, 34 STAN. L. REV. 513, 517-18 (1982).

46. *See* VERF. DDR (1974) art. 24, § 2.

47. *See id.* art. 25, § 4.

48. *See id.* art. 23, § 1.

effectively abolished in the 1950s.⁴⁹ Although the "principal organ of state power" was a one-house parliament called the Volkskammer,⁵⁰ in reality this body ordinarily accepted measures proposed by the Communist Party without dissent.⁵¹ The 1968/74 Constitution provided for two principal executive organs, the Council of State and the Council of Ministers. The Council of State, which had replaced the office of president of the GDR by amendment to the 1949 Constitution, was originally conceived as performing certain functions typically undertaken by a "head of state," as well as certain legislative functions. In contrast, the Council of Ministers was composed of functioning departmental ministers and was referred to in article 76 of the 1974 Constitution as the "government" of the GDR. During the tenure of SED party leader Walter Ulbricht (1949-1971) the Council of State exercised substantial power because Ulbricht was its chairman, but under the 1974 Constitution, power largely shifted from the Council of State to the Council of Ministers.⁵²

5. *Judiciary.*—Although the Constitution emphasized the independence of the judiciary—a supreme court and lower courts⁵³—the constitutional text itself called this independence into question. Indeed, a number of provisions made clear that the Supreme Court was to be responsible to the political organs—the Volkskammer and the Council of State.⁵⁴ For example, the Volkskammer chose the judges of the Supreme Court and could remove them at any time.⁵⁵ Moreover, provisions relating to the courts emphasized the importance of "socialist legality," a concept that sought to reconcile a degree of legal certainty with a strong role of the Communist Party in the making and interpretation of law.⁵⁶ In any case most accounts

49. See *infra* Part VII. The GDR Constitution, however, made provision for local government. See VERF. DDR (1974) arts. 81-85.

50. VERF. DDR (1974) art. 48.

51. See H. ROGGMANN, *DIE DDR-VERFASSUNGEN: EINFÜHRUNG IN DAS VERFASSUNGSRECHT DER DDR* 218-19, 230-31 (1989).

52. See generally Brunner, *supra* note 35, at 385, 416-21; Zieger, *supra* note 31, at 149-50.

The constitution also emphasized and defined the special role of unions in the structure of the state. VERF. DDR (1974) arts. 44-45. That the central organization of the unions (the Free German Federation of Unions or FDGB) was considered a part of the state is suggested by its power to propose statutes in the Volkskammer. *Id.* art. 65, § 1.

53. VERF. DDR (1974) art. 96, § 1; see also *id.* art. 92.

54. See, e.g., *id.* art. 93, § 3; art. 74, § 1; art. 49, § 3.

55. See *id.* art. 50.

56. See *id.* art. 90, § 1; art. 97. For discussions of "socialist legality" and ideological

agree that, as a practical matter, officials of the SED exercised substantial influence over judicial decisions in cases in which the party took a political interest.⁵⁷

B. Proposals for a New GDR Constitution—The Round Table Draft

From the fall of the Honecker regime in late 1989, it was clear that the necessary political, economic, and social reforms could not be undertaken on the basis of the GDR Constitution of 1968 as revised in 1974. It seemed clear that this constitution was based so completely on discredited Stalinist ideas that it could not be adequately reformed through amendment. Rather, most believed that an entirely new document was necessary.⁵⁸ Because in late 1989 many still thought that the GDR would continue to exist as a separate country for an interim period—perhaps for some years—the Round Table established a drafting committee to prepare a new, democratic constitution of the GDR.⁵⁹ The Round Table contemplated that its draft would be presented for adoption to the new, legitimate Volkskammer after its election in the early part of 1990.

The Round Table committee was advised by a few constitutional experts from the GDR who had gained the confidence of the reformers. The committee also invited western advisors who generally came from the left-wing of constitutional law teachers in the Federal Republic.⁶⁰ Moreover, in late 1989 and early 1990 an extraordinary amount of informal work on constitutional drafts took place in small working groups in various parts of the GDR—groups very often consisting of nonjurists who were connected with one or another of the new reform political parties. These informal groups

debates in the GDR concerning this concept, see S. MAMPEL, *supra* note 33, at 568-72; H. ROGGMANN, *supra* note 51, at 155-58; Brunner, *supra* note 35, at 405-07.

57. Indeed, more than 80% of all the GDR judges (and more than 90% of the prosecutors) were members of the SED. See H. ROGGMANN, *supra* note 51, at 298. As an aspect of "democratic centralism," the Supreme Court of the GDR exercised supervisory powers over the lower courts that included the issuance of mandatory special guidelines and went "far beyond the natural radiating force of high court jurisprudence." See Brunner, *supra* note 35, at 430.

58. Occasional calls were also heard for reinstatement of the more liberal 1949 Constitution of the GDR—at least as an interim solution. This position was asserted at an early point, for example, by Lothar de Maizière who later became Prime Minister (Minister-President) of the GDR. G. GAUS, *DEUTSCHE ZWISCHENTÖNE: GESPRÄCHS-PORTRÄTS AUS DER DDR* 38 (1990).

59. See Round Table Declaration of December 7, 1989, reprinted in ARBEITSGRUPPE "NEUE VERFASSUNG DER DDR" DES RUNDEN TISCHES, *VERFASSUNGSENTWURF FÜR DIE DDR* 75 (1990) [hereinafter RT-ENTWURF].

60. The Committee was also advised by Helmut Simon, a retired justice of the Federal Constitutional Court.

intended to submit their drafts as suggestions to the Round Table committee.

Personal discussions at that time with individuals involved in the process of constitutional reform indicated much agreement about what a new GDR constitution should contain.⁶¹ It would certainly include a full range of liberal defensive rights, as well as a detailed catalogue of social welfare rights—probably including rights to shelter, medical care, and employment—along with a system of property relations that included substantial amounts of both private and publicly owned property. Because of the baleful history of misuse of the courts in the GDR, most drafters foresaw strong assurances of judicial independence, as well as a constitutional court that would apply the constitution as “directly enforceable law” and would implement other values of the rule of law. The new constitutional system would re-create the traditional states of the GDR (effectively abolished by the SED government in the 1950s), and the central government would be based on a parliamentary system—perhaps with a president in addition to a prime minister. The president would not be a powerful officer, such as the president of the Weimar Republic, but might not be an almost-powerless figurehead as in the Federal Republic. Moreover, the parliament might well share a significant amount of power with the people themselves acting through popular votes on legislation.⁶²

Notwithstanding the enthusiasm of its participants, the importance of this work waned in February and March 1990 as it became clear that the GDR would not continue to exist for a substantial period as an independent country, but rather that unification would take place at an early date. It also became clear that, under the method favored for unification, the West German Basic Law itself—with certain limited amendments only—would become the constitution of the united country.⁶³ Thus no completely new GDR constitution was to be adopted; nor would there be a need for a completely new all-German constitution—at least in the first instance.

Nonetheless, the drafting committee of the Round Table continued its work and produced a draft of a proposed new GDR constitution in April 1990. Its provisions were an interesting mixture—reflecting the fundamental underlying structure of the Basic Law,

61. For a contemporary report on these issues, see Quint, *Building New Institutions in East Germany*, *The Sun* (Baltimore), Jan. 21, 1990, at E1, col. 2.

62. *Id.*

63. For detailed discussion of the possible methods of unification, see *infra* Part V.

but adding a substantial number of social rights and some plebiscitary elements, in accordance with the ideas of the GDR reformers and the western advisors.⁶⁴

In a moment of high drama, representatives of the Round Table presented this constitutional draft to the newly chosen Prime Minister of the GDR, Lothar de Maizière, in an open session of the Volkskammer shortly after the GDR's first free election. This ceremonial gesture could not conceal the hard political fact that, given the political hegemony of the conservatives in the east as well as the west, the possibility that such a constitutional draft would have an immediate impact was negligible.⁶⁵ As noted below, however, a new all-German constitution could conceivably be adopted to replace the Basic Law, even after unification.⁶⁶ If the political constellation so changes that a new constitution becomes a practical possibility, the Round Table's extremely interesting draft will certainly play a role in the accompanying discussion.⁶⁷

64. See RT-ENTWURF, *supra* note 59. For commentary on the draft by one of the West German advisors, see Preuß, *Der Entwurf der Arbeitsgruppe "Neue Verfassung der DDR" des Runden Tisches für eine Verfassung der Deutschen Demokratischen Republik*, 1990 KRITISCHE JUSTIZ [KJ] 222; Preuß, *Auf der Suche nach der Zivilgesellschaft*, FAZ, Apr. 28, 1990, at 49, col. 1. For a bitter attack on the Round Table draft on the grounds that it represents the "constitutional ideas of a green-red [presumably, Greens and SPD] coalition," see Roellecke, *Dritter Weg zum zweiten Fall*, FAZ, June 12, 1990, at 8, col. 1.

65. The coalition agreement of the GDR's new government did state that the Round Table draft (along with the GDR Constitution of 1949) would be "taken into account" in any constitutional developments, but a motion to adopt the Round Table draft as a new constitution of the GDR was defeated at an early point in the Volkskammer. See Fischer, *Verfassungsgeschichte der DDR 1990*, 1990 KJ 413; Mampel, *Das Ende der sozialistischen Verfassung der DDR*, 1990 DA 1377, 1385-86.

66. See *infra* text accompanying notes 129-140.

67. Moreover, the State of Brandenburg—the only one of the five new East German states that elected a primarily Social Democratic government—will make use of the Round Table draft in preparing its own state constitution. See *infra* note 201.

The Round Table draft is characterized by an expansive catalogue of basic rights, including detailed provisions for social rights, and the "direct" application of certain constitutional rights against individuals and groups as well as against the state. The structural provisions of the draft depart to a lesser degree from the fundamental structures of the Basic Law, but the draft does provide significant opportunities for the public to take part in lawmaking through direct popular vote. The following are some of the principal characteristics of this interesting document:

1. "*Liberal*" *Defensive Rights*. The Round Table draft contains a full complement of traditional rights such as equality, free speech, and travel. Some of these "liberal" defensive rights go beyond anything contained in the Basic Law or, for that matter, in the Constitution of the United States. For example, life imprisonment is prohibited, as well as the death penalty (as in the Basic Law), see RT-ENTWURF, *supra* note 59, art. 12, § 5, and even a foreigner (who, unlike a citizen, might be subject to extradition) cannot be extradited to a place in which he might be threatened by the death penalty. *Id.* art. 7, § 2. In sharp contrast with the doctrine under the Basic Law, women have a right to determine whether or not to be pregnant (presumably a right to abortion), *id.* art. 4, § 3,

C. *Amending the GDR Constitution—The Old Volkskammer and the Modrow Government*

Even during the period when the eventual adoption of a new

and every person has the right to be free of medical experimentation without consent and the right to dignity in dying, *id.* art. 4, §§ 1, 2. Long-lasting "living communities" (nontraditional family-like groups) may not be discriminated against. *Id.* art. 22, § 2. Everyone has a right to examine data collected with respect to him, and can indeed prevent data collection by making an objection—although this right can apparently be limited to some extent by law. *Id.* art. 8, § 2. With respect to power plants and other large projects, every citizen has the right to be heard in the process of planning. *Id.* art. 21, § 4. Resident aliens have a right to vote in local elections. *Id.* art. 21, § 2. Moreover, citizens' movements (Bürgerbewegungen), such as those that came to the fore in the revolutionary events of 1989, are granted special constitutional protection. *Id.* art. 35.

A number of constitutional rights apply directly against individuals and groups, as well as against the state (Drittwirkung). These include rights of equality, *id.* art. 1, § 2; rights of democracy within associations, *id.* art. 36, § 2, political parties, *id.* art. 37, § 2, and unions, *id.* art. 39, § 3; certain rights of free speech within employment relationships, *id.* art. 15, § 1; and employees' rights of co-determination in business enterprises that are of particular significance for the community, *id.* art. 28.

On the other hand, some rights have interesting (and perhaps dubious) limitations. For example, among the qualifications of free speech is the requirement that "war propaganda as well as the public declaration of discrimination that injures human dignity is to be prohibited by law." *Id.* art. 15, § 3. Moreover, "the permissibility of means or methods of research can be limited by law," *id.* art. 19, § 2; the context of this provision suggests that it refers to dangerous forms of scientific experimentation, but the statement itself seems considerably broader.

The Round Table draft also strictly qualifies rights of property. Property for personal use as well as property of collectives is particularly protected. In case of expropriation, only these forms of property are to yield full compensation; owners of other forms of expropriated property will receive only partial compensation in a "balancing of interests of the community and those involved." *Id.* art. 29. Real property may be used only in accordance with an overall property-use plan and, in a clear echo of rules relating to the 1945-49 expropriations in the Soviet occupation zone (*see infra* Part VIII(B)), the Round Table draft seems to prohibit private property in, or private use of, parcels of agricultural or forest land that exceed 100 hectares (approximately 250 acres), by reserving such extensive holdings for collectives, public institutions, and churches only. RT-ENTWURF, *supra* note 59, art. 32, § 1. Moreover, if changes in a land use plan result in converting certain property into property available for construction, with the result that the value of the property increases, the property owner must compensate the government for this increase of value—ordinarily by conveying a part of the property (not exceeding one-half) to the local government. *Id.* art. 32, § 2.

In a complex series of provisions, the Round Table draft also confirms expropriations that were undertaken by the Soviet occupation authorities from 1945 to 1949 and approved by article 24 of the GDR Constitution of 1949. *Id.* art. 131, § 1. Moreover, expropriations undertaken by the GDR government in accordance with its own law are confirmed, *id.* art. 131, § 2, although expropriations in violation of GDR law would be undone or would give rise to compensation. *Id.* art. 131, §§ 3-4.

2. "Affirmative" Social Rights. In sharp contrast with the extremely general "social state" provision of the Basic Law (GG arts. 20, 28)—which guarantees social welfare to an undefined degree—the Round Table draft sets forth a detailed catalogue of social rights. These include a right to full social security with respect to sickness, accident,

GDR constitution seemed to be a real prospect, most believed that certain constitutional changes were needed so urgently that they should be made by amending the old 1968/74 Constitution immediately—even though that document was generally agreed to be fundamentally unsalvageable. Because of the urgency of these amendments, it was necessary that they be enacted by the un-reformed Volkskammer, even before its replacement by a freely chosen parliament that would be seen as legitimate.

Acting before the election of March 18, 1990, therefore, the old Volkskammer under the government of Hans Modrow adopted four sets of amendments which indicate the areas in which reform was viewed as most urgent in that early period.⁶⁸ Although these amendments lacked the full legitimacy of changes enacted by the new Volkskammer after the election of March 18, 1990, they made a more powerful public impression and were in a sense more important. After the election of March 18, it was clear that unification would soon be achieved, and subsequent amendments were steps leading to that almost certain conclusion. The earlier changes, in contrast, were measures still being undertaken by a more or less au-

disability, handicap, inability to care for oneself, old age, and unemployment. RT-ENTWURF, *supra* note 59, art. 23, § 2. Moreover, the draft guarantees rights to appropriate living space, *id.* art. 25, and to employment or assistance in securing employment. *Id.* art. 27, § 1. In addition to providing equal access to education (including at least a ten-year required public school education), the state is further required to establish day care centers, *id.* art. 24, § 3, and give some support to private schools, *id.* art. 24, § 4. An elaborate constitutional provision, *id.* art. 33, also requires the state and all citizens to protect the environment.

3. *Structural Provisions.* The Round Table Draft creates a parliamentary system analogous to that of the Federal Republic, with a Volkskammer (popular assembly) and a Länderkammer (representing the states). Unlike the rule in the Federal Republic, the Volkskammer can dissolve itself at any time by a vote of two-thirds of its members. *Id.* art. 55. Following the lines of the Basic Law, the Round Table Draft provides for a Minister-President (Chancellor), along with a cabinet and a president. Executive powers can be conferred on the cabinet by law, but a statute can state that an executive regulation will be invalid if disapproved by a committee of the Volkskammer. *Id.* art. 94, § 2. (Thus the Round Table draft expressly permits a form of "legislative veto" found unconstitutional in the United States. See *INS v. Chadha*, 462 U.S. 919 (1983)).

In addition to lawmaking by parliament, a complex provision allows for lawmaking by popular vote: a petition will be presented to the electorate if it is signed by 750,000 voters and if its proposals are not adopted by the Volkskammer in a manner approved by representatives of the proponents of the petition. RT-Entwurf, *supra* note 59, art. 98. The Round Table draft also creates a court to decide constitutional matters, *id.* art. 109, and prohibits amendment of the constitution to change certain basic principles, *id.* art. 100. The draft provides for the re-creation of states in the GDR. *Id.* art. 129.

68. For a comprehensive discussion of the 1989-90 amendments of the GDR constitution, see Mampel, *supra* note 65.

tonomous state in the process of groping toward a new and not entirely foreseeable constitutional order.

1. *Rejection of Leading Role of the Communist Party.*—The first constitutional change was an amendment of enormous symbolic importance: on December 1, 1989, the Volkskammer amended article 1 of the 1974 Constitution to abolish the special leadership role of the “working class and its Marxist-Leninist party.”⁶⁹ In this brief amendment the Volkskammer officially recognized what had been established in the streets over the preceding two months—the overwhelming popular rejection of the former political basis of the GDR and, principally, the leadership role of the Communist Party, which had manifested itself in numerous aspects of government and life. This amendment abandoned the central Marxist-Leninist tenet that historical laws justify the Party’s monopoly power and generally opened the way for the recognition of pluralist democratic forms.⁷⁰

2. *Joint Ventures.*—A second set of amendments, enacted on January 12, 1990, was impelled by economic imperatives, particularly the urgent need to procure investment from the Federal Republic and other western nations. Western investment in socialist countries often took the form of joint ventures between the government and foreign corporations. Although some of these projects may already have been underway in the GDR by early 1990, they actually violated the Constitution of 1974, which prohibited private ownership interests in the basic means of production. The amendment of January 12 removed that prohibition.⁷¹ At the same time, a

69. Gesetz zur Änderung der Verfassung der DDR, of Dec. 1, 1989, GBl DDR I 265. At the same time the Volkskammer declined to alter language in article 1 proclaiming that the GDR is “a socialist state of workers and farmers.” See Mampel, *supra* note 65, at 1379. This language, which had been added in the 1974 revision, was drawn directly from the 1936 Constitution of the Soviet Union. See Zieger, *supra* note 31, at 147. Abandonment of this phrase was apparently too much for the old Volkskammer.

70. See generally H. ROGGMANN, *supra* note 51, at 193-94 (special role of Party in Marxist-Leninist theory). Abolition of the leading role of the Communist Party was also an initial step in constitutional reform in other countries of the East Bloc. On November 28, 1989, for example, the Czechoslovak Communist Party pledged to relinquish its monopoly of power, N.Y. Times, Nov. 29, 1989, at A1, col. 6, and on January 15, 1990, Bulgaria became the last of the Soviet Union’s European allies to abolish the Party’s monopoly, by deleting the relevant provision from its constitution, N.Y. Times, Jan. 16, 1990, at A1, col. 2. On March 13, 1990, the parliament of the Soviet Union repealed article 6 of its constitution, a provision that had guaranteed the Party’s political monopoly. N.Y. Times, Mar. 14, 1990, at A1, col. 6.

71. Gesetz zur Änderung und Ergänzung der Verfassung der DDR, of Jan. 12, 1990, GBl DDR I 15. According to article 12, § 1 of the 1968/74 GDR Constitution, “the minerals of the earth, mines, power plants, dams, large bodies of water, the natural re-

new provision was added specifically permitting joint ventures if authorized by law,⁷² and shortly thereafter the government issued regulations governing joint ventures.⁷³

This amendment evoked a bitter political dispute over the percentage of ownership interests that should be allowed to outside investors in joint ventures. Some argued that to permit more than forty-nine percent ownership by private investors would deliver control of People's Property into the hands of capitalist exploiters; others maintained that outside investors could be attracted only by the prospect of control. In light of later developments—including the swift disappearance of the GDR—this dispute seems to come from another world; at any rate it suggests that, even in January 1990, many in the GDR still believed that the country had some future as an independent nation. In any case, the government's initial regulation ordinarily limited foreign investors to forty-nine percent of a joint venture. A higher percentage could be permitted, however, if the people's general economic interest and the goal of the undertaking justified it or if the enterprise was "of small or middle size."⁷⁴

3. *Structural Changes.*—The third set of changes was more structural in nature. On February 20, 1990, the constitution was amended to abolish the "National Front," an amorphous collection of organizations that served as an organ of Communist Party electo-

sources of the continental shelf, industrial concerns, banks, insurance companies . . . are People's Property. Private property therein is not permitted." The amendment of January 12, 1990, removed the last sentence and added the statement, "Deviations from this [rule] are permitted if authorized by statute."

72. See VERF. DDR art. 14a, added by Gesetz zur Änderung und Ergänzung der Verfassung der DDR, of Jan. 12, 1990, GBl DDR I 15. Article 14a also sought to preserve employees' rights of co-determination in concerns with foreign participation in ownership.

73. Verordnung über die Gründung und Tätigkeit von Unternehmen mit ausländischer Beteiligung in der DDR, of Jan. 25, 1990, GBl DDR I 16; see generally Roggemann, *Rechtsgrundlagen für Auslandsinvestitionen in der DDR*, 1990 NJW 671. Among other things, these regulations required the approval of a government economic committee for the founding of any joint venture; approval could be denied on the basis of environmental concerns or if there was a danger that the foreign participant would dominate the concern to the disadvantage of the GDR participants and the GDR economy. The joint venture was required to establish a special fund "to assure the social and cultural rights of the workers."

74. GBl DDR I 16. In reality, these constitutional and statutory changes apparently did not have substantial practical effect because characteristics of the GDR system of property—reflected in regulations accompanying the amendments—made it difficult for entities of the GDR to enter into joint ventures with foreign investors. See Turner & Pflücke, *DDR-Recht im Umbruch*, 1990 NJW 1637, 1639.

ral control.⁷⁵ The amendment also provided for direct elections to the Volkskammer and guaranteed local voting rights for aliens.⁷⁶ The number of Volkskammer members was also reduced from 500 to 400.⁷⁷

4. *Reform of Labor Unions.*—The last set of constitutional changes by the old Volkskammer transformed the nature of labor unions in the GDR. As described in articles 44 and 45 of the 1974 Constitution—and also in reality—labor unions in the GDR more closely resembled governmental organs that participated in the planning of the economy than representatives of the work force in an adversary relationship with managers of concerns.⁷⁸ Indeed the leader of the FDGB, the East German confederation of labor unions, was one of the most powerful government officials in the GDR.⁷⁹

By a constitutional amendment of March 6, 1990 and an accompanying statute, the Volkskammer sought to change the labor unions into adversary bodies along the lines of the western pattern. Article 44 was replaced by a new provision which contemplated that the unions would represent workers' interests in labor struggles, guaranteed the right to strike, and prohibited lock-outs in any form.⁸⁰ This provision reflects a phenomenon that is absent in the United States Constitution but not uncommon in more modern constitutions—the description and regulation of social or economic institutions that are not completely governmental in nature. Indeed the provision prohibiting lock-outs could in effect create constitutional rights among “private” parties—in this case, rights of a union

75. Article 3, providing for the “National Front,” was repealed. Gesetz zur Änderung und Ergänzung der Verfassung der DDR, of Feb. 20, 1990, § 1, GBl DDR I 59. For interesting references to the National Front in the Constitutional Court's first major opinion on issues arising from unification, see *infra* note 384. On the National Front, see generally E. KLEIN & S. LÖRLER, ÜBERLEGUNGEN ZUR VERFASSUNGSREFORM IN DER DDR 44-45 (1989).

76. Gesetz zur Änderung und Ergänzung der Verfassung der DDR, of Feb. 20, 1990, §§ 2, 3, GBl DDR I 59 (amending VERF. DDR (1974) art. 22).

77. *Id.* § 3 (amending VERF. DDR (1974) art. 54). In addition article 23 was amended to grant a right of civil alternative service instead of an exclusive requirement of military service. Gesetz zur Änderung der Verfassung der DDR, of Feb. 20, 1990, GBl DDR I 60.

78. See Markovits, *supra* note 45, at 590-95 (noting, however, that in recent years unions sometimes represented individual workers in disputes about specific employment decisions).

79. Harry Tisch, the last leader of the FDGB, was the first East German official to go on trial for corrupt acts while in office. See *infra* note 226.

80. Gesetz zur Änderung der Verfassung der DDR, of Mar. 6, 1990, GBl DDR I 109.

against an employing company. Interestingly, the Basic Law also contains a provision that grants labor unions constitutional rights against private individuals and groups.⁸¹ The Basic Law's provision—prohibiting agreements and other measures that limit the freedom of joining a union—has its direct source in the Weimar Constitution.⁸²

D. Amending the GDR Constitution—The New Volkskammer and the de Maizière Government

After the election of March 18, 1990, a freely elected Volkskammer replaced the old legislature composed of the SED, other "bloc parties," and representatives of other social groups basically dominated by the SED. The largest group in the new Volkskammer was the CDU which, having abandoned its past as a compliant bloc party, had received strong support from its corresponding party in the west. Along with other conservative parties, the CDU formed the "Alliance for Germany," which emerged from the election with slightly less than one-half of the seats in the new Volkskammer. In a coalition with the small liberal party, the Alliance would have had a majority in the Volkskammer and would have been able to form a government. The constitutional changes necessary for unification, however, required a two-thirds vote of the Volkskammer. Accordingly, the CDU also sought to include the Social Democratic Party (SPD), the second-largest group in the parliament, and after difficult negotiations this melange of political parties formed an uneasy coalition government.⁸³ The CDU leader Lothar de Maizière was elected Prime Minister by the Volkskammer.

81. See GG art. 9, § 3.

82. WEIMAR CONSTITUTION [WRV] art. 159.

A statute accompanying the constitutional amendment set forth details of the new type of labor union in the GDR. Gesetz über die Rechte der Gewerkschaften in der DDR, of Mar. 6, 1990, GBl DDR I 110. A vestige of the older system remained in the unions' continued authority to propose legislation to the Volkskammer. See *id.* § 10(1), at 110; compare VERF. DDR (1974) art. 45, § 2; art. 65, § 1. The right to strike set forth in the constitutional amendment was qualified in the statute by provisions allowing strikes only after unsuccessful attempts at mediation and allowing the government to suspend strikes "on the basis of the general good." See Gesetz über die Rechte der Gewerkschaften in der DDR, of Mar. 6, 1990, § 18(1), GBl DDR I 110, 111.

The Round Table draft also includes a provision on labor unions. See RT-ENTWURF, *supra* note 59, art. 39. It possesses some similarities to the March 6 amendment but is much more detailed. Particularly interesting in the Round Table draft is an explicit guarantee of members' free speech within the union. See *id.* art. 39, § 3.

83. See generally Coalition Agreement of the GDR Governing Parties, reprinted in Bundesministerium für innerdeutsche Beziehungen, Beilage zu "Informationen" No. 8 (1990).

On June 17, 1990, the new Volkskammer issued its most sweeping amendment of the old 1968/74 Constitution of the GDR.⁸⁴ This amendment sought to alter the basic nature of the constitution by proclaiming a series of new general principles, reflecting the revolution accomplished by the popular upheavals of 1989 and the election of March 18, 1990.⁸⁵ The changes also responded to requirements set forth in the first State Treaty, which had been signed by the Federal Republic and the GDR on May 18, 1990.⁸⁶ The amendment declared that all constitutional and other legal rules were henceforth to be applied in accordance with these new principles and that any contrary constitutional provisions would be nullified. Through this technique, the drafters sought to change the basic nature of the GDR Constitution in a general way, without having to undertake—in a very short period of time—the detailed work that a full new constitutional draft would require.

Article 1, section 1 of the amendment proclaimed the GDR a “free, democratic, federal, social and ecologically oriented state based on the rule of law.” This provision is similar to a key section of the Basic Law—article 20(1)—except that it adds a new ecological orientation. Article 1, section 1 thus impliedly takes a position on attempts to include an ecological provision in West German consti-

84. See Gesetz zur Änderung und Ergänzung der Verfassung der DDR (Verfassungsgrundsätze), of June 17, 1990, GBl DDR I 299. In earlier amendments on April 5 the new Volkskammer had revoked the preamble of the 1974 Constitution and enacted administrative provisions relating to the Council of Ministers and Volkskammer; the constitution was also amended to authorize an office of President of the GDR to replace the Council of State, although this office was never filled or even officially established by statute. Gesetz zur Änderung und Ergänzung der Verfassung der DDR, of Apr. 5, 1990, GBl DDR I 221.

In a somewhat self-contradictory provision, the Constitution was also amended to make clear that the new government would not have to refer to the Constitution in taking the oath of office—a change that suggests the profound ambivalence with which the necessity of continuing to work under the 1968/74 Constitution was viewed. Gesetz zur Änderung und Ergänzung der Verfassung der DDR, of Apr. 12, 1990, GBl DDR I 229. Shortly thereafter, another statute, providing for self-government of local units, deleted inconsistent provisions of the 1968/74 Constitution—articles 41, 43 and 81-85. See Mampel, *supra* note 65, at 1386-87.

85. In May 1990, after the Volkskammer's rejection of the Round Table draft but before the sweeping amendments of June 17, the Justice Minister of the de Maizière government appointed a commission of constitutional experts drawn from the Federal Republic and GDR governments and from the universities. This group was charged with the task of drafting a proposal for a new interim constitution based on the GDR Constitution of 1949. The commission apparently finished its work in the extraordinarily short period of time allotted to it, but the results were ignored by the GDR government, which chose to issue the constitutional amendments of June 17 instead. The commission's draft was never published. See generally Fischer, *supra* note 65, at 419-21.

86. See *infra* Part VI; Stern, *supra* note 14, at 25.

tutions—a movement that has succeeded with respect to some of the state constitutions but not with respect to the Basic Law.⁸⁷ Article 1, section 2 of the June 17 amendment seeks to complement the basic principles of section 1 by declaring that rules “binding individuals or [state organs] to the socialist state and legal order, the principle of democratic centralism, socialist legality, the social legal consciousness, or the views of individual groups of the population or parties, are revoked.”⁸⁸ In all, the purpose of article 1 was to adopt a basic order resembling that of the Federal Republic and to reject the principles that had guided the constitution and the rest of the legal order up to the 1989 revolution.

The next series of articles in the June 17 amendment sought to support capitalist property and economic relations by guaranteeing private property rights in land and the means of production as well as the freedom of economic activity.⁸⁹ Nonetheless, according to article 2, special forms of property would be permissible for government participation in economic affairs, and the use of property should serve the common good and preservation of the natural basis of life. To some extent, the latter provision seems to parallel the statement in article 14 of the Basic Law that “property has its obligations,”⁹⁰ but the language of the amendment seems, if anything, to qualify property rights to a greater extent than the corresponding language of the Basic Law and also seems to recognize a qualification in favor of environmental protection.⁹¹

Article 5 of the June 17 amendments amplifies the declaration in article 1 that the GDR is a state based on the rule of law, by

87. See Häberle, *Verfassungspolitik für die Freiheit und Einheit Deutschlands*, 1990 JURIS-TENZEITUNG [JZ] 358, 363; Mampel, *supra* note 65, at 1388.

88. A provision similar to that of article 1, § 2—rejecting various principles such as socialist legality and the socialist legal consciousness in the GDR—had already been contained in a protocol to the State Treaty. See *infra* Part VI. The reference to “views of individual groups of the population or parties”—a phrase also contained in the protocol—is evidently a reference to provisions in the GDR Constitution referring to the working class and the SED.

Article 1, § 3 of the June 17 amendment introduced the principle of judicial review into the GDR but left the details to future regulation by statute.

89. As discussed above, private property interests in the principal means of production had been totally prohibited until the constitutional amendment of January 12, 1990. See *supra* text accompanying note 71.

90. See Mampel, *supra* note 65, at 1389.

91. Article 3 of the amendment goes on to set forth a right to enter into contracts and economic activity in general. Article 4 sets forth rights to form labor unions and employers' associations—a provision that to some extent complements the March 6 constitutional amendment changing the nature of labor unions. See *supra* text accompanying notes 78-82.

strengthening the independence of the judiciary. As noted above, the susceptibility of the judges to political pressure from the Communist Party was one of the characteristics of the old GDR state most criticized by the reformers. Article 5, section 1 is identical to the first sentence of article 19(4) of the Basic Law, which guarantees each individual the possibility of a legal remedy for a violation of rights; this provision, which forms the basis of West German administrative law, secures an extensive system of review of administrative decisions. According to article 5, section 2 of the June 17 amendments, "The judges are independent and subject only to the Constitution (in accordance with the provisions of this constitutional amendment) and the law."⁹² To make the point absolutely clear, article 5 also provides that the judges are "to that extent subject to no supervision of state or societal organs."⁹³

Articles 6 and 7 require the state to protect the environment and to further the right to work—provisions that elaborate on the general goals of article 1 and reflect an approach to social welfare and environment that goes beyond that of the Basic Law.⁹⁴ Although the Basic Law contains a very general provision declaring that the Federal Republic is a "social state," there are few provisions that render this guarantee more concrete, and any provision concerning a right of employment has met strenuous resistance in the Federal Republic. Finally, articles 8 and 9 make clear that the GDR can confer certain rights of sovereignty on international organs or organs of the Federal Republic and that state treaties and international agreements of the GDR can effect constitutional changes; in both cases approval by two-thirds of the members of the Volkskammer is necessary. The first of these provisions is similar to article 24(1) of the Basic Law; it was necessary in order to authorize those aspects of the State Treaty that conferred substantial authority over economic matters in the GDR on the Bundesbank, an organ of the Federal Republic.⁹⁵ The second provision made clear that the

92. This provision is a close adaptation of a portion of article 97(1) of the Basic Law which states that "the judges are independent and subject only to the law."

93. Indeed this provision also states that "leadership of the jurisprudence of lower courts by higher courts is not permissible"—a provision that seems to promote "independence" of the judiciary to an extraordinary degree. This provision is probably a reaction to the system through which the Supreme Court of the GDR set forth mandatory guidelines that were intended to direct the lower courts as an aspect of democratic centralism. See *supra* note 57; VERF. DDR (1974) art. 93.

94. Similar provisions were contained in the Round Table draft for a new constitution of the GDR. See *supra* note 67.

95. See Fischer, *supra* note 65, at 423.

State Treaty and the later Unification Treaty could amend the constitution upon approval of two-thirds of the members of the Volkskammer.⁹⁶

All in all, these provisions, which were criticized for their lack of judicial precision,⁹⁷ seemed to be an attempt to form a conceptual bridge to unification by replacing fundamental principles of the GDR Constitution with principles more in accord with those of the Basic Law. Nonetheless, certain points of tension with the Basic Law were also evident. By including specific social welfare and environmental provisions, the Volkskammer seemed to indicate that even the conservatives in the GDR were willing to support certain constitutional changes that continue to meet the skepticism or opposition of conservative political groups in the Federal Republic.⁹⁸

96. This provision was useful because the June 17 amendments were adopted after the State Treaty was signed, but before that treaty had been ratified by the Volkskammer. For critical commentary on the provision, see *id.* at 423; Mampel, *supra* note 65, at 1389-90.

97. For a particularly bitter criticism, see Fischer, *supra* note 65, at 421-24.

98. On July 5, 1990, the Volkskammer adopted additional constitutional amendments relating to the subject of judges and state prosecutors, one of the areas of greatest abuse under the old regime. Verfassungsgesetz zur Änderung und Ergänzung des Gerichtsverfassungsgesetzes, of July 5, 1990, GBl DDR I 634; Verfassungsgesetz zur Änderung und Ergänzung des Gesetzes über die Staatsanwaltschaft der DDR, of July 5, 1990, GBl DDR I 635. These constitutional changes, which were accompanied by detailed statutory amendments, sought to create a professional and independent judiciary and prosecutorial force in place of organs previously subject to political control. The amendments abolished the previous power of the Volkskammer and the Council of State to choose, remove, or supervise Supreme Court judges and chief state prosecutors, and they removed the Supreme Court's power to control the lower courts. See VERF. DDR (1974) arts. 49, 50, 74, 92, 93. Articles 94 and 95 were amended to establish a system of professional choice of judges, replacing the previous electoral system in most cases. Articles 97 and 98, binding prosecutors to the "strict preservation of socialist legality" and providing unitary control of prosecutors, were repealed. These changes give greater specificity to more general principles relating to the judiciary previously adopted in the June 17 amendments. See *supra* text accompanying notes 92-93. Like the June 17 amendments, these changes were designed to implement the provisions of the first State Treaty. See *supra* text accompanying note 86.

Later in July, the Volkskammer enacted a statute that had the effect of amending the constitution to re-create the five states of the GDR that had been effectively abolished in the 1950s. Verfassungsgesetz zur Bildung von Ländern in der DDR—Ländereinführungsgesetz—of July 22, 1990, GBl DDR I 955. Because the re-creation of the East German Länder is an important topic in its own right, this amendment will be discussed in detail in Part VII below. Finally, in July the Volkskammer amended the GDR Constitution to allow the creation of private schools, which had not been permitted in the GDR under the Constitution of 1968/74. Verfassungsgesetz über Schulen in freier Trägerschaft, of July 22, 1990, GBl DDR I 1036.

V. METHODS OF UNIFICATION UNDER THE BASIC LAW

As calls for unification became more insistent, attention began to turn to the question of how that goal should be achieved. There were several possible constitutional methods of unification, and the question of which method should be chosen had an important bearing not only for the relations between the two parts of Germany, but also for domestic political issues within the Federal Republic.

From the beginning, three possible methods of unification seemed to be in prospect.

A. Confederation

At the commencement of the East German reform movement in late 1989 some political figures proposed a confederation of the two German states—or perhaps an even looser form of “treaty community.” Through this technique, the two states could preserve their individual structures and governments while gradually merging some specified functions. Indeed, Chancellor Kohl proposed a confederation in his ten-point plan on November 28, 1989, carefully pointing out that this form of partial consolidation did not preclude full unification—called for by the Basic Law—at a later point.⁹⁹ Some of the new reform parties in the GDR, particularly Democracy Now, also proposed a confederation,¹⁰⁰ as did an influential article in *Der Spiegel* by two members of the Constitutional Court.¹⁰¹

The impetus underlying Kohl’s proposal, however, seemed to differ considerably from that underlying the views of groups like Democracy Now. Kohl’s original call for confederation seemed to follow the counsels of caution—a political impulse not to move too quickly, for fear of domestic and foreign opposition—and perhaps also uncertainty about the precise nature of the problems that lay in the way. For some of the reform parties, however, confederation was a means of preserving the possibility of developing a form of democratic society different from that of the Federal Republic: more social, less aggressively capitalistic, imbued with more plebiscitary elements—perhaps a type of democratic socialism. Of course,

99. See *WIR SIND DAS VOLK*, *supra* note 14, at 182-89; see also *id.* at 194, 236. Ironically, the idea of confederation had been first suggested (under quite different terms) by GDR leader Walter Ulbricht in January 1957, and it was repeated by Soviet and GDR officials thereafter. See M. McCauley, *supra* note 26, at 87.

100. See, e.g., *WIR SIND DAS VOLK*, *supra* note 14, at 224 (confederation as interim step in unification plan). Some prominent members of the SPD also favored this method.

101. Böckenförde & Grimm, *Nachdenken über Deutschland*, *DER SPIEGEL*, Mar. 5, 1990, at 72-77.

the idea of confederation would not necessarily exclude substantial economic support flowing to the GDR from the Federal Republic. With this form of confederation—even if it were to exist only for an interim period—a new GDR constitution would be necessary to replace the Stalinist document of 1968/74, and the original impetus toward constitution drafting in the GDR can be viewed partly in this light.

For all of its attractive possibilities, quasi-unification by confederation had little political support. Kohl abandoned it as soon as he saw that something more permanent was possible. Moreover, the idea of confederation—as well as the reform parties supporting it—were massively rejected in the election of March 18, 1990, which showed that a substantial majority of GDR voters wanted complete political unification as quickly as possible.¹⁰²

B. Article 146 of the Basic Law

The election of March 18 with its clear mandate for rapid unification raised the question of how this goal was to be accomplished—a question which, in turn, required examination of the status of unification under the constitutions of both German states. The 1974 GDR Constitution said nothing about German unification because by the 1970s the position of the GDR (and the Soviet government) was that the GDR and the Federal Republic were two separate states; as noted above, this was a change from an earlier eastern view more favorable to unification.¹⁰³ In any case, unification in any foreseeable form would involve dissolution of the GDR—an action that would require amendment of the GDR constitution by a vote of two-thirds of the Volkskammer.¹⁰⁴

On the other hand, the Basic Law of the Federal Republic was

102. See, e.g., Starck, *Deutschland auf dem Wege zur staatlichen Einheit*, 1990 JZ 349, 352.

103. See *supra* text accompanying notes 8-10. The GDR Constitution of 1949 was intended to be used as an all-German constitution and therefore sometimes employs the term "Germany" or "German people." See, e.g., VERF. DDR (1949) art. 1, § 1 ("Germany is an indivisible democratic republic . . ."); art. 51, § 1 ("The Volkskammer consists of representatives of the German people."). The 1968 Constitution of the GDR also contained references to "Germany" or "the German nation," see, e.g., VERF. DDR (1968) Preamble; art. 1; art. 3, but these references were systematically removed in the 1974 amendments.

