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Transition in the German Legal Order: East Back to West, 1990–91

*Daniel J. Meador**

INTRODUCTION

On October 3, 1990, the German Democratic Republic (GDR)—one of the two German states that had existed since 1949—ceased to exist. It was terminated as an international entity not by armed conquest, but by its own voluntary “accession” to its companion state, the Federal Republic of Germany (FRG).¹ This development reunites three-fifths of the former Reich and creates the largest nation in Europe. It has also set in motion a far-reaching transition, one considerably different from other changes taking place in eastern Europe.

Apart from its elevation of Germany to a position of European preeminence, this development eliminates a communist regime from the center of Europe, one closely linked with the former Soviet Union. It also brings the former GDR’s people and territory within the parliamentary democracy of the FRG. The legal apparatus and the entire system for the administration of justice

* James Monroe Professor of Law, University of Virginia. Much of the information included in this Article was gathered by the author in June, 1991 through interviews with officials in the FRG Ministry of Justice, the FRG Ministry of Education and Science, and the new Ministries of Justice for Brandenburg, Mecklenburg-West Pomerania, Saxony-Anhalt, and Thuringia. Unless other sources are specifically cited, these interviews are the sources of the information in this Article. Because the transition is ongoing and ever-changing, even many of the persons involved have had difficulty obtaining complete details. Consequently, and regrettably, this Article is less specific in many respects than the author would like. This account presents developments through August 1991, but not later. Appreciation for editing, design, and production assistance is expressed to Jordana Simone Bernstein, Class of 1992, University of Virginia School of Law. The author also wishes to express his appreciation to the Center for National Security Law at the University of Virginia Law School for its support of the research on which this Article is based.

¹ This accession was accomplished under article 23 of the FRG Basic Law (in effect, the West German Constitution) and pursuant to the Treaty of Unity entered into by the FRG and GDR on August 31, 1990. Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity, Aug. 31, 1990, BGBl. II 889 [hereinafter Treaty of Unity].

in the West are now being extended throughout a land where Marxism-Leninism once permeated the justice system and all of life.

The communist seizures of power in Russia in 1917 and later in eastern Europe were indeed revolutionary, but the transition now underway in the former GDR is no less so. A critical difference between these two revolutions is that the German transition stems from the will of the people manifested through orderly democratic processes, rejecting Marxism-Leninism in favor of democracy and the rule of law. A system of private ownership of property and free elections with multiple political parties is replacing a highly centralized state-controlled society. In addition, the Germans are purging all traces of Marxism-Leninism from educational institutions, governmental machinery, and the administration of justice.

The Germans are pursuing this massive transition under treaties between the two former German states and through statutes enacted at the federal and local levels. Sorting out tangled questions of property ownership is the most pressing concern in order to provide the basis for a healthy economy. Nevertheless, the dismantling of the Marxist-Leninist legal system and its replacement with the law and legal machinery of the West is a matter of great importance in attracting commercial enterprises. It also assures the former GDR citizens that they will have the protections of the rule of law.

Although similar movements are occurring in other countries in central and eastern Europe, the German situation is unique. In the other countries the people are attempting internally to shift to another system. By contrast, the people of the former GDR have simply joined a large and affluent neighbor, with whom they share a centuries-long cultural history, and are adopting its system. The difference is comparable to that between a drowning man struggling to stay afloat and save himself, and a drowning man who grasps a rope and is pulled aboard a friendly boat. The distinctive difficulties in Germany, with which this paper is concerned, are those associated with putting in place as rapidly as possible throughout the former GDR territory the existing legal system of the FRG. The focus here is on events in that transition through August 1991; developments after that date are not discussed.

The transition can be better understood by first looking at the unification process and the basic governmental transformation.

Part II of this Article compares the structures of the West German judicial system and the former East German judicial system. Part III examines the process through which the West German judicial structure will replace the former East German courts. Part IV describes difficulties with incorporating East German judges, prosecutors, and lawyers in the developing legal order. Part V discusses changes in East German legal education.

I. GOVERNMENTAL TRANSFORMATION

The dramatic events which began in East Germany in the late summer of 1989 had led, by the spring of 1990, unexpectedly to the realization in both East and West that unification of the two German states was inevitable. The first formal step to that end was the agreement, effective in July 1990, allowing all East Germans to exchange their GDR marks for FRG marks, one for one, thus establishing a common currency. Shortly thereafter, the GDR parliament (*Volkskammer*) enacted a measure that reestablished the old pre-1949 states (*Laender*), replacing the fifteen administrative districts that the GDR had created. Through the Treaty of Unity these five states then "acceded to" the Basic Law—in effect, the West German Constitution.²

The five new states in the East are Mecklenburg-West Pomerania,³ Saxony-Anhalt, Brandenburg, Thuringia, and Saxony. In addition, the city of East Berlin has been combined with West Berlin to form the state of Berlin. Table 1 provides information about these new states.

Each of the new states held elections in October 1990, immediately following the unification, and governments were formed in each accordingly. These state governments are parliamentary

² The events leading to reunification are described, with citations to official sources, in Bastuck, *Unity, Law, and Freedom: Legal Aspects of the Process and Results of German Unification*, 25 INT'L LAW. 251 (1991); Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 510–13, 524–30 (1991); Brunnée, *The Reunification of Germany: Comments on a Legal Maze*, 13 DALHOUSIE L.J. 725 (1990); McCurdy, *German Reunification: Historical and Legal Roots of Germany's Rapid Progress Towards Unity*, 22 N.Y.U.J. INT'L L. & POL. 253 (1990).

³ This is the usual English translation of Mecklenburg-Vorpommern. The eastern portion of Pomerania is now in Poland. Shifts of this sort in the German border, as a result of the Second World War, prevented re-creation of these states along their precise historical lines. Saxony, for another example, now includes a portion of what was Silesia, the remainder being in Poland. As a result of unification, there are now 16 states in the "new" FRG. West Germany prior to 1990 is now referred to as "the old FRG." What was formerly the GDR is now referred to as "the five new states."

