The Legal Status of Berlin after the Fall of the Wall and German Reunification

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I. Introduction

For more than forty years the Berlin Wall was the clearest sign that the German question was still unresolved[1] and that Germany was suffering an artificial division[2].

The peaceful revolution of 1989 in East Germany and the suspension of the Quadripartite Reservations on Berlin and Germany as a whole[3] – which were depicted as the still not yet exorcised ghost of Allied co-imperium over Germany as a whole and Berlin[4] – laid the legal preconditions for "normalisation". Germany's sovereignty

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Abbreviations: BGBl. = Bundesgesetzblatt; BVerfGE = Entscheidungen des Bundesverfassungsgerichts; DRiG = Deutsches Richtergesetz; EC = European Communities; ECHR =European Convention on Human Rights; ECJ = European Court of Justice; EEC = European Economic Community; FAZ = Frankfurter Allgemeine Zeitung; GBl. = Gesetzblatt der DDR; GVBl. = Gesetz- und Verordnungsblatt; JZ = Juristen Zeitung; NJW = Neue Juristische Wochenschrift; sec(s). = section(s); SZ = Süddeutsche Zeitung; UNTS = United Nations Treaty Series; VOBl. = Verordnungsblatt.

[1] See e.g. W. Schäuble, Relations between the Two States in Germany: Problems and Prospects, in International Affairs, Vol.64 (1988), 209 et seq. at 213.

[2] George Bush in his message to the Senate transmitting the Treaty on the Reunification of Germany on September 25, 1990, Weekly Compilation of Presidential Documents, no.39 of October 1, 1990, 1442.

[3] See below at III.B.

[4] G. Schwarzenberger/E.D. Brown, A Manual of International Law (6th ed. London 1976), 209.

over both Berlin and Germany as a whole have meanwhile been restored[5].

The effects on the legal situation of Berlin (West) and Berlin (East) are numerous. This article will concentrate on outlining the most fundamental changes first by giving a concise – and by no means exhaustive – overview of what the *status quo ante* was (II) and, second, by trying to answer the question what the *status quo* is (III).

II. The Status Quo Ante[6]

A. The Situation of Berlin (West) – Significance of the Allied Reservations

1. Development since 1944[7]

In the Protocol on the zones of occupation in Germany and the administration of "Greater Berlin" of September 12, 1944, the Governments of the United States, the United Kingdom and the Soviet Union laid down that the Berlin area should be jointly occupied by armed forces of the three Allies[8]. The administration of Berlin was governed by the "London Declaration" of November 14, 1944, Art.7 of which provided for the establishment of an Inter-Allied Governing Authority (Komman-

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[5] The US President used the term restored to explain the effect of the Treaty on the Final Settlement with Respect to Germany on Germany's Sovereignty.

[6] There is ample literature on this topic; the most detailed research in an English publication is provided by I.D. Hendry/W.C. Wood, The Legal Status of Berlin (Cambridge 1987); for an overview see also Schwarzenberger/Brown (note 4), 356 et seq. and 371; D.P. O'Connell, International Law (London 1970), at 442 et seq. The most recent German publications on the status of Berlin in general are D. Wilke, Die Entwicklung von Status und Verfassung des Landes Berlin seit 1945 in: Jahrbuch des öffentlichen Rechts der Gegenwart, Vol.37 (Tübingen 1988), 167–334; G. Stubing, Der Status Berlins und die Besetzungsgerichtsbarkeit (Berlin 1988); R. Scholz, Der Status Berlins, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts (Heidelberg 1987), 351–381; see also J.A. Frowein, Die Rechtslage Deutschlands und der Status Berlins, in: E. Benda/W. Maihofer/H.-J. Vogel (eds.), Handbuch des Verfassungsrechts der Bundesrepublik Deutschland (Berlin, New York 1983), 29–58, at 54 et seq.; J.A. Frowein, Berlin, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 12 (1990), 58–63.

[7] For more detailed information see Hendry/Wood, *ibid.*, 3–16; Scholz, *ibid.*, 360 et seq., and Wilke, *ibid.*

[8] See W. Heidelmeyer/G. Hindrichs (eds.), Documents on Berlin 1943–1963 (München 2nd ed. 1963), at 2 et seq.

datura) for the "Greater Berlin" area[9]. Later, the Provisional Government of the French Republic joined the agreement with the result that Berlin was divided into four sectors[10]. The joint administration of Berlin was subsequently exercised by the Inter-Allied Military Kommandatura[11] as an expression of protest against the order of the three other Allies introducing a new currency (the »Deutsche Mark«) in the Western Zones of Berlin (the Soviet Union withdrew from the Kommandatura in 1948)[12]. The withdrawal was founded on the Soviet assertion that Greater Berlin "economically forms part of the Soviet zone"[13]. From July 8, 1948 to May 4, 1949, the Soviet Union imposed a total blockade on land and water access to Berlin which was answered by the Western Powers with a massive airlift[14].

In the Convention on Relations between the Three Powers and the Federal Republic of Germany of May 26, 1952, as amended on October 23, 1954[15], the Three Western Powers retained their rights and responsibilities relating to Berlin and Germany as a whole (Art.2). Nevertheless, they undertook to consult the Federal Republic in regard to the exercise of their rights relating to Berlin: vice versa the Federal Republic was obliged to cooperate with the Three Powers (Art.6).

The next step in post-war development with regard to the legal status of Berlin was the Quadripartite Agreement of September, 3, 1971[16], with its annexes I–IV, two agreed minutes and exchange of letters, as well as

[9] For the English text see The Conferences of Malta and Yalta 1945, Department of State Publications 6199 (Washington 1955), 124–127.

[10] Amendment of July 26, 1945, of the above mentioned Protocol; Heidelmeyer/Hindrichs (note 8), at 10 et seq.

[11] See the Resolution by the Conference of the Representatives of Allied Commands on the Quadripartite Administration of Berlin, July 7, 1945, see Heidelmeyer/Hindrichs, *ibid.*, at 25 et seq.

[12] Heidelmeyer/Hindrichs (note 8), 67 et seq.

[13] *Ibid.*, at 68.

[14] For more information on the airlift from the angle of an historian see F.A. Ninkovich, Germany and the United States – The Transformation of the German Question since 1945 (Boston 1988), at 64–67, and A. Turner jr., The two Germanies since 1945 (Yale 1987), 26–29. It seems to be an irony of history that in December 1990 the German Government decided to donate Leningrade's residents Berlin's emergency stockpile which was established to ensure Berlin's food-supply in case of a second Soviet blockade, cf. Berlin Airlift – With a Difference, Newsweek, no.50 of December 10, 1990, 25.

[15] For the text see Hendry/Wood (note 6), 323–328; excerpt in Heidelmeyer/Hindrichs (note 8), 139; official source: UNTS 331, 327 et seq.

