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A Bitter Inheritance: East German Real Property and the Supreme Constitutional Court's "Land Reform" Decision of April 23, 1991

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Jonathan J. Doyle*

INTRODUCTION

The reunification of East and West Germany after forty-five years of painful separation has raised no more thorny or politically explosive legal questions than those surrounding ownership of land in the former German Democratic Republic ("G.D.R."). Immediately after the cessation of hostilities in World War II, and continuing down to the dismantling of the Berlin Wall during those extraordinary days in November 1989, authorities in the G.D.R. carried out a wide variety of expropriatory measures for both political and economic purposes. The victims of these campaigns frequently suffered imprisonment or execution as well as loss of all their property. Post-war economic conditions in the "Soviet Occupied Zone," as the area which would later become the G.D.R. was called, were so dismal that many citizens abandoned their possessions and fled to the West even in the absence of a specific threat to their lives or their interests. In later decades, individuals applying for permission to leave the G.D.R. were routinely required to "sell" their property to an "appropriate person" chosen by local Communist Party functionaries, usually at a price far below its market value.

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1. Indeed, the uncertainty surrounding real property titles has often been cited as the chief impediment to the private investment critically required for economic recovery in this part of Europe. See, e.g., Gerhard Fieberg & Harald Reichenbach, Zum Problem der offenen Vermögensfragen, 6 Neue Juristische Wochenschrift [hereinafter NJW] 321 (1991) (general overview of regulations concerning expropriated property in the former G.D.R. as of Feb. 6, 1991). The human dimension to these problems has been ably captured in Katie Hafner, The House We Lived In: Reclaiming Family Property in Eastern Europe, N.Y. TIMES, Nov. 10, 1991, § 6 (Magazine) at 32.

2. See infra notes 6-15 and accompanying text.


The inevitable consequence of these measures was a large number of citizens living in West Germany ("F.R.G."), who, if western legal concepts prevailed, could make out convincing claims to ownership of large portions of the G.D.R. As political momentum for German reunification gathered during the early months of 1990, many of these dispossessed persons, or their heirs, began to entertain hopes of recovering their lands. Simultaneously, East German homeowners anxiously awaited the arrival of some proverbially-rich "Westie" who, flashing some official-looking papers, would peremptorily inform them that they were trespassers on "his" land. In the commercial arena, western firms witnessed the collapse of negotiations on a number of potentially profitable joint ventures with state-owned G.D.R. conglomerates when third parties came forward with credible claims to ownership of the proposed business sites; since a parcel of land was often the principal asset offered by the East German partner, the potential invalidity of title to that land was often fatal to ongoing negotiations for a joint venture.

Although the Unity Treaty, which West Germany negotiated with the democratically elected East German government, generally provides for restitution to the original owners of real property confiscated by the G.D.R. after 1949, it expressly confirms the continuing validity of expropriations carried out during the period of Soviet administration from 1945 to 1949. This confirmation was meant, inter alia, to preserve the system of property ownership established after the tumultuous agricultural revolution known as "land reform." During this revolution thousands of property owners with holdings in excess of an arbitrary amount were arrested, deprived of their belongings, and often imprisoned or deported to labor camps. The Unity Treaty contains additional provisions revising the F.R.G.'s Constitution (the "Basic Law"), so as to protect these confiscations against any constitutional objection arising out of Basic Law Article 14's property guarantee.

5. By the year 1948 approximately one-third of all agricultural land (including forestry acreage) in the Soviet zone had been transferred to state ownership. In 1989 fully 94.5% of such property was owned by "agricultural production communes" or the government. "Land Reform" Decision of Apr. 23, 1991, BVerfGE [hereinafter Decision], at A II(1)(b) (advance copy on file with the Michigan Journal of International Law). Regarding the legal structure of the communes, see infra notes 16-18 and accompanying text.

6. See infra notes 19-27 and accompanying text.

7. See infra notes 44-45 and accompanying text. The drafters of West Germany's 1949 Basic Law were acutely aware that only the zones occupied by Britain, France, and the United States would be allowed to ratify the document and become part of the Federal Republic. To emphasize their conviction that they were not founding a new state, but merely reorganizing part of the "German Empire" until such time as all Germans would be free to adopt a new constitution,
As expected, the failure of the Unity Treaty’s drafters to redress land expropriations occurring between 1945 and 1949 elicited a storm of protest from the substantial number of Germans whose pre-war property the Bonn government appeared to be so carelessly “giving away.” The constitutionality of the Unity Treaty was questioned on a number of grounds. A flood of litigation ensued, and, after what was called “the most dramatic oral argument ever conducted before the Supreme Constitutional Court,” the Court rendered its controversial opinion of April 23, 1991. This historic decision could have far-reaching and unintended effects on the German law of property, on the law of asylum, and on the rights of foreigners in Germany. This article briefly examines the principal expropriatory measures undertaken between 1945 and 1989, the agreements between the two German governments relating thereto, and the divisive constitutional issues raised by this fusion of two antithetical legal systems in the area of property law. The text concludes with an analysis of the German Supreme Court’s “Land Reform” decision and the juridical controversy surrounding it.

I. EXPROPRIATION OF REAL PROPERTY 1945-1989

A. “Nazis and War Criminals”

Shortly after the surrender of Germany at the end of World War II, the Soviet Military Administration (“SMA”) carried out a rapid sequestration of real property in its occupation zone. According to SMA Command Nos. 124 of October 30 and 126 of October 31, 1945, the authorities were to seize all property of: 1) the German government; 2) the Nazi party and its leading members; 3) the German military command; 4) corporations and partnerships dissolved or forbidden by the SMA; 5) all citizens of countries allied with Germany in the war; and 6) “other persons identified by the Soviet Command on special lists or otherwise.”

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10. Decision, supra note 5.
11. The material in this section is largely adapted from the exhaustive survey found in Wilhelm Hebing, Enteignung und Rückerwerb von DDR-Vermögen, 45 BETRIEBS-BERATER, issue 16, supp. 21, pt. 8 (DDR-Rechtsentwicklungen) 1-9 (1990).
12. Reprinted in BESTIMMUNGEN DER DDR ZU EIGENTUMSFragen UND ENTBEIGNUNGEN
The sequestered property was placed under the administration of a fiduciary. The governments of the individual East German federal states (hereinafter “Länder”) later nationalized these assets by specific legislation or administrative decree, without compensating the original owners. Since this property passed to State ownership free of all encumbrances, the claims of the former owners’ secured creditors were likewise extinguished.

B. “Land Reform”

After August of 1945 the SMA directed and the individual Länder carried out a program of expropriations aimed at agricultural holdings of more than 100 hectares (approximately 250 acres). These measures were implemented without reference to the classification of the owner under any of the six categories listed above. Ownership of real estate, buildings, inventories and related businesses was forcibly transferred to manual laborers, displaced persons, and craftsmen without compensation to the former title holders. The new “owners” rarely had the knowledge or expertise to farm these estates at a profit, and the government soon used their poor economic performance to pressure them to collectivize into “agricultural production communes”. The property interests united in communes were technically retained by these “new farmers,” but could only be inherited, not sold or otherwise alienated, by them.

C. Expropriations Between 1949 and 1972

1. Continuation of SMA-Initiated Seizures

Although Article 23 of the G.D.R.’s Constitution of 1949 declared that fair compensation must be paid in every case of government expropriation, the campaign of outright confiscations begun by the SMA continued until at least 1952. These measures were particularly di-

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14. These enactments are reprinted in Bestimmungen, supra note 12, at 101-105 (Sachsen), 105-109 (Sachsen-Anhalt), 109-13 (Brandenburg), 113-15 (Mecklenburg-Vorpommern), 115-19 (Thüringen).
16. Id.
17. The owners were routinely directed to leave the county of their residence, often within a few hours time, taking with them only the barest of necessities. Representatives of families which had farmed their estates for centuries were thus summarily dispossessed without recourse to any judicial proceeding. Decision, supra note 5, at A II(1)(a).
rected at those citizens with business relationships to individuals officially classified as "Nazis or war criminals." 19

2. Property of Expatriates

The assets of Germans who had left the Soviet Occupied Zone/G.D.R. without permission of the appropriate authorities were disposed of in various ways over the years. The controlling principle in all such cases, however, was the legal definition of "flight from the republic" as a criminal act. 20

Prior to the formation of the G.D.R. in 1949, the governments of the individual Länder had seized such assets on their own initiative. In some cases, control of this property was vested in an agent or fiduciary, while in others title passed directly to the State. Fiduciaries were given broad discretion to deal with these assets. They were, for example, empowered to sell related personal property at its assessed value and to deposit the proceeds in a restricted account in the name of the former owner. 21

The first uniform national regulation of the legal status of expatriate property was the "Decree Concerning the Securing of Assets" of July 17, 1952. 22 This document declared that property of all persons who had left the G.D.R. without prior permission of the authorities was to be seized immediately. Agricultural property was to be disposed of according to "Land Reform" regulations, while other assets were temporarily placed under the administration of the central government. An order of the State Secretary of the Interior determined further that property of persons who had left the G.D.R. after June 10, 1953 was to be placed under the administration of: 1) an agent with full power of attorney chosen by the original owner; 2) an agent chosen by the State; or 3) in special cases, a fiduciary chosen by the local county council.

