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# Germany Reunified: International and Constitutional Problems

*Helmut Steinberger\**

*Editor's note—Professor Steinberger presented this speech on February 21, 1991 at a symposium held at Brigham Young University.*

## I. INTRODUCTION

Let me first express my sincere gratitude for the invitation to participate in and to speak before this conference organized by the distinguished Law, Business and International Studies institutions of Brigham Young University. It is a great honor, indeed, for me to contribute to this panel by discussing some of the international and constitutional problems of the reunified Germany.

## II. BACKGROUND

Few other countries can claim that their constitutional histories and status have been so intensely conditioned by international instruments as have Germany's. Since the peace treaties of Westphalia of 1648,<sup>1</sup> which terminated the

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1. The Peace Treaties of Westphalia contained important religious, constitutional and political regulations, thereby leading to deep and fundamental changes of traditional structures in Europe. Two treaties were signed: 1) Instrumentum Pacis Monasteriensis [Treaty of Peace of Munster], Oct. 24, 1648, Fr.-Empire, 1 Consol. T.S. 273 (1969) (English translation begins at 319); and 2) Instrumentum Pacis Osnabrugensis [Treaty of Peace of Osnabrug], Oct. 24, 1645, Swed.-Empire, 1 Consol. T.S. 121 (1969) (English translation begins at 198) [hereinafter Osnaburg Treaty]. The Osnaburg Treaty, *supra* art. XVII, ¶¶ 10 & 14, extended the scope of both treaties to include many other parties. Therefore, both treaties gained a much stronger acceptance among the European sovereigns than the number of signatory states might imply.

devastating thirty-year war,<sup>2</sup> almost every German constitution has been conditioned by international instruments. This was true with the Congress of Vienna and its impact upon the establishment of the German Confederation and with the Peace Treaty of Versailles on the Weimar Constitution of 1919.<sup>3</sup> Similarly, the Basic Law of the Federal Republic of Germany of 1949,<sup>4</sup> and the status of Berlin and Germany as a whole,<sup>5</sup> were conditioned by legal instruments of the occupation powers. International instruments will also condition the status of the reunified Germany.

### III. THREE LEGAL LEVELS OF GERMAN REUNIFICATION

The process of German unification has unfolded on various legal levels which, although intrinsically connected, can be distinguished from one another for the purpose of analysis. I will address only a few essential and pertinent features of the respective levels.

#### A. *The International Law Level*

Two important features characterize the international law level. First, the four-power status of Germany as a whole was determined in 1945 and has continued ever since.<sup>6</sup> Second, the

2. Starting mainly as a religious controversy in 1618, this war soon assumed the character of a far-reaching political struggle. Deeply-rooted discords between Protestant and Catholic states, between the provincial diets ("Landstände") and the sovereigns, between the imperial, free cities ("Reichsstädte") and the emperor, and between Habsburg and France culminated in this war.

3. Article 178 of the Weimar Constitution explicitly expressed the intention to keep the Peace Treaty of Versailles unaffected. For the text of this constitution, see 2 ERNST RUDOLF HUBER, *STAATSRRECHT DER NEUZEIT* 25 (1951).

4. The current text of the Grundgesetz [federal constitution or the German "Basic Law"] (hereinafter GG) may be taken from BGBl. III, No. 100-1. An English translation can be obtained through the Press and Information Office of the Federal Republic of Germany.

5. By the so-called "Frankfurt Documents" issued on July 1, 1948, the western military governors, while authorizing the elaboration of a formal constitution, determined the general principles to be respected in the future constitution and made its coming into force dependent on their consent (which was given by the so-called "Letter of Approval" on May 12, 1949). For the text and detailed information on this topic, see BODO DENNEWITZ, *BONNER KOMMENTAR, KOMMENTAR ZUM BONNER GRUNDGESETZ* 3 (1950).