[16] For comprehensive research on this agreement see H. Schiedermair, Der völkerrechtliche Status Berlins nach dem Viermächte Abkommen vom 3. September 1971 (Berlin, Heidelberg, New York 1975), with an English summary at pp.200–208; for concise information on its normative provisions see Hendry/Wood, *ibid.*, 44–54.

the Final Quadripartite Protocol[17]. Although the Quadripartite Agreement did not change the Four Powers' rights and responsibilities[18], its importance lay in guaranteeing free access to Berlin through East German territory (Part II.A). More generally it is stated that the Quadripartite Agreement served as an important instrument towards political *détente* in Berlin and in the relationship between the Federal Republic of Germany and the German Democratic Republic[19].

2. The Allies' reservations to the Basic Law

a) General observations

In their letter of approval to the Basic Law of May 12, 1949[20], the three Western Military Governors expressed a reservation on Arts.23 and 144(2)[21] of the Basic Law concerning the participation of Greater Berlin in the Federal Republic. The reservation stated that Berlin may neither be accorded voting membership in the Bundestag or Bundesrat nor be governed by the Federation: nevertheless, Berlin was permitted to designate a small number of representatives to attend the meetings of those legislative bodies (emphasis added).

b) Effects of the reservations on the relation of Berlin to the Federal Republic

In implementing the above-mentioned reservations, the Kommandatura approved the Berlin Constitution of 1950 on condition that Art.1 paras.2

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[17] For the texts see Hendry/Wood (note 6), 335–350.

[18] See para.3 of the preamble, *ibid.*, at 335; Hendry/Wood, *ibid.*, at 46, Frowein, Die Rechtslage Deutschlands ... (note 6), at 55, and Schiedermair (note 16), 200.

[19] Scholz (note 6), 366.

[20] Heidelmeyer/Hindrichs (note 8), at 107 et seq.

[21] Art.23 reads: "For the time being, this Basic Law shall apply in the territory of the Laender of ... Greater Berlin ..." *nota bene:* upon ratification of the Unification Treaty between the Federal Republic of Germany and the German Democratic Republic of September 29, 1990 (BGBl. [i.e. Federal Law Gazette] 1990 II, at 1360) this provision was annulled. Art.144 reads: "(1) This Basic Law shall require ratification by the parliaments of two thirds of the German Laender in which it is for the time being to apply. (2) Insofar as the application of this Basic Law is subject of restrictions in any Land listed in Article 23 or in any part thereof, such Land or part thereof shall have the right to send representatives to the Bundestag in accordance with Article 38 and to the Bundesrat in accordance with Article 50".

and 3, stating that Berlin is a federal state (Land) of the Federal Republic of Germany and that the Basic Law as well as the Federal laws are binding for Berlin, would be suspended[22, 23]. Furthermore, Art.87, providing for the applicability of Federal laws and the Basic Law in Berlin, was interpreted as meaning that at the time of the adoption of the Berlin Constitution, Berlin would have none of the attributes of a twelfth Land[24].

Notwithstanding this position of the Allies, the Federal Constitutional Court always held that Berlin *de jure* constituted an integral part of the Federal Republic, namely a Land, and that only the full exercise of the powers of a Land were limited by the Allied reservations[25, 26]. The Allies never shared this position[27] so that the issue remained unresolved[28].

A more far-reaching consequence of the Allied reservations to the Basic Law was that Federal laws were not immediately applicable in Berlin but had to be confirmed by the Berlin legislature in form of a »Mantelgesetz«[29]. It was established that "the provisions of Federal Laws shall apply in Berlin only when they have been voted upon by the House of

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22 See Heidelmeyer/Hindrichs (note 8), 121–122.

23 See also G. Pfennig/M. Neumann, Verfassung von Berlin – Kommentar (Berlin 1987), commentary on Art.1, pp.3–85.

24 *Ibid.*

25 See firstly the decision of May 21, 1957, BVerfGE 7, 1 et seq., reprint of the most important parts of the decision with an English summary in Fontes Iuris Gentium Series A – Sectio II Tomus 4, Decisions of the Superior Courts of the Federal Republic of Germany 1949–1960 (Köln, Berlin 1970) (hereafter referred to as Fontes), K. Doehring/W. Morvay/F. Münch, *ibid.*, 221 no.294; BVerfGE 37, 57, of March 1974 English summary in Fontes Tomus A II 7, Doehring [*et al.*] (Berlin, Heidelberg, New York 1979), at 60.

26 For a clear expression that the Federal Legislator shared this view see Third Transfer Law (Drittes Überleitungsgesetz) of January 4, 1952, containing Berlin's express obligation as a Land to take over all Federal Laws, §§ 12 et seq., BGBl.I, 1.

27 See the references in Hendry/Wood (note 6), at 148; this point of view is also shared by R. Piotrowicz, The Status of Germany in International Law: Deutschland über Deutschland?, International and Comparative Law Quarterly, Vol.38 (1989), 609–635, at 624–625. Probably the last expression of the Allies' position can be found in the notification to the Chancellor of the Federal Republic of June 8, 1990, regarding the annullment of the Allied reservations on the direct election of the Berlin representatives in the Bundestag and their complete right to vote in these organs, BGBl.I, 1068, of June 20, 1990, GVBl. Berlin (i.e. Law Gazette of Berlin), of June 30, 1990, 1303.

28 See K. Hailbronner, Völker- und europarechtliche Fragen der deutschen Wiedervereinigung, JZ Vol.45 (1990), 449–457, at 450.

29 See Hendry/Wood (note 6), 156 et seq., and BK/L (52) 81 by the Allied Kommandatura on the form of a »Mantelgesetz«, reprinted in Heidelmeyer/Hindrichs (note 8), at 135 et seq.; Art.87 (2) of the Berlin Constitution.

Representatives and passed as a Berlin law"[30]. The Berlin Senate had to present each proposal for taking over a Federal law by means of a »Mantelgesetz« to the Allied Kommandatura. Within a 21-day period the latter could raise objections to the law[31].

The most important law to which the Allies objected was the Law on the Federal Constitutional Court[32]. The basic argument for declining this law was that it would run counter to BK/O(50)75, which precluded Berlin from becoming a "constituent part" of the Federal Republic[33]. Nevertheless, the Federal Constitutional Court exercised jurisdiction in cases with a Berlin connection, but only where the constitutionality of Federal laws[34] or acts of Federal agencies in relation to Berlin were concerned[35].

The positions on whether the Federal legislation taken over in Berlin had the character of Berlin law or of Federal law were controversial: the Allies always took the first, the Federal Constitutional Court and following the other courts of the Federal Republic the opposite standpoint[36].

c) Effects on the external representation of Berlin (West)[37]

aa) General observations: Part II and Annex IV.A of the Quadripartite Agreement of September 3, 1971[38], expressed the Three Western Powers' agreement on allowing the Federal Republic to perform consular services for permanent residents of Berlin (West) if specified in each case. The

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[30] BK/O(50)75 of August 29, 1950, no.2(c), reprinted in Heidelmeyer/Hindrichs, *ibid.*, 121 et seq.

