The German Question of Reunification: An Historical and Legal Analysis of the Division of Germany and the 1989 Reform Movement in the German Democratic Republic

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I. Introduction

At midnight on September 10, 1989, when about 60,000 East
German vacationers were in Hungary, the government of Hungary
officially opened its doors to the West.1 Since that time, tens of
thousands of East Germans have fled unmolested through Hungary
to West Germany. This illegal exodus had begun in May 1989 when
Hungary began clipping the barbed wire separating the East bloc
from Austria.2 Hungary, which rejected East Germany’s angry pro-
tests, accused its Warsaw Pact ally of triggering the exodus by deny-
ing its citizens democratic rights.3 Hungary was the first East bloc
government to help the citizens of another Communist nation freely
leave their homeland.4

In ways once thought to be completely unattainable, the politi-
cal climate of Eastern Europe is changing rapidly and radically.
More than 170,000 East Germans left East Germany in 1989, which
is the largest emigration since the Berlin Wall went up in 1961.5 In
Poland, a government led by Solidarity, the independent trade union
which was banned only a few months prior to September 1989, has
taken power as the first non-Communist government in the East bloc
in forty-one years.6 Soviet leader Mikhail Gorbachev’s reform poli-
cies of glasnost and perestroika began to move the Soviet population
away from the strict orthodoxies of conventional communism and to-
wards a more democratic ideology.7 With the opening of the Berlin
Wall in November 1989, the German question of reunification has
once again emerged.

This Comment will consider the prospects of a German reunifi-

5. TIME, supra note 2 at 40.
cation in the context of the current tide of events in Eastern Europe and its legal significance under international law. Section II will give a brief background of the origins and development of the two Germanies with an emphasis on the postwar era. Section III will analyze the political structure of the Federal Republic of Germany and its constitution, the Basic Law. Section IV will examine the origins and growth of the German Democratic Republic and the events leading to and occurring after the construction of the Berlin Wall. Section V explores the judiciary of the Federal Republic of Germany and evaluates the decision of the Constitutional Court regarding the dispute over the Basic Treaty of 1972 between the Federal Republic of Germany and the German Democratic Republic. Section VI provides an overview of the major forms of opposition that have plagued the German Democratic Republic under the Honecker era (1971-1989). Finally, Sections VII and VIII will examine the recent mass exodus out of East Germany after Hungary opened its borders to the West and the future of the German Democratic Republic.

II. Background

In the 1,970 years of its recorded history, Germany has had only seventy-four years, from 1871 to 1945, in which it represented a politically unified, integrated state system. This period of unification can be subdivided into three systematic phases: the first forty-seven years falling under the period of the Second German Empire created by Bismarck and lasting from 1871 to 1918; the next fifteen years constituted the period of the parliamentary democracy known as the Weimar Republic (1918 to 1933); and finally, the twelve years of Hitler's Third Reich from 1933 to 1945. In 1918, the Weimar Republic was erected in the wake of World War I. After fourteen years of disorder, the Republic collapsed and was succeeded in 1933 by the National Socialist dictator, Adolf Hitler.

Hitler's regime was tyrannical and oppressive, particularly to Jews, but it surmounted the world-wide depression that had virtually crippled the other major industrial countries. Within a few years, the Third Reich had restored virtually full employment and had achieved a respected level of prosperity which bolstered Hitler's popularity in Germany and abroad. Hitler intended, however, to use

9. Id. at 114.
11. Id. at 3.
12. H. TURNER, THE TWO GERMANIES SINCE 1945, at 2 (1987) [hereinafter H. TURNER]. From 1919 until the end of 1923 the Weimar Republic was in a state of chronic crisis. In June 1919, the victorious Western Powers imposed on Germany the Treaty of Versailles, a
the productive capacities of Germany not to improve the lot of the German people, but rather to prepare for a war of ruthless and far-reaching conquest. Following a series of diplomatic victories which ultimately resulted in the disregard for the Versailles Peace Settlement, Hitler launched what would become the Second World War when he invaded Poland in September 1939. During the next five and a half years, Germany, which was joined by Fascist Italy in 1940 and temporarily allied with the Soviet Union, quickly dominated the European continent by attacking Poland, Denmark, Norway, the Netherlands, Belgium and France. Hitler also set his sights on Britain. In the summer of 1941 he invaded the Soviet Union and by December had declared war on the United States.

Ultimately, the tide turned on the Third Reich as the Soviets stopped the German advance and the Western Allies swept away Mussolini's fascist regime. In the spring of 1945, the European conflict finally came to an end as Hitler committed suicide and Germany was taken over by the Allied Powers. The German military leaders agreed to an unconditional surrender and in May 1945, Soviet, American, British, Canadian, and French troops occupied a Reich whose entire institutional structure had collapsed. Legislative, judicial, and executive authority was assumed by the Allied commanders. Germany had suffered its worst political and social defeat by ceasing to exist as a state and by becoming a geographic region ruled by foreigners.

The victorious Allies, like the Germans, assumed that the disruptions of war could, as after previous conflicts, find resolution in a peace treaty, but no immediate steps in that direction followed the capitulation of Nazi Germany. All the victors agreed that a harsh settlement which seemed to place the blame for the World War I on Germany and its allies and which ordered the payment of reparations to compensate the victors for the damages caused by Germany’s aggression. Unemployment and hyperinflation had cut deeply into the German economy and by 1932, more than forty percent of the German work force was without a job. Id. at 2. Hitler's goal was an empire of continental proportions in which the Germans, by right of alleged racial superiority, would subjugate or eliminate lesser peoples. F. Ninkovich, Germany and the United States: The Transformation of the German Question Since 1945, at 14 (1988). Id. at 2. H. Turner, supra note 12, at 3. Id. at 4. H. Turner, supra note 12 at 8. Id. at 4. Id. at 3.

