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## The Reunification of Germany: Comments on a Legal Maze

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# Comments

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Jutta Brunnée\*

The Reunification of Germany:  
Comments on a Legal Maze

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## The German People

...  
Conscious of their responsibility before God and men,  
Animated by the resolve to preserve their national and political unity and  
to serve the peace of the world as an equal partner in a united Europe,  
Desiring to give a new order to political life for a transitional period,  
Have enacted, by virtue of their constituent power, this Basic Law for the  
Federal Republic of Germany.

They have also acted on behalf of those Germans to whom participation  
was denied.

The entire German people are called upon to achieve in free self-  
determination the unity and freedom of Germany.<sup>1</sup>

## I. *Introduction*

In its Preamble, the Basic Law — the constitution — of the Federal Republic of Germany declares itself a transitional order put in place until all Germans can freely decide to live in a reunified Germany. The Preamble is evidence of both history and aspirations of the western part of Germany that emerged from the Second World War. It is now one of the legal foundations for an event that only a year ago few thought was possible: the merging of the German Democratic Republic and the Federal Republic of Germany into one German state. In its preamble and in several other provisions the Basic Law kept the door open for a home coming without precedent. Some said this door had, over the years, become a legal fiction. Yet the events of the past year, culminating in the opening of the Berlin Wall on the night of November 9, 1989, came as a surprise even to the most optimistic observers. The citizens of the German Democratic Republic forced the door open with peaceful means and the most compelling of all passwords: "We are the People".<sup>2</sup>

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1. Preamble of the Basic Law of the Federal Republic of Germany of 23 May 1949, (Bonn: Press and Information Office of the Federal Government 1981).

2. See P. Häberle, "Verfassungspolitik für die Freiheit und Einheit Deutschlands" (1990), 45 *Juristenzeitung* 358 at 360 [Constitutional Policy for Freedom and Unity of Germany]; for critical voices see J. O. Jackson, "Broken Dreams on the Road to Merger", *TIME* (Special Issue) June 25, 1990 at 20.

This comment will attempt to shed some light on the multi-faceted legal situation of Germany, a web of national and international law problems. It will outline the situation created in the years following 1945 and the resulting development of the two German states. It will then review the possibilities for their reunification available under the constitutional law of the Federal Republic of Germany. Finally it will high-light some of the legal issues facing the reunified Germany in the future. As the dust stirred up by the crumbling wall settles, it becomes clear that the opening of the gates was not the most difficult step. The true challenge is finding the way through at the right pace and with the route carefully staked.

## II. *The Creation of Two German States*

### 1. *Historical Development*

Not too long ago talking about the two German states conjured up images of on-going cold war, iron curtain and abnormalities that seemed to acquire disheartening normality in German-German relations. Berlin was an island of western lifestyle and culture in the middle of one of the most rigid socialist states. Many were killed when attempting to cross the border into the Federal Republic. The German-German border was one of the most heavily guarded frontiers in Europe, featuring a "death strip" with mine fields, self-firing devices, barbed wire fences, dogs, and heavily armed border guards. From the western point of view, however, this border was not even a border under the standards of international law. While travellers on the way from East Berlin to West Berlin were free to enter (provided, of course, eastern authorities let them go), those heading in the opposite direction faced lengthy controls or even denial of entry. While the German Democratic Republic claimed there were two entirely separate states on German ground, the Federal Republic issued its passports to all Germans requesting it.

Such are only a few examples of the complicated German-German relations which grew out of the division of one nation into two states belonging to antagonistic alliances and existing at the friction laden edges of these alliances' tectonic plates. Since the end of the war the relations between the two German states have been among the most reliable indicators of the overall east-west climate.<sup>3</sup> They were born out of the chilling down of this climate to cold war temperatures and would not have melted into their present form without the events in Eastern Europe.

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3. Deutscher Bundestag, *Interrogeons l'Histoire de l'Allemagne* (Bonn 1988) at 401 [hereinafter: *Interrogeons*].

However, inner-German relations have always been complicated and the question of what and where Germany was could never be settled for more than limited periods of time.<sup>4</sup> This goes far back in European history which has witnessed the rise and fall of various German tribes and their attempts to group and regroup. Unlike France or England, where a sense of national unity and a strong royal house began to develop relatively early on, Germany remained an array of competing territories and sovereigns. In 1648, when the Peace of Westphalia ended the Thirty Years War, Germany was fragmented into hundreds of units.<sup>5</sup> It was not unified as a national state until 1871, when the German Empire was established as a result of Bismarck's policy.<sup>6</sup> The German Empire had roughly the same size of Spain. Losing World War I, however, it ceded a part of its territory in the southwest to France and in the east to the newly created state of Poland (Treaty of Versailles).<sup>7</sup> The territorial limits thus created remained unchanged until December 13, 1937. In 1938 Hitler started his policy of territorial expansion.