Table 1 The New German States

State Name	Capital City	Population in Millions	Area in Square Kilometers	Former GDR Districts
Brandenburg	Potsdam	2.7	26,000	Frankfurt/Oder, Potsdam, Cottbus
Mecklenburg-West Pomerania	Schwerin	2.1	22,500	Rostock, Schwerin, Neubrandenburg
Saxony	Dresden	4.9	17,000	Leipzig, Dresden, Karl-Marx-Stadt
Saxony-Anhalt	Magdeburg	3.0	25,000	Halle, Magdeburg
Thuringia	Erfurt	2.5	15,209	Erfurt, Gera, Suhl
Berlin	Berlin	3.4	883	Berlin

democracies like those of the West German states. Each state's legislative body (*Landtag*) elects the Minister President, who in turn selects the ministers of the various government departments, including the Minister of Justice. As in the West, the Minister of Justice in each of the new states is responsible for the entire administration of justice in the state, including the courts and the prosecutorial services. Thus, the appointment of a Minister of Justice and establishment of a Ministry of Justice in each of the new states, promptly after the *Landtag* elections, was the first step toward the transition to the legal system of the FRG.⁴

In appointing these Justice Ministers and their staffs, the authorities have encountered a troubling dilemma which permeates all aspects of the unification process. On the one hand, it is widely believed by Germans, East and West, that unification should not be—and should not appear to be—a takeover of the East by the West; the East should not be put in the position of a colony being annexed by the FRG. On the other hand, persons with the requisite knowledge and experience to carry out the transition are almost all from the West. This is especially so in the legal field. Persons trained in the Marxist-Leninist law faculties of the GDR universities who have spent their careers entirely in that system do not usually have an understanding of the FRG legal system. Moreover, there are serious ideological difficulties for many in making an overnight shift to a radically different legal order. In

⁴ The new state of Berlin, formed by combining the GDR's East Berlin with West Berlin, took as its Justice Minister the existing "Senator for Justice," the title of that official in West Berlin. Thus, it was not necessary in Berlin to create a new Ministry.

addition, many GDR jurists were involved with the former regime in various ways, rendering them unsuitable to participate in the transformation. Nevertheless, the government has made strong efforts to bring GDR lawyers into the Justice Ministries to make the unification process a genuinely joint East-West effort.

Because of these obstacles, only modest progress has been made in bringing East German jurists into the new Ministries. Of the five Ministers of Justice outside Berlin, four come from the West and only the Minister in Saxony is from the East. Typically, GDR lawyers make up no more than one-fifth of the new ministries' professional staffs, because relatively few have been found suitable. For example, in the Brandenburg Ministry of Justice there are approximately forty lawyers, but only eight come from the East. The Ministries in Saxony-Anhalt, Thuringia, and Mecklenburg-West Pomerania each have some twenty lawyers, but in each only four or five are from the East. Except for the Justice Minister himself, all forty lawyers in the Saxony Justice Ministry come from the West. The task of planning and carrying out the reorganization of the courts and other agencies in the administration of justice in the former GDR thus is largely in the hands of West German lawyers.

In October 1990, one of the immediate, practical problems was finding buildings adequate to house the new state government agencies in their capital cities. The new regimes took over assorted buildings of the GDR district governments and Communist party agencies resulting in the housing of the Justice Ministries in some unusual quarters. In Magdeburg, for example, the Ministry is in the old headquarters of the Stasi, the former GDR secret police. In Erfurt, the Ministry is in the former local police headquarters. In Potsdam, the Ministry is in a complex of buildings that had served as the headquarters for the district Communist party (SED) apparatus—impressive structures built before the First World War as a cadet school to train army officers.

To understand further the legal transformation and the difficulties encountered in this process, it is necessary to examine briefly the former GDR court structure and the courts of the Federal Republic that will replace it.

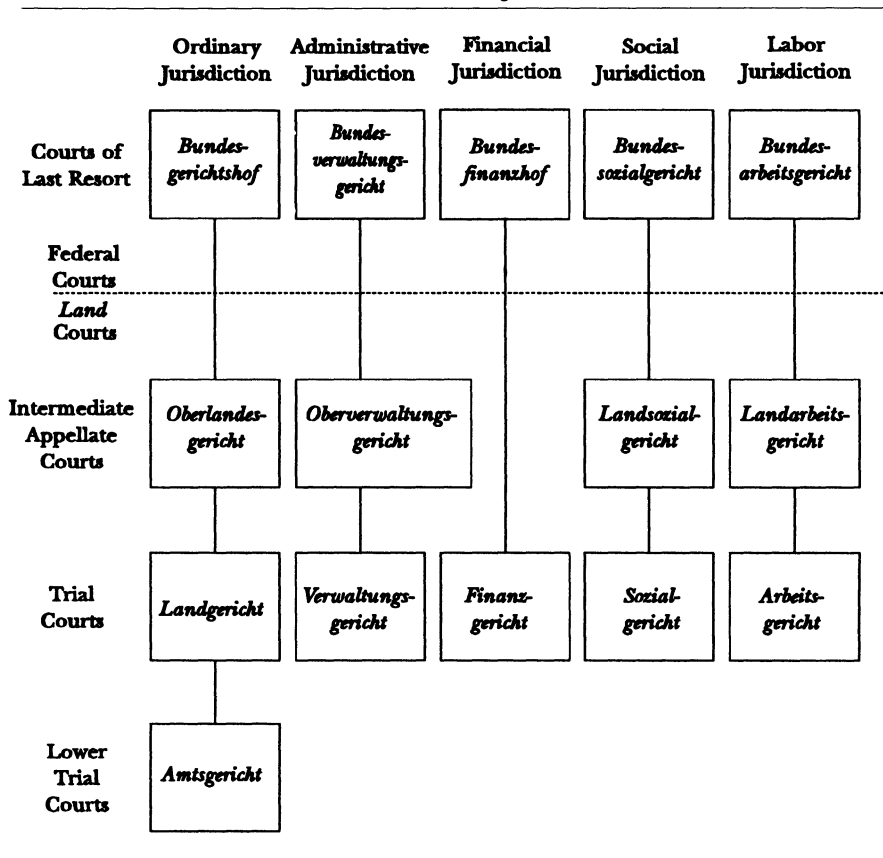
II. GERMAN COURT STRUCTURES: FRG AND GDR

When the two post-war German states were created in 1949, the FRG preserved the court structure that had been in place in Germany for decades. Despite a multitude of changes in law and

government, there was a high degree of continuity in the machinery for the administration of justice. That traditional German court structure remains in the West, and it is now being extended throughout the East.

Under this system the courts are organized into five "jurisdictions." These are designated as the ordinary, administrative, labor, financial, and social jurisdictions. Each jurisdiction is a separate, nationwide court system, organized on the basis of the subject matter of its business and not on a territorial basis. In each there is a trial level and a court of last resort; in all but one there is also an intermediate appellate level. Only the five courts of last resort are federal courts. The lower courts, although prescribed by federal law, are maintained by the various states that make up the Federal Republic. Table 2 shows the organization of these five jurisdictions as they exist today in western Germany.