[31] *Ibid.*

[32] BGBl. 1950 I, 243; BK/O(52)35 of December 20, 1952, reprinted in Hendry/Wood (note 6), 173.

[33] Cf. *supra* note 30.

[34] This is to be regarded as an inference from its assertion that the Federal laws taken over by the Berlin legislature maintain their character as Federal laws, see above.

[35] See BVerfGE 7, 1(7); 10, 229(230); 19, 377(384); 20, 257(266); 36, 1(17); 37, 57(62); 67, 70(84), and Hendry/Wood (note 6), at 173–177; Scholz (note 6), at 379 et seq. each with further references.

[36] See Hendry/Wood, *ibid.*, 163–167, and the Federal Constitutional Court in the *Niekisch* case (E 19, 377 at 388) and in the *Brückmann* case (E 37, 57 at 62). For a (short) English summary of the *Niekisch* case: Fontes Tomus 7 (note 25), 61 no.89.

[37] See generally Hendry/Wood (note 6), 189–194; Pfennig/Neumann (note 23), Art.1 note 121.

[38] *Supra* note 17.

Government of the Soviet Union declared in Annex IV.B[39] that it would raise no objections in this regard.

bb) The extension to Berlin of international treaties of the Federal Republic: The inclusion of Berlin in international treaties[40] was governed by BKC/L (52) 6 of May 21, 1952[41]. Two possibilities of inclusion were envisaged: either the express mention of Berlin in a treaty's text or reference to Berlin in the Federal Republic's instrument of adherence[42].

The international instruments had to be adopted by the Berlin Senate subject to the authority of the Allied Kommandatura.

A different procedure was followed in relation to the Treaty Establishing the European Economic Community of March 25, 1957[43]. Already upon signature on March 27, 1957, the Federal Government reserved its extension to the territory of the Land Berlin[44]. Contemporaneously, the other signatory States issued a joint Berlin declaration[45]. The Allied Kommandatura declared in BK/L (57) 44 of November 18, 1957[46], that it did not object to the application of the EEC Treaty to Berlin. In the view of the Kommandatura, European Law, such as regulations, were subject to the same procedure as Federal Legislation[47].

According to the procedures established, acts of secondary EEC "legislation" were thereafter promulgated in the Berlin Law Gazette with a final clause stating that: "These acts of EC legislation came into force in Berlin at the same time as in the rest of their sphere of application"[48]. No

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[39] *Ibid.*, 341.

[40] On this topic see W. Wengler, Berlin in völkerrechtlichen Abkommen der Bundesrepublik Deutschland, in: G. Zieger (ed.), Schriften zur deutschen Frage (Berlin 1986), at 558 et seq., and Hendry/Wood (note 6), at 195–206.

[41] Heidelmeyer/Hindrichs (note 8), at 130–132.

[42] *Ibid.*, at 131.

[43] For a comprehensive analysis of Berlin's relation towards the EEC see H. Schramm, Die Einbeziehung Berlins in die Europäischen Gemeinschaften (Frankfurt [etc.] 1986); for concise information: Hendry/Wood (note 6), 217–223; R. Hütte, Berlin and the European Communities, Yearbook of European Law. 3, 1983 (Oxford 1984), 1–23.

[44] BGBl. 1957 II, at 764.

[45] *Ibid.*, at 760.

[46] Reprint in Heidelmeyer/Hindrichs (note 8), at 156–157.

[47] For examples of regulations not accepted by the Allies see P.J.G. Kapteyn/P. Verloren van Themaat, Introduction to the Law of the European Communities (Deventer [etc.] 1989, reprint 1990), at 734 note 286.

[48] See e.g. GVBl. Berlin 1990, 889–915.

reservation was pronounced concerning the jurisdiction of the European Court of Justice[49].

The European Convention on Human Rights[50] is applicable to the territory of Berlin (West)[51] and the organs established under the Convention Law exercised jurisdiction in a number of cases where acts of Berlin authorities were at stake[52]. Nevertheless, where the exercise of the joint authority of the Allies in Berlin was concerned, the European Commission of Human Rights pointed out that an act occuring under this authority is not attributable to one of the Powers, leading to the result that such an act is not "within their jurisdiction" in the sense of Art.1 of the Convention[53]. It is suggested that such an act should be attributed to Germany as a whole[54]. In a case that dealt with acts of British troops in Berlin the Commission pointed out that acts attributable to one of the Western Allies might give rise to a claim under Art.6 para.1 of the Convention[55].

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[49] Hendry/Wood (note 6), 221, examples for ECJ jurisprudence in matters presented by courts of Berlin see Ch. Pestalozza, Berlin unter Europäischem Rechtsschutz, in: D. Wilke (ed.), Festschrift zum 125jährigen Bestehen der Juristischen Gesellschaft zu Berlin (Berlin, New York 1984), 549–571, at 567–569.

[50] Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, UNTS 213, 221.

[51] Declaration of the Federal Government upon Ratification on December 3, 1952, BGBl. 1954 II, 14; GVBl. Berlin 1953, 1163; on the initial difficulties with the extension to Berlin see Pestalozza (note 49), at 550–553, and at 559 et seq., on problems of its applicability; for the far-reaching restrictions to the jurisdiction of German courts in criminal and non-criminal matters relating to the Allied Forces, persons accredited to the Allies and their family members see Law no.7 of the Allied Kommandatura of March 17, 1950, Amtsblatt der Allierten Kommandatura Berlin, no.2 of March 31, 1950, 11–15.

[52] Pestalozza, *ibid.*, at 561–567 with a number of examples.

[53] European Commission of Human Rights, Decisions and Reports 2, 72 et seq., at 73, the Commission stated: "... there is, in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention"; see also J. A. *Frowein*/W. Peukert, EMRK-Kommentar (Kehl [etc.] 1985), 18–19.

[54] Hendry/Wood (note 6), at 213; Piotrowicz (note 27), at 629–631, referring to the statement of the Secretary of State in the *Trawnik* case, (1985) Times Law Reports 250.

[55] European Commission of Human Rights, Decision of January 18, 1989, Application no.12816/87 *Vearncombe* case, reprint in ZaöRV Vol.49 (1989), 512–519; for an annotation of this case see G. Nolte, *ibid.*, at 499–511; for a general review on the possibilities of legal protection against acts of the French and British members of the Allied Forces in Berlin view: H. Freitag, Rechtsschutz der Einwohner Berlins gegen Akte der Besatzungsbehörden gemäß Art.6 Abs.1 EMRK (München 1989), stressing the importance of the ECHR's applicability in Berlin with respect to Law no.7, *supra* note 51; the different

B. The Situation of Berlin (East)

1. General observations

On first glance, developments in Berlin (East) seem to have been similiar to those in Berlin (West). The eastern part of the city gained increasing independence from the supreme authority of the Soviets. However, integration of the eastern sector within the political and legal system of the GDR was – as will be exemplified – much more complete than the integration of Berlin (West) within the Federal Republic[56].