When the Acts of Surrender were signed after the war, Germany was completely occupied by Allied forces.<sup>8</sup> Anglo-American forces initially occupied almost half of what was to become the German Democratic Republic. Later these territories were handed over to the Soviet Union in exchange for the western sectors of Berlin.<sup>9</sup> This is how the "island situation" of the former capital was created.

Germany was, within the frontiers of December 31, 1937, and for the purposes of occupation, divided into four zones and a special Berlin area which was to be jointly occupied and divided by the Four Powers.<sup>10</sup> At

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4. See C.F. Menger, *Deutsche Verfassungsgeschichte der Neuzeit*, 5th ed., (1986) at 15 [Modern German Constitutional History]; for a brief and very readable account of these aspects of German history see Otto Friedrich, "Germany Toward Unity", *TIME* (Special Issue) June 25, 1990, 12-23.

5. Friedrich, *supra*, note 4, at 17; Menger, *supra*, note 4, at 25 et seq.

6. Menger, *supra*, note 4, at 141-146.

7. *Interrogations*, *supra*, note 3 at 252; on the Treaty itself see: E. von Puttkamer, "Versailles Peace Treaty", in: R. Bernhardt et al., eds., *Encyclopedia of Public International Law*, Vol.4 (1982), 276.

8. See Declaration of June 5, 1945 Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, CMND 1552, Doc. No.7, at 38; for a good overview on events and issues see: T.Schweisfurth, "Germany, Occupation after the War", in: R. Bernhardt et al., eds., *Encyclopedia of Public International Law*, Vol.3 (1982), 191.

9. See R. Piotrowicz, "The Border Between the Federal Republic of Germany and the German Democratic Republic: A Demarcation Line or just an International Frontier?" (1989), XXXVI *Netherlands International Law Journal*, 317.

10. Protocol between the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics on the Zones of Occupation in Germany and the Administration of Greater Berlin, UNTS 227, 279 et seq..

the Potsdam Conference of August 1945, all German territories east of the Oder-Neisse-Line were removed from the Soviet zone and placed under Polish administration.<sup>11</sup> The result was a shift to the west of Poland and of the Soviet Union, which incorporated the Baltic states, north-eastern Prussia and large portions of Polish territory.<sup>12</sup>

The occupying powers did not only take over supreme authority in Germany, but also, in their respective zones, the entire administration of the country. This was to provide the German people with time to prepare for the reestablishment of its life on a democratic and peaceful basis.<sup>13</sup> However, economic reasons and increasing alienation of the western and Soviet occupiers, eventually led to their decision to separately realize their conceptions of what was to become of Germany. The three western Allies, together with the Netherlands and Luxembourg, worked out the foundation of a separate West German state (Frankfurt Documents).<sup>14</sup> They authorized the provincial governments in their respective zones to convene a constituent assembly (Parliamentary Council). The assembly was to draft a democratic constitution for a federal state and to provide for the possibility of an eventual reestablishment of German unity.

On May 8, 1949 the accordingly established Parliamentary Council adopted the provisional order for the Federal Republic of Germany, the Basic Law. On May 12, 1949 the western powers approved the Basic Law which entered into force on May 23, 1949.<sup>15</sup> They simultaneously promulgated the "Occupation Statute", pursuant to which the new federal state and its participating Länder were to have full legislative, executive and judicial powers subject to certain rights of the occupying powers.<sup>16</sup> By 1955 the occupation of the western zones of Germany was terminated and the Federal Republic of Germany essentially became a sovereign state.<sup>17</sup> The Federal Republic had meanwhile become a member of the European Coal and Steel Community (1952) and NATO (1955).<sup>18</sup>

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11. Piotrowicz, *supra*, note 9, at 316; texts of all important documents can be found in: I. von Munch, *Dokumente des geteilten Deutschlands* (1976) [Documents on the Divided Germany].

12. Menger, *supra*, note 4, at 193; for a chronology of events see *Interrogeons, supra*, note 3, at 527 et seq.

13. Menger, *supra*, note 4 at 194.

14. *Ibid.* 201 et seq.; Maunz-Zippelius, *Deutsches Staatsrecht*, 26th ed., (1985) at 6 [German Public Law].

15. *Interrogeons, supra*, note 3 at 385 et seq..

16. See Menger, *supra*, note 4 at 209.

17. Artikel 2, Vertrag über die Beziehungen zwischen der Bundesrepublik Deutschland und den Drei Mächten vom 26.5.1952/23.10.54, BGBl. 1955 II, 301 et seq. [Treaty on the Relations Between the Federal Republic of Germany and the Three Powers].