6. The main documents in this regard, establishing and confirming the four power status of Germany, are: (1) the Declaration of the Governments of France, Great Britain, the Soviet Union and the United States "regarding the defeat of Germany and the assumption of supreme authority with respect to Germany" (the

Treaty on the Final Settlement with respect to Germany (the so-called Two Plus Four Treaty), signed by the two German States and the four main victorious powers of 1945,<sup>7</sup> was ratified by united Germany after formal reunification. An additional feature of the international level is that the formal termination of the membership of the German Democratic Republic (G.D.R.) in the Warsaw Pact took place before reunification.<sup>8</sup>

### B. *The Treaty Relations Level Between German States*

A second level is the treaty relationship between the Federal Republic of Germany (F.R.G.) and the G.D.R. that led to reunification. The two most important treaties in this context are: (1) the Treaty Establishing a Monetary, Economic and Social Union,<sup>9</sup> which established this union between the two parts of Germany on July 1, 1990; and (2) the Treaty on Unification, which became effective on September 29, 1990.<sup>10</sup> An additional agreement<sup>11</sup> was signed on September 18, 1990, regarding the execution and interpretation of both the Treaty

so-called "Berlin Declaration"), June 5, 1945, 60 Stat. 1649, 68 U.N.T.S. 189; (2) The Potsdam Protocol restating the assertion of the three western Powers of full governmental power in Germany, August 2, 1945, 3 Bevans 1224; (3) The Quadripartite Agreement on Berlin, September 3, 1971, 24 U.S.T 285, 880 U.N.T.S. 115; (4) the Declaration of the Governments of France, Great Britain, the Soviet Union and the United States regarding rights and responsibilities with respect to Germany on the occasion of the accession of the Federal Republic of Germany and the German Democratic Republic to the United Nations, November 9, 1972 (for this text, see BULLETIN DES PRESSE UND INFORMATIONSAMTES DER BUNDESREGIERUNG 1884 (1972)). See also Helmut Steinberger, *Voelkerrechtliche Aspekte des deutsch-Sowjetischen Vertragswerks vom 12. August 1970 [International Law Aspects of the German-Soviet Treaty of August 12, 1970]*, 31 ZAORV 63, 123 (1971).

7. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, S. TREATY DOC. No. 20, 101st Cong., 2d Sess. (1990), 29 I.L.M. 1186 (1990) [hereinafter Two Plus Four Treaty].

8. See *East Germany Becomes the First to Leave the Warsaw Pact*, N.Y. TIMES, Sept. 25, 1990, at A10.

9. Treaty Establishing a Monetary, Economic and Social Union, May 18, 1990, BGBl. II 537, 29 I.L.M. 1108 (1990) [hereinafter State Treaty]. Generally known as the "State Treaty," the agreement was accompanied by a "Joint Protocol Concerning Principles" and nine Attachments. See *id.*

10. 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 Treaty on Unification]. An English version of this treaty has been published by the German Information Center, 950 Third Avenue, New York, NY 10022.

11. Agreement on the Enforcement and Interpretation of the Treaty on Unification, Sept. 18, 1990, BGBl. II 822.

on Unification and the Treaty of All-German Elections.<sup>12</sup>

In regard to this level of inter-German treaty relations, the government of the Federal Republic of Germany has never recognized the G.D.R. as a *foreign* state. This attitude persisted even after both the F.R.G. and the G.D.R. became members of the United Nations. The F.R.G. did not consider the relationship between the states to be governed exclusively by international law. The F.R.G. considered the attempt at secession by the G.D.R. from the German state (which State had not been extinguished in 1945, in 1949, or at any later time) as invalid as long as the people in the G.D.R. could not exercise their right of self-determination. In particular the Federal Constitutional Court, in 1973,<sup>13</sup> 1987,<sup>14</sup> and 1990<sup>15</sup> decisions, constantly upheld this legal evaluation. This "unrealistic" point of view provoked a great deal of criticism from both inside and outside of Germany. In a 1987 decision, the Court stated that the overwhelming majority of the German people in both parts of Germany still maintained the desire to be reunified.<sup>16</sup>

The first free elections in the G.D.R. took place on March 18, 1990, and resulted in a government under Prime Minister de Maiziere, a pro-unification Christian Democrat, and a coalition of the democratic parties. This result suggested that the political wishes of the people in the G.D.R. were directed toward unification by joining the Federal Republic and not toward any kind of confederation or looser union.<sup>17</sup>

