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LEGAL-CONSTITUTIONAL DOCTRINES ON GERMANY'S POST-WORLD WAR II STATUS

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I

The task of legal-constitutional theories may be twofold: they may serve to explain some peculiar political situation or constitutional development; they may also serve as guideline or yardstick for political behavior and action. They are the product of some political-constitutional situation; subsequently they may become the basis of future policies. Such doctrines may shape political institutions, constitutional and international enactments, and help to form public policies.

Every government strives not only to be "legal,"— to conform to certain constitutional rules, irrespective of the origin of these rules —but also to be "legitimate," to be recognized as the only true and genuine government of the nation. Of course, the criterion for "legitimacy" may differ, which is why different groups may consider different governments "legitimate."

In the past, in many European countries so-called "legitimist" state doctrines opposed doctrines which gave preference to democratic principles of legitimacy. Revolutionary changes almost invariably led to doctrinal explanations and support of the new governments while other doctrines were upheld by others in support of the *ancien regime*. Not only internal public policies depended on the adoption or rejection of the legitimacy of one or other government but also international recognition, friendly or inimical attitudes of other governments hinged on the acceptability or inacceptability of the principles involved. In 1815 the Holy Alliance pledged not to recognize and to oppose governments which departed from the traditional monarchical principle of legitimacy. A number of foreign armed interventions were prompted by these and other legal-constitutional doctrines.

In France, legitimist principles of government juxtaposed throughout the 19th and early 20th centuries governments relying on "popular will"; in Britain, the struggle between Jacobites, relying on the doctrine of the "divine right of kings," and the theorists of

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the Bill of Rights and of parliamentary democracy fought one another for several decades. In Spain, the doctrine of succession as determined by the Salic Law was set against the right of the King and Cortes to determine royal succession and this conflict of principles originated the Carlist Wars.

But constitutional doctrines were not the exclusive preserve of royal absolutism versus the democratic principle. In the United States, the often theoretical struggle between the Federalists and the defenders of states' rights, between the Unionists and adherents of the doctrine of interposition and nullification, and the right to secession, eventuated the Civil War; it had not ended until recent years.[1] The potentialities inherent in the judicial review of conflicting federalist-versus-states' rights legislations, although not excluding resort to force, as during the Civil War, tended to enhance legalism in politics, and also to confer political functions to the courts.[2]

Nor was the United States immune from nationalist political doctrines: the concept of Manifest Destiny not only "overspread" the North American continent but also promoted American civilization and democracy in the Western hemisphere and elsewhere.[3]

Thus, Germany is not the only country where political issues were at times expressed and vindicated in terms of divergent constitutional-legal doctrines. The legal-international status of the Holy Empire, vis-a-vis its constituent members and the outside world, lent itself to various interpretations often exploited by expansionist member states and their greedy monarchs. The German Confederation (*Bund*), successor to the Empire (*Reich*) in the post-Napoleonic period similarly gave rise to various theoretical interpretations. Those in Frankfurt in 1848-49 who supported centralism and the establishment of a new *Reich* were liberals and nationalists; their opponents conservatives and promoters of "states' rights." The eventual "small German" solution supported and achieved by Bismarck, was the result of pragmatic politics and lacked an ideological basis. It was to be a "greater Prussia," the Prussian military and bureaucratic machine enlarged with permanent "confederates." The theoretical justification of its Constitution was merely that it "worked."[4] But this lack of a doctrinal basis of the unified Germany under Bismarck led to an intensification of the nationalist ideologies which became dominant under the young Kaiser in the form of Pangermanism, and after the collapse of the Weimar Republic, in the form of a racist-irrational Nazism.

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1. A good presentation of these theories is provided by Bennett, AMERICAN THEORIES OF FEDERALISM, 1964, *passim*.
2. See Havard, GOVERNMENT AND POLITICS OF THE UNITED STATES, 45-46 (1965).
3. See Kohn, AMERICAN NATIONALISM, 184, 189-190, 197-198 (1961).
4. Stern, THE POLITICS OF CULTURAL DESPAIR. A STUDY OF THE RISE OF GERMANIC IDEOLOGY, XXV (1961).

The Weimar Constitution of 1919, superseding the Bismarckian "alliance of princes," was a step toward a more unitary state system; but the member states (*Lander*) were to continue to exist with significant local powers. After debate, the Prussian super-state was left intact; it included about two-thirds of the territory and population of the Republican *Reich*. While it was debatable whether the 1871 German Empire was a *Staatenbund* (confederation of sovereign states) or a *Bundesstaat* (federal state), the Weimar Republic doubtlessly fell into the second type of decentralized governmental system. However, under Nazism, Germany became a *de facto* unitary state: *Gleichschaltung* (co-ordination) was implemented by the imposition of party hierarchy over administration, by merging state and *Reich* governments. While essentially maintaining the *Lander* as administrative units, political government was exercised through the administrative districts known as *Gaue* under the leadership of the *Gauleiter*, the personal representative of the *Fuhrer*. The *Third Reich* which, according to Hitler, was to last for a thousand years, suffered a cataclysmic destruction in World War II and with collapse of governmental power the chaotic vacuum of Germanism was inherited in 1945 by the victorious powers which dissected Germany into four Zones of Occupation.

II

The concluding Summit Conference of the war was held in Potsdam in the second half of July 1945. Germany, within her frontiers as they were on December 31, 1937—that is, before Hitler embarked on his road to conquest—was accepted "as a starting point" by the three leaders when they opened their discussion on how to handle the German problem. It should be remembered here that "Germany" had earlier different territorial meanings and passed through many metamorphoses: there was once a German Kingdom, the Holy Empire, and later the German *Bund*. There were long periods when Germany was, in reality, more a geographical than a political concept and, from 1806 to 1815, Germany, as a political entity was even formally non-existent.

Under the wartime agreements between the United States, Britain, and the Soviet Union defeated Germany was to be divided into three and with the later inclusion of France, four Zones of Occupation. Greater Berlin was to be under joint administration of the Four Powers. In the economic field, however, the Potsdam Protocol most emphatically decreed that: "During the period of occupation Germany shall be treated as a single economic unit." This principle was simultaneously infringed by the provisions which allowed the Soviet Union to satisfy its reparation claims by removals from its own zone of occupation while the United States, Britain,

and France were entitled to meet their reparation demands from the Western zones.[5]

Under the occupation statute Germany was to be governed by the Control Council, consisting of the representatives of the Four Occupation Powers. Of the three Potsdam Conference powers, the Soviet Union was most eager to proceed with the creation of a German central authority. But any such attempt was frustrated by the French veto. The French government refused to accept the provisions of the Potsdam Conference (where it was not represented) which foresaw the establishment of central departments and a central German government. A year after the end of the war the entire German question appeared to be caught in a vicious circle: the French refused the establishment of a central German administration and government, and insisted on a prior cession to France of the Saar and the Rhineland; the Russians refused preparations for a German Peace Treaty until a German government had first been set up. To go ahead with the creation of a central German administration by ignoring French opposition was vetoed by the British. While the Soviet Union paid lip-service to German unity, it prevented the management of Germany's economy as that of a single unit. For years this struggle between German state unity and fragmentation, and between economic order and chaos was fought until American initiative opened the road for economic and political rehabilitation of this country. Secretary of State Byrnes in his speech in Stuttgart on September 6, 1946, said that if "complete unification . . . of Germany's economy . . . cannot be secured, we shall do everything in our power to secure the *maximum possible* unification."[6] He also added that the German people, under proper safeguards, "should now be given the primary responsibility for the running of their own affairs."[7] The "maximum possible unification" was that of the American and British Zones, increased subsequently by the French Zone of Occupation. It was the area on which the Federal Republic of Germany was formed in 1948.