13. Id. at 2. Hitler’s goal was an empire of continental proportions in which the Germans, by right of alleged racial superiority, would subjugate or eliminate lesser peoples.
15. Id.
17. Id. at 4.
19. Id.
20. Id.
21. H. Turner, supra note 12 at 8. In the spring of 1945 the Second World War seemed far from over in the Pacific. The Japanese Empire still occupied much of China, Southeast Asia and many islands of the Pacific. The United States, unaware that the detonation of the first atomic bombs over two Japanese cities would put an end to the Pacific war by August 1945, remained preoccupied by the prospect of a long and timely conflict. The British and the Soviets were assessing the extensive damage to their respective nations and reasserting
many should be subjected to denazification, demilitarization, democratization, decentralization, and decartelization. They further agreed that the four-power Allied Control Council (Council) should administer Germany as one economic entity. The Council, however, did not exercise full control over Germany since the Allies had assigned executive authority in each of the four occupied zones to the American, British, French, and Soviet commandants, who were responsible primarily to their respective governments; disagreements among the Four Powers during 1947 hampered the functioning of the organs of the Four Power Administration.

During this period, both the Western Powers as well as the Soviet Union began to integrate into their respective spheres of influence those parts of Germany they occupied. An agreement on January 1, 1947 merged the British and American Zones of occupation into an integrated economic area (bi-zone). In place of the envisaged joint control and neutralization of Germany, the occupied areas gradually assimilated to the political, economic and ideological principles of the occupying powers. Finally, the Soviet Union quit the organs of the Four Power Administration at the German as well as at the Berlin level. The Soviet delegation withdrew from the Council on May 20, 1948, and thereafter ceased to meet with the Four Power Administration. The Western Powers, however, decided to continue to work on the “German Question” on a tripartite basis.

The currency reform carried out in the three Western zones in 1948 provided the Soviet Union with an excuse for blockading Berlin in order to bring the former German capital totally into its domain. For the eleven months, everything needed by the people of West Berlin—food, coal, and all vital supplies for the city’s inhabitants and Western troops—was flown into Berlin by American, French, and British airlifts. This became known as the “Berlin Airlift.”

their influence over strategically vital areas. The French, crushed by their 1940 military defeat, struggled to revive their national institutions. Id.

22. Id. at 11.

23. Id. at 12. However, two economic spheres, one in the Western zone and one in the Eastern zone, were recognized.


25. CONTEMPORARY GERMANY, supra note 18, at 63.

26. Id.

27. CONTEMPORARY GERMANY, supra note 18, at 63.


Soviet Union eventually backed down and on May 4, 1949, an agreement ending the blockade was arranged through the United Nations. The division of Berlin into eastern and western zones took place during the blockade period, at the end of 1948. A few months later, the Federal Republic of Germany (FRG) was created in the West by the acceptance of the FRG's Basic Law and by free elections to the first German Parliament (Bundestag). The Communist leadership in the Eastern zone soon reciprocated by establishing the Movement for a People's Congress, which had been created to ensure general social and political conformity in the Soviet occupation zone and eventually led to the formation of the German Democratic Republic (GDR). Both German states immediately claimed to be the sole "legal" German State to represent all Germany.

Neither of the German States which came into existence at the end of 1949 was a free agent in deciding the future of Germany. The main powers concerned—the United States and the Soviet Union—wanted a reunification of Germany on their own terms, if at all. Events have, however, landed upon opposite ends of the continuum for the two Germanies: East Germany, the GDR, prior to the recent reforms, was a rigidly organized Communist state without free elections, guaranteed human and civil rights in practice, or until November 1989, the fundamental freedom for its citizens to leave their own country. Above all, it has historically been contained within a satellite system under the tight control of Moscow.

32. Id.
33. CONTEMPORARY GERMANY, supra note 18, at 64.
34. H. Turner, supra note 12, at 25.
35. Id. at 27.
36. CONTEMPORARY GERMANY, supra note 18, at 64.
38. For United States policy towards the German Question as of December, 1957, see e.g., U.S. National Security Document No. 5727, declassified in Washington in 1982, which states:

... Germany is of vital importance to the U.S.: a) Germany's location in the heart of Europe and its considerable material and human resources make it a key area in the struggle between the Communist and free worlds; b) the division of Germany is a chronic source of European instability and East-West friction and a possible source of major armed conflict; c) West German military association with Western Europe is very important to strengthen NATO capabilities in Europe... major policy guidance... make clear that reunification is essential to any genuine relaxation of tension between the USSR and the West but that the US will not agree to any reunification involving: a) Communist domination of a reunified Germany; b) a federated Germany which perpetuates the existing government of the GDR; c) the withdrawal of US and other allied forces from West Germany without an effective quid pro quo from the Soviets and the satellites...

Id.
FRG, on the other hand, has a written democratic constitution with all due rights and liberties for the individual, including free elections. It is also part of the North Atlantic Treaty Organization (NATO).

III. The Power Structure in the Federal Republic of Germany

The Constitution of the FRG, known as the Basic Law, was conceived as a provisional document which deliberately avoided certain subjects, such as basic social rights, because there was hope in 1948 that a constitution for all of Germany might be enacted in the then foreseeable future. It was drafted by the representatives of the three occupation powers—the United States, Britain, and France—and those West German leaders acceptable to the powers, in the name of the entire “German people.” According to article 146, the Basic Law was to “cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force.”

The Constitution was designed to strengthen federalism. The declared object of the framers of the Basic Law of 1949, as stated in the preamble, was “to give a new order to political life for a transitional period.” The occupying powers, especially the United States, intervened numerous times in the process of drafting the Constitution. The role of the German president was kept deliberately weak because the experiences of the Weimar Republic suggested that competition between the president and the parliamentary majority should not be allowed to occur again.