104. See VERF. DDR (1974) art. 63, § 2. The procedure necessary for amending the GDR Constitution was rather simple compared, for example, with the elaborate and difficult amendment procedure in the Constitution of the United States. The 1968/74 GDR Constitution could be amended by a two-thirds vote of the single-house legislature (Volkskammer), so long as the statute so adopted explicitly stated that it was intended to amend or add to the Constitution. See *id.* art. 63, § 2; art. 106. Under the GDR Consti-

conceived as a provisional document that foresaw—and, as interpreted by the Constitutional Court, indeed required—steps toward eventual unification. Consequently, in striking contrast with most constitutions, the Basic Law contemplated its own termination, and the constitutional provision governing termination set forth a possible method by which unification could be achieved. Article 146, the termination provision, declared that “this Basic Law will lose its validity on the effective date of a constitution that has been chosen by the German people in a free decision.” This provision not only prescribed the method for terminating the effectiveness of the Basic Law, but also could be seen as explaining that German unification could be accomplished by the adoption of a new constitution by the people of both German states.

In accordance with this provision, therefore, some commentators proposed adoption of a new, all-German constitution that would replace both the GDR Constitution and the Basic Law. There was little authoritative guidance, however, on how this new constitution was to be adopted. According to the Constitutional Court, a “certain minimal standard of free-democratic guarantees” must be preserved in this process.¹⁰⁵ Perhaps an all-German constitutional convention could propose a draft, or perhaps the draft could be put forward jointly by the West German Bundestag and the GDR Volkskammer—in either case the constitution might be ratified by both populations in a plebiscite.¹⁰⁶ Some commentators argued that upon the adoption of a new, all-German constitution under article 146, both the Federal Republic and the GDR would disappear as legal subjects, to be replaced by a new entity: a united “Germany.”¹⁰⁷ Most maintained, however, that unification under article 146 would not disturb the continuity of the Federal Republic as the surviving legal subject—primarily because the prevailing doctrine

tution of 1949, as well as under the Weimar Constitution, it had also been possible to amend the Constitution by plebiscite. See VERF. DDR (1949) art. 83, § 3; WRV art. 76.

It has been argued that the democratic revolution in 1989-90 in the GDR had the effect of rendering the Stalinist Constitution of 1968/74 obsolete and therefore no longer valid—except that certain structural provisions could continue on with the force of statutory law only. See Isensee, *Staatseinheit und Verfassungskontinuität*, 49 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* [VVDStRL] 39, 43 n.9 (1990). This argument did not gain wide acceptance, however, and all steps in the GDR leading up to unification were taken on the basis of the existing 1968/74 Constitution—as amended in accordance with the procedure of that constitution itself. See Mampel, *supra* note 65, at 1382; Stern, *supra* note 14, at 24-25.

105. 5 BVerfGE 85, 132 (1956).

106. See, e.g., 3 GRUNDGESETZ-KOMMENTAR, *supra* note 7, art. 146, No. 5.

107. See Möschel, *DDR-Wege aus der Krise*, 1990 JZ 306, 310.

viewed the Federal Republic (but not the GDR) as in some sense identical with the continuing "German Reich."¹⁰⁸

It was possible that unification through article 146—and particularly the adoption of a new constitution by plebiscite—could cure a democratic "deficit" in the adoption of the Basic Law in 1949. In contrast with the Weimar Constitution and most of the Länder constitutions after World War II, the Basic Law was not proposed by a body that had been directly elected by the people. Rather, the Basic Law was proposed by a "Parliamentary Council" that had been chosen by the legislatures of the Länder.¹⁰⁹ The western Allies originally contemplated that this democratic deficit would be resolved by submitting the proposal of the Parliamentary Council to a popular referendum in each of the Länder.¹¹⁰ The Parliamentary Council ultimately decided, however, that the Basic Law should be ratified by the legislatures of the Länder rather than the people themselves.¹¹¹ On the other hand, it can be argued that the Basic Law has in effect been ratified by usage through its continual observance under democratic forms.¹¹²

It is indeed arguable that the framers of the Basic Law intended that unification would come about through the adoption of a new constitution under article 146. Moreover, from the point of view of democratic theory, the use of article 146 had another distinct advantage: a new document presumably would be adopted after extensive discussion of constitutional ideas from both the Federal Republic and the GDR, including not only the more-or-less settled political ideas of the western parties but also the new democratic self-under-

108. See, e.g., Frowein, *Die Verfassungslage Deutschlands im Rahmen des Völkerrechts*, 49 VVDStRL 7, 25-26 (1990); Isensee, *supra* note 104, at 47-48; *supra* text accompanying notes 3-4.

109. Accordingly, the Parliamentary Council included "only a narrowly drawn leadership-elite of the political parties That the Parliamentary Council represented the German people in its full extent was accordingly an obviously untenable fiction." Mußnug, *Zustandekommen des Grundgesetzes und Entstehen der Bundesrepublik Deutschland*, in 1 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 219, 254 (J. Isensee & P. Kirchhof ed. 1987).

110. See Frankfurt Documents, July 1, 1948, *reprinted in* 1 DOKUMENTE DES GETEILTEN DEUTSCHLAND 88-89 (I. v. Münch 2d ed. 1976) [hereinafter DOKUMENTE].

111. This decision was consistent with the Basic Law's general hostility to plebiscites. See 3 GRUNDGESETZ-KOMMENTAR, *supra* note 7, art. 144, No. 12. Perhaps ratification by plebiscite might also have suggested that the Basic Law would possess a permanence that would have been inconsistent with the document's intended "provisional" status.

112. For the argument that the Basic Law received popular legitimation in the first Bundestag election, on the ground that a large percentage of the population voted in that election and chose parties that had voted for the Basic Law, see Mußnug, *supra* note 109, at 255-56.

standing arising from the reform movements of the GDR.¹¹³

Although good arguments were thus available for the use of article 146, both on authority and principle, and although the use of article 146 had some support (for example from some parts of the SPD), it was clear after the election of March 18 that this solution also had no practical political chance. Indeed it probably was the democratic advantages of this process—the possibility of a cross-fertilization of ideas from east and west—that assured its demise. The CDU/CSU government in the west (which also largely controlled the conservative coalition in the east) did not want to take the chance that provisions that it considered dubious or even dangerous—for example, expanded social guarantees, such as a right to employment or living space, or increased plebiscitary elements now almost completely absent in the Basic Law—would make their way into a new all-German constitution. Both governments may also have feared that a risk of political instability might arise from the time-consuming and contentious process of drafting a new constitution. Consequently, the prevailing political coalition sought unification in a manner that would extend the Basic Law in its present form over the newly united country, with as few changes as possible.

C. *Article 23 of the Basic Law*

The method that was most clearly designed to achieve the conservatives' goals was set forth in article 23 of the Basic Law which, like article 146, did not specifically regulate unification but nonetheless presented a method for its achievement. The principal function of article 23 was to describe the territorial coverage of the Basic Law—a particularly important provision after the territorial rearrangements following World War II and the division of Germany into occupation zones. According to article 23, the Basic Law would be in effect at the outset in the states of "Baden, Bavaria [and all the original states of the Federal Republic and Berlin.] In other parts of Germany [the Basic Law would] be put into effect after their accession."

This provision raises several interesting points. For instance, it assumes that there are "other parts" of "Germany" that can "accede to" (or join) the Federal Republic—the territory of the Basic Law.¹¹⁴ When these "other parts of Germany" join the Federal Republic,

113. Cf. Häberle, *supra* note 87, at 360 (emphasizing the importance of the new "constitutional culture" that had arisen in late 1989 in the GDR).

114. The Basic Law was not the first German constitution to contain such a provision. The Constitution of the North German Confederation (1867) and the Weimar Constitu-

the Basic Law would be extended to cover them as well. The "joining" parts of Germany would become unified with the Federal Republic, but it is the Federal Republic that would survive; the joining parts, as separate legal subjects, would unquestionably disappear. There was no possibility of arguing—as might have been the case with unification under article 146—that *both* the Federal Republic and the GDR would be replaced by a new legal entity.

Indeed, the relationship between article 23 and article 146 is not entirely clear. Because article 23 speaks of parts "joining" or "acceding to" the Federal Republic, and because article 146 seems to cover the case of general unification, it could be argued that article 23 was only intended to cover the case of relatively small parts of "Germany" joining the Federal Republic. Indeed, the only previous use of article 23 occurred in 1957, when it was invoked to allow the Saarland to accede to the Federal Republic after the voters of the Saar rejected a special "Europeanized" status in a plebiscite.¹¹⁵ On the other hand, the historical materials may indicate that the Parliamentary Council also viewed article 23 as a possible method for achieving unification of the Federal Republic with the GDR (or the Soviet occupation zone, as it then was).¹¹⁶ Indeed, in the Basic Treaty case the Constitutional Court explicitly stated that the GDR was "another part" of Germany that could "accede" to the Federal Republic under article 23, and that this provision had in no way become obsolete.¹¹⁷

tion both contained sections contemplating the possible accession of additional territory. See Frowein, *supra* note 108, at 14.

115. In its argument before the Constitutional Court in the Basic Treaty case, see *supra* note 2, the government maintained that article 23 of the Basic Law was intended solely for the accession of the Saarland—a position ultimately rejected by the Court. O. KIMMINICH, *DIE EIGENTUMSGARANTIE IM PROZEß DER WIEDERVEREINIGUNG* 20 (1990); Stern, *supra* note 14, at 33. For historical background on the problem of the Saar, see 4 BVerfGE 157 (1955) (Saar Statute Case). See also R. DOLZER, *THE PATH TO GERMAN UNITY: THE CONSTITUTIONAL, LEGAL AND INTERNATIONAL FRAMEWORK* 17-18 (American Institute for Contemporary German Studies, German Issues No. 8, 1990).

116. See Binne, Forum: *Verfassungsrechtliche Überlegungen zu einem "Beitritt" der DDR nach Art. 23 GG*, 1990 JURISTISCHE SCHULUNG [JuS] 446, 448. See also T. MAUNZ & G. DÜRIG, *GRUNDGESETZ KOMMENTAR*, art. 23, No. 37 [hereinafter MAUNZ-DÜRIG].

117. 36 BVerfGE 1, 29 (1973). It is also worth noting that the expression "Germany"—other parts of which may accede to the Federal Republic—may have been intended to refer to the German borders of December 31, 1937 (thus including territories east of the Oder-Neiße line, now in Poland). A reference to these borders in article 116 of the Basic Law (defining the concept "German" for purposes of citizenship) may suggest such an interpretation. Thus, in theory, these territories might also have sought to accede to the Federal Republic under article 23, although this was a most unlikely prospect. This theoretical possibility required, however, that article 23 be stricken from the Basic Law after the accession of the GDR, as part of the final settlement of the Polish-

For conservatives in the Federal Republic the use of article 23 was a reassuring solution.¹¹⁸ Under this section the Basic Law—and forty years of Constitutional Court case law interpreting its provisions—would remain in effect and would be extended to the territory of the GDR. Almost all of the central governmental institutions of the new, united Germany would be the familiar institutions of the Federal Republic, with such alterations and extensions as would be needed to accommodate the additional territory and population. Only a few changes would be necessary in the Basic Law, and they would not touch the basic structure of state or society. Rather, these changes would be limited to those necessary to recognize that full unification had been achieved and, in a few cases, to recognize specific historical developments in the former GDR.¹¹⁹

The steps necessary for “accession” under article 23 were generally accepted in the literature.¹²⁰ The accession had to be declared by the GDR or by the states or other subdivisions of the GDR. The decision to accede had to be made in accordance with a democratic procedure—either by plebiscite or by the vote of a democratically organized government,¹²¹ although that government need not possess all of the specific democratic attributes of the Federal Republic under the Basic Law. Accordingly, it was necessary for the GDR to amend its 1974 constitution to include sufficient democratic attributes and to remove provisions that hindered unifi-

German border question, through which the Oder-Neiße line was recognized by treaty. Accordingly, the Unification Treaty, signed by the two German states on August 31, 1990, *see infra* Part VIII, required the deletion of article 23 from the Basic Law after unification. A similar provision was also included in the treaty concluding the “Two Plus Four” discussions. *See infra* Part X(D).

118. *See, e.g.*, Note, *supra* note 4, at 262 n.48 (conservatives favored accession under article 23 because it would retain “tested” West German system; SPD sought new constitution under article 146).

119. For example, along with the deletion of article 23 of the Basic Law, it was necessary to amend the Preamble to indicate that unification had been achieved and was not something to be sought in the future; retention of the original preamble could call the Oder-Neiße settlement into question by implying that some “German” territory remained that must ultimately be reunited with the territory covered by the Basic Law. *See infra* Part VIII(A). Treaty resolutions of questions of expropriated property and abortion required amendments of the Basic Law, as did certain other (less controversial) provisions in the Unification Treaty relating to the gradual introduction of certain aspects of the law of the Federal Republic into the territory of the former GDR. *See infra* Part VIII.

120. *See generally* Binne, *supra* note 116; Heintschel von Heinegg, *Der Beitritt “anderer Teile Deutschlands” zur Bundesrepublik nach Art. 23 Satz 2 GG, 1990 DIE ÖFFENTLICHE VERWALTUNG* [DÖV] 425.

121. *See, e.g.*, Degenhart, *Verfassungsfragen der deutschen Einheit*, 1990 DVBl 973, 974.

cession or prevented economic reform.¹²² Moreover, because accession in effect required dissolution of the GDR and revocation of its constitution, a vote to accede to the Federal Republic also required a two-thirds vote of the Volkskammer.¹²³

Under article 23, the government of the Federal Republic had no power to reject the accession of "another part of Germany,"¹²⁴ although it could examine the method of accession to determine that it was the product of "free will."¹²⁵ Thus, although the part of Germany that was joining the Federal Republic must presumably make its decision in a democratic manner, the populace of the Federal Republic had no power through democratic means to reject the accession. This interpretation is consistent with the Constitutional Court's view that the Basic Law requires the government of the Federal Republic to seek unification.¹²⁶ Although some argued that a specific statute of the Bundestag was necessary in order to extend the Basic Law over the territory that "acceded,"¹²⁷ the Bundestag may have been constitutionally obligated to enact such a statute.¹²⁸

*D. A New Constitution Under Article 146 After Accession
Under Article 23*

Even after accession under article 23, however, the possibility of a new all-German constitution under article 146 is not completely foreclosed.¹²⁹ Article 146 says nothing about when such a new constitution must be adopted. Although a new constitution could have been the final step in unification in place of accession under article

122. For a discussion of this process, see *supra* Part IV.

123. See *supra* note 104. In the *Basic Treaty* case, the Constitutional Court noted that "other parts of Germany" have . . . found their statehood in the German Democratic Republic," and therefore these "other parts" can declare their "accession" to the Federal Republic only through a process consistent with the Constitution of the GDR. 36 BVerfGE 1, 29 (1973).

124. See Stern, *supra* note 14, at 36; MAUNZ-DÜRIG, *supra* note 116, art. 23, No. 40.

125. *Id.* art. 23, No. 44.

126. See *supra* text accompanying notes 2-4.

127. MAUNZ-DÜRIG, *supra* note 116, art. 23, No. 43.

128. MAUNZ-DÜRIG, *supra* note 116, art. 23, No. 44; Rauschnig, *supra* note 10, at 401.

It is not clear whether the entire West German legal system would extend to the GDR immediately upon accession if no special provision were made for this purpose. Article 23 declared that the Basic Law would extend to the acceding territory but it said nothing about the rest of the legal system. One could argue, however, that the remainder of the legal system would be extended by implication. An intermediate position might be that remaining GDR law would continue in effect as a form of state law in all of the Länder constituting the GDR, but would be superseded to the extent inconsistent with federal law. As a practical matter, these questions were subject to comprehensive regulation in the Unification Treaty. See *infra* Part VIII(A).

129. See MAUNZ-DÜRIG, *supra* note 116, art. 23, No. 37.

23, the provisions of article 146 seem to authorize adoption of a new constitution by vote of an all-German parliament (or even by plebiscite, or by a combination of the two) *after* accession. Consequently, as early as summer 1990, the Länder with SPD governments proposed that within one year after unification the Bundesversammlung—a special organ composed of the members of the Bundestag and an equal number of members chosen by the state legislatures¹³⁰—should elect a constitutional council or convention which would prepare a new constitution modeled on the Basic Law, to be presented to the people for ratification.¹³¹

Yet, from the outset, the permissibility of using article 146 in this manner was not undisputed. Because article 146 was originally intended as a method of accomplishing German unification, it could have been argued that after unification under article 23 the provisions of article 146 should be deleted from the Basic Law.¹³² Indeed, some suggested that, after unification under article 23, the provisions of article 146 would become obsolete and therefore invalid, even if the article remained in the text of the Basic Law.¹³³

Perhaps with this problem in mind, the framers of unification made a deliberate decision to retain article 146 as a functioning part of the Basic Law. The Unification Treaty entered into by the Federal Republic and the GDR required the amendment of article 146 in a manner indicating that the provision retains its validity even after unification.¹³⁴ This amendment therefore changes the basic nature of article 146 from a provision contemplating a new constitution in the course of German unification, to a provision providing a broader opportunity for the adoption of a new basic document.¹³⁵ The governing CDU/CSU coalition might well have preferred to de-

130. See GG art. 54, § 3.

131. FAZ, July 26, 1990, at 2, col. 2.

132. Thus, upon unification, article 23 itself was repealed. See *supra* note 117.

133. See Degenhart, *supra* note 121, at 976 (suggesting that the GDR, having chosen to accede under article 23, accepted the Basic Law and could not seek to replace it under article 146). See also Badura, *Deutschlands aktuelle Verfassungslage*, 115 ARCHIV DES ÖFFENTLICHEN RECHTS [AÖR] 314, 318-20 (1990) (discussing Professor Isensee's view that with accession under article 23, the purpose of articles 23, 146 and the unification mandate of the Preamble had been achieved and therefore, following accession, these provisions should be considered obsolete).

134. For a discussion of this provision and the Unification Treaty in general, see *infra* text accompanying notes 238-241.

135. See generally Stern, *Der verfassungsändernde Charakter des Einigungsvertrages*, 1990 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT [DtZ] 289, 293. The retention and amendment of article 146 should be read together with other provisions of the Unification Treaty recommending that parliament examine the possibility of constitutional reform. *Id.*; see *infra* text accompanying notes 242-243.

lete article 146 altogether, but it was probably forced to accept these provisions by the SPD, Bündnis 90, and the Greens in order to achieve the two-thirds vote necessary for ratification of the Unification Treaty.

Neither the original nor the amended version of article 146 sets forth a specific method for adopting a new, all-German constitution. Arguably, therefore, a simple majority in a plebiscite might adopt the new basic document—perhaps following its proposal by a simple majority of a national convention convened for that purpose. Consequently, conservative voices in the Federal Republic—including political figures and legal scholars—have viewed the continued existence of article 146 as a threat.¹³⁶ Indeed, leaders of the CDU have argued that those who favor such a plebiscite seek to create a “different republic” without the necessity of achieving the two-thirds majority required for an ordinary constitutional amendment.¹³⁷

Some commentators have denied, however, that article 146 authorizes adoption of a new constitution by a simple majority. According to this argument, article 146 must be read together with article 79(2) of the Basic Law, which requires a two-thirds vote of the Bundestag and the Bundesrat for a constitutional amendment: since adoption of a new constitution is even more sweeping than adoption of a single constitutional amendment, article 146 must be read to require a two-thirds vote at some point in the process. For example, a two-thirds vote of the Bundestag and Bundesrat might be necessary to propose a constitutional amendment for a plebiscite.¹³⁸ If article 146 is used to adopt a new constitution by simple majority in the future, this widely debated question will certainly require resolution by the Constitutional Court.

Unless the political constellation changes considerably in the months following unification, however, the same forces that supported the use of article 23 could probably prevent any subsequent use of article 146 to work significant constitutional changes. Yet recent deliberations in the Free Democratic Party (FDP) suggest that this party—whose support is necessary to maintain the CDU coal-

136. See FAZ, Sept. 24, 1990, at 1, col. 5; Isensee, *Selbstpreisgabe des Grundgesetzes?*, FAZ, Aug. 28, 1990, at 10, col. 1.

137. See, e.g., FAZ, Sept. 24, 1990, at 5, col. 1 (CDU official fears that right of employment and right to a dwelling might be introduced through Bundestag vote and plebiscite under article 146). For a contrasting view, see, e.g., Göhring, *Einigungsvertrag und Mietrecht*, 1990 DtZ 317, 318 (arguing that a right to a dwelling should be introduced into a new all-German constitution).

138. See, e.g., Stern, *supra* note 135, at 293-94.

tion—may side with the Social Democrats on the question of proposing significant constitutional changes for approval through a plebiscite.¹³⁹ A more modest proposal is that the democratic deficit in the original adoption of the Basic Law be removed after accession under article 23, by adopting the Basic Law itself as the new, all-German constitution under article 146 through parliamentary decision followed by a plebiscite.¹⁴⁰

VI. THE STATE TREATY

Amalgamation of two quite different social, economic, and legal systems could not be accomplished instantaneously; instead a process of rapprochement and accommodation was necessary in which the manifold problems could be faced and to some extent resolved. The first official step in this process was the signing on May 18, 1990 of a "Treaty Concerning the Creation of a Currency, Economic, and Social Union" between the GDR and the Federal Republic—generally known as the "State Treaty."¹⁴¹ With the signing of this agreement, and the partial merger of the two economic systems, the process of unification had reached a point of no return.

The most noticeable effect of the State Treaty was the introduction of the West German currency, the Deutsche Mark (D-Mark), into the GDR on July 1, 1990. The immediate result of this currency reform was the sudden appearance of western consumer goods in the GDR. Bananas and other previously exotic fruits appeared in stands on the streets of East Berlin. Over a weekend, shops in the

139. See FAZ, Oct. 9, 1990, at 1, col. 2; see also FAZ, Oct. 15, 1990, at 4, col. 4. Cf. Frankfurter Rundschau [FR], Sept. 18, 1990, at 1, col. 2 (describing a "Curatorium" founded by civil rights organizations, the Greens, Bündnis 90, and individuals from the SPD and FDP, for the purpose of drafting a new constitution based on the Basic Law and the draft of the GDR Round Table, to be proposed for adoption by plebiscite).

140. See Frowein, *Das Grundgesetz behalten—per Volksentscheid*, Die Zeit, July 6, 1990, at 9, col. 1.

141. 1990 BGBl II 537 [hereinafter State Treaty]. The Treaty was accompanied by a "Joint Protocol Concerning Principles" [hereinafter "Joint Protocol"] as well as nine Attachments. The Treaty and its accompanying documents are reprinted with extensive commentary in I K. STERN & B. SCHMIDT-BLEIBTREU, VERTRÄGE UND RECHTSAKTE ZUR DEUTSCHEN EINHEIT (1990). See also Schmidt-Bleibtreu, *Der Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik*, 1990 DtZ 138. A statute of the Federal Republic that approved the State Treaty also contained extensive provisions amending existing economic, financial, and commercial legislation of the Federal Republic, for the purpose of carrying out the Treaty's provisions. See I K. STERN & B. SCHMIDT-BLEIBTREU, *supra*, at 239-317.

For an English version of the State Treaty and related documents, with commentary, see 29 I.L.M. 1108 (1990).

center of East Berlin filled with western clothes, cosmetics, electronics, and running shoes—the insignia of the long-desired consumer society replacing the more sober products of socialist planning. Western banks erected temporary offices on vacant land, and potential customers crowded around parked trailers advertising travel to the Mediterranean and other places now accessible to GDR citizens with D-Marks from the currency reform. Yet these developments were soon accompanied by difficult problems, which became even more serious in succeeding months.

In order for the State Treaty to come into effect, it had to be enacted by both German parliaments.¹⁴² As an historical matter, these votes were bound together with the vote of both parliaments on another important issue—the German recognition of the Oder-Neiße line, separating the territory of East Germany from that of Poland. According to Chancellor Kohl, the German confirmation of this border was an essential precondition to the ratification of the State Treaty because otherwise unification would face insurmountable objections from Germany's neighbors and from the victorious Allies of World War II.¹⁴³ Accordingly, on June 21, 1990, the Bundestag and Volkskammer passed a resolution recognizing the Oder-Neiße line as the permanent Polish-German border, and these resolutions were officially communicated to the Polish government. Chancellor Kohl attempted to pacify the right wing of his coalition with words of consolation for those expelled from the eastern territories.¹⁴⁴ Thereafter, on June 21 and 22, the Volkskammer and Bundestag, and also the West German Bundesrat, approved the State Treaty.

Although these votes were overwhelmingly favorable, the Treaty was not adopted without some objection both to its content and to the process of adoption. Members of the West German SPD sharply criticized the government for negotiating the Treaty without adequately consulting Parliament and the state governments.¹⁴⁵ A

142. Moreover, because the Treaty effected constitutional changes in the GDR, a two-thirds vote was necessary in the Volkskammer. See *supra* text accompanying note 96; note 104.

143. FR, June 22, 1990, at 4, col. 1. Kohl's certainty on this point most likely reflected the severe international criticism he received when he failed to take an unambiguous position on the finality of the Oder-Neiße line in public statements at an earlier point in the process of unification. For further discussion of this issue, see *infra* Part X(B).

144. See FR, June 22, 1990, at 1, col. 1. Kohl referred to the "unspeakable pain and injustice" inflicted by the Germans during the Second World War, but also stated that a "great injustice" was done to Germans driven from their homes in the eastern territories. FR, June 22, 1990, at 4, col. 1.

145. See FR, June 23, 1990, at 1, col. 4; FR, June 22, 1990, at 4, col. 5.

minority of SPD representatives also criticized the Treaty on the ground that it constituted economic shock therapy by introducing a market economy too abruptly—a process that would “heighten the crisis of economic development and could result in dramatic mass unemployment whose social results would necessarily endanger democracy in both parts of Germany.”¹⁴⁶

The State Treaty is in many ways an extraordinary document, for it makes clear the depth of the changes to take place in the GDR and the extent to which its economic system and political fate were henceforth to be under the control of the Federal Republic. The Treaty also makes clear how important—indeed omnipresent—were the rules and standards of the European Economic Community for the process of unification. As the most pressing problems were economic, it is principally these problems that the State Treaty sought to address. Yet the State Treaty also had more general political implications.¹⁴⁷

In its economic sections, the Treaty was basically intended to accomplish three tasks. First, it introduced the western D-Mark as the official currency of the GDR and provided an exchange rate for GDR-Marks. This exchange rate had been the subject of sharp debate because it would determine how much wealth the citizens of the GDR could salvage from the dissolution of their existing system and the economic basis on which they would begin their new lives in the Federal Republic. Many voices in the GDR, therefore, called for a one-to-one exchange of GDR-Marks for D-Marks. On the other hand, some western observers suggested that the ratio should be two GDR-Marks for one D-Mark.¹⁴⁸

The State Treaty reached a compromise on this question. Salaries, pensions, rents, and similar recurring payments were to be paid henceforth at the ratio of one to one. On the other hand, ordinary contract payments and other debts were principally to be paid at the rate of one D-Mark for two GDR-Marks.¹⁴⁹ Savings accounts were converted at a rate of one to one up to a maximum of 4000 GDR-Marks, for people who were 14 to 59 years old. For GDR citizens under 14 the maximum was 2000, and for citizens over 59 the maximum was 6000 GDR-Marks. Amounts over these maximums were

146. FR, June 22, 1990, at 4, col. 5.

147. Kriele, *Die politische Bedeutung des Staatsvertrages*, 1990 DtZ 188; see *infra* text accompanying notes 167-170.

148. This ratio was proposed, for example, by the Federal Bank (Bundesbank). See FAZ, Mar. 21, 1991, at 1, col. 2; *infra* text accompanying notes 151-152.

149. State Treaty, *supra* note 141, art. 10, § 5.

converted at a rate of one D-Mark for two GDR-Marks.¹⁵⁰

In some ways these exchange rates seemed extremely favorable to the GDR because, on the open market, the GDR-Mark was worth considerably less than one-third of a D-Mark. On the other hand, the elimination of government subsidies was clearly to be a consequence of unification, and the resulting increase of prices—together with a foreseeable increase in unemployment—could mean that savings would be deeply invaded or exhausted. Thus the fairness of this arrangement cannot be measured solely according to the market values of the respective currencies outside of the GDR. In general, currency reform was under the control of the German Federal Bank—a West German governmental organ with its own independent status under the West German Basic Law¹⁵¹—which thus assumed a major role in the fate of the GDR.¹⁵²

The second function of the State Treaty was to introduce a “social market economy” into the GDR—a capitalist economy with a significant social welfare component, similar to that of the Federal Republic. Indeed, the goal was the eventual creation of a single economy in the Federal Republic and GDR. It is perhaps in this area that the sweeping changes sought by this treaty are most notable. The future economic order of the GDR was to be characterized by “private property, competition, free formation of prices, and in principle fully free movement of labor, capital, goods and services”—although certain forms of public property in the GDR would also be recognized.¹⁵³ With respect to freedom of contract and other economic principles, as well as the other basic principles of the Treaty, “contrary rules of the Constitution of the German Democratic Republic concerning the principles of its previously socialist social and governmental order shall no longer be applied.”¹⁵⁴ Indeed, the attached Joint Protocol Concerning Principles is even more specific:

Rules that bind individuals or organs of state power (in-

150. *Id.* attachment I, art. 6, § 1. This system may reflect the view that the youngest are least in need of a favorable rate of exchange for savings—perhaps in part because they will come of age in a different economic system—while the oldest, whose savings represent their life’s work, are most in need of this form of support.

151. GG art. 88; *see also* Gesetz über die Deutsche Bundesbank, of July 26, 1957, BGBl I 745.

152. *See, e.g.*, State Treaty, *supra* note 141, attachment I, arts. 12-14 (summarizing authority and duties of the Deutsche Bundesbank under the Treaty).

153. *Id.* art. 1, § 3; *see also* Joint Protocol, *supra* note 141, part A, § II (principles of economic union under Treaty).

154. State Treaty, *supra* note 141, art. 2, § 2.

cluding the legislative and judiciary) to socialist legality, the socialist state and social order, the requirements and goals of central leadership and planning of the economy, the socialist legal consciousness, socialist views, the views of individual groups of the population or parties, or socialist morality or comparable concepts, will no longer be applied.¹⁵⁵

In these two provisions, therefore, the GDR agreed to change the underlying economic structure of the state and to abandon the fundamental legal doctrines which supported that economic structure. This is an extraordinary instance—but not the only example that we will see in the process of German unification—of a treaty provision mandating certain domestic constitutional requirements.¹⁵⁶

Moreover, the State Treaty obligated the GDR to take certain concrete steps to further its conversion to a market economy.¹⁵⁷ Among other things the GDR was required to restructure its commercial enterprises in a manner that would “ease the enterprises’ swift structural conformity with the new market conditions” with the ultimate goal of creating “a modern economic structure . . . through the development of private initiative.”¹⁵⁸ In general, state-owned commercial entities were to be “structured for competition as quickly as possible and, to the extent possible, converted into private property.”¹⁵⁹ Throughout this economic conversion, the legal requirements of the European Communities were to be taken into account.¹⁶⁰

To this end a bewildering array of laws in the GDR was to be annulled, altered, or replaced by statutes of the Federal Republic. For example, much of the corporation law of the Federal Republic and parts of its antitrust and commercial law were to be adopted in

155. Joint Protocol, *supra* note 141, part A, § I(2).

156. Accordingly, after the signing of the State Treaty but before its effective date, the GDR amended its constitution to remove the concept of “socialist legality” and related principles. See *supra* Part IV(D). Moreover, this amendment to the GDR constitution made clear that the adoption of a treaty by a two-thirds majority would have the effect of amending the constitution to the extent that amendments were required by the Treaty. See *supra* text accompanying notes 95-96. Thus the adoption of the State Treaty by a vote of two-thirds of the Volkskammer accomplished whatever constitutional changes were required by its terms.

157. See generally State Treaty, *supra* note 141, art. 11; *id.* attachment IX.

158. *Id.* art. 14.

159. Joint Protocol, *supra* note 141, part A, § II(7).

160. See, e.g., State Treaty, *supra* note 141, art. 11, § 3 (general economic policy should be oriented to goals of the EC); *id.* art. 13, § 3 (in foreign commerce, the authority of the EC is to be observed); *id.* art. 15, § 1 (central role of the EC in agricultural economy requires adoption of a system conforming to that of the EC).

the GDR.¹⁶¹ Substantial provisions of the GDR's Civil Code, and numerous other provisions of GDR law affecting the economy, were to be repealed or amended.¹⁶² Finally, the GDR agreed to enact statutes that would allow individuals and corporations greater freedom to carry on business in the GDR, as well as legislation that would liberalize commerce in goods, services, capital, and currency exchange with foreign countries.¹⁶³

The third task of the Treaty was to convert the state system of social security in the GDR into a system of comprehensive social insurance, financed by contributions from employers and employees, along the lines of the system prevailing in the Federal Republic.¹⁶⁴ The Treaty required that gradual steps be taken to alter the health service of the GDR through the introduction of private physicians and dentists and related private enterprises.¹⁶⁵ Because it was unlikely that private contributions in the GDR would be able to finance the social security system for an interim period, the Treaty contemplated a substantial subsidy from the Federal Republic to the GDR for this purpose.¹⁶⁶

Although the most conspicuous aspects of the State Treaty were economic, the agreement also possessed a fundamental—indeed an essential—political component.¹⁶⁷ As noted above, article 2 of the Treaty required that the GDR introduce an economic order characterized by private property and declared that contrary rules of the GDR Constitution must be disregarded; similarly, the Joint Protocol explicitly rejected future application of concepts such as “socialist legality.”¹⁶⁸ Moreover, the same provisions required the parties to institute a “free, democratic, federal and social basic order, based on the rule of law”—words clearly intended to refer to the fundamental political principles of the Basic Law and to reject the prevailing principles of the GDR constitution.¹⁶⁹ Thus, “central constitutional principles of the Basic Law” were made applicable to

161. *Id.*, attachment II, art. III.

162. *Id.* attachment III, art. II.

163. *Id.* attachment IV, art. I.

164. *Id.* arts. 18-25; attachment IV, art. II. The Treaty also sought to conform the general structure of labor-management relations to that prevailing in the Federal Republic. *See id.* art. 17.

165. *Id.* art. 22, § 2.

166. *See id.* art. 25; *id.* art. 28, § 1.

167. *See generally* Kriele, *supra* note 147.

168. *See supra* text accompanying notes 153-155.

169. *See* State Treaty, *supra* note 141, art. 2, § 1; Joint Protocol, *supra* note 141, part A, § I(1). Similarly, the Preamble of the State Treaty specifically refers to the “peaceful and democratic revolution” of autumn 1989 in the GDR.

the GDR through the adoption of the State Treaty.¹⁷⁰

Finally, two additional themes seem to run throughout the State Treaty. First, the Treaty in effect took note of the past control of the judiciary by the executive and by Communist Party authorities and prescribed special measures to ensure the independence of judicial action.¹⁷¹ In related sections the Treaty also attempted to increase the strength, scope, and independence of the legal profession in the GDR.¹⁷²

Moreover, in a number of provisions the Treaty required the GDR to take steps to improve the environment.¹⁷³ Given the catastrophic absence of environmental control in the GDR, these sections must be viewed as pious exhortations that would require much more in the way of legal implementation, and above all economic support, before they actually could be put into effect. Yet these provisions may have had some influence on an important amendment of the GDR Constitution that acknowledged basic environmental principles.¹⁷⁴

To assist the GDR in this transitional period, the State Treaty required that the Federal Republic pay substantial subsidies to the GDR. In the second half of 1990, the Federal Republic was to pay 22 billion D-Marks to balance the GDR budget, 750 million D-Marks for GDR pensions, and 2 billion D-Marks for unemployment compensation in the GDR.¹⁷⁵ As early as July 1990, however, it became clear that these amounts would be seriously insufficient. Even with the required payments, the GDR foresaw a substantial deficit in the

170. See Schmidt-Bleibtreu, *supra* note 141, at 140.

Indeed, fundamental amendments changing the principles of the GDR constitution, see *supra* text accompanying notes 84-98, can be seen as elaborations of the basic requirements of the State Treaty and, in effect, required by its provisions. See *supra* note 86 and accompanying text. As noted above, these amendments were enacted on June 17, after the signing of the State Treaty but before it went into effect.

171. See State Treaty, *supra* note 141, art. 6 (judicial review of questions arising under the Treaty); *id.* attachment III, art. II, § 21 (requiring the GDR to adopt laws strengthening judicial independence, limiting authority of prosecuting officials, strengthening rights of the accused, and strengthening judicial review of certain administrative actions); Joint Protocol, *supra* note 141, part B, § 1 (GDR rules requiring judicial cooperation with other organs or groups should no longer be applied; concepts such as "socialist legality" should no longer be applied). This theme was also emphasized in the ground-breaking amendments of June 17 as well as in a separate set of amendments of the GDR Constitution enacted thereafter. See *supra* text accompanying notes 92-93; note 98.

172. State Treaty, *supra* note 141, attachment III, art. II, § 21(h).

173. See, e.g., *id.* art. 16.

174. See *supra* text accompanying note 87.

175. State Treaty, *supra* note 141, art. 28, § 1.

1990 budget, because of unexpected expenses and a rapidly deteriorating economic situation.¹⁷⁶

* * * *

The implementation of the currency reform on July 1, 1990, together with the entire apparatus of the State Treaty, was thought to be essential in order to avoid an early accession of the GDR to the Federal Republic, with its attendant confusion, or perhaps a renewed outflow of thousands of GDR citizens to the Federal Republic. Whether it was wise to embark on currency reform before accession is a problem that must be confronted by future historians. The currency reform did indeed have the sudden effect of exposing the eastern economy and society to the rigors of capitalism without much preparation. By late summer of 1990, unemployment numbered in the hundreds of thousands because eastern business concerns were unable to compete with their western counterparts.¹⁷⁷ Moreover, many of the reforms called for by the State Treaty—such as the “privatization” of state-owned People’s Property—could not be effectively undertaken in the short period between the adoption of that treaty and the ultimate unification of both German states in October 1990. Indeed, unification occurred at an earlier point than was contemplated when the State Treaty was signed, and the two German governments adopted a second state treaty (the Unification Treaty) in late August 1990 for the purpose of regulating the remaining problems in a comprehensive manner.¹⁷⁸ Thus, the State Treaty was an important milestone in the process of unification, particularly with respect to currency reform and underlying constitutional change in the GDR, but it was unable to work effective changes in many of the other important areas that it was intended to cover.

176. FR, July 31, 1990, at 1, col. 1. The State Treaty also required that certain payments be made to the GDR in 1991, *see* State Treaty, *supra* note 141, art. 28, § 1, but, because unification occurred in 1990, these payments were presumably merged into the overall budget of the Federal Republic.

177. Indeed, in the early months of 1991 the economic situation in the east declined further, and the president of the German Federal Bank (Bundesbank) declared that the “overly hasty introduction” of the D-Mark into the GDR, through the State Treaty, had been a “catastrophe.” FAZ, Mar. 21, 1991, at 1, col. 2.

178. In general, the Unification Treaty—the “second state treaty,” entered into in August 1990—provides that the obligations of the first State Treaty shall continue on, except to the extent that those provisions have become obsolete or that contrary provisions are contained in the Unification Treaty. *See* Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity, Aug. 31, 1990, art. 40, § 1, BGBI II 889 [hereinafter Unification Treaty]. For more detailed discussion of the Unification Treaty, *see infra* Part VIII.

VII. RECONSTITUTION OF THE STATES IN THE GDR

On the path from the first State Treaty to the Unification Treaty and the accession of the GDR to the Federal Republic, the next important step was the reconstitution of the former states of the GDR.

When the GDR was founded in the Soviet occupation zone in 1949, it comprised five states (Länder) loosely drawn from the historical subdivisions that composed Bismarck's empire. The original states of the GDR were Mecklenburg, the most northerly of the five; Brandenburg, a part of Prussia that lay west of the Oder-Neiße line (excluding Berlin, which was governed separately); Saxony-Anhalt, composed of Prussian Saxony and the province of Anhalt; Saxony, the largest of the states in population; and Thuringia, located in the southwestern corner of the Soviet zone.¹⁷⁹ Each of these states had its own constitution.¹⁸⁰

In a centralizing move in 1952, however, the GDR government effectively abolished the Länder and replaced them with fourteen administrative districts. This significant change was carried out in violation of the procedural requirements of the 1949 GDR constitution and may not have been authorized by statute until 1958.¹⁸¹ This move was reminiscent of Hitler's abolition of the states of the Weimar Republic and their replacement by administrative districts. In both cases the central regime sought to consolidate its power by abolishing potential sources of competing authority.¹⁸² Yet in the GDR strong regional loyalties persisted even after the abolition of

179. For a similar description, see Bastuck, *Unity, Law, and Freedom: Legal Aspects of the Process and Results of German Unification*, 25 INT'L LAW. 251, 258 (1991). For the state borders, see Map *supra*. Although the historical geographic units composing the German states remained largely intact in 1871 and under the Weimar Constitution (1919), the Soviet occupation did make some significant changes, such as creating the state of Saxony-Anhalt from part of Saxony and the previously existing state of Anhalt. See Blaschke, *Alle Länder—Neue Länder: Zur territorialen Neugliederung der DDR*, Das Parlament/Beilage, JUNE 29, 1990, at 42.

180. See VERF. DDR (1949) art. 109, § 1; see generally *id.* arts. 71-80 (providing for a Landerkammer—a house of parliament representing the states); *id.* arts. 1, 109-116 (regulating relationship between states and central government). The original constitutions of the five eastern Länder are set forth in E. FISCHER & W. KÜNZEL, VERFASSUNGEN DEUTSCHER LÄNDER UND STAATEN 274-335 (1989).