18. Treaty Establishing the European Coal and Steel Community, UNTS 261, 140; North Atlantic Treaty, UNTS 34, 243.

In the Soviet zone the occupation regime was also terminated in stages. The Soviet Union regarded all the above mentioned events in the western zones as incompatible with the agreements on Germany. Being unable, however, to prevent them, she countered them with similar measures. She allowed the foundation of a second German state, the German Democratic Republic, the first constitution of which was passed by the so-called German People's Congress on May 30, 1949.<sup>19</sup> After Soviet suggestions regarding the unification of Germany under a socialist system had failed, administrative functions for the GDR were transferred to a provisional government under Soviet supervision. In 1954 the Soviet Government declared it established the same relations with the GDR as with other sovereign states.<sup>20</sup> In 1955 the Warsaw Treaty was signed under the participation of the GDR.<sup>21</sup> In 1968 a new constitution entered into force.<sup>22</sup> However, the Basic Rights had become "socialist personality rights", a self-declared "real democracy" was set up and the unitary model of statehood was entrenched in the constitution.<sup>23</sup> Revised in 1974, the constitution stated that the German Democratic Republic was forever and irrevocably allied to the Soviet Union.<sup>24</sup>

## 2. *Legal Aspects*

The result of these developments was a complicated state of affairs, which prevailed until the recent historical events. The post-war Germany fell into four different categories:

- (1) The Federal Republic of Germany with roughly 95,000 square miles and 60 million inhabitants.
- (2) The German Democratic Republic comprising about 41,000 square miles and a little less than a third of the Federal Republic's inhabitants.
- (3) Berlin which was divided into a western part of 187 square miles and approximately 2 million inhabitants and an eastern part of 157 square miles and around 1.1 million inhabitants.

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19. Maunz-Zippelius, *supra*, note 14 at 449; Menger, *supra*, note 4, at 210.

20. Souveränitätserklärung der Sowjetunion gegenüber der Deutschen Demokratischen Republik, reprinted in (1954) *Europa Archiv* 6534 et seq. [Declaration of Sovereignty Regarding the German Democratic Republic].

21. Treaty of Friendship, Cooperation and Mutual Assistance, UNTS 299, 3.

22. Verfassung der Deutschen Demokratischen Republik, 5th ed. (Berlin: Staatsverlag der DDR 1980).

23. Menger, *supra*, note 4, at 210.

24. Artikel 6; the Preamble speaks of the responsibility to direct the entire German nation to a future in peace and socialism, having regard for the historical fact that imperialism under the leadership of the United States in agreement with circles of West German monocapitalism split Germany.

(4) The controversial “Eastern Territories” (which had been part of Germany within the frontiers of December 31, 1937) which, with approximately 45,000 square miles had once constituted almost a quarter of Germany.

This situation entailed several issues which remained controversial between the two German states. Had the German Empire ceased to exist with the capitulation of the German Army? Were the German Democratic Republic and the Federal Republic of Germany two new and distinct states and their relations of international character? Was the border between the two German states an international border like any other? Were the Germans living within the borders of December 31, 1937 of one nationality or had they assumed new national identities?

According to the Eastern view the German Empire had ceased to exist with the unconditional surrender of the armed forces in 1945.<sup>25</sup> The Allied occupying powers established new administrative bodies and exercised their own and not German executive powers. A German administration was only gradually re-established until, eventually, the two parts of Germany were authorized to build new states.<sup>26</sup> Therefore, the argument went, the German Democratic Republic and the Federal Republic of Germany became successor states to the German Empire. Similarly, there are no intra-state relations between the two countries. All relations are based upon international law.

The West German position, which was generally shared by the western Allies, maintained that the German Empire did not perish. As the “Declaration Regarding the Defeat of Germany” signed by the Commanders-in-Chief of the Four Powers on June 5, 1945 explicitly stated, there was no annexation of Germany.<sup>27</sup> Consequently the executive powers of Germany did not cease to exist; they were exercised by the Allies in place of the German authorities. There was a military surrender, but no dissolution of the German state.<sup>28</sup> According to the western view, the German Empire, within its borders of 1937, still existed although it was not capable of acting.<sup>29</sup> The Federal Republic of Germany is thus partially identical with the German Empire. However, it is not entitled to act for all of Germany. This view was confirmed in the

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25. See Menger, *supra*, note 4, at 214; interestingly this view was shared by some western scholars: see Kelsen, “The Legal Status of Germany according to the Declaration of Berlin” (1945), 39 *American Journal of International Law* 518.

26. Maunz-Zippelius, *supra*, note 14, at 9.

27. H. von Mangoldt, “Zur Rechtslage Berlins” (1990), 34 *Recht in Ost und West*, at 3 [On the Legal Situation of Berlin].