In light of the experience of the Nazi dictatorship, the system was constructed with an exaggerated attention to the supremacy of law, and for the first time in German history, the constitution became the supreme law of the land. Basic rights were protected without provision for exceptions and all acts of the State were sub-

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41. Id.  
42. CONTEMPORARY GERMANY, supra note 18, at 77. The separate existence of the two German States during the Cold War and the inclusion of the separate parts of Germany in the economic and military alliance systems destroyed these hopes. Id.  
43. L. EDINGER, WEST GERMAN POLITICS 7 (1986). “German people” also included those Germans to whom participation was denied because they lived in the area controlled by the Soviet Union. Id.  
44. Id. at 9.  
45. CONTEMPORARY GERMANY, supra note 18, at 77.  
47. As such, the document which was drawn up was not an expression of prevailing political norms in Western Germany, but a compromise between the various views of the members of the constituent assembly and of the American, French and British military governors and their advisors. Id. at 9.  
48. E. ZIVIER, supra note 24, at 57.  
49. CONTEMPORARY GERMANY, supra note 18, at 107.
The West German constitution emulated the American model, but it went beyond it by creating a Federal Constitutional Court as a specialized guardian of the constitution with the task of resolving disputes between various governmental authorities as well as protecting the basic rights of citizens. The Basic Law grants the states two important roles: (1) states, rather than the federal government, have primary powers in important areas, most notably education, cultural affairs, radio, television, law enforcement, the environment, the organization of the bureaucracy, and the regulation of local government; and (2) West Germany has a field system of administration with only a small number of bureaucrats in Bonn.

The most significant democratic institution established by the Basic Law is the federal parliament or Bundestrat which enjoys the greatest measure of political power within the governmental system. This institution is a hybrid between the United States Senate, which accords each state an equal number of representatives, and the Federal Council of Bismarck's empire, which allotted the number of representatives according to the size of each state. All laws require approval by a majority of its deputies, who number just under 500, with a requisite two-thirds majority vote for constitutional amendments. The Bundestrat ordinarily considers only controversial constitutional legislation; half of the bills passed have required two-thirds majority vote for constitutional amendments. Other bills require only a majority vote to pass, with a second vote requiring a two-thirds majority where there are any constitutional challenges to the Basic Law. Although the Constitutional Court in 1974 somewhat circumscribed its importance, the Bundestrat still considers and comments on draft legislation submitted by the cabinet; it approves bills that have passed the Bundestrat; it exercises its right of an absolute or suspensive veto; and in the case of a veto it seeks to resolve its differences with Bundestrat representatives in a conference committee that normally succeeds in redrafting contro-

50. Id. at 78.
52. Id. at 16.
53. Id. The effect of these constitutional provisions is readily apparent. The federal government has no choice but to negotiate and cooperate with centers of State power over which it has no control.
55. Id. at 16.
56. Id. at 40. The deputies are chosen in elections open to all citizens eighteen years of age and older (until 1971 the minimum age was 21). Bundestrat elections must be held at least every four years and may occur after less time has elapsed if sufficient backing cannot be found for a cabinet.
versial legislation. In short, as an expression of West German federalism, the *Bundestrat* is a powerful institution in a decentralized state.

IV. The Origins and Growth of the German Democratic Republic.

East German history is conventionally dated from either the Allied conferences at Yalta (February 1945) and Potsdam (August 1945) when the boundaries of postwar occupation were set down, or from the formal creation of the GDR on October 7, 1949. After its creation the *Sozialistische Einheitspartei Deutschlands* (Socialist Unity Party of Germany)(SED) defines the period from 1949 to 1961 as a stage in the "Socialist revolution" in which the "foundations of Socialism" were created. These terms are used to describe a comprehensive structural change that was intended to radically alter the political system, the economy, and society. A distinct German path to socialism was soon replaced and the goal soon became emulation of the USSR and the construction of a "people democracy" similar to those of the other regimes set up with Soviet backing in Eastern Europe.

Repressive methods of rule were applied throughout the Soviet zone by the SED-dominated civil administration as those holding, or aspiring to positions in the bureaucracy, judiciary or the school system had to pass ideological scrutiny. Dissent or disagreement with the policies of the occupation regime was discouraged by denying the offenders advancement in their careers, dismissing them from their jobs, or imprisoning them. In their policy on Germany the GDR and the Soviet Union pursued a double strategy through which they hoped to influence Western positions. As a result of its own policy of non-recognition, the government of the FRG rejected all official contacts with East Germany. The FRG’s adoption of this policy under Chancellor Konrad Adenauer, which was intended to weaken the

58. P. Katzenstein, supra note 51, at 17.
59. Id.
60. C. Scharf, Politics and Change in East Germany: An Evaluation of Socialist Democracy 2 (1984). For their part, East German historians emphasize departures from a past of feudal and capitalist repression and from the tyranny of national socialism. Western historians, employing similar conventions, depict the present GDR as essentially having no past and, often by implication, as being unnatural or illegitimate. Id.
61. Contemporary Germany, supra note 18, at 204.
62. Id.
63. H. Turner, supra note 12, at 46. In schools and universities throughout the Soviet zone, Marxist-Leninist indoctrination became a compulsory part of the curriculum. Id.
64. Id.
65. Id. at 47.
66. Contemporary Germany, supra note 18, at 209. The Federal Republic of Germany (FRG) considered the GDR to be nothing more than an executive organ of Soviet interests and thus felt that it would be possible to overcome the division of Germany only by integrating the eastern part of Germany into the West German “core state.” Id.
GDR by its systematic isolation, motivated the GDR's political leadership to erode this attitude by constantly proposing negotiations.\textsuperscript{67} The GDR government under Otto Grotewohl repeatedly emphasized the need for accelerating the conclusion of a peace treaty and the restoration of German unity through agreements between the two German States.\textsuperscript{68} As a result, the Soviet Union developed a German policy initiative of its own aimed primarily at preventing the intended integration of the GDR into Western Europe on the basis of security considerations.\textsuperscript{68}