Order No. 2 of August 20, 1958 adopted the "special case" as the rule, allowing in principle only state-controlled fiduciaries to administer seized property. 23 Although title technically remained in the expatriate, this amounted to de facto expropriation, since the former owner

19. Id. at 3.

20. The highest court of the G.D.R. went so far as to declare that the very act of leaving the country without official permission was itself sufficient to effect a transfer of title to "people's ownership," without the need for a formal government proceeding. Id. at 3 n.15.

21. Id. at 3.

22. 1952 GBl. I 615 (author's translation).

had no right to deal with his assets and lost even his legal claim to information concerning them.

The powers of expatriate property administrators were substantially enhanced by the Order of December 11, 1968, which gave them the power to sell expatriates' property to satisfy the claims of third parties, including claims of the State. Sales were facilitated by a revaluation of the property which invariably resulted in drastically reduced prices. Moreover, agents were authorized to charge a fee for their services which could be satisfied out of the expatriates' assets.

3. Assets of Germans Living Outside the G.D.R. but Not Defined as Expatriates

The legal status of property belonging to Germans who had left their domicile with official permission before 1945 was not addressed by the East German government prior to the "Decree Concerning the Securing of Assets" of July 17, 1952. The Decree stipulated that such property was to be placed under the temporary administration of the East German government. This temporary administration was subsequently repealed by the "Order of December 1, 1953," which remained in effect until November 14, 1989. The Order of December 1, 1953 obligated non-resident owners either 1) to arrange for the administration of their property in the G.D.R. themselves, or 2) to sell such property to a third party. Where the owner did not fulfill this obligation, the State installed its own administrator. In either case, the non-resident had little control over his assets: proceeds such as rent payments were automatically deposited in a restricted East German State Bank account. Withdrawals by the owner were allowed only with permission of the bank, and all costs for the upkeep of the property, including taxes, were automatically deducted from this account.

4. Restraints on the Transfer of Real Property, Compulsory Loans and Mortgages

Throughout its history, the G.D.R. placed extensive restrictions on the transfer of real property interests by private citizens. Government approval was required not only to sell land outright, but also to conclude even a simple lease agreement. Landlord/tenant law in East

25. See supra note 22.
26. 1953 GBl. I 1231.
27. Hebing, supra note 11, at 4.
Germany placed the entire burden for maintenance and repairs on the owner of the underlying “fee,” and required the issuance of “compulsory loans” secured by “compulsory mortgages” on the property in cases where the landlord was deemed to have neglected his responsibilities. The overall effect of such measures was to make ownership of real property in the G.D.R. an economic liability of intolerable proportions. Though property holders hoped to salvage some value by voluntary transfer, government-imposed conditions on such “sales” usually amounted to expropriation without compensation.28

5. “Classical” Expropriations After 1952

The government of the G.D.R. conducted further seizures of real property in the course of implementing a series of laws designed to create and improve the national infrastructure. Although Article 23 of the Constitution (1949) required compensation to the owner for all such takings, procedural rules and regulations concerning computation of the amount to be paid did not exist until passage of the “Law Concerning Compensation” of April 25, 1960.29 With these measures the authorities satisfied the State's need for land on which to construct roads, post-offices, energy installations and other public utilities. Although the takings were not politically motivated in most cases, the amount of compensation was determined by government-appointed appraisers who based their calculations on property values assessed as of January 1, 1935.30

D. Expropriations After 1972

In the early 1970s the authorities in the G.D.R. set out to eliminate the remnants of private investment in business and create a truly uniform system of “people's ownership.” The resulting wave of confiscations in 1972 was aimed at the most profitable of the remaining private firms, nearly all of which were already partially state-owned. These confiscations usually took the form of “voluntary” sales to the State of the citizen’s residual interest in the business. Ironically, prices for these coerced transactions were determined by provisions of the “Decree concerning Treatment of Claims of Private Investors who Withdraw on Their Own Initiative from Businesses Partially Owned by the State” of December 15, 1972.31 Up to 10,000 Ost-Marks of the

28. See DDR HANDBUCH, supra note 4.
31. 1972 GBl. II 763 (author's translation).
sales proceeds could be paid to the seller immediately; the portion of
the sales price exceeding 10,000 Marks was automatically deposited in
a savings account, from which the individual was allowed to withdraw
an additional 10,000 Marks annually.

II. APPLICABLE LAW AFTER OCTOBER 3, 1990

Introduction

In early 1990, as the East German economy hastened towards col-
lapse, the government began to recognize that the question of individ-
ual property rights was fundamental to the transition to a market
economy now regarded as inevitable. It became apparent that the
State-run manufacturing and agricultural conglomerates were incapa-
bble of sustaining operations even while their artificial monopolies re-
mained in place. Incentives which would lure private investors back
into an active economic role were urgently required. As a result, the
interim government of Hans Modrow passed the “Act concerning the
Establishment and Activities of Private Businesses” of March 7,
1990,\textsuperscript{32} pursuant to which the State offered to resell to the original
owners, or their heirs, the interests in business entities expropriated
under the 1972 decrees. Far more important in this regard, however,
were two agreements concluded by the new democratically elected
East German government in contemplation of the coming reunifica-
tion: 1) the “Joint Declaration of the F.R.G. and the G.D.R. Con-
cerning Unresolved Property Questions” of June 15, 1990\textsuperscript{33} (“Joint
Declaration”) and 2) the “Treaty Concerning the Establishment of
German Unity” of August 31, 1990\textsuperscript{34} (“Unity Treaty”). Each of these
documents is examined in some detail below.

A. The Joint Declaration

The Joint Declaration was concluded only after protracted and
sometimes acrimonious negotiations between the two German govern-
ments.\textsuperscript{35} After describing the nature of the unresolved property own-
ership problems and reciting its goal of creating a “socially acceptable

\textsuperscript{32} 1990 GBl. I 141 (author’s translation).

\textsuperscript{33} Gemeinsame Erklärung der Regierungen der Bundesrepublik Deutschland und der
Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen, 1990 BGBI. II
1237 (Joint Declaration of the F.R.G. and the G.D.R. Respecting Property Questions) [hereinafter
Joint Declaration] (author’s translation).

\textsuperscript{34} Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen
Republik über die Herstellung der Einheit Deutschlands, 1990 BGBI. II 889 (Treaty Between the
F.R.G. and the G.D.R. concerning Establishment of German Unity) [hereinafter Unity Treaty]
(author’s translation).

\textsuperscript{35} Carl Graf Hohenthal, Opfer auf dem Altar der Geschichte?, FAZ, Sept. 5, 1990, at 1.
adjustment of conflicting interests,” the document states:

1. Expropriations carried out on the basis of occupation law or authority (1945 to 1949) can no longer be rescinded. The governments of the U.S.S.R. and the G.D.R. see no possibility of annulling the measures then undertaken. In light of historical developments, the government of the Federal Republic of Germany acknowledges this decision. It is of the opinion, nevertheless, that a final decision concerning any burden-sharing payments must be reserved to a future pan-German parliament.³⁷

In section 2 the parties agree that involuntary fiduciary administration and similar measures limiting the rights of owners to deal in and with real property, businesses, and other assets “are to be abolished.” Citizens whose property was nationalized due to “flight from the G.D.R. or other reasons” are once again to receive all rights over such assets.³⁸

In section 3 the signatories agree to the basic principle that real property confiscated after 1949 will be returned to its original owners, with two qualifications.³⁹ First, outright restitution of property which has been dedicated to the public, incorporated in complex residential settlements, or adapted to business purposes “is, by nature of the matter, impossible.” In such cases, former owners will receive monetary compensation instead of the property itself. Second, to the extent that citizens of the G.D.R. have acquired, in good faith, ownership or other property rights in real estate which is subject to a claim by the former owner, the latter will be compensated in money or by exchange of parcels of similar value. The principles of this section are then declared to apply equally to property nationalized for “economic” reasons (as described supra p. 845).⁴²

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36. Joint Declaration, supra note 33, pmbl. (author’s translation).
37. Id. § 1.
38. Id. § 2.
39. Subsequent legislation has significantly expanded the number and scope of the exceptions to this basic principle. As described in the text infra, Article 41 of the Unity Treaty itself sets forth an “investment exception” to the restitution rule which is further defined in an act appended to the Unity Treaty, the Gesetz über besondere Investitionen in dem in Artikel 3 des Einigungsvertrages genannten Gebiet (Investitionsgesetz), 1991 BGBI. I 994 (as amended effective Mar. 29, 1991). A second act attached to the Unity Treaty, the Gesetz zur Regelung offener Vermögensfragen (Vermögensgesetz — Verm G), 1991 BGBI. I 957 (as amended effective Mar. 29, 1991) establishes additional requirements for claimants of property expropriated after 1949. A discussion of these laws is beyond the scope of this article. See generally Fieberg & Reichenbach, supra note 1; Jürgen Kohler, Zivilrechtliche Sicherung der Rückerstattung von Grundstücken in den neuen Bundesländern, 1991 NJW 465; Michael Gruson & Georg Thoma, Investments in the Territory of the Former German Democratic Republic, 14 FORDHAM INT’L L.J. 540 (1990-91).
40. Joint Declaration, supra note 33, § 3(a) (author’s translation).
41. Id. § 3(b).
42. Id. § 4.
B. The Unity Treaty

The first of the two inter-German treaties, which entered into force on July 1, 1990, establishes uniformity between the F.R.G. and the G.D.R. in matters of currency and economics, but contains no provisions relating to expropriated property, real or personal. The second agreement, the so-called Unity Treaty signed in Berlin on August 31, 1990, addresses all significant issues connected with unification of the two States, including the controversial "property question."