181. Czybulka, *Zur Entwicklung des Föderalismus in der DDR und in Deutschland (mit einem Seitenblick auf Europa)*, 1990 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 269, 270. Indeed, some argue that the five states of the GDR were never properly abolished, although they were not recognized in the 1968/74 GDR Constitution.

182. For the historical context of this action in the GDR—a general strengthening of the principle of “democratic centralism” and implementation of the Soviet cadre principle—see H. WEBER, *supra* note 11, at 219-31. For Hitler's conversion of the states into administrative districts of the central government, see G. CRAIG, GERMANY 1866-1945, at 582-83 (1978); 3 H. HOLBORN, A HISTORY OF MODERN GERMANY 730 (1969).

the Länder, particularly in the southern states of Thuringia and Saxony, and with the revolutionary activity of autumn 1989 these loyalties, in many cases stronger than any loyalties that the GDR as a whole had evoked, again came to the fore.

After the revolutionary events of autumn 1989, it was assumed—even before unification became a certainty and at a time when a new GDR Constitution seemed probable—that the historical states of the GDR would be re-created. In reaction to prior centralizing theory, many believed that strong states were necessary to resist any possible authoritarian tendencies in a central government. Interestingly, a similar view prevailed among the victorious western Allies in 1948-49 during the drafting of the West German Basic Law. One of the principal occasions on which the Allies intervened in this process (after setting down certain basic outlines) was to seek stronger state governments than the West German drafting group had proposed.¹⁸³

The State Treaty was signed before the historical states were re-created in the GDR, but its provisions clearly contemplated their re-creation.¹⁸⁴ Then on July 22, 1990, in its last session before the summer recess, the Volkskammer adopted a statute with the force of a constitutional amendment providing for the re-creation of the historical states in the GDR.¹⁸⁵ The Law for the Establishment of the Länder determined the general outlines of each state's territory, but contemplated that a number of localities lying on or near state borders might petition, through votes of local councils and direct popular votes, to be transferred to the jurisdiction of an adjoining state. An accompanying statute also provided that elections would be held on October 14, 1990 for one-house state parliaments, and these parliaments would have the power to adopt state constitutions.¹⁸⁶ Although the state constitutions were to be adopted after accession, much work was being done in the summer of 1990 on proposals for

183. See, e.g., Stammen & Maier, *Der Prozeß der Verfassungsgebung*, in *VORGESCHICHTE DER BUNDESREPUBLIK DEUTSCHLAND* 410-13 (J. Becker, T. Stammen & P. Waldmann ed. 1979).

184. Czybulka, *supra* note 181, at 270. For example, the Preamble and other provisions of the State Treaty required that the GDR be a "federal" state. See *supra* text accompanying note 169.

185. See *Verfassungsgesetz zur Bildung von Ländern in der DDR—Ländereinführungsgesetz*—of July 22, 1990, GBl DDR I 955 [hereinafter *Länder Statute*]; FAZ, July 23, 1990, at 1, col. 2.

186. In the elections for state legislatures, a five percent minimum vote for any party would be required for its entry into the legislature, with the exception of parties representing the Sorbian minority in the east. This was the first time that a five percent requirement had been adopted in the GDR.

these constitutions, in some cases with assistance from legal experts from the Federal Republic.¹⁸⁷ The GDR statute contemplated that these five states would become states of the Federal Republic after accession, and this point was confirmed through its explicit inclusion in the Unification Treaty.¹⁸⁸

Here as elsewhere, the status of Berlin raised special problems. Until the Allies relinquished their reserved rights, Berlin could not become a state in the full sense, and there was also uncertainty over whether Berlin should remain a separate state or be merged with the State of Brandenburg, which surrounds it. The GDR statute provided, however, that East Berlin would receive "state authority" which could be exercised by its city council and Magistrate.¹⁸⁹ After unification with West Berlin, the united city could decide whether it would be an independent state or become part of Brandenburg.¹⁹⁰

When the GDR's accession to the Federal Republic was first seen as a significant possibility in early 1990, the prevailing view seemed to be that, after the creation of the Länder, each state would accede to the Federal Republic independently. This method would ensure the continued existence of the individual states in the Fed-

187. See, e.g., FAZ, Aug. 28, 1990, at 12, col. 2. Models for these drafts included West German state constitutions and the constitutions of the East German states promulgated in the early postwar period. See Lapp, *Fünf neue Länder—Das Ende der DDR*, 1990 DA 1315, 1317. Notwithstanding this early work, it appears that most of the new state constitutions will not be adopted until mid-1991 or even later. See *infra* note 201.

188. See Unification Treaty, *supra* note 178, art. I, § 1.

The statute providing for the reconstitution of the Länder also set forth elaborate provisions allocating authority between the states and the central government (paralleling the provisions of the Basic Law), along with certain interim administrative measures. Because the date of unification was moved up to October 3—ultimately, the effective date of the statute—these provisions had no effect because on the effective date of the statute the Länder became Länder of the Federal Republic. See Mampel, *supra* note 65, at 1394-95.

189. Länder Statute, *supra* note 185, § 1(2). Even after accession on October 3, separate East and West Berlin governments continued to exist—although they were to work together through a joint council until a single local government for all of Berlin was elected at the time of the national election in December 1990.

190. Article 29 of the Basic Law sets forth a process through which the borders of states may be changed, and this procedure could also be used for the purpose of merging Berlin and Brandenburg. The procedure required by article 29 is extremely complex, however, and ordinarily requires approval through popular referendum in the states involved. Article 5 of the Unification Treaty contemplates the possibility of an amendment of the Basic Law through which Brandenburg and Berlin might merge through a state treaty, without the necessity of complying with the complicated provisions of article 29.

Some commentators and political figures have advocated the creation of an entirely new system of states in the united Germany. If such a sweeping measure is ever adopted, it will presumably be accomplished through constitutional amendment rather than through the procedures of article 29.

eral Republic. Although it was generally contemplated that this step would be taken by all states simultaneously—pursuant to a joint decision or a central resolution of the GDR Volkskammer—there were occasional fears that one or two particularly impatient states would seek to accede on their own.¹⁹¹ Eventually, however, it was agreed that accession would be accomplished by the central government of the GDR and not by the individual states, and article 1 of the Unification Treaty clearly reflected this decision. The Treaty also guaranteed the existence of the five east German states as new Länder of the Federal Republic.¹⁹²

The inclusion of five new eastern Länder raised the issue of their representation in the Bundesrat of the Federal Republic. The Bundesrat, which is the second house of the West German parliament, is composed of members of the state governments and represents the states in the federal system.¹⁹³ In contrast with the United States Senate, the representation of the states in the Bundesrat is not equal, but it is not precisely proportional to population either. While the smaller states have no less than three representatives in the Bundesrat, until the Unification Treaty was adopted the largest states had no more than five.¹⁹⁴ Yet the proportional difference in population is much greater. Under this system, for example, the new states of the former GDR would receive a total of twenty seats

191. On the other hand, it has been argued that an individual state's attempt to accede to the Federal Republic against the will of the central GDR government would have been invalid; such a move would have violated GDR law and contravened the principle of nonintervention recognized by the Basic Treaty of 1972. See Tomuschat, *Wege zur deutschen Einheit*, 49 VVDStRL 70, 76-77 (1990).

192. See Unification Treaty, *supra* note 178, art. 1, § 1.

193. In some ways this system reflects a representational theory not unlike that of the United States Senate as originally conceived. Until the seventeenth amendment was enacted in 1913, senators were elected by the legislatures of each state, and thus could be seen as representatives of the state governments. U.S. CONST. art. 1, § 3. The Bundesrat is not as powerful as the United States Senate because its ability to prevent enactment of legislation passed by the popular house—the Bundestag—is only a qualified power in many cases. If the Bundesrat objects to legislation enacted by the Bundestag, the legislation will ordinarily go into effect if re-enacted by the Bundestag; if the Bundesrat defeats the legislation by a two-thirds vote, the Bundestag must re-enact it by a two-thirds vote before it can become effective. See GG art. 77. In certain matters closely affecting the states, however, a negative vote of the Bundesrat will prevent enactment of the legislation. See, e.g., GG art. 109, §§ 3-4 (certain matters affecting state budgets). In the United States, of course, a negative vote (or a failure to vote) in the Senate always prevents the enactment of legislation.

194. According to article 51, § 2 (in its original form), "each state has at least three votes [in the Bundesrat], states with more than two million inhabitants have four, states with more than six million inhabitants have five votes." GG art. 51, § 2. The votes of each state cannot be split, but must all be cast for the same position on a particular question. GG art. 51, § 3.

in the Bundesrat.¹⁹⁵ On the other hand, the West German state of North Rhine-Westphalia, which has a population slightly exceeding that of the entire GDR, would have five representatives only.¹⁹⁶

The existing apportionment of votes in the Bundesrat already imposed considerable disadvantages on the large states and some argued that the accession of the GDR, with its relatively small states, would exacerbate that apparent unfairness. The Unification Treaty addressed this problem, but undertook only a minor adjustment by adding a clause providing that states with more than seven million inhabitants would be accorded six votes in the Bundesrat.¹⁹⁷ This change increases the representation of North Rhine-Westphalia from five to six votes, but the five new states of the GDR—with approximately the same population—still receive twenty votes.¹⁹⁸

The re-creation of the East German states suggested another constitutional (and practical) problem that would have existed whether the GDR acceded to the Federal Republic as a single state or as five separate states. In sharp contrast with the Constitution of the United States, the Basic Law requires that the richer German states in effect make contributions to the poorer states, with the goal of making living standards approximately equal throughout the nation. These contributions are effected through the sharing of revenues between the states and the federal government, coupled with federal distributions to the poorer states, as well as by direct payments from the richer to the poorer states according to a complex statutory scheme enacted pursuant to constitutional require-

195. The smallest of the new states is Mecklenburg-West Pomerania (2.1 million) and the largest is Saxony (almost 5 million). See Rauschnig, *supra* note 10, at 399. Because each of these 5 states has between 2 and 6 million inhabitants, each will receive 4 votes in the Bundesrat. See GG art. 51, § 2; see also Rauschnig, *supra* note 10, at 400.

196. *Id.* at 399-400.

197. Unification Treaty, *supra* note 178, art. 4, § 3. This change required an amendment of article 51, § 2 of the Basic Law. In this and some other respects, therefore, it was necessary that the Unification Treaty be ratified by a two-thirds vote of the Bundestag and of the Bundesrat, so that an amendment of the Basic Law would be effected. See *infra* Part VIII(A).

198. Before unification, the four largest states of the Federal Republic, voting together, possessed more than one-third of the votes in the Bundesrat and therefore could block the adoption of any amendment of the Basic Law. The provision of the Unification Treaty increasing the seats allocated to states with more than seven million inhabitants was apparently intended to preserve this de facto veto power of the largest states, even after expansion of the Bundesrat by the representatives of the five new Länder.

If, as some have urged, unification is followed by a complete redrawing of state boundaries, in the west as well as the east, a complete revision of the states' representation in the Bundesrat would also be required.

ments.¹⁹⁹ It seems clear that, for the foreseeable future, the five eastern states will be considerably less affluent than the original states of the Federal Republic, but the original states have strongly resisted paying anything close to the daunting amounts that would be necessary to equalize living standards in the two parts of Germany, if indeed such a thing were possible. This difficult constitutional problem was ultimately regulated in article 7 of the Unification Treaty.²⁰⁰

* * * *

On October 14, 1990—less than two weeks after unification—the five new Länder of the former GDR held elections for the state parliaments. The conservative CDU received enough votes to form a government, in various coalitions, in four of the five Länder—the exception was Brandenburg. These results confirmed the political trend that had led to rapid unification in the first instance. The organization of the states, however, was accompanied by substantial difficulty and confusion. It was not clear, for example, that the five new Länder would be able to adopt new state constitutions in an expeditious manner following the state parliamentary elections in October.²⁰¹ Moreover, many of the difficult social, political, and

199. See GG arts. 106-107; Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 294-98 (1977).

200. The success of these arrangements was called into question in the early months of 1991 by what appeared to be the impending bankruptcy of a number of the new eastern Länder. To stem further economic deterioration, the federal German government agreed in February 1991 to transfer an additional \$3.4 billion to states and cities of the former GDR. N.Y. Times, Feb. 13, 1991, at A1, col. 1. The Minister-President of the new state of Brandenburg declared, however, that a total of \$22 billion would be required. The Sun (Baltimore), Feb. 14, 1991, at 6A, col. 1. In March 1991 the central government announced a two-year program of massive additional aid to eastern Germany, to be financed by a tax increase. N.Y. Times, Mar. 12, 1991, at A1, col. 5.

201. On November 7, 1990, the Thuringian parliament adopted a "state statute," which would act as a governing document until replaced by an actual state constitution before the end of 1992. FAZ, Nov. 8, 1990, at 1, col. 4. In Saxony-Anhalt it was unclear whether a planned new state constitution would be limited to structural provisions, or whether it would also reproduce the constitutional rights set forth in the Basic Law. FAZ, Nov. 9, 1990, at 4, col. 4. In November 1990, the Parliament of Mecklenburg-West Pomerania established a special commission to issue a proposed constitutional draft in the summer of 1991. Until a constitution is adopted, the state will be governed through a temporary "state statute." FAZ, Nov. 24, 1990, at 4, col. 5. According to the Minister-President (Governor) of Brandenburg, a new constitution will be published by the state parliament in the middle of 1991 and presented to the people for adoption in a plebiscite. The draft constitution of the Round Table, *see supra* note 67, will play an important role in the drafting of this constitution. FAZ, Dec. 7, 1990, at 4, col. 4.

The recent constitutional history of Berlin is particularly complicated. From 1950 on, West Berlin had its own "state" constitution, although the Allies refused to recognize Berlin as a state of the Federal Republic. On the other hand East Berlin—which

economic problems arising upon unification will of necessity have an impact on the functions and activities of the five new Länder. Indeed, severe economic problems developing in East Germany in 1991 have left the governments of the new Länder almost bankrupt and dependent upon massive infusions of credits from the central government.²⁰² Moreover, the process of providing administrative and judicial personnel to operate the governments of the East German Länder has also proved to be deeply problematic. Until these fundamental problems are resolved, it is doubtful that the five eastern states will fully assume their intended role as significant governmental factors in the political system of the Federal Republic.

VIII. THE UNIFICATION TREATY

A. *Purpose and General Structure of the Treaty*

The problems addressed by the State Treaty, while extremely important, were limited to certain specific areas. Even after the State Treaty was signed—and even after it went into effect on July 1—there remained a host of difficult problems to be resolved before political unification of the two German states. Negotiations and deliberations over a second state treaty—the Unification Treaty—occupied the summer months of 1990, and it was signed by representatives of the Federal Republic and the GDR on August 31, 1990.²⁰³ After lively debate, the Treaty was approved by the GDR

was not a state even when states existed in the GDR—had no separate constitution. In July of 1990, however, the first elected city council of East Berlin adopted its own constitution. Thereafter, both the East and West Berlin constitutions continued in effect, even after unification, until a single Berlin city government was elected on December 2, 1990. *See supra* note 189. With the commencement of the first unified Berlin government in January 1991, the West Berlin constitution of 1950 (as amended over the years—most recently to include new rights such as a general guarantee of environmental protection) became the constitution for all of Berlin, and the East Berlin constitution of 1990 ceased to be valid. (Among other things, the East Berlin constitution had guaranteed a right of abortion—something unique in German constitutions.) It is contemplated that in the next five years the Berlin constitution will be revised and submitted to the people for adoption in a plebiscite. Therefore, there is likely to be “a comprehensive constitutional debate” in Berlin, “which certainly will have an influence on efforts toward a revision of the Basic Law.” *FAZ*, Jan. 11, 1991, at 6, col. 4.

202. *See supra* note 200.

203. Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity, Aug. 31, 1990, BGBl II 889 [hereinafter Unification Treaty]. *See also* Agreement on the Enforcement and Interpretation of the Unification Treaty, Sept. 18, 1990, BGBl II 1239. The text of the Unification Treaty, together with its three extensive Attachments and other related documents, is reprinted in 2 K. STERN & B. SCHMIDT-BLEIBTREU, *VERTRÄGE UND RECHTSAKTE ZUR DEUTSCHEN EINHEIT* (1990). An English version of the Treaty (without Attachments) is published by the German Information Center, 950 Third Avenue, New York, NY 10022. For an en-

Volkskammer and by the West German Bundestag and Bundesrat. A two-thirds majority was necessary for approval in each body because the Unification Treaty in effect provided for revocation of the GDR Constitution and contained provisions that amended the Basic Law.²⁰⁴

In drafting the Unification Treaty, the negotiators confronted three basic problems. First, accession would involve the addition of 16 million citizens to the Federal Republic, as well as a new territory of almost 42,000 square miles.²⁰⁵ These profound changes would require significant modifications of the governmental institutions of the Federal Republic. As we have seen, for example, the addition of five new Länder would require changes in the size and composition of the Bundesrat.²⁰⁶ Moreover, certain alterations and additions in administrative and judicial structures would be necessary. An important task of the Unification Treaty, therefore, was to establish the basic structure of those changes.

Moreover, the legal systems and the substantive law of the two German states differed widely. Because the accession of the GDR to the Federal Republic under article 23 would result in extending the Basic Law and its governmental system to the GDR—the GDR becoming a part of the Federal Republic—it might seem logical simply to extend the law of the Federal Republic to the GDR, in every area of life, at the time of accession. Yet for various reasons—practical difficulty in some cases and political unwillingness in others—it was impossible to adopt such a sweeping solution. Thus a second principal task of the Unification Treaty was to determine the substantive law that would apply to the GDR for a transitional period and to specify the length of time such interim adjustments would remain in effect.²⁰⁷

lightening essay on the Unification Treaty by its chief author, see Schäuble, *supra* note 23.

204. The requirements for amending the Basic Law are more complex than those necessary for amending the 1968/74 GDR Constitution, *see supra* note 104, but still considerably less onerous than the procedure required for amending the Constitution of the United States. The Basic Law can be amended by a statute that receives the approval of two-thirds of the members of the Bundestag and two-thirds of the votes of the Bundesrat, so long as the statute expressly declares that it amends or expands the text of the Basic Law. GG art. 79, §§ 1, 2. As discussed more fully below, the Basic Law itself prohibits amendments that would impair basic constitutional principles of democratic political organization and human dignity. GG art. 79, § 3.

205. N.Y. Times, Oct. 3, 1990, at A16, col. 2.

206. *See supra* notes 193-198 and accompanying text.

207. Of course, the process of legal adjustment and “harmonization” had already begun under the provisions of the State Treaty and its accompanying documents. *See supra* Part VI.

Finally, international pressures as well as political and practical exigencies required that the Basic Law itself be amended in a few important respects. Accomplishment of these changes was the third important task of the Unification Treaty. The agreement also makes certain recommendations with respect to possible future constitutional change.

1. *Structural Provisions.*—The central structural provision of the Unification Treaty made clear that, although the GDR “acceded” to the Federal Republic as a whole, the former territory of the GDR would be divided into five new states of the Federal Republic. As indicated above, the new states were Brandenburg, Mecklenburg-West Pomerania, Saxony, Saxony-Anhalt, and Thuringia. Moreover, all of Berlin would constitute a separate state, although it was possible that Berlin would be included in the state of Brandenburg in the future.²⁰⁸ Berlin would be the capital of Germany, but the all-German Parliament would determine whether the Parliament and the government should be located in Berlin or in Bonn, the former capital of the Federal Republic.²⁰⁹

After 1952, the GDR as a practical matter possessed a central government only, without separate state governments. It was necessary, therefore, for the Unification Treaty to allocate the requisite governmental functions among the five new states and the central government of the Federal Republic. According to the Treaty, each of the five new states will be responsible for administrative and judicial organs that formerly exercised authority within its borders, but only to the extent that those organs exercised powers that fall within

208. See Unification Treaty, *supra* note 203, arts. 1, 5. For a more detailed discussion of the reconstitution of the eastern Länder and their constitutional development, see *supra* Part VII.

209. Unification Treaty, *supra* note 203, art. 2, § 1. The future location of the German government was one of the most sharply debated issues in the period immediately following unification. Some argued that Berlin's historical role as German capital favored its claim, while others maintained that the baleful history of Berlin as the capital of the “Third Reich” required that the seat of government be located elsewhere. For some, the choice of Berlin would be an important source of political and economic support for the five new states of the east, because Berlin is located in the middle of the former GDR. Others pointed out that moving most government offices would cost millions or billions of marks, in addition to the other heavy financial burdens of unification. Cutting across these arguments were regional rivalries—with roots deep in past centuries—which prompted representatives of certain areas of the country to reject the idea that the government should again be located in the former Prussian capital.

In a close vote in June 1991, the Bundestag resolved to move the seat of government to Berlin over the next few years. The Bundesrat, as well as some administrative offices, will remain in Bonn. See Wash. Post, June 21, 1991, at A1, col. 1.

the authority of the states under the competence rules of the Basic Law.²¹⁰ In the case of former administrative districts that overlapped state borders, both states will have joint control. To the extent that former GDR administrative and judicial organs exercised powers that fall within the competence of the federal government under the Basic Law, these organs will be controlled by federal authorities.²¹¹

After the accession of the GDR to the Federal Republic, the five new Länder were entitled to representation in the Bundesrat and, as discussed above, the representation of the states in the Bundesrat was adjusted slightly by the Unification Treaty.²¹² Moreover, article 42 of the Unification Treaty authorized the Volkskammer to choose 144 of its members to represent the territory of the former GDR in the Bundestag from the date of unification until the first all-German federal election on December 2, 1990.

It was also necessary to allocate property possessed by former governmental institutions of the GDR. Government property that was used for administrative purposes in the former GDR was allocated in a manner similar to the allocation of administrative authority: if particular "administrative" property was used principally for purposes that fell within the competence of the states or localities under the Basic Law, that property went to the relevant state or locality;²¹³ if the property served purposes principally within the competence of the federal government under the Basic Law, it became federal property—but it must be used to carry out federal administrative tasks within the territory of the former GDR.²¹⁴ Of the GDR government property *not* used for administrative purposes, one-half is to go to the GDR Länder (divided proportionately according to

210. Unification Treaty, *supra* note 203, art. 13, §§ 1-2. See GG arts. 70-75 (allocating lawmaking power between states and federal government).

211. Unification Treaty, *supra* note 203, art. 13, § 2. Understanding and carrying out the administration of a broad range of powers will no doubt tax the capacity of the newly formed states. Accordingly, the Unification Treaty obliges the federal government and the western states to give administrative assistance to the newly formed states until June 30, 1991. *Id.* art. 15, § 3. In an example of interstate assistance, the western state of Lower Saxony has assigned more than twenty of its judges and five of its prosecutors for at least temporary work in the new eastern state of Saxony. See FAZ, Nov. 8, 1990, at 6, col. 4.

212. Unification Treaty, *supra* note 203, art. 4, § 3. As noted above, this change effected an amendment of the Basic Law. See *supra* text accompanying notes 193-198.

213. This provision of the Unification Treaty bears some similarity to the section of the Basic Law that allocated former property of the "Reich" among organs of the federal government and the states at the time that the Federal Republic came into existence. See GG art. 134, § 2.

214. Unification Treaty, *supra* note 203, art. 21.

population), and one-half is to go to the federal government for the fulfillment of public tasks in eastern Germany. An exception to this provision is People's Property used (or intended to be used) for public housing; such property goes to the local communities, for gradual privatization.²¹⁵

As with government property, the debts of the GDR will also be allocated between the federal government and the eastern states—after an interim three-year period. Initially, all debts of the GDR will be assumed by a special agency of the federal government (Sondervermögen) under the administration of the Ministry of Finance. Until the end of 1993, the federal government and the state Trust Agency²¹⁶ will each pay one-half of the interest on these debts. From January 1994, however, the debts will be allocated among the federal government, the state Trust Agency, and the eastern Länder (according to population), pursuant to a principle set forth in the State Treaty and further clarified by law.²¹⁷

The central institution in the conversion of the former GDR from a planned economy to a market system is the state "Trust Agency" (Treuhandanstalt) authorized under a GDR law of June 17, 1990.²¹⁸ This institution, which developed into a massive bureaucracy in the months following unification, has the task of administering state-owned businesses and, to the extent possible, selling those businesses into private hands. The proceeds of these sales could then perhaps be used for the purpose of compensating certain individuals whose property was expropriated by the GDR government

215. *Id.* art. 22, § 4. To the extent that any public property was used primarily by the former Ministry for State Security (Stasi), however, that property goes directly to the state Trust Agency, *see infra* text accompanying notes 218-220, unless by October 1, 1989 the property had been devoted to some other public purpose. *See* Unification Treaty, *supra* note 203, art. 21, § 1; art. 22, § 1.

216. *See infra* text accompanying notes 218-220.

217. Unification Treaty, *supra* note 203, art. 23. Guarantee agreements and similar obligations of the GDR are from the outset to be divided equally between the federal government, and the states of the former GDR and East Berlin (and further subdivided among these units according to population). *Id.* art. 23, § 6. In contrast with the above provisions, international contractual obligations of the GDR will be handled exclusively by the federal government without participation of the Länder, although the state Trust Agency will also play a role. *Id.* art. 24.

218. Gesetz zur Privatisierung und Reorganisation des volkseigenen Vermögens (Treuhandgesetz), of June 17, 1990, GBl DDR I 300. With certain modifications this statute remains in effect under the Unification Treaty. *See* Unification Treaty, *supra* note 203, art. 25.

In autumn 1990, the state Trust Agency founded a "Corporation for the Privatization of Commerce," for the specific purpose of implementing the transfer of state-owned commercial businesses into private hands. FAZ, Nov. 24, 1990, at 13, col. 3.

after 1949.²¹⁹ Under article 25 of the Unification Treaty, the state Trust Agency is made a “public law institution” of the federal government, under the supervision of the Minister of Finance.²²⁰

2. *Law Applicable in Eastern Germany After Unification.*—The second central task of the Unification Treaty was to determine the extent to which the law of the Federal Republic would be applicable in eastern Germany and the extent to which former GDR law would continue to apply. A related task was to set forth appropriate modifications of each of these bodies of law, in light of the special problems of unification.

Although much of this extremely complex work is undertaken in Attachments I and II to the Treaty, the basic outlines are set forth in the text of the Unification Treaty itself. The first central principle is that the law of the Federal Republic will extend to the GDR and East Berlin except to the extent that the Unification Treaty—and particularly Attachment I—determines otherwise. Attachment I occupies 244 pages in the version published by the Bundestag, and it is clear that although West German law applies in principle to the former GDR, numerous adjustments have been made, at least for an interim period.²²¹

The status of the law of the former GDR is also complex. The GDR law that would fall within the authority of the Länder under the Basic Law (as well as law that might be federal law under the Basic Law but regulates matters that federal law has not comprehensively regulated) continues on as law of the new eastern Länder—but only if it is consistent with the Basic Law, applicable federal law, European Community law, and the provisions of the Unification Treaty.²²² Moreover, law of the GDR that is specifically mentioned in Attachment II (as modified in that Attachment) will generally

219. See *infra* note 295 and accompanying text.

220. From the outset, the state Trust Agency has been plagued by numerous problems stemming from the desperate condition of the enterprises that it must administer and the general economic conditions in the east. See, e.g., DER SPIEGEL, Mar. 25, 1991, at 34. Some have criticized the Agency on the ground that its steps toward privatization have been unduly slow. Others argue that the Agency has increased unemployment by closing troubled businesses too quickly rather than seeking to keep them in operation and improving their performance. The problems of the Trust Agency were further compounded by the assassination of its director, Detlev Rohwedder, in early April 1991. See Washington Post, Apr. 2, 1991, at A12, col. 5.

221. See Bundestag Drucksache 11/7760, at 19-263, reprinted in 2 K. STERN & B. SCHMIDT-BLEIBTREU, *supra* note 141, at 209-730; Unification Treaty, *supra* note 203, art. 8. See also Bastuck, *supra* note 179, at 257-58.

222. Unification Treaty, *supra* note 203, art. 9, § 1.

have the status of federal law in eastern Germany if it falls within an area of federal competence under the Basic Law, and if it is consistent with the Basic Law and European Community law.²²³

Thus the underlying principle seems to be as follows: law of the Federal Republic becomes applicable in the former territory of the GDR, except as altered by the provisions of the Unification Treaty, and that federal law invalidates any inconsistent law of the GDR. Law of the GDR that is *not* inconsistent with applicable law of the Federal Republic, however, continues in force as law of the Länder, except that certain GDR law mentioned in Attachment II will have the status of federal law within the former GDR (and therefore can presumably override any contrary law of the Länder).²²⁴

The Unification Treaty also sets forth rules relating to the continued validity of GDR judicial decisions. These rules seek to combine the practical necessity of respecting judgments in ordinary cases with a deep suspicion that many decisions may have reflected forms of political oppression. Thus, in principle, decisions of GDR courts issued before accession remain valid. These decisions, however, may be subject to re-examination to ensure that they are consistent with principles of the rule of law.²²⁵ Moreover, a statute will provide "rehabilitation" and compensation for victims of politically motivated criminal judgments or criminal judgments that are otherwise unconstitutional or violate the rule of law.²²⁶ Similarly, admin-

223. *Id.* art. 9, §§ 2, 4.

224. On these provisions, see generally Schäuble, *supra* note 23, at 298-99.

225. Unification Treaty, *supra* note 203, art. 18, § 1; see also *id.* art. 18, § 2; attachment I, ch. III(A), para. III (14)(d).

226. *Id.* art. 17; for this "rehabilitation" statute, see Rehabilitierungsgesetz, of Sept. 6, 1990, GBl DDR I 1459. Furthermore, the Unification Treaty provides a right of convicted criminal defendants in the GDR to seek review of judicial decisions. Unification Treaty, *supra* note 203, art. 18, § 2.

In contrast, members of the former GDR leadership most likely will be tried for corrupt or oppressive acts committed under the old regime, although the choice of applicable law may raise serious difficulties. One such prosecution, brought against former GDR union leader Harry Tisch, took place in early 1991, see FAZ, Jan. 31, 1991, at 6, col. 5; FAZ, Jan. 29, 1991, at 9, col. 1, and constitutional doubts arising in this case were referred to the Constitutional Court, FAZ, Mar. 25, 1991, at 5, col. 4. In June 1991 Tisch was convicted of misappropriation of funds for personal use, but he was acquitted on what was generally considered to be a more serious count of diversion of union pension funds. See N.Y. Times, June 7, 1991, at A1, col. 1.

In May 1991 four leading former GDR officials, including former Prime Minister Willi Stoph, were arrested in connection with their alleged complicity in orders to shoot persons attempting to escape from the GDR. N.Y. Times, May 22, 1991, at A3, col. 4. Although these former officials may eventually be tried, it seems unlikely that SED chief Erich Honecker will ever face a German court because he fled to the Soviet Union in March 1991. N.Y. Times, Mar. 15, 1991, at A1, col. 1.

istrative rulings of the GDR remain in effect, unless they are "inconsistent with principles of the rule of law or with this treaty."²²⁷

In the countries of western Europe, the law of the European Communities has assumed a position of importance that is in many ways comparable to that of national law. The Unification Treaty makes clear that treaties of the European Communities will be effective in the former territory of the GDR.²²⁸ Other rules of the European Communities will also apply there except to the extent that the Communities have made exceptions to avoid economic difficulties in the GDR or to accommodate the administrative problems of unification.²²⁹

The drafters of the Unification Treaty also recognized that the Federal Republic and the GDR were subject to numerous other—perhaps conflicting—international agreements. According to article 11 of the Unification Treaty, the treaties of the Federal Republic will remain in effect and will extend to the former GDR except to the extent set forth in Attachment I.²³⁰ With respect to the treaties of the GDR the situation is, as might be expected, somewhat more complicated. Under article 12, the federal government will discuss the possible continuation, adjustment, or termination of each of these agreements with the other party to the agreement, in light of a number of specified factors. These include the preservation of international confidence, the interests of the states involved, the treaty obligations of the Federal Republic, the principles "of a free and democratic basic order according to the rule of law," and the observance of the authority of the European Communities.²³¹ Thus, in principle, the treaties of the Federal Republic will continue on, but the treaties of the former GDR will be carefully evaluated in light of the relevant factors to determine their future validity.²³²

227. Unification Treaty, *supra* note 203, art. 19. The Unification Treaty also sets forth complicated provisions allocating judicial tasks to the courts of the five eastern Länder—including interim jurisdiction over matters in administrative law, employment relations and other areas that are ordinarily confided to special courts in the Federal Republic. *See id.* attachment I, ch. III(A), para. III(1)(t)-(x). In the months following unification, it seemed doubtful that the courts in the former GDR could cope with their increased tasks, due to a lack of judicial personnel. FAZ, Feb. 12, 1991, at 1, col. 2.

228. Unification Treaty, *supra* note 203, art. 10, § 1.

229. *Id.* art. 10, § 2. *See infra* Part XI.

230. If unification appears to require some alteration of a particular treaty of the Federal Republic, the all-German government will resolve the issue through negotiation with the other party to the agreement. Unification Treaty, *supra* note 203, art. 11.

231. *Id.* art. 12, § 1.

232. For the background of these provisions in the "state succession" doctrines of

3. *Constitutional Amendments and Future Constitutional Changes.*—
 a. *Constitutional Amendments Effected by the Unification Treaty.*—

Because of the important changes in political structure that unification would bring, it was clear that the Basic Law, although remaining fundamentally intact, would necessarily undergo a few significant alterations. In consequence, chapter II of the Unification Treaty sets forth a number of provisions expressly amending the Basic Law.²³³ Because the Unification Treaty was ratified by a requisite two-thirds vote of both the Bundestag and the Bundesrat, adoption of the Treaty itself effected the necessary amendments.²³⁴

From a theoretical point of view, the most important constitutional amendments were those confirming that the process of German unification was complete with the accession of the GDR. These amendments, which were insisted upon by the World War II Allies, were necessary to obviate any argument that Germany retained a claim to the territories east of the Oder-Neiße line.²³⁵ Three constitutional amendments were necessary to effect this result. First, the Preamble of the Basic Law, which in its original form declared that unification is something to be achieved in the future, was amended to declare that the "Germans" in all of the German states—including the five eastern Länder—"have achieved the unity and freedom of Germany in free self-determination."²³⁶ Because unity has been

international law, see, e.g., Doehring, *Die Anwendung der Regeln der völkerrechtlichen Sukzession nach der Wiedervereinigung der beiden deutschen Staaten*, in *NATION UND DEMOKRATIE* 11-19 (R. Wildenmann ed. 1991). See also, Note, *Taking Reichs Seriously: German Unification and the Law of State Succession*, 104 *HARV. L. REV.* 588 (1990).

233. See generally, Stern, *supra* note 135.

234. See *supra* note 204 and accompanying text.

235. These amendments are not only contained in the Unification Treaty; they are also required by the Two Plus Four agreement executed by the two German states and the World War II Allies. See *infra* Part X(D). Thus any attempt to return to the former provisions by subsequent amendment of the Basic Law would violate an agreement that is binding in international law. The problem of the Oder-Neiße line is discussed in detail in Part X(B) below.

236. In its amended form, the Preamble states in full:

With consciousness of their responsibility before God and human beings, and animated with the will to serve world peace as an equal member of a united Europe, the German people have adopted this Basic Law by virtue of their constitution-giving power.

The Germans in the states of Baden-Württemberg, Bavaria, Berlin, *Brandenburg*, Bremen, Hamburg, Hessen, *Mecklenburg-West Pomerania*, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, *Saxony*, *Saxony-Anhalt*, Schleswig-Holstein and *Thuringia* have achieved the unity and freedom of Germany in free self-determination. Thus this Basic Law is effective for the entire German people.

Unification Treaty, *supra* note 203, art. 4, § 1 (emphasis added, indicating new German states).

“achieved,” there is no further claim that additional territory must be “unified” with Germany as it now exists.

The second of these necessary amendments deleted article 23 which allowed “other parts of Germany” to “accede” to the Federal Republic.²³⁷ If this provision had remained in the Basic Law after the accession of the GDR, it would have suggested that other parts of Germany still existed outside of the present territory of the unified country.

Finally, it was necessary to amend article 146 of the Basic Law which, in its unamended form, foresaw a later date upon which the “German people” would adopt a constitution by a free decision.²³⁸ Although this provision did not specifically state that unification had not yet occurred, the original context of the provision clearly implied that the “German people” adopting the future constitution would include a group that extended beyond the population of the Federal Republic. Thus, this provision also might have suggested that additional territory and population remained to be incorporated into a united Germany in the future. One resolution of this problem would have been to delete article 146 entirely, as the drafters had done with article 23. The conservatives in the Federal Republic would almost certainly have preferred this result, but the Social Democrats and GDR reform groups sought to retain article 146 and, with it, the possibility of adopting a new, all-German constitution to replace the Basic Law even after accession under article 23.²³⁹ Accordingly, article 146 was amended to read as follows:

*This Basic Law, which is applicable for the entire German people following the achievement of the unity and freedom of Germany, will lose its validity on the effective date of a constitution that has been chosen by a free decision of the German people.*²⁴⁰

This provision makes clear that unification has been achieved but nonetheless preserves the possibility of a new all-German constitution. As noted above, the amendment also obviates the argument that article 146 had become obsolete as a result of unification.²⁴¹

237. *Id.* art. 4, § 2.

238. *See generally supra* Part V(B).

239. *See supra* text accompanying note 136.

240. Unification Treaty, *supra* note 203, art. 4, § 6. The language added by the amendment is in italics.

241. *See supra* text accompanying notes 133-135. Whether a new constitution could be adopted under article 146 by a simple majority in a plebiscite, or whether some form of

b. *Suggested Areas of Future Constitutional Change.*—Of particular political interest was article 5 of the Unification Treaty which “recommended” that the all-German parliament consider amending the Basic Law within two years in order to deal with certain problems raised by unification. Two of these recommendations dealt with the relations of the Länder and the federal government—proposals for a possible increase in the power of the Länder in accordance with a decision of the western minister-presidents, and for a possible readjustment of state lines involving Berlin and Brandenburg (including presumably a merger of those two Länder).

More interesting, however, was the inclusion in article 5 of two possibilities that seemed to show the strength of the Social Democrats and reform groups in the GDR in the process of negotiating the Treaty. Article 5 recommended, for example, that the all-German parliament should review considerations relating to the adoption of “state goals” in the Basic Law. In the dogmatic theory of German constitutional law, such state goals generally relate to matters such as environmental protection or social welfare, and thus this provision urges consideration of amendments long supported by certain sections of the SPD but greeted with reserve or hostility by the more conservative CDU/CSU.

Similarly, article 5 recommended that the parliament should

two-thirds approval would be required, is a subject of current debate. See *supra* text accompanying notes 136-138.

Additional constitutional amendments were required to adjust matters of finance. Article 7 of the Unification Treaty set forth rules for revenue-sharing by the former GDR Länder as well as provisions granting special support for those Länder. Another section amended article 135a of the Basic Law in a manner that made clear that the Federal Republic would not be required to pay all obligations incurred by the government of the GDR. Unification Treaty, *supra* note 203, art. 4, § 4; see *infra* text accompanying notes 266-267.

Certain other important constitutional amendments effected by the Unification Treaty are closely related to the reconstitution of the Länder and the constitutional problems of expropriated property and abortion. Consequently, these amendments are discussed in the context of those specific issues. See *supra* Part VII (Länder); *infra* Part VIII(B) (expropriated property); *infra* Part VIII(C) (abortion).

Shortly after the signing of the Unification Treaty the Constitutional Court rejected, as clearly without merit, a constitutional attack on the provisions of the Treaty that amended the Basic Law. 82 BVerfGE 316 (1990). The petitioners, eight members of the Bundestag, argued that under the Basic Law any proposed constitutional amendment must be presented to parliament as a separate statute (so that members of parliament could propose changes) rather than as part of a treaty (which must be voted on as a whole without alteration). (The petitioners believed that the former German territories east of the Oder-Neiße line should be included in a future united Germany; thus they objected to the amendment deleting article 23 of the Basic Law.) The Constitutional Court rejected this complaint, emphasizing the broad degree of procedural discretion possessed by the government in undertaking steps toward unification. *Id.* at 321.

consider the question of whether article 146 of the Basic Law should be employed to adopt a new German constitution, perhaps by plebiscite. The conservatives had strongly opposed the use of article 146, and they objected particularly to the adoption of a new constitution by plebiscite. The appearance of these suggestions in the Unification Treaty—guarded as they are—may reflect the fact that the votes of the SPD were essential in order to obtain the two-thirds majority necessary to ratify the Unification Treaty. That the SPD could block a two-thirds vote for the Unification Treaty (and thus secure inclusion of these provisions) does not necessarily mean that an affirmative two-thirds majority could be found for any particular constitutional amendment. Yet, under some interpretations at least, the adoption of a new constitution under article 146 would not necessarily require a two-thirds vote,²⁴² and voices outside of the SPD (particularly among the Free Democrats) suggest substantial support for at least some constitutional change. In any case, one of the most vigorously debated issues in the period immediately following unification was whether article 146 indeed ought to be employed in the near future to adopt a new constitution, perhaps with some significant changes from the Basic Law.²⁴³

* * * *

In addition to general provisions on structure and the future legal regime, the Unification Treaty and its attachments included a wealth of detail on the law that would apply in the eastern territory during the inevitable transitional period of change and accommodation. Among the many issues covered by this massive document, three were of particularly profound importance and stirred the deepest political passions. These three topics—the treatment of property expropriated by the Soviet occupation authorities and the GDR, the future of the GDR's liberal abortion law, and the future of the civil service in the territory of the former GDR—will be discussed in turn.