After the failure of the Berlin Conference of Foreign Ministers early in 1954, each side's policy on Germany was increasingly reduced to an effort to justify its own position in the light of irreconcilable views.\textsuperscript{69} Western demands for all-German free elections without preconditions, while refusing to recognize the GDR as a separate state, were countered with East German proposals for an \textit{a priori} conclusion of a peace treaty, recognition of the GDR as a negotiating partner, and neutralization of Germany.\textsuperscript{70} The belief that political unification was hopeless abounded and was reinforced by the Korean War and the advancement to membership of both the FRG and the GDR in NATO and the Warsaw Pact respectively.\textsuperscript{71} When the FRG became a member of NATO in May 1955, the Soviet Union, for its part, stabilized the GDR's political status by means of the Declaration of Sovereignty of March 25, 1954, and the treaty of September 20, 1955, which formally ended occupation status.\textsuperscript{72} The Soviets created the Warsaw Pact on May 14, 1955, and with the participation of the GDR, the formation of military blocs in Europe was established, permanently consolidating the political division of Germany in 1955.\textsuperscript{73}

\textbf{A. The Construction of the Berlin Wall}

Faced with increasing economic disorders in the GDR, the political leadership attempted to increase economic production by means of an administrative measure which imposed higher work quotas...
which in turn triggered the uprising of June 17, 1953. The citizens of the GDR had no choice between political alternatives in their own society, but they were able to choose between two German societies by "voting with their feet" and moving to the West. The GDR attempted to implement its "priority economic task" in 1958 with the objective of attaining and surpassing West German economic growth by 1961. The communist party's ambitious economic aims were rapidly seen to be unattainable as workers fled to the West. When the total who had fled reached nearly three million, or one out of every six persons in the part of Germany occupied by the USSR in 1945, the GDR obtained the approval of the Soviet Union and the other Warsaw Pact countries and began to seal off its border with the West; it began construction of the Berlin Wall on August 31, 1961. The abrupt end of the refugee movement became the basis for economic stability and an acceleration of economic growth, turning the GDR into an achievement-oriented society.

The effects of the Berlin Wall soon became evident in the economic sphere. For the first time, the East German regime could make allocations for the economy without having to deal with the constant yet unpredictable loss of skilled laborers. At the sixth SED Congress in January 1963, GDR leader Walter Ulbricht unveiled a new economic system as an integral part of the comprehensive construction of Socialism. Even though the GDR still lagged behind the FRG in the production of consumer goods, it began to appease the desire of its citizens for material conveniences. By the latter half of the 1960's, Ulbricht dominated the GDR, but during 1970 his economic reforms began to abate. The economy experienced a number of setbacks, and the aging leader's inability to summon sufficient energy to rectify these problems was instrumental in

75. Id. at 211. This demonstrative denial of loyalty on the part of the workers in opposition to the arrogance of the "workers and farmer's state" clearly showed that the rule of the SED could be guaranteed only through the use of Soviet occupation forces.
76. German Information Center, supra note 31, at 27.
77. CONTEMPORARY GERMANY, supra note 18, at 212.
78. H. TURNER, supra note 12, at 130. Under the guns of the People's Police, workmen blocked with barbed wire entanglements the many street crossings between the two parts of the City. GDR guards permitted passage at only a handful of locations and turned back anyone from the East who lacked the regime's permission to cross over to the west. The fortifications soon grew into the Berlin Wall, more than a hundred miles in length which sealed off access from the East and severed communications as well.
79. CONTEMPORARY GERMANY, supra note 18, at 212.
80. H. TURNER, supra note 12, at 138.
81. M. DENNIS, supra note 10, at 33.
82. H. TURNER, supra note 12, at 139. Whereas in the 1950's private automobiles had been virtually unknown in the GDR, by 1969, when forty-seven percent of the households in the FRG owned a car, but only fourteen percent in the GDR had acquired a vehicle. Id. Two-thirds of East German households, as compared to nearly three-quarters in the West, had acquired television sets by that time. Id.
his replacement by Erich Honecker in May 1971.83

V. The Federal Constitutional Court and the Basic Treaty of 1972 Between the Federal Republic of Germany and the German Democratic Republic

The decision of the Federal Constitutional Court of the FRG of July 13, 1973 dealing with the Basic Treaty dispute marked the end of a political struggle that caused polarization of political opinion in Germany. On the one hand, there were those who felt that after the irretrievable losses suffered as a result of the Second World War, Germany as a whole should not be further diminished by a perpetuation of the partition of Germany into two independent States, and even less by giving such partition legal recognition.84 On the other hand, there were leaders who felt that whatever the effect on a long-range solution of the German problem might be, it was in the best interests of Germany to attain an accommodation between East and West on the best available terms, even at the price of political orthodoxy.85 The Constitutional Court, faced with the dilemma of either instigating a diplomatic crisis between the FRG and the GDR or of the alienation of a substantial segment of German political public opinion, successfully disposed of this issue in a manner that may well have permitted both sides to claim victory.86

A. The Judiciary of the Federal Republic of Germany

The Constitutional Court itself may be regarded as one of the seminal achievements of German constitutional development. The Constitutional Court is the most political and institutionally autonomous component of West Germany’s decentralized judicial structure.87 Constitutional adjudication had been established in the FRG in its purest form through the Constitutional Court, which is modeled after the United States Supreme Court but which deals exclusively with constitutional issues.88 The Constitutional Court is the organ which is exclusively called upon to make binding decisions on all questions concerning application and interpretation of the Basic Law89 (the constitution of the FRG). The sixteen judges of its two

83. M. Dennis, supra note 10, at 35.
85. Id.
89. East Europe Monographs, supra note 84, at 11; Article 92 of the Basic Law of the Federal Republic of Germany lists specifically the Federal Constitutional Court. It is, therefore, a constitutional organ of the Federation. This special position of the Federal Constitutional Court is also emphasized in paragraph 1 of the Act of March 12, 1951 which regu-
chambers are bound only by the Basic Law and may, on appeal, set aside the verdict of any other court—including the constitutional courts of the states—if they find the verdict to conflict with the spirit or letter of the Basic Law. The central basis of its jurisdiction is conflict among governmental agencies, disagreements resulting from the federal structure, and determinations of constitutionality and constitutional constraints. The Court has original jurisdiction in the constitutional disputes between the Federal Government and state governments, between the Federal executive and parliament, between different states, and between other courts.