Likewise, the Treaty of May 18, 1990 on the Monetary, Economic and Social Union evidences a desire of the people in the G.D.R. to follow the F.R.G.. The treaty contains common, fundamental, and substantive constitutional elements. Article Two provides that both contracting parties committed them-

12. Vertrag zur Vorbereitung und Durchführung der ersten gesamtdeutschen Wahlen des Deutschen Bundestages zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik [Treaty regarding all-German elections], Aug. 3, 1990, BGBl. II 822. The electoral portion of this agreement was subsequently amended because the Federal Constitutional Court, on September 29, 1990, declared that part unconstitutional. Judgment of Sept. 29, 1990, 82 Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [hereinafter cited as BVerfGE] 322 (F.R.G.). The elections took place on December 21, 1990.

13. Judgment of July 31, 1973, 36 BVerfGE 1 (F.R.G.).

14. Judgment of Oct. 21, 1987, 77 BVerfGE 137 (F.R.G.).

15. Judgment of Sept. 29, 1990, 82 BVerfGE 322 (F.R.G.).

16. Judgment of Oct. 21, 1987, 77 BVerfGE 137 (F.R.G.).

17. This view is analyzed in more detail in Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 587 (1991).

selves to the principles of a basic, free, democratic, federal social order under the rule of law.<sup>18</sup> This terminology is similar to that used in Articles Twenty and Twenty-One of the Basic Law of the Federal Republic.<sup>19</sup> Article Two also provides that conflicting provisions of the G.D.R.'s constitution on the fundamentals of its longstanding socialist order will no longer apply.<sup>20</sup> Even at that juncture this language imposed an obligation on the G.D.R. to desist from the ideological basis of its legal order and to turn to the fundamentals of the F.R.G.'s constitutional order.

### C. *The Purely Internal Legal Orders Level*

The third level of the unification process consists of purely internal legal structures created since reunification.

## IV. PROBLEMS FROM THE LEGAL LEVELS OF GERMAN REUNIFICATION

A few problems from these different levels have arisen in the context of German reunification.

### A. *Dissolution of Four-Power Institutions*

Article Seven of the Two Plus Four Treaty terminates the rights and responsibilities of the four powers relating to Berlin and Germany.<sup>21</sup> As a result, the quadripartite agreements concerning Berlin are terminated and all four-power institutions, like common air control and military missions, are dissolved.<sup>22</sup>

The three western powers and the reunified Germany have already ratified this treaty.<sup>23</sup> The Supreme Soviet has this week started a session with the question of its ratification on its agenda. Until the Soviet Union ratifies the treaty, it will not be in force. By a declaration of October 1, 1990, the four powers have suspended their rights and responsibilities as of October

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18. State Treaty, *supra* note 9, art. 2.

19. GG, arts. XX and XXI.

20. State Treaty, *supra* note 9, art. 2, § 2.

21. Two Plus Four Treaty, *supra* note 7, art. 7.

22. *Id.*

23. On March 4, 1991, subsequent to Professor Steinberger's delivery of this address, the Soviet Union ratified the Two Plus Four Treaty. See N.Y. TIMES, Mar. 5, 1991, at A3; see also Quint, *supra* note 17, at 620 n.520.

3, 1990.<sup>24</sup> An unclear legal situation would result should the Soviet Union not ratify the treaty.

### B. German Borders

The Two Plus Four Treaty provides in article one that upon its enactment the current external borders of the F.R.G. and of the G.D.R. will be final.<sup>25</sup> Section two of article one provides that united Germany and Poland shall confirm the existing border between them in a treaty binding under international law.<sup>26</sup>

Interestingly enough, no similar provision has been included with regard to the German territories of East Prussia, which were placed under the administration of the Soviet Union. No final settlement of the borders of Germany had been established, either at the 1945 "Big Three" Potsdam Conference, which had expressly reserved the final delineation to a peace settlement, or at any later date.