Table 2 The Five FRG Jurisdictions⁵



⁵ This table is taken from Daniel J. Meador, *Appellate Subject Matter Organization: The*

This court structure was radically altered along with all else in the GDR after 1949. The five jurisdictions were abolished, and two court systems were established in their place—the state courts and the contract courts. The GDR also abolished the historic states and replaced them with fifteen districts, each named for the city in which its administrative headquarters was located.⁶ The two new court systems were structured to conform to this new district administrative organization throughout the GDR.

The state courts consisted of three levels. The courts of first instance, forming the bottom tier, were called *Kreisgerichte*. Every district had several such courts, and numerous judges served on each. At the next level there was a single court in each district, also employing many judges, known as the *Bezirksgericht*. It had a mixed trial and appellate jurisdiction; it reviewed decisions of the *Kreisgerichte* within its district, but some categories of cases could be initiated in it. At the top of the system was the supreme court, the *Oberstesgericht* which had appellate jurisdiction over all the lower courts. The business of these state courts, within their respective districts, consisted of cases arising under four codes developed in the GDR: civil, criminal, family, and labor.⁷

The separate GDR contract courts were also organized along district lines. There was one contract court in each of the fifteen districts and a single country-wide contract court to which the district courts were subordinate. These bodies were something of a combination of court and administrative agency. They had jurisdiction over all disputes between state-owned enterprises. Because the entire GDR economy was state-controlled, these bodies played an important role in regulating that economy.⁸ Inasmuch as a move away from a state-controlled economy to a market economy is a key feature of the unification, this contract court system has been dismantled. The state courts, however, have not been altogether abolished.

German Design from an American Perspective, 5 HASTINGS INT'L & COMP. L. REV. 27, 33 (1981).

⁶ The GDR governmental and legal machinery is described in DANIEL J. MEADOR, IMPRESSIONS OF LAW IN EAST GERMANY 34–49 (1986). The GDR administrative districts (except East Berlin) are listed in Table 1 in the text of this Article.

⁷ The state court system is described in MEADOR, *supra* note 6, at 117–30.

⁸ The state contract courts are described in MEADOR, *supra* note 6, at 159–68.

III. TRANSITION IN COURT ORGANIZATION

Pursuant to the Treaty of Unity, effective October 3, 1990, the administration of justice in the former GDR territory is being converted to the system existing in the FRG. The change is being made in each of the new states under the direction of its Ministry of Justice. Although the overall pattern and objectives are the same, the pace and order of the transition vary among the states.

In several respects, the state of Mecklenburg-West Pomerania is farther along with the transition than the other four. There, in early 1991, the *Landtag* enacted statutes prescribing the number and locations of the courts for all five jurisdictions.⁹ In the other new states the *Landtag* has not yet taken that step. Drafts of such laws are on the drawing boards, however, and will be enacted in the near future.

In all of the new states, the first two levels of the former GDR state court system remain—the local courts of first instance (*Kreisgerichte*) and the district courts (*Bezirksgerichte*). The GDR Supreme Court (*Oberstesgericht*), however, has been abolished. Accordingly, decisions of the *Kreisgerichte* and *Bezirksgerichte* now go for review to the five supreme courts of the FRG. These five federal courts of last resort and their locations are as follows:

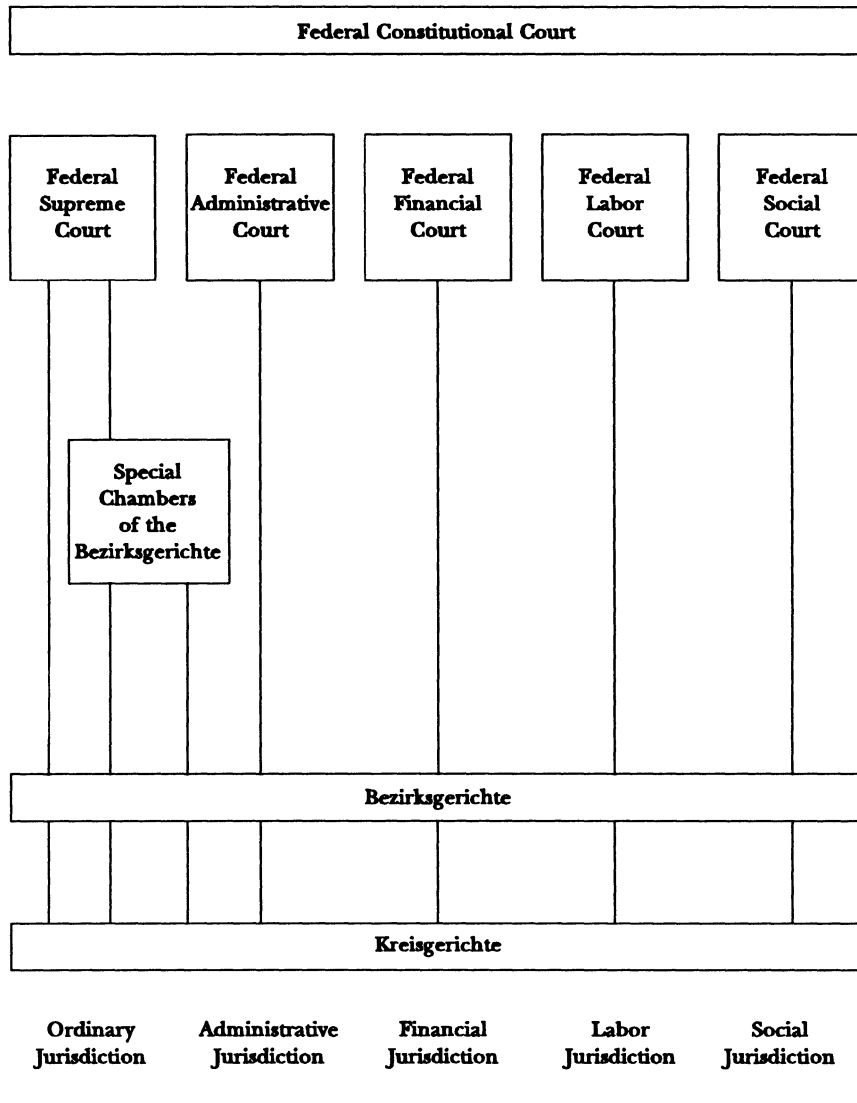
<i>Bundesgerichtshof</i> (Federal Supreme Court)	Karlsruhe
<i>Bundesverwaltungsgericht</i> (Federal Administrative Court)	Berlin
<i>Bundesarbeitsgericht</i> (Federal Labor Court)	Kassel
<i>Bundessozialgericht</i> (Federal Social Court)	Kassel
<i>Bundesfinanzgericht</i> (Federal Financial Court)	Munich