2. "Berlin – capital of the GDR"

Art.1 of the GDR Constitution[57] proclaims Berlin as the capital of the GDR. In practice, Berlin (East) also served as seat of the GDR Government[58]. This led to immense practical problems for official representatives of the Federal Republic and the Western Allies to the GDR, because they wanted to avoid informal recognition of this state of affairs, which they saw as a violation of the city's quadripartite status[59]. As a result of this perception, a Western diplomatic mission Berlin (East) was designated as an "Embassy to the GDR" rather than an "Embassy Berlin"[60].

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situation of the American members is described by H.J. Stern, Judgment in Berlin (New York 1984), especially p.377.

[56] For an overview of the development see D. Schroeder, Berlin unter Besatzungsrecht, in: H. Horn (ed.), Berlin als Faktor nationaler und internationaler Politik (Berlin 1988), 125–141, at 132–133; E. Lieser-Triebnigg, Ost-Berlin – Status und Entwicklung, in: E. Diepgen (ed.), Berlinpolitik: Rechtsgrundlagen, Risiken und Chancen (Berlin 1989), 96–120.

[57] Verfassung der Deutschen Demokratischen Republik of April 6, 1968, GDR-GBl.I (GDR Law Gazzette), at 199, as amended on October 10, 1974, GDR-GBl.I, at 429; for an English translation see Law and Legislation in the GDR, 2/1978, 43–76, at 47; the Government of the GDR upheld this position as can be deduced from § 1 sec.2 of the Ländereinführungsgesetz (Law introducing Länder) of August 14, 1990, see GDR-GBl. I, 955.

[58] Hendry/Wood (note 6), at 300; S. Mampel, Die sozialistische Verfassung der DDR (commentary) (Frankfurt/Main 2nd ed. 1982), at 131.

[59] For examples see D. Schröder, Berlin, »Hauptstadt der DDR« – Ein Fall der streitgeborenen Fortentwicklung des Völkerrechts, in: Archiv des Völkerrechts, Vol.25 (1987), 418–459, at 418.

[60] D. Schröder, Die ausländischen Vertretungen in Berlin (Baden-Baden 1983), at 90; the US Embassy to the GDR was closed on October 2, 1990, and the US Embassy Office Berlin was opened, effective as from October 3, 1990, "as an integral part of the US Embassy to the Federal Republic", US Department of State Dispatch of October 8, 1990, at 167.

3. The extension of international treaties to the territory of Berlin (East)

Since the GDR considered East Berlin as part of its territory, international treaties of the GDR did not contain a clause extending their sphere of application to Berlin (East)[61], but extension was rather regarded as automatic[62]. Notwithstanding this position of the GDR – which was not shared by the Western Allies – the other party to an international agreement could express its approval of the application of the instrument to the Soviet sector[63].

4. Application of GDR legislation to Berlin (East)

Until September 1976, the applicability of GDR laws was extended to Berlin (East) by means of parallel legislation by the Magistrate of the Soviet sector, who promulgated the laws in the »Verordnungsblatt für Groß-Berlin«[64]. Thereafter, such publication was terminated since the GDR regarded Berlin as "an integral part of the GDR"[65], thereby implying that GDR legislation was to be regarded as automatically applicable in the Soviet sector.

As early as January 26, 1962, the Government of the GDR extended the laws on defence and on conscription as well as the sphere of application of the military criminal code to the territory of East Berlin by means of statutory decree[66]. The Western Powers and the Federal Republic considered this a violation of the London Protocol; consequently, the Western Commandants sent a note of protest[67]. In contrast to this practice concerning the Eastern Sector, the Federal law on conscription[68] was not extended to Berlin (West) before January 1, 1991.

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[61] See for example the treaty establishing the COMECON of May 14, 1955 (GDR-GBl.I, 381) and the Warshaw pact of May 10, 1960, GDR-GBl.I, 283; for more information on formulation H.-H. Mahnke, Beistands- und Kooperationsverträge der DDR (Köln 1982), at 29–35; A. Uschakow/D. Frenzke, Der Warschauer Pakt und seine bilateralen Bündnisverträge (Berlin 1987), at 246.

[62] Hendry/Wood (note 6), at 306.

[63] *Ibid.*

[64] See Mampel (note 58), at 138–140; after the entry into force of the 1968 Constitution only the titles of the superseded laws were published, *ibid.*

[65] *Ibid.*, at 140.

[66] VOBl. Groß-Berlin 1962 I, 1962.

[67] See Hendry/Wood (note 6), at 307–308, and, e.g., G. Langguth, Der Status Berlins aus Sicht der DDR – Eine kritische Bestandsaufnahme, in Diepgen (note 56), 121–161, at 125–161.

[68] Wehrpflichtgesetz of June 13, 1968 (BGBl.I, 879) as amended by Law of June 30, 1989, BGBl.I, 1292.

III. The Status Quo

Before examining details of the changes in the legal status of Berlin, it seems necessary to briefly outline the development towards full integration of Berlin into the unified Germany, since it is unquestionable that the Allies had, if not the sole competence for deciding on German unity[69], at least the competence to regulate its external aspects[70], and each of them had, apart from mere participatory rights in the unification process, a veto competence with respect to acts establishing a German State[71]. Due to the special status of Berlin the Allied competence concerning an alteration of its status were even more far-reaching[72].

A. Termination of the Allied Reservation on the Direct Election of Representatives of Berlin to the Bundesrat and Bundestag of June 12, 1990

The first step towards the integration of Berlin and towards the final abrogation of the Allied reservations on the Status of Berlin was undertaken on June 8, 1990, when the Three Western Powers granted for the first time in more than forty years full participatory rights to the Berlin representatives in the Bundestag and in the Bundesrat.

As indicated above[73] the Western Allies, contrary to the position of the Soviets with respect to the GDR and its constitution[74], had upheld their reservations to the Basic Law which stated that "Berlin may not be governed by the Federal Republic", implying *inter alia* that the representatives of Berlin (West) in the Bundestag were not elected by the people of Berlin but by the Berlin House of Representatives[75] and had only a consultative status in the Bundestag as well as in the Bundesrat.

With notification of June 8, 1990, the ambassadors of the Three West-

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[69] For this position see C. v. Goetze, Die Rechte der Alliierten auf Mitwirkung bei der deutschen Einigung, NJW Vol.43 (1990), 2161–2168, at 2164, and 2168.

