THE BASIC LAW AND THE PROCESS OF REUNIFICATION

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I. ONE BASIC LAW FOR THE ENTIRE GERMAN NATION

A. THE CONSTITUTIONAL CHALLENGES OF REUNIFICATION

1. An "Old" Basic Law But New Constitutional Issues

Among the dozens of amendments added to the Basic Law during the course of its fifty-year history, the Fortieth Amendment, made in 1990, is of unique significance. It brought about the constitutional changes which became necessary in the wake of the Reunification of Germany. Relatively speaking, the actual number of changes was quite small. Reunification was not a matter of different states merging and then giving themselves a new joint constitution; the German Democratic Republic (GDR) actually joined the Federal Republic. The Basic Law was extended in scope to cover the territory of the former GDR, and the wording of the revised preamble to the Basic Law brings this across simply, yet evocatively: thus this Basic Law now applies to the entire German people.¹

Unification itself was implemented by most of the amendments to the Basic Law introduced during the year of Reunification. This applies above all to the preamble, as well as to Articles 23 and 146. In 1990, the Basic Law was modified with just a few specific rules of law to solve the legal problems created by Reunification. To avoid placing too much strain on the public purse, the new Article 135(a)(2) allows the federal legislature to stipulate that financial liabilities of the former GDR do not have to be discharged, or at least not to their full extent.² Moreover, the


² See GG art. 135(a)(2). For an interpretation of this rule, see Norbert Bernsdorf, Aufhebung oder Kürzung von Verbindlichkeiten der DDR, 1997 Neue Juristische
Basic Law also waives strict enforcement for a transitional period under certain circumstances. According to paragraphs 1(1) and (2) of Article 143, laws in former GDR territory ("acceding territory") may to a certain extent, and for a given period of time (until either December 31, 1992 or December 31, 1995), diverge from the provisions of the Basic Law—if, as a result of the discrepancies in prevailing circumstances, full-scale adjustment to the rules of the Basic Law proves unfeasible. I will return to the new regulation in Article 143(3) of the Basic Law later in the article.

In practice, these rules were quite significant when it came to overcoming the legal problems posed by implementing Reunification in accordance with the Constitution. By introducing these rules, the Basic Law set up a safety net designed to protect the legislature from coming to grief, in constitutional terms, when tackling the extraordinary problems posed by this extraordinary event. In hindsight, we see that the answers to the trickiest constitutional issues brought by Reunification were found in the provisions of the "old" unrevised Basic Law. This applies particularly to the basic constitutional rights and similar civil rights pursuant to Articles 2(1), (2); 3(1); 12(1); 14; 33(2); and 103(2) of the Basic Law.

When the Federal Constitutional Court faced solving constitutional issues arising from Reunification in dozens of decisions and rulings issued over the past ten years, it proved advantageous that the German code of constitutional procedure allows recourse to the Court in various ways, including: (1) by way of appeals filed with the Constitutional Court by individuals claiming that administrative acts—and in particular court judgments—violate their personal basic rights; (2) on the basis of arguments submitted pursuant to Basic Law, Article 100(1), by judges convinced that a specific rule of law they need to apply in a particular case is contrary to constitutional law; and (3) by the governments of the new Länder, who under Basic Law Article 93(1), No. 2, can apply for a judicial review of any provisions in federal law which they claim constricts the Basic Law. So far, the Constitutional Court has administered justice in all these various kinds of proceedings.

2. The Federal German Constitutional Court, and the Psychological Issues Underlying Its Work

Since the early nineties, the entire constitutional debate over the legal problems posed by Reunification has become a focal point of the work done by the Federal German Constitutional Court. "Psychologically", however, the Court's jurisdiction has come under dual pressure. The Court itself is in Karlsruhe, a location which was and still is located at the...
very western edge of the Republic, both the old and the new. None of
the judges there underwent legal training in East Germany. The East
Germans are always critically scrutinizing the Court for having a "west-
ern" bias, which favors western interests and is marked by western values.
Furthermore, the Federal German Constitutional Court is still suffering
from the impact of what Bärbel Bohley, a prominent figure in the GDR
civil rights movement once said: "[With Reunification] we expected to
get justice, but what we got was the rule of law." Seen from the point
of view of the Basic Law, however, there is no alternative if the outcome
of unjust socialist rule is to be corrected, using the means available to a state
in which the rule of law prevails. This applies equally to both perpetra-
tors and victims of the GDR's communist regime. A peaceful revolution
leaves the task of correcting injustice up to a constitutional state.6