German autonomy in the Western zones was first conceded to the *Lander*. The Potsdam Protocol had provided that "the administration of affairs in Germany should be directed towards the decentralization of the political structure." The Four Powers were also in agreement that Prussia should be divided into her constituent units forming several *Lander*. After the economic unification of the Western Zones, failing Soviet co-operation, the Western Powers decided "to do it alone." At the London Conference in the spring of

5. Mason, "Has Our Policy in Germany Failed?" FOREIGN AFFAIRS, 579-590 (July, 1944-1961, p. 58.

6. Committee on Foreign Relations, United States Senate, *Documents on Germany*, 1944-1961, Washington, D. C., 58. (italics added).

7. *Id. at* 60.

1948 the Ministers-President of the *Lander* in the Western Zones were invited to convene a Constituent Assembly in order to prepare a constitution for the approval of the German states.

In order to challenge the impending political integration of the Western Zones of Germany, the Soviet Government stated on March 20, 1948, that because of independent Allied action "the Control Council virtually no longer existed as the supreme body of authority in Germany exercising quadripartite administration in that country." The Soviet representative thereafter left the Council which was never convened again. Thus the formal quadripartite Allied government had come to an end and the partition of Germany began to take constitutional forms.

The joint administration by the Four Powers of Berlin was also soon to be disrupted. The excuse for the Soviet government to withdraw from the Berlin Kommandature was the introduction of the new *Deutsche Mark* issued by the Western Powers to replace the devaluated *Reichsmark*. Again, for lack of Soviet agreement, the Western Powers had proceeded alone. The right to mint or issue money had always been considered an essential attribute of sovereignty; under the mixed system of authority in Berlin the issue of new money became the formal reason of the battle for Berlin. Not only the Allied administration of Berlin became split; the German City administration became, in consequence of Soviet pressures, divided into one exercising authority in the Western and the other exercising authority in the Soviet sector of Greater Berlin.

Though the Berlin blockade had failed, Germany and Berlin remained partitioned. While Berlin was isolated and supplied by air, on July 1, 1948, the three Western Military Governors called upon the Ministers-President of their respective Zones to convene a Constituent Assembly to draft a democratic constitution of a federal type "which is best adapted to the eventual re-establishment of German unity at present disrupted."

The West German political leaders had serious misgivings whether the establishment of a West German government would not jeopardize the chances of reunification, whether it would not rather strengthen and perpetuate Germany's partition. The advantages of creating - for the time being, as it was believed - a German government in the area of the three Western Zones were felt to outweigh the dangers. It was also thought that the compromise formula of creating only a "provisional" state would not foreclose the chances of reunification.

For all these reasons it was considered important that no definitive or permanent form should be given to the political unit to be established and that its provisional and territorially incomplete state should duly be emphasized. Therefore, the German leaders

objected to naming the assembly which was to draft the constitution a "Constituent Assembly" and the document to be drawn a "Constitution." Instead, they suggested calling the meeting "Parliamentary Council" and the constituent law of the new state: *Grundgesetz* (Basic Law). The Basic Law itself was to be submitted to the *Land* parliaments for approval rather than to a popular referendum as suggested by the Military Governors.

The issue of greater centralism as against larger competences to the individual *Lander* was again hotly debated when the Parliamentary Assembly met in Bonn on September 1, 1948. But the constant emphasis on the provisional character of the document to be accepted facilitated the reaching of compromises. The name given to the new political entity was Federal Government of Germany (*Bundesrepublik Duetschland*) instead of Federation of German States (*Bund deutscher Lander*) as proposed by "states' rights" minded representatives. The debates lasted until May 8, 1949, when the Parliamentary Council passed the Basic Law with 53 votes against 12. Approval by two-thirds of the *Lander* was required. All accepted it except Bavaria. Subsequently, when the Basic Law was passed by all other states, Bavaria also joined them.[8]

In East Germany, in view of Western developments, the Soviets undertook to organize their Zone into a state-like structure. A People's Council adopted a constitution in March 1949 modelled, strangely enough, after the Weimar Constitution of 1919 rather than after Communist constitutions. After the Bonn Goverment went into operation on the basis of the *Grundgesetz*, a new German People's Council, on October 6, 1949, reconstituted itself as the Provisional People's Chamber for the German Democratic Republic (the name given to the German state of the East).

As a result of political and administrative developments, by 1949 Potsdam Germany (the area subjected to Four-Power control) had become dissected into five parts: (1) the Federal Republic of Germany, (2) the German Democratic Republic, (3) West Berlin, under a Three-Power control, (4) East Berlin under direct Soviet control, and (5) the Saar Territory, under French control.

At the time of present writing, the political-administrative units in what used to be Potsdam Germany are reduced to three: East Berlin had been merged into the German Democratic Republic, the Saar was reunited with West Germany. The legal-constitutional theories are now called to explain the constitutional and international status of these units, their relations to the former *Reich*, their relations to one another, and their duration as provisional or permanent entities.

8. For the complete story of the creation of the West German state see Golay, THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY (1958); Merkl, THE ORIGIN OF THE WEST GERMAN REPUBLIC (1963).

III

The Basic Law was passed by the overwhelming majority of the Parliamentary Council and ratified by the parliaments of the *Lander*. It is thus reasonable to believe that its principles represent the quasi-unanimous consensus of the three major West German political parties and of the West German electorate. By its own terms, the Basic Law wishes to serve West Germany for a "transitional period" only; by declaring itself temporary in character it had enacted the fundamental goal and *raison d'etre* of the Federal Republic: to preserve the "national and political" unity of the German people.

According to its Preamble, the Basic Law was enacted by the German people in the *Lander* of the Western Zones and "also . . . on behalf of those Germans to whom participation was denied." The Preamble also called upon the entire German people "to achieve, by free self-determination, the unity and freedom of Germany." German politicians and publicists, therefore, do not fail to point out that the furtherance of Germany's reunification is, under the terms of the Basic Law, not only a political objective but also a duty prescribed by the provisions of this Law. It should be pointed out, however, that under German legal doctrine, the preamble of a statute is not "normative," only programmatic (political). It is, nevertheless, advanced with respect to the Basic Law that the injunction to promote reunification of Germany is still to be considered "normative" by the support it received in various articles of the main body of this constitutional document.[9]

The area of application of the Basic Law is not identical with the areas of the *Lander* which, according to the Preamble, participated in its enactment.[10] Article 23 mentions, in addition to the states of the Western Zones, "Greater Berlin" as one of the territories where the Law applies. In still other parts of Germany, "it shall be put into force on their accession."[11] The Basic Law may thus be extended to those parts of "Germany" where, because of the existing international situation, it could not be made applicable, and may become the constitution of reunited Germany. But the West German organic law also provided for its own replacement by a permanent constitution when it pronounced in Article 146 that it shall cease to be in force "on the day on which a Constitution adopted by a free decision of the German people comes into force."

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9. Grewe, DEUTSCHE AUSSENPOLITIK DER NACHKRIEGSZEIT 234 (1960); Schuster, DEUTSCHLANDS STAATLICHE EXISTENZ IM -WIDERSTREIT POLITISCHER UND RECHLICHER GESICHTSPUNKTE, 1945-1963, pp. 138-142 (1963).

10. These were: Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine-Westphalia, Rhineland, Palatine, Schleswig-Holstein, Wurttemberg-Baden and Wurttemberg-Hohenzollern.