B. Problems Relating to Expropriated Property

One of the most difficult and potentially explosive problems of German unification arose from the millions of acres of property expropriated or placed under state administration during the Soviet

242. See *supra* text accompanying note 136.

243. See, e.g., Leicht, *Vom Grundgesetz zur Verfassung*, Die Zeit (overseas edition), Mar. 22, 1991, at 3, col. 1. In March 1991, the Bundestag and Bundesrat announced the formation of a joint committee to consider constitutional changes that might be indicated as a result of unification. See FAZ, Mar. 20, 1991, at 4, col. 1.

occupation and under the government of the GDR. Although some real property remained in private hands, the GDR viewed itself as a socialist society and much real property, and all significant means of production, came to be held in various forms of "socialist" property—principally People's Property and Collective Property.²⁴⁴ In addition some private property was held under government administration.

As unification became a real possibility, claims for the return of expropriated property—some of it seized many years in the past—were heard with greater insistence. Many, but not all, of the former owners raising these claims were now living in the west.

At the outset, the legal basis of such claims was not entirely clear. Confiscations occurring between 1945 and 1949, under the Soviet occupation regime, were undertaken before the adoption of either the West German Basic Law or the 1949 Constitution of the GDR, and therefore these actions do not appear to have violated any constitutional provision in effect at the time they were completed.²⁴⁵

The constitutional status of GDR expropriations occurring after 1949 was somewhat different. Article 14 of the Basic Law provides for a right of property and requires compensation in the case of a taking by the government. Yet, although the Basic Law was adopted in 1949, its provisions did not apply to the territory of the GDR at the time of these expropriations. Of course, the Constitutional Court's position was always that the German "Reich" (including the GDR) continued on in some ideal sense and that the Federal Republic was "identical" or "partially identical" with the "Reich."²⁴⁶ Yet article 23 makes unmistakably clear that the Basic Law does not apply to "other parts of Germany" (including the GDR) until their accession to the Federal Republic—an act that took place in October 1990. Perhaps it might be argued that, upon accession, the Basic Law requires that all existing property relations be traceable to market transactions or to expropriations with compensation in accordance with the general principles of article 14. Similarly, it might be argued that article 14 imposes a duty on the legislature to provide

244. See VERF. DDR (1974) arts. 10, 12, 13; *supra* Part IV(A)(2). This system was basically drawn from the model of the Soviet Union. H. ROGGMANN, *supra* note 51, at 257.

245. It was sometimes suggested, however, that the property guarantees of the Weimar Constitution remained in effect during the occupation period. See 6 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 270, 274 (1952); O. KIMMICH, *supra* note 115, at 43-44.

246. See *supra* Part II.

for compensation in the event that expropriated property falls within its jurisdiction through accession of a part of Germany under article 23. Without an *ex post facto* argument of this sort, however, it is difficult to see how article 14 of the Basic Law can apply to expropriations by the government of the GDR.

On the other hand, the expropriations in the GDR after 1949 did take place under written constitutions. The GDR constitutions of 1949 and 1968/74 both protected private property and seemed to contemplate at least some degree of compensation for governmental takings. Article 22 of the 1949 Constitution protected property, subject to "the social duties in favor of the community," and article 23 allowed expropriations "only for the good of the community on the basis of a statute." Article 23 also required compensation, "as long as the law does not determine otherwise"—a provision that may have allowed expropriation without compensation if authorized by statute.²⁴⁷

The 1968/74 Constitution of the GDR guaranteed "personal property," but the use of property "may not contradict the interests of the community."²⁴⁸ Nonetheless, article 16 of the 1968/74 Constitution stated that expropriations could only be undertaken "in return for appropriate compensation." Although both GDR constitutions indicated that they were directly enforceable law,²⁴⁹ in reality there was no judicial enforcement of their provisions.²⁵⁰ In

247. VERF. DDR (1949) art. 23; *see also id.* art. 27 (socialization of property). Moreover, article 24 of the 1949 GDR Constitution explicitly ratified the expropriations of Nazi activists and large landowners undertaken under the Soviet occupation regime. *See* VERF. DDR (1949) art. 24, § 3 (expropriating businesses of "war criminals and active National Socialists," as well as enterprises that serve a war policy); *id.* art. 24, § 5 (redistributing "great land holdings" of more than 100 hectares). *See also id.* art. 24, § 2 (expropriating property "[misused] to establish economic power to the damage of the common good"); *id.* art. 144, § 2 (constitutional rights cannot prevail against past or future provisions undertaken to "overcome National Socialism and militarism and to afford compensation for the injustice of which [those forces] are guilty"). For discussion of the expropriations undertaken during the Soviet occupation, *see infra* Part VIII(B)(1).

248. VERF. DDR (1974) art. 11. The term "personal property" basically referred to "property in consumer goods purchased from income from work"—a considerably narrower concept than "personal property" in the Anglo-American sense. *See* H. ROGEMANN, *supra* note 51, at 258.

249. *See* VERF. DDR (1949) art. 144, § 1; VERF. DDR (1974) art. 105.

250. The 1949 GDR Constitution provided for a Constitutional Committee of the Volkskammer, which was also to include three members of the Supreme Court and three "German teachers of constitutional law." This committee—and not the judiciary—would have the power to review the constitutionality of statutes, although the Volkskammer was apparently to have the ultimate decision on these issues. VERF. DDR (1949) art. 66; art. 89. The Constitutional Committee, however, was never established.

any case, few would argue that the federal Constitutional Court could now enforce the provisions of those superseded constitutions.

In negotiations with the GDR, nonetheless, the government of the Federal Republic argued strenuously that prior property rights should be respected and the expropriations undone to the greatest extent possible. Accordingly, on June 15, 1990 after very complicated negotiations, the two governments entered into a "Joint Declaration on the Regulation of Open Property Questions." This Declaration, in turn, was made part of the Unification Treaty, and was appended to the Treaty as Attachment III.²⁵¹ The Unification Treaty also set forth two additional statutes, generally known as the "Property Statute"²⁵² and the "Investment Statute,"²⁵³ which were intended to clarify and expand the general provisions of the Joint Declaration. After unification, discussion of property issues focused on these statutes, and in March 1991 they were significantly amended in an effort to accelerate the lagging pace of investment in the former GDR.²⁵⁴ The Declaration and these related statutes covered a number of separate points, which will be discussed in turn.

1. *Expropriation Under the Soviet Occupation Regime, 1945-49.*—As noted above, a distinct and extremely important series of expropriations took place during the Soviet occupation regime, before the founding of the GDR. The Soviet authorities seized the businesses and certain other property of numerous groups and individuals, including those found to be Nazi Party officials or prominent party members. As the first stage of a comprehensive land reform, the authorities of the newly created East German Länder—acting under Soviet inspiration—also expropriated property of large landowners; this category included not only the aristocratic Junkers of the east but also any person who owned more than 100 hectares (approx-

251. See Unification Treaty, *supra* note 203, art. 41, § 1. In addition, article 41, § 3 of the Treaty provides that the Federal Republic will not make any future legal changes that would contradict the rules of the Joint Declaration.

252. Statute on the Regulation of Open Property Questions, *printed in* Unification Treaty, *supra* note 203, attachment II, ch. III(B), para. I(5) [hereinafter Property Statute].

253. Statute Concerning Special Investments in the German Democratic Republic, *printed in* Unification Treaty, *supra* note 203, attachment II, ch. III(B), para. I(4) [hereinafter Investment Statute].

254. The Property Statute, as amended in March 1991, is set forth in FAZ, Mar. 27, 1991, at B1, col. 1. Unless otherwise noted, all citations of the Property Statute refer to this amended version. For the statute effecting these changes, see Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen und zur Förderung von Investitionen, of Mar. 22, 1991, BGBl I 766.

mately 250 acres).²⁵⁵

The Joint Declaration clearly states that expropriations “on the basis of occupation law or occupation authority”—that is, the expropriations of 1945-49—are not to be undone, although the all-German parliament may decide on some form of governmental compensation in the future.²⁵⁶ This important decision may have reflected a number of factors. In particular, the vast amount of property involved—3.3 million hectares, apparently still one-third of the agricultural property of the GDR²⁵⁷—doubtless played a central role. The GDR government apparently feared substantial social unrest if thousands of farming families, who had exercised some control over collective property, were suddenly to see this property transferred to large landowners from the west.²⁵⁸

In any case, it is clear that the relevant authorities of the GDR—and also, apparently, the Soviet Union—believed very strongly that the legality of these occupation measures should not be called into question. These views were made clear in a well-known letter that GDR Prime Minister Hans Modrow wrote to President Gorbachev in March 1990—seeking Gorbachev’s assistance in preserving existing

255. The Soviet occupation authorities established Länder governments in the Soviet zone substantially before the founding of the GDR. Although these governments were clearly acting under Soviet inspiration and control, it was the legal acts of the Länder that expropriated the property taken for the land reform. In addition to the property of large landowners, the land reform also extended to real property of those found to be war criminals, Nazi leaders, or active members of the Nazi Party.

In the second stage of the land reform, most of the property seized by the Länder authorities was distributed to individual farmers in small plots of seven to nine hectares on the average. This property accounted for approximately 35% of agricultural land in the Soviet zone. See M. McCauley, *supra* note 26, at 22-24. In the decade following the founding of the GDR, these plots were combined—often on a mandatory basis—into collective enterprises. By 1960 all private farms had been collectivized in this manner. *Id.* at 98.

Postwar measures of land reform (with compensation) were also undertaken in certain of the West German states. See O. Kimmich, *supra* note 115, at 51; 46 BVerfGE 268 (1977).

256. Unification Treaty, *supra* note 203, attachment III, § 1. The provision of the Unification Treaty that confirmed the 1945-49 expropriations was repeated in a letter signed by representatives of the GDR and the Federal Republic as part of the matters regulated at the end of the Two Plus Four discussions. See *infra* text accompanying notes 511-513. Therefore, this provision may now also have the force of a treaty in international law.

257. DER SPIEGEL, June 18, 1990, at 29.

258. See *supra* note 255. Indeed, GDR legislation in 1990 reformed the collectives and accorded farmers the right to withdraw their individual property at will; these new arrangements would have been imperiled if the underlying 1945-49 expropriations were undone.

property relations in the GDR²⁵⁹—and also in subsequent statements of the Soviet government and GDR Prime Minister de Maizière.²⁶⁰ It is quite possible that unification would not have occurred without the explicit confirmation of the 1945-49 expropriations.

The government of the Federal Republic also had strong views on this issue, and they were quite different from the views of the GDR and the Soviet Union. Although the eastern position prevailed, it is interesting that the differing positions of the separate governments were specifically acknowledged in the Joint Declaration, immediately following the passage which made clear that the 1945-49 expropriations were not to be undone. Thus section 1 of the Joint Declaration states that the Soviet Union and GDR “see no possibility of revising (revidieren) the measures that were taken” during the Soviet occupation period; this view clearly rejects restoration of the property. The crucial role of the Soviet Union in insisting on the confirmation of these expropriations can be seen in the extraordinary fact that the Soviet Union—which was not a party to the Joint Declaration or the Unification Treaty—is specifically mentioned at this point. The same section goes on to state, however, that the Federal Republic “takes note of this [result] in light of the historical development,” but then declares that, in the view of the Federal Republic, “a final decision over possible government compensation payments must remain reserved for a future all-German parliament.”²⁶¹ This latter statement held out the possibility of some measure of compensation, without creating an enforceable obligation.²⁶²

It should be noted that, with the possible exception of the section on abortion, this provision on the 1945-49 expropriations was the single most bitterly disputed portion of the Unification Treaty. In the weeks following the signing of the Treaty, a constant drumbeat of outraged letters—presenting personal recollections of expropriation as well as prolific legal arguments—appeared in the

259. See FAZ, Mar. 8, 1990, at 2, col. 1. At the same time Modrow also sent a similar letter to Chancellor Kohl.

260. See Fieberg & Reichenbach, *Zum Problem der offenen Vermögensfragen*, 1991 NJW 321, 322 (quoting Soviet responses to Modrow letter).

261. Unification Treaty, *supra* note 203, attachment III, § 1.

262. The language of this provision does not appear to foresee compensation for the full value of the expropriated property but may contemplate the possibility of settlements (*Ausgleichsleistungen*) in some lesser reasonable amount. See Papier, *Verfassungsrechtliche Probleme der Eigentumsregelung im Einigungsvertrag*, 1991 NJW 193, 197; see also *infra* text accompanying note 271.

respected pages of the conservative *Frankfurter Allgemeine Zeitung*, protesting the failure to provide for repossession or compensation for property expropriated during the Soviet occupation. Moreover, a number of constitutional complaints were filed in the Constitutional Court seeking a declaration that this treatment of the 1945-49 expropriations violated the Basic Law. The challengers argued that even if the expropriations violated no constitutional provision when they occurred, a present recognition by the Federal Republic of property relations created in such a manner would constitute a *present* violation of the protection of property contained in article 14 of the Basic Law.²⁶³ The complainants also urged that exclusion of the 1945-49 expropriations from a general regime of compensation or return of property, applicable to GDR expropriations after 1949, violated the constitutional guarantees of equality contained in article 3.²⁶⁴

Because of the central importance of this provision in the negotiations leading up to the Unification Treaty, the drafters sought to protect the 1945-49 expropriations against attack in the Constitutional Court by amending the Basic Law specifically for the purpose of preserving those expropriations. Under article 4 of the Unification Treaty, a new article 143(3) was added to the Basic Law, stating in part that "article 41 of the Unification Treaty [regulating property questions], and regulations in pursuance thereof, will remain permanent to the extent that they provide that incursions on property [in the GDR and East Berlin] are not to be undone."²⁶⁵ Since it is the 1945-49 expropriations that, in accordance with the Joint Declaration, "are not to be undone," this constitutional amendment declares that those expropriations are permanent. An accompanying provision of the Unification Treaty amends article 135a of the Basic Law, to make clear that the Federal Republic need not pay all debts of the GDR.²⁶⁶ This amendment was also primarily designed to negate any governmental obligation to afford compensation for the 1945-49 expropriations.²⁶⁷

263. For an early statement of this view, see FAZ, July 30, 1990, at 2, col. 5 (discussing the view of Professor Kimminich of Regensburg that any recognition of the confiscations of 1945-49 in the Unification Treaty would be a violation of article 14 of the Basic Law, unless requisite compensation was paid). See also O. KIMMINICH, *supra* note 115, at 84.

264. See GG art. 3, § 1. For the treatment of post-1949 expropriations under the Unification Treaty, see *infra* text accompanying notes 272-302.

265. Unification Treaty, *supra* note 203, art. 4, § 5.

266. *Id.* art. 4, § 4.

267. These constitutional amendments, however, were not necessarily the end of the story because the Basic Law imposes limitations on its own amendment. Article 79(3)

In a decision of fundamental importance issued in April 1991, the Constitutional Court unanimously upheld the provision of the Unification Treaty which stated that the 1945-49 expropriations were "not to be undone."²⁶⁸ In general, the Court found that, in light of the constitutional amendment adding article 143(3) to the Basic Law, the legislature had remained within its constitutional powers. The Court first noted that the expropriations of the Soviet occupation regime were not subject to the Basic Law because that document did not apply to the eastern territory until its accession in 1990; indeed, at the time of most of the 1945-49 expropriations, the Basic Law was not even in effect. The Court also rejected claims that the Unification Treaty violated fundamental guarantees of equality by excluding the 1945-49 expropriations from the provisions favoring return of property, applicable to later GDR expropriations. According to the Court, the government had discretion to take steps—like preservation of the 1945-49 expropriations—that appeared necessary to achieve the constitutionally required goal of unification.²⁶⁹ The Court did indicate, however, that some form of compensation to the former owners of the expropriated property would be constitutionally required under the equality principle.²⁷⁰ Even so, compensation need not be made at full market value; the legislature could decide upon a reasonable lesser amount in light of the government's other obligations incurred upon unification and in

prohibits certain amendments of the Basic Law— particularly those that affect "human dignity" or interfere with the basic democratic structural principles of the government or the rule of law. In the Constitutional Court the complainants argued that this provision prohibited the amendments of the Basic Law that were designed to confirm the 1945-49 expropriations. See generally *infra* text accompanying notes 268-271; note 269.

268. Decision of Constitutional Court (First Senate), Apr. 23, 1991, 1991 EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT [EuGRZ] 121. For initial commentary on the decision, see Fromme, *Viele Worte und wenig Klarheit*, FAZ, Apr. 24, 1991, at 1, col. 5. For an earlier decision denying a preliminary injunction in this case, see 1990 EuGRZ 556.

269. See 1991 EuGRZ at 131. At oral argument in the expropriation case, Lothar de Maizière and others argued that unification could not have been achieved without this provision in the Unification Treaty. *Id.* See also *supra* text accompanying notes 259-260. In the Court's view, therefore, the amendment of the Basic Law confirming the 1945-49 expropriations did not violate the limits on amendment of the Basic Law set forth in article 79, § 3. 1991 EuGRZ at 129-31; see *supra* note 267.

270. 1991 EuGRZ at 131-32. In the Court's view, the Unification Treaty had amended the equality principle in order to exclude return of the property expropriated between 1945-49, but had not amended the equality principle to the extent that compensation—rather than return of property—was at issue. Thus the equality principle did require the government to afford some measure of compensation for the 1945-49 expropriations, so that the disparity between the treatment of that property and the property expropriated later by the GDR would not be so great. See *id.* The Court also appeared to suggest that a similar result might be required under the "social state" and rule of the law principles of the Basic Law. *Id.* at 130-31.

light of the fact that during the same period of history many people had undergone serious deprivations without compensation.²⁷¹

With this decision the Constitutional Court has taken a substantial step toward settling the largest open constitutional question arising from unification. The decision frees much of the real property in the former GDR from clouds on ownership and, in that respect, will certainly further investment in the east. The question of required compensation, however, remains a political issue that must soon be confronted.

2. *Property Expropriated After 1949.*—For property expropriated after 1949—that is, property expropriated by the GDR government rather than under the Soviet occupation regime—the situation under the Unification Treaty is significantly different. The basic principle adopted by the Joint Declaration is that these takings are to be undone. In some cases this property must be returned to the former owner or the heirs of the former owner, and in other cases compensation will be paid instead.²⁷² This principle reflects a very strong conception of property, as indicated in part by the fact that the heirs of the former owner can pursue these claims even though in many cases they have had no personal contact with the property. Moreover, this right of recovery extends all the way back to 1949—now more than forty years in the past. Earlier proposals to draw a line at 1972 (when a large number of confiscations occurred), and to extend rights only for confiscations occurring after that point, have been rejected.

For this purpose, the Joint Declaration and statutes adopt a broad view of “expropriated property,” which is defined to include not only property taken by confiscatory decree but also certain property acquired by the state “as a result of economic coercion.”²⁷³ Accordingly, former owners may be able to recover property that was transferred to the state when permissible rents, as determined by GDR law, were insufficient to pay the costs of maintaining the property.²⁷⁴ Moreover, in most cases in which a claimant has a right to return of the property, the claimant may choose compensation instead.²⁷⁵

271. See 1991 EuGRZ at 132.

272. Unification Treaty, *supra* note 203, attachment III, § 3.

273. *Id.* attachment III, § 4.

274. See Property Statute, *supra* note 252, § 1(2); DER SPIEGEL, Oct. 8, 1990, at 50; *cf.* Property Statute, *supra* note 252, § 8(1).

275. See Unification Treaty, *supra* note 203, attachment III, § 3(c); Property Statute, *supra* note 252, § 8(1). For a useful collection of materials on these problems, along with

When the Unification Treaty was originally adopted, its framers contemplated that property expropriated by the GDR would be returned to the original owner in most cases, and that the former owner would be required to accept compensation instead of restitution in three categories of exceptional situations only. This principle seemed to reflect the view that compensation can rarely be a fully adequate substitute for return of expropriated property. Yet the exceptional situations, in which the former owner would be required to accept compensation, were also important, and they will be discussed in turn below. Indeed the first of these exceptions—the exception for property to be used for investment purposes—has become so significant as a result of recent statutory amendments that some believe that its expansion has impaired the basic principle that property should generally be returned to the former owner.²⁷⁶

a. Property to be Used for Investment.—In its only substantive provision on expropriated property (other than the Joint Declaration

commentary, see VERMÖGENSRECHTLICHE ANSPRÜCHE DER DDR-ENTEIGNUNGSGESCHÄDIGTEN (1990); see also Gruson & Thoma, *Investments in the Territory of the Former German Democratic Republic*, 14 *FORDHAM INT'L L.J.* 540 (1990-1991).

In July 1990, the GDR government issued a regulation requiring that all claims with respect to confiscated property be filed by January 31, 1991 and seeking to prohibit the future sale of property whose ownership is disputed. *FAZ*, July 31, 1990, at 9, col. 4. Six weeks later, however, the de Maizière government moved the date for filing claims up to October 13, 1990—a move that was bitterly criticized as an attempt to achieve the effective forfeiture of western property rights. Shortly before the deadline, it was estimated that by October 13, 150,000 claims for the return of property would be filed in Berlin alone. *DER SPIEGEL*, Oct. 8, 1990, at 51.

The Property Statute also provides for compensation for—or the return of—property confiscated or forcibly sold as a result of racial, political, religious, or ideological discrimination by the Nazi regime in the territory that later fell within the borders of the GDR. Property Statute, *supra* note 252, § 1(6). The rules applicable to the post-1949 expropriations generally apply in these cases also, except that a somewhat longer period is permitted for the filing of these claims. Claimants of property confiscated between 1933 and 1945 also take precedence over later holders of the property who may claim in turn that their property was expropriated by the government of the GDR. See *id.* § 3(2).

The inclusion of provisions requiring return of property lost as a result of oppression under the Nazis reflects the fact that, after World War II, the government of the GDR refused to accept financial responsibility for acts of oppression undertaken in its territory during the Nazi period. (The GDR maintained that, because the Communist Party opposed Hitler, the GDR government bore no responsibility for acts of the National Socialist regime.) Unlike the Federal Republic, therefore, the GDR provided no compensation or other relief for expropriation or other discriminatory acts of the Nazi regime. Now after 45 years, therefore, the opportunity for repossession of seized property, or compensation, arises for the first time.

276. Except as specifically stated, the rules discussed in this section do not apply to businesses expropriated by the GDR. The special rules applicable to expropriated businesses are discussed in Part VIII(B)(4) below.

and statutes incorporated as attachments), the Unification Treaty set forth the first exceptional situation in which compensation could replace the general principle of return of property. Article 41(2) of the Unification Treaty contemplated that a former owner of expropriated property could be granted compensation rather than restitution if the property is urgently needed for investment uses that would yield general economic benefits—principally the creation or preservation of jobs.²⁷⁷ Accordingly, under the Investment Statute, the present manager of expropriated property (the Trust Agency or a local government) was empowered to sell the property to an investor, notwithstanding the claims of a prior owner, if the property was urgently needed for a business that would create jobs, for significant housing needs, or for necessary infrastructure for such projects.²⁷⁸ In this way, the economic reconstruction of the former territory of the GDR would take precedence over the specific property rights of former owners, and the former owner would be relegated to the proceeds of the sale or to other compensation.²⁷⁹ Yet the required procedure for such sales posed some difficulties. The prospective investor was required to obtain a certificate from a local government office approving the proposed investment goals—often a time-consuming process—and an objection by the former owner could further delay the sale.

In early 1991 the economic situation in the former GDR became desperate, and government officials believed that accelerated sales of property for investment purposes were essential. Consequently, statutory amendments in March 1991 greatly simplified the process of selling expropriated property for investment purposes. In effect, the current manager of the property would make the final decision on whether a prospective purchaser's investment plan is adequate; no immediate judicial review of this decision was possible and no objection by the former owner could delay the decision.²⁸⁰ After this accelerated decision, the investor could receive the property and the original owner would only be entitled to the proceeds of the sale or compensation. Some commentators claimed that this accelerated process constituted a "second expropriation" of the former owners, and argued that many local governments managing ex-

277. The Investment Statute, *see supra* note 253, was enacted to carry out this provision.

278. Investment Statute, *supra* note 253, § 1.

279. *Id.* § 3.

280. Of course the former owner could also propose an investment plan which would then be considered along with the plans of any other prospective purchasers of the property.

propriated property were still controlled by former SED cadres which were basically hostile to those whose property had been expropriated.²⁸¹

In any case, the new rules will probably expand the number of instances in which the original principle of return of expropriated property will be replaced by compensation.²⁸² Indeed, some maintain that this expanded exception fatally compromises the principle. Yet the amendments did not accept the more sweeping argument of some, including the SPD, that investment would best be furthered if the principle of the return of property were abandoned altogether and all former owners received compensation. Such a proposal evidently went too far for the strong property views held by the governing coalition.

b. Impossibility of Return.—In a second exception to the principle of restitution, the Joint Declaration recognized that in certain cases an actual return of the property would be impossible, impractical or inequitable, and it provided special rules for these situations.²⁸³ In some cases property has been so merged with other property that it cannot be extricated and separately returned. For example, numerous pieces of expropriated property may have been combined to form the site of a large apartment building, or property may have become an inextricable part of a business enterprise. In these cases, the former owner will receive compensation—to the extent that compensation has not already been paid to a GDR citizen under GDR law.²⁸⁴

c. "Honest" Acquisition by Third Person.—A third exception to the principle of return of expropriated property is made when individuals or certain institutional owners have acquired interests in real

281. These commentators also doubted that the previous property rules had actually been the cause of delays in investment. See FAZ, Apr. 2, 1991, at 8, col. 4; FAZ, Mar. 20, 1991, at 1, col. 5.

282. The March amendments also extended the principle of sale for investment purposes to business enterprises, in addition to real property in general. See *infra* text accompanying note 318.

283. Unification Treaty, *supra* note 203, attachment III, § 3(a). See also Property Statute, *supra* note 252, § 4(1) (return of property will not be required "when according to the nature of the situation this is no longer possible").

284. Unification Treaty, *supra* note 203, attachment III, § 3(a). The same principle is applicable when the property has been devoted to public use, or when a substantial expenditure has been made to adapt property for a particular function and it is in the public interest that this function continue. See generally Property Statute, *supra* note 252, § 5.

property "in an honest manner" (in redlicher Weise).²⁸⁵ In these cases the rights of the innocent third party purchaser are protected, and the purchaser can keep the property. On the other hand, the original owner receives a "socially acceptable exchange"—either real property of comparable value or monetary compensation.²⁸⁶ The same rule applies in cases in which a state trustee has sold real property to a third person.²⁸⁷ These provisions are clearly intended to preserve reasonable expectations upon the transfer of property. The provisions may also reflect the judgment that, in the case of "honest" purchases of real property, special assurances of validity are necessary in order to promote privatization.

The precise meaning of acquisition "in an honest manner," however, may raise difficult questions. Certainly it seems likely that most purchasers of property knew or could easily have discovered that what they were purchasing or receiving was property that had originally been expropriated. On the other hand, whether that knowledge—arising in a socialist legal order—should be held against them is another question.²⁸⁸ There is no requirement in the Joint Declaration or the Property Statute that a person acquiring in an honest manner must actually have paid value for the property; in any case, the definition of "value" in a nonmarket society can be elusive. Under the Property Statute, an acquisition is ordinarily "dishonest" (unredlich) if it was inconsistent with the prevailing law or administrative practice of the GDR (and the acquirer knew or should have known of the inconsistency), or if the transaction was influenced by corruption or exploitation of a personal position of power, or otherwise the result of coercion or deception.²⁸⁹ The chief purpose of this provision may have been to deny SED and government officials valuable property acquired as a result of their posi-

285. Unification Treaty, *supra* note 203, attachment III, § 3(b); Property Statute, *supra* note 252, § 4(2).

286. Unification Treaty, *supra* note 203, attachment III, § 3(b); Property Statute, *supra* note 252, § 9(2). In the case of exchange of property, however, already difficult problems of valuation may be further complicated because two pieces of property must be assessed instead of one. See *infra* text accompanying note 297.

287. Unification Treaty, *supra* note 203, attachment III, § 3(b).

288. See Fieberg & Reichenbach, *supra* note 260, at 327.

289. Property Statute, *supra* note 252, § 4(3). As defined in this section, the concept of "dishonesty" seems to be different from the concept of bad faith (absence of "guter Glaube") in the German Civil Code—a concept which, like the analogous concept in Anglo-American law, primarily involves knowledge that the property belongs to a third person. See BÜRGERLICHES GESETZBUCH 1027-31 (O. Jauernig 3d ed. 1984) (Section 932 of Civil Code and related commentary); Fieberg & Reichenbach, *supra* note 260, at 327-28. It is not entirely clear, however, whether the definition in the Property Statute is intended to be an exhaustive definition of "dishonesty."

tions of power: in the last days of the Modrow government, for example, high officials purchased villas in East Berlin and elsewhere for what reportedly were, by any calculation, bargain prices.²⁹⁰ Notwithstanding many difficulties, however, it may ultimately be necessary to consider the reasonableness of a purchase price as evidence of whether the property was acquired through corruption, coercion, or deception.²⁹¹

In all of these exceptions to the principle of return, the alternative of compensation plays an important role. Indeed, with the probable increase of property sales for investment purposes, the role of compensation becomes even more crucial. The Joint Declaration does not specifically state the ultimate source or sources from which compensation will be derived. Under the Declaration the GDR was required to establish a "legally independent compensation fund, separate from the governmental budget,"²⁹² and the Federal Republic is now required by statute to create a special fund for the purpose of compensation.²⁹³ Presumably compensation will be paid, in the first instance, by the public fund rather than by the person or entity that is allowed to retain ownership of the property. Although the Joint Declaration and statutes may not exclude a claim by the fund against the present owner in some instances, it is not clear that such claims are contemplated.²⁹⁴

The source of financing for the public fund must also be determined. Perhaps the fund may receive the proceeds of the sale of certain former People's Property which is not being claimed by a prior owner or which, for some other reason, is not returned to that

290. DER SPIEGEL, Oct. 8, 1990, at 54-55. In this connection, see also Property Statute, *supra* note 252, § 4(2) (excluding protection for persons acquiring real property after October 18, 1989, under certain circumstances).

291. Two further provisions of the Joint Declaration address the likelihood that certain property relations in the GDR resulted from oppressive acts of the state and seek to assure that the beneficiaries of such actions do not benefit under the Joint Declaration. Section 8 states that in the case of property interests obtained by a person who engaged in dishonest machinations ("unlautere Machenschaften") such as "misuse of power, corruption, extortion or fraud," there will be no claim for recovery of the property. See Unification Treaty, *supra* note 203, attachment III, § 8. Although this provision may be primarily directed against governmental misuse of power, it also apparently applies to instances of private fraud between individuals. Section 9 requires the GDR to take legal steps to undo criminal proceedings through which property was forfeited in a manner contrary to the rule of law. *Id.* attachment III, § 9.

292. *Id.* attachment III, § 13(c).

293. See Property Statute, *supra* note 252, § 29a.

294. See generally Fieberg & Reichenbach, *supra* note 260, at 326; Gruson & Thoma, *supra* note 275, at 560.

owner.²⁹⁵ For example, many large apartment houses and factories were held in the form of People's Property and the sale of these buildings could provide funds for compensation of former owners of other property. Ultimately it may also be necessary for the general treasury of the Federal Republic to support the compensation fund.

Another question left open in the Joint Declaration and statutes is the level of compensation, or more generally, the principles on which compensation is to be determined.²⁹⁶ One possibility would be the value of the property at the time of confiscation, perhaps including interest at a specified rate. This amount could be difficult to ascertain because it might require the determination of a hypothetical past market value in the context of what was at the time a nonmarket economy. Current value is also a possibility, but this resolution also raises problems. When property cannot be returned because it has been merged into the site of a large factory, for example, compensation according to current value would require that the "value" of the underlying land somehow be separated from the value added by the presence of the structures that made return of the property impossible. Moreover, compensation at current value might well impose an intolerable burden on the public treasury.²⁹⁷

Although the point is not made explicitly in the Joint Declaration or accompanying statutes, it would be consistent with a number of existing provisions if compensation were to be paid according to the value of the expropriated property *at the time of expropriation*.²⁹⁸ First, a special provision of the Property Statute regulating the return of expropriated *businesses* specifically states that, if the business itself is not to be returned, compensation will be paid according to "the value of the enterprise *at the time it was transferred into People's Property or [placed under] state administration*."²⁹⁹ There is little reason to believe that the method of compensation for other expropriated

295. See Unification Treaty, *supra* note 203, art. 25, § 3; Badura, *Der Verfassungsauftrag der Eigentumsgarantie im wiedervereinigten Deutschland*, 1990 DVBl 1256, 1258.

296. The details of compensation are to be regulated in the future by statute. Property Statute, *supra* note 252, § 9(3).

297. The burden of compensation will be further increased by the Constitutional Court's recent decision finding that some degree of compensation should also be paid for expropriations undertaken in 1945-1949 during the Soviet occupation regime. See *supra* text accompanying notes 268-271.

298. Although the use of market value seems most defensible in theory—if market value could be determined—it is also possible that the (ordinarily very low) tax assessment value could ultimately be used.

299. Property Statute, *supra* note 252, § 6(7) (emphasis added); see *infra* text accompanying notes 310-318.

property should differ from that applicable to expropriated businesses. Moreover, a similar principle of compensation can be inferred from those provisions of the Property Statute which, by requiring certain compensating payments upon the return of property, imply the principle that in many cases the value of the property currently recovered by the former owner should not differ materially from the value of the property at the time of expropriation.³⁰⁰ If this principle governs the return of property, a similar principle should probably prevail when the former owner recovers compensation instead of the property itself.

Although the provisions on compensation in the Joint Declaration and accompanying statutes are already quite complex, fundamental questions relating to the basic principles of compensation remain open.³⁰¹ In the view of the Constitutional Court, the legislature generally has significant discretion in determining the principles of compensation for expropriations. Moreover, it seems clear that on questions arising from unification the legislature will be accorded, if anything, an even broader measure of discretion. Thus, the exact principles of compensation remain unknown, and the bureaucracy for determining specific amounts of compensation has not yet been established. All signs indicate, therefore, that the quest for compensation may be long, and the results may well be disappointing. Accordingly, in the months following unification, claimants with a choice between receiving property or compensation often seek to recover the property. In contrast, claimants entitled to receive a specified purchase price of property sold for investment purposes may sometimes find this to be an attractive alternative. In any case, many former owners are seeking to reach a private settlement of all competing claims to specified property in order to avoid the delays and uncertainties of the administrative and judicial process.³⁰²

The great complexity of the return and compensation provi-

300. See Property Statute, *supra* note 252, § 7 (With respect to the return of property other than businesses, "increases in value financed by the state budget after transfer [of the property] into People's Property, as well as decreases of value that have occurred in the interim, are to be determined and compensated for."); *id.* § 21(4) (If a prior owner receives property in substitution for certain expropriated property, "differences in value between the value of the substitute-property and the value of the [expropriated] property at the time of expropriation or placement under state administration are to be compensated for."). See also Investment Statute, *supra* note 253, § 3(3).

301. See *supra* note 296.

302. See Gruson & Thoma, *supra* note 275, at 564-65 (emphasizing advisability of reaching settlement among competing claimants).

sions suggests only one aspect of the enormous difficulties that arise from the hundreds of thousands of claims that have now been filed for the return of expropriated property. Up to this point the offices of the state Trust Agency, as well as local offices dealing with property questions, are totally unable to handle the massive numbers of claims. Moreover, in addition to the problems of interpreting the relevant rules, there are often factual problems of bewildering complexity. The ravages of war and the passage of time have erased whole streets or areas of cities. Under these circumstances, it may be difficult or impossible to establish exactly where the boundaries of a given piece of property now lie. Moreover, the previous land registration system was often neglected by local offices under the GDR government, as private ownership of real property and its various incidents were generally neglected. Thus, even proof that a particular person owned identifiable property at one point in the past may not always be easy to establish.

3. *Property Placed Under State Administration.*—Before the Wall was built in 1961, two and one-half million citizens of the GDR left for the west. Even after 1961, a significant number left the GDR legally or illegally.

Many of these individuals left houses and other forms of real property behind. Some of this property was expropriated by the state and converted into People's Property. Much of this property, however, was not actually expropriated; rather it was transferred to a state administrative trustee and held in the name of the original owner—with limitations that effectively restricted the owner's use of the property. In a typical case the state administrator then leased the property—often a house—to a citizen of the GDR who paid low, subsidized rates and had the benefit of strong GDR legislation for the protection of tenants.

According to the Joint Declaration, this form of administration is to be abolished and the property is to be returned to the original owner:

Trustee administration, and similar measures involving limitations on control, with respect to real property, businesses and other property are to be abolished. Thus those citizens whose property was taken into state administration as a result of flight from the GDR or on other grounds are to recover the authority to control their own property.³⁰³

303. Unification Treaty, *supra* note 203, attachment III, § 2; *see also* Property Statute,

This provision raises difficult and potentially explosive social problems because many thousands of GDR citizens have lived for years in houses owned by former residents who departed for the west. These tenants now face the prospect of eventual ejection from their long-term homes by persons who may have long abandoned any hope of recovering their former houses and any real interest in those dwellings. Those who left for the west, and often prospered there, can recover the dwellings of those who remained to face the more difficult circumstances of the GDR.

The residents of the former GDR, however, are not totally without protection. Under the Joint Declaration the tenants' protection law of the GDR remained in effect, and the Property Statute makes clear that existing leases will not be disturbed.³⁰⁴ These provisions may mean a period of continued residence for many tenants in the east—but, most likely, under a progressively increasing rent.³⁰⁵

There is yet another issue of underlying importance that is not expressly recognized by the Joint Declaration but is handled in an accompanying statute. The state administrator often did little or nothing to keep the houses of departed citizens in reasonable condition. In many cases, therefore, it was necessary for the GDR tenant to expend substantial personal effort and savings in order to undertake fundamental repairs and continuing maintenance of the property. Without these efforts, many houses could have become completely uninhabitable and therefore valueless (leaving the value of the underlying land alone). To avoid the injustice that might otherwise result, the Property Statute provides that the former GDR tenant can recover compensation for certain of these expenditures.³⁰⁶ Interestingly, it appears that liability for the tenants' expenditures will be borne by the person entitled to own the property and not by the state.³⁰⁷ This arrangement is rather unusual in the

supra note 252, § 1(4). In this case also, the claimant has the option to choose compensation instead of the return of property. *Id.* § 11(1).

304. Unification Treaty, *supra* note 203, attachment III, § 5; Property Statute, *supra* note 252, §§ 16, 17; *but see* Göhring, *supra* note 137, at 318-19 (discussing landlords' rights of eviction under applicable sections of Civil Code as modified by Unification Treaty).

305. Under the Unification Treaty, however, most rents for apartments and other dwellings were to remain frozen for an interim period. *See* Unification Treaty, *supra* note 203, attachment II, ch. V(A), para. III(1)(a)(dd); Göhring, *supra* note 137 at 320. There has been substantial debate about the appropriate percentage increase of rents after this period.

306. Property Statute, *supra* note 252, § 19.

307. *See, e.g., id.* § 19(3) ("If the [original owner] acknowledges the [tenants'] claims, an agreement on this matter shall be entered into. In case of dispute, the procedure of

structure of the regulations relating to expropriated property, because in many other cases claims for compensation seem to be directed against the state and not against a private holder of property.³⁰⁸

4. *Expropriated Businesses.*—During the early period of the GDR certain businesses of moderate size remained in private hands. Indeed some owners of successful companies became quite prosperous even though the government took steps to acquire a share of private enterprises. In 1972, however, the government and Communist Party changed course sharply, seeking greater conformity with the economic structure of the Soviet Union.³⁰⁹ As a result, a great wave of expropriations placed most private businesses under government ownership, where they remained until the events of 1989-90.

Interestingly, even before the Joint Declaration, the GDR Volkammer sought to return some businesses nationalized in 1972 to private hands. In a statute enacted in March 1990, the Volkammer determined that the former private owners (or their heirs) could reclaim these enterprises by returning the minimal price paid by the government in 1972.³¹⁰ This was an early step toward privatization, but the opportunities upon recovery were not always so favorable as they may have seemed at the outset. Some owners found, for example, that the businesses expropriated by the government in 1972 had lost substantial ground in the intervening years through poor management and insufficient capital investment. Some of these owners found that what they received from the GDR government in 1990 was a failing enterprise that could not compete against its western counterparts. Perhaps one solution was to enter into a joint venture with a western firm, but that was to risk losing

the civil courts is available.”). In Germany, a reference to the civil courts ordinarily indicates a cause of action between two private individuals, and not against a state entity.

308. See *supra* text accompanying note 294. The current tenants of a one- or two-family house also have a right of first refusal if the property is sold. Property Statute, *supra* note 252, § 20(1). Moreover, the tenant of a one-family house being reclaimed by a prior owner can request the state administrator to offer the prior owner an equivalent piece of property in the same area as a substitute. If the prior owner accepts the substitute property, the original property can be sold to the tenant. *Id.* § 21.

309. See, e.g., Zieger, *supra* note 31, at 148.

310. Gesetz über die Gründung und Tätigkeit privater Unternehmen und über Unternehmensbeteiligungen, of Mar. 7, 1990, §§ 17-19, GBl DDR I 141, 143. These sections were later replaced by the Property Statute. See Property Statute, *supra* note 252, § 39(10).

control of the enterprise itself.³¹¹

In the case of expropriated businesses, the Property Statute applies principles that are similar to those underlying its other basic provisions. In the case of businesses under state administration, the owner can often recover full control of the property.³¹² Businesses that were taken into People's Property in the great wave of expropriations in 1972 (as well as in earlier GDR expropriations) may also be returned to their owners if the enterprise remains "comparable" to the business at the time of expropriation—taking into account intervening changes in technology and general economic developments.³¹³ Adjustments must be made, however, for changes in the value of the business. Thus, in principle, if the value of the business substantially declined after the point of expropriation, the property owner may receive compensation for the decrease, in addition to the property; if the value has materially increased, compensation could be due to the state Trust Agency.³¹⁴ In many cases, a previous owner can choose compensation instead of return of the enterprise.³¹⁵ Compensation will equal the value of the enterprise at the time of its expropriation, reduced by any compensation that was paid at the time (the price in GDR-Marks being converted at the rate of two GDR-Marks to one D-Mark).³¹⁶ The Property Statute sets forth a number of extremely complex provisions designed to measure substantial increases or decreases in value and to regulate the problem of joint owners and stockholders, and businesses that have joined with other businesses, among other issues.