[70] K. Hailbronner, Völker- und europarechtliche Fragen der deutschen Wiedervereinigung, JZ Vol.45 (1990), 449–457, at 449.

[71] D. Rauschning, Deutschlands aktuelle Verfassungslage, Deutsches Verwaltungsblatt, Vol.105 (1990), 393–404, at 398.

[72] v. Goetze (note 69), 2168.

[73] *Supra* II.A.

[74] *Supra* II.B.

[75] See section 53 of the Law on Federal Elections of September 1, 1975 (BGBl.I, 2325) and August 4, 1976 (BGBl.I, 2133, 2799) as amended by Law of June 8, 1989, BGBl.I, 1026.

ern Powers informed the Government of the Federal Republic of Germany that these Powers:

> "... in the light of most recent developments in Germany and in the international situation have reexamined certain aspects of their reservations to the Basic Law ... The reservations of the Three Western Powers regarding the direct election of Berlin representatives in the Bundestag and in the Bundesrat ... are hereby terminated. The position of the Allies that the relations between the Western Sectors of Berlin and the Federal Republic of Germany shall be maintained and developed, taking into consideration that these sectors as before are not a constitutive part of the Federal Republic of Germany and continue not to be governed by it, remains unchanged ..."[76].

As clearly shown by the phrasing of the last paragraph, it was not the intention of the Western Allies to give up all their reservations on the status of Berlin, but, nevertheless, in the face of a direct election of the Berlin representatives the reservation on the applicability of Federal law in Berlin (West)[77] would have stood on very weak grounds. A discussion of the question to what extent the reservation connected with the phrase "not be governed" could have been maintained after this note, would seem to be superfluous in the light of the complete suspension of the Four Power's rights on October 3, 1990[78]. Nevertheless, the cancellation may be assessed as a further important step towards German unity[79].

The Federal legislator reacted by immediately extending the sphere of application of the Federal Electoral Law to the Land Berlin[80] subject to the procedure laid down by the Third Transfer Law[81]. In light of succeeding events, the discussion on whether the Soviet Union's approval of this measure of the Western Allies was necessary under the Quadripartite Agreement of 1971[82] proved to be purely academic, since the Soviet

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[76] For the French and German text see BGBl. 1990 I, 1068; GVBl. Berlin, 1303 [English translation by the author].

[77] *Supra* at II.A.2.a).

[78] *Infra* at III.B.2 (notes 96 and 97) and accompanying text.

[79] Statement of the vice-president of the German Bundestag, Cronenberger, during the first session in which the Berlin representatives participated under their new status on June 21, 1990, Bulletin der Bundesregierung, no.80 of June 26, 1990, 691.

[80] Neuntes Gesetz zur Änderung des Bundeswahlgesetzes of June 11, 1990, BGBl.I, 1015; for the extension to the territory of the GDR and Berlin (East) see the treaty between the Federal Republic of Germany and the German Democratic Republic of August 3, 1990 (BGBl.II, 822) which entered into force on September 9, 1990, BGBl.II, 868.

[81] See Art.2 of the said law; for the provision of the Third Transfer Law *supra* at note 26; the Berlin legislature took over this law on June 14, 1990, GVBl. Berlin, 1242.

[82] The present author would answer this question in the negative, see also A. Wilke, Bundestagswahlen in Berlin, Zeitschrift für Rechtspolitik, Vol.8 (1990), 307–310.

Union left the Western Allies' decision uncontradicted. It may be noted that the immediate effect of the lifting of the reservation was the full right of the Berlin representatives in the Bundestag and the Bundesrat to vote on the adoption of the first German-German State Convention on the Introduction of the Economic, Currency and Social Union[83].

B. Termination of All Remaining Four-Power Rights and Responsibilities for Berlin and Germany As a Whole

1. Development towards termination[84]

During the "Open Skies Conference" in Ottawa on February 13, 1990, the Ministers of Foreign Affairs of France, the United Kingdom, the United States of America, the Soviet Union as well as of the Federal Republic of Germany and the German Democratic Republic issued the so-called "Ottawa Declaration", starting a development that led to the full restoration of German sovereignty over Berlin and Germany as a whole. The Declaration contained the following wording:

> "They ... [i.e. the said Ministers] agreed upon meetings of the ... [Ministers of Foreign Affairs as listed above] to discuss the external aspects of establishing German unity, including the issues of security of their neighbouring states.
>
> Preparatory talks on an administrative level will soon begin"[85].

The Ottawa Declaration marked the beginning of the "Two-plus-Four" forum which was retained during the four meetings of the Ministers of Foreign Affairs of the six countries involved.

On May 5, 1990, a program for further negotiations was stipulated, consisting of the following four-point agenda: border questions, political-military questions taking into consideration factors necessary for suitable security structures in Europe, Berlin-problems, and the final settlement and termination of Four-Power rights and responsibilities in an instru-

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[83] Wilke, *ibid.*, at 307 note 6; for the wording of the treaty see BGBl. 1990 II, 518, it came into force on June 30, 1990, BGBl.II, 700; for an English translation: International Legal Materials, Vol.29 (1990), 1120–1185; see also K. Stern/B. Schmidt-Bleibtreu, Verträge und Rechtsakte zur Einheit Deutschlands, Vol.1: Staatsvertrag zur Währungs-, Wirtschafts- und Sozialunion (München 1990); World Affairs, Vol.152 (1989/90), 219–229.

[84] For a compilation of documents on the "Two-plus-Four" negotiations see EA Vol.45 (1990), D 491 et seq.

[85] Kessing's Record of World Events, Vol.36 (1990), at 37259. For the German text see Bulletin der Bundesregierung, no.27 of February 20, 1990, 215.

ment binding under international law[86]. The third and fourth points underlined the significance of reaching an internationally binding solution of the problems connected with the Four Power status of Berlin and Germany as a whole[87].

2. The significance of the Treaty on the Final Settlement with Respect to Germany – especially in Relation to the Status of Berlin[88]

On September 12, 1990, the Ministers of Foreign Affairs of the Four Powers and the two German states which constituted the "Two-plus-Four" forum signed the Treaty on the Final Settlement with Respect to Germany in Moscow after the Unification Treaty of August 31, 1990, between the Federal Republic of Germany and the GDR[89], had proved to meet the requirements set out above[90].

The Treaty on the Final Settlement refers already in its preamble to the rights and responsibilities of the Four Powers relating to Berlin and Germany as whole. It states expressly that with the unification of Germany and the change in the relationship between NATO and the Warsaw Pact and in the whole world these rights and responsibilities have lost their function.

Article 1 para.1 reads as follows:

"The united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin"[91].

The formulation used seems to imply – contrary to the position the Soviet Union had been holding ever since 1949[92] – that the Soviet Union

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[86] For the German wording of the final declaration see Bulletin der Bundesregierung, no.54 of May 8, 1990, 423.