The territorial question was a central issue of the external aspects of reunification. Germany stood to permanently lose between one-fourth and one-third of its former territory. Whether this settlement is to be qualified as a cession of territory by united Germany or as a recognition of an annexation is controversial. Notwithstanding this issue, German territorial sovereignty over the territories east of the Oder-Neisse line will be terminated as of the relevant date.

It was not an easy decision for the F.R.G. to agree to this settlement considering that these territories had been German for eight hundred years and that twelve million Germans had been driven from their homes or had been fugitives before the Red Army. But this is one possible result when a nation starts a war of aggression and then loses.

### C. The Military Status of a United Germany

A very serious issue that developed after the fall of 1989 was the future military status of a united Germany.

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24. See Thomas L. Friedman, *Allies Waive Occupation Rights, Clearing Way for German Unity*, N.Y. TIMES, Oct. 2, 1990, at A11.

25. Two Plus Four Treaty, *supra* note 7, art. 1. The settlement of the territorial question was considered by all six contracting parties as central and indispensable to future European peace and security.

26. *Id.* art. 1, § 2.

### 1. *United Germany's Membership in NATO*

The F.R.G. has been a member of NATO since 1955. The issue was whether to allow an enlarged F.R.G. to continue this membership.

The Soviet position on this question is clear, as is its development on the issue. Initially, the Soviets insisted that a united Germany could not be a member of NATO. I had always considered this as a negotiation tactic to heighten the Soviet position: the Soviet Union wanted the highest possible price for their acceptance of NATO membership for united Germany.

The Soviets have been very clever in foreign policy. They recognized NATO's dual function with respect to the F.R.G. since it joined the alliance in 1955. First, it acts as an effective defense system for the alliance, thereby lending the indispensable component of political stability to the alliance. Second, it exerts a permanent and effective control over the F.R.G.'s military capability while at the same time integrating this capability into the defense potential of the West. To have this control by NATO extended to a united Germany was not against the interests of the Soviet Union. The Soviets realized that the F.R.G. could never consent to leaving NATO and losing the alliance's protection. A breakthrough in regard to this issue finally resulted from a face-to-face meeting between Mr. Gorbachev and Chancellor Kohl.<sup>27</sup> The Soviet Union agreed to allow a unified Germany to continue the NATO status enjoyed by the F.R.G. In addition, Mr. Gorbachev committed to withdraw Soviet forces from the former G.D.R.

Unified Germany possesses the right to participate in multinational alliances in addition to NATO. The Two Plus Four Treaty provides that "[t]he right of the united Germany to belong to alliances, with all the rights and responsibilities arising therefrom, shall not be affected by the present Treaty."<sup>28</sup> Nevertheless, the treaty contains certain provisions relating to the future military status of Germany.

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27. See Council on Foreign Relations, *Germany's Unification*, 1990, AMERICA AND THE WORLD 179; *Encounter at Stavrapallo*, THE ECONOMIST, July 21, 1990, at 47.

28. State Treaty, *supra* note 9, art. 6.



## 2. *Germany's position on weapons and nuclear proliferation*

United Germany chose to stand by the renunciation of the manufacture, possession, and control of nuclear, biological, and chemical weapons and its rights and obligations arising from the Nuclear Non-Proliferation Treaty.<sup>29</sup> No political opposition arose over this decision.<sup>30</sup> Additionally, when acceding to the Non-Proliferation Treaty, the F.R.G. expressly declared that it would be fully obligated to the collective security regulations of NATO. The F.R.G. also preserved its position in regard to a future European Political Union's disposition of nuclear weapons.

## 3. *Armed forces in Germany*

Article three, section two of the Two Plus Four Treaty reiterates a declaration by the two German governments that Germany will reduce the personnel strength of its armed forces to 370,000, beginning with implementation of the first Conventional Armed Forces in Europe (CFE) agreement.<sup>31</sup> In connection with this reduction of the German forces, Germany and the Soviet Union state in article four that "the conditions for and the duration of the presence of Soviet armed forces . . . as well as the conduct of the withdrawal of these armed forces which will be completed by the end of 1994" will be settled by a German-Soviet treaty.<sup>32</sup>