II. SELECTED FOCAL ISSUES FROM THE FEDERAL
GERMAN CONSTITUTIONAL COURT'S RULINGS
ON REUNIFICATION

A. THE GDR'S CIVIL SERVICE MOVING FROM COMMUNIST
DICTATORSHIP TO A FREE DEMOCRATIC
CONSTITUTIONAL ORDER

The employment system in the GDR posed huge problems for the all-
German state. There was gross over-staffing both in the public sector and
in trade and industry. Productivity was low, but levels of employment
were high. Unemployment certainly did exist, but it was a matter of lack
of work while actually on the job. In many areas of the public sector,
even those with specialized qualifications failed to meet the standards of
a modern administration in a constitutional state where the free demo-
ocratic communal structure is highly developed.7

The Basic Law was, and still is, unable to set any normative limits to
the huge loss of jobs which occurred after Reunification in business, in
general, and industry, in particular. The Basic Law quite rightly fails to
acknowledge any state-guaranteed right to work.8 The principle of a so-
cial state laid out in the Basic Law obliges the state to pursue no more
than an active employment policy and to provide minimum social security
in the event of unemployment.9

6. See Josef Isensee, Diskussionsbeitrag, 51 Veröffentlichungen der Ver-
einigung der Deutschen Staatsrechtslehrer 134 (1992); Rechtsstaat-Vorgabe
und Aufgabe und Einigung Deutschlands, 9 Handbuch des Staatsrechts der
Bundesrepublik Deutschland § 202 (Josef Isensee & Paul Kirchhof eds., 1997).
7. See Hans-Heinrich Trute, Organisation und Personal der DDR, Handbuch des
Staatsrechts der Bundesrepublik Deutschland § 215; Bernhard Schlink, Ver-
8. See BVerfGE 84, 133 (146); Jürgen Kühling, Die Berufsfreiheit des Arbeitnehmers,
Richterliches Arbeitsrecht, Festschrift für Thomas Dieterich zum, 65 Geburtstag 325
(1999).
As far as the public sector was concerned, however, the Unification Treaty assumed that the federation and its constituent states (Länder) should, as a matter of principle, enter into existing employment contracts. The Treaty does include a whole series of factors that permit summary dismissal, in addition to the factors already permitting routine dismissal under German Labor Law. In addition, routine termination of an employment contract in the public sector was permissible until 1994:

1. If, in view of his or her lack of specialist qualifications or personal suitability, the employee failed to meet the requirements; or

2. If with fewer jobs being called for, there was no work for the employee; or

3. If the employee’s previous place of employment was closed down entirely, or if, in the event of this former place of employment being merged, incorporated or substantially reorganised and restructured, it was no longer possible either to keep the employee in his or her previous job, or to offer them any alternative.  

In addition to this, for an indefinite period, the Unification Treaty also allows summary dismissal if the employee has violated principles of humanity or the rule of law, or has been active for the former GDR ministry of state security or department of national security, thus rendering it unreasonable under the circumstances to uphold the contract.

When these grounds for summary notice were applied in the new Länder, labor courts were inundated with cases pleading unlawful dismissal. In a whole series of proceedings, the Federal German Constitutional Court clarified the fundamental constitutional issues arising from this litigation. One criterion here has been the constitutional right laid out in Article 12(1) of the Basic Law, which, in this context, has acquired a new protective dimension. The Court held the stipulated right to freedom of choice of occupation or profession was not deemed to constitute the right to claim provision of a job of one’s own choice. Nor did it imply any guarantee of the continuation of any job, once chosen, in either the public or private sector. The Court maintained that the protective function of this basic constitutional right did, however, apply in cases where an individual was obliged by the State to give up his or her job. The State also had a protective duty under Article 12(1) of the Basic Law, which was sufficiently taken into account in the regulations on dismissal laid out in German Labor Law.

The Federal German Constitutional Court thus extended the scope of protection provided by Basic Law, Article 12(1), although in terms of constitutional law it did not in fact object to the inevitable downsizing in

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11. See id.
12. See id. § 5.
13. See BVerfGE 84, 133 (146).
the former GDR’s administration.\textsuperscript{14} The absolute necessity was, above all else, to set up a modern, efficient administration as quickly as possible, working to the standards of a state founded on the rule of law. The Court maintained this could only be achieved with reduced personnel, the financing of which should not be too great an economic burden on the State.\textsuperscript{15}

The issue of taking over staffing in ideologically and politically sensitive areas, such as schools and education, was equally explosive. One important factor was the teachers whose training and practical teaching experience were committed to the Communist state. These same teachers wanted to work in a school system determined by the principles of the Basic Law—heeding human dignity and guaranteeing basic rights in a free and democratically structured State. Thus, when it came to taking over academic staff, the question of suitability arose—for Article 33(2) of the Basic Law states that each and every German citizen may have access to any public office, but that such access is dependent upon aptitude, qualifications and professional ability.