28. I. von Seidl-Hohenveldern, *Völkerrecht*, 4th ed. (1980) at 149 [Public International Law].

29. Maunz-Zippelius, *supra*, note 14 at 9.

1973 landmark decision of the Federal Constitutional Court on the “Grundlagenvertrag” (Basic Treaty).<sup>30</sup> Flowing from this position was the assertion that the inner-German border was not an international border strictly speaking.<sup>31</sup> Similarly, while both German states were sovereign (members of the UN), their relations were of special character. And, finally, all persons of German citizenship living within the 1937 borders were one people.<sup>32</sup> This was a result of the fact that the question of who has German citizenship is still governed by a law of 1913 when Germany covered the controversial areas.<sup>33</sup> As a result the Federal Republic, having responsibilities regarding all of Germany, but able to exercise power only within its territory, would issue passports to all Germans.<sup>34</sup>

The Preamble of the Basic Law for the Federal Republic of Germany as well as several other of its provisions bear witness to these positions. The call for the reunification of Germany thus entrenched in the Basic Law is consistent with the views just presented. It is also a demand flowing from the right to self-determination of peoples confirmed in the Friendly Relations Declaration.<sup>35</sup> As such it was at different stages recognized by the former occupying powers.<sup>36</sup>

Article 7 of the Agreement on the Relations between the Federal Republic of Germany and the Three Powers of May 26, 1952 states that a final determination of the German borders presupposes a peace treaty between Germany and its former adversaries.<sup>37</sup> The signatories agree that

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30. BVerfGE 36,1; excerpts in English language in (1976), 70 *American Journal of International Law* at 147; the Basic Treaty is a product of Willy Brandt’s new “Ostpolitik” which undertook to put the German-German relations on new foundations. Both countries are called upon to develop good neighbourly relations on a basis of equality. Among other things they were to accept the inviolability of their frontiers. The Bavarian government challenged the constitutionality of the Treaty on the grounds of incompatibility with the goal of reunification.

31. Menger, *supra*, note 4 at 213; Piotrowicz, *supra*, note 9 at 317.

32. Article 116 (1) of the Basic Law of the Federal Republic of Germany reads:

Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock (Volkszugehörigkeit) or as the spouse or descendant of such a person.

33. Piotrowicz, *supra*, note 9 at 321; and R. Bernhardt, “German Nationality”, in: *Encyclopedia of Public International Law*, Vol.8 (1985) 255 et seq..

34. Regarding the impact of this policy on the events of the fall of 1989 see: C. Starck, “Deutschland auf dem Wege zur staatlichen Einheit” (1990), 45 *Juristenzeitung* 349 at 350 [Germany on the Way to Unity as a State].

35. GAOR, 25th Session, Suppl. No. 28, 2625 (XXV), 121 et seq.; see also E. Klein, “The Concept of the Basic Law”, in: C. Starck, ed., *Main Principles of the German Basic Law* (1983), 15 at 25,26 [hereinafter: *in: Starck*].

36. Starck, *supra*, note 34 at 350.

37. See *supra*, note 17.

until then they will peacefully pursue their common goal, that of the reunification of Germany under a free and democratic order and integrated into the European Community.<sup>38</sup> Similar statements can be found in other Allied documents on the status of Germany and have only recently been confirmed by the three western Powers.<sup>39</sup> The idea of reunification had also been confirmed by the Soviet Union in the Sovereignty Declaration regarding the German Democratic Republic.<sup>40</sup>

On February 10, 1990 General Secretary Gorbachev confirmed the German right to self-determination and reunification pursuant to their freely expressed will.<sup>41</sup>

This statement was a reaction to continuing flow of East German citizens leaving their homes to build a new life in the West. The East German provisional government's attempts to stem the flood had been without effect on the mass exodus of the country's most precious resource: young and qualified workers. Reforms had come too late and had not managed to restore the peoples' faith in their government and the future of their country. The danger of economic and administrative breakdown grew and the loss of its citizens threatened to annihilate the German Democratic Republic.

### III. *Toward the Reunification of Germany*

#### 1. *Options under The Basic Law of the Federal Republic of Germany*

The pace of these developments took all sides by surprise. Only in November 1989 the Federal Republic's "three-stage-plan", which sketched the gradual reunification of Germany via a confederation, had seemed premature and daring.<sup>42</sup> A few months later it was evident that a much quicker solution was necessary to avert the looming collapse of the German Democratic Republic. It was more and more clear that there was no time for the elaboration of a new constitution, but a desperate need to end the legal limbo paralyzing all levels of life in the German Democratic Republic. Hesitation within the German Democratic Republic itself had given way to a broad consensus in favour of fast

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38. E. Klein, "An der Schwelle zur Wiedervereinigung Deutschlands" (1990), 43 *Neue Juristische Wochenschrift* 1065 at 1067 [At the Threshold to the Reunification of Germany] [hereinafter: *Threshold*].

39. Starck, *supra*, note 34 at 350.

40. *Supra*, note 20; and see: K. Hailbronner, "Völker-und Europarechtliche Fragen der deutschen Wiedervereinigung" (1990), 45 *Juristenzeitung* 449 at 450 [Questions of International and European Law regarding the Reunification of Germany].