As in the case of other expropriated property, the statutory amendments of March 1991—designed to accelerate privatization—will likely have an important impact on the return of expropriated enterprises. First, the amendments provide for an accelerated process by which a former owner—or even a claimant who appears to be the former owner—can receive and operate the enterprise on a temporary basis pending a final determination of the issue.³¹⁷ On the other hand, the special investment rules, discussed above in connection with the return of other expropriated property, are now also

311. See, e.g., N.Y. Times, Feb. 14, 1991, at D1, col. 3.

312. See Unification Treaty, *supra* note 203, attachment III, § 6; Property Statute, *supra* note 252, §§ 11, 12.

313. Property Statute, *supra* note 252, § 6(1).

314. *Id.* § 6(1)-(4).

315. *Id.* § 6(6); see also Unification Treaty, *supra* note 203, attachment III, § 7.

316. Property Statute, *supra* note 252, § 6(7); see *supra* text accompanying note 299.

317. Property Statute, *supra* note 252, § 6a.

applicable with some variations to expropriated enterprises.³¹⁸ This provision is not particularly favorable to the former owner of the business, because it is possible that the former owner's rights may be superseded by those of a purchaser with a preferable investment plan and the former owner may be relegated to receipt of the purchase price or other compensation.

In all, the new amendments add considerable complexity to an already complex statute—indeed, the general description provided here can only hint at these problems. In sum, the statute only seems to scratch the surface of the difficulties that will attend the carrying out of its provisions.

* * * *

It is difficult to overestimate the enormous conceptual and practical problems raised by this sweeping attempt to undo past changes in property relationships extending over the decades since 1949. Inevitably, the ambiguities of the Joint Declaration and related statutes, together with the likelihood of considerable problems of proof in individual cases, will ensure years if not decades of litigation on these property questions. The recent amendments seeking to accelerate private investment may ease some problems but, even on the most optimistic assessment, they may create many additional claims for future compensation.

Moreover, the result of these provisions—even with the Constitutional Court's decision that the 1945-49 expropriations are not to be undone—will be a massive shift of effective control of real property from residents of eastern Germany to their more prosperous fellow citizens in the west. Against the backdrop of some of the other economic problems of unification, the problems raised by the Joint Declaration may indeed mean substantial social dislocation over a number of years for the people in the east. Moreover there seems little doubt that the uncertainty engendered by this reallocation of property interests has deterred investment in the GDR: it may be difficult to encourage people to invest in eastern Germany if the property on which potential factories and offices are located may ultimately be found to belong to someone else. It is too early to know whether the statutory steps recently enacted to solve this problem will be successful.

In general, the strong property principles of conservative ideology have played a significant role in the development of these problems. First, these principles prevailed in the basic decision to

318. See *id.* § 3a(1)(2); see *supra* text accompanying notes 280-281.

undo all GDR expropriations. Second, strong property principles were important in the basic decision to adopt a general principle of return of expropriated property—rather than a general principle of compensation—although the principle of return of property has been qualified by significant exceptions. Whether these basic decisions were wise on the whole cannot yet be determined. In general, however, the positions adopted in the Joint Declaration and accompanying statutes—notwithstanding the exclusion of the expropriations under the Soviet occupation—can be seen as a victory for strong property principles supported over the years by the conservatives in the Federal Republic.

C. *Abortion*

Along with the problem of expropriated property, questions about the regulation of abortion in a united Germany evoked the most bitter and prolonged dispute. The struggle over abortion was the continuation of a political debate that had been prominent in the Federal Republic before there was any real possibility of unification, and the roots of this dispute extend back into the history of the Weimar Republic.

From an American point of view, the key to an understanding of this issue is the fact that the Constitutional Court in the Federal Republic of Germany has established a constitutionally required view of abortion that is fundamentally different from that prevailing in the United States. In 1973 in *Roe v. Wade*³¹⁹ the Supreme Court of the United States held that a general right of privacy includes a woman's right to an abortion. Under *Roe*, this right is essentially unqualified during the first three months of pregnancy; beyond that up to the point of the fetus's viability (approximately six months), it is qualified only by the state's power to regulate to preserve the health of the mother. Although the Court may have eroded the strict rules of the "trimester system" in the late 1980s,³²⁰ a woman's basic right to an abortion has not yet been rejected.

In contrast, the West German Constitutional Court issued a decision in 1975 that is, in theory at least, almost diametrically opposed to the American position.³²¹ In the German abortion case,

319. 410 U.S. 113 (1973).

320. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

321. 39 BVerfGE 1 (1975). For an edited English translation of this case, see D. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 348-59 (1989). For comparative discussions of the German and American cases, see M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 25-39 (1987); Kommers, *Abortion*

the court held that the state is under a constitutional *duty* to protect the life of the fetus and consequently the constitution *requires* that abortion remain a punishable criminal offense, in basic principle. In this case the court struck down a federal statute—enacted under a coalition led by the Social Democrats—that would have allowed a woman to obtain an abortion without criminal penalty during the first three months of pregnancy as long as she underwent counseling beforehand. The court decided that the right to life contained in article 2(2) of the Basic Law extends to fetuses and that the state's duty to protect human dignity—set forth in article 1(1)—includes a duty to protect human life. Moreover, the court decided that in practice the only way the fetus could be adequately protected was through criminal sanctions. Thus the court found that the state has an obligation to protect the fetus through a combination of two provisions, articles 2(2) and 1(1) of the Basic Law. Among other things the court indicated that a different basic resolution of the abortion question would be particularly unfortunate in light of the Nazi government's destruction of "unworthy" life.³²²

The Constitutional Court also found, however, that the right to life was not the only constitutional interest at issue. The court acknowledged that the pregnant woman also has countervailing constitutional interests, derived from the right to the free development of her personality set forth in article 2(1) of the Basic Law. These rights are presumably similar to those recognized by the Supreme Court in *Roe v. Wade*, particularly in those passages of the *Roe* opinion that refer to a woman's control over her family relationships and her future life.³²³ In the view of the West German Constitutional Court, however, those rights of personality are ordinarily outweighed by the state's duty to protect the life of the fetus. Only in particularly exigent circumstances—cases of rape, serious medical problems, congenital defects, or severe social problems for the pregnant woman—can the woman's right of personality prevail.³²⁴

In sum, therefore, the Constitutional Court found that abortion is constitutionally permissible only when certain circumstances or "indications" are present, and the West German Parliament then

and Constitution: *United States and West Germany*, 25 AM. J. COMP. L. 255 (1977); Brugger, *Abtreibung—ein Grundrecht oder ein Verbrechen?: Ein Vergleich der Urteile des United States Supreme Court und des BVerfG*, 1986 NJW 896.

322. See 39 BVerfGE at 36-37, 66-68.

323. 410 U.S. at 153.

324. See 39 BVerfGE at 48-51.

enacted a statute basically adopting the court's solution.³²⁵ Of the court's indications, the most unclear—and the most sharply debated—is the “social indication,” allowing an abortion in the case of severe social problems for the pregnant woman. In the Federal Republic the individual states ordinarily administer federal law and consequently the actual enforcement of the abortion statute is subject to significant variations. In some conservative Länder (notably Bavaria), the social indication may be comparatively difficult to assert, while in some others (particularly those governed by the SPD) it is often easier to establish. Even in the more liberal states, however, the circumstances supporting the claim must generally be certified by a physician, and the process of obtaining the exception can be seen as inherently degrading.³²⁶ Even so, the relatively liberal practice in some Länder has been bitterly criticized, and the state of Bavaria has recently filed an action in the Constitutional Court advocating a narrower view of the social exception and seeking greater rigor in its administration.³²⁷ A decision in this case could indicate whether the court's strict views of 1975 still retain currency.³²⁸

In contrast with the West German duty of the government to prohibit abortion (with noted exceptions), the GDR in 1972 adopted a statute that ordinarily allowed a woman to obtain an abortion during the first three months of pregnancy if the abortion was performed by a physician in an obstetrical clinic.³²⁹ This GDR statute thus bears some similarities to the result in *Roe v. Wade* and also to the West German law struck down by the Constitutional Court in

325. See STRAFGESETZBUCH [StGB] §§ 218, 218a, 218b, 219. Under the statute, certain “indications” can be invoked only at relatively early stages of the pregnancy. In the case of violations, the statute more frequently imposes penalties on the physician than on the woman obtaining the abortion. See generally Eser, *Reform of German Abortion Law: First Experiences*, 34 AM. J. COMP. L. 369, 374-80 (1986).

326. See, e.g., *id.* at 382 (procedure that must be followed by pregnant woman seeking abortion).

327. See Wilms, *Rechtsprobleme des Schwangerschaftsabbruchs im vereinten Deutschland*, 1990 ZRP 470, 472. The action brought by the state of Bavaria also challenges aspects of a statute providing that the costs of a legal abortion will be paid by national social insurance. The Constitutional Court has previously rejected constitutional challenges by individuals against these financing provisions (or their enforcement) on grounds of justiciability, see 78 BVerfGE 320 (1988); 67 BVerfGE 26 (1984), but this defense may not be applicable in an action brought by a state.

328. According to recent statements of the Vice President of the Constitutional Court, however, it seems unlikely that the case will be decided before 1992. See FAZ, Feb. 6, 1991, at 7, col. 2.

329. Gesetz über die Unterbrechung der Schwangerschaft, of Mar. 9, 1972, GBI DDR I 89. The preamble of the statute refers to article 20, § 2 of the 1968/74 GDR Constitution—a provision that sets forth the principle of gender equality. See Wilms, *supra* note 327, at 473.

1975.³³⁰

In their negotiations, therefore, the drafters of the Unification Treaty were faced with a clash of statutory rules. According to the law of the Federal Republic, an abortion is legal only if the presence of certain "indications" can be established, while under the GDR statute an abortion is generally permissible during the first three months of pregnancy without further limitation. In many such statutory conflicts, the Unification Treaty simply requires that the law of the Federal Republic replace that of the GDR.³³¹ In this case, however, such a resolution would have been difficult because of the strongly held popular view in the GDR—among feminists and other groups—that it was essential to retain the more liberal GDR abortion rule. Indeed, as in the United States, a liberal abortion policy had become an important social institution in the GDR. Moreover, the western Social Democrats, whose votes were necessary for the requisite two-thirds majority for the Unification Treaty, might have balked at a resolution that simply extinguished the abortion policy of the GDR. On the other hand, simply retaining the GDR rule in eastern Germany would have raised its own serious difficulties. After accession under article 23, the Basic Law—and presumably its interpretation by the Constitutional Court—applies to the former territory of the GDR and would appear to invalidate the GDR statute of 1972, just as it invalidated the West German statute of 1975.

When the drafters of the Unification Treaty addressed these problems, they found themselves confronted by political forces that seemed even more equally balanced than those relating to issues of expropriated property. Those strongly in favor of retaining the GDR rule—or perhaps even extending it to the west—were the bulk of the population in the GDR and the Social Democrats in the west, led by important women's organizations.³³² On the other hand, conservatives in the east and west could invoke the powerful role of the Constitutional Court in arguing against the retention of the GDR's first-trimester rule.

330. Interestingly, some members of the East German CDU, ordinarily a compliant bloc party under the Communist Party government of the GDR, voted against the liberalized abortion statute of 1972. This vote marked one of the very few instances in the history of the GDR—until the revolutionary days of 1989—that a legislative measure was enacted by anything less than a unanimous vote. See H. ROGGMANN, *supra* note 51, at 230.

331. See *supra* Part VIII(A).

332. See generally Frommel, *Strategien gegen die Demontage der Reform der §§ 218 ff. StGB in der Bundesrepublik*, 1990 ZRP 351 (arguing that the GDR rule could be extended to all of Germany).

Because any clear decision of this issue might have imperiled the entire Unification Treaty, the drafters adopted a compromise that postponed an ultimate resolution. In effect, the GDR will retain its previous rule until the end of 1992 at the latest. During the interim, the all-German legislature will have the task of deciding on a new rule for all of Germany.³³³ The nature of this new rule, as sketched in the Unification Treaty, is a masterpiece of ambiguity. According to the Treaty, this regulation should "better guarantee the protection of prenatal life and the constitutional resolution of the conflicts faced by pregnant women, than is the case in both parts of Germany at the present—above all, through legally assured claims of women, particularly claims for counseling and social assistance."³³⁴ The provision goes on to require that a comprehensive system of counseling offices be established in the former GDR with the financial assistance of the federal government. These offices must be able to give counseling and (apparently financial) assistance to pregnant women even beyond the point of the birth of the child.

In this compromise, the territory of the GDR retains its former rule for up to two years, but the establishment of the counseling offices during this period is clearly intended to reduce the numbers of abortions that would take place under the GDR rule. Although the requirement of counseling offices in the first two years is relatively clear, the nature of the ultimate regulation of abortions called for by the Unification Treaty is highly unclear because the provision does not state whether the future abortion statute must continue to make abortions basically illegal. The fundamental question is which side of the balance the extension of counseling and social assistance in the future abortion statute is intended principally to affect. Perhaps a sufficient network of counseling and extended social assistance might—even in the eyes of the Constitutional Court—so reduce the perceived likelihood of abortion that these measures could permissibly replace the requirement of criminal penalties. On the other hand, it could be argued that, with greater opportunities for counseling and social assistance, a narrower exception for the "social indication" could be constitutional and as a result more abortions could be criminalized. The Unification Treaty is silent on the choice between these contrary possibilities.³³⁵

333. See Unification Treaty, *supra* note 203, art. 31, § 4.

334. *Id.*

335. The treaty was somewhat more successful in resolving a related issue that was vigorously debated during the negotiations. An early proposal stated that during the two-year interim period, the GDR's more liberal abortion rule would apply to residents

The basic problem with this provision, however, is that the two-year compromise of the Unification Treaty, without more, might well be found to violate articles 1(1) and 2(2) of the Basic Law under the Constitutional Court's abortion decision of 1975. The Unification Treaty, after all, retains for up to two years a GDR statute closely resembling the statute that was held unconstitutional in that decision. In an attempt to deal with this and similar problems, drafters of the Unification Treaty included a general provision that seeks in effect to suspend certain of the provisions of the Basic Law during an interim period, through an amendment of the Basic Law itself.³³⁶ Although this provision has a bearing on numerous other parts of the Unification Treaty, it will be discussed here because of its application to this particularly contentious problem.

Through adoption of the Unification Treaty by the requisite two-thirds margin, a new article 143(1) has been added to the Basic Law, stating as follows:

For the period up to December 31, 1992 (but not longer), law in [the territory of the former GDR and East Berlin] can deviate from determinations of this Basic Law, so long as and to the extent that, as a result of differing circumstances, full conformity with the order of the Basic Law cannot yet be achieved. [Any such] deviations may not violate article 19(2) and must be consistent with the principles

of the former territory of the GDR only, and the stricter western rule would continue to apply to abortions obtained by western residents in the former GDR. See FR, July 20, 1990, at 1, col. 1. This provision was intended to discourage travel by women from the west to the east for the purpose of obtaining an abortion. Opponents argued that this proposed rule contravened the principle that criminality should be determined by the law of the territory in which the act occurs, but proponents replied that the law of the Federal Republic already prohibits citizens of the Federal Republic from obtaining abortions even where they are legal, for example in Holland. Such a rule might also impose onerous obligations on physicians to determine the residence of the patient seeking an abortion and to examine whether an apparent residence was recently established in the east for the purpose of circumventing the rule. The drafters of the Unification Treaty ultimately decided to abandon the residency requirement in this instance, and sought to provide that an abortion obtained in the east by a western resident would be measured by the more liberal rule of the GDR. See Wilms, *supra* note 327, at 474 (arguing, however, that this resolution was not reflected with requisite clarity in the treaty language).

336. It is not entirely clear that an amendment of the Basic Law was strictly necessary to accomplish this result. Some commentators argue that article 23 itself contemplates the possibility of a gradual, incremental introduction of the Basic Law into the territory that is acceding to the Federal Republic under that provision. See, e.g., 2 GRUNDGESETZKOMMENTAR, *supra* note 7, art. 23, No. 27. When the Saarland acceded to the Federal Republic, for example, certain provisions of the Basic Law were introduced into that territory in an incremental manner. See Rauschning, *supra* note 10, at 401; Stern, *supra* note 14, at 37-38.

specified in article 79(3).³³⁷

Presumably the interim regulation on abortion meets the basic test of the first sentence of article 143(1), if serious objections among the population constitute the kind of "differing circumstances" that prevent immediate conformity with the Basic Law. The second sentence of article 143(1), however, presents more serious problems. Article 19(2) of the Basic Law—referred to in that sentence—states that "in no case may a Basic Right be disturbed in its essential content." This provision, which applies primarily to Basic Rights that are subject to qualification by statutory law, indicates that each Basic Right has a fundamental core that may not be disturbed. It could be argued that the GDR law of abortion disturbs the Basic Rights set forth in articles 1(1) and 2(2) of the Basic Law, "in [their] essential content," and therefore is not saved by the two-year exception contained in the first sentence of new article 143(1).

The provisions of article 79(3)—also referred to in article 143(1)—may raise an even greater obstacle. Article 79(3), a central provision of the Basic Law, qualifies the power of constitutional amendment.³³⁸ According to this provision, it is impermissible to enact any amendment of the Basic Law "through which the division of the federation into states, the basic participation of the states in legislation, or the principles laid down in articles 1 and 20 [of the Basic Law] would be affected."³³⁹ Because the West German abor-

337. Unification Treaty, *supra* note 203, art. 4, § 5. As set forth in the Unification Treaty, new article 143 of the Basic Law contains two other sections. Article 143(2) extends the interim suspension of the Basic Law to December 31, 1995, in cases of non-compliance with various structural provisions of the Basic Law such as those relating to federalism, administration, the judiciary, and the financial system. This provision appears to rest on the assumption that in the case of governmental structure, deviations from the Basic Law often do not evoke the most central constitutional concerns and can be tolerated for a somewhat longer period than other deviations. Moreover, the creation of conforming governmental structures in the former GDR may be a long and difficult process. In contrast, deviations from any of the Basic Rights are subject to the two-year interim period set forth in the new article 143(1).

The Unification Treaty also sets forth a new article 143(3) which seeks to confirm the permanence of the 1945-49 expropriations in the Soviet occupation zone. See *supra* Part VIII(B).

338. See *supra* note 267.

339. Articles 1 and 20—whose basic "principles" are preserved from amendment by article 79, § 3—can be viewed as the cornerstones of the Basic Law. Article 1 protects human dignity, and article 20 sets forth the basic characteristics of the Federal Republic as a "democratic and social federal state" and also provides for popular sovereignty, separation of powers, and the rule of law. Article 79, § 3 was adopted in reaction to the denial of human rights and democracy under the Nazis. It reflects the view that some principles of human rights (and some basic democratic organizational principles) are so fundamental to a free society—and the consequences of deviation from these principles

tion case rested in part on the guarantee of human dignity contained in article 1(1), it is at least arguable that principles laid down in article 1 would be "affected" by permitting any regulation of abortion that is less stringent than the system required by the Constitutional Court. As a consequence, it could be argued that no constitutional amendment can change the decision of the Constitutional Court on this point. Indeed, this would presumably be the case whether or not article 79(3) were specifically mentioned in article 143(1).³⁴⁰ On the other hand, it could be argued that abortion regulations, even if they implicate human dignity to some extent, do not affect that constitutional concept in its essence, and therefore the legislature in enacting constitutional amendments on this subject has substantial discretion in striking an appropriate balance. Perhaps the constitutional lawmaker should also have considerable latitude in determining whether counseling or criminalization, or some other form of regulation, would most effectively decrease the number of abortions in accordance with the general imperatives of the Court's decision.³⁴¹

These issues—the meaning of the new article 143(1), and the question of whether the interim abortion measure can be justified by a constitutional amendment—may be debated before the Constitutional Court. In any case, the resolution adopted in the Unification Treaty is in reality no resolution at all. By 1992, it will be necessary for the parliament to revisit the question of abortion. Shifting political views in the Federal Republic may well suggest that there will be substantial pressure for a new, all-German abortion law resembling

would be so dire—that these principles should not be alterable no matter what degree of super-majority may be in favor of their amendment at any particular time.

340. See, e.g., Stern, *supra* note 135, at 290-91.

341. No case in the Constitutional Court has passed upon the status of the Court's abortion decision under the limitations on amendment set forth in article 79, § 3 of the Basic Law. In reviewing a constitutional amendment in another area, however, the Constitutional Court interpreted the reach of article 79, § 3 quite narrowly and rejected a claim that the amendment impermissibly affected human dignity. In the Security Surveillance Case, 30 BVerfGE 1 (1970), article 10 of the Basic Law had been amended in order to permit "national security" surveillance without requiring that the subject of the surveillance ultimately be notified and without allowing review of the surveillance in the ordinary courts. See *infra* note 419. The constitutional amendment was attacked as invalid under article 79, § 3, in part on the ground that the amendment treated people under surveillance as "objects" and consequently violated human dignity. The court upheld the constitutional amendment, suggesting that article 79, § 3 only prohibited amendments that moved more clearly in the direction of a totalitarian dictatorship. For a more recent discussion of article 79, § 3, perhaps indicating a broader scope for its provisions, see Decision of Constitutional Court, Apr. 23, 1991, *supra* note 268.

the GDR statute.³⁴² If this is the case, the Constitutional Court will once again be forced to confront a problem that in West Germany, as in the United States, seems not only politically intractable, but also in the forefront of popular consciousness.³⁴³

D. *The Civil Service in Eastern Germany*

The problem of reforming the civil service in the GDR requires an understanding of the special nature of the traditional civil service as it now exists in the Federal Republic. The civil service (*Beamten-tum*) has a special, guaranteed position in the Basic Law derived from the concept of an orderly *Rechtsstaat*—a state based on expert application of general legal rules that had its origin in eighteenth

342. Thus although the Free Democratic Party (FDP) is currently allied with the conservative CDU in the coalition government, FDP members of parliament are preparing a draft statute that guarantees a woman's free choice of abortion (after counseling) within a specified period following conception. See FAZ, Mar. 21, 1991, at 2, col. 2; FAZ, Feb. 6, 1991, at 7, col. 2.

343. At the time that the Unification Treaty was being negotiated, Bundestag President Rita Süßmuth (a member of the CDU) proposed a "third way" between the three-month abortion period of the GDR and the "indication" exceptions of the Federal Republic. Süßmuth proposed that the Unification Treaty declare that a woman seeking an abortion should undergo compulsory counseling and, if she has done so, should then be free to choose an abortion. At the same time, both the nature of the counseling and the opportunities for social assistance for mother and child should be improved. See FR, July 31, 1990, at 10, col. 1 (text of Süßmuth proposal). This proposal gained the support of some important political figures—although not all supporters believed that it should be inserted into the Unification Treaty. See, e.g., FR, July 30, 1990, at 4, col. 2. The problem with this proposal, however, is that the three-month solution declared invalid by the Constitutional Court in 1975 also included a requirement of counseling before an abortion could be performed. If the Süßmuth proposal lacked a three-month period, it would seem even less likely to survive the Court's scrutiny—but in any case it would seem invalid unless the Court were to change its position.

In March 1991, Süßmuth presented a refined version of her proposal which resembled a resolution offered by the FDP. See FAZ, Mar. 9, 1991, at 4, col. 2; cf. *supra* note 342. Süßmuth's revised proposal made clear that an abortion would not be punishable if it took place within the first three months of pregnancy and if the pregnant woman had received mandatory counseling. The person doing the counseling must be someone other than the doctor who would perform the abortion—this requirement would obviate one serious flaw that the Constitutional Court had perceived in the statute found unconstitutional in 1975. Moreover, the pregnant woman must certify that, in her "best conscience," the abortion is necessary—another possible distinction from the earlier, unconstitutional statute. Thus the pregnant woman would decide whether the requisite social or psychological "situation of necessity" is present. DER SPIEGEL, May 13, 1991, at 28-30. Süßmuth would combine this proposal with improved financial assistance for a woman and child following birth. FAZ, Mar. 9, 1991, at 4, col. 2.

According to Süßmuth, the coming debate over abortion legislation may lead to serious divisions in the CDU. Indeed many CDU members take positions on abortion that are much more restrictive than Süßmuth's view. One important CDU figure, for example, seeks to abolish public financing for legal abortions. *Id.*

century absolutism.³⁴⁴

The basic idea of the traditional *Beamtentum* is that the civil servant (*Beamter*) owes a special duty of loyalty and devotion to the state. In this way the modern state steps into the former role of the monarch, who also received a high degree of loyalty from his officials. In return, the state provides the *Beamter* with life tenure—after successful completion of an initial probationary period—as well as a generous salary and an appropriate pension. The salary of the *Beamter* must correspond to the social standing of the profession, and the *Beamter* has a constitutional claim for a salary at that level, in addition to special supplements for children.³⁴⁵ A hierarchical structure in the public administration is intended to ensure that individual decisions affecting citizens are made in accordance with law, but some officials other than administrators, such as teachers in public secondary schools and universities, are also part of the *Beamtentum*. Moreover, judges are viewed as bearing some resemblance to civil servants—making more or less routine applications of general rules to specific cases in many instances. While judges are not considered part of the *Beamtentum*, a number of rules applicable to judges are similar to those applicable to civil servants.

In contrast with this highly developed and formalized system of administration, the public service of the GDR (which did not include life tenure) was often under the direct control of party cadres. The system of party control was dismantled after the revolutionary events of autumn 1989, but many of the former administrators and judges, including some who may have participated in instances of political oppression, remained in their offices up to the point of unification and beyond.

It was clear, therefore, that a reform of the civil service in the GDR was necessary. Questions relating to reform fell into two basic categories: the general structure of the civil service in eastern Germany, and the related but separate question of its future personnel.

With respect to the structure of the civil service, it seemed advisable that the territory of the former GDR should ultimately have the same administrative structure as the rest of the nation, including

344. See GG art. 33. Indeed, in the Parliamentary Council that drafted the Basic Law in 1948-49—as in earlier constitutional assemblies—a significant number of representatives were civil servants. The Weimar Constitution also protected the special role of the *Beamtentum*. See WRV art. 129.

345. In the Basic Law, these and other rights are derived from an expansive interpretation of article 33, which states that the “law of the public service is to be regulated in a manner that takes into account the traditional principles of the professional civil service (*Berufsbeamtentum*).” See GG art. 33, § 5.

the same categories of administrative officers: the two sections of the unified nation should not have different administrative systems, beyond the variations generally permitted among the West German Länder. Accordingly, the Unification Treaty indicates that the general principles of article 33 of the Basic Law, authorizing and regulating the *Beamtentum*, should extend to the former GDR.³⁴⁶ By implication, therefore, the Unification Treaty distinguishes officers that are “*Beamte*” from other government employees. In taking this position, the framers of the Treaty rejected proposals to reform or abolish the traditional civil service system, as a part of the process of unification. Proposals for abolition have been made over several decades, principally by the Social Democrats, on the ground that the *Beamtentum* is an undemocratic and retrograde institution that preserves a separate and distinct class of civil officers standing apart from the population. These proposals have been singularly unsuccessful over the years and they did not fare any better in the process of unification.³⁴⁷

An extension of the West German civil service system to the former GDR provides both advantages and disadvantages for administrative officials in the east. Life tenure and substantial salaries were lacking in the GDR administration, and GDR officials therefore pressed for the immediate adoption of the western system. Yet the government of the Federal Republic was unwilling to extend the benefits of tenured civil service to existing GDR officials on an automatic basis. Two separate but related problems gave rise to these concerns. First, the government of the Federal Republic feared that many GDR officials lacked the qualifications necessary to perform administrative functions at the level of the West German civil service. These doubts were perhaps even more acute in the case of judges, whose future tasks—applying the laws of the Federal Republic of Germany—required thorough training in the West German

346. According to article 20 of the Unification Treaty, the task of carrying out public functions is to be conferred on *Beamten* “as quickly as possible,” in accordance with the special interim rules set forth in attachment 1 of the Treaty. Moreover, a memorandum accompanying the Unification Treaty emphasizes the importance of the general principles of the public service set down in article 33 of the Basic Law, and notes that in principle this provision will apply to the GDR as soon as the GDR accedes to the Federal Republic—although an interim period will be necessary before the provision can be fully realized in practice. *Denkschrift zum Einigungsvertrag*, Bundestag Drucksache 11/7760, at 364-65, reprinted in 2 K. STERN & B. SCHMIDT-BLEIBTREU, *supra* note 141, at 143-44. See generally Goerlich, *Hergebrachte Grundsätze und Beitrittsbeamtentum*, 1991 JZ 75.

347. See Nicksch, *Die Einführung des Berufsbeamtentums im Gebiet der früheren DDR nach dem Einigungsvertrag*, 1990 DtZ 340, 341-42.

legal system, an education that the GDR judges lacked.³⁴⁸ Even more serious problems arose from the political past. Some judges and other officials had taken part in acts of political oppression under the old regime or had worked actively for the Ministry for State Security (Stasi). There was general agreement that such officials should not be employed further in the public service.³⁴⁹

In order to resolve these questions on a case-by-case basis, the Unification Treaty requires that any present East German civil servant successfully undergo a three-year probationary period before achieving the lifetime status of *Beamter*.³⁵⁰ Supervisory officials in the administration ultimately will decide whether the applicant has

348. Although in 1949 the statutory law of the Federal Republic and that of the GDR bore numerous similarities, the legal systems grew apart over the years. The German Civil Code was in use in the east as well as the west after 1949, for example, but the Code was substantially amended and ultimately replaced in the east in 1975. See, e.g., Markovits, *Socialist vs. Bourgeois Rights—An East-West German Comparison*, 45 U. CHI. L. REV. 612, 613 n.3 (1978). In consequence, after unification became a certainty, many judges (as well as lawyers) in the GDR began to study the law of the Federal Republic in the evening and on weekends, attending lectures delivered by lawyers from the west.

349. Similar questions had arisen at the outset of the Federal Republic, with respect to members of the public service under the "Third Reich"—many of whom were denied jobs or pensions as a result of denazification proceedings or otherwise. In important early decisions, the Constitutional Court held that these civil servants had lost their tenure rights because the Nazi government transformed the public service into an organ serving the Nazi party and its leader. This transformation was inconsistent with traditional ideas of neutral service to an abstract state, upon which the principles of life tenure depended. See 6 BVerfGE 132 (1957) (Gestapo Case); 3 BVerfGE 58 (1953) (Civil Servant Case); see generally Baade, *Social Science Evidence and the Federal Constitutional Court of West Germany*, 23 J. POL. 421 (1961). On the other hand, the government of the Federal Republic provided a measure of pension support or employment for most of these former public employees. See *id.* at 433-34; GG art. 131.

350. Unification Treaty, *supra* note 203, attachment I, ch. XIX(A), para. III(3)(b). This probationary period can be reduced on a case-by-case basis, but cannot be reduced to less than two years. Moreover, all employees—not only those applying for permanent civil service status—may be dismissed during the first two years after unification for failure to possess the required qualifications or for participation in past acts of oppression. See *infra* text accompanying notes 352-355 and note 355.

The present judges in eastern Germany are subject to a somewhat more complex procedure. According to the Unification Treaty, the former GDR judges are subject to an initial screening by special "judicial appointments committees" composed of judges and elected officials. A judge who is successful in this initial screening is then required to undergo the three-year probationary period required of all GDR officials. See Brachmann, *Die Gerichtsverfassung im Übergang—Zur Regelung auf dem Gebiet der ehemaligen DDR nach dem Einigungsvertrag*, 1990 DtZ 298, 304. In the territory of the former GDR, the present judges may continue to decide cases until they have been removed by the judicial appointments committee or otherwise during the probationary period. See generally Unification Treaty, *supra* note 203, attachment I, ch. III(A), para. III(8); FAZ, Nov. 8, 1990, at 14, col. 2; FR, Oct. 29, 1990, at 4, col. 1; FR, Oct. 12, 1990, at 8, col. 1. In Berlin, however, from the date of unification, all judicial activity has been conducted by the judges of West Berlin, and the judges of the former East Berlin will not decide cases

met the stringent requirements for lifetime tenure, and special interim rules are provided to take into account the fact that few (if any) applicants from the GDR will have satisfied the specific requirements for education and training contained in West German law.³⁵¹ The difficult question of how to measure an official's participation in oppressive political acts is approached in an interesting manner. Under the Unification Treaty (Attachment I), it is possible grounds for immediate dismissal if the employee has in the past

violated the principles of humanity or the rule of law, in particular [if the employee] has violated the human rights that are protected by the International Covenant on Civil and Political Rights of December 19, 1966 or the principles contained in the Universal Declaration of Human Rights of December 10, 1948.³⁵²

Thus, a candidate's participation in oppressive acts will be primarily determined under the provisions of these United Nations human rights instruments.³⁵³ Moreover, an official who "was active" on behalf of the Ministry for State Security could also be subject to immediate dismissal.³⁵⁴ The provision requires dismissal if retaining an

while their suitability for entry into the judiciary is individually examined. See Majer, *Die Überprüfung von Richtern und Staatsanwälten in der ehemaligen DDR*, 1991 ZRP 171, 176.

In general, the procedure set forth for the initial screening of judges has proved to be deeply problematic. Although the Unification Treaty required that the process be completed by April 15, 1991, numerous problems in the formation of the judicial appointment committees made this deadline impossible to meet. See FAZ, Feb. 18, 1991, at 5, col. 4; FAZ, Feb. 9, 1991, at 4, col. 3. Indeed one new state, Mecklenburg-West Pomerania, has sought to do away with the judicial appointment committees entirely. FAZ, June 6, 1991, at 4, col. 5. Moreover, a particularly difficult problem arises because under a policy of the Modrow government, judges and prosecutors in the GDR had access to their individual personnel files and were able to remove damaging items from those files. See FAZ, Feb. 9, 1991, at 4, col. 3; FAZ Nov. 8, 1990, at 14, col. 2.

351. See Nicksch, *supra* note 347, at 343.

352. Unification Treaty, *supra* note 203, attachment I, ch. XIX(A), para. III(1), § 5(1).

353. These two documents, which were adopted by the General Assembly of the United Nations, contain comprehensive guarantees of fair procedures and prohibitions against political discrimination and invasions of privacy—all of which might be relevant in this context. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). (The GDR ratified the 1966 Covenant in 1974, but GDR leaders argued that the document was binding in international law only and had no internal effect. Mampel, *supra* note 65, at 1379-80.) Because these provisions are stated in very broad terms, judicial interpretation of their scope may eventually be required in order to determine whether the attempted dismissal of any given employee has been undertaken in accordance with law. If so, such adjudication could be a rare example of the interpretation of these United Nations human rights instruments by a national court.

354. Unification Treaty, *supra* note 203, attachment I, ch. XIX(A), para. III(1), § 5(2).

employee under such circumstances would be “unreasonable.”³⁵⁵

The text of the Unification Treaty, however, seems to leave one crucial question unanswered—at least in any express manner. Except for the provisions noted above, the Treaty does not specify how the political past of former GDR officials should be treated. Indeed, the provision allowing immediate dismissal of officials who worked for the Stasi or participated in human rights abuses does not exclude the possibility that other aspects of an official’s political past might be taken into account in determining whether the official should be accepted into the *Beamten*um.

From the beginning of the Federal Republic, and with particular rigor in the years following 1972, the institution of the public service has been characterized by a strict application of the principle of “loyalty to the constitution.” The basic public service law of the Federal Republic—coupled with a special “Radicals Decree” in 1972—has required that persons be excluded from the public service if they cannot “guarantee that [they] will at all times support the free democratic basic order.”³⁵⁶ Although this doctrine has sometimes excluded members of right-wing parties from the public ser-

Stasi records, which might otherwise be sequestered pending a final statutory regulation of their disposition, are specifically made available for this inquiry. *Id.* attachment I, ch. II(B), para. II(2)(b), § 2(1)2(b)-(c).

In addition to possible exclusion from the public service, individuals who undertook espionage on behalf of the Stasi may remain subject to criminal penalties under the law of the Federal Republic. A statute of amnesty, proposed by the Federal Justice Minister before unification, was withdrawn by the government. FR, Sept. 20, 1990, at 1, col. 1.

355. Unification Treaty, *supra* note 203, attachment I, ch. XIX(A), para. III(1), § 5. Although this provision is directed in the first instance toward ordinary employees, a separate section of the Unification Treaty also makes it applicable to *Beamten*. *Id.* attachment I, ch. XIX(A), para. III(3)(d). See Nicksch, *supra* note 347, at 344.

356. Section 7 of the Federal Law of the Public Service states that “only those [persons] may be taken into the *Beamten* relationship who . . . can guarantee that [they] will at all times support the free democratic basic order in the sense of the Basic Law.” *Bundesbeamtengesetz*, in the version of Feb. 27, 1985, BGBl I 479 (as amended). The same requirement is contained in § 35 of the Public Service Framework Law, applicable to the public service of the *Länder*. *Beamtenrechtsrahmengesetz*, in the version of Feb. 27, 1985, BGBl I 462 (as amended). Although the precise meaning of the phrase “free democratic basic order” is debatable, it is generally taken to refer to a political order of the western, liberal-democratic type, acknowledging the rule of law and affording protection of individual rights. See generally 2 BVerfGE 1 (1952).

In 1972 during a period of alarm over “radical” political activity, the government of Chancellor Willy Brandt, along with the minister-presidents of the West German states, issued the “Radicals Decree.” This decree was based on the statutory provisions described above, but appeared to contemplate particularly strict enforcement of those provisions. The text of the Radicals Decree is reprinted in *DER ABSCHIED VOM EXTREMISTENBESCHLUSS* 84 (H. Koschnick ed. 1979). For a decision of the federal government in 1979 relaxing aspects of the procedure that had grown up under the Radicals Decree, see *id.* at 173-75.

vice, its principal use over the past decades has been to exclude members of the West German Communist Party (DKP), or members of other Communist splinter groups, on the ground that the necessary requirement of loyalty had not been met.³⁵⁷

This invocation of the principle of loyalty, which has been compared to aspects of the McCarthy period in the United States, has been the subject of bitter political dispute over the years. Its application has apparently been most vigorous and most significant in the teaching profession, as almost all teachers and university professors in the Federal Republic must be members of the public service. One interesting general issue for the future is the extent to which this principle will continue to be applied against members of Communist parties, now that the "danger" from those sources has been shown to be without much strength.

For our purposes, however, the specific question is whether—or how—these principles will be applied to applicants for the civil service from the former GDR during their three-year probationary period. A stringent application of these principles might result in excluding a high percentage of former GDR civil servants because of the prevalence of former SED members in their ranks.³⁵⁸ But the wholesale exclusion of former GDR officials—and presumably their (at least temporary) replacement by candidates from the west—seems to be an unacceptable method of reconstituting east German political life.³⁵⁹

It is unfortunate that the Unification Treaty gives no detailed

357. The Constitutional Court has found that these statutory and administrative rules reflect a *constitutional* requirement of loyalty applicable to members of the public service. For this view and the general constitutional principles applicable to these exclusions, see 39 BVerfGE 334 (1975) (Civil Servant Loyalty Case). An edited English version of this case, along with commentary, appears in D. KOMMERS, *supra* note 321, at 232-38. Although the special provisions of the Radicals Decree have been abandoned in a number of West German Länder, the underlying loyalty principles relating to the public service remain in effect in all German jurisdictions.

358. Although the controlling decision of the Constitutional Court suggested that party membership is only one element to be taken into account in making the ultimate judgment, see 39 BVerfGE 353-55, 359-60, membership in the Communist Party was very often the primary factor in cases of exclusion.

359. Thus, the West German Interior Minister has stated:

Even if most of the two million persons active in the public administration of the GDR have been members of the SED, they must have a fair chance to "find themselves" again in the process of German unification. They too belong to a unified Germany, and we do not want to exclude a chance for a better future, even for them.

Debate in German Bundestag, *quoted in* Nicksch, *supra* note 347, at 343. *But see* FAZ, Nov. 23, 1990, at 15, col. 1 (letter from West Berlin judge suggesting that East German judges—because of their education, almost universal SED membership, and required

guidance on the future application of the loyalty doctrine. The Treaty states that the western public-service law will continue in effect in the territory of the former GDR with certain "modifications," two of which are the human rights and Stasi rules. As noted above, this language does not state that the grounds contained in these provisions constitute the only political or quasi-political grounds for exclusion. Certainly, the general loyalty rules remain part of the federal Civil Service Law.³⁶⁰

Perhaps it could be argued that the human rights and Stasi rules were intended to be the principal political qualifications applicable to former GDR officials and that the more general loyalty rules should apply only in extreme cases. It could also be argued that the PDS—the successor of the SED—is now a reformed, democratic party and that the revolutionary changes in the GDR (and subsequent unification) should neutralize damaging inferences that might otherwise be drawn even from past SED membership. On the other hand, according to the Constitutional Court, the judgment as to qualifications is to be made with respect to each applicant individually; it would not be alien to the spirit of past patterns in the application of the loyalty doctrine if former SED membership, for example, were to suggest that the internal political culture of the applicant is insufficiently democratic to permit acceptance into the public service. Some might argue that similar inferences should arise from present membership in the PDS. Parallels might even be drawn with the Weimar Period in which, under a democratic constitution, the undemocratic political views of many judges and civil servants were said to have contributed to the weakening of the republic and the later rise of a totalitarian system.³⁶¹

cooperation with the Stasi—most likely cannot "guarantee that they will at all times support the free democratic basic order in the meaning of the Basic Law").