The Supreme Court of the United States, by way of contrast, does not engage in a formal review of constitutionality in the way used in the German system. It cannot decide abstract problems of constitutional law nor abstract determination of constitutionality which is so significant in German constitutional adjudication. Although the importance of the United States Supreme Court is grounded in its position as a constitutional organ, it is most visible in its role as the court of last resort. Contrary to the practice of the FRG's Constitutional Court, the United States Supreme Court cannot, in the abstract, declare laws invalid because of their conflict with the Constitution; it can only invalidate such laws in connection with the case at bar.

The regular courts of the FRG function at four levels, with the district courts (Amstergerichte) at the lowest level. They operate in towns or other limited geographical areas and exercise jurisdiction over minor civil suits and petty criminal offenses punishable by up to two years imprisonment. The next level is the county court system (Landgerichte) which is composed of trial courts of general jurisdic-

lates in detail the Court’s position and jurisdiction. Id. It describes the Court as “autonomous and independent from all other constitutional organs.” Grundgesetz (Basic Law) art. 92 (W. Ger.).

90. CONTEMPORARY GERMANY, supra note 18, at 209.
91. EAST EUROPE MONOGRAPHS, supra note 84.
92. E. ZIVIER, supra note 24, at 80. It may also consider—and reject—complaints by individuals and organizations who claim that their constitutional rights have been invaded by the public authorities and that they have no other recourse for redress. Id. It may also outlaw organizations and practices deemed to be inconsistent with the constitutional order and the duties of responsible citizenship. Id.
93. The power of judicial review of the United States Supreme Court does not follow, as in the case of the Federal Constitutional Court, from a provision of the Constitution. Chief Justice Marshall was able to bring about the acceptance of judicial review in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Compare HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 94 (1932).
94. EAST EUROPE MONOGRAPHS, supra note 84.
95. Id.
96. POLITICS AND GOVERNMENT IN THE FRG, supra note 40, at 85.
97. Id. The district courts also perform many non-judicial functions such as administering estates, drafting wills and conveyances, keeping registers, appointing guardians, and supervising executors and trustees in bankruptcy. Id.
The court of last resort in each state is the superior court (Oberlandesgericht), although it also has original jurisdiction in cases involving high treason and betrayal of the Basic Law. The final court of appeals is the Federal Supreme Court (Bundesgerichtshof).

B. The Decision of the Constitutional Court Regarding the Basic Treaty of 1972

It was hoped that the conclusion of a peace treaty between the two Germanies would make possible the re-establishment of normal relations between the GDR and the FRG. On November 8, 1972, the Intra-German Treaty negotiated between the FRG and the GDR was signed. Article 4 of the Intra-German Treaty on the Basis of Relations provides that neither of the signatories can represent the other internationally or act in its name, a matter which caused double diplomatic representations of the German States in foreign countries and in international organizations such as the United Nations. Key elements of the Intra-German Treaty on the basis of relations are as follows: a mutual renunciation of force; inviolability of the present frontier and territorial respect; a pledge to develop good neighborly relations; an agreement to disagree on the nature of the national question; a respect for the autonomy of each state; the principle that the jurisdiction of each is confined to its own borders; and an explicit agreement to develop and promote cooperation in a number of fields including economics, science, and sports.

On May 28, 1973, the State Government of Bavaria petitioned the Federal Constitutional Court for a declaration that "[t]he Act concerning the Treaty of December 21, 1972 between the FRG and the GDR is inconsistent with the Basic Law and is therefore null and void." To substantiate the petition, the State Government of Bavaria argued that the Treaty conflicted with the command to preserve the national unity of Germany because it is based on a theory, rejected by the Basic Law, of the extinction of the German State and the coming into existence of two independent states on the territory of the Old Reich. Bavaria also argued that the Treaty conflicted with the command for reunification stipulated in the Basic

98. Id.
99. Id.
100. Id.
101. EAST EUROPE MONOGRAPHS, supra note 84, at 35.
102. Intra-German Treaty between the FRG and the GDR, art. 4, Dec. 21, 1972; Kindermann, supra note 8, at 114.
103. Kindermann, supra note 8, at 115.
104. EAST EUROPE MONOGRAPHS, supra note 84, at 38.
105. Id.
Law because it recognized the GDR as an independent and sovereign state, on an equal standing with the Federal Republic. Bavaria further argued that the Treaty was in conflict with the constitutional obligation to protect and care for Germans living in the GDR who are considered Germans under article 116 of the Basic Law. The Treaty, however, precludes the FRG from legal intervention on behalf of the Germans who reside in the territory of the GDR; as a consequence, additional difficulties arise when representatives of the FRG in third countries want to assist Germans in the GDR.

The Federal Constitutional Court dismissed Bavaria's petition as being prejudicial to its own political interpretation of the Treaty as well as disregarding the political situation which led to the Treaty. The Court weighed the option of not having the Treaty in force and concluded that the advantages of the Treaty were evident. The Treaty served the practical constitutional aim of securing peace and humaneness by bringing to the people practical benefits; it was in consonance with the intent of the framers of the Basic Law to uphold the existence of Germany and to be a document of a policy not governed by the interests of the Federal Republic, but by the needs of the whole Nation. It left the German question open.

The Court held that reunification was indeed a constitutional command of the Basic Law, but that the decision as to the politically appropriate and expedient manner for attaining reunification, however, had to be left to the organs of the Federal Republic responsible for such political action. The Court also stated that the constitutional entities entrusted under the Basic Law with the duty of protecting the free, democratic fundamental order and its institutions had to decide whether a specific and otherwise constitutional measure would legally hinder or factually render reunification impossible and whether such action should not be taken. The Court concluded that they may only block a legislative mandate if it is an unequivocal abuse of discretion or if its measure for legal or factual reasons obviously contradict the goal of reunification.