41. Starck, *supra*, note 34 at 351.

42. See Haberle, *supra*, note 2 at 358.

reunification.<sup>43</sup> Not only had thousands of East Germans “voted with their feet” (a phrase coined to describe their exodus), a vast majority also supported the pro-reunification parties in the elections of March . . . , 1990.<sup>44</sup>

The Germans in the German Democratic Republic had freely expressed their will to be reunified with the Germans in the Federal Republic. The central requirement for action under the Basic Law’s Preamble had been met and cleared the way to achieving reunification according to its rules. The Basic Law provides two avenues for reunification and there was some discussion as to the proper procedure.

The first provision relevant in this context is Article 23,2 of the Basic Law which states: “For the time being, this Basic Law shall apply in the territory of the Länder (. . .) . *In other parts of Germany it shall be put into force on their accession*”<sup>45</sup>

The second provision to be considered in the debate on reunification is Article 146 of the Basic Law: “This Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force.”

Before discussing the considerations for and against these provisions in more detail, it should be stated that the constitution of the German Democratic Republic offers no alternative to the options for reunification provided by the Basic Law. The German Democratic Republic’s constitution cannot be the foundation for a democratic state. It also contains no reference whatsoever to the possibility of reunification and, therefore, does not even provide a mechanism for it to be achieved. The constitution’s silence, however, does not preclude reunification as such. This is due to the fact, as is rightfully pointed out by one scholar, that the East German constitution was rendered obsolete by the revolutionary events of the recent past.<sup>46</sup>

The two options provided by the Basic Law have been characterized as the “small” (Article 23) and the “big” (Article 146) solutions.<sup>47</sup> While this terminology may describe the extent of “activity” required, one should be careful not to attach to Article 23,2 the stigma of a minimalist approach. This would not do justice to the fact that both provisions are equally valid legislative options.

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43. W. Binne, “Forum: Verfassungsrechtliche Überlegungen zu einem Beitritt der DDR nach Artikel 23 GG” (1990), *Juristische Schulung* 446 at 447 [Constitutional Considerations Regarding an Accession of the GDR under Article 23 of the Basic Law].

44. Klein, *supra*, note 38 at 1066.

45. Emphasis added.

46. Klein, *Threshold*, *supra*, note 38 at 1068.

47. Häberle, *supra* note 2 at 358.

Article 23,2 — this is why it was labelled “small solution” — does not require the creation of a *new* all-German constitution. Instead the German Democratic Republic would come under the umbrella of the existing Basic Law which would then be applicable to Germany as a whole.

Given the wording of Article 23,2, which does not refer to a ‘request for accession’ but simply speaks of ‘accession’, the initiative rests solely with the German Democratic Republic.<sup>48</sup> Once it freely expresses its will to accede to the Federal Republic, the process is set in motion without the need for the Federal Republic to “accept”.<sup>49</sup> In, fact, the Federal Republic cannot decline the accession, but only negotiate the details of its bringing about.<sup>50</sup> That process will necessarily require a certain transitional period which can be accommodated under Article 23.<sup>51</sup> Technically, all that is required on the Federal Republic’s side is a federal law making the Basic Law applicable to all acceded parts of Germany.<sup>52</sup> Article 23 does not specify this aspect: the requirement of a federal law can be taken from an analogy to Article 59 (2) of the Basic Law regarding the ratification of international agreements. German constitutional scholars widely agree that the accession route is open either to the German Democratic Republic as a whole or to any of its Länder, once they are reestablished.<sup>53</sup> The former Länder in the eastern part of Germany will be reconstituted in elections scheduled for October 4, 1990.<sup>54</sup>

It is also generally accepted that the German Democratic Republic is a “part of Germany” within the meaning of Article 23,2. There is a precedent for the use of this provision, the 1956/57 accession of the Saarland to the Federal Republic.<sup>55</sup> In a decision on the “Grundlagenvertrag” (Basic Treaty) the German Federal Constitutional Court held that the wording of Article 23,2 was to be widely construed and included the German Democratic Republic.<sup>56</sup> Neither the accession of the Saarland nor any political development had rendered the provision obsolete. In the

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48. Generally held view: see Häberle, *supra*, note 2 at 358; Binne, *supra*, note 43 at 449.

49. Klein, *Threshold*, *supra*, note 38 at 1070.

50. Häberle, *supra*, note 2 at 359; Starck, *supra*, note 34 at 353.

51. Klein, *Threshold*, *supra*, note 38 at 1070.

52. Starck, *supra*, note 34 at 353; Häberle, *supra*, note 2 at 359; Binne, *supra*, note 43 at 450.

53. Starck, *supra*, note 34 at 359; Häberle, *supra*, note 38 at 358; Binne, *supra*, note 43 at 450; more hesitant: Klein, *Threshold*, *supra*, note 38 at 1070.