360. Moreover, with respect to judges, a resolution of the reformed GDR-Volkshammer specifically required that a judge seeking continued employment possess "loyalty to the free, democratic, federal, social and ecologically-oriented state under the rule of law (Rechtsstaat)." See Beschluß der Volkskammer der DDR zum Richtergesetz—Ordnung über die Bildung und Arbeitsweise der Richterwahlausschüsse—of July 22, 1990, § 5(2), GBl DDR I 904, 905. This provision remains in effect under the Unification Treaty. See Unification Treaty, *supra* note 203, attachment I, ch. III(A), para. III(8)(o).

361. What inferences would ultimately be drawn from membership in the PDS remained unclear in the months immediately following unification. In December 1990, a majority of the directors of the internal security agencies of the Länder voted not to subject the PDS to security surveillance, for the present at least. In this vote, however, the important states of Bavaria and Baden-Württemberg dissented. Moreover, the Bavarian Minister of the Interior argued that the PDS should be classified as "inimical to the constitution" (verfassungsfeindlich). See FAZ, Dec. 15, 1990, at 5, col. 3; see also FAZ,

In this connection, a provision in the documents accompanying the conclusion of the Two Plus Four negotiations is of particular interest.³⁶² In a letter delivered to the foreign ministers of the four Allied powers, GDR Prime Minister de Maizière and Foreign Minister Genscher of the Federal Republic made the following representation:

In the united Germany, too, the free democratic basic order will be protected by the Constitution. It provides the basis for ensuring that parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order as well as associations which are directed against the constitutional order or the concept of international understanding can be prohibited. This also applies to parties and associations with National Socialist aims.³⁶³

The second sentence of this section basically repeats language contained in articles 21(2) and 9(2) of the Basic Law, which authorize the banning of political parties and other associations whose goals are contrary to the fundamental principles of the "free democratic basic order." Although these sections do not explicitly authorize exclusions from the civil service, articles 21(2) and 9(2) are closely related to the rules excluding applicants on political grounds because membership in radical political groups has generally formed the centerpiece of evidence leading to exclusion.³⁶⁴ The letter of de Maizière and Genscher could thus raise an implication that the principles of loyalty will in any case continue to exclude members of far right-wing groups from the public service: such a result might be inferred from the last sentence of the section, which specifically mentions "parties and associations with National Socialist aims."

Dec. 17, 1990, at 4, col. 4. Such a classification could give rise to strong inferences against the loyalty of PDS members applying for positions in the civil service. *See also* FAZ, Mar. 15, 1991, at 2, col. 5 (Interior Minister of the State of Hesse also suggests that there are grounds to suspect that the PDS "is directed against the free democratic basic order and thus follows goals that are inimical to the constitution").

362. For these negotiations and the resulting treaty, see *infra* Part X(D).

363. Letter from Lothar de Maizière and Hans-Dietrich Genscher to the Allied foreign ministers, Sept. 12, 1990, *reprinted in* Treaty on the Final Settlement with Respect to Germany, S. EXEC. REP. NO. 33, 101st Cong., 2d Sess. 21 (1990) (as translated in S. EXEC. REP.).

364. It was once argued that article 21 of the Basic Law *prohibited* exclusions from the public service based on membership in a radical political party—until that party was actually found unconstitutional by the Constitutional Court, as provided for in article 21, § 2. This argument was rejected by the Constitutional Court in 1975. *See* 39 BVerfGE 334 (1975). In any event, the relationship between the principles lying behind these articles and political exclusions from the public service remains clear.

On the other hand, the language of the second sentence—referring to the free democratic basic order—is general in nature and has often been applied to left-wing groups in the Federal Republic. This language, therefore, could raise the implication that the principles of loyalty might also be applied to exclude present members of Communist parties and perhaps even former members of the SED from the public service.³⁶⁵

Throughout the recent history of the Federal Republic, the role of the civil service—and in particular the difficult problem of the Radicals Decree in the 1970s—has evoked bitter controversy. At times it has seemed that the conservatives pushing to enforce the Radicals Decree in such crucial institutions as the secondary schools and universities were seeking not only to protect the state against what they considered subversive influences, but also more generally to ensure that the center of political discourse in the Federal Republic did not move further to the left. Now that any possible political dangers from the East Bloc have faded—and the GDR has become a part of the Federal Republic itself—it will be interesting to observe how the loyalty principles are enforced in the Federal Republic in the future. Continuation of vigorous enforcement could reinforce suspicions that these principles were being used for more general political purposes. These questions could be raised in a most insis-

365. The issue of banning political parties also assumed some prominence in the last days of the GDR. Of course, under the SED regime, all parties except the SED itself and the four traditional bloc parties were in effect banned. Indeed, the new reform parties or movements initially faced the hostility of the Central Committee of the SED, which declared that the reform group "New Forum" stood in opposition to the values of the GDR Constitution. See WIR SIND DAS VOLK, *supra* note 14, at 78-80, 112. After the principle of free formation of parties was in effect accepted in late 1989, many argued that far right-wing parties should nonetheless be prohibited. This discussion focused principally on the "Republicans," a far right-wing group that had experienced some success in the Federal Republic and sought to establish itself in the GDR. Indeed, this party was banned from participation in the Volkskammer election of March 18, 1990, but its prohibition was later rescinded. See *Umschau*, 1990 DA 1321, 1327.

This issue was also treated with some care in the Round Table draft of a new constitution for the GDR. See *supra* note 67. The provision for excluding political parties in the Round Table draft has a somewhat narrower focus and seems to be more qualified than the rather sweeping provision in article 21, § 2 of the Basic Law. Under the Round Table draft, a party can be prohibited or excluded from an election if it "systematically and persistently attacks human dignity in its program or if, through [its] activity, [it] similarly infringes the principles of an open and nonviolent process of the forming of political will—so long as the dangers for the process of forming the political will cannot otherwise be avoided." RT-ENTWURF, *supra* note 59, art. 37, § 4. The constitutional court is to decide upon exclusions and, before a party is so excluded, neither it nor its members can suffer any governmental disadvantage; moreover, the civil and political rights of party members are not to be affected by a judicial exclusion of the party. *Id.*

tent manner by the necessity, over the coming years, of reviewing and evaluating thousands of new applicants for the civil service from the GDR.

* * * *

One additional issue of great importance relating to the civil service in the East German universities has developed in the months following unification. Under the Unification Treaty the governments of the five new eastern Länder have asserted the authority to dissolve various "faculties" (departments) of the East German universities if they believe this step to be appropriate.³⁶⁶ The Treaty required the Länder to take these steps by January 2, 1991. The governments of the eastern Länder have accordingly dissolved numerous faculties in the social sciences and law—faculties that they believed were susceptible to influence and control by the former SED apparatus remaining in office. These governments apparently believed that the faculties were (by virtue of their subject matter) so deeply influenced by the political thought of the old regime, and in general so unlikely to be reformed from within, that the preferred response was total dissolution.

Accordingly, almost all of the law faculties in the former GDR have been dissolved. At the Humboldt University in East Berlin, the faculties of law, economics, history, education, and philosophy have been dissolved.³⁶⁷ Here as elsewhere, however, certain dissolved faculties are being swiftly reconstituted with new personnel, and the former members of these faculties must now reapply for new positions. Although doubtless some of the former professors will be re-employed, the chances for most do not seem bright. At the outset, therefore, it seems likely that many of the open faculty positions will be occupied—either on a temporary or permanent basis—by candidates from the west.

This upheaval—only one of the many that face the citizens of the east—has evoked protests and demonstrations by students in Berlin and elsewhere.³⁶⁸ Moreover, some commentators have argued that the technique of first dissolving a department, and then immediately reconstituting the department with new personnel cho-

366. For general provisions authorizing the dissolution of certain GDR governmental units (including those relating to education) on or after unification, see Unification Treaty, *supra* note 203, art. 13; *id.* Protocol to art. 13. For the status of the personnel of a dissolved governmental unit, see *id.* attachment I, ch. XIX(A), para. III(1), §§ 2-3; see also *infra* note 369.

367. See FAZ, Dec. 27, 1990, at 8, col. 2.

368. See FAZ, Jan. 3, 1991, at 2, col. 2.

sen by university or government officials, represents an illegal (or even unconstitutional) attempt to evade other provisions of the Unification Treaty which contemplate an individual evaluation of each official before a decision is made on dismissal or retention.³⁶⁹

The debates over these dissolutions reflect a theme that recurs in many other constitutional problems arising from unification: In the process of attempting to merge the two parts of Germany, how much of the eastern culture and society should be reformed as worthless or malign, and how much should be retained as representing elements of value.

IX. CONSTITUTIONAL PROBLEMS OF THE FIRST ALL-GERMAN ELECTION

The questions surrounding the first all-German Bundestag election were closely related to some of the central issues of unification. The forces prevailing in this election would guide the nation through the crucial post-unification period—in which the principles negotiated and set forth in the Unification Treaty and the Two Plus Four agreement would actually be applied, and the enormous long-

369. For criticism of this technique of dissolution, see Konzen, *Die "Abwicklung" und der Rechtsstaat*, FAZ, Feb. 12, 1991, at 10, col. 1; Battis, Correspondence, FAZ, Dec. 27, 1990, at 6, col. 2; for a contrary view, see Meier, *Lieber abwickeln*, FAZ, Dec. 21, 1990, at 33, col. 1.

The dissolution of the university faculties can be viewed as a special aspect of a broader problem. Because western authorities viewed the East German Civil Service as grossly inflated, many administrative offices and bureaus were dissolved upon unification. The result of this action was that between 300,000 and 600,000 employees—precise figures were not available—would receive 70 percent of their salary for six or nine months, but after that period their government employment would end in most cases.

In a recent decision, the Constitutional Court held that these massive layoffs were constitutional. See Decision of Constitutional Court (First Senate), Apr. 24, 1991, 1991 EuGRZ 133; see also FAZ, Apr. 25, 1991, at 1, col. 2. The Court acknowledged that the Federal Republic was the legal successor of the GDR with respect to employment relations; therefore, these relations did not automatically cease at the moment of unification, as the government had argued. Yet, in most cases, the importance of creating a healthy economy in the east outweighed the rights of the former employees to the free choice of workplace, guaranteed by article 12 of the Basic Law. 1991 EuGRZ at 136-39. Challenges based on the rights of property, GG art. 14, human dignity, GG art. 1, and equality, GG art. 3, § 1, were also rejected. *Id.* at 140. (The Court did create a special exception for pregnant women and mothers of infants, who are constitutionally protected under article 6, § 4 of the Basic Law; they must be retained in their employment positions.) *Id.* at 139-40. As in the Court's contemporaneous decision on the 1945-49 expropriations, see *supra* text accompanying notes 268-271, this decision accords substantial discretion to the legislature in the process of unification. The decision may not resolve all questions relating to the dissolution of university faculties, however, because the opinion did not discuss the special problem of dissolved units that were swiftly reconstituted with new personnel.

term political, economic, and social problems of integrating the former GDR into the western system would have to be confronted. This election, moreover, would serve as a plebiscite on the process of unification up to that point, affording the voters of the original Federal Republic their first opportunity to express a judgment on these issues by ballot.

During the summer of 1990, debates over the structuring of the first all-German election—which had been set for December 2—became curiously involved with the question of when the GDR should accede to the Federal Republic under article 23 of the Basic Law. The main issue was whether the GDR should accede before or after the December 2 election. At the bottom of this peculiar imbroglio was the most basic of political quarrels—a dispute over future partisan advantage. If the GDR acceded *before* the all-German elections, most observers assumed that the general election law of the Federal Republic would cover the entire country including the former GDR. Under the Federal Election Law as it existed in the summer of 1990, a party that failed to receive five percent of the total vote was, as a practical matter, barred from entering the Bundestag.³⁷⁰ If this rule would require parties to obtain five percent of the votes of the entire unified nation—as was thought to be the case if accession occurred before the election—the almost certain result would be the elimination of a number of significant parties in the GDR. These would include the PDS (the former ruling Communist Party, whose sixteen percent showing in the GDR Volkskammer election in March would not amount to five percent of the entire German electorate);³⁷¹ the German Social Union (DSU), a conservative party most closely associated with the Christian Social Union (CSU) of Bavaria; and certain small reform parties that led the East German revolution in 1989

370. Bundeswahlgesetz, in the version of Sept. 1, 1975 (as amended), § 6(6), BGBl I 2325. A party could also achieve representation if it received the highest vote in three electoral districts, *id.*, but such local strength is unlikely to be shown by a party that fails to receive five percent of the total national vote.

The German electoral system is particularly complex because it requires two votes from each voter—a first ballot for a representative from a specified district and a second ballot for a political party only. As a practical matter, it is the proportionate vote on the second (party) ballot that determines each party's representation in the Bundestag, and this ballot is also used to determine whether the five percent requirement has been met. See generally D. KOMMERS, *supra* note 321, at 185-86.

371. Because the 16 million inhabitants of the GDR must be compared with more than 60 million in the Federal Republic before unification, a significant number of votes in the GDR could still fall below five percent of the total combined vote in an all-German election.

but whose electoral alliance "Bündnis 90" had received less than three percent of the GDR vote in the Volkskammer election.

On the other hand, an accession that occurred only after the December 2 Bundestag election would allow a separate election law for the GDR with a separate minimum percentage requirement or indeed, as in the March 18 Volkskammer election, no minimum requirement at all. Under this system, some of the smaller parties in the GDR would probably be represented in the Bundestag at least for one legislative period.

Interestingly, the Christian Democrats, the largest party in the GDR, and particularly their leader Prime Minister Lothar de Maizière, fought strenuously for accession *after* the December 2 election—a move that could have preserved some of the smaller parties.³⁷² Commentators assumed that this was his (and Chancellor Kohl's) way of paying a political debt by supporting a solution that would preserve the conservative DSU. Moreover, many believed that the continued existence of the PDS might siphon votes from the Social Democrats—another advantage for the conservative coalition.³⁷³ In contrast, the Social Democrats (SPD) argued that accession should occur *before* the election—a move that would presumably eliminate the conservative DSU as well as the threat from the PDS.

The public arguments, however, were conducted on a considerably more elevated plane. Pressing for an early accession, the SPD argued that it was only logical to form a single state before conducting elections for the government of that state;³⁷⁴ the SPD sought to preserve the heritage of the 1989 opposition parties by suggesting that Bündnis 90 might receive a number of places on the SPD party list. In contrast, de Maizière maintained that a later accession was necessary in order to preserve the smaller parties of the 1989 revolution³⁷⁵—although the primary beneficiary would not be those parties but the successor of the SED. Perhaps more convincing was de Maizière's argument that accession—and indeed any Volkskammer vote setting a definite future date for accession—should be delayed in order to maintain the GDR's position in negotiations on the Unification Treaty.³⁷⁶ De Maizière apparently believed that any remaining weight in the GDR's negotiating position

372. See FR, July 25, 1990, at 3, col. 3; *id.* at 1, col. 1.

373. *Id.* at 1, col. 1.

374. FR, July 9, 1990, at 1, col. 4. FDP leaders also took the position that the GDR should accede before the election. *Id.*

375. FR, July 25, 1990, at 1, col. 1.

376. FAZ, July 21, 1990, at 1, col. 2.

rested on its ability to refuse accession on inadequate terms; an early accession—or even an early vote binding the GDR to a future accession—would forfeit this advantage.

In August 1990 the Federal Republic and the GDR adopted an election treaty that split the political advantage between the CDU and the Social Democrats.³⁷⁷ Under the Treaty, accession would occur before the first all-German election, and the election would be conducted pursuant to the requirement that a party must ordinarily receive five percent of the votes of the all-German electorate in order to enter the Bundestag. But the Treaty qualified the draconian five percent rule in one important way. Small parties could improve their chances of representation by joining with larger parties for purposes of meeting the five percent requirement, but only if the parties thus joining restricted their campaigns to separate Länder. Thus, parties with candidates running in the same state (except Berlin) could not join together for this purpose.

This qualification of the five percent rule was significant, but it did not favor all of the small parties equally. For the PDS, for example, the qualification appeared to be useless because the former ruling party of the GDR would certainly be unable to attract any western partner of significance. But for the conservative DSU—an ally of the Bavarian CSU—this provision was a means of political salvation. The political strength of the DSU was concentrated in the former GDR, and the party had no plans to campaign in Bavaria—the only state in which the CSU ordinarily registers its candidates. Thus the DSU and CSU could easily mount a joint campaign under the election statute. Indeed the purpose of this provision was so transparent that it was viewed as a special law favoring the DSU and the conservative coalition; accordingly, the provision was attacked as “raising the impression of an unrestrained misuse of power.”³⁷⁸ In contrast, under this provision the PDS would almost certainly fail to meet the five percent requirement in an all-German election; it therefore would not have been represented in the Bundestag—a result that was seen as yielding some benefit for the SPD.

Yet the PDS still represented a significant, if minority, position in the former GDR and its exclusion from the Bundestag in this

377. Vertrag zur Vorbereitung und Durchführung der ersten gesamtdeutschen Wahl des Deutschen Bundestages zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik, of Aug. 3, 1990, BGBl II 822. The Treaty, along with an accompanying statute, is reprinted in 2 K. STERN & B. SCHMIDT-BLEIBTREU, *supra* note 141, at 191-206.

378. FAZ, Aug. 3, 1990, at 2, col. 5 (quoting *Rhein-Neckar-Zeitung*).

manner raised serious questions. The ultimate effect of the statute on the GDR reform parties was less clear because the western Greens had entered into an alliance with a consolidated group composed of the GDR reform parties and the separate eastern Greens. Yet if this group failed to obtain five percent of the total vote, the reform parties of autumn 1989 would also be excluded from the Bundestag. In any case the Greens and other small parties continued to insist that the five percent clause—especially in this election—was unconstitutional.

Accordingly, the Greens and the Left List/PDS filed an action in the Constitutional Court, arguing that their rights of equality of political opportunity were infringed by the provisions of the election treaty and the first Election Statute.³⁷⁹ Individual Bundestag candidates of the Greens were also complainants. Argument in this case was heard on an expedited basis, and in late September 1990 in its first major opinion relating to unification—doubtless the first in a series that could extend over years—the Constitutional Court unanimously held the Election Statute unconstitutional as a violation of the equality of opportunity of political parties.³⁸⁰

From an early point in its history, the Court had found that constitutional provisions guaranteeing the free formation of political parties and equal electoral rights implied a general requirement that the government treat political parties equally.³⁸¹ Although any five percent minimum requirement might infringe this principle of equality—because small parties may sometimes receive no representation at all instead of their actual proportionate share—the Court had held that a five percent requirement is constitutional in principle as a means of ensuring a stable and functioning parliamentary system.³⁸² In the Unification Election Case the Court continued to

379. The Left List/PDS was a western counterpart of the eastern PDS. See FAZ, Aug. 16, 1990, at 3, col. 3. The complainants were joined in the Constitutional Court action by the Republicans, a far right-wing group that has experienced some success in local elections in the Federal Republic in recent years. See *supra* note 365. The Republicans also believed that their chances would be impaired by the imposition of a national five percent requirement. Because the Republicans had been banned in the GDR from February until August 1990, they did not take part in the March 18 Volkskammer election and their electoral strength in the GDR was unknown. See *id.*

Although the GDR reform groups that formed Bündnis 90 were not parties to the action, they (along with others) were allowed to participate in the oral argument. See 82 BVerfGE 322, 334-35 (1990).

380. 82 BVerfGE 322 (1990).

381. See GG art. 21, § 1; art. 38, § 1.

382. See, e.g., 6 BVerfGE 84 (1957) (Bavarian Party Case); for an edited English version, see D. KOMMERS, *supra* note 321, at 187-89.

adhere to this general doctrine but indicated that prior decisions had involved ordinary elections in the Federal Republic and that the constitutionality of any specific five percent provision must depend upon the surrounding circumstances.³⁸³ It was the special circumstances of the unification election that made the all-German five percent clause unconstitutional.

In this case—in contrast with prior elections in the Federal Republic—the reduction of electoral chances for certain small parties seemed particularly drastic. From the point of view of political parties in the GDR, unification represented a sudden expansion of the relevant election territory and population, and these parties were largely unprepared to compete on a broader scale. The disadvantages were particularly acute in the case of the small reform parties which, in contrast with the PDS and the former bloc parties (such as the CDU), had been in existence for a few months only.³⁸⁴ Under these circumstances, expansion of the election territory would drastically reduce the opportunities available to many parties in the GDR. Indeed, extending the five percent clause across the entire united country meant that the new parties of the east would be required to obtain a number of votes equal to more than twenty-three percent of the voting population of the territory in which they had previously campaigned and were best known. In contrast, the parties of the west would need to receive votes equaling only six percent of the previous western electorate.³⁸⁵ Thus the unequal impact of the all-German five percent clause on the eastern and western parties was evident. The government argued that the provision allowing combined party lists would mitigate this unfairness, but the Court noted that, because of its narrow limitations, very few parties would be able to take advantage of this provision. Consequently, this exception worked its own unconstitutional inequality.³⁸⁶

In its opinion striking down the first Election Statute, the Court

383. 82 BVerfGE at 337-39.

384. The Court emphasized that, under the 1968/74 GDR Constitution, associations were only permitted to exist if they conformed to the "principles of the socialist order of society," and political parties could only be formed within the "National Front" of the GDR. 82 BVerfGE at 340-42. As noted above, the National Front (which was abolished in one of the early amendments of the GDR Constitution in 1990) was an organization designed to further electoral control by the SED. See *supra* text accompanying note 75.

385. 82 BVerfGE at 340.

386. *Id.* at 342-45. Indeed, the Court went on to find that any joint list among parties would be unconstitutional if it was entered into for purposes of a particular election only. In contrast, an actual consolidation of parties for common action—not just to pool votes in an election—is not unconstitutional. *Id.* at 345-47. Indeed, the Court suggested that, due to the discrimination against new parties that existed until recently in

suggested that a constitutionally acceptable alternative would be a statute instituting *separate* minimum requirements, at an equal percentage level, in the two parts of Germany.³⁸⁷ Because a new statute had to be enacted within a few days if the election was to be held as planned on December 2, the Bundestag almost immediately enacted a second election statute, adopting separate five percent clauses for the two parts of Germany, as suggested by the Court.³⁸⁸

Although the Greens voted against this statute on the ground that any five percent clause was an unfair and unnecessary impairment of the democratic principle, they did not file an action in the Constitutional Court. The election of December 2, therefore, was conducted with two separate electoral regimes for elections to the Bundestag.³⁸⁹ But subsequent elections to the Bundestag—the first of which will probably be held in 1994—may well be conducted under a statute extending the five percent provision across the entire nation; it seems unlikely that the special principles of the unification election would be found applicable to an election occurring four years thereafter. Thus, the PDS and the small reform parties of the former GDR seem to have gained a four-year grace period in which they may try to establish themselves as factors on the national scene.³⁹⁰

the GDR, it would be permissible (and perhaps constitutionally required) to allow parties in the GDR to consolidate in this manner. *Id.* at 349-50.

387. *Id.* at 348-49.

388. 1990 BGBl I 2141, *reprinted in* 2 K. STERN & B. SCHMIDT-BLIEBTREU, *supra* note 141, at 207-08.

389. In the election of December 2, a strong vote for the CDU/CSU seemed to indicate approval of the results of unification up to that point. In something of an electoral surprise, the western Greens received less than 5 percent of the vote in West Germany, thus failing to achieve the minimum necessary for representation in the Bundestag. FAZ, Dec. 4, 1990, at 2, col. 4. The eastern Greens (allied with the reform parties of Bündnis 90) did obtain more than five percent of the vote in the former GDR, however, and the Greens will therefore continue to be represented in parliament. The PDS will also be represented, because its vote exceeded five percent of the electorate of the former GDR, although it did not approach five percent of the entire country. The DSU, which was basically dependent on its alliance with the CSU, received less than five percent of the votes in eastern Germany and thus will not be represented in the Bundestag.

390. The special circumstances of the unification election led to another decision of the Constitutional Court based on principles of equality. 82 BVerfGE 353 (1990). Under the federal election law, parties that were not represented in a parliamentary organ (in East or West Germany) were required to submit petitions with signatures of specified numbers of registered voters in order to achieve a place on the ballot. Two small West German parties (including the right-wing NPD) challenged this provision on the ground that it was easier for small East German parties to have achieved a place in the GDR Volkskammer (in the election of March 18, 1990) than for small West German parties to be seated in the state or federal parliaments—because the Volkskammer election had been conducted without the five percent requirement that was almost universal

* * * *

Many commentators in the Federal Republic and the GDR have criticized what they viewed as the pettiness and cynicism of the political disputes regarding the structure of the first all-German election. In contrast, the decision of the Constitutional Court seemed to inject a measure of reason and principle into an otherwise unedifying spectacle. In the context of broader and more principled disputes over matters such as property and abortion, the dispute over the election law illustrates—on a somewhat less elevated level—how unification provided other occasions for the further unfolding of continuing political differences in the Federal Republic of Germany.

X. THE LEGAL STATUS OF DIVIDED GERMANY AND THE ROLE OF THE WORLD WAR II ALLIES IN THE PROCESS OF UNIFICATION

German unification did not depend upon actions taken under German law alone. The same historical events that resulted in the division of Germany created certain rights in the victorious powers of World War II that qualified German sovereignty. The Allies retained a measure of authority to approve or disapprove of plans for unification and to settle the question of a united Germany's eastern border—the debated question of the Oder-Neiße line. Moreover, in the course of the Cold War, both German states had become essential parts of separate and hostile military alliances—NATO and the Warsaw Pact. Unification of the two German states, therefore, would also require adjustments of these relationships.

Thus, at the same time that the Federal Republic and the GDR were negotiating the internal terms of unification in the first State Treaty and the Unification Treaty, the two German states were also negotiating certain external terms of unification with the Allied powers in the so-called "Two Plus Four" talks. The Two Plus Four process concluded with a treaty between the two German states and the four Allied powers, effectively extinguishing the Allies' reserved rights on the date of German unification, confirming the Oder-Neiße line as the permanent eastern border, and acknowledging that a unified Germany would become a member of NATO.

As some historical background is necessary to understand the

in the west. The complainants argued that this system represented an inequality, disfavoring small West German parties. Moreover, the government had unduly delayed distributing the necessary petitions for collecting signatures. The Constitutional Court found that these arguments had sufficient weight for a preliminary injunction to issue, and therefore these parties were allowed a position on the election ballot.

import of these arrangements, the history of these three issues will be discussed separately, and their resolution in the Two Plus Four Treaty will then be analyzed.

A. *Reserved Rights of the Allies*

At the end of World War II, the Allies completely occupied German territory, and any effective German government ceased to exist upon the Germans' capitulation in May 1945. At that point, therefore, the victorious Allies exercised full sovereignty over German territory.

This sovereignty, however, was not to be exercised in a totally uniform manner. Even before the end of the war the Allies agreed at the Yalta Conference that Germany would be temporarily divided into a separate occupation zone for each of the four victorious powers. A Control Commission of the Allied military commanders, however, would exercise "coordinated administration and control."³⁹¹

In the course of time the Allies returned substantial rights of sovereignty to the two German governments, but certain Allied rights were reserved up to the point of unification. Because the reserved rights pre-existed the founding of the Federal Republic and the GDR, those rights were arguably superior to any governmental powers exercised by the two German states.

1. *The Occupation.*—The original Allied rights of occupation were reflected in a declaration of the four victorious powers "regarding the defeat of Germany and the assumption of supreme authority with respect to Germany," issued in Berlin on June 5, 1945.³⁹² This declaration stated that, as a result of its unconditional surrender, "Germany has become subject to such requirements as may now or hereafter be imposed upon her." Because there was no

391. Report of the Crimea (Yalta) Conference, Feb. 11, 1945 [hereinafter Yalta Report], reprinted in 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 1005, 1007 (C. Bevans ed. 1969) [Bevans]. The Yalta Report reflected an agreement on future occupation zones, entered into by Great Britain, the United States, and the Soviet Union in London in 1944. See Protocol on the Zones of Occupation in Germany and the Administration of "Greater Berlin," and amending agreement, Sept. 12 & Nov. 14, 1944, 5 U.S.T. 2078, T.I.A.S. No. 3071, 227 U.N.T.S. 279; see also Mosely, *The Occupation of Germany: New Light on How the Zones Were Drawn*, 28 FOREIGN AFF. 580 (1950). France was not a party to the Yalta Conference but the Yalta Report contemplated that France would also administer an occupation zone, and France was ultimately granted portions of the British and American zones.

392. Berlin Declaration of June 5, 1945, 60 Stat. 1649, T.I.A.S. No. 1520, 68 U.N.T.S. 189.

German government capable of acting effectively under the circumstances, the Allies "hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority."³⁹³ The declaration made clear, however, that an annexation of German territory was not intended.³⁹⁴

The Berlin Declaration was followed by the Potsdam accord (or "report") approved by Truman, Stalin, and Attlee on August 2, 1945, after a conference in the outskirts of Berlin.³⁹⁵ In the Potsdam accord, the Allies restated their assertions of full governmental power in Germany, noting that

supreme authority in Germany is exercised on instructions from their respective Governments, by the Commanders-in-Chief of the armed forces [of the Allied powers], each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole, in their capacity as members of the Control Council.³⁹⁶

According to the agreement, one of the purposes of the occupation was to "prepare for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life by Germany"³⁹⁷—and to this end the Allies contemplated the swift re-establishment of local self-government.³⁹⁸

The use of the word "Germany" in the Potsdam accord seems to assume the eventual re-establishment of a single country—although during the war the Allies had discussed various plans for the permanent partitioning of Germany. Indeed, for the purposes of the occupation, Germany was to be "treated as a single economic unit,"³⁹⁹ notwithstanding its division into four separate zones.⁴⁰⁰

Nonetheless, it was clear that any future unified Germany would be significantly smaller than the prewar Germany of the Weimar Re-

393. 60 Stat. at 1650.

394. *Id.*

395. Report on the Tripartite Conference of Berlin (Potsdam), Aug. 2, 1945, 3 Bevans 1224 [hereinafter Potsdam Report]. For important memoirs of the Potsdam Conference, see W. CHURCHILL, TRIUMPH AND TRAGEDY 630-76 (1953); I. H. TRUMAN, MEMOIRS: YEAR OF DECISIONS 343-414 (1955). For general commentary, see, e.g., W. BENZ, POTSDAM 1945 (1986).

396. Potsdam Report, *supra* note 395, at 1227.

397. *Id.* at 1228.

398. *Id.*

399. *Id.* at 1229.

400. The Potsdam accord also stated that "for the time being no central German government shall be established." *Id.* This language implies that at some future point a central German government might be created.

public. At Yalta and Potsdam, the Allies effectively recognized the transfer of Königsberg and a substantial part of East Prussia to Soviet control.⁴⁰¹ At Potsdam the Allies also agreed that former German territory east of the Oder-Neiße line should be placed under the "administration" of Poland—an adjustment that was to remain in effect pending "the final delimitation of the western frontier of Poland" in a future peace settlement.⁴⁰²

Contrary to the original expectations of the Allies, however, hostility and mistrust between the western and Soviet governments hardened, and the separate occupation zones developed in 1949 into two German states, marking one of the fundamental steps in the development of the Cold War. From an early point, therefore, the Allies had begun to exercise their occupation rights in a divided manner and, when those rights were partially relinquished, they were relinquished to two separate German states.

2. *The Allies' Reserved Rights and the Creation of Two German States.*—

a. *Reserved Rights and the Adoption of the West German Basic Law.*—The western Allies carefully preserved their occupation rights in the process that led to the drafting and adoption of the Basic Law. Thus, in the so-called "Frankfurt Documents," authorizing the convocation of a parliamentary council to draft the Basic Law, the western military governors set forth the general principles necessary for a German constitution and made clear that they must approve the constitution (and any subsequent amendments) before ratification.⁴⁰³ Moreover, the Frankfurt Documents noted that even after a new German government was established, the military governors "reserve to themselves such powers as are necessary to ensure the

401. See Yalta Report, *supra* note 391, at 1010 (Poland's eastern frontier should generally follow the Curzon line); Potsdam Report, *supra* note 395, at 1232-33 (Königsberg and adjacent territory should ultimately pass to the Soviet Union; the American and British leaders state that they will support this change at the peace conference).

402. Potsdam Report, *supra* note 395, at 1234. In the report of the Yalta Conference, the three heads of government acknowledged that eastern Polish territory should be given to the Soviet Union and recognized that "Poland must receive substantial accessions of territory in the north and west," although "final delimitation" of Poland's western border must await a peace conference. Yalta Report, *supra* note 391, at 1010-11. Thus the Allies seemed to agree that "substantial" German territory must be finally transferred to Poland, and it seems likely that it was the extent of that transfer (rather than the principle) that was to await the peace conference. See, e.g., W. CHURCHILL, *supra* note 395, at 647-48.

403. Frankfurt Documents, July 1, 1948; reprinted in 1 DOKUMENTE, *supra* note 110, at 88, 89-91.

fulfillment of the basic purpose of the Occupation.”⁴⁰⁴ Among other things, these powers included control over Germany’s foreign relations, certain aspects of foreign trade, reparations, disarmament, and security of the occupation forces, and the authority to ensure the German government’s observance of its own constitution. Indeed, the “Military Governors will resume their exercise of their full powers in an emergency threatening security, and if necessary to secure compliance with the constitutions or the occupation statute.”⁴⁰⁵ When the military governors approved the draft West German constitution for submission to the states, they were to issue an “Occupation Statute” incorporating broad principles discussed among the military governors and the parliamentary council so that the people “may understand that they accept the constitution within the framework of this occupation statute.”⁴⁰⁶

In their letter approving the Basic Law for submission to the states in May 1949, the western military governors reiterated that its adoption was to be subject to the provisions of the Occupation Statute.⁴⁰⁷ The Occupation Statute, in turn, reserved a number of specific areas to the occupation authorities—including foreign affairs,

404. *Id.* at 90.

405. *Id.*

406. *Id.* at 91.

407. See Letter from the Three Western Military Governors to the President of the Parliamentary Council, May 12, 1949, reprinted in 1 DOKUMENTE, *supra* note 110, at 130. Although § 1 of the Occupation Statute emphasized that the new German federal government and Länder shall have “full legislative, executive and judicial powers in accordance with the Basic Law” and state constitutions (subject to the limitations of the Occupation Statute), the statute also noted that it was made in “the exercise of the supreme authority which is retained by” the Allied governments. See Occupation Statute Defining the Powers to be Retained by the Occupation Authorities, Apr. 8, 1949, effective Sept. 21, 1949, 63 Stat. 2819, T.I.A.S. No. 2066, 140 U.N.T.S. 202 [hereinafter Occupation Statute].

A contemporaneous memorandum of the three Allied governments noted that they “retain the supreme authority assumed by them under the [Berlin Declaration], including the right to revoke or alter any legislative or administrative decisions in the three western zones of Germany.” Agreed Memorandum Regarding the Principles Governing Exercise of Powers and Responsibilities of US-UK-French Governments Following Establishment of German Federal Republic, Apr. 8, 1949, 63 Stat. 2818, T.I.A.S. No. 2066, 140 U.N.T.S. 200. Thus although the Allies intended that “military government will disappear, and that the function of the Allies shall be mainly supervisory,” *id.* at 2818, they clearly retained ultimate control.

In accordance with this basic principle, the Allies retained power to disapprove legislation of the federal government or the states, but noted in the Occupation Statute that they would not exercise this authority “unless in their opinion [the legislation] is inconsistent with the Basic Law, a Land Constitution, legislation or other directives of the occupation authorities themselves or the provisions of [the Occupation Statute], or unless it constitutes a grave threat to the basic purposes of the occupation.” See Occupation Statute, *supra*, at 2820.

foreign trade and exchange, disarmament, and reparations—and also reserved the right “to resume, in whole or in part, the exercise of full authority if [the occupation authorities] consider that to do so is essential to security or to preserve democratic government in Germany or in pursuance of the international obligations of their governments.”⁴⁰⁸ The military governors’ letter of approval also qualified certain provisions of the Basic Law and reiterated the Allied position that Berlin could only have observers, not voting members, in the two houses of the West German parliament.⁴⁰⁹

b. Allied Reserved Rights and the Founding of the GDR.—The process that led to the founding of the GDR followed a similar pattern. In October 1945, the Soviet military commander Zhukov empowered the provincial and Länder administrations within the Soviet zone to enact binding laws and regulations and exercise other governmental powers, “if they are not contrary to the laws and orders of the Control Council or the orders of the Soviet Military Administration.”⁴¹⁰ In November 1949, shortly after the adoption of the first constitution of the GDR, the Soviet Military Administration was converted into the Soviet High Commission with the function of overseeing the measures of the new government.⁴¹¹ According to the Soviet “Declaration,” the provisional administration of the German Democratic Republic could freely exercise its activity on the basis of the constitution of the German Democratic Republic, “so long as this activity does not violate the Potsdam decisions and the obligations that arise from the joint decisions of the four powers.”⁴¹²

408. Occupation Statute, *supra* note 407, at 2819-20. Moreover, under the Occupation Statute, any amendment of the Basic Law required “the express approval of the occupation authorities before becoming effective.” *Id.* at 2820. For adverse reaction in Germany to the broad powers reserved by the Allies in the Occupation Statute, see T. SCHWARTZ, *AMERICA’S GERMANY: JOHN J. MCCLOY AND THE FEDERAL REPUBLIC OF GERMANY* 38-39 (1991).

409. See Letter from the Three Western Military Governors to the President of the Parliamentary Council, May 12, 1949, *reprinted in* 1 *DOKUMENTE*, *supra* note 110, at 130; GG art. 23; art. 144, § 2.

410. Directive of the Supreme Commander of the Soviet Military Administration in Germany, Oct. 22, 1945, *reprinted in* 1 *DOKUMENTE*, *supra* note 110, at 294.

411. See H. KOCH, *A CONSTITUTIONAL HISTORY OF GERMANY IN THE NINETEENTH AND TWENTIETH CENTURIES* 345 (1984). This move substantially paralleled steps that had been taken earlier in 1949 by the western Allies before the adoption of the Basic Law. *Id.* at 343; see Message to the Bonn Parliamentary Council from the Foreign Ministers of the US, UK and France, Apr. 8, 1949, 63 Stat. 2825, T.I.A.S. No. 2066, 140 U.N.T.S. 218.

412. Declaration of the Chairman of the Soviet Control Commission with Respect to

3. *The "General Treaty" and the Further Release of Sovereign Rights.*—The great change in the occupation status occurred in 1955 when the "General Treaty" between the western Allies and the Federal Republic came into force.⁴¹³ This treaty declared the end of the occupation regime and lifted the Occupation Statute: As a result, the treaty announced, "[t]he Federal Republic shall have . . . the full authority of a sovereign State over its internal and external affairs."⁴¹⁴ Even though the General Treaty marked an extremely important step in the extension of the sovereignty of the Federal Republic, the western Allies' relinquishment of authority was not complete. As a result of the international situation—which made unification of Germany impossible—the western Allies "retain[ed] the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement."⁴¹⁵ It is this language—reserving rights relating to (a) Berlin, and (b) Germany as a whole, including questions of reunification and a peace settlement—that formed the basis of the occupation rights that the western Allies continued to hold up to the point of German unification. The rights relating to Berlin will be noted below; the rights with respect to "Germany as a whole" have been interpreted (at least in the German literature) to include authority over the total geographical structure of the country—particularly the territorial extent of a unified Germany—but *not* to include internal political issues, such as the precise process by which unification would be achieved.⁴¹⁶

the Transfer of Administrative Functions to German Officials, Nov. 11, 1949, *reprinted in* 1 DOKUMENTE, *supra* note 110, at 325-27.

413. The General Treaty (Generalvertrag or Deutschland Vertrag) was originally signed in 1952 but its ratification was delayed when a companion treaty on the European Defense Community was rejected by the French National Assembly. After modification, the treaty was signed again in 1954 and came into effect in 1955 after ratification by the signatory parties. *See* Convention on Relations Between the Three Powers and the Federal Republic of Germany, May 26, 1952, 6 U.S.T. 4251, T.I.A.S. No. 3425, as amended Oct. 23, 1954, 6 U.S.T. 4121, T.I.A.S. No. 3425 [hereinafter General Treaty]. As one of the "Paris Treaties," the General Treaty was accompanied by another declaration accepting the Federal Republic as a member of NATO. In response to West German rearmament and entry into NATO, the Soviet Union established the Warsaw Pact in May 1955. *See* J. SOWDEN, *THE GERMAN QUESTION 1945-1973*, at 158-62 (1975); Stern, *supra* note 14, at 12-13.

414. General Treaty, *supra* note 413, art. 1, para. 2.

415. *Id.* art. 2.

416. *See generally* Rauschnig, *supra* note 10, at 397; v. Goetze, *supra* note 1, at 2165. The joint Allied responsibility for "matters affecting Germany as a whole" can be traced back to a three-power "Agreement on Control Machinery in Germany," signed by the United States, Great Britain and the Soviet Union in November 1944. *See* 1 DOKUMENTE, *supra* note 110, at 29. *See also* Rauschnig, *supra* note 10, at 397.