Baden, Wurttemberg-Baden and Wurttemberg-Hohenzollern (formerly divided between the American and French Zones of Occupation) were united into the *Land* Wurttemberg-Baden; after the return of the Saarland, the Federal Republic consisted of ten (together with Berlin, eleven) *Lander*.

11. The English translation of the Basic Law is taken from CONSTITUTIONS AND CONSTITUTIONALISM (Andrews ed. 1961).

German political and legal scholars have pointed out that the Basic Law as well as the official political philosophy held by the Federal Government rest on three fundamental theses: (1) the continued legal existence of the German nation-state; (2) the territorial integrity of this Germany, as long as a Treaty of Peace, to be concluded with an all-German government, has not changed the territorial status quo; and (3) within the confines of this German state there exists only one legitimate state-structure and government—the Federal Republic of Germany and its government.[12] These are the principles which are generally accepted as guidelines of governmental policies with regard to the dismembered status of Germany. They, however, only partly explain the constitutional-legal and international legal status of those political entities which exercise governmental functions in the area of Germany. This peculiar status almost daily raises problems which have to be met by the policy-makers and also by the judiciary. Thus the circumstances surrounding divided Germany have engendered constitutional and legal polemics concerning the survival of the German state and the legal position of the two German governments, as well as the controversial situation of Berlin.

The constitutional-legal theories generally cover three specific controversial points which they undertake to explicate in terms of known constitutional or international legal tenets: (1) continuity or discontinuity of the former German *Reich*; (2) legal relationship of the Federal Republic with the former German state; and (3) the question of legitimacy of one, or more than one, German political entity. It is, of course, understood that the above mentioned three areas of controversial approaches often overlap or are logically dependent on one another.

(1) *Continuity or discontinuity*

The complete surrender of Germany, Allied assumption of integral control over the country, and the subsequent revival of a native governmental machinery gave rise to various doctrinal interpretations. Outside Germany (but also by a few German scholars) it was held that the German state, as a consequence of *unconditional* military and political surrender, had ceased to exist (discontinuity theories). But as to the post-surrender status of Germany, opinion varied from asserting

(a) the existence of an inter-Allied *condominium*[13] (that Germany had come under the joint sovereignty of the four Occupation Powers); or

(b) that Germany had become internationally a *terra*

12. Grewe, *op. cit., supra* note 9, at 95; Schuster, *op. cit., supra* note 9, at 261-262.
13. The chief protagonist of the condominium doctrine was Kelsen, *The Legal Status of Germany according to the Declaration of Berlin*, AMERICAN JOURNAL OF INTERNATIONAL LAW, 519 (1945); same author, PRINCIPLES OF INTERNATIONAL LAW 263 (1952).

nullius, that is no man's land, under international law.[14]

Others, mostly West German scholars, developed the doctrine of German state survival: the German state as a legal entity had never ceased to exist, it had only lost its self-governing capacity to the inter-Allied Government.[15] This view is said to have received official confirmation by the wording of the Four Power Declaration of Berlin, June 5, 1945, and also by the Potsdam Protocol.[16]

From these official texts and from the various statements of Allied leaders during and following World War II it appears that there never was any intention to annex (either by dividing her or by turning her into a condominium) Germany as a whole. International practice clearly indicates that it is correct to distinguish between the (temporary) exercise of sovereign powers and the fullness of sovereign authority owned by independent states. The concept of "occupation" also contradicts the thesis of complete loss of German statehood; one does not "occupy" one's own territory. On the other hand, it is also clear that German state power remained dormant for a number of years, that Germany was a ward in the hands of the occupying Powers which exercised full control internally and represented Germany externally.

If we assume, as we have to, that the German state did not cease legally to exist, the relationship between this German state and the new political entities has to be examined next. On the other hand, if we stand on the thesis that the German state has ceased to exist, the new political entities are to be regarded as new states, successors to the former *Reich*.

(2) *Identity, temporary substitution or succession*

Followers of the now prevailing "continuity doctrine" are divided

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14. Virally, DIE INTERNATIONALE VERWALTUNG DEUTSCHLANDS 29 (1948).

15. Among others, Kaufman, DEUTSCHLANDS RECHSTLAGE UNTER DER BESATZUNG (1948); Alfred Verdross, *Die volkerrechtliche Stellung Deutschlands von* 1945 *bis zur Bildung der westdeutschen Regierung*, ARCHIV DES VOLKERRECHTS, 129, 1951/52; Bathurst and Simpson, GERMANY AND THE NORTH ATLANTIC COMMUNITY, 188-195, 196-198 (1956); Theodor Eschenburg, DIE DEUTSCHE FRAGE-VERFASSUNGPOBLEMS DER WIEDERVEREINIGUNG (1959).

16. The Declaration of the Assumption of Supreme Authority by the Four Occupation Powers contained in its Preamble the following statements:

"There is no central Government of authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers."

"It is in these circumstances necessary, without prejudice to any subsequent decisions that may be taken respecting Germany, to make provisions for the cessation of any further hostilities on the part of German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply."

"The Governments of the United States of America, The Union of Soviet Socialist Republics and the United Kingdom and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. *The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany.*"

"The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory."

Committee on Foreign Relations, *op. cit., supra* note 6 at 13.

The Potsdam Protocol of Aug. 1, 1945, also emphasizes the "occupation" of Germany thus discarding any intention of annexation. It provided that *"for the time being, no central German Government shall be established."* *id.* at 32.

between those who identify the Federal Republic with "Germany," either by explaining its status

(a) as a "Germany," reduced in size (contraction theory) or

(b) as conterminous with the German state of 1937 but *de facto* prevented from exercising authority beyond its factual border (kernel or core-state theory).[17]

Protagonists of both above doctrines are again divided in their explanation of the legal status of Eastern Germany. This area is considered either

(a) as being under "foreign occupation" or

(b) a *terra nullius* (no man's land) under international law.

Others again operate with the so-called "roof" theory (*Dach Theorie*). This is a two-state doctrine but not one which is professed by the German Democratic Republic and the Soviet Union. The practical conclusions of this doctrine are not basically dissimilar from those of the single-state doctrines. This "unreal" two state theory differentiates between the still dormant all-German state (which used to be called the German *Reich*) and the rump state (Federal Republic) which functions within part of its territory. Under this conceptual approach, the all-German state has so far failed to recover its capacity to function, while the Federal Republic possesses almost all the prerequisites of a sovereign state and is, because of its democratic legitimacy, entitled to represent, as a kind of trustee, the still inactive all-German state. Accordingly, the Federal Government is thus one German government but not *the* German government and, at present, there is no other German government. The "so-called German Democratic Republic," according to this view, fails to possess the characteristics of statehood because of its complete lack of popular democratic legitimacy. This doctrinal explanation appears to be the official view of the Social Democratic Party on the legal status of Germany and of the Federal Republic.[18]

Finally, according to the theories which reject the continuity of Germany, the Federal Republic is regarded a new state, sole successor to the *Reich* but not identical with it.[19] Only the German nation has remained but not the former German state. Such a view, however, is by no means incompatible with the rejection of the legitimate

17. For a systematic presentation of these doctrines see Vocke, *Politische Gefahren der Theorien uber Deutschlands Rechtslage*, EUROPA-ARCHIV, 10199-10215 (1957); Schuster, DEUTSCHLANDS STAATHCHE EXISTENZ IM WIDERSTRIET POLITISCHER UND RECHLICHER GESICHTSPUNKTE, 1945-1963 (1963).