Thus, in this transitional period there is an odd hybrid arrangement under which the longstanding West German federal appellate courts are reviewing cases decided in the still-existing GDR courts. The cases are routed to the appropriate federal court in accordance with their nature and subject matter. In other words, a case is regarded as though it were being litigated in the FRG system to determine which of the five federal appellate courts is appropriate. Criminal cases and private civil cases, therefore, go on appeal to the *Bundesgerichtshof* because such cases would be within the ordinary jurisdiction in the FRG. In some of the jurisdictions there is little business so far. For example, few cases have

⁹ Verordnung über die Zuständigkeit der Gerichte, Jan. 30, 1991; Gerichtsstrukturgesetz; Mar. 19, 1991.

arisen in the financial jurisdiction, because the GDR had no tax system and FRG tax laws now in force there have not yet produced much litigation. The potential for confusion in this mixed

Table 3 Transitional Trial and Appellate Structures in the Five New States¹⁰



¹⁰ This table is adapted from a table provided to the author by the Federal Ministry of Justice, June 1991. The Federal Constitutional Court shown at the top of this table is an independent constitutional organ not part of the five jurisdictions.

GDR-FRG court structure would seem to be considerable, but it appears to be working tolerably well as a transitional device. Table 3 shows the temporary, hybrid court structure in the former GDR territory.

Measures being taken to reshape the *Kreisgerichte* and *Bezirksgerichte* internally to conform to the five-jurisdiction structure of the West serve to reduce confusion resulting from this hybrid system. For example, in Brandenburg the forty-two *Kreisgerichte* are being consolidated into twenty-five, or perhaps twenty-eight, bringing together a larger number of judges in each court. This in turn makes it feasible to create chambers or divisions within each of these trial courts to correspond to the five FRG jurisdictions. The limited number of judges available, however, necessitates only one or two judges typically sitting in each chamber, instead of three as is customary in the West. In some places a judge will sit half-time in the chamber of his special field and spend the remainder on all other types of cases.

Under this internal arrangement, for example, an administrative law case that would be filed in an administrative court in the West will be filed in a *Kreisgericht* and referred to the chamber now concentrating on such cases. By this means there is a gradual movement to the subject-matter form of judicial organization of the FRG. Thus, it should be a relatively easy evolutionary step for a *Kreisgericht* chamber handling administrative law cases to split off into an independent administrative law court. This kind of evolution from internal subject-matter chambers to separate courts will continue until the five FRG court systems completely replace the GDR courts.

The pace of this evolution varies from one state to another. In Mecklenburg-West Pomerania, where the process in general is most advanced and where the *Landtag* has already enacted a law establishing courts for the five FRG jurisdictions, it is anticipated that all these courts will be in place by the end of 1991. The pace is slower elsewhere. In Brandenburg, after the *Kreisgerichte* are consolidated into a smaller number, the plan is to establish the labor courts and then a few months later, the social courts. Saxony-Anhalt expects to move initially to establish administrative and social courts. Both the timing and the order in which the various courts are established will differ among the states.

The courts of the ordinary jurisdiction are likely to be among the last to be put in place. The authorities apparently believe that their business—all criminal cases and a large part of private civil

disputes—can continue to be handled satisfactorily in the old GDR courts while the other four jurisdictions are being set up. The *Kreisgerichte* will ultimately become the *Amtsgerichte*, the first tier of the ordinary jurisdiction, the courts that are the most numerous in each state and that have the most judges.

Above this bottom tier of the ordinary jurisdiction, are the *Landgerichte*. These are trial courts for the larger and more important criminal and civil cases; they also exercise appellate jurisdiction over *Amtsgerichte* decisions. In general, the plan in these new states appears to have the *Bezirksgerichte*, the middle tier in the old GDR system, evolve into the *Landgerichte*.

The highest court in each state in the ordinary jurisdiction is the *Oberlandesgericht*, an appellate court, whose decisions are reviewable by the *Bundesgerichtshof*, often referred to as the Federal Supreme Court. In function and position in the judicial hierarchy, an *Oberlandesgericht* is what Americans might consider a cross between a state supreme court and an intermediate appellate court. In some of the larger western states there is more than one *Oberlandesgericht*. At present, however, only one such court is being planned in each of the new states. These courts will be new entities, because there are no former GDR courts out of which they could evolve. These new *Oberlandesgericht* will have some twenty-five to forty judges each, very large for an appellate court by U.S. standards, but in line with traditional German judicial organization.

Fixing the location of the *Oberlandesgericht* in each of the new states has involved important political and economic considerations. Being the seat of the *Oberlandesgericht* gives a certain distinction to a city. Ease of access to lawyers from throughout the state must be considered, as well as the attractiveness of the location to the judges. Decisions have been made in Mecklenburg-West Pomerania to place the *Oberlandesgericht* at Rostock; in Thuringia at Jena; in Saxony-Anhalt at Naumburg; and in Saxony at Dresden. These decisions, with the exception of Dresden, follow a German tradition of locating major courts at places other than the capital city. In Brandenburg the location remains under debate. Many favor Potsdam, the state capital, as the most central location, but others argue that this would result in too much centralization of government, an argument intensified by vivid memories of the overly centralized GDR.

Law played a far less significant role in the GDR than it plays in West Germany or in other western democracies. Thus, the

GDR courts required fewer buildings than will be needed to house the trial and appellate levels of the ordinary jurisdiction and the other four jurisdictions. Some of the buildings occupied by GDR courts had been court buildings before 1945, and these can continue to serve that purpose. Some of them, however, like much else in the East, are badly in need of refurbishing. Eventually, additional facilities must be acquired or constructed in order to house the entire FRG court system. At the moment, though, physical facilities are low in priority. In the administration of justice the most pressing needs are for personnel.

An interesting question could arise concerning the future location of the *Bundesgerichtshof* in light of unification. That court—the court of last resort in the ordinary jurisdiction—is the oldest of the German supreme courts. Since 1949, it has been housed in a former ducal palace in Karlsruhe, the city where the Federal Constitutional Court is also located. It is viewed as the direct successor to the *Reichsgericht* (Imperial Supreme Court), created after the establishment of the Reich in 1871. Until 1945, that court sat in Leipzig in an impressive building designed especially for it in the late nineteenth century at the time the *Reichstag* building in Berlin was constructed. The two structures are architectural brothers. The *Reichsgericht* building survived intact the heavy bombing Leipzig suffered during the Second World War and has been used by the GDR as a museum. It is not difficult to imagine a movement to relocate the *Bundesgerichtshof* back to this elegant, domed home of its predecessor. There are, however, many far more pressing concerns relating to the resurrection of the traditional courts in the East, so one may expect any such idea to receive relatively little attention for some time.