[87] See *supra* II.

[88] For the English, French, German and Russian wording see BGBl. 1990 II of October 13, at 1318 et seq. (reprint of English text see Annex A.1); for the English wording see also US Department of State Dispatch of October 8, 1990, at 165–167; the treaty was ratified by the Bundestag on October 11, 1990, BGBl., *ibid.*; the US Senate ratified it after a unanimous vote on October 11, 1990; D. Blumenwitz, Der Vertrag vom 12.9.1990 über die abschließende Regelung in bezug auf Deutschland, NJW Vol.43 (1990), 3041–3048, at 3041 note 3, and SZ of October 12, 1990, 8; on November 16, 1990, the United Kingdom deposited her instrument of ratification, SZ of November 17/18, 1990, 1. Finally, on March 4, 1991, the Soviet Union also ratified the treaty, SZ of March 5, 1991, 1, it entered into force on March 15, 1991, BGBl.1991 II, 587.

[89] *Infra* III.C.

[90] *Supra* note 16 and accompanying text.

[91] For the corresponding provisions of the Unification Treaty and change in the Berlin Constitution see *infra* III.C.

[92] *Supra* note 13 and accompanying text.

agreed that Berlin (East) was not a constituent part of the GDR; otherwise, the express mention of the territory of the GDR and the whole of Berlin would have been meaningless.

Arts.4 and 5 involved military questions which will be dealt with separately[93].

Art.7 contains the essence of the Treaty; it reads:

> "(1) The French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole. As a result, the corresponding, related quadripartite agreements, decisions and practices are terminated and all related Four Power institutions are dissolved.
>
> (2) The united Germany shall have accordingly full sovereignty over its internal and external affairs" [emphasis added].

Art.8 stipulates that the Treaty will be ratified by the united Germany and therefore will be binding upon it.

In accordance with general practice in relation to multilateral treaties, Art.9 states that the entry into force of the Treaty is subject to the deposit of the last instrument of ratification or acceptance by the six, or – after German unification – five state parties. It may be noted that the Treaty was signed by the Minister of Foreign Affairs of the Federal Republic of Germany as well as by the Prime Minister of the German Democratic Republic, supporting the view that each German State was acting only on its own behalf, not as a representative for Germany[94].

It seems incontestable that the final step towards the unification of Germany and restoration of full German sovereignty would have been incomplete without a renunciation of the still-persisting responsibilities of the Western Allies[95] and that the Treaty alone could not overcome this obstacle. Accordingly, the Four Powers agreed upon a formal declaration to be issued jointly in New York on October 1, 1990, on the suspension of their rights and responsibilities, referring to the quadripartite agreements as well as the decisions and practices and the activities of the re-

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[93] See the article by T. Stein, External Security and Military Aspects of German Unification, 451 et seq., in this issue.

[94] Blumenwitz (note 88), at 3041.

[95] As one commentator stated earlier: "What's wrong with this picture (i.e. the unification of Germany with the Allied rights and responsibilities still pertaining) ... is that the baby would be born without a birth certificate", H. Sonnenfeldt as quoted in Newsweek, no.24 of June 11, 1990, at 14.

lated institutions[96]. Thus, the date of entry into force of the Unification Treaty and the full restoration of Germany's sovereignty coincided on October 3, 1990[97].

C. The Stipulations in the Unification Treaty with Respect to Berlin[98] and the Related Changes in Federal and Berlin Law

1. Territory and status of Berlin

Before considering the substantial changes in Federal law necessary to integrate Berlin into the Federal Republic of Germany, the Unification Treaty clarifies in its first chapter, entitled "effects of accession", Art.1 para.2, that "The 23 districts of Berlin constitute the Land Berlin". Further specifications are provided by para.1 of the explanatory Protocol, referring to the 1920 Law on the Establishment of the new Municipality of Berlin[99] and imposing the obligation on Berlin and the adjacent Land Brandenburg to review and document the course of their frontier within a one-year period[100].

Divergencies emerged between the 1920 law and the *status quo* because the old law mentioned only 20 districts, whereas both parts of Berlin meanwhile comprise 23 districts, since 3 new districts in the eastern part

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[96] For the German wording see BGBl. 1990 II, 1331 (reprint of English text see Annex A.2); the difficulties in the negotiations on the suspension are pointed out in the FAZ of September 14, 1990, 3.

[97] The direct effects on the applicability of Federal laws "vetoed" by the Allies and the continuance of Allied "legislation" in Berlin will be dealt with below.

[98] Treaty Between the Federal Republic of Germany and the German Democratic Republic on Establishing German Unity (hereinafter referred to as Unification Treaty) of August 31, 1990, in force since September 29, 1990, for the German text see BGBl. 1990 II, 1360; the actual entry into force took place on October 3 when the GDR declared her accession to the Federal Republic, Art.1 §1 of the Unification Treaty. See also Stern/Schmidt-Bleibtreu (note 83), Vol.2: Einigungsvertrag.

[99] Gesetz über die Bildung einer neuen Stadtgemeinde Berlin of April 27, 1920, Preußische Gesetzessammlung 1920, 123; for an historical overview of this law see G. Schmidt-Eichstaedt, Berlin und das Gesetz über die Bildung einer neuen Stadtgemeinde Berlin, Juristische Rundschau 1990, 133–141.

[100] For an explanation of the close links between Berlin and Brandenburg see Schmidt-Eichstaedt, *ibid.*; see also Art.5 of the Unification Treaty giving a recommendation to the legislatures of the unified Germany to discuss amendments of the Basic Law concerning *inter alia* reorganisation of the Berlin/Brandenburg region different from the plebiscite envisaged by Art.29 of the Basic Law.

of the city were added after the war[101]. The Twenty-second Law Amending the Constitution of Berlin[102] simply subsumes the 3 new districts – Marzahn, Hohenschönhausen and Hellersdorf – under Art.4 of the Berlin Constitution of 1950 describing the territory of Berlin.

Clearly distinguishing between the accession of the five Länder to the Federal Republic in para.1 and the plain statement of what the Land Berlin is in para.2, the structure of Art.1 of the Unification Treaty provides evidence that the German Democratic Republic was unable to assert successfully its position concerning the status of Berlin as a constituent part of the GDR[103]. The status of Berlin as a Land is also stipulated[104].

Art.2 of the Unification Treaty states that Berlin is the capital of the Federal Republic of Germany. With the exception of the GDR Constitution of 1968[105], no German Constitution since the Constitution of the German Reich of 1871 contained such a provision[106]. § 16 para.2 of the Third Transfer Law established that Berlin should be provided with the necessary support in order to enable it, *inter alia*, to fulfill its tasks as capital of a unified Germany[107]. According to the rule that *lex posterior derogat legi priori*, however, this could not produce a binding effect on the legislator. Consequently, there was no legal obligation for the Government of the Federal Republic to have such provision included in the Unification Treaty, but political pressure in favour of such a solution was strong[108].