18. The principal proponent of this theoretical view is Arndt, DER DEUTSCHE STAAT ALS RECHTPROBLEM (1960); same author, *Deutschland als Warheit und Wagnis*, DIE ZEIT, (March 1954).

19. See Munch, *uur deutschen Frage*, in the volume GIBT ES ZWEI DEUTSCHE STAATEN*?*, 20-21 (1963).

existence of the East German state. The German Democratic Republic is only a *de facto* entity upheld by a foreign power. Still, according to another view, the German area east of the border of the Federal Republic is considered "unredeemed" (*irredenta*) national territory under foreign domination.[20]

The Basic Law, by its reference to "Germany," as distinguished from the Federal Republic (the reference to the *Reich* appears whenever the pre-1945 situation is meant), by its insistence on one German citizenship, by its claim to valid extension over the whole of "Germany," is said to be in conformity with the core-state doctrine (which is probably the one representing the views of the CDU/CSU governmental party) or an interpretation of the roof-state doctrine which would recognize limited statehood for the Federal Republic but deny it to the German Democratic Republic. The practical interpretations drawn from both these doctrines appear in the policy and statements of the Federal Government and of the major parties: the non-recognition of the East German state and the so-called Hallstein Doctrine. The constitutional-legal acceptance of the Federal Republic, as a continuing form of the German state created between 1867 and 1871 makes the demand for reunification more than a policy objective: it is the justification of the very existence of today's free German state.

Under the Basic Law there is only one kind of citizenship: German citizenship. There is no special citizenship reserved for the inhabitants of the Federal Republic. Therefore Germans from West Germany hardly ever call themselves "Federal Republicans" (*Bundesrepublikaner* or *Bundesburger*) but simply "Germans." Inhabitants of East Germany, wishing to differentiate themselves in third countries from those of the West, occasionally call themselves "Democratic Germans" which may give rise to some misunderstandings.

"Germany" in the meaning of the Basic Law, is the area which was the German *Reich* on December 31, 1937 (similar to the meaning of the word under the Potsdam Protocol). Citizens of the Reich, as it was at that date, their descendants and also refugees or expellees of German stock, are "Germans" within the meaning of the Basic Law.[21] It follows that no citizenship of the German Democratic Republic would be recognized by any agency of West Germany.

State names can have particular legal significance. It should be remembered that the West German state does not call itself

20. These various doctrines are represented by Reuther, BUNDESREPUBLIK DEUTSCHLAND UND DEUTSCHES REICH (1951) (secessionist doctrine); von der Heydte, *Deutschlands Rechtslage*, FRIEDENSWARTE, 323 (1950/51) (roof-theory); Rumpf, *Aktuelle Rechtsfragen der Wiedervereinigung Deutschlands*, EUROPA ARCHIV, 9723 (1957).

21. Art. 116, par. 1.

German Federal Republic but rather Federal Republic of *Germany* (while in East Germany no reluctance was felt to call their state *German* Democratic Republic). In German the difference is even more expressive: West Germany is *Bundesrepublik Deutschland,* instead of *Deutsche Bundesrepublik.* The Federal Republic's official name thus denotes its claim to represent all of Germany.

(3) *Legitimacy, singularity and two German states doctrine*

The reasons for West Germany's legal position of refusing recognition of statehood to the East German political unit has already been discussed together with the questions of identity. At this point, the legal arguments for the claim of the Federal Republic to be the only German state and its right to represent alone the German people are to be examined.

Immediately after the Soviet bestowal of sovereignty on the German Democratic Republic, the three Western Powers, in a joint statement issued by the three High Commissioners for West Germany, refused to recognize the change in status and declared that they would continue to consider the Soviet Union the Power internationally responsible for the "Soviet Zone of Germany."

The Final Act of the Nine-Power Conference held in London from September 28 to October 3, 1954, contained the following statement by the eight Western governments:

> They consider the Government of the Federal Republic as the only German Government freely and legitimately constituted and therefore *entitled to speak for Germany as the representative of the German people in international affairs.*

In return, the Federal Republic had declared:

> . . . never to have recourse to force to achieve the reunification of Germany or the modification of the present boundaries of the Federal Republic of Germany, and to resolve by peaceful means any disputes which may arise between the Federal Republic and other States.[22]

The Paris Treaty of October 23, 1954, which conferred sovereignty on Western Germany, furthermore provided:

> The Signatory States are agreed that an essential aim of their common policy is a peaceful settlement for the whole of Germany, freely negotiated between Germany and her former enemies, which should lay the foundation for a lasting peace. They further agree that the final determination of the boundaries of Germany must await such a settlement.

The Western Powers are thus bound not to recognize the East German state because such an international act would violate their

22. See von Oppen, (ed.) DOCUMENTS ON GERMANY UNDER OCCUPATION, 1954-1955, p. 600-609 (1955).

commitment to consider the Federal Republic of Germany as "the only German Government."

Although international lawyers disagree whether there is or can be under certain circumstances an obligation to recognize a new state or government, the practice of most states over the last fifty years demonstrates that recognition of states or governments is not considered an obligation but a political decision guided by considerations of foreign policy.

The recognition of the independence of a state which has seceded from another or which has arisen as a result of a dismemberment of a state poses problems which, in many respects, differ from those cases where recognition means formal acknowledgement of the existence of a state and the resumption of diplomatic and other relations with it. For a truncated state to recognize the sovereign existence of its severed member implies, *inter alia*, the final and irrevocable acknowledgement of its own dismemberment. There are historical precedents in which states have refused, for many decades, to recognize the loss of former territories.[23]

But West Germany not only refuses diplomatic communication with the German Democratic Republic; she denies its natural existence as an independent political entity. German legal and political theorists point out that under the generally accepted criteria of international law required for the existence of an independent state (territory, population and governmental authority), East Germany cannot qualify as a state. Though it has territory where to operate, it possesses no population willing to support this "state" (evidence for this is the constant mass exodus until the erection of the Berlin Wall and the revolt of June 17, 1953, suppressed by the Russians); its government is said to be "pseudo-autochthonous," in reality thrust upon the unwilling population by a foreign government; the government authority could not be maintained without the presence and support of the Soviet Army. It is thus, we are told, not the population which supports the regime but the Communist Party, disguised as a government, which controls the population by coercion.[24]

For the leaders of the Federal Republic, including the major political parties, neither a full (so-called *de jure*) nor a limited (*de facto*) diplomatic recognition of the East German regime is conceivable; even the mental acknowledgement of the existence of the German Democratic Republic as a normal "state" is rejected.

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23. For instance, Spain refused recognition to the secessionist Seven Provinces (Netherlands) from 1572 to 1648. China, the United States and other democratic powers, refused to recognize the Japanese puppet-state of Manchukuo (Manchuria) after its establishment in 1931. The Arab states have refused the recognition of Israel since its foundation in 1948. Neither South and North Korea, nor South and North Vietnam, nor the People's Republic of China (Peking) and the Republic of China (Taiwan), all partitioned or truncated states, recognize one another.

24. See, e.g., Stein, *Ist die 'Deutsche Demokratische Republik' ein Staat?* 85 ARCHIV DES OFFENTLICHEN RECHTS, 363-391 (April 1961 (4).

That is why official circles in West Germany warn against "upgrading" the "Soviet Zone," that is, acknowledging it, not diplomatically, but in its physical existence as a "state." This is a far cry from even *de facto* diplomatic recognition.