54. T.L. Friedman, “Two Germanys Vow to Accept Border with the Poles”, *New York Times*, July 18, 1990 A1, A6.

55. Starck, *supra*, note 34 at 352.

56. BVerfG *supra*, note 30, at 28 et seq..

contrary, the Federal Republic was under its Basic Law not allowed to endanger the goal of reunification.<sup>57</sup>

Article 146 appears to more match the classical concept of constitution making. The constituent power, that is the German People as a whole, is called upon to terminate the transitional order established under the Basic Law by giving itself a new all-German constitution. The provision requires the free decision of the German people, either directly or via its democratically legitimized representatives.<sup>58</sup>

Some also argue both processes should be combined to have the swiftness of one and the thoroughness of the other. It is suggested that the German Democratic Republic should accede to the Federal Republic, but reserve the right to participate in a joint constitution eventually to be created.<sup>59</sup>

The Basic Law itself is silent regarding priority or even the appropriateness of one of these approaches. Only a few voices in the older literature argue that Article 146 takes precedence over Article 23.<sup>60</sup> Yet the history of the Basic Law and Article 23 in particular does not confirm this view. Rather, the drafters of the constitution wanted to provide a quick way to restate national unity. Article 146 is to be understood as evidence of the intention to install the Basic Law only as a transitional order.<sup>61</sup>

The Basic Law, however, has in the meantime grown into a full constitution.<sup>62</sup> Also, when contemplated more closely, Article 23 cannot be said to entail any deficit in legitimacy. The provision does, in fact, lead to a perfect legitimization of the Basic Law as the constitution of a unified Germany. While the current Basic Law does not claim to apply to all Germans (Preamble, Article 146), it also explicitly recognizes the fact that a part of the German people was denied the opportunity to participate in the creation of the Basic Law.<sup>63</sup> Article 23,2 offers them the opportunity to now legitimize the Basic Law as their constitution by accession.<sup>64</sup>

Large parts of the Federal Government, the East German “Alliance for Germany”, and the vast majority of German constitutional law teachers

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57. *Ibid.* at 29.

58. Klein, *Threshold*, *supra*, note 38 at 1069.

59. Häberle, *supra*, note 2 at 359, 360; K.-H. Seifert et al., eds., *Grundgesetz für die Bundesrepublik Deutschland* (1988), Artikel 146, No. 1,2 [Basic Law for the Federal Republic of Germany].

60. See Binne, *supra*, note at 447 for references.

61. *Ibid.*, at 448.

62. Klein, *Threshold*, *supra*, note 38 at 1069.

63. See Preamble, *supra*, p.1.

64. Klein, *Threshold*, *supra*, note 38 at 1069.

favoured the Article 23 solution.<sup>65</sup> It is currently to be expected that the German reunification will be brought about under this provision and before the end of the year.<sup>66</sup> The practical reasons for this preference lie in the need to quickly provide the constitutional basis for a unified Germany. Not only do economic and social conditions call for immediate action. One also needs to keep in mind the need for stability in a period of transition. The Basic Law has proven to be a solid order, a coherent system offering the continuity needed in the nearer future.<sup>67</sup>

In what way can the Four Powers influence the reunification process? While their rights continue to exist until a formal peace treaty with Germany is signed, they are legally speaking not in a position to oppose the reunification of Germany. They clearly have a say as to the international dimension of the reunification process, but cannot influence how it will be brought about internally.<sup>68</sup> The reason for this is rooted in the special character of the Four Power rights which are intimately linked to the responsibility to support the reunification. It was pointed out earlier that all of the former Occupying Powers have recognized the goal of reunification.<sup>69</sup>

## 2. *Legal Questions Arising*

The technical side of the reunification as such does not cause insurmountable problems. The multitude of legal issues it entails, however, will be far more difficult to address. As is typical of the German question, these problems arise both at the internal and the international levels. At least the reunification of Germany will eliminate the international component, from the current mixture of administrative law, constitutional law and international law.

On the internal level a unified Germany will have to address the issue of how to divide/organize the enlarged federation. The five Länder which once made up the German Democratic Republic could be re-established and Berlin — because of its size — could be accorded the status of a 16th Land.<sup>70</sup> The only constraints on the recreating constitutions and structures of these Länder are set by Article 28 of the

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65. Binne, *supra*, note 43 at 447 with further references; Klein, *Threshold*, *supra*, note 38 at 1069, 1070; Starck, *supra*, note 34 at 352-355.

66. Friedman, *supra*, note 54 at A6.

67. Starck, *supra*, note 34 at 354.

68. Hailbronner, *supra*, note 40 at 450; Klein, *Threshold*, *supra*, note 38 at 1067, 1068.

69. *Supra*, pp. 10, 11; see also Hailbronner, *supra*, note 40 at 450.

70. Klein, *Threshold*, *supra*, note 38 at 1071; Starck, *supra*, note 34 at 357; see *infra* p.21 regarding the status of Berlin.