1. Article 41

Article 41 of the Unity Treaty is of fundamental importance. Section 1 incorporates the Joint Declaration of June 15, 1990 into the text of the Treaty, thereby transforming it from a mere "memorandum of understanding" into directly enforceable federal law. In Section 3 the F.R.G. declares that it will pass no laws or regulations which contradict the provisions of the Joint Declaration.

2. The New Article 143

Article 4 of the Unity Treaty covers changes to the text of the F.R.G.'s Constitution (the "Basic Law") required by reunification. Anticipating constitutional challenge to article 41 of the Treaty, the signatories deemed it advisable to assure in advance the "constitutionality" of this provision by amending the Basic Law itself. In article 4, section 5, the Treaty therefore inserts a new constitutional article, Article 143, into the Basic Law. This new Article reads in relevant part: "...article 41 of the Unity Treaty, and regulations for its implementation, shall be valid despite the fact that they contemplate that infringements of property rights in [the former G.D.R.] shall not be annulled."

3. Extension of Basic Law Article 135a

Article 135a of the Basic Law grants the West German Parliament discretion to allow or forbid, in whole or in part, certain claims against the Third Reich arising out of the Second World War. Article 4, section 4 of the Unity Treaty adds a new section to Article 135a which makes this reservation equally applicable to claims against the former

43. Vertrag über die Schaffung einer Währungs, Wirtschafts, und Sozialunion (Treaty Regarding Creation of Currency, Economic and Social Union), May 18, 1990 BGBI. II 537.
44. Unity Treaty, supra note 34.
45. Id. art. 4, § 5 (author's translation).
G.D.R. The new Parliament of a unified Germany, in other words, has the constitutionally recognized discretion to honor or dishonor dispossessed persons' claims for compensation as it deems appropriate.

III. THE CONSTITUTIONAL STORM

Introduction

The West German government's apparently wholesale recognition of the confiscations undertaken in the Soviet Occupied Zone prior to the formation of the G.D.R. in 1949 unleashed a vigorous and sometimes bitter debate within the German bar and public. Constitutional scholars disagreed about the legality of the Unity Treaty in this respect. Particularly blistering criticism was reserved for the treaty negotiators' attempt to "heal" perceived constitutional infirmities by amending the Constitution in the treaty itself. Senior jurists publicly assailed this maneuver as a crass violation of the separation of powers principle. A sitting justice on Germany's Supreme Civil Court went so far as to call the new Basic Law Article 143 "patently unconstitutional." Attitudes within the legal community toward the "property question" could hardly have been more polarized when, on October 5, 1990, only two days after formal union between the Germanies, the first suit asserting the unconstitutionality of the Unity Treaty's disposition of pre-1949 seizures was filed with the Supreme Constitutional Court. The main arguments propounded by each side prior to final decision of the case on April 23, 1991, are examined below.

A. Interpreting the Joint Declaration

Initially, there was considerable disagreement as to the intended meaning of section 1 of the Joint Declaration. As has been seen, the text is somewhat imprecise in its identification of exactly which exprop...
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appropriations can no longer be reversed, referring only to those "carried out on the basis of occupation rights or law (1945 to 1949)." Did the drafters intend this language to confirm all confiscations which took place within this four year period, or did they mean to address a subset of the expropriations, implying that some expropriations occurring during that period were not made on the basis of occupation rights?  

A variation on the latter interpretation was forcefully advanced by East German attorney Joachim Ziegner. In an article published before conclusion of the Unity Treaty, Mr. Ziegner demonstrated that all relevant decrees of the Soviet Military Administration ("SMA") effected, by their own terms, only a temporary sequestration of property, without purporting to make any transfer of ownership rights. The instructions to SMA Command No. 124 of October 30, 1945, for example, ordered the "sequestration and temporary administration of ... a) all real property." All decisions regarding expropriation of the individual owners were left to the German administrative councils. Transfer of title to "people's ownership" was accomplished by subsequent laws passed by the governments of the individual Länder, not by Soviet occupation decrees. The overwhelming majority of actual expropriations, Ziegner argued, could thus be ascribed to German civil councils, not to Soviet military decrees with any articulable basis in "occupation rights or law."

Moreover, sequestration under the SMA Commands was legally authorized for only a portion of the time period identified in the Joint Declaration. SMA Command No. 64 of April 17, 1948 announced the determination of the occupying authorities that sequestration of real property was no longer necessary. Section 5 of this Command therefore repealed Command No. 124 and forbade all further proceedings thereunder. The SMA was thus active only during the period from May 5, 1945 to April 17, 1948; all expropriations carried out between April 18, 1948 and October 7, 1949 were undertaken by German administrators or Länder governments, and should therefore not be protected by the terms of the Joint Declaration.

The subtleties of Ziegner's argument did not attract a wide following; most legal commentators understood Joint Declaration section 1 and the new Basic Law Article 143 as confirming all property takings which occurred prior to the establishment of the East German Consti-

52. BESTIMMUNGEN, supra note 12, at 51.
53. 1948 GBI. Sachsen-Anhalt 68.
tion. The proposition, however, that the legal effects of a massive campaign of ideological persecution, of which expropriation was only one instrumentality, could now be sanctioned and permanently secured under the venerated Basic Law profoundly offended the sensibilities of many West Germans.

B. The Joint Declaration: Retroactive Sanction for Ideological Terrorism?

Certainly the most passionately argued challenge to the Joint Declaration was published by Professor Hans von Arnim in a lengthy analysis for the Frankfurter Allgemeine Zeitung. Von Arnim assailed as fundamentally meaningless the choice of October 7, 1949 as the "cut-off point" for property claims. The measures carried out both before and after this date, he argued, were alike the expressions of a uniform communist ideology put into effect by the ruling Socialist Unity Party ("S.E.D."). The perversity of the "land reform" undertaken during this period, in his view, is especially evident in the fact that owners of more than 100 hectares were officially assigned the same classification as "Nazi leaders and war criminals," solely by reason of this ownership. It was in many cases precisely those individuals directly involved in the resistance to National Socialism (whose property was confiscated by the Third Reich after the failed assassination attempt on Adolf Hitler) who were then dispossessed for the second time by the S.E.D. after 1945. Von Arnim likewise challenged the presumption of the Joint Declaration that the 1945-49 expropriations "can no longer be rescinded." The vast State landholdings assembled primarily during the period of "land reform," he argued, would in fact be privatized, but the Unity Treaty appears to deny the original owners all right to reclaim them.

In von Arnim's view, the Joint Declaration's and the Unity Treaty's treatment of dispossessed people's claims violates at least three "fundamental rights" enumerated in the Basic Law: 1) the right to the protection of personal property set forth in Article 14; 56 2) the

54. von Arnim, supra note 3.
55. Id. One of many such cases is recounted by Graf Hardenberg-Neuhardenberg, Der geplante Verfassungsputsch, FAZ, Sept., 1990.
56. GG art. 14 provides in relevant part:
(1) The right of private property and the right of inheritance are guaranteed. The content and limitations of such rights shall be determined by the legislature.... (3) Expropriation shall be permitted only when in the interest of the general public. It may be accomplished only through or by virtue of an act of the legislature which regulates the type and amount of compensation to be paid. The amount of compensation shall be determined after a just weighing of the interests of the individual and the public. The district courts shall have jurisdiction to hear any appeal from such a decision.
principle of "equal protection" mandated by Article 3, section 1;\textsuperscript{57} and 3) the prohibition against discrimination on the basis of origin or class laid down in Article 3, section 3.\textsuperscript{58} The legal import of proposed new Basic Law Article 143 is that these and other fundamental rights are to be simply withdrawn from those affected by "land reform."