In the midst of the exceptional upheaval brought about by Reunification, the Federal German Constitutional Court stated that only those persons who proved that they were genuinely willing and able to perform their official duties in accordance with the principles of the Constitution, were, in terms of the Basic Law, suited to work in public service and, in particular, to safeguard citizens’ personal rights and observe constitutional rules. The Court maintained that people who had already been employed in the former GDR’s education system could also be required to meet these demands.\textsuperscript{16} I need scarcely emphasize to my honorable readers, with their experience of life, in general, and humankind, in particular, that the task thus imposed on the authorities concerned—namely verifying the personal views of all former staff in respect of the new values set out in the Basic Law—posed a virtually insoluble problem.

In this context, incidentally, the Court also added that anyone not taking on old staff until their suitability had been established would, at the same time, open up opportunities to new candidates who, for political reasons, may not have had any access to public service under the GDR regime.\textsuperscript{17} This is, of course, small comfort to persons in former East Germany who, because of their age, are no longer able to take any of the opportunities now available under the new constitutional order. This just goes to show how limited the law is, when it subsequently has to cope with a system, such as that in the GDR, which was neither free nor democratic. Retrospectively, reunified Germany was unable to put those who had been at a disadvantage under the GDR regime in the position they

\textsuperscript{14} Even now, the public sector in the former GDR is still regarded as being over-staffed.
\textsuperscript{15} See BVerfGE 84, 133 (151-52).
\textsuperscript{16} See BVerfGE 92, 140 (151-52).
\textsuperscript{17} See id. at 152.
would have enjoyed if they had spent their lives and careers in the West after the Second World War. And in terms of constitutional law, the Federal German Constitutional Court has also accepted that this is as far as making amends can go.

I would like to note that there was no day of reckoning between the “winners” and “losers” of Reunification in the public sector. I mention this because a different opinion would seem to prevail in some international bodies. For example, according to the figures I have, some 53,000 of the 55,000 teachers in Saxony were taken over. These figures give some indication of an underlying integration concept, as a result of which many of the former GDR elite now occupy public posts in the Federal Republic. As it happens, the question under which conditions GDR judges or members of state security may be admitted, in a constitutional state, to the legal profession—a judicial institution whose independence is stipulated in German law—has been dealt with similarly. Here, too, only relatively few applications have been turned down.

There are indeed risks involved in retaining personnel on this scale, and it was more widespread in education than anywhere else. Staff rooms are often described as being the most stable GDR environment. Meanwhile, in schools the foundation is being laid for having the next generation employed in the interests of a free and democratic order and a social market economy.

B. GDR Property Law and Outstanding Issues—An Open Wound in the Constitutional State?

Doing away with injustices involving real estate is right at the very core of the series of problems known among experts in Germany as “open property questions.” Back in 1990, when it first launched into dealing legally with acts of expropriation and sequestration carried out on GDR territory, which constituted a violation of constitutional rights, reunified Germany’s concept was pretty clear. Expropriations carried out by Soviet or German authorities on the basis of occupation law between 1945 and 1949 were not going to be reversed. On the other hand, owners of real estate in the former GDR—those known as “former property owners”—in particular, people who had fled to the West were, as a matter of principle, to have unlawfully confiscated land and property transferred back to them. The property involved here belonged to people who—as GDR authorities officially held—had left the country illegally between 1949 and 1989. Any property owned by such people in the GDR was either expropriated or sequestrated by the state. Altogether, about 3.5 million people left East Germany during this period.

18. See BVerfGE 93, 213.
19. For pending cases regarding the subject, see 1 BvR 661/96.
20. See FAZ no. 68, Mar. 17, 1999, at 19, for figures showing application declined.
21. See FRITZ OSSENBÜHL, Eigentumsfragen, Handbuch des Staatsrechts der Bundesrepublik Deutschland § 212.
Looking back now, it is undeniable that more doubt was cast, to a certain degree, on the original concept of reversing injustice in property matters inflicted by the political powers—that be at both the federal and regional levels, than in any other field. In particular, the so-called principle of restitution, the principle of restoring property, largely went astray in the legislation which followed the Unification Treaty. According to the statistics, over two million applications for restoration of property have already been dealt with, with restitution awarded in 399,000 cases (excluding Berlin).22

However, at the time of the Unification Treaty the legislature also had to decide how to make amends to all those who had suffered injustice with regard to property and expropriation by the National Socialists. The GDR did nothing about this, taking the view that it was a Nazi-free state and had nothing whatsoever to do with the Third Reich. Thus in 1990, numerous cases involved handling, which in legal terms was the heritage of two distinct totalitarian regimes, that had ruled in Germany over the course of only half a century.

The Federal German Constitutional Court has not yet resolved constitutional issues involved in correcting injustices done with regard to property in the GDR. Important cases still have not been decided,23 especially those involving the problem of compensation.24 The problem that has repeatedly arisen has been finding the best way of achieving a socially acceptable balance while integrating a property regime, which has grown over forty years into the system governed by West German property law. It is up to the legislature to do this, and the German Federal Constitutional Court has given it wide scope in this respect.