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101 Pfennig/Neumann (note 23), Art.4 note 3.

102 Law of September 3, 1990, GVBl. Berlin 1990, 1877 et seq.

103 *Supra* II.B.3.

104 For the formerly diverging positions of the Federal Republic and the Allies see *supra* II.A.2.b).

105 *Supra* II.B.2.

106 M. Heintzen, Die Hauptstadtfrage – verfassungsrechtlich und rechtspolitisch betrachtet, Zeitschrift für Politik, Vol.37 (1990), 134–148, with an English summary at p.148, at p.134, and with references to the discussion of this question in the Weimar period.

107 BGBl. 1956 I, 420, amending the Third Transfer Law, BGBl. 1952 I, 1.

108 E.g. Committee of the Bundestag on Inner German Questions, recommendation of February 7, 1990, reprint in Die Woche im Bundestag of February 14, 1990, 53; on the question whether Berlin should also become seat of government and parliament, the Bundestag issued a resolution on June 20, 1991; 338 members of parliament voted in favour of Berlin, 320 in favour of Bonn, Das Parlament of June 28, 1991, 1. Hufen doubts that these resolutions can form the correct legal basis for such a decision claiming that a formal law would be necessary, see F. Hufen, Entscheidung über Parlaments- und Regierungssitz der Bundesrepublik Deutschland ohne Gesetz?, NJW Vol.44 (1991), 1321–1327.

2. *Applicability of legislative acts*

a) On the constituional level

Art.3 of chapter II of the Unification Treaty treats basic rules on the entry into force of the Basic Law, including the changes set forth in Art.4 of the Unification Treaty, in the 5 new Länder and "in the part of the Land Berlin, where it has not been in force yet". The cited wording supports the conclusion set above that in the negotiations on the Unification Treaty the Government of the Federal Republic was successful in asserting its position on the *status quo ante* of Berlin as constituting a Land of the Federal Republic.

Art.3 Unification Treaty must be read together with Art.4 para.5 of the Unification Treaty, inserting new Art.143 into the Basic Law. In its first paragraph this provision sets forth a transition period for diverging law in the territories named in Art.3 of the Unification Treaty ending on December 31, 1992. Subject to the norms of Art.19 para.2 and Art.79 para.3 of the Basic Law[109] differences in law between the old and the new Länder are thus sanctioned. The second paragraph of the new Art.143 stipulates that differences in law concerning chapters II (The Federation and the Länder), VIII (Execution of Federal Statutes and Federal Administration), IX (Administration of Justice), X (Finance), and XI (Transitional and Concluding Provisions) of the Basic Law are permissible until December 31, 1995, at the latest[110].

Besides changing the operative provisions of the Basic Law, the Unification Treaty also amends the preamble[111]. Art.4 para.1 of the Unification Treaty includes the people of Berlin in the listing of the Länder where, "[T]he Germans ... completed unity and liberty of Germany in

[109] Art.119 – restrictions on fundamental human rights – para.2 reads: "In no case may the essence of a fundamental right be encroached upon". Art.79 – amendments of the Basic Law – para.3 states: "Amendments of this Basic Law affecting the division of the Federation into Länder, the principle of the Länder's participation in legislation, or the basic principles laid down in Articles 1 and 20 (basically containing the guarantee that all State power shall be bound by fundamental rights, first of all human dignity and the principles of democracy, Rechtsstaat, division of powers and representative democracy), shall be inadmissible".

[110] A detailed analysis of the implications of these provisions would exceed the scope of this article, nevertheless, in the course of the present article the author will try to suggest the most important implications for the law of Berlin.

[111] For an analysis of the genesis of the former preamble and its binding legal effect see W. Geiger, Die Entstehung der Präambel des Grundgesetzes und ihre Bindungswirkung, in: D. Haack [et al.] (eds.), Das Wiedervereinigungsgebot des Grundgesetzes (Köln 1989), 121–133.

the exercise of free self-determination ..."[112, 113]. The former wording of the Preamble did not mention Berlin. Thus, the new status of Berlin as a Land entirely like the other Länder is accentuated.

b) Federal laws, EC-legislation and land law

Arts.8 and 10 of the Unification Treaty extend Federal laws, subject to the qualifications in Annex I (see below) (Art.8) and any legal acts of the European Communities (Art.10) to the territory named in Art.3[114], whereas Art.9 para.1 provides for the continuance of laws of the German Democratic Republic, subject to the modifications provided for in Annex II (see below), with the rank of laws of a Land, hence subjecting such laws to Art.31 of the Basic Law, which stipulates the precedence of Federal law over Land law.

Art.9 para.2 refers to appendix 2 of the Unification Treaty, listing GDR law remaining in force, subject to its compatibility with the Basic Law and the directly applicable law of the European Communities. With respect to Art.9 paras.1 and 2, important modifications concerning Berlin, due to its special status, should be mentioned. The Federal Republic's position regarding Berlin, as a Land of the Federal Republic renders the "Land law" clause of Art.9 para.2 of the Unification Treaty inapplicable to the territory of Berlin as referred to in Art.3 of the Unification Treaty. Consequently, Art.49 of the Berlin Constitution of 1950[115] was amended by the 22nd Law on the Amendment of the Berlin Constitution of September 3, 1990[116], enabling the extension of law hitherto only applicable in a part of Berlin, subject to federal legislation. The applicability of Ber-

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[112] For a critical evaluation on the right to self determination in relation to the unification process, see Blumenwitz (note 88), at 3043.

[113] A different proposal for a new preamble to the Basic Law was put forward by G. F. de la Croix, Zur äußeren Verfassung eines wiedervereinigten Deutschland – Gedanken zur Neufassung der Präambel des Grundgesetzes, EA Vol.45 (1990), 330–332.

[114] Regulation (Rechtsverordnung) on the Transfer of EC Law to the Territory named in Art.3 of the Unification Treaty of September 28, 1990, in force since October 3, 1990 (BGBl.I, 2117), and Regulation of December 18, 1990, in force since January 1, 1991, BGBl.I, 2915.

[115] Constitution of September 1, 1950 (VOBl.I, 433) as amended on December 17, 1988, GVBl. Berlin, 2324.

[116] Zweiundzwanzigstes Gesetz zur Änderung der Verfassung von Berlin, GVBl. Berlin 1990, 1877.

lin (West) Law was thereby extended to the whole territory of Berlin by the Law on Unification of Berlin Land Law[117].