Particularly objectionable, in von Arnim's view, was the Bonn government's decision to deny this group recourse even to Basic Law Article 19, section 2, which prohibits any branch of government from altering or weakening the "core meaning" of the enumerated "fundamental rights."\textsuperscript{59} Such a result appears particularly crass in light of the fact that other provisions of East German law, which under the Unity Treaty are expressly permitted to deviate from the Basic Law for a defined transition period, are nevertheless void to the extent their enforcement would violate the "core meaning" clause of Article 19.\textsuperscript{60}

Von Arnim sees the Unity Treaty drafters' attempt to forestall constitutional challenge to the treaty by amending the Basic Law in the treaty itself as a plain violation of the separation of powers principle contained in Basic Law Article 20.\textsuperscript{61} Quoting Professor Horst Ehmke, he asserts that parliamentary amendments to the Basic Law cannot decree that "constitutional provisions are not to be applied to particular cases or for particular periods of time . . . For this would mean the abandonment of the very concept of constitutional government; the Constitution would lose all meaning, and in place of a free and democratic form of government we would have simply the absolutism of the current two-thirds majority."\textsuperscript{62}

In addition to this separation of powers argument, von Arnim points out that Basic Law Article 79, section 3 specifically forbids any constitutional amendment which disturbs the unenumerated class of "inviolable and inalienable human rights" addressed in Article 1 or the "fundamental rights" enumerated in Articles 2 through 20.\textsuperscript{63} It is

\begin{itemize}
  \item 57. \textit{Id.} art. 3(1), which provides: "All persons are equal before the law." (author's translation).
  \item 58. \textit{Id.} art. 3(3), which provides: "No one may be discriminated against or preferred because of his sex, family background, race, language, geographical origin, beliefs, or religious or political views." (author's translation).
  \item 59. \textit{Id.} art. 19(2), which reads: "In no event may the core meaning of a [constitutional provision defining a] fundamental right be altered." (author's translation).
  \item 60. Unity Treaty, \textit{supra} note 34, art. 4, § 5.
  \item 61. The text of GG art. 20(3) is set forth \textit{infra} at note 69.
  \item 62. von Arnim, \textit{supra} note 3, at 8 (author's translation).
  \item 63. GG art. 79(3), which provides: "An amendment to this Basic Law by which the division of the republic into \textit{Länder}, the fundamental role of the \textit{Länder} in the legislative process, or the principles set forth in articles 1 and 20 hereof, are infringed, is void." (author's translation). This provision has been denominated the "eternity clause" because it was intended to secure the enu-
the experience of Germany's recent past, in his view, which has hitherto prompted the West German judiciary to guard this principle so jealously.

C. The Joint Declaration as Reluctant Realpolitik

These widely-discussed constitutional objections to the Unity Treaty were most cogently answered in a lengthy analysis by Professor Hans-Jürgen Papier published shortly before issuance of the Supreme Court's decision. Papier notes initially that the legislative treatment of 1945-49 expropriations has de facto constitutional validity because of new Article 143. The question now cannot be whether the original confiscations are somehow unconstitutional, but rather solely whether the Unity Treaty negotiated by the German government, which is subject to the Basic Law, violates constitutional principles by distancing itself from restitution or compensation for these past takings. In light of the new Basic Law amendments it is likewise irrelevant to ask whether the treaty and its implementing laws violate the property guaranty of Article 14 or the equal protection principle of Article 3. The sole pertinent inquiry, in Papier's view, is the narrow question of whether the "eternity clause" of Basic Law Article 79, which impliedly protects the "core meaning" of fundamental rights enumerated in Articles 2 through 19 without guaranteeing the full extent of their current form, has been impermissibly ignored by these treaty-based Basic Law amendments.66

1. Is the Basic Law Controlling?

Papier notes that the "expropriations...on the basis of occupation rights or law (1945 to 1949)" cannot be measured against the property guaranty of Article 14, since the Basic Law is binding only on the particular State authority which it constitutes. It is meaningless to inquire whether the 1945-49 confiscations were carried out by Soviet or German officials, since even the latter were not acting on behalf of the government established by the Basic Law. Moreover, no retroactive application of this document in the ex-G.D.R. is contemplated in any provision of the treaty.67

Second, the confiscatory actions in question cannot be attributed to

64. Papier, supra note 46.
65. Id. at 194.
66. Id.
67. Id. at 195 (author's translation).
the F.R.G. under the theory that it is somehow the "successor-in-interest" to the G.D.R. West Germany's ratification of the Unity Treaty did not constitute a repetition, confirmation, or adoption of these expropriations; it represented rather a realistic political assessment of the acts as unalterable historical reality and a decision to forego any attempt to alter the status quo presented to it. Fundamental to any analysis under the property guaranty, including evaluation of its human-rights component, is a consideration of whether the State formed under the Basic Law is itself prosecuting such takings or is merely reacting to the actions of a foreign government.\(^{68}\)

2. The Property Right as a "Fundamental Right"

In Papier's view, Basic Law Article 14 establishes an individual right to freedom of action with regard to existing property and protects against any invasion of the protected sphere by the government established under the Constitution. Article 14 is not violated by West German authority in the present case, since neither the Unity Treaty nor its accompanying legislative enactments themselves effect the confiscations or in any way repeat or confirm them. The treaty provisions could contravene Article 14 only if the latter established a right to acquire or reacquire individual property, in addition to the purely defensive right described above.

Moreover, the "eternity clause" of Article 79, which prohibits alteration or amendment of the "principles contained in Articles 1 and 20," does not specifically mention the fundamental rights set forth in Articles 2 through 19.\(^{69}\) The individual rights described therein are thus not guaranteed in their currently existing form.\(^{70}\) The Parliament is permitted under Article 79 to limit or restrict by constitutional

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68. *Id.*

69. GG art. 1 reads:

(1) The dignity of man is inviolable. To observe and protect it is the obligation of all state power. (2) The German people acknowledge the inviolable and inalienable human rights as the basis for every human relation, for peace and justice in the world. (3) The following fundamental rights are binding on the legislature, the executive, and the judiciary as directly applicable law.

(author's translation). GG art. 20 provides:

(1) The Federal Republic of Germany is a democratic and social federal state. (2) All government power proceeds from the people. It is exercised by them in elections and referenda and through the special organs of the legislative, executive and judicial branches. (3) The legislative branch is bound by the constitutional order. The executive and judicial branches are bound by the laws.

(author's translation).

70. These include, for example, the right to "free development of one's personality" and the "right to life and bodily safety" (art. 2); equality before the law (art. 3); freedom of religion and of conscientious objection to military service (art. 4); freedom of the press, of art, and of science (art. 5); freedom of assembly (art. 8); freedom of movement (art. 11); the right of petition (art. 17); and numerous others.
amendment the exercise of particular rights, so long as it does not disturb the "fundamental principles" of Articles 1 and 20. Examples of such inviolable fundamental principles include: "the dignity of mankind," "inviolable and inalienable human rights as the foundation of human society," and the essential character of the F.R.G. as a "democratic and social federal State." Parliament thus retains broad scope for legislation.\(^7\)

3. The Limits of Constitutional Amendment

In light of these general principles for the interpretation of Article 79, Papier asserts, the "core meaning" of the Basic Law's property guaranty, including its human rights component, cannot be altered even by constitutional amendment.\(^7\) The Supreme Constitutional Court has always regarded Article 14 as "a fundamental right... which stands in close connection to the guaranty of personal freedom."\(^7\) Article 14 fulfills the function of preserving to the individual "a sphere of freedom in the area of personal property... which enables him to arrange his life in a responsible manner."\(^7\) This intersection of the property guaranty with the constitutionally recognized right to unhindered individual personality development defines the basic human rights component or "core meaning" of Article 14, which is inviolable under the "eternity clause" of Article 79.\(^7\) An indispensable minimum level of property protection forms the basis for individual human development and cannot be relinquished to the State, even by means of a constitutional amendment.

With regard to the 1945-49 expropriations, however, we do not encounter a situation in which the government constituted by the Basic Law is disregarding the human rights-related core meaning of the property guaranty: only in such a case could Article 79's "eternity clause" come into play. For the former owners and devisees of property expropriated more than forty years ago, the minimum economic basis for the free development of individual personality is not at stake. What these plaintiffs demand is the reversal of specific past acts of a foreign governmental authority and the restoration of the status quo ante. It is this restoration, Papier argues, which surely exceeds the

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\(^7\) See Papier, supra note 46, at 195.
\(^7\) Id.
\(^7\) Id.
\(^7\) Id. at 196 (quoting 24 BVerfGE at 367, 389) (author's translation).
\(^7\) GG art. 2(1), which reads: "Every individual has the right to free development of his personality to the extent that he does not infringe the rights of others or undermine the constitutional order or good morals." (author's translation).
intended scope of the protection afforded by Article 79.\textsuperscript{76}

4. The F.R.G. as "Constitutional State"

In Papier's view, the appeal to the general German legal principle that the F.R.G. is a constitutional State ("Rechtsstaat") does not change this result. The Supreme Constitutional Court has indeed recognized that certain elements of this principle can be derived from Article 20 and are therefore protected in perpetuity by Article 79;\textsuperscript{77} among those elements are the concept of "separation of powers" and the subordination of the legislative branch to the "constitutional order."\textsuperscript{78} The Basic Law amendments, particularly the new Article 143, however, do not constitute an impermissible circumvention of the judicial branch in derogation of the separation of powers principle. Generally speaking, it is the prerogative of parliament to direct the judiciary to the proper rule of decision; we cannot classify every legislative enactment which binds the executive and judicial branches of government as an impermissible infringement of the latters' power.