I am focusing on one area from this whole field of complex issues—the so-called “Bodenreform” or land reform in the Russian zone between 1945 and 1949.25 The expropriations carried out have put the Court to a particularly harsh test, maybe even stretching it beyond the limits of constitutional judgment.

23. For instance, a decision has yet to be taken on the constitutionality of the Law Governing Compensation and Settlements. See Entschädigungs—und Ausgleichsgesetz (EALG), v. 27.9.1994 (BGBl. I S. 2624); Proceedings 1 BvR 2307/94 and 1408/95; see also BVerfGE 95, 48 (illustrating other problematic issues).
24. A good example is the protection afforded by the all-German legal system to owners of so-called “Datschen”, challenged by proprietors claiming the right to use their own property themselves. Over half the population in the former GDR owned one of these weekend homes, which made up for travel restrictions, particularly abroad, and also provided a retreat from the prying of the state. The German Federal Constitutional Court has largely ruled in favor of people using the “Datschen” statutory protection against eviction provided in the Statute on the Alignment of the Law of Obligations. See Schuldrechtsanpassungsgesetz, v. 21.9.1994 (BGBl. I S. 2538); see also, 1 BvR 995/95 (July 13, 1999).
A brief statement of the facts is necessary to understand the issues presented to the Court. In September 1945, the Soviet Union expropriated, or had such expropriation carried out by German authorities under occupational law, agricultural land and woodland, along with all the inventory, from people considered to be war criminals or war debtors. No compensation was paid. The Soviets also extended this measure to include all agricultural estates and forests over 100 hectares in size (about 250 acres), no matter what the owners’ alleged political leanings were. By the end of 1948, the confiscated areas totaled about 3.225 million hectares (about 8 million acres). In addition, property in trade and industry was also expropriated, affecting over 15,000 businesses. The circumstances under which owners were frequently forced to leave their property were, in some cases, appalling.

The parties to the Unification Treaty, the GDR and the Federal Republic, agreed in 1990 that these expropriations carried out under occupational law or under occupational jurisdiction would not be reversed. Upon Reunification, a specific regulation was included in the Basic Law excepting, in constitutional terms, this particular item from the negotiation agenda. With the normative force of legislation altering the Constitution, Article 143(3) of the Basic Law confirms that restitution in these cases is excluded. Under the German Constitution, the legislature is empowered to alter the Basic Law with the support of two-thirds of the members of the Bundestag, and a two-thirds majority in the Bundesrat.26

In contrast to the American constitution, the Basic Law may not be amended if this affects the principles laid down in Articles 1 and 20.27 In the wake of appeals lodged by numerous people, the Federal German Constitutional Court had the difficult task of deciding whether excluding restitution, as in Article 143(3) of the Basic Law, in fact, amounted to a “constitutional rule of law contrary to the Constitution,” because it infringed on Article 79(3) of the Basic Law. The Court denied this in two rulings,28 proving that legal recourse is exhausted while the political energy of those concerned most certainly is not.29

The Court’s arguments are based on an important presumption: the fundamental elements of the principle of equality, which under Article 79(3) of the Basic Law may not be encroached upon, are not infringed by the regulation laid down in Article 143(3) which makes provision for the restoration of confiscated property in expropriations for which no compensation was paid and are not covered by the inadmissibility of restitution laid down in the Unification Treaty. Meaning, above all, the expropriations carried out after the GDR came into existence in 1949. The Court continued by arguing that there was sufficient justification for

26. See GG art. 79(2).
27. See GG art. 79(3).
28. See BVerfGE 84, 90 (95); 94, 12 (15).
ruling out restitution in view of the fact that, during the negotiations on German unification, the GDR and the Soviet Union had insisted on introducing this very arrangement. On further examination, the Federal German Government was forced to accept this condition if it were to achieve the unification of Germany at all.

The parties involved take the view that the Constitutional Court has been misinformed or misled by the Federal German Government, and strongly support this view in public debate. The legislature responsible for the Unification Treaty pointed out that a final decision as to any kind of state compensation was left to a future all-German parliament. In the meantime, the law has been enacted and the first senate of the Federal German Constitutional Court will be ruling on its constitutionality by the end of this year.

The all-German authorities’ prosecution of injustices inflicted by the state is at the very center of measures for dealing with the circumstances and the legal system, which actually prevailed in the GDR. This poses very fundamental constitutional problems. It is standard practice in unified Germany to prosecute crimes committed in GDR territory by GDR citizens. This is because when East Germany ceased to exist as a country, a practical obstacle to prosecution also disappeared.