Until the completion of the withdrawal of the Soviet armed forces, only German territorial defense units not assigned to NATO will be stationed in the former G.D.R. and in Berlin. During this period, armed forces of other states will not be stationed in or carry out any other military activity in these two areas.<sup>33</sup>

After the complete withdrawal of Soviet armed forces, united Germany can station units of German forces assigned to NATO in the former G.D.R. and Berlin. However, foreign

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29. Treaty on the non-proliferation of nuclear weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

30. See Juergen Ruhfus, *Proliferation Isn't a German Problem*, WASH. POST, Dec. 25, 1991, at A19.

31. Two Plus Four Treaty, *supra* note 7, art. 3, § 2.

32. *Id.* art. 4, § 1.

33. *Id.* art. 5, § 3.

armed forces and nuclear weapons or their carriers must not be stationed in that part of Germany or deployed there.<sup>34</sup> Controversies arose over the term "deploy," *i.e.*, whether "deploy" would exclude joint maneuvers. To resolve this issue, an agreed minute was attached to the treaty stating that "[a]ny questions with respect to the application of the word 'deployed' . . . will be decided by the Government of the united Germany in a reasonable and responsible way taking into account the security interests of each Contracting Party."<sup>35</sup>

#### D. United Germany's Treaty Obligations

The question of continued membership in NATO is a subdivision of a larger international law issue. This larger issue deals with the question of state succession of the united Germany into the thousands of treaties concluded by the former G.D.R.

General international law contains some acknowledged principles with regard to state succession. However, a number of state succession issues have no generally accepted principles that can be distilled from state practice, divergent as it has been. Even the generally recognized rules are qualified as dispositive rules: they may be deviated from by the consent of the states concerned, but are not part of the international *jus cogens*.

The most uncontroversial principle is the so-called "moving borders theory" dealing with the territorial scope of treaty application. This principle is not as complicated as it sounds. Suppose State A cedes part of its territory to state B and both states remain in existence. In such a circumstance, the territorial scope of application of State A's treaties retreats from the ceded territory, while the territorial scope of State B's treaties is *ipso jure* extended to the newly acquired territory.<sup>36</sup> An exception to this principle is assumed only where the very nature of the treaty's contents excludes extension of its territorial applicability.

This principle, strictly taken, may not apply to the German case because the G.D.R. ceased to exist as an international law

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34. *Id.*

35. *Id.* Agreed Minute.

36. A common example of this concept would be the terms of most-favored-nation clauses.

subject as of October 3, 1991.

### 1. *Treaties of the F.R.G. before unification*

Aside from the issue of NATO and the other modifications made by the Two Plus Four Treaty,<sup>37</sup> the most important case in which the moving borders principle may apply is the extension of the treaties of the European Community to the territory of the former G.D.R.

Early in 1990, there was some question within the Commission of the European Community whether unified Germany would have to be qualified as a new state. This would possibly require new accession to, or at least modification of, the European Community's treaties. This question was answered when the F.R.G. took the position that even after unification, it retained and continued its identity as the same subject of international law as before. The F.R.G. has taken this position from the very beginning of its constitution: it regards itself as the identical subject, and not a successor, of the German state established in 1870-71. This position is indeed the precondition for these consequences under international law.<sup>38</sup> Article Eleven of the Treaty on Unification accordingly states that the parties proceed from the assumption that treaties in force and concluded by the F.R.G. before unification extend to the territory of the former G.D.R.<sup>39</sup> If in individual cases adjustment is required, the government of the united Germany will consult with the respective contracting party.

There are exceptions to the applicability of pre-unification F.R.G. treaties, including exceptions to the extension of the scope of the territorial application of the treaties concluded by the F.R.G. before unification.<sup>40</sup> They concern the treaties which the F.R.G. concluded with the three western powers in 1954 concerning its relations with them<sup>41</sup> and the treaties

37. See *supra* part III. C.

38. See RUDOLF GEIGER, GRUNDGESETZ UND VÖLKERRECHT 60 (1985); Wilfried Fiedler, *Die staatsund völkerrechtliche Stellung der Bundesrepublik Deutschland*, 43 JURISTENZEITUNG 132 (1988).