106. Id. Bavaria argued that in the place of the German Reich two sovereign states guaranteeing each other their existence have emerged thus leading to a permanent division of Germany. The Treaty turns the previous demarcation line into a voluntary and contractually acceptable State border. Id.
107. Id. at 41; Grunesetz (Basic Law) art. 116 (W. Ger.).
108. EAST EUROPE MONOGRAPHS, supra note 84, at 39.
109. Id. at 41.
111. EAST EUROPE MONOGRAPHS, supra note 84, at 41.
112. Id. at 45. Decisions of the Federal Constitutional Court 5, 85, 26 ff; 12, 45, 51 ff.
113. Id. at 46. The Constitutional Court further stated that ample room for political discretion in this field is granted above all to the legislative organs. Id. The weighing of the prospects of its mandated policy aim of reunification is left to its discretion and that of the parliamentary majority which is its power base. Id.
114. Id.
By its decision, the Federal Constitutional Court not only elevated the principle of reunification from the scarcely legally binding field of *obiter dictum*, but confirmed its full legal contents. The wide field of discretion granted by sentence 3 of the preamble is limited by the leading principle 5 of the decision:

> [n]o constitutional organ of the FRG may abandon the political aim of the restoration of national unity; all constitutional organs are obliged to strive for this aim through their policies . . . this includes the demand to keep awake the claim for reunification internally and to advocate steadily this claim externally . . . and to avoid everything which might obstruct reunification."

For the first time, an internal connection between sentence 1 of the preamble (fixation of national unity) and sentence 3 (the so-called principle of reunification) was pronounced.

VI. The Opposition to the German Democratic Republic Under Honecker (1971-1989)

Since Honecker succeeded Ulbricht as party leader in 1971, the GDR has been subjected to social, economic, and political strains, many of which originated outside its borders but which were aggravated by the internal problems of East German society. Although the GDR has managed to become one of the twelfth largest industrial states in the world and has reached the highest living standard of any of the Communist-ruled states, there has been a continuing increase in dissatisfaction among its citizens. This concern is primarily connected with the fact that hopes of bettering material standards, awakened by Honecker, have not been fulfilled. In addition, the living standards of the East Germans is still only about half as high as in West Germany. The record of opposition in Eastern bloc countries reveals a clear link between economic problems and political instability. The link took on particular significance under Honecker as the GDR has experienced a shift of emphasis on the leading role of the party from an ideological to an economic justifica-

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118. R. Woods, *Opposition in the GDR Under Honecker* 8 (1986). The earliest of these strains in the Honecker era arose from increased contact with the West. Against the background of growing hostility between the Soviet Union and the People's Republic of China, and rapprochement between the United States and China, the Soviet Union pushed the GDR into detente with the West. *Id.*
120. H. Weber, supra note 119, at 5.
121. *Id.*
122. R. Woods, supra note 118, at 15.
tion, followed by mounting problems for the economy.\footnote{123} Given the vagueness of legal criteria, the fact that the party may not always move against political opposition, and the possibility of the official line becoming flexible when challenged, opposition can perhaps best be thought of as an unwelcome pressure for significant political change.\footnote{124} The major source of opposition in the GDR under Honecker came from dissident intellectuals who wished to stay in the GDR and who claimed the right to criticize the regime, to recall it to its duty, and to advocate alternative policies for it to pursue.\footnote{125} In the 1970’s, the focus tended to be on issues of intellectual freedom and on the shortcomings of East German Socialism.\footnote{126} In the 1980’s, criticism from intellectuals has tended to be directed towards what is seen as the increasing militarization of GDR society.\footnote{127}

The second source of opposition in East Germany under Honecker’s rule, and the one which is most significant in light of the recent mass exodus to West Germany, is the desire of East German citizens who wish to leave the GDR and take up permanent residence in the West.\footnote{128} Estimates of the numbers involved range from 150,000 to a staggering half a million out of a total population of around seventeen million.\footnote{129} The motives of those wishing to renounce East German citizenship include hopes of a better economic future; rejection of the East German political system, often from a Christian or non-Socialist viewpoint; and the desire to be reunited with family members residing in the West.\footnote{130} Initially, the majority of those wishing to leave were not allowed to do so and some resorted to oppositional methods such as publicizing their cause in the West, criticizing the GDR’s record on basic human rights, forming themselves into self-help groups, and attempting to cross the border ille-

\footnote{123} Id. The shift of emphasis has prompted observers to apply sociologist Antonin Tiehm’s concept of a “new social contract” \textit{Id.} to the GDR. This is an unwritten agreement according to which a political party guarantees the people a secure existence and a rising standard of living and in return expects the people to accept certain limitations on their political freedom and to acknowledge, or at least passively accept, the supremacy of the party. \textit{Id.}

\footnote{124} Id.

\footnote{125} L. Schapiro, \textit{Political Opposition in One-Party States} 3 (1972).

\footnote{126} R. Woods, \textit{supra} note 118, at 24. Following Wolf Biermann’s expatriation in November 1976 for “gross dereliction of his duties” as a citizen of the GDR, over one hundred well-known writers and artists made their way to the West, some after periods of imprisonment. \textit{Id.}

\footnote{127} Id. The high points of critical activity were the two Berlin meetings (December 1981 in East Berlin and April 1983 in West Berlin) of writers and scientists from the East and West to discuss how to further the cause of peace. Both meetings were given extensive coverage on West German television, and many prominent East Germans aired their criticisms of GDR peace policy. \textit{Id.}

\footnote{128} Id.

\footnote{129} \textit{Id.} at 21.

\footnote{130} R. Woods, \textit{supra} note 118, at 21.
gally. As a result, many were charged with taking up illegal contacts, agitation against the State, and illegal exodus.