Basic Law according to which the Länder have to mirror certain basic values of the constitution:

The constitutional order in the Länder must conform to the principles of republican, democratic and social government based on the rule of law, within the meaning of the Basic Law.<sup>71</sup>

A more time-consuming and complicated task will be the harmonization of the German legal systems which, over the last forty years, have evolved into very different directions. Federal laws will have to be uniform and generally applicable. However, certain “grace periods” will be necessary in order to allow for a smooth change-over.<sup>72</sup> That is also true for the Civil Code<sup>73</sup> and related laws, particularly in the commercial area. Property issues and the like will have to be settled as quickly as possible since an uncertain legal situation will deter the desperately needed investment and economic activity in the German Democratic Republic.<sup>74</sup>

Another urgent matter is the reform of the administrative and judicial system in the GDR, which currently does not conform to western democratic standards.<sup>75</sup>

A first step to addressing the briefly sketched issues was taken on July 1, 1990 when the German Democratic Republic and the Federal Republic of Germany signed an agreement bringing about the economic and currency union of the two states.<sup>76</sup> On that day the Deutsche Mark was made the official currency in both parts of Germany, the Federal Republic’s social system was extended to the German Democratic Republic and most border controls were eliminated. In its Chapter I the agreement sets out its foundations: the recognition of a free, democratic, federal and social order based on the rule of law (Article 2), the first steps taken toward the harmonization of law (Article 4) and guaranteed access to justice (Article 6). Chapters II, III, and IV deal with the currency,

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71. The basic principles referred to in Article 28 are set out in Article 20 of the Basic Law which reads:

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs.
- (3) Legislation shall be subject to the constitutional order; the executive and judiciary shall be bound by law and justice.
- (4) . . .

72. Starck, *supra*, note 34 at 355.

73. The German Civil Code which dates back to 1900 had originally been applicable to all of Germany. However, the judiciary, the demands of modern society, and EEC regulations have since substantially developed civil law in the Federal Republic of Germany.

74. Klein, *Threshold*, *supra*, note 38 at 1071.

75. See Starck, *supra*, note 34 at 356.

76. German text published in *DIE WELT* — Nr. 113 — May 16, 1990, pp. 10, 11.

economic and social unions respectively, and Chapter V covers budgetary issues. A second treaty on “legal, practical and logistical technicalities, and an election law” are scheduled to be negotiated by December 2, 1990.<sup>77</sup>

Beyond the national scope the unifying/unified Germany is faced with a host of international legal questions.

It was clear that it would have to settle the sensitive issue of its eastern borders as soon as it is reunified. Because of the legal situation outlined earlier,<sup>78</sup> the German Democratic Republic and the Federal Republic could not — be it individually or jointly — change the border.<sup>79</sup> Only a reunified Germany has the power to conclude a treaty with Poland. Once this is accomplished, all references to reunification should be removed from the Basic Law. The respective passages in the Preamble, Article 23,2 and Article 146 will have lost their relevance. Their removal will also be a further step toward giving the Basic Law a permanent character. These aspects have now been addressed between the two Germanys and Poland. In a historical agreement both German states now assured Poland that a border treaty will be concluded as quickly as possible after unification. The Polish government expressed its satisfaction with the proposal consisting of the following five principles: (1) after the signing of a final settlement the united Germany will delete any legal language suggesting the provisional character of its border with Poland; (2) a united Germany will only comprise the territory of the present two German states and Berlin; (3) the Parliament of a united Germany will confirm the Oder-Neisse-Line in a treaty with Poland “in the shortest time possible”; (4) a united Germany will give up any territorial claims, and (5) the Four Allies agree to observe the fulfilment of these commitments.<sup>80</sup>

Germany and the Four Powers will have to sign a peace treaty which will also have to terminate their powers and privileges in Germany.<sup>81</sup> Among other things this will have effect on the basis upon which foreign troops are stationed in Germany.<sup>82</sup> According to the political agenda at the time of writing, a meeting in Moscow is scheduled for September 12, 1990. The plan is to draft an agreement that will indeed terminate all

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77. Friedman, *supra*, note 54 at A6.

78. See *supra*, p. . . .

79. On June 21, 1990 their Parliaments had adopted corresponding resolutions guaranteeing that the Oder-Neisse-Line would remain the border; see Friedman, *supra*, note 54 at A6.

80. Friedman, *supra*, note 54 at A6.

81. Regarding the general agreement as to the necessity of a peace treaty see *supra* p. 10; and Hailbronner, *supra*, note 40 at 451.

82. Klein, *Threshold*, *supra*, note 38 at 1073.

Four Power rights and responsibilities over Germany. This draft is to be submitted to a summit meeting of the Conference on security and Cooperation in Europe scheduled for Paris on November 19, 1990.<sup>83</sup> A peace treaty must further bring about the end of Berlin's special status. Currently it does not — in spite of the wording of Article 23,1 of the Basic Law — have the status of a Land of the Federal Republic of Germany.<sup>84</sup> The three western Powers, in their recognition of the Berlin constitution of 1950, made it clear that federal laws can only be applied in Berlin when they are enacted in the shape of a Berlin law.<sup>85</sup>

Another very complex area will be the treaty relations in which both German states are entangled. The reunification of Germany will be a test case for the controversial law of state succession. The 1978 Vienna Convention on the Law of State Succession has not entered into force.<sup>86</sup> It is a matter of controversy whether any of its provisions may be said to have attained the status of customary international law.<sup>87</sup>

There is a dispute as to whether the reunification of Germany would be a case of two states merging into one.<sup>88</sup> In this case the continuity principle (Article 31 Vienna Convention) would apply and, in principle, both sides' treaty relations would remain intact.<sup>89</sup> In the case of incompatible obligations an argument could be made in favour of the termination of treaties (Article 31 I b Vienna Convention).