IV. TRANSITION IN PERSONNEL: JUDGES, PROSECUTORS, AND LAWYERS

In accordance with the historical German governmental arrangements, the Ministry of Justice in each of the new states is responsible for all personnel in that state's justice system. These Ministries will administer the state examinations to persons who have completed university law study. Thus, they will determine who will be qualified to become a jurist and thereby eligible to pursue a career in both the private and public sectors of the varied branches of the legal profession. The Justice Ministries in the East, like those in the West, will appoint, assign, and promote

judges and prosecutors. This latter function is the most urgent facing these new Ministries.

Pursuant to an authorization in the Treaty of Unity, GDR judges remained temporarily in service on the *Kreisgerichte* and the *Bezirksgerichte*, with these courts continuing in operation during a transitional period. The alternative of immediately dismissing all GDR judges and starting with a clean slate in October 1990 was rejected because it was simply not feasible to take such a drastic step. At the same time, it was understood that all GDR judges would undergo investigation and screening. Those who were cleared could remain as judges for a probationary period of three to five years; those who were not cleared would be dismissed. The same process would be applied to prosecutors.

Each state's Ministry of Justice has the responsibility of investigating and screening the judges and prosecutors within that state. The entire program was scheduled to have been completed by April 15, 1991; however, the process was slower and more difficult than was anticipated, and no state met that deadline. Indeed, in some states not one case had been completed by that date. As of August 1991, the hope was that all investigations could be completed by the end of the year. The status of the judges and prosecutors being investigated, as of June 3, 1991, is shown in Table 4.

When one considers that there were some 1,500 judges in the GDR, it is clear that a large percentage remained in service pend-

Table 4 Status of Former GDR Judges and Prosecutors Still in Office as of June 3, 1991¹¹

State	Judges	Prosecutors	Investigations Completed	Judges and Prosecutors Approved
Brandenburg	235	166	4	4
Mecklenburg-West Pomerania	164	130	0	0
Saxony	603 ¹²	—	270	143
Saxony-Anhalt	215	156	39	19
Thuringia	170	130	0	0

¹¹ This table is adapted from a table provided to the author by the Federal Ministry of Justice, June 1991.

¹² Includes both judges and prosecutors; separate figures were not available.

ing clearance. In the four states other than Saxony, where the figures for judges and prosecutors are not separated, there were a total of 784 judges still serving in June 1991. A significant number resigned after unification; estimates of that number vary, but most put it as high as 20 percent in some states. Those who resigned apparently did so because they realized that they had no chance of being cleared. Some may have found it impossible ideologically to switch overnight to the law and legal system of the West. Perhaps the more surprising figure is the number electing to remain in the new order after years of working under Marxism-Leninism.

As of the end of August 1991, three months after the figures shown above, investigations had progressed in all of the states. The results appear in Table 5.

The mechanisms and procedures for investigating judges and prosecutors are similar in all the new states, although there are local variations. Typically, there is a committee established within each state, consisting of six members of the *Landtag* and four judges. In some instances some of these judges are from the East, but most are from the West. This committee reviews all the evidence in each case and makes a recommendation to the Minister of Justice whether the judge or prosecutor should be retained or dismissed. The Minister of Justice can accept or reject a recommendation for retention, but cannot decide to retain

Table 5 Former GDR Judges and Prosecutors: Investigation Results as of September 1, 1991¹³

State	Investigations Completed		Number Accepted		Estimated Completion of Investigations
	Judges	Prosecutors	Judges	Prosecutors	
Brandenburg	54	89	47	76	December 1991
Mecklenburg-West Pomerania	53 ¹⁴	—	43	—	October–November 1991
Saxony	336	193	212	114	Complete except for five cases
Saxony-Anhalt	207	66	120	26	Fall 1991
Thuringia	19	29	19	27	October 1991

¹³ This table is adapted from information provided to the author by the Federal Ministry of Justice, September 1991.

¹⁴ Includes both judges and prosecutors; separate figures were not available.

someone the committee has voted to dismiss. When dismissal is contemplated, the judge or prosecutor has an opportunity to respond to adverse evidence.

The criteria for retention appear to be rather general, as are the grounds for dismissal. Essentially, the committee and the Justice Minister are seeking to determine whether the official has engaged in activity in the GDR that raises serious questions about his fitness to serve in a democratic legal order, in a regime of government under law. Membership in the SED is not in itself considered to be disqualifying. Many persons may have joined the party merely as a necessary step to pursuing a career in the GDR. The investigators are especially interested in whether, and the extent to which, the person was involved with the Stasi. Apparently Stasi connections were far more extensive than had even been suspected. As one Justice Ministry official put it, the GDR was not a state with a secret police; it was a secret police system with a state. In a country with a population of sixteen million, some 400,000 were employed by the Stasi. A Stasi connection is a ground for nonretention.

Judges' prior involvements in GDR criminal cases are also a subject of special interest for the investigators. If the facts show that a judge gave harsh sentences in what are considered to have been political cases, such a judge is likely to be disqualified. Also likely to be disqualifying is evidence that a judge acted overzealously and with undue severity, going beyond the demands of the law. Some participants in the screening process think it probable that most judges with substantial service on criminal cases will be eliminated. The nature of the GDR regime was such that a judge would not have been assigned to criminal cases for a substantial time unless he was supportive of the SED's political ends and accordingly acted in a way inconsistent with an independent judiciary and the rule of law.

Sources of information available to the investigators include the voluminous Stasi files, data collected over the years in the Saltzgitter archives (named for the town in West Germany where the data were stored) concerning political prisoners and political prosecutions, and facts gathered from GDR prisoners whose freedom the FRG bought. Much data gathering is being done for the various state committees by a body in Berlin known as the Gauck Commission, named after its chairman, an East German theologian. According to one report, the Saltzgitter archives reveal that since 1961 in the GDR some 6,000 judges and prosecutors have

participated in 30,752 convictions, apparently thought to be “political,” in which a sentence of one year or more was imposed.¹⁵

Although some three-quarters of the former GDR judges continued to serve during the investigation and clearing process, there continues to be great need for additional judicial manpower. It is estimated that approximately 4,000 judges will be required for the entire western-style court system in the five new states. Inasmuch as no more than a few hundred of the GDR judges are likely to survive the screening process, this means that the system will need some 3,500 or more new judges.