39. Treaty on Unification, *supra* note 10, art. 11.

40. These exceptions are listed in the Treaty on Unification, *supra* note 10, Annex I, § I.

41. Vertrag zur Regelung aus Krieg und Besatzung entstandener fragen [Treaty on the Relations between the Federal Republic of Germany and the Three Powers], May 26th, 1952, BGBI. II 305, as amended by protocol of October 23, 1954, BGBI.

concerning the stationing of NATO and French forces in the F.R.G.<sup>42</sup> To extend these to the territory of the former G.D.R. would conflict, at least for the time being, with the provisions in the Two Plus Four Treaty mentioned above.

## 2. *The treaties of the former G.D.R.*

Less clear under general international law is the legal situation in regard to treaties concluded by and still in force for the former G.D.R. One aspect of the problem is almost beyond controversy: that G.D.R. treaties with ideological-political contents inconsistent with the attitude of the unified state are no longer valid.

In the case of the G.D.R., its membership in the Warsaw Pact military alliance was terminated before unification. But other treaties were still in force at unification. It must be assumed that treaties of a specific ideological-political content and context ceased to be valid with regard to unified Germany.

As to the G.D.R.'s other treaty obligations, article twelve of the Treaty on Unification takes the position that there must be consultations with the other contracting parties in order to regulate or state the treaties' continuation, adjustment or termination. These consultations must take various factors into account: the principle of good faith; the interests of the parties concerned, including those of the F.R.G.; the competency of the European Community (under which many economic agreements will fall); and the principles of a free, democratic basic order under the rule of law. The position appears to correspond to a Resolution of the 1978 Vienna Conference on State Succession regarding treaties.<sup>43</sup> The Vienna Convention, not yet in force, "recommends that if a uniting of states gives rise to in-

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42. Vertrag über den Aufenthalt ausländischer Streitkräfte in der Bundesrepublik Deutschland [Treaty Concerning Stationing of Foreign Troops in the F.R.G.], Oct. 23, 1954, BGBl. 253 (1955); Deutsch-französische Regierungsvereinbarung—Das Stationierungsrecht und die Statusfragen der französischen Truppen in Deutschland [German-French Governmental Agreement—The Law on Stationing of Troops and the Questions of the Status of French Troops in Germany], Dec. 21, 1966, Bulletin des Presse—und Informationsamtes der Bundesregierung 1304 (1966); NATO Truppenstatut [NATO Statute on Troops], June 19, 1951, BGBl. II 1183, 1190 (1961) including various Additional Agreements.

43. See Hans D. Treviranus, *Die Konvention der Vereinten Nationen ueber Staatensukzession bei Vertragen*, 39 ZAORV 259, 271 (1979).

compatible obligations or rights under treaties, the successor state and the other states parties of the treaties in question make every effort to resolve the matter by mutual agreement."<sup>44</sup>

#### V. TWO CONSTITUTIONAL ISSUES OF THE PROCESS OF UNIFICATION

Turning to constitutional issues of the process of unification, only two problems will be singled out. The two specific issues to be addressed are: (1) regulation of expropriations in the former G.D.R., and (2) the abortion law. The Unification Treaty in regard to these issues provided regulations which did not comply with the Basic Law as it then stood. Therefore, the Treaty provided for express amendments to the Basic Law. The law assenting to the treaty accordingly had to be enacted as a constitutional amendment under the procedure of Article Seventy-Nine of the Basic Law. An amendment requires a two-thirds majority in the Federal Diet and in the Federal Council, the organ in which the governments of the states of the Federation are represented. That procedure was observed, and the majorities were assembled.

A foreign observer might be inclined to question, "What then is your constitutional problem?" The very serious constitutional problem arises under Section Three of Article Seventy-Nine, the article dealing with amendments to the Basic Law. That section provides, "[a]mendments of this Basic Law affecting . . . the basic principles laid down in Articles One and Twenty, shall be inadmissible."<sup>45</sup> The principle referred to in Article One is that the state has the duty to respect and protect human dignity. The principles in Article Twenty, referred to by Section Three of Article Seventy-Nine, are the principles of the democratic, social and federal state and the "Rechtsstaatsprinzip" or rule of law.