5. "Equal Protection"

On its face, the Unity Treaty's determination that property expropriated after 1949 will be returned, while assets taken prior to that date cannot be reclaimed, appears to violate the "equal protection" principle set forth in Basic Law Article 3. This discrimination, however, is likewise "constitutionalized" by the new Basic Law Article 143, so that it only remains to inquire whether such an amendment itself exceeds the limits imposed by Article 79. Papier notes that Article 3, like the property guaranty of Article 14, is not specifically mentioned in Article 79, and thus is not directly protected by the "eternity clause." Nevertheless, the equality principle of Article 3, which prohibits arbitrary governmental discrimination between citizens, embodies a general legal maxim inherent in western notions of a constitutional order. This principle is, in fact, derived from considerations of basic fairness, and should thus arguably be included in the fundamental principles which enjoy the protection of the "eternity clause" via Article 20.\textsuperscript{79}

The West German government's refusal to recognize restitution claims for pre-1949 expropriations, however, cannot arguably be de-

\textsuperscript{76} Papier, supra note 46, at 196.
\textsuperscript{77} See supra note 63.
\textsuperscript{78} See supra note 69.
\textsuperscript{79} Papier, supra note 46, at 196.
scribed as "arbitrary." The government's constitutional mandate to pursue reunification, coupled with the considerable pressures brought to bear by foreign powers in international negotiations leading to unity, justify Bonn's acquiescence on this point. The U.S.S.R. and the G.D.R., both of which played decisive roles in the reunification process, made it clear from the outset that preservation of the "land reform" was a material condition to their continued participation in the process.\(^\text{80}\) The F.R.G. thereupon accepted this state of affairs as historically irreversible in order to avoid endangering the chances for reunification. Whether Bonn's estimation of what was realistically obtainable in these negotiations was correct is not a question for the Supreme Constitutional Court, according to Papier. It was a political decision which lay in the peculiar domain of the legislative branch of government.\(^\text{81}\)

D. The Supreme Constitutional Court's "Land Reform" Decision

Introduction

The Supreme Constitutional Court's opinion, which was issued on April 23, 1991, is sixty pages long in the original: only a fraction of these are substantive.\(^\text{82}\) After reprinting the text of important legislative enactments at issue in the litigation and recounting the history of relevant treaty negotiations and various supplemental acts, the opinion summarizes the principal arguments of the parties. Only after giving a précis of certain prior decisions of the Supreme Civil Court and the Supreme Administrative Court on tangential questions does the Court reach the issues presented, dealing first with procedure, then with substance.\(^\text{83}\)

1. Procedure

The Court was initially obligated to determine whether the plaintiffs' action was the proper means under German law for challenging the constitutionality of the Unity Treaty Implementing Act.\(^\text{84}\) In the course of resolving this question in the affirmative, the opinion states that the 1945-49 expropriations are emphatically to be classified as

80. See Fieberg & Reichenbach, supra note 1, at 322 (recounting the history of the negotiation process).
81. Papier, supra note 46, at 197.
82. Decision, supra note 5.
83. Id. at A V(2), (3).
84. German law provides that any citizen can challenge the enforcement of a law or administrative act which infringes upon the fundamental rights set forth in the Basic Law by a direct appeal (Verfassungsbeschwerde) to the Supreme Constitutional Court as long as all other remedies have been exhausted. GG, supra note 7, art. 93(1)(4)(a).
“based on occupation law or authority.” Although the takings were made pursuant to SMA Command No. 124 the opinion notes that they rest only partly on occupation law, since the confiscations themselves were effected by implementing laws passed by German organs. Nevertheless, these laws were made on the basis of “occupation authority,” since they were sanctioned by the Soviet occupiers and depended substantively on their decisions. The influence of the occupying authority, according to the Court, is further demonstrated by the fact that SMA Command No. 64 expressly confirmed expropriations previously carried out.

With specific regard to the “land reform” measures, the Court admits that these takings do not at first blush appear to fit within the “occupation law or authority” category, since the relevant laws and decrees were issued solely by German authorities. Nevertheless, the Court does define these takings as occurring under occupation law, “since the train of events indicates that they were not only accepted by the Soviet occupying power, but conformed to its stated will and intention.” This is best demonstrated by the Command of October 22, 1945, which declared that all acts which were passed by the State and provincial governments installed by the Soviets, and which were consistent with orders of the SMA, were to “have the force of law.” Importantly, the G.D.R. and the U.S.S.R. also insisted on the view that the “land reform” measures were based on “occupation authority;” this was expressed in the Soviet “Statement” of April 27, 1990 and other official documents.

2. Substance

The Supreme Constitutional Court declared that Unity Treaty provisions confirming the 1945-49 expropriations do not violate the plaintiffs’ constitutional rights. These provisions are specifically made valid under the new Basic Law Article 143. They could violate the Constitution only if Article 143 were itself invalid. This is not the case.

85. The German adjectives “besatzungsrechtlich” and “besatzungshoheitlich” have no English equivalents. I have chosen to render the former “pertaining to or based on occupation law,” and the latter “pertaining to or based on occupation authority.” The concept of a law or decree derived from “occupation authority” is an invention of the Joint Declaration drafters and has no previous place in German constitutional jurisprudence. See supra text accompanying notes 56-60.

86. See supra note 53.

87. Decision, supra note 5, at B I(2).


89. TASS, Mar. 27, 1990.

90. Decision, supra note 5, at C II.
The procedure chosen by the government of including constitutional amendments required by unification within the text of the Unity Treaty, so that Parliament could only vote yes or no on the measures as a package, was necessitated by the course of treaty negotiations and amply justified by the broad constitutional mandate for reunification. This linkage could not be given up without endangering the chances for unification.\footnote{Id. at C II(1)(a).}

New Article 143 also does not violate the separation of powers principle. It does not retroactively remove from constitutional scrutiny an act of the government created by the Basic Law. The measure simply defines the extent to which implementation of the Basic Law in new territory will be allowed to affect certain actions which occurred in the past.\footnote{Id. at C II(1)(b).}

Like every other constitutional amendment, however, Article 143 must pass the test imposed by Article 79(3), which forbids any amendment “disturbing the principles set forth in Article 1 and Article 20.”\footnote{GG, supra note 63.} Among these principles are the “dignity of mankind” and certain unenumerated “inviolable and inalienable human rights.” The reference in Article 1(3) to the individual rights enumerated in Articles 2 through 19 means that their guarantees also may only be limited to the extent compatible with the preservation of a political order which upholds these basic principles.\footnote{Decision, supra note 5, at C II(2)(a).} Even the majority required to amend the Basic Law may not ignore basic principles of justice such as the concept of equality before the law and the prohibition against arbitrary government action. Article 79(3), however, requires only that these principles not be “disturbed;” it does not prevent the legislature from amending the particular manner in which these rights are exercised, as long as such modification is justified after consideration of all relevant factors.\footnote{Id.}

The Court found that toleration of pre-1949 expropriations does not transgress the above-described limits of Article 79(3). Initially, the Court held that the plaintiffs had no legal rights at the time of reunification which could be injured by such an action.\footnote{Id. at C II(2)(b)(aa).} An individual right must always be established by reference to a concrete and existing legal system. The expropriations which took place in the Soviet Occupied Zone/G.D.R. were designed to deprive the owner of all

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91. *Id.* at C II(1)(a).
92. *Id.* at C II(1)(b).
93. GG, *supra* note 63.
95. *Id.*
96. *Id.* at C II(2)(b)(aa).
legal rights to the property. These confiscations were consistently viewed by the Soviets, the German authorities in the Occupied Zone, and the G.D.R. government as having full legal force and effect. Former owners of East German real property thus had no residual property interests which could have been violated at the time of reunification.