The majority of writers contend that the reunification of Germany is a case of one state incorporating another.<sup>90</sup> As a result of this view the concept of "moving treaty frontiers" will be relevant (Article 15 Vienna Convention). The German Democratic Republic would no longer exist as a subject of international law. Therefore its treaty relations would be annihilated. The treaty relations of the Federal Republic would extend to encompass the former German Democratic Republic.<sup>91</sup>

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83. Friedman, *supra*, note 54 at A1.

84. Klein, in: Starck, *supra*, note 35 at 25, points out that the Treaty on the Presence of Foreign Troops in the Federal Republic of Germany of October 23, 1954 ceases to be in force once a peace treaty enters into force.

85. von Mangoldt, *supra*, note 27 at 6.

86. UN DOC. A/CONF. 80/31; reprinted in: (1978), 17 *Int'l. Legal Mat.* 1488.

87. See S.A. Williams and A. de Mestral, *An Introduction to International Law*, 2nd ed. (1987) at 98.

88. Klein, *Threshold*, *supra*, note 38 at 1072; for different types of cases in which state succession may arise see: M.N. Shaw, *International Law*, 2nd ed. (1986) at 440.

89. *Ibid.*

90. E.Grabitz and A. von Bogdany, "Deutsche Einheit und Europäische Integration" (1990), 43 *Neue Juristische Wochenschrift* 1073 at 1076 [German Unity and European Integration]; Hailbronner, *supra*, note 40 at 453.

91. The German Democratic Republic would, e.g., automatically cease to be a member of COMECON or the United Nations; see Hailbronner, *supra*, note 40 at 451.

Of particular importance and interest, finally, is the question of the German membership in the European Communities. While there is no doubt that a membership is desired by both German states and the Communities, its technical dimensions remain to be clarified.

Until the reunification of Germany is achieved the German Democratic Republic can join the EEC according to Article 237 EEC Treaty.<sup>92</sup> The Democratic Republic's application for membership would be considered in light of its ability to — after a transitional stage — grow into the existing primary and secondary Community law. This includes the body of law developed by the European Court of Justice and basic principles such as democracy, guaranteed protection of human rights and, the EEC's economic system.<sup>93</sup> The latter aspect may well cause considerable problems. The German Democratic Republic is currently in no position to open itself to full competition.<sup>94</sup>

The Federal Republic's membership in the European Communities does not preclude it from seeking reunification. The Federal Republic has consistently reserved this option for itself.<sup>95</sup>

Most writers consider a formal accession of the German Democratic Republic (Article 237) or an adaptation of the EEC Treaty (Article 236) unnecessary.<sup>96</sup> Because of Article 227 of the EEC Treaty which confirms the concept of moving treaty frontiers the EEC Treaty will automatically extend its application to the German Democratic Republic.<sup>97</sup> It goes without saying that it will be necessary to phase the German Democratic Republic into its EEC obligations under this provision as well.<sup>98</sup>

#### IV. *Conclusion*

The preceding account could only highlight a selection of issues related to the reunification of Germany. However, even this cursory account provides an indication of how much is involved in the seemingly natural process of reunifying a country.

The reunification of Germany is not only an extraordinary legal phenomenon. It also is an event of historical importance in more than

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92. Hailbronner, *supra*, note 40 at 455.

93. Grabitz/von Bogdany, *supra*, note 90 at 1078.

94. *Ibid.*, at 1076; the authors provide the example of the application of the Community environmental standards which would force most of the German Democratic Republic's industries to close down.

95. Hailbronner, *supra*, note 40 at 454.

96. Hailbronner, *supra*, note 40 at 455; Starck, *supra*, note 34 at 356.

97. Hailbronner, *supra*, note 40 at 456, points out that the EEC Treaty was extended via Article 227 to St. Pierre et Miquelon.

98. Hailbronner, *supra*, note 40 at 456, 457.

one sense. Not only will it conclude a chapter of post war history. It also leads into a new era of redefined structures and power balances within an increasingly integrated Europe. Currently, the first all-German elections since the Second World War are scheduled for December 2, 1990. Unification could then be achieved before the end of the year and an all-German Parliament could be convened in January 1991.<sup>99</sup> Yet a great deal of re-connecting and soul-searching will be necessary until the two Germanies will truly be one again. This is important to keep in perspective in the present rush to deal with the legal issues at hand.

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99. Friedman, *supra*, note 54 at A6.