In the light of the West German state doctrines, any kind of recognition or near-recognition of the East German state would be an abandonment of the claim to German unity. It would be—according to these views—a violation of the fundamental principles which the Federal Republic professes, a denial of the *raison d'etre* of the West German state. To accept the legitimate existence of the German Democratic Republic would be an open breach of the West German constitutional system embodied in the Basic Law. Under its own constitutional rules, the Federal Republic considers itself the sole legitimate state in the German area and the only spokesman in behalf of the German people.

In the case of the Federal Republic, the legal reasons for non-recognition of the East German state are much more profound and theoretically substantiated than for instance, those which the United States alleges against the recognition of Communist China. In international law and diplomacy one of the non-aggressive weapons is non-recognition; the state or government whose legal existence or legitimacy is denied or doubted is officially though not literally ignored. This may cause inconveniences to both parties. Whether one's own disadvantages outweigh those of the non-recognized state is a point of expediency not one of law.

The Federal Republic maintains manifold contacts with East German authorities though it is very careful to keep these contacts on a lower or technical level; they are restricted to exchanges between railroad, postal, and other technical administrations. For trade and other administrative contacts with East Germany a special non-governmental agency is being maintained in Berlin. All these contacts, seemingly conflicting with the thesis of non-recognition, are supported by the prevailing legal doctrine: the Federal Republic while insisting on the legal non-existence of an East German state also insists on the continued existence of Germany as a whole. It wishes to preserve unity of Germany, as far as feasible, but desires to isolate the East German regime. Therefore Bonn opposes trade of other Western countries with the German Democratic Republic but continues to maintain trade contacts itself: theoretically, it only carries on business within "Germany." If all this appears inconsistent, it is simply due to the ambiguities of the situation and the unavoidable ambivalence of a doctrinal position which implies seemingly inconsistent courses of action.

It is not for the first time that legal concepts appear fictitious. German unity, the continued existence of Germany, and the legal

non-existence of an East German political entity are fictions. But both the West Germans and the Allies have decided to operate with these fictions because they consider them useful, expedient, and necessary. Legal fictions may perform wholesome tasks in international life as they do in the domestic field; they may help to support what is considered right and just. West German legal scholars submit that the pretense of running a democratic state in the East is more mendacious, and therefore fictitious, than their assumption of the unity of Germany. In their view the German Democratic Republic is the real fiction: it is neither "German," nor "Democratic," nor even a "Republic."

The Western Powers and all the signatories of the revised Brussels Treaty have endorsed the thesis that the government of the Federal Republic is the only legitimate government *in* Germany. The relevant declarations always speak of the Federal Republic as the government "in" and not "of" Germany. This subtle differentiation may indicate that there might be one day another legitimate government *in* Germany. Or, it may also indicate the support for the thesis that there is a theoretical, now dormant, all-Germany, and the Federal Republic, within the area of its own jurisdiction, is the ersatz government as long as the present provisional situation lasts.

Thus, the doctrine and practice of the singularity of the German state, as embodied in the Federal Republic, diametrically oppose the theory of two German states, three if we include Berlin, which is the official and doctrinal prevailing thesis of the East German regime and its supporter, the Soviet Union. The doctrinal interpretation of the German Democratic Republic by its own leaders and jurists is an image of the ambivalent attitude displayed by the Soviet Union in its German policy.

IV

In 1949, when the German Democratic Republic was formally established, it wished to consider itself as the "core" of an all-German state. In 1950, the official attitude held the thesis that two new states had emerged within the area of Germany and, therefore, the German Democratic Republic was not even a successor-state to the Reich. (This is similar to the early position of the Soviet state disclaiming any successorship to Tsarist Russia). After 1955, however, the now "sovereign" East German state claimed the Democratic Republic together with the Federal Republic were joint successors to the former all-German state.

Thus, in the first phase, the East German government recognized the continuity of Germany after the collapse in 1945; in the second phase all continuity was rejected; in the third and present phase,

domestic discontinuity but international continuity, in the form of successorship, is being claimed.[25]

The thesis of complete discontinuity, if upheld, would have contradicted the Soviet demand for conclusion of a Peace Treaty (there being no need to conclude such a treaty with a "new" state) and would have barred the German Democratic Republic from any claim to properties or assets of the *Reich* abroad.[26]

The theoretical basis of the East German legal position (whichever position it may be) is anchored in the Marxist-Leninist doctrine of state. The state being, by this view, a power-structure serving the purposes of the "ruling class," the state itself undergoes a change whenever another "ruling class" takes over. The German Democratic Republic, it is claimed, is a country where the proletariat has seized power, and therefore it is a "new" state. Nevertheless, internationally, it is a member of the international community.

The text of the East German Constitution does not, in many essentials, harmonize with constitutional reality and the two-state theory. According to its Preamble, "The German People has given itself a Constitution." Article 1, paragraph 1, announces that "Germany is an indivisible democratic Republic; she is formed by the German *Lander*."[27] Article 1, paragraph 4, provides: "There is only one German citizenship." Article 118, paragraph 1, states that "Germany forms a unitary customs and trade-area, surrounded by a common customs-frontier." Thus, the Constitution distinguishes between "Germany" (meaning all Germany, without closer territorial definition), the "Republic" (meaning the German Democratic Republic), and the *Lander*."

The Constitution of the German Democratic Republic has only been slightly amended since its adoption. Indeed, it could well have been replaced by a new one better suited to the requirements of the East German Communist state. Failure to do so may be explained by the ideological disdain of the Communists for constitution and law in general; but it may also have reflected a wish to leave the door open for reunification. It should be remembered that the present Constitution was originally intended to become the constitutional instrument for a unified Germany; thus it was tailored to suit the legislative requirements of the entire country. A constitution based more on the realities of the Communist Party state (copied after the Stalinist Constitution of 1936, as were most of the constitutions

25. See Schuster, *op. cit supra* note 9 at 164-172.
26. See Mampel, DIE VERFASSUNG DER SOWJETISCHEN BESATZUNGSZONE DEUTSCHLANDS, 17-18 (1962). The Federal Republic, unlike the D.D.R., not only claims to be the (sole) successor to the Reich (or, according to other views, to be identical with it) but was ready to assume liabilities of pre-war and Nazi Germany by paying debts and indemnities.
27. The Soviet Zone and the German Democratic Republic consisted originally of five *Lander* (Brandenburg, Saxony, Thuringia, Saxony-Anhalt and Mecklenburg). In 1952, however, the *Lander* were (without the required constitutional procedure) dissolved and East Germany divided into 14 administrative districts.

in the East European People's Democracies) might have discouraged all opportunities for establishing a Confederation of the German states or any other organized collaboration between the two severed parts of Germany, as had frequently been proposed by Moscow and the East German leaders. Accordingly, the German Democratic Republic, while advertising the two-state or, more recently, the three-state (including West Berlin) theory, has not given up its pretenses to becoming a partner or constituent part of a united Germany.

The paradox of the German situation is well revealed by the nature of the West and East German constitutions: the former is intended to be a transitional, provisional legal instrument in expectation of reunification; the latter is a definitive constitutional document, intended for Germany as a whole, but serving a political entity which is officially (though not finally) committed to German separatism.

V

The controversial legal status of Berlin lends itself to conflicting doctrinal interpretations: one may distinguish between West German, East German, and Allied positions.

(1) Under Article 23 of the Basic Law its provisions apply in "Greater Berlin." According to the official West German view, sanctioned by the courts, Berlin is a *Land* of the Federal Republic. It is, however, admitted in deference to actual practice, that the application of the Basic Law and of West German law, in general, is *de jure* restricted by the continued exercise of authority by the Occupation Powers in West Berlin. Territorially, these applications are also limited by the *de facto* division of Greater Berlin.