To help with its justice system personnel problems, each of the five new states has a partner state or states in the West. These partnerships are as follows:

Brandenburg.....	North Rhine-Westphalia, Saarland
Mecklenburg-West Pomerania....	Bremen, Hamburg, Schleswig-Holstein
Saxony.....	Baden-Württemberg, Bavaria
Saxony-Anhalt	Lower Saxony
Thuringia	Bavaria, Hesse, Rhineland-Palatinate

The western states have voluntarily entered into these partnerships. In doing this, each has assumed the responsibility of supplying judges and prosecutors to its partner state in the East. There is, however, no authority in any government to order a judge or prosecutor to go eastward. The Ministries must rely on appeals to the spirit of public service in the interest of the new national unity. The Federal Ministry of Justice plays only a secondary role, apparently attempting to coordinate and stimulate efforts. The federal government also assists by paying 40 percent of these western judges' salaries while they serve in the East.

Strenuous efforts are being made to recruit several types of western judges to the East. One group consists of retired judges willing to reenter active service, though usually for only a year or two; another, of young judges, also willing to undertake the adventure for a year or two. Still others are willing to make the move with a view toward remaining in the East. As of June 1991, there were about 200 West German judges serving in the East. A few months later, Saxony alone was using 155 judges from the

¹⁵ Henrichs et al., *Ehemalige DDR-Richter als Richter im geeinten Deutschland?—Materialien zur Orientierung bei der Beantwortung einer schwierigen Frage*, 44 NEUE JURISTISCHE WOCHENSCHRIFT 449–520 (Feb. 20, 1991).

West. Many more are needed, and the demand will become more acute as the new courts are created.

Despite the overall difficulties of attracting western jurists, Mecklenburg-West Pomerania, the most advanced of the states in the legal unification process, seems to have had less of a problem. By June 1991, the Justice Ministry there had received 2,100 applications for positions as judges and prosecutors, mostly from young western jurists. When the new court systems are fully established, the state will require 435 judges and 220 prosecutors. In Thuringia, there seemed to be no dearth of interest in legal positions; as of May 1991, the Justice Ministry there had received 1,200 applications for positions as judges, prosecutors, and government lawyers.¹⁶

In the meantime, throughout the five new states, the GDR judges who continue to serve are required to attend courses in the FRG law they are being called upon to apply. The instruction is offered by West German jurists. These are in effect crash courses designed to indoctrinate former Marxist-Leninist judges into the radically different system of western-style law as quickly as possible. Many of these courses are conducted in the courts where the judges are sitting; in some states, the courses are conducted in one or two central locations. Typically, a judge will spend one week per month studying FRG law while sitting in the courts the other three weeks. This arrangement, however, further dilutes the available judicial manpower. In some instances, GDR judges have gone for short courses to the Academy for German Judges in Trier and at other locations in the West. A new, additional national academy of this type is being established at Wustrau, northwest of Berlin.

For former GDR prosecutors, the process of investigation and clearance is essentially the same as that for judges. Like the judges, most prosecutors have remained in service pending the outcome of this process. Observers, however, think that only a small percentage of the prosecutors are likely to be deemed acceptable. To an even greater extent than the judges, the prosecutors were servants of the SED and collaborators with the Stasi. It is thought that some of the younger prosecutors who came into service near the end of the GDR may turn out to be accept-

¹⁶ Thüringer Ministerium der Justiz, *Der Neuaufbau der Thüringer Justiz-Eine Bilanz nach 6 Monaten* (May 8, 1991).

able simply because they had not had time enough to become imbued with the system or to be given significant responsibility. Each of the new states, however, faces the necessity of filling the ranks of prosecutors, in addition to filling its judgeships, with jurists from the West.

Lawyers, in contrast, have received more lenient treatment. In the GDR a person was qualified as a "jurist" if he had completed university law study, receiving the degree of *Diplom Jurist*, and had satisfactorily completed the required period of practical training.¹⁷ All such jurists are, for the time being at least, allowed to pursue the practice of law. In the GDR there were some 600 practicing lawyers.¹⁸ In addition, there were approximately 3,000 lawyers serving as legal counsel in the multitude of state-owned enterprises and government ministries.¹⁹ There is disagreement on the extent to which these persons should be subjected to investigation and screening through a process similar to that applied to judges and prosecutors. The Federal Ministry of Justice drew up a proposal that would require such screening, but as of August 1991, it was not clear what the *Bundestag*, the lower house of the federal parliament, would do with the proposal. One possibility is that judges and prosecutors disqualified from continued service in those positions will be able to pursue careers as practicing lawyers.

The need for lawyers in the East will be at least as acute as it is for judges and prosecutors. The old East German legal system required far fewer lawyers than that of West Germany, just as it required far fewer judges. In the mid-1980s the ratio of lawyers to population in the East was 40 per 100,000, whereas there were 85 per 100,000 in the West.²⁰ As the transition progresses, and FRG law and courts replace the remnants of the GDR system, the demand for lawyers will rise dramatically. Even if some former GDR jurists continue as practicing lawyers, many believe that most citizens and business people in the East will prefer a western lawyer for two reasons. First, the western lawyers have greater knowledge and experience in FRG law. Second, eastern lawyers may not have the trust and confidence of the people because of their association with the former regime. There are, thus, im-

¹⁷ MEADOR, *supra* note 6, at 169.

¹⁸ *Id.* at 146.

¹⁹ *Id.* at 164.

²⁰ *Id.* at 174.

mense opportunities for new lawyers in this eastern territory. With 56,000 lawyers in West Germany today, there tends to be an oversupply, making the opportunities in the East more attractive. Some 2,000 of these lawyers have already gone East—some permanently, some on a part-time basis rotating between an eastern and a western office.²¹

It is obvious that the major transitional problem in all aspects of the administration of justice concerns personnel. Relatively huge numbers of competent law-trained persons, free of serious GDR taint, must be infused into the burgeoning western-type legal system in the East. A somewhat similar problem was confronted in Germany in 1945. At the end of the Second World War when Germany surrendered, the occupying western Allies faced the necessity of restoring and maintaining governmental services and the justice system. Germans were essential to this work. Yet many of them, especially those in the higher and more responsible positions, had been members of the Nazi Party. The western Allies instituted a program of "denazification" in an effort to screen out those considered most undesirable and retain in service those who, although party members, were deemed not to be overly tainted. That effort has been criticized as letting through the net too many Nazis who should have been eliminated. The validity of that criticism is difficult to assess, but the experience is much on the minds of some Germans today. It underlies their determination not to let something like that happen, or appear to happen, again. They want the justice system to be cleansed of anyone who might reasonably be considered to have been an active or believing participant in the human rights and rule of law violations perpetrated in the GDR. At the same time, they face the problems of staffing the justice system, badly needing all the manpower they can get. Whether that pressure will cause the Justice Ministries to compromise or shade their standards of acceptability remains to be seen.