The GDR citizens who wish to go to the West come from all segments of society and from all age groups. According to statistical information compiled on the West German side relating to the 31,194 East Germans who emigrated to the Federal Republic in the first half of 1984, there are indications that the emigrants' motives may not have been exclusively political or related to family members living in the West. The largest single group (8,178) was comprised of 25-34 year olds and the second largest (5,911) of 35-44 year olds. Seventy percent of those who left were of employable age, and given the fact that up to one million skilled workers in the GDR are currently not able to obtain employment which matches their relatively high level of qualifications, along with notoriously low pay levels, it can be suggested that many of those who left did so because they thought their economic prospects would be better in the FRG.

VII. The 1989 Mass Exodus from East Germany

East Germans began fleeing to the West through Hungary in June 1989 after Hungarian border guards began dismantling the barbed wire “iron curtain” that separated Hungary from Austria for decades. Hungary’s action marks the first time that a Warsaw Pact country has aided an exodus of refugees from an allied Communist nation. East German leaders expressed outrage at the Hungarian government and in Moscow, the Soviet news agency Tass condemned Western media for what it called a “tendentious campaign” to spur illegal East German emigration. The exodus

131. Id. at 30.
132. In practice, many of those convicted do not serve the full sentence, but are “bought free” by the FRG under the controversial Friekauf arrangements and thus eventually make their way across the border. Id. at 32.
133. Id. at 33; Statistics for the Bundesausgleichsamt (6838/6943/1). See also R. Fricke, Opposition in the GDR 162-174 (1978). Sociologists Kohler and Ronge discuss the problems of interpreting their survey result that 71 percent of the emigrants cited “lack of freedom of opinion” and 66 percent “political pressure” among their motives for leaving. Id.
134. R. Fricke, supra note 133, at 1281. Seventy percent of those who left were of employable age, a figure which is appreciably higher than for the East German population as a whole (64% in 1982). R. Woods, supra note 118, at 33.
135. R. Woods, supra note 118, at 33. The survey further revealed that nearly seventy percent of those asked expected working conditions to be better in the FRG than in the GDR. (p. 1284).
136. Philadelphia Inquirer, Sep. 3, 1989, at 1, col. 6. At this time a reported 6,000 East Germans already had sneaked through woods and cornfields to Austria evading Hungarian border patrols that had been ordered to try to halt those trying to flee illegally, but not to shoot them. Id.
138. Id. at 6, col. 2.
139. Id.
came after weeks of talks between the two Germanies failed and the Hungarian government formally announced that it would allow all East Germans in Hungary to leave for West Germany.\textsuperscript{140} West German Chancellor, Helmut Kohl, in a speech delivered in Bremen, stated that until East Germany adopted reforms, West Germany would be seen as a mecca for unhappy East German citizens.\textsuperscript{141}

Almost thirty years since the construction of the Berlin Wall in August 1961, reunification of the two Germanies is once again forcing itself into the political spotlight. Once more, the yearning of East Germans is the driving force, and political freedom is a stronger magnet than it was in 1961 when poverty was a factor.\textsuperscript{142} The dramatic stampede of more than 50,000 East Germans into West Germany marked the largest mass exodus from behind the Iron Curtain since the Berlin Wall was constructed.\textsuperscript{143} To open its borders, Hungary suspended key paragraphs of a 1969 bilateral treaty with East Germany that forbid unauthorized passage of citizens of either country into third countries.\textsuperscript{144}

In the weeks that followed the initial exodus, riot police battered protesters during massive demonstrations in East Berlin, Leipzig, Dresden, and Potsdam.\textsuperscript{145} The riots were fueled by the recent exodus and the presence of Soviet leader Mikhail Gorbachev at the celebration of East Germany's 40th Anniversary on October 7, 1989.\textsuperscript{146} During his two-day visit, Gorbachev publicly called on Honecker to follow the Soviet example of reform.\textsuperscript{147} But Honecker, a doctrinaire Communist, continued to refuse, repeating that his government would adhere to what he called the "proven course for the good of the people."\textsuperscript{148}

As East Germany's Communists struggled to ease a volatile situation, their brethren in Hungary took steps to further denounce Communism in Eastern Europe. Over the weekend of October 8, 1989, a majority of the 1,274 delegates at a Hungarian Communist Party Congress voted to rechristen themselves the Republic of Hungary and sever their Communist ideals for all intents and purposes.\textsuperscript{149} The Hungarians will draft a new constitution based in part on the United States model, featuring a separation of executive, leg-

\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{U.S. News and World Report, Oct. 16, 1989, at 40, col. 1.}
\textsuperscript{143} \textit{Id. at 39.}
\textsuperscript{144} \textit{Time, Sep. 25, 1989, at 30. Budapest's bold maneuver provided the West with a vivid glimpse of fractures within the Warsaw Pact and raised unnerving questions about the refugee tide that might ensue if the Iron Curtain were completely dismantled.}
\textsuperscript{145} \textit{Philadelphia Inquirer, Oct. 8, 1989, at 1, col. 1.}
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Time, Oct. 23, 1989, at 44.}
islative, and judicial power and establishment of a Western-style social democracy, which presumably will mix democracy and free enterprise with a major government stake in the economy and a large welfare-state safety net. The Hungarian decision, coming less than two months after the installation of Poland's first non-Communist government since the end of World War II, reinforced the historic shift taking place in Europe.

Confronted with these increasing demands for change, the East German Communist Party on October 18, 1989, ousted Honecker, its hard-line leader of eighteen years, and named his fifty-two year-old protégé as his successor. The new leader, Egon Krenz, had been the former Politburo member charged with security and youth affairs. He was named to Honecker's three former positions—party chief, head of state, and chairman of the Defense Council—granting him the broad powers which Honecker had taken years to accumulate. Krenz was indelibly marked as Honecker's creation, rising through the party ranks from a very young age.

With growing anti-government demonstrations, Krenz's regime promised dialogue and reform: during the week of October 23, 1989, it moved toward easing travel restrictions, relaxing censorship, and expanding the supply of consumer goods.