I would like to pick out just two matters from this constitutionally sensitive field. First, crimes committed in connection with guarding the fortified border between the GDR and the Federal Republic, and second, the prosecution of perversion of justice by judges and district attorneys in the GDR.

Courts in unified Germany have held that individuals working for the GDR ministry of defense and guards patrolling the GDR border are liable under criminal law for killing people that try to escape to the West on the border between East and West Germany. In general, these people were killed by mines or deliberately shot merely for attempting to flee to the West. A whole series of sentences have been passed in the Federal Republic for crimes of this nature on the basis of GDR criminal law, unless the Federal German criminal code proved more lenient. Murder and manslaughter were, of course, criminal offences under GDR criminal law.

31. See supra note 24 and accompanying text.
32. For the constitutional prohibition of prosecuting GDR spies who did reconnaissance in the Federal Republic from GDR territory, see BVerlGE 92, 277. See also Gunter Widmaier, Vom Grundsatz des rechtsstaatlichen Vertrauensschutzes, in Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 377 (1994) (discussing basic problems with prosecuting GDR spies).
also, and subject to harsh prison sentences. The same applied to criminal liability for instigating such crimes. The sentences passed have been confirmed on principle by the Federal German Court of Justice.

The appeals against the sentences passed by the criminal courts, which were then lodged with the Federal German Constitutional Court, complained, above all, about a violation of the so-called inadmissibility of retroactivity in criminal law. Article 103(2) of the Basic Law states that an act may only be prosecuted provided that it constituted a criminal offense under the applicable law when the act was committed. The convicted parties claimed the killings were not unlawful, since they were justified under GDR law in force at the time in the GDR.

Two things about GDR practice in preventing attempts to escape to the West need to be added. First, the authorities were not at all interested in getting prompt medical assistance to people with bullet wounds or who had been injured by mines. Second, the dead were frequently buried without their relatives' knowledge. Next of kin were later told that the victims had committed suicide.

The Federal German Constitutional Court rejected these appeals. In the Court's opinion, Article 103(2) of the Basic Law offered protection against the existing assessment of the criminal elements of an act that is subsequently altered to the offender's disadvantage. Thus, legally acceptable grounds already existing at the time the offense was committed still applied, even if they had lapsed by the time criminal proceedings were actually held. In the Court's opinion, the strict inadmissibility of retroactivity in Article 103(2) justified, by reason of the Basic Law, that special degree of reliability which criminal laws enjoy when adopted by a democratic legislature bound by constitutional rights. The Court held, however, that this special degree of reliability lapsed if the other state stipulated criminal offenses in the field of the most severe criminal injustice, but at the same time excluded criminal liability by providing justification in given areas, such as demanding beyond the written rules of law that such offenses be committed, aiding the perpetrators, and thus grossly disregarding the human rights generally accepted under international law. Thus, those in political power harbored extreme state injustice, which could only persist as long as their powers actually continued to exist.

Ultimately the GDR was judged by its own standards, for under inter-

34. See §§ 112, 113 StGB [GDR Criminal Code].
35. See §§ 2, 22, No. 1 StGB.
36. See generally BGHSt 39, 1; BGHSt 39, 168; BGHSt 39, 199; BGHSt 39, 353; BGHSt 40, 48; BGHSt 40, 113; BGHSt 40, 218; BGHSt 40, 241; BGHSt 41, 10; BGHSt 41, 101.
38. GG art. 103(2).
39. For details on how the Ministry for State Security (Stasi) influenced the selection and supervision of border guards, see Frank Petzold, Heiner Timmermann, DIE DDR - POLITIK UND IDEOLOGIE ALS INSTRUMENT 543 (1999).
40. See BVerfGE 95, 96 (131).
national law it had committed itself even in human rights issues.\textsuperscript{41} Of particular significance are Articles 12(2) and 6(1), and clauses 1 and 3 of the International Covenant on Civil and Political Rights dated December 19, 1966, which came into force for both German states on March 27, 1976. The GDR, in fact, failed to implement this Covenant in domestic law pursuant to Article 51 of its constitution; however, this did not alter the fact that under international law the covenant was binding on the GDR. The GDR's border controls infringed upon the civil right of freedom to leave the country stipulated in Article 12(2) of the Civil Rights Covenant quite simply because, contrary to the objective of Article (3) of the Covenant, inhabitants of the GDR were, as a general rule and not merely in exceptional circumstances, denied the right to leave the country freely. According to the German Federal Court of Justice, both GDR regulations and practice within East German borders contravened Article 6(1), clauses 1 and 3 of the Civil Rights Covenant, which stipulate that every person has a natural right to life which may not be denied arbitrarily.\textsuperscript{42} In any event, the covenant found that using firearms as a deterrent for preventing third parties from crossing the border without permission was going beyond the limit.