There is one large difference between the situation today in the East and the situation in 1945. Then, foreigners undertook to revive and install a cleansed German justice system. Today no foreigners are involved; the problem is exclusively German. Although there are many differences between West and East Ger-

²¹ Speech of Dr. Klaus Kinkel, FRG Minister of Justice, before the Stuttgart Bar Association (May 2, 1991).

mans stemming from forty years of separation under radically different systems, still there is the common history, language, and culture stretching back for centuries. If a former GDR judge or prosecutor is disqualified, a jurist from the West can be put in his place, an option not available in 1945. The easterners may resent what appears to be a takeover from the West, but many of them realize that there is no alternative in the short run. The best hope for an adequate supply of competent, indigenous personnel for the justice system in the five new states lies in the rising generation of law graduates from the eastern universities. Filling the ranks from that source, however, like nearly all else in the transition, will take time.

V. TRANSITION IN THE UNIVERSITY LAW FACULTIES

Among the historic German universities, six were located in what became the GDR: those at Berlin, Greifswald, Halle, Jena, Leipzig, and Rostock. In accordance with German university structure dating back to the Middle Ages, each had a law faculty. After sweeping educational reforms in the GDR during the 1960s, however, law faculties continued in only four: the Humboldt University in East Berlin, the Martin Luther University in Halle, the Friedrich Schiller University in Jena, and the Karl Marx University in Leipzig. In addition, the Academy for State and Law in Babelsberg was essentially a law school for GDR government administrators and foreign service personnel.

The curriculum in these four law faculties was centrally prescribed by the GDR Ministry for Higher Education. It was based throughout on Marxism-Leninism and was taught from a single set of texts prepared under the supervision of that Ministry. Students graduating at the end of the four-year curriculum with the degree of *Diplom Jurist* were thoroughly indoctrinated with that ideology and charged not with a duty to administer justice objectively and fairly, but with a duty to work toward the realization of socialism.²² It is understandable, given their educational background and the atmosphere in which they functioned before 1990, that many GDR judges, prosecutors, lawyers, and ministry officials find it difficult, if not impossible, to switch in a few weeks or months to the totally different set of premises and concepts

²² These and all other aspects of legal education in the GDR are described in MEADOR, *supra* note 6, at 72-88, 176-92.

involved in the administration of justice under FRG law. On the other hand, some of these judges have apparently found it easy to make this switch.

It was obvious from the moment of unification that legal education in the East needed to be completely overhauled. The existing law curriculum was so permeated with Marxism-Leninism that there was no way that piecemeal steps or tinkering could work. The entire curriculum had to be scrapped. The same was largely true of the law professors. Being imbued, as they were, with this ideology and knowing little of FRG law, almost all had to be replaced. Unlike the feasibility—though perhaps not the desirability—of continuing the GDR courts and judges for a transitional period, there was no reasonable possibility of letting GDR legal education continue through a gradual transition to that of the West. Thus the change in the university law faculties was immediate and abrupt.

With rare exceptions the professors and instructional staffs in the four university law faculties were terminated in December 1990. Those under the age of fifty were paid 70 percent of their salary for six months; those over fifty were paid at this rate for nine months. There were over 200 men and women in law faculty positions who were discharged in this manner and had to seek new lines of work. Many of them apparently shifted into the practice of law. Those who wanted to remain in teaching were required to undergo evaluation by West German academicians to determine whether they met professional standards of scholarship. Few were found to be qualified. Some remained in a transitional period under limited term contracts. At Halle, for example, only one former GDR professor of legal history remains. The new law faculty at the University of Brandenburg, however, has employed several instructors from the GDR Academy for State and Law. The Humboldt University law faculty has retained, for the time being, a former GDR professor as its head.

Students enrolled in the study of law in the four GDR universities were thus suddenly left with almost no instructors. To fill this void, professors were imported from the West on visiting and temporary bases. Many were brought in for short periods, such as two or three weeks. Some apparently commuted from week to week. Many were retired professors from western universities. For months into 1991 there were no coherent faculty bodies, but merely a collection of unrelated individuals coming and going to give lectures and seminars on a subject alien to the

students: FRG law. Although this was not an ideal academic arrangement, it did enable students to continue their studies without interruption, albeit with the jolting experience of completely new instructors and material. Overnight they went from the Marxist-Leninist texts, with their express hostility to everything western, to the whole body of West German law, now the law of their country. These interim instructors for the law faculties in the East came from certain western universities. Göttingen supplied the law teachers for Halle; Osnabrück supplied them for Greifswald; Marburg supplied them for Jena; universities in Baden-Württemberg supplied them for Dresden; and several universities in Bavaria supplied them for Leipzig.

In the meantime, plans were being laid for a long-range rebuilding of the universities in the East, including the law faculties. Although primary responsibility for higher education, as well as for the justice system, rests with the states, the federal government is providing substantial assistance in this transitional period. The Federal Ministry of Education and Science took the lead in devising the official plan. A special working group, consisting of representatives of all state governments and the federal government, was assembled to develop a plan for the renewal and reconstruction of higher education in the East. The plan, entitled "Renewal Program for Universities and Research" and published in July 1991 by the Ministry, was scheduled to go into effect in the fall of 1991. Federal financial aid, amounting to 75 percent of the total cost, is committed through a renewal program for five years from 1991, by which time it is contemplated that the transition will be complete.

The plan calls for establishing law faculties at seven universities in the East—the six historic universities plus the University of Brandenburg. In addition, a law faculty will be established at the Technical University in Dresden. Because the state of Saxony is large in population, it is deemed to need a law faculty in its southern part, in addition to the one in the northern part at Leipzig. In the newly created University of Brandenburg at Potsdam the law faculty is to be built out of the GDR Academy for State and Law that offered legal training for foreign service personnel and government administrators. There is interest in reopening the old universities at Erfurt and Frankfurt an der Oder, which were closed in the nineteenth century. At present, however, at least in relation to Erfurt, that proposal has low

priority among the more pressing needs in the existing universities.

Each of these new law faculties will be initiated by five founding professors brought from the West, all of whom will be paid largely by the federal government through the renewal program mentioned above. They in turn will recruit at least seven other instructors from the West as visitors for a year or two. The theory is that a full law curriculum can be offered with a minimum of twelve instructors. Gradually, over a period of a few years, the five founding professors will make additional permanent appointments, with the objective of building a faculty of from twelve to fifteen. An Academic Council, established by the Federal Ministry, and others are assisting in recruiting western law professors willing to go East, at least for a while. That task is made particularly difficult because the western universities are themselves hard-pressed to attract law teachers due to the greater economic lure of other lines of legal work. The hope, however, is that the challenge of creating a new law faculty will entice a sufficient number to move eastward. The former GDR law professors who have been terminated may apply for positions on the newly constituted eastern law faculties and will be considered along with all other applicants. It is likely, however, that only a few, if any, will be selected.