The constitutional question, then, is whether the constitutional amendments contained in the unification treaty dealing with these two issues are null and void because they violate Article Seventy-Nine, Section Three, in connection with the principles laid down in Articles One and Twenty.

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44. *Id.*

45. GG, art. 79, § 3.

A. *Expropriation by the Former G.D.R.*

In regard to the expropriation issue, the government of the G.D.R., in connection with the negotiations on the economic union in the spring of 1990, took the position that it was an indispensable precondition for such union that expropriations effected in the years between 1945 and 1949 on the basis of occupation laws or under the authority of the occupation power would have to be respected. These expropriations, which were really confiscations, occurred as part of the so-called land reform. All real estate parcels over 250 acres were confiscated without compensation. Two-thirds of this land was distributed to small farmers, and one-third was retained by the state.

During negotiations on this subject, the Modrow Government turned to the Soviet Union for support. This resulted in a declaration of March 27, 1990 which stated that the "eventual attempts" to deny the rights of present owners of real estate and other property, which in the relevant years (1945-49) had been acquired with the consent or on the basis of decisions of the Soviet Union, would be absolutely unacceptable. The new G.D.R. government under Prime Minister de Maiziere took the same position. A Joint Declaration of the two German governments of June 15, 1990 stated that the expropriation on the basis of occupation law or under the authority of the occupation power in the time between 1945 and 1949 could not be taken back. The governments of the G.D.R. and the Soviet Union do not see any possibility to reverse these measures. The F.R.G. is of the opinion that a future all-German parliament must make a final decision on possible compensation by the state.

This joint declaration was verbally inserted in the Treaty on Unification in article forty-one section one.<sup>46</sup> The F.R.G. undertook the obligation not to enact provisions conflicting with the Joint Declaration. In Article Four, numbers four and five of the Treaty on Unification, the F.R.G. also undertook to amend the Basic Law with the goal to secure this resolution of the expropriation issue.<sup>47</sup> The constitutional amendment was brought about by article four, number five, section three of the Treaty on Unification.<sup>48</sup> It provides that regulations in article

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46. Treaty on Unification, *supra* note 10, art. 41, § 1.

47. *Id.* art. 4, numbers 4-5.

48. Treaty on Unification, *supra* note 10, art. 4, number 5, § 3.

forty-one and regulations to implement article forty-one shall be maintained and shall stand insofar as they provide that expropriations shall not be rolled back.<sup>49</sup> This was enacted as a new Article 143 of the Basic Law.<sup>50</sup>

Meanwhile, many constitutional complaints have been entered against these provisions. They claim a violation of Article Seventy-nine, Section Three of the Basic Law, *i.e.*, they assert the unconstitutionality of a constitutional amendment.

Those asserting the amendment's unconstitutionality argue that the principle of human dignity comprises at least a certain minimum of property protection such that property must not be taken, as in this case, without any possibility of legal remedy, and without the slightest compensation. Other opponents consider this a violation of the principles of *Rechtsstaatlichkeit*.<sup>51</sup>

The argument is not that the Basic Law and its principles were to be applied to measures taken between 1945 and 1949, before the Basic Law had even entered into force, or to measures taken by or under the authority of a foreign occupation power. Rather, the argument claims that the F.R.G. in 1990 was constitutionally barred from accepting the perpetuation of these measures even by amending its constitution.

I doubt that the Federal Constitutional Court will declare the relevant provisions in the Treaty on Unification and the relevant amendment of the Basic Law unconstitutional and void. I rather suspect that it will try to find a solution by pointing to the possibility of adequate compensation in some form. The Court might find that the international situation involving the Soviet Union leaves no other realistic possibility for the F.R.G. than merely to accept, not to approve of, that situation. Acceptance may bring a constitutional solution nearer than non-acceptance, and nonacceptance may bar, at least for a crucial period of time, the accomplishment of German unification.