From a constitutional point of view, the Constitutional Court has confirmed the Federal German Court of Justice's finding that any grounds justifying the application of the law must be left unheeded if these grounds justified the deliberate killing of people not wanting anything more than to pass the inner-German frontier, unarmed and without endangering any objects generally recognized as enjoying legal protection. In fact, the Federal German Court of Justice held that any grounds of this kind, which quite simply gave priority to enforcing a ban on crossing a border over safeguarding the human right to life, were null and void, being quite obviously an intolerable violation of the elementary precepts of justice and human rights protected under international law.\textsuperscript{43} The Federal German Court of Justice maintained that this infringement was so grave that it violated legal convictions about the value of life and human dignity common to all nations. In a case like this, positive law had to yield to justice.

The public approved this ruling, in particular the interpretation of Article 103(2) of the Basic Law, without exception, although some criticism from experts in criminal and constitutional law were forthcoming.\textsuperscript{44}

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\item See BVerfGE 95, 96 (112).
\item See BGHSt 39, 1 (15-16). For reference to “Radbruch’s Formula” mentioned here, see Gustav Radbruch, Rechtspolitik 347, 353 (1963).
\item For the reaction of legal circles to the ruling issued by the German Federal Constitutional Court on October 24, 1996, see Jörg Arnold, Einschränkung des Rückwirkungsgesetzes sowie sorgfältige Schuldprüfung bei den Tötungsfällen an der DDR Grenze, Juristische Schulung 400 (1997); Bundesverfassungsgericht contra Einigungsvertrag. Der „Mauerschützen”-Beschluss des BVerfG auf dem strafrechtlichen Prüfstand, Juristenzeitung 115 (1997); Peter-Alexis Albrecht, Das Bundesverfassungsgericht und die
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public accepted that the Court had to set a moral example. The details are beyond the scope of this article, but it is interesting to note that the outcome of the Federal German Constitutional Court’s jurisdiction complies with the rule given in Article 7(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, the conviction or punishment of anyone guilty of an offense or omission which, when committed, was punishable in accordance with the legal principles generally recognized in the civilized world, may not be excluded on the grounds of the inadmissibility of retroactivity. The ultimate irony is that, for constitutional reasons, the Federal Republic of Germany has never ratified this rule. Practically speaking, prosecution has not been widespread. Of sixty-two cases, only around half have ended up with mild sentences being passed, with most of those being suspended.45

Criminal law in the GDR also stated that perversion of justice constituted a criminal offense.46 Criminal liability depended on whether the judge or district attorney ruled “unlawfully to the advantage or disadvantage of any party involved.” The fundamental problem, which subsequently arose, can only be comprehended if the dubious facts surrounding the allegations of perversion of justice are at least outlined.

In the fifties, the death penalty or long prison sentences were imposed for relatively minor infringements of the GDR’s so-called political criminal law, which included acts done while performing lesser functions in the state security police or for enticing professionals from the GDR to go to the West. Prison sentences were imposed on people who expressed a desire to leave the GDR even though they did not do so publicly or cause any kind of provocation, and of those who made enquiries about the possibility of leaving the country at West German facilities such as the Federal Republic’s Permanent Mission in East Berlin.

In one instance, a district attorney deliberately twisted the facts and dropped criminal proceedings for manslaughter brought against a member of the state security police who had shot a person while under the influence of alcohol. Prosecution of the judges and district attorneys involved in these court rulings were carried out in accordance with the GDR criminal code. It is obvious, though, that this practical application of criminal law was countered with the reproach that the GDR criminal code

45. For more detailed figures, see Seidel, supra note 33, at 19; Lore Maria Peschel-Gutzeit, Aufarbeitung von Systemunrecht durch die Justiz: Anspruch und Wirklichkeit, Die Strafrechtsjustiz der DDR im Systemwesent 9, 13 (1988).

46. See § 244 StPO [GDR Criminal Code].
code, in force at the time of the offense, was being applied superficially. Actually, the criminal code was removed from the context of the GDR's legal system and retroactively subjected to the values of a constitutional order where justice was administered independently. Court rulings reflect the reaction to this reproach such that prosecuting the perversion of justice has been restricted to cases where cruel and harsh penalties were imposed that infringed upon fundamental human rights. These penalties served to deter or even destroy political dissidents, and not to protect objects subject to general legal protection. Perversion of justice was only prosecuted in instances of gross injustice by the state, hidden under the cover of ostensible judicial proceedings.

In terms of constitutional law, the Federal German Constitutional Court has approved this jurisdiction passed by the criminal courts. The reasons given are similar to those decisions in the cases of homicide committed on the inner-German border. In the view of the Court, grossly disregarding generally recognized human rights in individual cases does not constitute a violation of the inadmissibility of retroactivity laid down in Article 102(2) of the Basic Law. There is an inner-German irony here, too: in the criminal proceedings brought against them, the GDR judges on trial claimed, among other things, that they had been able to impose long prison sentences without causing any harm to the individuals because the West ransomed political prisoners anyway.