The General Treaty contained two other provisions of lasting importance. Article 3 pledged the Federal Republic to make its policy conform to the principles of the United Nations Charter and to the goals set forth in the Statute of the Council of Europe.⁴¹⁷ Perhaps even more important for our purposes, all of the parties to the General Treaty—including the Allies—pledged to pursue the goal of a “reunified Germany enjoying a liberal-democratic constitution, like that of the Federal Republic, and integrated within the European Community.”⁴¹⁸ A number of German scholars have argued that by agreeing to this language, the western Allies pledged *not* to use their reserved rights to deny consent to German unification.⁴¹⁹

Also in 1954—before the final release of the General Treaty but in contemplation of its adoption—the Soviet Union issued a document recognizing the GDR’s sovereign rights over “domestic and foreign affairs” and declaring that it would enter into the same rela-

417. See General Treaty, *supra* note 413, art. 3, para. 1. This pledge accords with the Preamble of the Basic Law, which sees the Federal Republic as an “equal member of a united Europe.” The pledge to observe the principles of the United Nations can be seen in part as a less rigorous version of the Allies’ attempts under the occupation regime to ensure that Germany would not be in a position again to threaten aggressive war. See U.N. CHARTER, art. 2, para. 4 (no “threat or use of force against the territorial integrity or political independence of any state”).

418. General Treaty, *supra* note 413, art. 7, para. 2. The parties to the Treaty were to pursue this goal until a peace treaty was signed. Presumably, the Allies contemplated that a peace treaty would contain similar guarantees.

419. See, e.g., Hailbronner, *Völker- und europarechtliche Fragen der deutschen Wiedervereinigung*, 1990 JZ 449, 450; Klein, *An der Schwelle zur Wiedervereinigung Deutschlands*, 1990 NJW 1065, 1067.

One other reservation in the General Treaty is worth noting. The Allies reserved their previous rights with respect to the stationing of troops in the Federal Republic—a subject that was also covered by a separate agreement. General Treaty, *supra* note 413, arts. 4-5. Moreover, in order to ensure the safety of stationed troops, the western powers in effect reserved the right to undertake certain security measures—until the German government obtained legal authorization under German legislation to undertake those security measures itself. *Id.* art. 5, para. 2. Among other things, this somewhat guarded passage apparently implied a reference to secret electronic surveillance—an activity that was arguably prohibited by the Basic Law unless the subject of the surveillance had the ability to contest the surveillance in court. In 1968, in connection with other constitutional amendments and legislation intended to tighten security measures, the Basic Law was amended to permit surveillance without informing the subject of the surveillance—and without providing a possible judicial remedy—if the “free democratic basic order” would thus be protected and if parliamentary committees exercised a degree of review. See GG art. 10, § 2; art. 19, § 4. The Constitutional Court upheld this amendment against claims that it was invalid as violating certain basic ideas of human dignity, GG art. 1, and principles of the rule of law, GG art. 20. See GG art. 79, § 3; 30 BVerfGE 1 (1970); D. KOMMERS, *supra* note 321, at 230-31; see also *supra* note 341. The Allies relinquished their reserved rights to undertake security measures upon enactment of the relevant amendments and legislation by the Bundestag. See Note, *Recent Emergency Legislation in West Germany*, 82 HARV. L. REV. 1704, 1707 n.25 (1969).

tions with the GDR "as with other sovereign nations."⁴²⁰ On the other hand, the Soviet Union retained those functions that related to the "guaranteeing of security" as well as functions that arose from the obligations growing out of the four-power agreements—including matters affecting Germany as a whole.⁴²¹ In this document, the Soviet Union referred to the western Occupation Statute as "one of the main obstacles" to German unification and, in reply, the western Allies denied that the Soviet Union had actually relinquished sovereignty to the GDR.⁴²²

By 1955, therefore, the Allies' reserved rights had assumed the contours that they would retain until they were finally relinquished pursuant to the Two Plus Four agreement among the Allies and the two German states. Even before their relinquishment, however, some German commentators had raised a number of questions about the Allied reserved rights. Some suggested that these rights were not properly established in the first place. Another view was that occupation rights under international law could not remain in effect after the occupation forces had left. Since Berlin was the only part of Germany that remained theoretically subject to a true occupation, this argument would suggest that by the 1980s the Allies possessed no more occupation rights with respect to the unification of Germany, except for Berlin.⁴²³ Others suggested that even if these rights had been properly established at the outset, their foundation in principles of self-defense had become obsolete and that they had been qualified by other principles and agreements of international law, such as the principle of self-determination and the Helsinki Final Act.⁴²⁴

Even though these questions were raised in the German literature, all practical political action of the German states and the four Allied powers proceeded from the premise that the Allied reserved rights were always valid and continued to be so—until their final relinquishment by agreement.

420. Declaration of the Government of the USSR Concerning the Granting of Sovereignty to the German Democratic Republic, Mar. 25, 1954; *reprinted in* 1 DOKUMENTE, *supra* note 110, at 329-31; *see* Stern, *supra* note 14, at 14.

421. 1 DOKUMENTE, *supra* note 110, at 330.

422. *Id.* at 330-31.

Additional statements preserving the Allied reserved rights can be found in the preamble of the four power treaty on Berlin (1971), *see infra* note 436, and in a four-power declaration concerning the applications of the Federal Republic and the GDR to join the United Nations. *See* Rauschnig, *supra* note 10, at 395-96.

423. *See, e.g.*, Rauschnig, *supra* note 10, at 396; *but see v. Goetze, supra* note 1, at 2162-63 (arguing that all of the remaining reserved rights of the Allies are occupation rights).

424. *See* Hailbronner, *supra* note 419, at 450-51.

4. *The Separate Status of Berlin.*—With respect to the Allied reserved rights—as well as in many other areas—the legal status of Berlin raised special problems.⁴²⁵ From the beginning, the Allies viewed Berlin as the former center of German political and military power and sought to reserve special rights over that area. Indeed, this view animated the western Allies' desire to occupy their own sections of Berlin, even though that city lay deep within the Soviet occupation zone.

Accordingly, when the western Allies began to contemplate the reconstitution of federal political authority in Germany, Berlin was in substantial respects excluded from the new political structure. During the deliberations over the Basic Law in 1948-49, the western Allies objected to the inclusion of West Berlin as a state of the Federal Republic, although they were willing to permit Berlin to send nonvoting observers to the Federal Parliament.⁴²⁶ Article 23 of the Basic Law does list greater Berlin as a state of the Federal Republic, but article 144 declares that any state remaining under "limitations" may send (nonvoting) representatives to the German parliament. Accordingly, in their letter to the President of the Parliamentary Council approving the Basic Law, the western military commanders interpreted "the effect of [articles 23 and 144] as constituting acceptance of our previous request that while Berlin may not be accorded voting membership in the Bundestag or Bundesrat *nor be governed by the Federation* she may, nevertheless, designate a small number of representatives to attend the meetings of those legislative bodies."⁴²⁷ This statement of the military commanders was generally taken as prohibiting the Federal Republic from exercising "governing" power in West Berlin. Instead, political authority in Berlin was to be exercised by its own political organs, pursuant to its own constitution.

Berlin's first postwar constitution was adopted as a provisional document on August 13, 1946, and approved by the Allied Kommandatura, then composed of representatives of all four Allied powers.⁴²⁸ In 1950, after the effective division of Berlin into two separate parts, West Berlin adopted a new constitution. Before its

425. See generally Stern, *Grundfragen der Rechtslage Berlins*, in G. BRUNNER, T. SCHWEISFURTH, A. USCHAKOW & K. WESTEN (ed.), *SOWJETSYSTEM UND OSTRECHT* (FESTSCHRIFT FÜR BORIS MEISSNER) 793-803 (1985) [hereinafter *FESTSCHRIFT FÜR BORIS MEISSNER*].

426. See generally 2 *GRUNDGESETZ-KOMMENTAR*, *supra* note 7, art. 23, Nos. 7-8.

427. Letter from the Three Western Military Governors to the President of the Parliamentary Council, May 12, 1949, *reprinted in* 1 *DOKUMENTE*, *supra* note 110, at 130 (emphasis added).

428. See Provisional Constitution For Greater-Berlin, Aug. 13, 1946, *reprinted in* 1

adoption, the western military commanders made clear that any new constitution would "require the express approval of the Allied Kommandatura before becoming effective."⁴²⁹ Moreover, in accepting this constitution, the Allied Kommandatura (now composed of the three western commanders only)⁴³⁰ set aside provisions proclaiming that Berlin was a state of the Federal Republic of Germany and that the Basic Law and statutes of the Federal Republic were binding on Berlin. The Allied military commanders further required that another section be interpreted so that, during the transitional period, "Berlin [would] possess no characteristics of a twelfth state" of the Federal Republic. The West German Basic Law could prevail over contrary provisions of the Berlin Constitution, but a federal law would only apply if it was separately enacted by the legislature of Berlin.⁴³¹ Thus, the Allied view that Berlin remained occupied territory, and not an integral part of the Federal Republic, was maintained.

In subsequent years, the West Berlin government and the Federal Republic sought close relations—perhaps even closer than contemplated by the Allies. The Berlin legislature adopted federal laws as the law of Berlin and, after some hesitation, the Constitutional Court proclaimed that Berlin was indeed a state of the Federal Republic (although subject to certain Allied reserved rights) and began to exercise judicial review of certain classes of cases arising in Berlin.⁴³² In reaction to this creeping rapprochement of the Federal Republic and Berlin, the Allied commanders in 1967 delivered a sharp note to Berlin officials, rejecting the Constitutional Court's

DOKUMENTE, *supra* note 110, at 138, and accompanying Note of Allied Commanders, *id.* at 149.

The Allied Kommandatura was the highest legislative and executive organ of occupied Berlin, originally composed of one representative of each of the four Allied commanders-in-chief. In June 1948 at a time of increasing tensions, the Soviet representative withdrew from the Allied Kommandatura, which continued to function with the three remaining representatives, exercising authority over the western part of Berlin only. See generally I. HENDRY & M. WOOD, *THE LEGAL STATUS OF BERLIN* 57-59 (1987). Until the point of unification, the law of the Allied Kommandatura (and other Allied law) superseded German law in Berlin. *Id.* at 83-90.

429. Declaration of the Allied Kommandatura of the City of Berlin Concerning the Principles of the Relationship of the City of Greater-Berlin to the Allied Kommandatura, May 14, 1949, *reprinted in* 1 DOKUMENTE, *supra* note 110, at 151, 154.

430. See *supra* note 428.

431. Note of the Allied Kommandatura of Berlin Concerning the Approval of the Constitution of Berlin, Aug. 29, 1950, *reprinted in* 1 DOKUMENTE, *supra* note 110, at 172. The 1950 Constitution of Berlin is *reprinted in id.* at 158-71.

432. See, e.g., 7 BVerfGE 1 (1957) (Berlin is a state of the Federal Republic); 19 BVerfGE 377 (1966) (Constitutional Court may decide certain cases arising in Berlin).

decision in a case that had arisen in Berlin and reiterating their view that "Berlin is not to be regarded as a Land of the Federal Republic and is not to be governed by the Federation."⁴³³ The Allied commanders stated their view that the Constitutional Court "does not have jurisdiction in relation to Berlin" and therefore could not review the constitutionality of actions of Berlin's officials or laws of Berlin—even those laws that incorporated federal legislation.⁴³⁴

In the General Treaty, in which the western Allies released a substantial degree of sovereignty to the Federal Republic, they retained rights over Berlin.⁴³⁵ Although a Four-Power Treaty with respect to Berlin in 1971, adopted in the general context of Chancellor Brandt's new eastern policy, had some effect in mitigating tensions,⁴³⁶ Berlin remained a special focus of concern, and the western Allies were assiduous in exercising their reserved rights in the city. In the Treaty of 1971 the western powers declared that ties between West Berlin and the Federal Republic would be "maintained and developed," but they also acknowledged that West Berlin would "continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it."⁴³⁷ Certainly, it would be necessary for the Allies to release their rights with respect to Berlin, as well as those relating to Germany as a whole, if Berlin was to be included within the political structure of the country upon unification.

B. *The Oder-Neiße Line*

The second important aspect of the status of Germany in international law—an issue intimately related to the question of Allied reserved rights—was the bitterly debated subject of the western border of Poland, the so-called Oder-Neiße line. This issue arises from the history of the last days of World War II, although it has an even more remote background.

During the Weimar period, the map of central Europe looked significantly different than it does today. In addition to the territory

433. Note of the Allied Kommandatura of Berlin, May 24, 1967, Concerning the Decision of the Constitutional Court of Jan. 20, 1966, *reprinted in* 1 DOKUMENTE, *supra* note 110, at 200-01. The case that evoked this note can be found at 19 BVerfGE 377 (1966).

434. Note of the Allied Kommandatura, *supra* note 433.

435. *See supra* text accompanying notes 415-416.

436. *See* Quadripartite Agreement on Berlin, Sept. 3, 1971, 24 U.S.T. 283, T.I.A.S. No. 7551, 880 U.N.T.S. 115; the text of the Treaty and accompanying documents are *reprinted in* I. HENDRY & M. WOOD, *supra* note 428, at 335-50.

437. Quadripartite Agreement on Berlin, *supra* note 436, part II(B). *See generally* Schiedermaier, *Die Bindungen West-Berlins an die Bundesrepublik*, 1982 NJW 2841.

that later became the Federal Republic and the GDR, Germany included two additional areas farther to the east. The first of these was territory adjacent to the present eastern border of Germany, including the province of Silesia and parts of Pomerania and Brandenburg—a region approximately the same size as the GDR. Even farther to the east—and separated from the rest of Germany by the “Polish corridor” created by the Treaty of Versailles—was a large island of German territory bordering on Poland and Lithuania, containing parts of East Prussia and the important city of Königsberg.

At the end of World War II the Russian Army occupied these eastern territories. The Soviet Union annexed the northern part of East Prussia including Königsberg (now Kaliningrad), as well as the eastern portion of Poland—representing almost one-half of the area of that country as it had existed before World War II. The Soviet annexation of eastern Poland (east of the so-called “Curzon line”) was ratified by the Allies at the Yalta Conference with the understanding that Poland would be compensated for this loss by “substantial accessions of territory in the north and west.”⁴³⁸ At the Potsdam Conference, therefore, the previously German territory east of a line formed by the Oder and the Western Neiß Rivers—comprising Silesia and parts of Pomerania, Brandenburg and East Prussia—was placed under Polish administration pending a final settlement at a future peace conference.⁴³⁹ Although this declaration was provisional, the understanding at Yalta that Poland would receive territory in compensation for regions annexed by the Soviet Union suggests that the transfer of at least a significant part of this territory was intended to be final. The Potsdam Conference also agreed in principle to the transfer of Königsberg and part of East Prussia to the Soviet Union, and the American President and British Prime Minister pledged to support this settlement at a future peace conference.⁴⁴⁰

Because of the increasing tensions of the Cold War, which followed almost immediately after the conclusion of hostilities in Eu-

438. Yalta Report, *supra* note 391, at 1010. See *supra* note 402. Various proposals for the Soviet acquisition of eastern Polish territory, and for compensation to be accorded to Poland from German lands, were debated throughout the war. For the complexities of these arguments as well as an analysis of the positions taken at Yalta and Potsdam, see J. SOWDEN, *supra* note 413, at 228-41; see also J. LALOY, *YALTA: YESTERDAY, TODAY, TOMORROW* (1988); 2 N. DAVIES, *GOD'S PLAYGROUND: A HISTORY OF POLAND* 488, 504 (1982).

439. Potsdam Report, *supra* note 395, at 1234; see also *supra* text accompanying note 402.

440. Potsdam Report, *supra* note 395, at 1232-33.

rope, the peace conference contemplated at Potsdam was never held. Thus it remained open to German governments to maintain that some or all of the territory placed under Polish "administration" at Potsdam was still German territory and should be returned to Germany at a final peace conference or otherwise.⁴⁴¹ (The return of Königsberg and the northern part of East Prussia was less frequently mentioned.) This position received significant political support from large groups of "expellees"—German speaking persons who were expelled or who fled from the former German territories east of the Oder-Neiße line when these territories were transferred at the end of World War II. Nonetheless, by the 1980s it seemed clear to most—including most German politicians—that this was one result of World War II that was not to be undone and, as discussed below, treaties entered into as part of Chancellor Brandt's Ostpolitik in 1970 seemed to concede the permanence of the Polish and Russian borders.

Yet in a series of bizarre episodes in the course of unification discussions, Chancellor Kohl refused to relinquish unconditionally all claims to the former German territory east of the Oder-Neiße line.⁴⁴² Many believed that Kohl was principally seeking to prevent the ranks of the expellees from leaving the CDU en masse for some alternative further to the right.⁴⁴³ Yet Kohl's argument, oddly, also had a constitutional background. To understand this background and to understand the role that these territories played in the process of unification, it is necessary to return to article 23 of the Basic Law, the provision under which the GDR acceded to the Federal Republic.

Article 23—it will be recalled—declared that at the outset the Basic Law was to cover the specified original Länder of the Federal Republic. The provision then went on to state that in "other parts of Germany, [the Basic Law] will be put into effect after their accession."⁴⁴⁴ The GDR constituted "another part" of Germany under this provision—as did the Saarland, which acceded to the Federal

441. Under Soviet and Polish law, in contrast, the territory in question was apparently treated—from a very early point—as fully incorporated territory of the Soviet Union and Poland, and not merely as territory remaining under provisional administration. See 40 BVerfGE 141, 158-59 (1975).

442. See, e.g., N.Y. Times, Feb. 27, 1990, at A8, col. 1; see also N.Y. Times, Mar. 3, 1990, at A6, col. 3 (Kohl argues that German ratification of Polish border should be accompanied by Poland's waiver of any rights to war reparations).

443. See, e.g., Note, *supra* note 4, at 275-76.

444. See *supra* text accompanying note 114.

Republic in 1957.⁴⁴⁵ An important question, however, was whether the GDR and the Saarland constituted all of the other parts of Germany mentioned in article 23, or whether there were yet other regions that at least theoretically might accede under article 23. Specifically, did the former German territories lying east of the Oder-Neiße line constitute "other parts" of Germany that could accede to the Federal Republic under article 23?

Apparently the prevailing response of the German constitutionalists to this question was yes.⁴⁴⁶ Neither article 23 nor any other provision of the Basic Law defines the term "Germany" for the purposes of the Basic Law; it was not entirely clear, therefore, what was to be included within the other parts of Germany. Certainly the concept of "Germany" had certain clear limitations; it did not include, for example, parts of the German Empire ceded to Poland by the Treaty of Versailles in 1919 in a manner clearly recognized by international law. On the other hand, article 116(1) of the Basic Law, in defining the concept "German person," refers to the "territory of the German Empire [Reich] as of December 31, 1937," and a number of authors have taken the position that "Germany" for the purposes of article 23 also included this territory.⁴⁴⁷ The borders of December 31, 1937 encompassed all the territory of Germany recognized in the Versailles Treaty—before the occupation of Austria and Czech territory in 1938 and other aggressive territorial expansions of the Nazi regime. Under this view, therefore, the "other parts of Germany" referred to in article 23 included the territory east of the Oder-Neiße line.

On the other hand, by the 1970s both German governments had arguably recognized the Oder-Neiße line as the western border of Poland. In the Warsaw Declaration of June 1950—followed by the more formal Görlitz Treaty a month later—the provisional government of the GDR recognized the Oder-Neiße line, as described in the Potsdam agreement, as the permanent border between Poland and Germany.⁴⁴⁸ In a bitter response, a majority of the West German Bundestag (excluding representatives of the Communist Party) rejected the Warsaw Declaration, arguing that the territory in

445. See *supra* note 115 and accompanying text.

446. See, e.g., Klein, *supra* note 419, at 1072.

447. See, e.g., Heintschel von Heinegg, *supra* note 120, at 427-29.

448. See Warsaw Declaration, June 6, 1950, reprinted in 1 DOKUMENTE, *supra* note 110, at 496; Agreement Concerning the Demarcation of the Established and Existing Polish-German State Frontier, July 6, 1950, 319 U.N.T.S. 93, reprinted in 1 DOKUMENTE, *supra* note 110, at 497-99.

question remained a part of Germany and that, under the Potsdam agreement, Poland only exercised "temporary administration" over that territory. The Bundestag also declared that the "so-called provisional government" of the GDR was in fact acting on behalf of the Soviet Union in "shameful bondage" to a foreign power.⁴⁴⁹ The western Allies vigorously rejected the Görlitz agreement as well.⁴⁵⁰

The position of the Federal Republic in 1950 reflected the tensions of the Cold War, but that position was relaxed in the late 1960s. This process culminated in the accommodations of the new "eastern policy" (*Ostpolitik*) adopted by the SPD government of Willy Brandt. In two cornerstones of this policy, the Moscow and Warsaw Treaties of 1970, the government of the Federal Republic appeared to recognize the Oder-Neiße line. According to the Moscow Treaty—entered into between the Federal Republic and the Soviet Union—the parties "consider as inviolable, today and in the future, the borders of all states in Europe as they exist on the day of the signing of this Treaty, including the Oder-Neiße line which forms the western border of the People's Republic of Poland"⁴⁵¹ Moreover, under the Warsaw Treaty between the Federal Republic and Poland, the parties declared that the Oder-Neiße line formed the western border of Poland, confirmed the inviolability of existing borders, pledged unrestricted observance of each other's territorial integrity, and declared that they had no present or future claims to each other's territory.⁴⁵² Unqualified as this language may have seemed, however, it was not clear that the Federal Republic possessed the authority to settle this question definitively. Indeed, both the Moscow and Warsaw Treaties made clear that they did not affect earlier international agreements,⁴⁵³ and both treaties were accompanied by a note of the Federal Republic explicitly pointing out that no agreement of the Federal Republic could affect the reserved rights of the four occupation powers. Since the question of the

449. See Declaration of Bundestag, June 13, 1950, *reprinted in* 1 DOKUMENTE, *supra* note 110, at 496-97.

450. J. SOWDEN, *supra* note 413, at 244-45.

451. See Treaty Between the Federal Republic of Germany and the USSR, Aug. 12, 1970, art. 3; 1972 BGBl II 354, 355 [hereinafter Moscow Treaty].

452. Treaty Between the Federal Republic of Germany and the Peoples Republic of Poland Concerning the Basis of the Normalization of their Mutual Relations, Dec. 7, 1970, 1972 BGBl II 362 [hereinafter Warsaw Treaty].

453. According to article 4 of the Moscow Treaty, the treaty "does not affect bilateral and multilateral treaties and agreements previously entered into by [the parties]." Moscow Treaty, *supra* note 451, art. 4. Article 4 of the Warsaw Treaty states that the treaty "does not affect bilateral or multilateral international agreements entered into by the parties or relating to them." See Warsaw Treaty, *supra* note 452, art. 4.

Oder-Neiße line remained open in the Potsdam and other four-power agreements pending a final peace settlement, these provisions (and accompanying notes) suggest that the four occupation powers retained authority to make adjustments of the western Polish border—regardless of anything contained in agreements between the Federal Republic and the Soviet Union and Poland.⁴⁵⁴

Moreover, even without fully relying on the reserved rights of the Allies, some German authors argued that the Oder-Neiße territory could not be effectively relinquished before unification of the Federal Republic and the GDR—even by vote of both German parliaments. Apparently, this was the position originally adopted by Chancellor Kohl. According to this argument, the Federal Republic and the GDR represented only parts of the “entire” German state and therefore could not act on its behalf in relinquishing its territory. Only the parliament of a united Germany could effectively undertake this task.⁴⁵⁵ This position may seem inconsistent with the claims of the Federal Republic that it represented the entire German state in other instances.⁴⁵⁶

In any case, as part of the general settlement upon unification—which would also include relinquishment of the Allies’ reserved rights—it was to be expected that these vestigial German claims to long-lost territory would also be definitively relinquished. Certainly the Soviet government would insist upon this action. Accordingly, in votes that accompanied the adoption of the first State Treaty, both the West German Bundestag and the East German Volkskammer enacted resolutions confirming the Oder-Neiße line as the western border of Poland.⁴⁵⁷

Nonetheless, the government of Poland insisted on a separate treaty confirming the Oder-Neiße line, and the World War II Allies supported Poland’s position. Accordingly, the Polish government was invited to present its views at the Two Plus Four discussions. At

454. This position seems to have been taken by the Brandt government, *see* J. SOWDEN, *supra* note 413, at 337-38, and may be implied by the Constitutional Court’s discussion of this aspect of the treaties. *See* 40 BVerfGE 141, 171-75 (1975). *See also* Hailbronner, *supra* note 419, at 449-51 (noting that the federal government made this point clearly in negotiations over its East Bloc treaties, but that the GDR did not make similar reservations with respect to its treaties with Poland). That the problems of these treaties can still evoke passionate responses is demonstrated by recent newspaper correspondence. FAZ, Sept. 3, 1990, at 8, col. 1 (discussion of political background of treaties).

455. *See* Klein, *supra* note 419, at 1072. In this argument, the Allies’ reserved rights with respect to Germany as a whole played a secondary role.

456. *See* Klein, *Wiedervereinigungsklauseln in Verträgen der Bundesrepublik Deutschland*, in Festschrift für Boris Meissner, *supra* note 425, at 775, 783-91.

457. *See supra* Part VI.

first, Poland insisted that such a treaty be signed before German unification, but at the Two Plus Four conference in Paris on July 17 the Polish government indicated that it would accept a treaty approved by the all-German parliament after unification.⁴⁵⁸ In light of the theory discussed above, this was the safer course. In any case, when an adequate treaty is ultimately ratified,⁴⁵⁹ this persisting problem of World War II will finally disappear as a legal issue—although it will leave a legacy of bitterness among some groups in Germany. Although the conservatives generally prevailed in the main issues surrounding unification, this is one area in which they were required to defer to unanimous international opposition. Kohl was correct in referring to the relinquishment of the eastern territories as a price that had to be paid for unification.

C. NATO

The international status of Germany is affected not only by events occurring before the establishment of the two German states, but also by international treaties entered into by those states. As part of its task of establishing the Federal Republic as an “equal member of a united Europe,”⁴⁶⁰ the Basic Law contemplates that the Federal Republic may become not only part of a European political organization like the European Economic Community, but may also join an organization providing for a collective military defense. This authority could possibly be derived from article 24(2) which provides that:

the Federal Government can be included in a system of mutual collective security, for the purpose of preserving peace; it will thus agree to the limitation of its sovereign rights for the purpose of establishing and assuring a peaceful and lasting order in Europe and among the peoples of the world.⁴⁶¹

According to the Constitutional Court, however, authority to join a western military alliance actually flows from article 24(1)—also employed to authorize participation in the EEC—which simply allows the Federal Republic, acting through a statute, “to transfer sovereign rights to international institutions.”⁴⁶²

It was not until 1955 that the Federal Republic exercised this

458. FR, July 18, 1990, at 1, col. 1.

459. See *infra* note 490 and accompanying text.

460. GG Preamble.

461. GG art. 24, § 2.

462. GG art. 24, § 1; see 68 BVerfGE 1 (1984) (Pershing Rockets Case).

authority by joining the North Atlantic Treaty Organization (NATO) after a bruising internal dispute over rearmament.⁴⁶³ The Soviet Union responded by forming the Warsaw Pact in May 1955, and the GDR became a member.⁴⁶⁴ By 1955, therefore, the two German states had become parts of a pact system that reflected the division of Europe into two hostile military blocs, perhaps the most visible manifestation of the Cold War. Over the years, the armies of both German states became important parts of the pact system and were essential aspects of military planning on both sides.

By the time that German unification became a real possibility in 1990, the Warsaw Pact had lost much of its effectiveness. With the revolutionary changes in the governments of Poland, Hungary, and Czechoslovakia, it was most unlikely that forces of those countries would take part in planning significant military exercises with the Soviet Union in the future.⁴⁶⁵ Therefore, any remaining obligations of the GDR to the Warsaw Pact were not a serious impediment to unification. Although the GDR's membership in the Warsaw Pact would probably have ended automatically upon its accession to the Federal Republic,⁴⁶⁶ the GDR formally withdrew from the pact a few days before unification.⁴⁶⁷

The real problems for unification raised by the vestiges of the pact system surrounded the issue of a united Germany's future membership in NATO. It was clear from the outset that the political leadership of the Federal Republic would insist that a united Germany remain a member of NATO. Other western countries—and indeed some former East Bloc countries like Poland—also strongly advocated that a united Germany remain in NATO. In part at least, these views reflected anxiety over the possible military role that a “neutral”—but not disarmed—Germany might play without the restraint of being embedded in the western security system.

463. The document admitting the Federal Republic to NATO was issued as part of the “Paris Treaties” of 1954, which went into effect in 1955; perhaps the most important of these accords was the General Treaty discussed above. *See supra* text accompanying notes 413-419. For the political struggles surrounding rearmament, see, e.g., T. SCHWARTZ, *supra* note 408, at 145-55.

464. *See* Treaty of Friendship, Co-operation and Mutual Assistance, Signed at Warsaw, May 14, 1955, 219 U.N.T.S. 3. The Preamble of the Warsaw Pact refers specifically to the rearming of West Germany and its inclusion in NATO.

465. *See, e.g.*, FAZ, Sept. 13, 1990, at 4, col. 1 (Czechoslovak army to cease participation in large-scale military exercises of Warsaw Pact). Indeed, the Warsaw Pact has subsequently dissolved its military alliance completely. N.Y. Times, Apr. 1, 1991, at A9, col. 1; N.Y. Times, Feb. 26, 1991, at A1, col. 1.

466. *See* Hailbronner, *supra* note 419, at 452.

467. N.Y. Times, Sept. 25, 1990, at A10, col. 3.

With respect to the NATO Treaty itself, German unification presented few serious problems. Since the GDR was to join the Federal Republic under article 23 of the Basic Law, no additional state would be joining the NATO alliance; rather, an expanded Federal Republic would continue on as a member of the alliance under the principle of "moving treaty boundaries."⁴⁶⁸ Instead, it was vigorous Soviet opposition to NATO membership for united Germany that raised real difficulties. This opposition seemed to be based less on a calculation of international advantages and disadvantages than on domestic Soviet political considerations. If a united Germany were to join NATO—with a concomitant withdrawal of Soviet forces from the territory of the former GDR—it might seem that the Soviet participation in the victory in World War II had gone for naught: no more Soviet troops would be occupying Germany, and the territory of the Soviet Union's former ally, the GDR, would henceforth be included in an alliance that the Soviet Union had always seen as directed against itself.⁴⁶⁹ For a substantial period, therefore, the Soviet government refused to agree to NATO membership for a united Germany, threatening in effect to invoke its reserved rights over Germany as a whole in order to prevent unification if NATO membership for the united Germany was to remain a possibility. Subsequently—apparently as part of a gradual process of retreat from its original view—the Soviet Union suggested that a united Germany could remain a member of both alliances, a proposal that met with unanimous rejection in the West.⁴⁷⁰

From a practical point of view the problem was particularly serious because the Soviet Union had 380,000 troops stationed in the GDR⁴⁷¹—the largest contingent of Soviet troops outside of the Soviet Union. The continued presence of these troops had led to substantial tensions with the population of the GDR. Immediate withdrawal, however, was a practical impossibility: the Soviet Union

468. See Hailbronner, *supra* note 419, at 452. Perhaps such a significant change in the borders might justify other states in leaving NATO, but no such action was contemplated. See *id.* For a different perspective on this issue, see Tomuschat, *A United Germany within the European Community*, 27 COMMON MKT. L. REV. 415, 422 (1990).

469. On the other hand, final acceptance of the Oder-Neiße line would in effect put a permanent seal on substantial Soviet annexations of Polish territory and part of East Prussia at the end of the War. See generally *supra* Part X(B).

470. See generally Hailbronner, *supra* note 419, at 453 (double membership for united Germany "would actually be the dissolution of both pact systems through an all-European security system").

471. See FAZ, Oct. 13, 1990, at 3, col. 3. Including family members of military personnel, a total of 600,000 Soviet citizens were stationed in the GDR. *Id.*

could not afford the expenditures involved in moving the troops, nor could it house them if they returned immediately.

The Soviet government's ultimate acquiescence in NATO membership for a united Germany must be viewed in the context of the groundbreaking "London Declaration" issued by the NATO heads of government on July 6, 1990.⁴⁷² The Declaration suggested that NATO had been transformed from an alliance that was basically intended to confront the Warsaw Pact into a group that sought cooperative arrangements with the countries of eastern Europe. The signatories reaffirmed the defensive nature of NATO and emphasized that its actions would remain consistent with the United Nations Charter and with the Helsinki Final Act adopted by the Conference on Security and Co-operation in Europe (CSCE). The Declaration also invited President Gorbachev to address the NATO Council, requested the Soviet Union and the countries of eastern Europe to "establish regular diplomatic liaisons with NATO," and announced moves designed to reduce the threatening military posture of NATO.⁴⁷³ In a press conference immediately following the London Declaration, President Bush acknowledged the Soviet Union's fears with respect to NATO and expressed the hope that the London Declaration would allay these fears, with the result that the Soviet Union might accept the concept of a united Germany as a member of NATO.⁴⁷⁴

The London Declaration apparently had this desired effect. On July 16, 1990—little more than a week after the Declaration was issued—Chancellor Kohl and President Gorbachev announced an agreement through which the Soviet Union would allow a united Germany to enter NATO.⁴⁷⁵ Although the agreement was basically favorable to Germany, it also contained concessions to Soviet con-

472. London Declaration on a Transformed North Atlantic Alliance, July 6, 1990, reprinted in 26 WEEKLY COMP. PRES. DOC. 1041 (July 9, 1990).

473. The Declaration emphasized the reduction of forces, and announced a new military strategy "moving away from 'forward defense'" and modifying the strategy of "flexible response" to de-emphasize nuclear weapons, *id.* at 1044, including a proposal for reciprocal removal of nuclear artillery shells from Europe, *id.* at 1043.

474. 26 WEEKLY COMP. PRES. DOC. 1048-49 (July 9, 1990) (President's news conference following the North Atlantic Treaty Organization Summit in London, July 6, 1990).

475. This eight-point agreement was announced by Chancellor Kohl in a press conference in the Soviet Union on July 16, 1990; see FAZ, July 17, 1990, at 1, col. 1; *id.* at 2, col. 2; see also FR, July 18, 1990, at 2, col. 4. In his remarks following the meeting with Kohl, President Gorbachev explicitly acknowledged the significant impact that the London Declaration had on his government's view of NATO membership for united Germany. According to Gorbachev, "what took place in London was indeed something like the beginning of a new historical development." *Id.*

cerns. First, although united Germany could choose the alliance to which it would belong—and Chancellor Kohl made clear that that choice would be NATO—Soviet troops would be allowed to remain in eastern Germany during a period of gradual withdrawal that would last from three to four years after unification.⁴⁷⁶ As long as Soviet troops remained in the former GDR during the period of withdrawal, the jurisdiction of NATO would not be extended to this area and no NATO forces could be stationed there. Yet this condition was qualified in two respects. First, the provisions of articles 5 and 6 of the NATO Treaty—providing for collective defense of any NATO member against attack—would extend to the territory of the former GDR upon unification.⁴⁷⁷ Thus, in the event of an attack by a non-NATO member upon this territory, NATO forces presumably *could* intervene in eastern Germany even while Soviet troops remained there. Second, units of the German army that have not become part of NATO—so called “units of territorial defense”—would be permitted to enter eastern Germany immediately after unification and also could be stationed in Berlin.⁴⁷⁸ Although Chancellor Kohl’s communiqué expressly excluded the “NATO structures” from the former GDR only during the three to four years of the Soviet troop withdrawal, Gorbachev at the same press conference seemed to suggest that this territory would remain free of “other foreign troops,” even after the Soviet withdrawal.⁴⁷⁹

As long as Soviet forces remained in eastern Germany, troops of the three western Allies could remain in Berlin.⁴⁸⁰ Upon the final Soviet withdrawal, however, these occupation units presumably must leave. (On the other hand, army units of the western Allies doubtless will remain in Germany to the extent that they constitute NATO troops stationed there.)

The Kohl-Gorbachev agreement contained two other points clearly intended to quiet Soviet anxieties. In the current Vienna negotiations over reduction of conventional forces, the Federal Republic would declare itself ready to reduce its military strength to 370,000 troops within three to four years after the effective date of

476. FAZ, July 17, 1990, at 1, col. 1; *id.* at 2, col. 2. The German and Soviet governments were to enter into a treaty regulating the details of withdrawal and also providing for German payments with respect to withdrawal. Indeed, much of the cost of withdrawal will be borne by Germany. For these treaties, see *infra* note 500.

477. FAZ, July 17, 1990, at 2, col. 2. See North Atlantic Treaty, Apr. 4, 1949, arts. 5-6, 63 Stat. 2241, 2244, T.I.A.S. No. 1964, 34 U.N.T.S. 243, 246-48.

478. FAZ, July 17, 1990, at 2, col. 2.

479. FR, July 18, 1990, at 2, col. 4.

480. FAZ, July 17, 1990, at 2, col. 2.

the first Vienna Treaty. Second, the German government would promise not to manufacture, possess, or control atomic, biological, or chemical weapons, and would promise to remain bound by the nuclear nonproliferation treaty.⁴⁸¹

Given the present geopolitical realities—particularly the economic and political weakness of the Soviet Union—this agreement seems to be balanced and well conceived. It did not force the Russians into an economically damaging immediate troop withdrawal, and to some extent at least, it allayed other Soviet concerns.

Yet the agreement raised a number of questions. Most obviously, for example, the agreement seemed to make dispositions of western Allied troops in Germany—as well as German NATO troops—without consultation with the western Allies. This independent process was presumably a harbinger of things to come, as a “sovereign” Germany begins to make an increasing number of fundamental decisions on its own, albeit within the framework of the western alliance and the European Economic Community.

A subordinate but nonetheless important theme that accompanied the negotiations over Germany's choice of a military alliance was the increasing importance of the Conference on Security and Co-operation in Europe. This conference of eastern and western European states and the United States and Canada concluded its 1975 deliberations with the adoption of the so-called “Helsinki Final Act.”⁴⁸² In this document, the parties agreed to observe the territorial integrity of the signatory nations; the principles of independence, national self-determination, and nonintervention under international law; the renunciation of force for the settlement of disputes; and respect for human rights, fundamental freedoms, and the protection of minorities. Moreover, the parties pledged further cooperation on these and other issues. Some politicians and commentators have viewed the Conference as representing the possible beginning of an all-European security system, which would eventually replace NATO and the Warsaw Pact. Such a result would of course be consistent with article 24(2) of the Basic Law, which allows the Federal Republic to join “a system of mutual collective security” for the purpose of ensuring “a peaceful and lasting order in Europe and among the peoples of the world.” Indeed membership in such an organization seems more fully consistent with the

481. *Id.*

482. Conference on Security and Co-Operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter Helsinki Final Act].

basic aspirations of article 24 than does the Federal Republic's membership in an alliance such as NATO which covers only a part of Europe. Although frequently discussed, however, any such developments do not seem close at hand; rather they remain goals for the future.⁴⁸³

D. The Two Plus Four Treaty and the Legal Status of Germany

The remaining questions relating to the status of Germany in international law were largely resolved in the Treaty on the Final Settlement with Respect to Germany,⁴⁸⁴ signed by the four World War II Allies and the two German states on September 12, 1990, at the conclusion of the "Two Plus Four" negotiations.⁴⁸⁵ The principal parties in these negotiations were the Federal Republic on one side and the Soviet Union on the other—although the United States, through its strong support of unification, also played an important role.⁴⁸⁶ The government of the GDR, in this as in other negotiations, was largely guided by the Federal Republic.

This important agreement—which can be viewed as the legal conclusion of World War II in Europe—effectively settled the issues of German sovereignty, the Oder-Neiße line, and the membership of a united Germany in NATO. In the agreement, the Federal Republic obtained Allied—principally Soviet—agreement to its posi-

483. On November 21, 1990, representatives of the nations of eastern and western Europe, along with the United States and Canada, signed the "Charter of Paris for a New Europe," providing for democracy and human rights throughout Europe. 30 I.L.M. 190 (1991). This agreement, which was adopted under the auspices of the Conference on Security and Co-operation in Europe, was a direct outgrowth of the process begun in the Helsinki Final Act of 1975. Although the agreement established a secretariat of the organization in Prague, and offices in Vienna and Warsaw, it did not establish enforcement mechanisms for its provisions and fell far short of the creation of a new security system to replace NATO and the Warsaw Pact, as sought by the Soviet Union. See N.Y. Times, Nov. 22, 1990, at A1, col. 3; *id.* at A17, col. 1. At the same Paris Conference, the NATO and Warsaw Pact leaders signed a Treaty on Conventional Armed Forces in Europe, providing for substantial reductions of tanks, combat aircraft, and other military equipment stationed throughout Europe. The leaders also signed a declaration rejecting previous relations of hostility and pledging to "establish new relations of partnership and mutual friendship." N.Y. Times, Nov. 20, 1990, at A1, col. 1.

484. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, S. TREATY DOC. No. 20, 101st Cong., 2d Sess., *reprinted in* 29 I.L.M. 1186 (1990) [hereinafter Two Plus Four Treaty].

485. These negotiations commenced with a declaration by the foreign ministers in Ottawa on February 13, 1990, and continued with meetings in May (Bonn), June (Berlin), and July (Paris), before the concluding meeting in Moscow on September 12. The foreign minister of Poland participated in the meeting in Paris in July. See *id.* at Preamble.