Just as the Federal Government considers itself the only legitimate government of Germany, the Magistrate of (West) Berlin regards itself the only legitimate municipal authority of Berlin. The Governing Mayor of Berlin claims to have jursidiction over the entire Greater Berlin area, even if temporarily prevented from exercising such authority in the Eastern sector of the city.[28]

(2) Article 2, paragraph 2, of the East German Constitution of October 7, 1949 provided that: "The capital of the Republic is Berlin." The German Democratic Republic was formed on the territory of the Soviet Zone of Occupation, and Berlin was, under the agreement between the United States, Britain, and the Soviet Union of September 12, 1944 (to which, subsequently, France also adhered), an area to be administered jointly by the four Occupation

28. See Plischke, GOVERNMENT AND POLITICS OF CONTEMPORARY BERLIN, especially pp. 63-74 (1963); Schuster, DEUTSCHLANDS STAATLICHE EXISTENZ IM WIDERSTREIT POLITISCHER UND RECHTLICHER GESICHTSPUNKTE, 1945-1963, pp. 103-106 (1963).

Powers. The Communist legal interpretation of Berlin's status is not entirely consistent. It was maintained that Berlin, as a whole, belonged to the D. D. R. until the Soviet-East German friendship treaty of June 12, 1964 introduced a new view by declaring that West Berlin is an "independent political unit."

According to views set forth in East German publications, Greater Berlin originally belonged to the Soviet Zone; the three Western Powers were subsequently given a right of administration in their respective sectors but they failed to obtain "sovereignty." The Western Powers, by their violation of the Potsdam Agreement (or other agreements pertinent to the Four-Power status of Germany) forfeited their rights to be in Berlin. When the Soviet Union transferred its sovereign rights over the Soviet Zone to the German Democratic Republic the entire area of Berlin became part of this state. Consequently, the Western Powers remain in their sectors of Berlin only "by sufferance" or "toleration" of the German Democratic Republic.[29] Inconsistent with this opinion is Ulbricht's view that the border between East and West Berlin is a "state frontier."[30]

The municipal authorities of East Berlin claim jurisdiction for the entire Berlin area though their authority does not extend beyond the Wall. On the other hand, from 1955 on East Berlin has been integrated into the German Democratic Republic and considered as a special District (*Bezirk*).[31] In October 1958 Ulbricht stated that the "democratic" section of Berlin was no longer subject to any military occupation.[32] On August 23, 1962 even the office of the Soviet Commandant in Berlin was abolished.

The second campaign for Berlin, initiated by Khrushchev in November 1958 relied theoretically on the contention that all Greater Berlin is part of the D. D. R. The Soviet leader's address before the Polish state delegation inveighed against the violations of the "Potsdam Agreement" by the Western Powers and insisted that the obligations derived from this agreement "had outlived themselves:"[33]

The time has obviously arrived for the signatories of the

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29. See Herbert Kroger, *Zu einigen Fragen des staatsrechlichen Status von Berlin*, DEUTSCHE AUSSENPOLITIK, January 1948; Wewjura and Lukashuk, *International Legal Aspects of the West Berlin Problem*, INTERNATIONAL AFFAIRS, 1963, No. 4, pp. 37-42.

30. See Walter Ulbricht's speech at the XVII German Workers' Conference, Leipzig, March 9, 1963; *Politische Studien*, 333 (May-June, 1963).

31. DOKUMENTE ZUR BERLIN-FRAGE, 1944-1961, pp. 251-296 (1962).

32. *Op cit* p. 296, but Khrushchev in his speech of November 10, 1958, threatened to hand over to the D.D.R. "the functions in Berlin that are still exercised by Soviet agencies." Embree (ed.), THE SOVIET UNION AND THE GERMAN QUESTION, 19 (1963).

33. In referring to the Potsdam Agreement Khrushchev committed a *gaffe* which was exploited by Secretary of State Dulles in his news conference when the latter stated:

". . . it seemed as though Mr. Khrushchev had spoken initially without the benefit of legal advice which is, of course, a very bad thing to do that he has based his case upon alleged breaches of the Potsdam Agreement."

"Now, the rights and status of the allies in Berlin and the responsibilities and obligations of the Soviet Union do not in any way whatsoever derive from the Potsdam

> Potsdam Agreement to renounce the remnants of the occupation regime in Berlin and thereby make it possible *to create a normal situation in the capital of the German Democratic Republic.*[34]

Khrushchev's error in referring to the wrong document with regard to Berlin was corrected in the Soviet diplomatic note of November 27, 1958. Here the Soviet Union formally denounced the Agreement of September 12, 1944, concerning the Zones of Occupation and the administration of Greater Berlin, and suggested that

> . . . the most correct and natural way to solve the problem would be for the Western part of Berlin, *now actually detached* from the German Democratic Republic, to be reunited with its eastern part and for Berlin to become a unified city within the state *in whose territory it is situated.*[35]

But the Soviet note wished to acknowledge the development of West Berlin, so different from that of the Eastern part of that city, and also the desire of the West Berliners to preserve their present way of life. Accordingly the proposal of the Soviet Government for West Berlin ran as follows:

> . . . in view of all these considerations, the Soviet Government on its part would consider it possible to solve the West Berlin question at the present time by the conversion of West Berlin into an independent political unit—a free city, without any state, including both existing German states, interfering in its life. Specifically, it might be possible to agree that the territory of the free city be demilitarized and that no armed forces be contained therein. The free city, West Berlin, could have its own government and run its own economic, administrative, and other affairs.[36]

The Soviet note further expressed the view that

> . . . the German Democratic Republic's agreement to set up *on its territory* such an independent political organism as a free city of West Berlin would be *a concession, a definite sacrifice* on the part of the German Democratic Republic for the sake of strengthening peace in Europe, and for the sake of the national interest of the German people as a whole.[37]

Agreements. Indeed that subject is, I am told by my own legal adviser, not even mentioned in the Potsdam Agreements. . ."

" . . . if the Soviet Union takes the position that the Potsdam Agreement is nonexistent, the consequences of that would be not to destroy our rights in Berlin, because they don't rest upon the Potsdam Agreement at all, but it might greatly compromise the territorial claims of Poland which do rest upon the Potsdam Agreement primarily." U. S. Department of State and Staff of Senate Committee on Foreign Relations, 87th Congress 1st Session, DOCUMENTS ON GERMANY, 1944-1961, pp. 346-237 (1961).

34. DOCUMENTS ON GERMANY, 1944-1961, *op. cit., supra* Note 9 at 342. (italics are added).

35. *Id.* at 359 (italics are added).

36. *Id.* at 360.

37. *Id.* at 361 (italics are added).

The West German and the Communist views on the status of West Berlin and of Berlin, as a whole, are in direct conflict. And opposed to the Communist position is the Western view, itself not totally consistent with the official doctrine of the Federal Republic.