Regardless of whether the expropriations are ascribed to the Soviet Army or to the German authorities, however, they cannot be laid at the feet of the Federal Republic. The F.R.G. has always felt responsible for all of "Germany," but it cannot be held liable for putative unconstitutional acts which took place outside the territorial reach of its sovereignty.\textsuperscript{97} German law generally recognizes expropriations of a foreign State as long as the government of such State does not venture beyond its territorial boundaries. This principle is limited solely by the concept of the German \textit{ordre public}, which only comes into play in cases of a substantial domestic and contemporaneous injury.\textsuperscript{98}

The plaintiffs' objection that the confiscations were part of a radical transformation of society on the model of a socialist State is inap-propriate, according to the justices, for "[i]t inheres in the character of such an order that little or no compensation can be given: otherwise the intended social revolution is spoiled."\textsuperscript{99}

The Supreme Constitutional Court, the opinion continues, has determined in its "War Consequences" line of cases that the Basic Law principle defining Germany as a "social State" requires the F.R.G. government to promulgate "burden-sharing" legislation in such cases.\textsuperscript{100} Bonn has adequately fulfilled this obligation, however, via sentence 4 of Joint Declaration section 1.\textsuperscript{101} The government may, at its discretion, arrange for compensation in excess of such burden-sharing payments, but Article 79(3) cannot be interpreted to mandate restitution of title as the only permissible means of compensation.\textsuperscript{102}

Compensation claims for past injustices of the type indicated can-

\textsuperscript{97} \textit{Id.} at C II(2)(b)(aa)(2).
\textsuperscript{98} \textit{Id.} at C II(2)(b)(aa)(3).
\textsuperscript{99} \textit{Id.} (author's translation).
\textsuperscript{100} Burden-sharing (\textit{Lastenausgleich}) was instituted after World War II in order to partially compensate German citizens who had been rendered homeless or substantially destitute by the hostilities. Certain taxes were levied beginning in 1949 on individuals or corporations resident in West Germany as of June 21, 1948, and the proceeds granted upon application to compensate for losses and assist refugees in establishing new lives in the F.R.G. Gesetz über den Lastenausgleich (Burden-Sharing Act) 1969 BGBI. I 1909 (as amended); A brief overview is provided in O. \textsc{Model et al}, \textsc{Staatsbürger Taschenbuch}, § 565 (Lastenausgleich-sabgeben) 677-79 (24th ed. 1989).
\textsuperscript{101} Decision, \textit{supra} note 5, at C II(2)(b)(cc)(1). \textit{See also} Joint Declaration, \textit{supra} note 33.
\textsuperscript{102} Decision, \textit{supra} note 5, at C II(2)(b)(cc)(2).
not be based on the human rights set forth in the Basic Law, but must rather be derived solely from an inference from the "social State" principle embodied therein.\textsuperscript{103} The Joint Declaration, the opinion notes, does not by its terms prohibit a former owner from purchasing his property back, to the extent this is possible after weighing various competing interests.\textsuperscript{104}

Objections to denial of restitution under Joint Declaration section 1 likewise do not obtain constitutional status because such restitution is the general rule for individuals whose property was expropriated after 1949. Bonn's decision to deny restitution is amply justified by (a) the insistence of the U.S.S.R. and the G.D.R. on this point, and (b) the F.R.G.'s conclusion that any continued objection on its part might endanger chances for reunification. "This assessment of what was realistically obtainable in the actual negotiations was the sole responsibility of the federal government and cannot legitimately be the subject of judicial review in this, or any other, Court."\textsuperscript{105}

Finally, the justices opine, the Joint Declaration clause which reserves to a pan-German legislature any decision regarding "burden-sharing" regulations likewise does not violate the basic rights of the complainants. The plaintiffs correctly argue that the legislature lacks the discretion to decline to create any burden-sharing system at all. The equal protection principle of Article 3(1)\textsuperscript{106} is directly applicable here; having allowed the victims of post-1949 confiscations the right to restitution, the government is not free to leave the complainants totally without compensation.\textsuperscript{107} The text of the Joint Declaration, however, does not prevent the legislature from fulfilling its constitutional obligations in this regard. In determining the correct measure of such compensation, Parliament may take into account the financial means available in light of all other public expenditures in the budget, including, of course, the massive outlays which will be required to rebuild eastern Germany in the next few years. In view of the fact that present estimates put this figure well into the hundred billions (DM), any possible obligation to make monetary compensation approximating the value of property taken must be dismissed.\textsuperscript{108}

\textsuperscript{103} Although the plaintiffs have no justiciable constitutional rights applicable to this case, they may have some kind of claim against the West German government under "burden-sharing" law, an outgrowth of the sentiment that all West-Germans should share equally the hardship resulting from World War II.

\textsuperscript{104} Decision, \textit{supra} note 5, at C II(2)(b)(cc)(2).

\textsuperscript{105} \textit{Id.} at C II(2)(b)(cc)(3) (author's translation).

\textsuperscript{106} \textit{See supra} note 57.

\textsuperscript{107} Decision, \textit{supra} note 5, at C III(1)(a).

\textsuperscript{108} \textit{Id.} at C III(2).
“We need not decide today whether new Article 135a(2) is consonant with Article 79(3). As explained above, the former does not free the legislature from the strictures of the equal protection clause, nor does it prevent the Parliament from devising a constitutional scheme for ‘burden-sharing.’ Inasmuch as Article 135a(2) could have any disadvantageous effect on the plaintiffs, such would arise only in the future upon passage of the law creating the putatively inadequate ‘burden-sharing’ arrangement, and not directly through the provisions before us today.”

E. Analysis

Introduction

The Supreme Constitutional Court’s decision was greeted with incomprehension by most observers. The Frankfurter Allgemeine Zeitung entitled its front-page editorial “Many Words and Little Clarity.” Though it was generally conceded that the Court was handling a politically sensitive topic under enormous political pressure, most commentators were dismayed by the opinion’s lack of organization and its failure to address so many relevant questions: questions which had been publicly debated at least since publication of the Joint Declaration.

The Court’s decision to deny restitution for expropriations occurring between 1945 and 1949, however, was widely expected. After all, in the highly-charged atmosphere of a reunified Germany, a court-imposed transfer of approximately one-third of the territory of the former G.D.R. would have caused a radical restructuring of existing economic relationships and serious social unrest. The foreign relations implications of such an act were also enormous, especially given the U.S.S.R.’s firm insistence that its policies as victorious power in eastern Germany remain immune to review by courts of the F.R.G. The Bonn government made clear during oral arguments that this had been a condition precedent to Soviet agreement on reunification, and that judicial reversal of the policy would be considered impermissible meddling in political affairs.

Nevertheless, the Court’s reasoning, where intelligible, has defied methodical analysis. The eight justices appear to ignore arguments

109. Id. at C IV (author’s translation).
111. Id.
112. See Fieberg & Reichenbach, supra note 1, at 322.
113. Decision, supra note 5, at A V(1)(a).
which both sides considered essential to determining the case.\footnote{See supra notes 54-63 and accompanying text.} Many questions raised in the course of litigation are not addressed, and even the fundamental reasons for the Court’s ruling must often be deduced or developed from scattered references in the text. The Court’s lack of clarity is troubling because, as discussed below,\footnote{GG art. 16(2), which reads in relevant part: “politically persecuted individuals shall have the right of asylum.” (author’s translation). The broad scope of Germany’s asylum law, perhaps adopted partly as a reaction to the atrocities perpetrated by the Nazi regime, has guaranteed a steady flow of applicants from around the world. Attempts to restrict abuse of the law were made in 1982, Asylverfahrensgesetz, 1982 BGBl. I 946, and in 1987, Gesetz zur Anderung asylverfahrensrechtlicher, arbeits erlaubnisrechtlicher, und ausländerrechtlicher Vorschriften, 1987 BGBl. I 89.} the decision could have profound and unintended consequences in other areas of constitutional jurisprudence, especially in the law of asylum and in the rights of foreigners in Germany.

In the most thorough and probing analysis to date, Professor Walter Leisner has delineated three fundamental theses underlying the Court’s decision: 1) the expropriations of 1945-49 constitute actions of a foreign power; 2) they may be accepted as legally binding by the F.R.G.; and 3) it cannot be argued in opposition that such actions were elements of a campaign of persecution violative of fundamental human rights.\footnote{Walter Leisner, Das Bodenreform-Urteil des Bundesverfassungsgerichts, 1991 NJW 1569, 1570-72.}

1. German Law or “Occupation Law?”

With regard to (1), Leisner notes that the Court simply dismisses a question which both sides in the litigation considered determinative: whether “German law” or “occupation law” was at work in effecting the confiscations in the Soviet Zone. The Court states that the expropriationary measures “were promulgated solely by German entities,” yet cautions that “it is undetermined whether and to what extent the occupying power exercised pressure in this regard.”\footnote{Decision, supra note 5, at B I(2).} This very uncertainty, notes Leisner, prevents the straightforward classification as “occupation law,” which would relieve West Germany of any possible obligation to correct the confiscations in question.\footnote{Leisner, supra note 116, at 1570.} The Court gets around this difficulty, however, by describing the expropriations as “measures on the basis of occupation authority.”\footnote{See supra note 84.} The decision uses the term “occupation authority” in such a way as to encompass all administrative and legislative acts of the eastern Länder. Yet, ac-
cording to Leisner, such a concept is entirely foreign to German law, which traditionally distinguished between "directed German law," which was classified as occupation law, and "indirect, hidden occupation law." Under the more traditional analytical framework, the expropriations in question could only be considered German law: mere post facto agreement of occupying authorities to German acts cannot by itself convert such acts into "occupation law."\footnote{Leisner, supra note 116, at 1570.}