Under the Treaty of Unity²³ all law students who had been enrolled in the university law faculties in the four-year program leading to the *Diplom Jurist* prior to September 1, 1990 are entitled to complete that program. This means that all students beginning the second, third, and fourth years of law study in the fall of 1990 could remain in the former four-year format and receive the *Diplom Jurist*. The result is that until 1993 the law graduates from the eastern universities will have had a portion of their law study under the old Marxist-Leninist curriculum. Their more recent training, however, will have been under West German instructors and in FRG law. Students beginning law study in the fall of 1990 will pursue the West German curriculum, which requires a longer period of study than the old four-year GDR program. Not until about 1996 will law graduates enter the justice

²³ Treaty of Unity, *supra* note 1, at app. I, ch. III.

system with an academic background exclusively in FRG law under western-oriented instructors.

Although the law graduates entering the justice system from the summer of 1991 through 1993 will not have had a purely western academic experience, they at least will not have become imbued with the GDR system through working in it. They will provide much-needed additions to the ranks of judges, prosecutors, lawyers, and ministry officials in the East. Their numbers may be surmised from the full-time enrollment in the GDR law faculties in the 1980s—and presumably in 1990—which were as follows:²⁴

Berlin	680
Halle	400
Jena	240
Leipzig	<u>400</u>
Total	1,720

These institutions were collectively graduating upward of 400 students annually with the degree of *Diplom Jurist*. Assuming that these enrollments continue through to the graduation of those now enrolled, they should provide a thousand or more new jurists for the system in the East by 1994. Of course, not all of those will necessarily choose to remain in their home territory. Some may be lured away by the attractions of the West, particularly if the economy in the East has not substantially improved. The effects of the additional law faculties now being created, and the increased law enrollments they will provide, will not be felt until the latter part of the decade.

CONCLUDING OBSERVATIONS

Accurately predicting the judgments of history is rarely possible. One can, however, hazard an educated guess that the events associated with the unification of East and West Germany, and its aftermath, will loom large among the significant political, social, economic, and legal developments of the twentieth century. In practical effect, 1990 finally closed the catastrophic chapter of German and European history that had opened in 1914. A new chapter—indeed, a new era—has now begun.

²⁴ MEADOR, *supra* note 6, at 58–59, 63, 68, 71.

From the outbreak of the First World War until 1945, all German people suffered tumult, hardship, and grievous loss of life and property. In 1945, however, their experiences diverged. Germans living east of the Oder and Neisse Rivers lost all—homes, land, jobs—to the Soviet Union and Poland; forcibly uprooted, they moved westward to start over again. Those living west of the Oder-Neisse, in the territory that became the GDR, came under Soviet military occupation and then Communist party rule for the next four and a half decades. At the same time, those living in western Germany came under occupation by the western Allies and then, after 1949, evolved into an affluent, self-governing democracy. The vast majority of the Germans of the GDR who rejoined the Germans of the FRG in 1990 were too young to remember anything earlier than Hitler and the Nazis. The Communists had followed the Nazis without interruption. Thus, when the day of unification came on October 3, 1990, most East Germans had had no experience living in a democratic order under the rule of law.

Unlike people in other former communist countries of eastern Europe, the East Germans are not struggling independently to move toward a democratic system. Rather, they have simply ousted their communist regime and, in a clock-tick of time, joined—acceded to, or perhaps even surrendered to—the Federal Republic of Germany. Becoming part of an existing, stable, democratic nation should give them an enormous advantage over other eastern Europeans. Yet a society cannot go suddenly without stress, pain, and upheaval from darkness to light, from near-total control to freedom, from economic security to insecurity, from authoritarianism to government under law.

When, pursuant to the Treaty of Unity, the GDR extinguished itself as a state, its sixteen million people and an area the size of Tennessee came under the law of the FRG, with a few temporary qualifications. To function fully and effectively, the new legal order will require some 4,000 judges and thousands of lawyers and prosecutors who understand and are committed to the concepts of an independent judiciary and the rule of law. Realizing that such an army of legal talent could not be supplied overnight, the treaty provided that the lower GDR courts would temporarily continue to exist and their judges and prosecutors would remain in office, subject to the elimination of those individuals deemed unfit, and the gradual evolution into the five court systems of the West. The process of unification, with its rapid, forced integration

of East into West, has revealed, as perhaps nothing else could have, the commitment of the Germans to government under law. If the rest of the world is uneasy about German attitudes and intentions, their program of transition in the legal order should do much to allay those apprehensions. All the evidence suggests that the Germans are determined to establish legal institutions in the East uncompromisingly compatible with the best western traditions of constitutionalism. Americans would be unlikely to do any better or to insist on higher standards in this process.

The challenge for the Germans is daunting and will absorb the time and energies of many jurists for several years; much money will also be required. If all goes as planned and hoped, within three to five years fully-staffed FRG courts and FRG-oriented jurists will blanket the territory of the former GDR; the German Humpty Dumpty will have been put back together again. If this is accomplished by 1996, it will have been a remarkable achievement, one without close parallel in the history of democracy. Europe and the entire world can take satisfaction in the realization that the rule of law will have been extended peacefully and consensually over a large piece of central Europe where it did not exist before 1990.

It has become a cliché to say that as late as the spring of 1989 no one foresaw or could have foreseen what happened in the ensuing twelve months. It is equally true, however, that for decades many in Germany believed that someday, somehow, the two artificially-delineated post-war states would come together. Indeed, that was a fundamental article of faith in the West German political and legal order, expressly embodied in the Basic Law.²⁵ That it did occur is a tribute to the West Germans' per-

²⁵ For example, the Preamble to the Basic Law, adopted in 1949, reads as follows:

The German People
 in the Laender of . . . [the states constituting the FRG in 1949],
 Conscious of their responsibility before God and men,
 Animated by the resolve to preserve their national and political
 unity and to serve the peace of the world as an equal partner
 in a united Europe,
 Desiring to give a new order to political life for a transitional
 period,
 Have enacted, by virtue of their constituent power, this Basic
 Law for the Federal Republic of Germany.
 They have also acted on behalf of those Germans to whom
 participation was denied.
 The entire German people are called upon to achieve in free
 self-determination the unity and freedom of Germany.

severance and unwavering stance on this point. The events of 1990 represent a triumph of will and a dedication to law and democracy, without armed aggression, that deserve a prominent place in twentieth-century annals.