III. PROVISIONAL SUMMARY

A. THE INTERPRETATION OF BASIC RIGHTS: MODIFICATION BOTH OBSCURED AND APPARENT

The constitutional problems of Reunification call for assessment of the strength of the Basic Law, the scope of which has been extended—essentially unaltered—to include the territory of East Germany. However, in some rulings, the Federal German Constitutional Court's solutions to these problems have resulted in an apparent modification of previous interpretations of constitutional law. It has been said that in 1999, the Federal Republic and its constitution had existed for forty-one years plus nine, not fifty. This modification applies in particular to civil and similar fundamental rights. I have already mentioned Article 12(1) and Article 103(2) of the Basic Law as examples of such modification of the

47. See generally BGHSt 40, 30; BGHSt 40, 169; BGHSt 40, 272; BGHSt 41, 247; BGHSt 41, 317.
48. For court rulings, see Friedrich-Christian Schroeder, Der Bundesgerichtshof und der Grundsatz, ulla poene sine lege, 2 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 90, 10 (1999); Manfred Seebode, DDR-Justiz vor Gericht, FESTSCHRIFT FÜR THEODOR LENCKNER 585 (Albin Eser et al., eds. 1998); VOLKER KASEWIETER, DER BEGRIFF DER RECHTSBEUGUNG IM DEUTSCHEN STRAFRECHT, 80 (1999).
49. See BVerfG, (2. Kammer des Zweiten Senats), Beschl. v. 7.4.1998, 35 NJW.
50. See GG art. 102(2).
51. See SCIDDEUTSCHE ZEITUNG, No. 151, July 5, at 6 (quoting political scientist Alfred Grosser).
Constitution. Other examples exist, such as the interpretation of Article 2(2), clause 1 of Basic Law regarding abortion.

In its 1975 ruling, the Federal German Constitutional Court\textsuperscript{52} determined that under Article 2(2), clause 1 and Article 1(1) of the Basic Law, the legislature was obliged to apply the criminal code to safeguard unborn life if there was no other way of achieving the protection demanded by the Constitution. In the second ruling on abortion issued in 1973,\textsuperscript{53} the Court granted the legislation more leeway on the question of whether abortion is grounds for prosecution. The only factor derived from the Basic Law was the prohibition against declaring abortions justifiable (as opposed to illegal) if they are carried out without any ascertainable medical, social or ethical grounds. The Court's shifting opinion may certainly be attributable to the change in social attitudes towards the role of women and doctors when it comes to actually protecting unborn life. However, it must also be seen in the light of the fact that, upon Reunification, a large number of people from the former GDR, where abortion was not only exempt from punishment but where there was even a legal right to abortion, came within the scope of the Basic Law and its commitment to unborn life.\textsuperscript{54}

The rulings issued by the Court with reference to so-called "GDR pensions" dated April 28, 1999,\textsuperscript{55} also reflect the way the interpretation of basic rights has changed as a result of Reunification. The GDR promised its political, scientific, military and administrative elite fairly generous pensions, which the all-German legislature proceeded to cut to various degrees and for various reasons under the rules given in the Unification Treaty.\textsuperscript{56} In its assessment of these pension laws in terms of constitutional law, the Federal German Constitutional Court also took Article 14 of the Basic Law as a criterion. In the rulings made by the Constitutional Court over the years, the concept of protection of property has always benefitted pension rights and claims if they accrued on the strength of an individual's work, and, in particular, if they were based on contributions made to the pension insurance scheme.\textsuperscript{57}

In the GDR though, legal rights of this nature were not always based on contributions, at least not on sufficient old age pension contributions which had been deducted from wages. In view of the particular circumstances surrounding the GDR's old age pension and wages system, the Court held—and this was a very innovative move—that the concept of protection of property laid down in Article 14(1) of the Basic Law also

\textsuperscript{52} See generally BVerfGE 39, If.
\textsuperscript{53} See generally BVerfGE 88, 203. The problems at issue here, which are extremely complicated in legal terms, cannot be elucidated at this point.
\textsuperscript{54} The all-German legislature has been charged in Article 31(4) of the Unification Treaty with finding a uniform regulation to protect unborn life. See Unification Treaty, supra note 10, art. 31(4).
\textsuperscript{55} See 1 BvL 32/95; 1 BvL 22/95; 1 BvR 1926/96; 1 BvL 11/94 (to be published shortly in \textsc{Amtliche Sammlung des Bundesverfassungsgerichts, vol. 100}).
\textsuperscript{56} See Unification Treaty, supra note 10, annex II, ch. VIII, area H, § III, No. 9(b).
\textsuperscript{57} See BVerfGE 69, 272 (301-02).
applied if the pension claims and rights had accrued mainly on the basis of the individual's work as opposed to insurance contributions. In this respect, the Court strongly took into account the idea of state pensions as recognition for a lifetime of work.