To avoid classifying the 1945-49 expropriations as "German law," the Supreme Court gave its blessing to this novel doctrine of "occupation authority." Yet, Leisner points out, attributing post-war confiscations to "occupation authority" cannot alter the essential character of these measures as German law: otherwise all West German legislative acts between 1945 and 1949, including adoption of the Basic Law itself, would have to be regarded as products of "occupation authority." If the Basic Law is German law, argues Leisner, so also is the expropriation legislation of the Soviet Occupied Zone.\footnote{Id.}

Yet the Court did not clearly classify the expropriations as "virtually occupation law," but preferred to leave the issue unresolved, since, according to the decision, the confiscations cannot "be attributed to" the F.R.G. in either case.\footnote{Decision, supra note 5, at C II(2)(b)(aa)(2). This reasoning seems to contradict the Court's hitherto well-settled doctrine concerning the theoretical unity of "Germany" as defined by the 1937 borders: "The clear legal position of every government of the Federal Republic has been: the existence of this unitary 'Germany,' stipulated by and anchored in the Basic Law, presupposing a pan-German state citizenry and a pan-German governmental authority." Judgment of July 31, 1973, 36 BVerfGE 1, 19 (author's translation). See also infra note 124.}

The Court bolsters this somewhat conclusory statement by pointing out that the sovereignty of the F.R.G. has always been limited to the territorial boundaries of the former western occupation zones. That the takings were indisputably prosecuted by German citizens, therefore, is immaterial, since the governmental authority being exercised was not that of West Germany.

Equally irrelevant, in the Court's view, was the plaintiffs' contention that the confiscations took place within "Germany." According to a famous line of prior constitutional decisions,\footnote{E.g., Judgment of May 7, 1953, 2 BVerfGE 266, 277; Judgment of Feb. 26, 1954, 3 BVerfGE 288, 319-20; Judgment of Aug. 17, 1956, 5 BVerfGE 85, 126; Judgment of Mar. 26, 1957, 6 BVerfGE 309, 338; Judgment of July 31, 1973, 36 BVerfGE 1, 15-16; See also GG arts. 23, 116.}

this "Germany" had continued to exist after 1945 and was presumably still governed, at least until 1949, by the Weimar Constitution, which contained its own property guaranty.\footnote{The possibility that the Court would hold the pre-1949 confiscations to have been violations of the property guaranty of the "Weimar Constitution" of 1919, and therefore incurably}
decision, that the F.R.G. "felt itself responsible for all of Germany," as demarcated by the pre-1937 borders.\textsuperscript{125} In light of the instant decision, however, it is difficult to determine what meaning, if any, this doctrine ever had. In sum, the Court holds that even property takings within Germany carried out entirely by Germans must be attributed to a foreign "sovereignty" because such actions were later approved and preserved through the authority and on the territory of the G.D.R.\textsuperscript{126} The issue of possible F.R.G. responsibility arising out of its status as "successor-in-interest" to the G.D.R. was raised by the Court in oral arguments but not addressed in the opinion. Nevertheless, as Leisner points out, well accepted principles of public international law dictate that one nation state takes over the territory of another without being bound by any legal strictures whatever, so that West Germany was free to assume or deny any or all prior obligations incurred by the East German government.\textsuperscript{127}

2. Enforceability Within West Germany

With regard to the opinion's second premise, that the "land reform" laws could properly be enforced within the F.R.G., the Court glosses over the subtleties of the argument in a disturbing way. Leisner points out that article 6 of the German conflict of laws statute ("EGBGB") expressly prohibits application of foreign law where it is fundamentally at odds with "basic principles of German law," such as unconstitutional entirely apart from any consideration of the 1949 Basic Law, was broached by Friedrich Fromme in Einheit und alte Rechte. Fromme, supra note 46.

\textsuperscript{125} In upholding the constitutionality of the F.R.G.'s Vertrag über die Grundlagen der Beziehungen zwischen der Bundesrepublik Deutschland und der DDR of Dec. 21, 1972, the Supreme Court held:

The Basic Law, not merely a thesis of public international law, assumes that Germany (\textit{Das Deutsche Reich}) survived the collapse of 1945, and that neither the capitulation nor the exercise of foreign sovereignty by the Allied Occupation forces destroyed it; this is apparent from the preamble as well as articles 16, 23, 116 and 146. This also conforms to the consistent jurisprudence of the Supreme Constitutional Court, to which the panel today adheres. The German Reich continues to exist and retains legal personality; it is nevertheless not capable of acting because of its lack of institutional organization. The concepts of a pan-German people, and of the pan-German state authority are also "anchored" in the Basic Law.

The organization of the Federal Republic of Germany did not constitute erection of a new German state, but rather the reorganization of part of Germany. The Federal Republic is therefore not the "successor in interest" to Germany, but is rather identical with the state of "Germany" — with reference to its territorial boundaries, however, partly identical. . . . [The F.R.G.] limits its sovereignty to the area subject to the Basic Law, but feels itself responsible for all of Germany. . . . The German Democratic Republic belongs to Germany and cannot be considered a foreign state in regard to the Federal Republic.

\textsuperscript{126} Leisner, \textit{supra} note 116, at 1571.

\textsuperscript{127} \textit{Id.}
the basic rights set forth in the Constitution. In these situations, enforcement of foreign law is considered violative of the German ordre public. Although this argument was raised by the plaintiffs, the Court failed to discuss it in a meaningful way, noting casually that the ordre public forbids application of foreign law only in cases of a "current and domestic injury." The jurisprudence in this field is far richer than the opinion indicates.

In fact, “black-letter law” is that foreign expropriations without compensation are generally not recognized by German courts. The requirement that the confiscations have some domestic effect, i.e. that actual harm result within the territorial boundaries of West Germany, is usually gauged by reference to the citizenship of the complainant. Yet here, the injured original property owners were all German citizens, many of whom later became citizens of the F.R.G. Moreover, the grosser the violation of German principles of justice, the lessstringently the “domestic effect” requirement is to be applied.

Despite the opinion’s failure to address these important issues, the result here is correct according to Leisner. The conflict-of-law provisions of article 6 EGBGB must plainly yield to duly enacted provisions of the Basic Law. Recognition and enforcement of foreign law which facially violates the ordre public can be sanctioned by constitutional amendment, as was the case with the “land-reform” measures here at issue. If one agrees with the Court that “foreign sovereignty” was here at work, the Court’s holding that the German Parliament has power to recognize foreign confiscations which violate the fundamental rights of West Germans, provided that such expropriations are “constitutionalized” by appropriate amendments to the Basic Law, is clearly correct.

3. “Expropriation” or “Persecution?”

Despite the foregoing, the “Land Reform” decision does not confer upon the legislative branch of government unlimited power to sus-

128. Gesetz zur Neuregelung des Internationalen Privatrechts, 1986 BGBI. I 1142, 1143 (amending Einführungsgesetz zum Bürgerlichen Gesetzbuche) reads: “The laws of a foreign State shall not be applied when such application would lead to a result which is obviously and fundamentally irreconcilable with basic principles of German law. Such laws are particularly inapplicable when they are in conflict with the fundamental rights [enumerated in the Basic Law].” (author’s translation).
132. Leisner, supra note 116, at 1571.
133. Id.
pend rights whenever it can muster the majority needed to amend the Basic Law. The opinion clearly sets forth the limits to parliamentary power: the principle of basic human dignity as well as generally established German human rights concepts “necessary to the preservation of a decent social order.” Even amenders of the Basic Law must observe “fundamental principles of justice, such as equality before the law and the prohibition on arbitrary government action.”

Once the Court undertook to measure the constitutional amendments which confirmed the 1945-49 expropriations against this description of the Article 79, section 3 yardstick, it should have considered whether continued tolerance of the ownership structures established by the “land reform” was itself a transgression of human dignity and thus a violation of the human rights component of Article 14 expressly recognized in its jurisprudence. The Court, however, failed to do this in any organized manner. Instead, as Leisner notes, the Court merely hints at its positions in scattered dicta, without undertaking a systematic analysis. In response to the suggestion that denial of restitution of title violated the human rights component of Article 14, the Court remarks flatly that Article 79 requires no such restitution. The obvious question of whether some minimal compensation is at least due is not addressed by the opinion at all: rather, the text tersely notes that “burden-sharing” (Lastenausgleich) payments are sufficient, and that theoretically nothing prevents an owner from buying the property back again.