VIII. The Future of the German Democratic Republic

The demands for reform continue to gain momentum in East Germany. On October 26, 1989, in Leipzig, more than 100,000 protesters staged the largest single demonstration in the country's history shouting "Freedom and Democracy now." There are signs of ferment inside the ruling party and some top party members have criticized the country's "climate of intellectual and social stagnation." The pro-reform group, New Forum, and the fledgling Social Democratic Party are emboldened by growing popular support. Any attempt by East Germany to further suppress these movements will only result in further unrest and rejection of the present regime.
Nearly 60,000 of East Germany's brightest and best-trained citizens have fled the country since August 1989. If East Germany is to maintain any type of stability, it must restore confidence in the ruling party. Political reforms are needed in East Germany since the price of repression will only exacerbate the social stagnation of the country. The time has come for a more progressive and visionary thinker to take the reins of East Germany and lead it down the path of democracy. If East Germany continues to reject the sweeping reforms taking place in the Soviet Union, Poland, Romania, Czechoslovakia, and Hungary, not only will East Germany further isolate itself from its East bloc allies, but it will deteriorate as the citizens continue to emigrate to the West.

The mass refugee exodus has once again brought the issue of German unification into the spotlight. The simple answer is that a Germany restored might prove to be a positive event, but in the long run it might not be the practical solution. A quasi-democratic nation of seventy-eight million with an army of 650,000 in the heart of Europe could rise into a new power very quickly, but also a new enemy if the alliances erode and the new order in the USSR collapses. The influence of the current tides of change are not small, but they could be rolled back.

After conferring with Mikhail Gorbachev on November 1, 1989, Egon Krenz returned home and pleaded with his citizens to stop fleeing the country, promising a number of reforms through a far-reaching program to change the Constitution, the economy, the education system, and the administration. On November 6, 1989, East Germany published a draft of a law that declared for the first time that every citizen has the right to travel abroad or to emigrate. Sebastian Pflugbeil, a founding member of the opposition movement New Forum stated that “travel is no longer the primary problem as too many have already left.” “The leadership must take other steps to prove that it is earnest in its reform effort.”

Under the awesome pressure of mass demonstrations and mass flight, the entire forty-four member Council of Ministers of the East German Cabinet resigned on November 7, 1989 and requested that Parliament select a new government. The demonstrations have continued with demands that the people of East Germany be allowed

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159. N. Y. Times, November 4, 1989, at 1, col. 6.
161. Id.
162. Id. An evening news program in East Germany reported that 23,500 East Germans had left for West Germany since November 4, 1989 when East Germany first announced that its citizens would be allowed to leave through Czechoslovakia using only personal identification cards. Nearly 170,000 East Germans, about 1 percent of the country's population, have left in 1989.
to decide their own future in freedom and self-determination through a system of free elections. On November 9, 1989, the reform movement caused what will be remembered as a great event in history as the East German government opened up the Berlin Wall which had separated the two Germanies for twenty-eight years.  

By this simple act of forcing their rulers to open the Berlin Wall and allow them to go wherever they wish, the people of East Germany have irrevocably changed the way Berlin, Germany, and all of Europe have defined themselves for more than forty years; the entire post-war European order had been based on the assumption that Germany and Europe would remain divided and that the countries of Eastern and Western Europe would be firmly anchored in their respective alliances.

IX. Conclusion

In the wake of these momentous reforms, the German question of reunification has once again been thrust to the forefront, but a single Germany still remains a distant prospect. The first signs of new policies in Bonn indicated a consensus that the East Germans should be left alone to decide the future of their state. Under the West German Constitution, the goal of unity is to be achieved through self-determination, and if the East Germans decide to form a socialist or non-socialist state, the West Germans will have to respect that choice. The Communist Party in East Germany as of November 1989 denied any possibility of reunification, and New Forum and other opposition movements have also declared themselves opposed to union.

The opposition, composed largely of reformist socialists, insists that its goal is to create a new form of democratic socialism in East Germany.

East Germany's Communist Party granted the ultimate concession when its leader, Egon Krenz, and the other nine members of the Politburo resigned during the week of December 11, 1989, along with the entire 163-member Central Committee. Honecker, meanwhile was expelled from the party, placed under house arrest and

164. N. Y. Times, November 10, 1989, at 1, col. 3. At Checkpoint Charlie where Allied and Soviet tanks were locked in a tense face-off while the Berlin Wall was being erected in August, 1961, lines of cars and people began to file across the border by late evening.  

165. N. Y. Times, November 11, 1989, at 1, col. 3.  

166. Id. In this assumption, the United States, in the NATO alliance, guaranteed the security of Western Europe. And in this same assumption, France, West Germany and the other major industrial countries of Western Europe began the economic and political nification of the European Community.  


168. Id.  

169. Id. at 20, col. 5.  

170. Id.  

criminally charged with an additional 104 party functionaries and eight former Politburo members. On December 14, 1989 the Communist Party and the opposition yielded agreements to recommend parliamentary elections for May 6, 1990 and to rewrite the Constitution. The party overwhelmingly nominated Gregor Gysi, a reformist lawyer, as party leader who at forty-one becomes the youngest Communist leader in Eastern Europe.

The changes that have occurred and continue to occur in East Germany have set into motion political and economic forces that cannot be reversed. The prospects of a unified Germany are probably in the future, but the reforms must continue in an effort to equalize economic conditions and freedoms on both sides of the border. Otherwise, it is apparent that East Germans will continue to move to the West. The political structures are still too divergent to allow a compromise of goals and ideals. The two governments need to strive for a de facto unification of Germany which would maintain separate political structures while embracing an attitude of close cooperation between the two German states. Gregor Gysi must listen to the demands of his people, the Communist Party, and other nations who are realizing the true right of the people to decide their own national fate. East Germany and Czechoslovakia have joined Hungary and Poland in abolishing the Communist Party's constitutional monopoly on power. Communism has demonstrated that it does not work and if East Germany is going to survive as an independent country with the support of its citizens, fundamental reforms pursuant to a democratic ideology are the only solution.

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