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49. *Id.*

50. GG, art. 143.

51. The "Rechtsstaatsprinzip" represents one of the fundamental principles of the Basic Law. See Judgment of Oct. 25, 1966, 20 BVerfGE 323, 331 (F.R.G.). Being a general axiom, it has been molded by multiple provisions of the Basic Law. The Rechtsstaatsprinzip is embodied in and expressed by, *e.g.*, the Basic Rights, the balance of power, the principle of the priority of the constitution and the statutes, and even, at least in principle, in the right of compensation in the case of expropriations. Concerning this principle, see 1 KLAUS STERN, DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 602 (1977).

The government, pleading before the Court, argued that the position of the Soviet Union regarding the finality of expropriations was absolutely insurmountable. The Soviet Union probably took this position because these confiscations were unlawful even under international law, and the Soviet Union did not want to have this confirmed by German courts.

### B. *The Abortion Law*

The Treaty on Unification provides that principles of the Basic Law, as well as federal statutory law beginning October 3, 1990, apply to the territory of the former G.D.R. and to East Berlin. Therefore, laws of the G.D.R. incompatible with the Basic Law or with federal law lose their validity.

The annexes to the Treaty on Unification provide for many exceptions for certain transitional periods. Some of the deviations from the Basic Law have been secured by constitutional amendments, the most important of which I have just mentioned.

The treaty and a constitutional amendment, which is now Article 143, Section One of the Basic Law, provide that law of the former G.D.R. may deviate from the Basic Law until December 31, 1992.<sup>52</sup> The law may deviate only to the extent that, and as long as, a complete adjustment to the constitutional order cannot be accomplished.<sup>53</sup> Such deviations must not violate Article Nineteen, Section Two and must be compatible with Article Seventy-Nine, Section Three of the Basic Law.<sup>54</sup> This constitutional amendment was adopted, in particular, to constitutionally safeguard a provision in an annex to the Treaty on Unification which maintains the G.D.R. law on abortion. This law permits abortion during the first twelve weeks of pregnancy. The Treaty on Unification, article thirty-one, section four, provides that the legislature shall enact a regulation providing for a better protection of the unborn life and for a constitutional solution of the situation of conflicts of pregnant women by December 31, 1992.<sup>55</sup> Should such a regulation not be enacted by that date, the substantive law in the territory of

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52. GG, art. 143, § 1.

53. *Id.*

54. *Id.*

55. Treaty on Unification, *supra* note 10, art. 31, § 4.



the former G.D.R. shall continue to be valid.<sup>56</sup>

This provision of the treaty and the constitutional amendment, to the extent they are related to the abortion law of the former G.D.R., are under heavy attack by a number of constitutional lawyers. The question is whether the relevant G.D.R. law is in compliance with Article Seventy-Nine, Section Three of the Basic Law,<sup>57</sup> assuming such G.D.R. law should be valid beyond the end of 1992. The G.D.R. law could easily be valid beyond 1992 because regulation by the federal legislature might not be accomplished, and the chances for a regulation complying with the decision of 1975 of the Federal Constitutional Court as of now appear rather slim.

In my opinion, continuing the validity of the G.D.R. abortion law would indeed violate the principle of human dignity. The legislation of abortion, in our country as well as yours, is an exceedingly controversial topic.

#### VI. FINAL REMARKS

German unification caused serious irritations in Europe, more so in western Europe than in the eastern European states. The eastern European states must have realized that one result of their transformation into free societies would be that the German people could no longer be barred from their right to self-determination. The F.R.G. government tried to alleviate these irritations by pursuing, stronger than ever before, a policy of European integration and a security system which would prevent a repetition of European history. I consider this to be the right path. United Germany has not yet found its role in world politics. However, in view of German history, this should not be resented too deeply. Germany will eventually find its proper role.

Let me add a specific expression of gratitude. Since 1945, the western part of Germany has developed into a free society under the rule of law. The generous material aid, political support and military protection provided by the United States have allowed and encouraged this. Germans are also aware that the United States, more than any other state, has supported the quest of the German people for reunification and free

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56. *Id.*

57. *See* text accompanying *supra* note 46.

self-determination. For that we are and will continue to be grateful.