486. Kaiser, *supra* note 13, at 190.

tion on the remaining issues of German legal status. The Allies would completely relinquish their remaining reserved rights over Berlin and Germany as a whole, thus basically according Germany the same sovereignty as any other western European nation; moreover, this united Germany would be permitted to be a member of NATO and, as a result, Soviet forces would completely withdraw from the former territory of the GDR over a period of years. In return for these crucial concessions, the Soviet Union received effective confirmation of the Oder-Neiße line, as well as agreement on a number of other important points. Indeed, the Two Plus Four Treaty (as well as its predecessor, the Kohl-Gorbachev declaration) can be viewed as an attempt to allay Soviet fears through a carefully devised series of concessions—some of them actually protecting the security of the Soviet Union, and others serving as face-saving devices for the Soviet government. The structure of the agreement, which emphasizes provisions designed for the security of Poland and the Soviet Union, seemed clearly designed to have this rhetorical force.

In the preamble of the Treaty, the signatories note that Europe has lived in peace since 1945 and that recent changes in Europe have allowed the division of the continent to be overcome. The preamble also invokes the principles of the United Nations and the Helsinki Final Act. Perhaps referring to the NATO London Declaration of July 1990, the signatories also declare that they are ready to cease viewing each other as opponents and to work toward a relationship of trust and cooperation. In light of these factors—and because of German unification on a democratic and peaceful basis—“the rights and responsibilities of the Four Powers relating to Berlin and to Germany as a whole lose their function.”⁴⁸⁷

After this general introduction, the Treaty itself begins with a resolution of those issues that were most important to the security of the Soviet Union—particularly the issue of the Oder-Neiße line. Article I declares that united Germany will consist of the territories of the Federal Republic, the German Democratic Republic, and Berlin, that these borders are final and that confirmation of the permanence of these borders is essential for peace in Europe.⁴⁸⁸ Moreover, “united Germany has no territorial claims whatsoever against other states and shall not assert any in the future,”⁴⁸⁹ and united Germany and Poland will confirm their present border in a

487. Two Plus Four Treaty, *supra* note 484, at Preamble.

488. *Id.* art. 1, § 1.

489. *Id.* art. 1, § 3.

treaty binding under international law.⁴⁹⁰

To make this point even more clearly, the agreement goes on to require that the Federal Republic and the GDR ensure that the constitution of a united Germany will not contain any provision contrary to these principles.⁴⁹¹ Specifically, this section requires amendment or deletion of the Preamble of the Basic Law (foreseeing future unification), article 23 (allowing "accession" of "other parts of Germany") and article 146 (also foreseeing future steps for unification). At the time this agreement was signed, the Unification Treaty had already required deletion of article 23 and amendment of the Preamble and article 146 in an appropriate manner.⁴⁹² The signing of the Two Plus Four Treaty, however, required united Germany to retain the principle of these changes permanently. Any future amendment seeking to revert to the previous provisions of the Basic Law would be a violation of a treaty obligation binding in international law.⁴⁹³

Thus, in these interesting provisions, the two German states agreed that when they are united, their joint constitution will conform to certain principles. Yet this is not the only section of the Treaty in which the Allies sought to ensure that the constitution of a united Germany would contain specified provisions. In article 2, the German states declared that "only peace will emanate from German

490. *Id.* art. 1, § 2. On November 14, 1990, the foreign ministers of Germany and Poland signed the border treaty called for by the Two Plus Four agreement. Adopting the border agreed upon by the GDR and Poland in the Görlitz Treaty, *see supra* text accompanying notes 448-450, and also invoking Brandt's Warsaw Treaty of 1970, the parties declared the inviolability of the Oder-Neiße line, now and in the future, and pledged that neither would raise any territorial claim against the other. *See* FAZ, Nov. 15, 1990, at 2, col. 4. The ratification of the treaty by the German and Polish parliaments was to await the signing of a friendship treaty between the two states. *See* FAZ, Nov. 16, 1990, at 2, col. 4; FAZ, Nov. 15, 1990, at 2, col. 2. The friendship treaty was signed on June 17, 1991, and the two treaties will be submitted jointly for ratification. FAZ, June 18, 1991, at 1, col. 2.

491. Two Plus Four Treaty, *supra* note 484, art. 1, § 4.

492. Unification Treaty, *supra* note 203, art. 4, §§ 1, 2, 6. *See supra* Part VIII(A).

493. A question may arise concerning whether a treaty signed by the two separate German states can bind the united Germany. Because unification was accomplished through accession of the GDR to the Federal Republic under article 23 of the Basic Law, unification occurred when the GDR became part of the Federal Republic. Therefore, the Federal Republic clearly continues on as a legal subject, and its obligations before unification should (in general) also continue. Some German constitutionalists have argued, however, that only a united Germany may make binding agreements with respect to questions of territory. *See supra* text accompanying notes 455-456. Perhaps to meet this argument, the Two Plus Four Treaty requires that its provisions be ratified by the all-German parliament after accession of the GDR. *See* Two Plus Four Treaty, *supra* note 484, art. 8, § 1. This step was accomplished in October 1990.

soil," and noted that "[a]ccording to the constitution of the united Germany, acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for aggressive war, are unconstitutional and a punishable offence."⁴⁹⁴ This is almost a word-for-word quotation of article 26(1) of the Basic Law, and article 2 of the Treaty accordingly appears intended to ensure that this provision will remain in any future German constitution. Also according to article 2, the two German states declared that a united Germany will not use weapons except in accordance with its own constitution and the Charter of the United Nations. Thus even though a united Germany has theoretically become "sovereign," the signatory Allied powers have extraordinary rights under international law to ensure that the provision referred to in article 2 of the Treaty remain in the constitution of the new united Germany and that this provision be observed.⁴⁹⁵

Article 3 of the Treaty contains additional important measures of security for the Soviet Union. Article 3, section 1 declares in effect that a united Germany will continue to renounce the manufacture, possession, and control of nuclear, biological, and chemical weapons⁴⁹⁶ and that the rights and duties of the Treaty on the Non-Proliferation of Nuclear Weapons will also apply to united Germany.⁴⁹⁷ Moreover, as part of the Vienna negotiations with respect to conventional forces in Europe, the Federal Republic has already declared its obligation to reduce its troops to a maximum of 370,000, although the German government expects the signatory Allies to make a contribution to European security, by limiting the number of their own armed forces.⁴⁹⁸

The limitation of German forces reflected a principle already adopted in the Kohl-Gorbachev agreement of July 1990,⁴⁹⁹ and articles 4, 5 and 6 of the Two Plus Four Treaty essentially developed certain other provisions of that agreement. Article 4 contemplates that a united Germany will enter into a treaty with the Soviet Union

494. Two Plus Four Treaty, *supra* note 484, art. 2.

495. Moreover, of course, Germany (and many other countries) have relinquished substantial "sovereign" rights by joining NATO and the European Economic Community.

496. *Cf.* R. DOLZER, *supra* note 115, at 23 (Federal Republic had previously renounced those weapons).

497. Two Plus Four Treaty, *supra* note 484, art. 3, § 1. For the Non-Proliferation Treaty, *see* Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.

498. Two Plus Four Treaty, *supra* note 484, art. 3, § 2.

499. *See supra* text accompanying note 481.

relating to the withdrawal of Soviet troops from the territory of the GDR and Berlin. Instead of the more general three to four year period for withdrawal of Soviet troops mentioned in the Kohl-Gorbachev discussions, the Two Plus Four Treaty contemplates that Soviet troops be withdrawn by the end of 1994, but appears to couple that date with the concomitant reduction of the size of the German armed forces contemplated in article 3, section 2.⁵⁰⁰

Articles 5 and 6 regulate the complicated subject of the presence of western forces in former GDR territory—before and after the ultimate departure of Soviet troops. These provisions add considerable detail to the general statement in Kohl's communiqué of July 16 that as long as Soviet troops remain in the territory of the GDR the "NATO structures would not be extended to this part of Germany."⁵⁰¹ Article 5, section 1 of the Treaty makes clear, as did Kohl's communiqué, that until all Soviet troops are withdrawn (no later than 1994), only German units of territorial defense—which are not integrated into the NATO structure—can be stationed in eastern Germany. Moreover, during this period, other nations may not station forces in this territory and may not undertake other military activities there.

As the Kohl communiqué indicated, French, British and American troops can remain stationed in Berlin as long as Soviet troops remain in eastern Germany. The number of troops of the western Allies cannot exceed their present amount, and no new categories of weapons can be introduced into Berlin by the foreign troops.⁵⁰² These provisions give a certain leeway to the German government: there is no requirement that during this period French, British and

500. The German-Soviet Treaty with respect to the gradual withdrawal of Soviet troops was signed on October 12, 1990. See FAZ, Oct. 13, 1990, at 3, col. 3. As part of this process, the two countries also entered into an agreement through which the Federal Republic agreed to defray substantial costs incurred by the Soviet Union for troops temporarily remaining in Germany, as well as for their return transportation and additional housing for the troops in the Soviet Union. These payments will total 12 billion D-Marks, together with an additional 3 billion D-Mark five-year interest-free loan. See Treaty Concerning Transitional Measures, Oct. 9, 1990, BGBl II 1655.

The process of rapprochement took a dramatic step on November 9, 1990 when Germany and the Soviet Union signed a comprehensive "Treaty on Good-Neighborliness, Partnership and Cooperation." See FAZ, Nov. 10, 1990, at 1, col. 2; FAZ, Sept. 14, 1990, at 7, col. 1 (text of Treaty as initialed); for an English translation of the text, see 30 I.L.M. 504 (1991). Among other things, this treaty contains guarantees that neither state shall be the first to attack the other—although this agreement is presumably subject to the primacy of NATO obligations. See Blumenwitz, *Der Vertrag vom 12.9.1990 über die abschließende Regelung in bezug auf Deutschland*, 1990 NJW 3041, 3047 & nn. 67-68.

501. FAZ, July 17, 1990, at 2, col. 2; see *supra* text accompanying note 477.

502. Two Plus Four Treaty, *supra* note 484, art. 5, § 2.

American troops *must* remain in Berlin; rather, they are permitted to do so “upon German request,” pursuant to agreement between the united German government and the western Allies.⁵⁰³

Article 5, section 3 seeks to spell out the possible military role of eastern Germany after the withdrawal of Soviet troops—a subject not specified in Kohl’s communiqué, although referred to in very general terms by Gorbachev on July 16.⁵⁰⁴ According to article 5, section 3, German troops, including German troops integrated in NATO, can be stationed in former GDR territory after the withdrawal of Soviet troops, but foreign troops may never be stationed in that territory, nor may they be “deployed” there. Thus after the departure of Soviet troops, only German NATO forces—but not NATO forces of other nations—may be stationed or deployed in eastern Germany.⁵⁰⁵

Article 5, section 3 also reveals the great sensitivity of the Soviet government with respect to the stationing of nuclear weapons in the former territory of the GDR: foreign nuclear weapons and carriers for nuclear weapons may not be stationed or deployed there.⁵⁰⁶ Moreover, German NATO troops stationed in that territory may not possess carriers for nuclear weapons. (Of course, under article 3, united Germany will not possess its own nuclear weapons; therefore German nuclear weapons are not expressly excluded.) A significant dispute arose on the question of weapons carriers because certain conventional weapons systems can also be used as nuclear weapons carriers, and NATO apparently believed that German NATO forces should eventually be free to use those conventional systems in east-

503. *Id.* For agreements relating to the continued stationing of Allied forces in Berlin during this interim period, see Treaty on the Final Settlement with Respect to Germany, S. EXEC. REP. NO. 33, 101st Cong., 2d Sess. 28-54 (1990).

504. See *supra* text accompanying note 479.

505. It is not clear, however, whether it might be possible for foreign NATO troops to engage in relatively short maneuvers in that territory after the Soviet withdrawal: the issue rests on the meaning of the word “deployed.” This question was apparently debated in the final Two Plus Four negotiations because the British government wished to preserve the possibility of joint NATO maneuvers in former GDR territory. See Blumenwitz, *supra* note 500, at 3046. The problem was ultimately resolved by a separate addendum providing that, should questions arise, the word “deployed” will be interpreted by the united German government “in a reasonable and responsible way taking into account the security interests” of the signatories of the agreement. See Two Plus Four Treaty, *supra* note 484, Agreed Minute; see also N.Y. Times, Sept. 13, 1990, at A1, col. 3.

506. But foreign forces might be permitted to bring nuclear weapons into eastern Germany during any maneuver that is interpreted not to constitute a “deployment” under article 5, § 3 of the Treaty and the related addendum. See *supra* note 505.

ern Germany.⁵⁰⁷ This problem was resolved by a provision stating that the German NATO forces may possess conventional weapons systems that *could* be used for nonconventional (nuclear) purposes in eastern Germany, so long as the systems are armed solely with conventional weapons and only designated for such use.⁵⁰⁸

Yet by the very nature of the NATO structure, the provisions of the Two Plus Four Treaty with respect to eastern Germany might not necessarily prevail in all foreseeable instances. Cutting across all of the limitations of the Two Plus Four agreement are the provisions of articles 5 and 6 of the NATO Treaty, which allow (and require) members of the alliance to come to the defense of NATO territory invaded by other states.⁵⁰⁹ Article 6 of the Two Plus Four agreement permits united Germany to belong to "alliances, with all the rights and responsibilities arising therefrom." It seems clear, therefore, that the Two Plus Four Treaty itself recognizes that the obligations of NATO—the alliance to which united Germany belongs—will take precedence over other sections of the Two Plus Four Treaty. That result would apply, at least, to those NATO obligations existing at the time of the signing of the Two Plus Four Treaty. Presumably, therefore, if there was an attack on former GDR territory, articles 5 and 6 of the NATO Treaty would allow German and other NATO forces to come onto that territory to repel the attack—before or after the departure of the Soviet troops stationed there—notwithstanding any contrary provisions in the Two Plus Four agreement.⁵¹⁰

Not all of the concessions to the Soviet Union (and perhaps to the other Allies) were contained in the actual Two Plus Four Treaty. GDR Prime Minister de Maizière and West German Foreign Minister Genscher supplied the Allies with a separate letter containing additional points.⁵¹¹ The letter first noted that the two German states had made a representation in the Two Plus Four negotiations to the effect that they had agreed (in the Joint Declaration and Unification Treaty) that expropriations on the basis of occupation measures from 1945 to 1949 were not to be undone, and that the Federal Republic would not enact any legal rules inconsistent with that principle, but that the all-German parliament might provide for com-

507. N.Y. Times, Sept. 13, 1990, at A1, col. 3.

508. Two Plus Four Treaty, *supra* note 484, art. 5, § 3.

509. See North Atlantic Treaty, Apr. 4, 1949, arts. 5-6, 63 Stat. 2241, 2244, T.I.A.S. No. 1964, 34 U.N.T.S. 243, 246-48.

510. See *supra* text accompanying note 477.

511. Letter from de Maizière and Genscher, *supra* note 363.

pensation. It is difficult to assess the effect of this representation incorporated in a letter rather than in the text of the treaty.⁵¹² Viewed at its strongest, however, this statement could bind a united Germany to the observance of the Joint Declaration's position on the 1945-49 expropriations, through an obligation enforceable by the signatories of the Two Plus Four agreement (including the Soviet Union) in international law.

It is not entirely clear why the Soviet government apparently remained so determined to preserve the property relationships created by the 1945-49 expropriations. Perhaps as a domestic political matter the Soviet Union was anxious to show some permanent social change accomplished by its period of occupation in Germany after the war. The Soviet Union may also have sought to avoid any declaration that its acts during the occupation violated international law or treaty obligations. Most likely, as indicated by the Modrow-Gorbachev correspondence discussed above,⁵¹³ the government of the GDR feared serious political unrest in the event that the 1945-49 land reform was undone, and the Soviet Union sought to support this deeply held wish of its former ally.

In a second point in the letter, the signatories declared that war memorials and graves on German soil—presumably those of the Allies, principally the Soviet Union—are protected under German law.⁵¹⁴ In an extremely interesting third point, the signatories declared that “the free democratic basic order” would be protected by the constitution of a united Germany and that, on this basis, it would be possible to prohibit political parties “which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order as well as associations which are directed against the constitutional order or the concept of international understanding.”⁵¹⁵ As noted above, this language tracks pro-

512. The legal effect of this letter may not be entirely clear because it is not actually set forth in the Treaty. Yet it must have been intended by the parties to have some binding effect. Cf. Blumenwitz, *supra* note 500, at 3048. For example, when President Bush sent the Two Plus Four Treaty to the Senate, he specifically called attention to the letter and noted that it formally conveyed “additional assurances.” See 26 WEEKLY COMP. PRES. DOC. 1443, 1444 (Oct. 1, 1990).

513. See *supra* text accompanying notes 259-260.

514. Letter from de Maizière and Genscher, *supra* note 363, at 21. This has been a longstanding concern of the Soviet government, reflected in a significant number of treaties entered into by the Soviet Union over the years. A similar provision appears in the Soviet-German partnership treaty. See *supra* note 500; Blumenwitz, *supra* note 500, at 3048.

515. Letter from de Maizière and Genscher, *supra* note 363, at 21 (as translated in S. EXEC. REP., *supra* note 363).

visions of article 21(2) and article 9(2) of the Basic Law, providing for the prohibition of "unconstitutional" political parties and associations.⁵¹⁶ These provisions have a long and controversial history but, in essence, they have been directed to a significant extent against the left—particularly the Communist Party—and only to a lesser extent against movements of the right. The Soviet Union's apparent insistence on this provision is therefore deeply ironic. Yet, in the present political circumstances, the Soviet Union may well have believed that the successor of the SED, or any left-wing party that may arise in united Germany, will be sufficiently imbued with liberal ideals that it would not violate the "free democratic basic order." In any case, this provision seems to be directed principally toward the danger of new right-wing movements in a united Germany and, indeed, the letter goes on to state specifically that these provisions include "parties and associations with National Socialist aims."⁵¹⁷

In light of articles 1 through 6 of the Two Plus Four Treaty—and perhaps also in light of the points in the letter of de Maizièrre and Genscher—the four Allied powers declared that they "hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole," and all related four-power agreements, decisions, practices, and institutions were dissolved.⁵¹⁸ Consequently, "the united Germany shall have . . . full sovereignty over its internal and external affairs."⁵¹⁹ Unification would therefore be accompanied by the achievement of practical sovereignty by the unified country.

At the insistence of the Soviet Union, the Two Plus Four agreement ultimately took the form of a treaty, and it was therefore necessary that the text be ratified by the legislatures of the participating states. From the German side, ratification would come from a united Germany—an action that could take place only after unification. Moreover, ratification by the four Allied powers also required legislative procedures that would last beyond the point of unification. In order to confer practical sovereignty on a united Germany at the point of unification, therefore, the four Allies declared that

516. See *supra* text accompanying notes 363-364.

517. Finally, the letter also incorporates the provision of the Unification Treaty that sets forth the principles by which it will be determined whether treaties of the former GDR will be preserved as treaties of the united Germany. Letter from de Maizièrre and Genscher, *supra* note 363, at 21-22. See *supra* Part VIII(A).

518. Two Plus Four Treaty, *supra* note 484, art. 7, § 1.

519. *Id.* art. 7, § 2; but see *supra* note 495 and accompanying text.

they would "suspend" all of their reserved rights from the date of unification until the final ratification of the treaty, and the Allies signed a document effecting the suspension in New York on October 1, 1990.⁵²⁰

XI. UNIFICATION AND THE EUROPEAN ECONOMIC COMMUNITY

The European Communities, which include most of the countries of western Europe, were created through the adoption of three treaties—the European Coal and Steel Agreement (1951), the European Atomic Energy Agreement (Euratom) (1957) and, by far the most important, the Treaty Establishing the European Economic Community (1957). Indeed, the European Economic Community (EEC) has come to assume an extremely important role in the economic and legal life of Europe. A significant portion of the internal law of the member states—extending far beyond direct economic regulation into areas such as environmental control—is determined by treaty, legislation or judicial interpretation of the EEC.

The Federal Republic was a founding member of the European Economic Community. Its membership is consistent with the Basic Law and indeed perhaps even mandated by that document. According to the Preamble, the German people are "animated by the will . . . to serve world peace as an equal member of a united Europe,"⁵²¹ and article 24(1) authorizes the Federal government to transfer "sovereign rights to international institutions."⁵²² The Federal Republic joined the European Community under that authority.⁵²³

520. See N.Y. Times, Oct. 2, 1990, at A11, col. 1. The United States Senate approved the Two Plus Four Treaty by a unanimous vote on October 10, 1990. FAZ, Oct. 26, 1990, at 1, col. 3. The Federal Republic completed its process of ratification on October 8. See Blumenwitz, *supra* note 500, at 3041 n.3.

On March 4, 1991, the Soviet Union became the last of the parties to ratify the Two Plus Four Treaty. See N.Y. Times, Mar. 5, 1991, at A3, col. 4. Certain related Soviet-German treaties, see *supra* note 500, were ratified or approved by the Soviet Parliament on the same date. FAZ, Mar. 5, 1991, at 1, col. 1; *id.* at 2, col. 4. Along with the instruments of ratification, the Soviet Parliament issued a statement declaring that the Parliament "proceeds from the proposition that human rights will be seriously observed in unified Germany and that, in particular, discrimination against citizens of the former GDR from political and similar motives will be barred." FAZ, Mar. 9, 1991, at 4, col. 4. This interesting statement presumably seeks to protect former members of the SED from exclusion from the public service and may also seek to prevent criminal trials of former GDR officials. Cf. FAZ, Mar. 19, 1991, at 5, col. 6.

521. GG Preamble.

522. GG art. 24, § 1.

523. See, e.g., 2 GRUNDGESETZ-KOMMENTAR, *supra* note 7, art. 24, No. 24; Stern, *supra* note 14, at 14-16.

From the beginning of the Federal Republic's relationship with the EEC, the parties recognized the special legal status of Germany and particularly the constitutional goal of unification. In negotiations over the EEC Treaty, for example, the leader of the West German delegation made clear that in the event of German unification, the EEC Treaty would be open to re-examination.⁵²⁴ Although this remark was not made part of the Treaty, it did not encounter contradiction and therefore may have been tacitly accepted by the other delegations, with the result that it may have a measure of binding legal effect. Some have argued, therefore, that the Federal Republic (or perhaps any other member state) could require renegotiation of the Treaty upon German unification.⁵²⁵ In any event, no member state has sought to make use of this possibility.⁵²⁶

Moreover, as noted above, the constitutional theory of the Basic Law held that the German "Reich" continued in existence and therefore the GDR could not constitutionally be treated as a separate country. Accordingly, the Federal Republic always treated trade with the GDR as domestic trade. Yet EEC rules would ordinarily have compelled the Federal Republic to create a customs frontier that would have imposed the Common Customs Tariff and other restrictions on trade with the GDR. To avoid that result, a "protocol on internal German trade" was made an integral part of the EEC Treaty in 1957.⁵²⁷ Under the protocol, the Federal Republic could continue to treat intra-German trade as domestic trade. The ordinary EEC rules on trade with non-EEC countries would thus not apply to goods traveling between the GDR and the Federal Republic—although such rules would apply to goods traveling between the GDR and other EEC countries. In this way the GDR has always received some benefits of quasi-membership in the EEC.

In the early months of 1990, as German unification became increasingly probable, attention turned to prospective problems of incorporating the territory of the GDR into the structure of the EEC. Some issues turned on the constitutional method of unification that

524. See, e.g., Grabitz & v. Bogdandy, *Deutsche Einheit und europäische Integration*, 1990 NJW 1073, 1076.

525. See Randelzhofer, *Deutsche Einheit und europäische Integration*, 49 VVDStRL 101, 112-13 (1990); cf. Sedemund, *Deutsche Einheit und EG*, 1990 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 11, 12.

526. See Tomuschat, *supra* note 468, at 425.

527. Protokoll über den innerdeutschen Handel und die damit zusammenhängenden Fragen, of Mar. 25, 1957, BGBl II 984. For commentary, see Beise, *Deutsche Einheit und Europäische Integration*, in *EUROPA-LEITFADEN: EIN WEGWEISER ZUM EUROPÄISCHEN BINNENMARKT 1992*, at 205, 206-08 (T. Oppermann & E.-W. Moersch 2d ed. 1990).

would be chosen. If German unification had proceeded through a substantial interim period of cooperation in a form of confederation or "treaty community"—as originally suggested by Chancellor Kohl and by then-Prime Minister Modrow—the GDR might have petitioned for associate status in the EEC under article 238 of the EEC Treaty. The GDR might even have sought full membership under article 237—a complex process requiring unanimous approval of the European Council, a majority vote of the European Parliament, and approval of a related agreement or treaty by each member state.

Because the GDR "acceded" to the Federal Republic under article 23, however, neither of these independent actions was necessary. Upon accession, the GDR became part of the existing Federal Republic and lost its independent legal status. Moreover, under the doctrine of "moving treaty boundaries," the EEC Treaty applies to new territory incorporated into the boundaries of a member state, without any requirement that the Treaty be amended. After accession, therefore, the Federal Republic—now including the territory of the former GDR—remains a party to the Treaty.⁵²⁸ Because the Treaty will not be amended, however, the Federal Republic must remain content with its present number of votes on the Council and representatives in the European Parliament, and the present number of judges on the European Court—even though its population increased substantially upon unification. Although changes of representation on these bodies may eventually take place, they will require an amendment of the EEC Treaty or subsequent agreements.⁵²⁹

Because the GDR became part of the Federal Republic upon accession, it would seem to follow that EEC law would henceforth apply in the former GDR to the same extent as it applies in the rest

528. See, e.g., Beise, *supra* note 527, at 213-14; Sedemund, *supra* note 525, at 11-12. The European Council decided on April 28, 1990 that German unification could occur without amendment of the EEC Treaty. Schmidt-Bleibtreu, *supra* note 141, at 141.

If German unification had occurred with the adoption of a new, all-German constitution under article 146 of the Basic Law, the problems might have been more difficult. Under those circumstances, the resulting entity may not have been viewed as the continuing Federal Republic but rather as a new all-German state. *But see supra* text accompanying note 108. In that case, perhaps, the doctrine of state "succession" could have been applied for the purpose of finding that the new entity assumed the role of the Federal Republic in the EEC. Otherwise, the new entity would presumably have had to apply for membership under article 237 of the EEC Treaty. See, e.g., Ranzelzhofer, *supra* note 525, at 115-17.

529. See Tomuschat, *supra* note 468, at 427 (European Parliament); Note, *supra* note 4, at 307 n.299.

of the Federal Republic.⁵³⁰ Here as elsewhere, however, some of the hardest problems were not constitutional or legal, but economic. It was clear that the economy of the GDR was not strong enough to accept immediate application of all aspects of EEC law. Enterprises in the east could not withstand unrestricted competition from other EEC countries and were not equipped to comply with all applicable EEC environmental and product quality standards. Rather, it was necessary to devise a series of special measures for an interim period.⁵³¹

In order to accomplish a smooth transition that would take these serious problems into account, the process of German unification was marked by close cooperation with the relevant Community institutions.⁵³² Accordingly, the State Treaty contained a number of provisions specifically acknowledging the authoritative role of the law of the European Communities.⁵³³ In this cooperative spirit, the Economic Community allowed most goods from the GDR to have free access (without tariff barriers) to the countries of the EEC, even before unification. Thus "a de facto customs union . . . existed between the Community and the German Democratic Republic since 1 August 1990."⁵³⁴

These measures, however, did not resolve the necessity of excepting the former GDR from the rigor of certain rules of the Economic Community. In order to deal with these problems adequately in light of the accelerated pace of German unification, the Council authorized the European Commission to recommend certain excep-

530. See generally Rengeling, *Das vereinte Deutschland in der Europäischen Gemeinschaft: Grundlagen zur Geltung des Gemeinschaftsrechts*, 1990 DVBl 1307, 1309-11.

531. As noted above, article 10 of the Unification Treaty sets forth the basic structure for the relationship between the European Communities and the unified Germany for an interim period. See *supra* notes 228-229 and accompanying text. Article 10, § 1 of the Unification Treaty extends the treaties of the European Communities to the territory of the former GDR, but article 10, § 2 notes that other legal measures taken by the EC will extend to that territory only insofar as EC law itself has not made exceptions to the application of these measures.

532. Indeed, representatives of the EC were present at treaty negotiations between the two German governments. Schäuble, *supra* note 23, at 301.

533. See State Treaty, *supra* note 141, Preamble; art. 11, § 3; Joint Protocol, *supra* note 141, part A, art. I, § 1; *supra* text accompanying notes 147 & 160; note 160. See also *The Community and German unification: implications of the Staatsvertrag*, reprinted in *THE EUROPEAN COMMUNITY AND GERMAN UNIFICATION* 20 (Bulletin of the European Communities Supp. 4/90).

534. The Community and German unification, Communication presented by the Commission to the European Council on Aug. 22, 1990, reprinted in *THE EUROPEAN COMMUNITY AND GERMAN UNIFICATION* 38 (Bulletin of the European Communities Supp. 4/90).

tions for this purpose. Pursuant to this authorization, the Commission proposed measures dealing particularly with agriculture, transportation policy, energy, environment, and the law relating to food and protection of workers.⁵³⁵ The government of the Federal Republic, in turn, issued regulations adopting these proposed exceptions as internal German law.⁵³⁶

In December 1990 the Council accepted these proposed rules and they accordingly became part of Community law.⁵³⁷ In light of continuing economic uncertainties in the five eastern Länder, additional EEC measures may be needed, but the Community foresees that this transitional period should in general be concluded by the end of 1992.⁵³⁸

CONCLUSION

With the interim "suspension" of the Allies' reserved rights on October 1, 1990, the final step necessary for effective unification had taken place. In an extraordinary period of less than one year, the process of unification had proceeded from vague proposals for a treaty community or confederation, through the March 18 Volkskammer election, the fundamental amendments of the GDR Constitution, and the State Treaty and currency reform of July 1, to the crucial Unification Treaty and Two Plus Four agreement. On August 23, 1990, the Volkskammer had declared that the GDR's accession under article 23 of the Basic Law would take place on October 3, 1990, and the President of the Federal Republic had received official notice of this action.⁵³⁹ In consequence, at a moment after midnight on October 2/3, the GDR ceased to exist, becoming part of the Federal Republic of Germany.

Accession completed the requisite constitutional steps for unification—although, as noted above, constitutional and other legal issues will continue to be presented over the coming years by the decisions that were adopted in 1990. Yet, even though constitutional issues will persist, the focus of attention will turn toward very serious problems raised by attempts to incorporate what remains of

535. For an analysis of measures proposed by the Commission, see Carl, *Die Gemeinschaft und die deutsche Einigung*, 1990 EuZW 561.

536. See Schäuble, *supra* note 23, at 301.

537. See Priebe, *Die Beschlüsse des Rates zur Eingliederung der neuen deutschen Bundesländer in die Europäischen Gemeinschaften*, 1991 EuZW 113. These measures replaced certain provisional regulations that had been in effect since October 3, 1990. *Id.* at 114 & n.10.

538. *Id.* at 113-15.

539. See 1990 BGBl I 2057-58.

the GDR's economy into that of the Federal Republic and the social and psychological problems raised by the spiritual "Wall in the head" which is likely to separate eastern and western society in Germany for some years to come. Moreover, in facing these issues—and future constitutional issues also—German politics may turn decisively inward in an attempt to resolve these problems arising out of the course of German history.

Indeed, one of the most striking aspects of the year's debates on problems of unification was the extent to which these problems raised—in many cases perhaps more sharply than before—important issues of political and constitutional principle that had been present in the Federal Republic long before unification appeared to be a real possibility. Although, in form, the negotiations surrounding unification involved reconciling the positions of the Federal Republic and the GDR—and to a lesser extent, those of the Federal Republic and the Allies (principally, the Soviet Union)—some of the most important disputes over unification actually focused on domestic political issues within the Federal Republic. Some of these disputes raised issues that have formed points of political tension within the Federal Republic for decades (and, in some instances, have a history reaching back into the disputes of the Weimar Republic).

Indeed, the goal of unification itself has been viewed rather differently from differing political positions in the Federal Republic. The idea of a single "German Reich" that demanded continuing government action toward unification seemed over time to become much more congenial to the conservative CDU/CSU than it was to the Social Democrats. Although Chancellor Brandt protested that his Ostpolitik did not impair the goal of unification, for most practical purposes the Basic Treaty was indeed a step toward normalizing the recognition of two separate states on the territory of the former "Reich." In their political characterization of the Basic Treaty, therefore, the conservatives were not too far from the mark.

Tension between views traditionally supported by the CDU/CSU and views generally attributed to the Social Democrats is also evident in many of the specific constitutional issues arising from unification. The choice of a method of unification is a prime example. Having succeeded in securing accession under article 23 as the method of unification, the conservatives seemed at the outset to have preserved the Basic Law generally intact and to have avoided what they saw as the dangers of including social guarantees and elements of direct democracy in the constitutional structure. These el-

ements might have made their way into a new, all-German constitution if unification had been accomplished under article 146 of the Basic Law. Yet, inclusion of social and ecological elements in the GDR constitutional amendments of June 17, 1990—even though promulgated by a government in which the eastern CDU was the controlling factor—seemed to suggest that this particular debate was not over. Indeed, the CDU was required to adopt a Unification Treaty that at least contemplated the possible insertion of “state goals” in a constitution that might be adopted by plebiscite under article 146 even after unification. In future debates about constitutional reform, it is likely that the SPD (along with the Greens and Bündnis 90) will support expanded social and ecological guarantees, as well as increased participation of the people in lawmaking through plebiscites. In many respects, the constitutional draft of the GDR Round Table may well provide a model for constitutional discussions of this kind.

The specific disputes over the civil service, abortion, and property rights also furnish fascinating examples of the persistence of political themes deeply embedded in the history of the Federal Republic as important aspects of the process of unification. Arguments over the future of the GDR’s abortion regulation form merely the latest chapter in a dispute whose origin lies deep in the history of the Weimar Republic, with conservative forces seeking strict legislation limiting abortions and groups associated with the SPD—in particular, feminist and women’s groups—supporting liberalization of the rules relating to abortion.

Political tension surrounding the role of the German public service (*Beamtentum*) is at least as longstanding as that relating to abortion. Indeed, from the nineteenth century on, many on the left viewed the *Beamtentum* as an element of the polity which, along with the army, was fundamentally hostile to basic republican ideas. This aspect of the traditional public service may have faded in recent years, but disputes over the exclusion of members of radical political parties (and primarily left-wing radical parties) from the public service have played a major role in the political life of the Federal Republic over the last two decades. Here again, the conservative CDU and CSU have sought most vigorously to enforce these exclusions, while the Social Democrats—notwithstanding Willy Brandt’s leading role in issuing the Radicals Decree—have recently taken a considerably more tolerant position. Applications for the *Beamtentum* from former officials of the GDR may bring these issues to the fore once again.

More broadly, these questions may be related to differing views of the value of the former GDR on the whole. The conservatives are more likely to reject the former eastern political system as totally worthless, whereas the Social Democrats—in accordance with some of their attempts at rapprochement in the few years preceding unification—are more likely to search for occasional virtues or achievements.

While the connections are not quite so direct, disputes over the status of expropriations by the Soviet occupation authorities and by the government of the GDR reflect differing conceptions of property that also have their parallels in constitutional disputes in the Federal Republic. Conservatives have often asserted a strong conception of property, including hard requirements of restitution or compensation for expropriation of property or the diminution of its value. In contrast, a weaker view of property suggests willingness to emphasize the social requirements of property and to be more flexible about requirements of restitution or compensation. Disputes over expropriation raise these points in very sharp form, but they have echoes in debates of past decades in the Federal Republic, such as those relating to co-determination. Even such disputes as those over the Oder-Neiße line—which, in the context of unification, principally involved negotiations between Germany and the Soviet Union—also had domestic political implications. The quest for the return of these territories has generally been confined to the right-wing sections of the CDU and CSU; the Brandt government of the SPD was willing in practical effect to concede the permanence of those boundaries at a relatively early point.

In many of the domestic political issues arising from unification, the conservative forces of the CDU appear to have prevailed—as befits its strong political position, particularly as a result of the GDR elections of March 18, 1990. Yet, even so, a surprising amount remains open. It is not impossible, for example, that political and judicial shifts might ultimately permit the practical extension of the GDR's abortion rule to all of Germany. Certainly the proposal of Bundestag President Rita Süßmuth—a proposal coming from the ranks of the CDU—would come very close to having this effect. Moreover, on the more general question of the revision of the Basic Law to include social and environmental guarantees and more elements of direct democracy, the debate now occurring within the Federal Republic demonstrates a continued high level of public concern on these issues. Positions currently being taken by members of the FDP—a crucial coalition partner of the CDU—apparently favor

some constitutional amendments and may suggest the possibility of future constitutional change. Thus, as many of the disputes over unification implicate political struggles of the past, political disputes in the course of unification itself—as well as the shifts in economic and political organization that are certain to occur—will shape the domestic political future of the Federal Republic in important ways that are still developing.

APPENDIX A

CALENDAR OF EVENTS - THE BACKGROUND OF
GERMAN UNIFICATION1. *The End of World War II in Europe*

Feb. 1945 - Yalta Conference

May 1945 - German capitulation; end of World War II in Europe

June 1945 - Berlin Declaration

July-August 1945 - Potsdam Conference

2. *Creation of Two German States*

July 1948 - Frankfurt Documents, authorizing parliamentary council to draft West German constitution.

May 1949 - Promulgation of Occupation Statute by Western Allies (effective Sept. 1949); adoption of West German Basic Law.

Oct. 1949 - Adoption of 1949 Constitution of GDR.

July 1950 - Görlitz Treaty; GDR recognizes Oder-Neiße line.

3. *German Re-armament and the Restoration of Qualified Sovereignty*

Oct. 1954 - General Treaty, between western Allies and Federal Republic of Germany (effective May 1955).

May 1955 - Federal Republic enters NATO.

May 1955 - Warsaw Pact signed; GDR a member.

4. *Brandt's Eastern Policy (Ostpolitik)*

Aug. 1970 - Moscow Treaty, between Federal Republic of Germany and USSR.

Dec. 1970 - Warsaw Treaty, between Federal Republic of Germany and Poland.

Sept. 1971 - Quadripartite Agreement on Berlin.

Dec. 1972 - Basic Treaty, between Federal Republic and GDR.

APPENDIX B

CALENDAR OF EVENTS - 1989-1990

1989

- Summer - GDR citizens cross Hungarian border into Austria and seek refuge in West German embassies in Prague, Budapest, and Warsaw.
- Sept. 10 - First GDR opposition group, "New Forum", is founded.
- Oct. 7 - 40th anniversary of founding of GDR; visit of Gorbachev to Berlin.
- Oct. 18 - Erich Honecker resigns as General Secretary of the Central Committee of the Communist Party.
- Nov. 9 - Opening of the Berlin Wall.
- Nov. 13 - Hans Modrow elected Prime Minister of the GDR.
- Nov. 28 - West German Chancellor Helmut Kohl proposes 10-point plan for confederation of the two German states.
- Dec. 1 - GDR Constitution amended to abolish leading role of Communist Party.
- Dec. 7 - First meeting of GDR Round Table.

1990

- Jan. 30 - Gorbachev concedes likelihood of German unification.
- Mar. 18 - Election for GDR Volkskammer.
- May 18 - State Treaty signed.
- June 17 - GDR Constitution amended to adopt general principles similar to those of West German Basic Law.
- July 1 - Effective date of State Treaty and currency reform.
- July 6 - London Declaration of NATO heads of government.
- July 16 - Kohl-Gorbachev agreement on NATO membership for united Germany.
- Aug. 3 - Treaty between Federal Republic and GDR regulating first all-German Bundestag election.
- Aug. 31 - Unification Treaty signed.
- Sept. 12 - Two Plus Four Treaty signed.
- Sept. 29 - Constitutional Court invalidates law regulating first all-German Bundestag election.
- Oct. 1 - Allies suspend reserved rights.
- Oct. 3 - GDR accedes to Federal Republic.
- Oct. 8 - Second Election Law enacted.
- Oct. 14 - Election for parliaments of five eastern Länder.
- Nov. 14 - German-Polish Border Treaty signed.
- Dec. 2 - First all-German Bundestag election.

APPENDIX C

GLOSSARY OF FREQUENTLY USED TERMS

<i>Bundesrat</i>	House of parliament of the Federal Republic of Germany, representing the governments of the <i>Länder</i> .
<i>Bundestag</i>	Popularly elected house of parliament of the Federal Republic of Germany.
<i>Bündnis 90</i>	Alliance of reform parties that led the 1989-90 revolution in the GDR.
<i>CDU</i>	Christian Democratic Union, the leading party in the coalition currently governing the Federal Republic of Germany.
<i>CSU</i>	Christian Social Union, a counterpart and ally of the CDU, active only in Bavaria.
<i>DSU</i>	German Social Union, conservative East German party allied with the CSU.
<i>FDP</i>	Free Democratic Party, currently a coalition partner of the CDU/CSU. Though a relatively small party, the Free Democrats have for many years held the balance of power between the CDU and the SPD.
<i>Greens</i>	German political party which concentrated originally on ecological issues but has expanded its interests to cover all areas of politics.
<i>Länder</i>	The German states. <i>Länder</i> is the plural form; <i>Land</i> is the singular.
<i>PDS</i>	Successor of the SED.
<i>Round Table</i>	Council of GDR parties and other groups that exercised a measure of control over the SED government in late 1989 and early 1990.
<i>SED</i>	The Communist Party of East Germany. In the course of the revolutionary events of 1989-90, it changed its name to SED-PDS (Party of Democratic Socialism) and then dropped the initials SED entirely.
<i>SPD</i>	Social Democratic Party, currently the main opposition party in Germany.
<i>Stasi</i>	Ministry of State Security, the secret police of the GDR.
<i>Volkskammer</i>	Single-house parliament of the GDR.