B. Development of General Principles for Dealing with the Constitutional Issues Created by Reunification

It would take a thorough study of the Federal German Constitutional Court's judicial decisions to determine what general principles have developed to cope with one part of the German people changing over to a legal system which has a completely different structure and is dominated by completely different values and principles from which they previously lived. Only a few indications can be given here. For instance, the Court automatically assumed that upon the GDR joining the Federal Republic, despite their underlying differences, there would be legal continuity with regard to legal relations in everyday life and legal institutions common to both legal systems, such as marriage, movable property, or sales contracts and leases. The general policy it adopted was that under certain circumstances, and to a certain extent, there was a need to uphold the trust which citizens of the former GDR put in the continuation of their old legal order.

However, the Basic Law was not yet binding on this legal system, which is why the Court has emphasized time and again that the West German constitution never claimed to apply to GDR territory, and it has drawn numerous conclusions from this. Another significant point in the Court's decisions is that the Basic Law does not put all-German government agencies under any obligation to employ legal means—having retroactive effect if at all possible—to put citizens of the former GDR in the position they would have been in had they spent their lives in the Federal Republic with all its freedom and economic wealth.

Ultimately, the way the Basic Law developed assured that the Federal Republic would not have to take responsibility for acts by the authorities on GDR territory, which it regards as being a contravention of both the law and the constitution. However bitter this realization for those concerned, this adjudication amounts to a realistic acceptance of the actual limits, above all when making good the injustices suffered by individuals, such as discrimination in working life experienced by those confessing to belong to a Christian church or disassociating themselves from the East

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58. See GG art. 14(1).
59. See 1 BvL 32/95 circular p. 48.
60. See BVerfGE 84, 133 (147); BVerfGE 85, 360 (373); BVerfGE 91, 294 (309); BVerfGE 95, 267 (305-06). See generally Georg Brunner, Fortgeltung des Rechts der bisherigen DDR, 9 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 210.
61. See BVerfGE 88, 384 (404).
62. See BVerfGE 84, 90 (122-23).
63. See id.; see also BVerfGE 95, 267 (309).
64. See BVerfGE 84, 90 (122-23).
German political order. The Court has repeatedly emphasized that the legislature has a particularly broad scope when it comes to compensating injustice inflicted by another state; it is sufficient that such compensation complies with the precept of justice, at least in principle.

In solving the problems posed by Reunification, the Federal German Constitutional Court has ultimately confirmed and accepted the limits imposed by the financial restrictions to the all-German budget. This budget has had to bear a tremendous burden, and it will continue to do so for some time. One such restriction, for example, has played a role in the legislator's decision not to put pensioners from the GDR elite (e.g. university academic staff) on a level with corresponding professional groups in West Germany in respect to pension rights. In terms of constitutional law, the Federal German Constitutional Court has approved this fundamental decision supporting unequal treatment.

C. THE ROLE OF THE FEDERAL GERMAN CONSTITUTIONAL COURT

In respect to the constitutional issues brought up by Reunification, I prefer not to evaluate the jurisdiction of the Federal German Constitutional Court, being involved in it myself. In regards to its rulings, I should merely like to state that, notwithstanding any criticism which has been made in specific cases, the decisions it has passed are those of a Constitutional Court serving the entire German people, not merely those of a German court with a Western bias. Maybe it has also contributed, as such, towards the inner unification of Germany. In many issues the Federal German Constitutional Court has provided an answer to the question of whether the Unification Treaty—and above all, the way it is interpreted and applied by all-German government agencies—is compatible with the constitutional rights of the East Germans. In doing so, it has taken on the important task of arbitrating between the viewpoint of the majority as represented in the all-German law-making bodies, and the Germans in the East.

In a most practical manner, its jurisdiction has conveyed to the citizens in the new Länder the basic idea of a constitutional state, namely that law, and in particular constitutional law, has priority over majority politics. This does not mean that the Federal German Constitutional Court's rulings on the constitutional issues of German unity deserve approval in all respects. Like all the Constitutional Court's jurisdiction, it, too, is subject to criticism. In reference to criticism of its jurisdiction, I should just like to add, quoting the Minister of Finance in one of the new Länder: "Next time we have a Reunification, we'll make a better job of it."

66. See BVerfGE 13, 31 (36); BVerfGE 13, 39 (43); BVerfGE 27, 253 (286); BVerfGE 84, 90 (125); BVerfGE 94, 315 (326).