(3) Under the "Protocol on Zones of Occupation and Administration of the 'Greater Berlin' area" of September 12, 1944, the United States, Britain, and the Soviet Union (and subsequently France) agreed that Germany would, for the purposes of occupation, be divided into three (subsequently four) zones, to be allotted to each of the three (four) Powers, and "a special Berlin area, which will be under joint occupation by the three (four) Powers."[38] The Four-Power statement of June 5, 1945 on Zones of Occupation in Germany further clarified the situation of Berlin:

> The area of 'Greater Berlin' will be occupied by forces of each of the four Powers. An Inter-Allied Governing Authority (in Russian, Komendatura) consisting of four Commandants, appointed by their respective Commanders-in-Chief, will be established to direct jointly its administration.[39]

On the basis of these unequivocal texts the Western Powers have denied that any part of Berlin was ever part of the Soviet Zone of Occupation. The Western Powers gained occupancy of their sectors in Berlin in return for the withdrawal of their forces from the zone allotted to the Soviets in July 1945. In addition to their treaty rights, the Western Powers also derive their status in Berlin from a right of conquest, that is, their right to participate in Germany's occupation with sovereign authority as a result of Germany's military defeat and unconditional surrender. This would imply that the Allied status in Berlin is not *derivative*, transmitted by either the Germans or the Russians, but, under international law, an *original* right of sovereign power. Such a right can neither be forfeited nor lapse except by voluntary relinquishment or mutual agreement. The Western Powers maintain that their right to stay in Berlin is independent of the survival or efficaciousness of the Potsdam Agreement or any other Inter-Allied agreement. They also deny that any of their actions have given cause for the denunciation of these agreements.[40]

The Soviet-East German contention which attempts to differentiate between "exercise of supreme authority" and "administration," the first being vested in the Commanders-in-Chief of the Zones of Occupation, the latter carried out by the Berlin *Kommandatura*, is

38. *Id.* at 1.
39. *Id.* at 19.
40. See THE ISSUES IN THE BERLIN-GERMAN CRISIS, with contributions by Bowie, Conant, Debevoise, McCloy, Munroe, and Schwarz, (The Hammarskjold Forums), 24-39.

based on a one-sided reading of the relevant texts and rejected by the Western Powers.[41]

In the view of the Western Powers, the Soviet withdrawal from the *Kommandatura* in 1948 did not destroy the authority of this organ; according to this view, the administrative machinery under the quadripartite agreements cannot be abolished without the approval of the three Western Powers. The *Kommandatura*, reduced to the representatives of the three Western Allied and *de facto* limited in its exercise of functions to the three Western sectors of Berlin, continues to act under the war-time and postwar arrangements. It considers the Soviet seat vacant and to be filled at the will of the Soviet Commandant of Berlin. When, on August 23, 1962, the Soviet Government announced the abolition of the office of Soviet Commandant in Berlin (though certain "limited functions" were still to be continued by the Soviet Army), the three Western Powers protested and declared that such a unilateral renunciation could not impair the rights of the Allies in the city. Furthermore, the Western statement emphasized that

> . . . the Soviet announcement can in no way affect *the unity of Berlin as a whole*. Despite the illegality of the wall and the brutality of the East German authorities in preventing the inhabitants of East Berlin from leaving that area, Berlin remains a *single city*. No unilateral action by the Soviet Government can change this.[42]

From the Western point of view, the administrative incorporation of East Berlin into the German Democratic Republic was illegal and a breach of the Berlin Agreements. Similarly, the entry of East German armed forces (which raised and protected the Berlin Wall) was a violation of these agreements.[43]

At times, the Soviet military authorities attempted to regain a foothold in the administration of West Berlin but the Western Allies would only agree if the Soviet Union acknowledged that East Berlin, too, was subject to four-power control.[44]

The Allied persistence in holding strictly to the letter of occupation rights in Berlin has occasionally created friction between the Western Commandants and the Berlin and Bonn authorities. To

41. The Allied statement on "Control Machinery in Germany," dated June 5, 1945, provided for the "administration of Greater Berlin" whereas the Control Council, composed of the four Commanders-in-Chief, was designated, by the same instrument, to exercise supreme authority. However, the Allied statement of the same day (see above) spoke of *occupation* by the Allied forces of Berlin, the same term used for the taking over of the Zones by the Allied. The Soviet argument is also refuted by the text of the September 12, 1944, agreement on the occupation of Germany. See Legien, THE FOUR POWER AGREEMENTS ON BERLIN, 11-12 (1961).

42. New York Times, August 24, 1962, p. 2, col. 4. (italics added).

43. The Soviet Government lodged protests against alleged recruitment of West Berliners into the West German *Bundeswehr*, protests rejected as unwarranted by the Allies. Similar protests were launched by the West against recruitment into the East German *Volksarmee* in Berlin and the entry of such forces into East Berlin; DOKUMENTS ZUR BERLIN-FRAGE, 1944-1966, pp. 442-446.

44. New York Times, December 12, 1964, p. 1, col. 3.

safeguard their authority the Western Powers refused to recognize Berlin as the twelfth *Land* of the Federal Republic of Germany. Thus the Three-Partite *Kommandatura* refused on August 29, 1950, to approve paragraphs 2 and 3 of Article 1 of the Constitution of Berlin. The two paragraphs declared respectively that "Berlin is a *Land* of the Federal Republic of Germany," and that "the Basic Law and Laws of the Federal Republic of Germany are binding in Berlin."[45] Any act passed by the Berlin House of Representatives had required approval by the *Kommandatura* before becoming effective. Under the practice developed as a consequence of the Allied refusal to accept Berlin as part of the Federal Republic, the Berlin Parliament now formally endorses the laws passed by the legislature in Bonn, which thereafter obtain the approval of the Allied *Kommandatura*.

Before 1958 the *Bundestag* held sessions in Berlin once in each legislative term in order to demonstrate the city's symbolic significance as the historical capital of Germany. After the opening of Khrushchev's campaign against Berlin, Allied intervention temporarily prevented the holding of further parliamentary sessions in Berlin. But the "right" of the *Bundestag* to sit in Berlin was formally upheld.

West Berlin is represented by eight deputies in the *Bundestag* of Bonn; they exercise a purely consultative function.[46] Strangely enough, despite the total integration of East Berlin into the German Democratic Republic, the thirteen deputies of Berlin have no voting rights in the *Volkskammer* which holds its sessions in East Berlin.[47]

Although the Soviet Union has at different times proposed to clear away "the residue of World War II," and moved in this direction, the Russians have still been reluctant to eliminate certain remnants of the defunct quadripartite occupation regime. These are:

(1) The Inter-Allied Air-Safety Center which regulates air traffic between West Berlin and the Federal Republic;

(2) the International War Crimes Prison in Spandau (West Berlin) where soldiers of the four Powers take turns in guarding the remaining three prisoners;

(3) the Soviet cenotaph in the British sector of West Berlin, guarded by Soviet detachments;

(4) the Allied Military Commission in Potsdam (East

45. DOKUMENTE ZUR BERLIN-FRAGE 154-155.

46. Electoral Law of June 15, 1949; DOKUMENTE ZUR BERLIN-FRAGE, 133.

47. Law concerning the elections to the *Volkskammer* of August 9, 1950, Article 49; subsequent electoral laws did not reiterate expressly that Berlin representatives have consultative rights only, but they are still separately elected. Since there is in practice no voting in the *Volkskammer* the voting rights play no role whatsoever; DOKUMENTE ZUR BERLIN-FRAGE, 199, 191; Mampel, DIE VERFASSUNG DER SOWJETISCHEN BESATZUNGS-ZONE DEUTSCHLANDS, 24-25, (1962).

Germany) and the Soviet Military Commission in Frankfurt/M. in the Federal Republic.

Other, more important souvenirs of the post-war military regime affect the field of transportation and travel. Besides the access rights to Berlin, Allied military personnel still exercise their right of free circulation in East Berlin and in East Germany; conversely, the Russians have similar rights in West Berlin and in the territory of the Federal Republic.