More problematic, however, is the Court’s response to the plaintiffs’ urgently argued contention that “land reform” was merely the most visible public expression of a campaign of persecution which itself constituted a severe violation of human rights and dignity. The opinion records the plaintiffs’ arguments that the expropriations were conceived, not essentially as property law measures, but rather as a means of serving the Marxist objective of the economic and physical destruction of the “property owning class.” The illegal confiscations, they argued, were now simply the ossified remains of this arbitrary brutality, which branded them as “class enemies” of the proletarian socialist revolution and reduced them to mere objects of State power. The expropriation “proceedings,” they claimed, violated the same fundamental principles of justice and human rights which

134. Decision, supra note 5, at C II(2)(a) (author's translation).
135. Id. (author's translation).
136. Id. at C II(2)(b)(cc)(3).
137. Id. at C II(2)(b)(cc)(2).
138. Id. at A IV(2)(a).
the Court itself recognized as limits on the amendment power of the legislature. Finally, they posed the question whether the takings in the Soviet Zone were not in actuality "persecutorial confiscations," which, according to established doctrine, differ from expropriations in that they are principally aimed at the individual, rather than the property being taken.\textsuperscript{139}

These allegations were neither contradicted by the defendant Bonn government, nor treated or even mentioned in the opinion. We must assume that they were rejected by the Court, which appeared to view "land reform" purely in terms of routine "expropriation." The opinion uses the word "confiscation" only once, within quotation marks and without apparent reference to the indicia of persecution essential to its character.\textsuperscript{140} It is indeed questionable whether, in the wake of this decision, the traditional concept of confiscation as "expropriation motivated by desire to punish or harm an individual" retains validity in German law.\textsuperscript{141}

Perhaps the most unsettling aspect of the opinion is the Court's failure to utter a single harsh word about the severe, often deadly, persecutions to which property owners in the East were subjected. Adopting a thoroughgoing relativism, it refers blandly to the "measures undertaken by German authorities which, in the opinion of the F.R.G., are to be considered illegal and unconstitutional."\textsuperscript{142} It appears to attempt to justify the persecutions in an astonishing passage claiming:

Our conclusion is undisturbed by the plaintiffs' objection that the takings were part of a radical transformation of social relationships on the model of a socialist order. It inheres in the character of such an order that little or no compensation can be given: otherwise the intended social revolution is spoiled.\textsuperscript{143}

The Supreme Constitutional Court has historically been anything but reticent in its condemnation of similar measures on the part of Germany's Nazi regime, declaring them "void ab initio for their manifest injustice, contradicting the first principles of the rule of law,"\textsuperscript{144} and judging the government's efforts "to destroy a group of citizens based on racial criteria" to be irreconcilable with law and justice.\textsuperscript{145}

\textsuperscript{139} See Leisner, \textit{supra} note 116, at 1572 n.37 and accompanying text.
\textsuperscript{140} Decision, \textit{supra} note 5, at C II(2)(b)(aa)(3).
\textsuperscript{141} Leisner, \textit{supra} note 116, at 1573 (author's translation).
\textsuperscript{142} Decision, \textit{supra} note 5, at C II(2)(b)(aa)(2) (author's translation).
\textsuperscript{143} Id. at C II(2)(b)(aa)(3) (author's translation).
\textsuperscript{144} Judgment of Feb. 28, 1955, GSZ, 16 BGHZ 350, 354 (author's translation).
With regard to the horrible persecutions attending "land reform," however, the justices had nothing to say.

Leisner notes that an important principle for adjudicating constitutionally guaranteed fundamental rights may be drawn from the Court's disturbing silence on this point. It appears to make a material difference under German law whether a group of individuals is persecuted because of (a) its racial/religious characteristics, or (b) its social class standing based on property ownership. Expropriations attending a "class struggle" may be analyzed under general property law principles, and, in doubtful cases, may be recognized and enforced in Germany under the rubric "actions of a foreign sovereign." This principle, of obvious application to Germany's asylum law, likewise indicates that only minimal weight should be attached to the human rights component of the property guaranty.

Given the assumption that the 1945-49 expropriations had no relation to "persecution," the "Land Reform" decision is internally consistent. But it establishes principles regarding fundamental judgments in property law cases which run diametrically counter to settled tenets of German law. Although events such as "land reform" are not likely to recur, the decision will certainly play a role whenever "transformations of the social order" are in question. Its effects on the future jurisprudence of Germany are thus incalculable.

4. "Burden-Sharing Payments"

Once the Court determined that the Unity Treaty provisions recognizing "land reform" did not constitute a violation of the human rights component of Article 14's property guaranty, the plaintiffs' claims to "compensation" under property law were plainly inadmissable. The litigants were left only with the possibility of "burden-sharing" entitlements under the Court's war reparations jurisprudence. According to the Justices, any claims of this nature arose solely out of the "value-system of the Basic Law, especially with regard to the principle of the 'social State' expressed in Basic Law Article 20." The essential elements of the "social State" principle are protected from amendment by Article 79, but, as Leisner notes, the Court draws the government's obligation to provide some kind of burden-sharing payment primarily from its consideration of the equal-

146. Leisner, supra note 116, at 1573.
147. See supra note 115 and accompanying text.
149. Decision, supra note 5, at C II(2)(b)(cc)(1) (author's translation).
ity principle. Since some form of compensation, in the broad, non-technical sense, had been allocated to all other affected groups, the Parliament could not deny minimal payment to "land reform" victims.

The logic of the opinion here necessarily leads to an astounding, though unstated, result: all legal provisions regarding restitution or compensation for East German real property takings, whether they occurred before or after 1949, are in essence "burden-sharing" regulations. They cannot be deemed to create conventional property law claims of the type arising out of expropriation. Yet, Leisner notes, the Parliament which approved the Unity Treaty and its related legislative acts plainly intended to, and understood itself to be, regulating expropriation claims. In its rush towards what many felt was a pre-determined result, the Court appears to have misapprehended the very nature of this legislation. The only explanation which can be gleaned from the opinion appears to be that

the Unity Treaty refused to recognize the post-1949 expropriations by the 'foreign sovereignty' because they violated fundamental rights; the drafters allowed article 6 EGBGB to protect the German ordre public in the normal manner. In doing this they adequately fulfilled their responsibilities regarding 'burden-sharing.' They were free, however, not to grant restitution/compensation of this type to the victims of 'land reform.'

Such is the tortuous logic required by the text.

Thus, according to the Court, once Parliament had granted such restitution/compensation as "burden-sharing" to people whose land was expropriated after 1949, it could not refuse "land reform" victims any compensation whatsoever. According to the Court, denial of restitution/compensation was fully justified in light of the U.S.S.R.'s demands, because noncompliance could have prevented unification. Yet, as Leisner points out, nowhere in the pleadings of the Bonn or Berlin governments does it appear that the Soviet Union voiced any objection to compensation; indeed, the concept of compensation is itself predicated on a valid expropriation, and it was precisely the validity of "land reform" expropriations that Moscow insisted on preserving. Nevertheless, the discrimination was upheld. The justices make plain that a violation of the equality principle of Article 3 in property cases is virtually impossible to establish; the Court's doctrine as set forth in

150. Id. at C III(1).
151. Leisner, supra note 116, at 1573-74.
152. Id. at 1574-75.
153. Id. at 1574 (author's translation).
154. Id.
this decision offers the legislature the broadest possible scope for discrimination. The Court even suggests the "lengthy time period intervening since the takings" as a reason for denying compensation to pre-1949 expropriation victims.\textsuperscript{155} The confident assertion of one German newspaper headline: "Massive Injustice Cannot Become Justice by Passage of Time,"\textsuperscript{156} appears to require some qualification under current German law.

The emerging democracies of eastern Europe are said to be carefully observing Germany as a pioneer in the "marketization" of a socialist command economy. The process, wherever it takes place, is bound to entail societal disruption and a great deal of human suffering. Despite the constraints of West Germany's unique history, there is certainly much to emulate in that country's approach. Few observers, however, would consider the "Land Reform" decision to have been the Supreme Constitutional Court's finest hour. The opinion's effects on asylum law, specifically on the relative weight to be accorded particular indicia of "persecution" necessary to support a claim, could be profound.\textsuperscript{157} The Court's acceptance of confiscatory measures as necessary tools for "radical social transformation" sounds a dark note of expediency in German constitutional adjudication, a note not unfamiliar to our twentieth century. It may be hoped that the opinion's Article 14 jurisprudence will be classified more as a one-time response to a unique and unrepeatable set of facts—as "coming to terms with the past"—than as considered and purposeful development of constitutional doctrine.

\textsuperscript{155} Decision, supra note 5, at C III(1)(a) (author's translation).
\textsuperscript{156} Kläger: Massenhaft begangenes Unrecht wird nicht durch Zeitablauf Recht, FAZ, Jan. 23, 1991, at 6 (quoting brief submitted by plaintiffs) (author's translation).
\textsuperscript{157} See supra note 115 and accompanying text.