In a declaration of 1952, reiterated at the time of the Paris agreements of 1954, the Federal Republic promised financial assistance and economic aid to Berlin. It pledged further "to ensure the representation of Berlin and of the Berlin population outside Berlin, and to facilitate the inclusion of Berlin in the international agreements concluded by the Federal Republic, provided that this is not precluded by the nature of the agreements concerned."[48]

By virtue of this agreement, the Federal Government represents the interests of (West) Berlin internationally as well as those of its residents. The Federal Republic's trade agreements invariably include a "Berlin clause" which, not surprisingly, has created difficulties with Bonn's Communist trade partners. However, upon the Federal Government's insistence, Poland, Rumania, Hungary, and Bulgaria have agreed to a text which, instead of directly mentioning Berlin, recognized Bonn's right to represent the "*Deutsche Mark* (West) area."[49] Since such a clause is a practical recognition of West Germany's rights over Berlin, the Soviet refusal to accept this formula has impeded Moscow's trade and cultural relations with Bonn.[50]

Inhabitants of West Berlin use passports of the Federal Republic when travelling abroad; but they cannot identify themselves with such passports when entering or passing through East Germany or East Berlin. Federal Republic passports of West Berliners had been frequently confiscated by agents of the German Democratic Republic. East Berliners use East German passports, but only outside West Germany or West Berlin, where they need to show their identification papers and require no special entry or exit permits.

It should also be remembered that West German trade pacts (concluded on behalf of West German trade interests by the "inofficial" *Treuhandstelle Fur Interzonenhandel* in West Berlin) with the German Democratic Republic also include West Berlin. East German negotiators have tried several times to exclude West

48. von Oppen, DOCUMENTS ON GERMANY UNDER OCCUPATION, 1945-1954, 631-634 (1955).

49. In November, 1964, the Soviet Government refused to accept the West German ratification documents of the nuclear test ban treaty because they provided for the inclusion of Berlin into the operational area of the treaty; New York Times, November 29, 1964, p. 53, col. 1.

50. New York Times, June 6, 1964, p. 2, col. 1.

Berlin from such agreements and conclude conventions directly with representatives of West Berlin. Occasionally, the Federal Republic has had to make sacrifices in the bargaining procedure for retaining the Berlin clause. The trade agreements also provide guarantees for the travel of West Germans to and from West Berlin; but thus far it has not been possible to extend similar general safeguards for the inhabitants of the Western sections of Berlin.[51]

The theoretical and practical legal problems of Germany's partition are compounded by involved conflicts between theory and practice in Berlin. Both East and West Berlin pretend to be "Greater Berlin"; the Federal Republic claims to be the sovereign power of all Berlin, while the German Democratic Republic claims the same sovereignty for itself. And the Western Allies consider all of Berlin to be under the control of the *Kommandatura*, a three-Power agency in reality, a four-Power agency in theory. These theoretical divisions and their fictional character were accentuated when the city became physically divided by the Wall in 1961.

The Western Occupation Powers refused to acknowledge any change in the status of Berlin, as they conceived it, despite the Wall and the liquidation of the office of Soviet Commandant in Berlin on August 23, 1962. The Three Occupation Powers promptly issued a communique stating that the abolition of the post of Soviet Commandant did not destroy the authority of the *Kommandatura* and asserting that

> . . . the commandants in the Western sectors of Berlin will continue to exercise their rights and discharge their responsibilities both in their individual sectors and jointly in the Kommandatura in accordance with long established procedures and agreements. *They will continue to consider the Soviet officials as responsible for carrying out their obligations regarding the Soviet Sector of Berlin.*[52]

The Soviet campaign against West Berlin abated by 1964. After the second Cuba crisis no major move took place, no new deadlines were set and little was heard of the threat to conclude a separate peace treaty with the German Democratic Republic. The final anti-climax came in June 1964 when the Soviet Union concluded a Treaty of Friendship, Mutual Assistance and Co-operation with East Germany. Before the signature of this instrument in Moscow, the Kremlin gave official notice to the Western Powers that the treaty to be signed would not be the oft-threatened "Peace Treaty" abolishing Western rights in Berlin, including the access rights.[53]

The treaty signed by Khrushchev and Ulbricht on June 12, 1964,

51. New York Times, January 23, 1964, p. 7, col. 1.
52. New York Times, August 24, 1962, p. 2, col. 4. (italics added).
53. New York Times, June 12, 1964, p. 1, col. 1.

contained nothing of a revolutionary nature. The signatories promised to work

> . . . for the elimination of the remnants of World War II, for the conclusion of a German Peace Treaty and for the normalization of the situation in West Berlin on this basis.[54]

The Treaty, once more, guaranteed the "inviolability" of the borders of the German Democratic Republic (which had already been guaranteed by the Warsaw Treaty of 1955) and confirmed the opinion that

> . . . the creation of a peace-loving democratic united German state can be achieved only through negotiations on an equal footing and agreement between both sovereign German states.[55]

As for Berlin, the Treaty merely affirmed that:

> The High Contracting Parties will regard West Berlin as an independent political unit.[56]

Thus the Treaty in no way suggested that West Berlin was part of the German Democratic Republic. That Khrushchev had no intention to confer further rights on the East German state, and that no *de facto* change in existing arrangements was planned is made evident by this provision:

> The present Treaty does not affect the rights and commitments of the Parties under the bilateral and other international agreements which are in force, including the Potsdam Agreement.[57]

It may be assumed that this text relates to the rights of control which the Soviet Union had reserved for itself when the German Democratic Republic was granted sovereignty. Thus the Treaty has implicitly given up the earlier thought of extending East German rights to the Western access routes to Berlin.

The basic policy goals of both the Federal Republic and the German Democratic Republic are supported and inspired by the constitutional-legal doctrines relative to Germany's present status.

Constitutional-legal theories spur the momentum of politics by mingling political expediency with juridical arguments. In a country like West Germany, where the majority of the civil service, the staff of their Foreign Office, and a great many politicians and publicists receive legal training, constitutional theories supporting the idea of German unity—even if they are not always understandable to

54. The Treaty is printed in New York Times, June 13, 1964, p. 2, col. 3.
55. *Id.* at p. 2, col. 3.
56. *Ibid.*
57. *Id.* at p. 2, col. 4.

the ordinary laymen— are of considerable political and practical importance. Statements made by the Federal Government, diplomatic notes of the German Foreign Office, arguments advanced by German legal scholars, writers and journalists are today under the influence of the prevailing doctrines relative to Germany's international and constitutional legal status.

It is only natural that the Communist side has also developed its own doctrinal legal explanations for the support of their political positions and in refutation of the Western theses.

A political-legal doctrine that purports to explain the inner aspirations of a nation is both a source of strength and weakness. It is a comfortable guide-line for decision-making, a lode star for public opinion, a standard by which actions or attitudes can be measured. Doctrines often simplify decision-making but they may hinder the solution of problems which could be solved if greater flexibility would be employed. Such doctrines make policy-shapers prone to inflexibility where suppleness would be expedient.

The doctrinaire-deductive approach to the problem of German unity adopted by the leaders of West Germany may occasionally clash sharply with the empirical-pragmatic thinking which prevails in Washington as exemplified by the misapprehensions surrounding Ambassador Grewe's mission in the American capital in 1962. While the Federal Republic may, at times, be reproached by its Allies for being too doctrinal and rigid, the Western Powers themselves are compelled to be scrupulously "legalistic" when defending their rights in Berlin against Soviet and East German "nibbles."

It can and should never be ignored that the theoretical foundations used for explaining the status of the Federal Republic of Germany, of Berlin, and of the problems of Germany's unity are inseparable from the understanding and appreciation of West German attitudes and foreign policy toward the fundamental issue of reunification.