For a transition period before the Government of "the whole of Berlin" is constituted[118], Art.16 of the Unification Treaty puts the tasks of an "All-Berlin" government under the "joint" authority of the Senate and the Magistrate.

c) The special regulations in Annex I, sec.IV and Annex II, sec.IV Unification Treaty with respect to the territory of Berlin as specified by Art.3 of the Unification Treaty

Annex I to the Unification Treaty further specifies the scope of applicability of Federal laws in the territory described by Art.3 of the Unification Treaty. The special regulations in sec.IV of this Annex partially extend the ambit of certain Federal laws in the former Berlin (East) beyond the scope provided for in Art.9 of the Unification Treaty with respect to the five new Länder.

In principle, Annex I declares the Federal laws on the administration of Justice[119], save the modifications listed below, fully applicable for the part of Berlin described in Art.3 of the Unification Treaty. The German Code on Judges[120] (DRiG) is modified in a number of aspects: Judges who are or were employed in Berlin (East) may take the position of an assistant judge except on a higher »Landesgericht«, e.g. the Higher Administrative Court of Berlin (OVG Berlin); their status will be one of a judge on probation (sec.22 of the DRiG), implying that not more than one judge having this status may participate in a court decision (sec.29 of the DRiG) and that such a judge can be discharged much more easily than a tenured judge, who can only be dismissed on the basis of a final court decision not subject to appeal (sec.21 para.3 of the DRiG).

The continued employment of a prosecutor who worked in Berlin (East) is subject to approval by the Berlin Senator for Justice.

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[117] Gesetz zur Vereinheitlichung des Berliner Landesrechts of September 28, 1990, in force since October 3, 1990 (GVBl. Berlin, 2119) as amended by the Second Law on the Unification of Berlin Land Law – Zweites Gesetz zur Vereinheitlichung des Berliner Landesrechts of December 10, 1990, GVBl. Berlin, 2289.

[118] This transition period ended on January 25, 1991, when the Berlin House of Representatives' resolution extending the Constitution's scope of application entered into force, GVBl. Berlin 1991, at 35.

[119] Annex I Chapter III – portfolio of the Federal Minister of Justice – Subject A: administration of justice, sec.IV.

[120] Deutsches Richtergesetz (BGBl. 1972 I, 713) as amended on June 26, 1990, BGBl.I, 1206.

The jurisdiction of the Berlin (West) courts was extended to the former Eastern districts[121] and branch offices of the courts of first instance were opened[122]. Sec.IV of Annex II[123] excludes the former Berlin (East) from the ambit of some GDR laws on the administration of justice that, for a transition period, remain in force on the territory of the five new Länder.

D. The "Fate" of Acts of the Allies with Respect to Berlin

1. "Vetoed" federal law

In the wake of the suspension of the Allied Reservations with respect to Berlin and Germany as a whole[124] the Sixth Transfer Law[125] declared in sec.1 that Federal law which was theretofore, not at all or not completely applicable in Berlin (West), due to Allied reservations, becomes fully applicable in Berlin (West) from the entry into force of this law, subject to the provisions of secs.2 and 3 of the present law. Therewith, the restrictions on, *inter alia*, the Law on the Federal Constitutional Court and the Law on Conscription[126] were lifted.

Sec.2 of the Sixth Transfer Law lists special rules applicable with respect to Allied competences. In this context it should be emphasized that, until the end of 1992, the Federal Agency on Air Traffic Control can still make use of the Four Powers' agency, the Allied air traffic control[127] and its staff (sec.2 para.6).

Sec.3 lists Federal law not applicable in Berlin (West), naming first the

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[121] Law of September 25, 1990, GVBl. Berlin, 2076; on the practical difficulties see e.g. FAZ of September 29, 1990, 4; SZ of September 22, 1990, 4: »Justitia müßte ein Herkules sein« ("Justice would have to be a hercules").

[122] Art.1 para.3 of the said law and directive of the Senate administration for Justice of September 26, 1990, Amtsblatt für Berlin (official gazette), no.52 of October 12, 1990, 1902, and no.55 of November 2, 1990, 2018.

[123] Annex II Chapter III – portfolio of the Federal Minister of Justice – Subject A: administration of justice, sec.IV.

[124] *Supra* III.B.2.

[125] Gesetz zur Überleitung von Bundesrecht nach Berlin (West), (Sechstes Überleitungsgesetz) of September 25, 1990 (BGBl.I, 2106), according to para.5 in force since the suspension on the Allies' rights and reservations on October 3, 1990, announcement on its entry into force, BGBl.I, 2153.

[126] *Supra* II.2.b).

[127] After the death of Rudolf Heß on August 17, 1987, and the consequent end of the Four Power administration of Spandau Military Prison, air traffic control remained the only field of the Four Allies' common administration, see M.J. Hahn, Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1987, ZaöRV Vol.49 (1989), 520–630, at 630.

Convention on Relations between the Three Powers and the Federal Republic of Germany of May 26, 1952, as amended on October 23, 1954[128]; thereafter instruments on the stationing of troops are indicated.

In sec.4 special regulations with respect to Berlin are declared invalid; among the regulations named are secs.1–15, 17–20 of the Third Transfer Law[129].

2. Acts of the Allied authorities with respect to Berlin

The Agreement between the Federal Republic of Germany, the French Republic, the United States of America and the United Kingdom of Great Britain and Northern Ireland on the Regulation of Certain Questions with Respect to Berlin of September 25, 1990[130], stipulates in Art.2 that all rights and obligations established or determined by measures of the Allied Authorities remain in force under German law. The second sentence of this provision submits these rights and obligations without discrimination to the same kind of future legislative, judicial and administrative measures which apply to other rights and obligations established under German law.

Whereas Art.3 para.1 regulates the competence of German courts and civil authorities with respect to all acts or omissions having taken place in or relating to Berlin before the Four Powers' rights and responsibilities became ineffective, its scope of application is considerably limited by para.2, which contains basically the same limitations to the jurisdiction of German courts and the competence of German civil authorities as found in Law no.7 of March 17, 1950[131].

A further "stand-still" provision for Allied judgments and decisions is contemplated by Art.4 which stipulates that such judgments and decisions are not subject to appeal and remain effective in law. The last clause

[128] BGBl. 1955 II, 305, see also *supra* note 15; this treaty was suspended by an exchange of notes between the Federal Republic of Germany, the French Republic, the United States of America and the United Kingdom of Great Britain and Northern Ireland on September 28, 1990, taking effect with the suspension of the Allies' rights and responsibilities on October 3, 1990, BGBl.II, 1386.

[129] Published in BGBl.III classification no.603–5 as amended by Art.6 of the Law of August 30, 1971, BGBl.I, 1426.

[130] BGBl. 1990 II, 1274. According to Art.10 this agreement becomes preliminarily applicable from the time of the suspension of the Four Powers' rights on; its preliminary entry into force was put into effect by regulation (Rechtsverordnung) of September 28, 1990, BGBl.II, 1273; for further discussion of its provisions see Stein (note 93).

[131] *Supra* note 51 and accompanying text.

of Art.4 precludes named acts of the Allies from being subjected to retrial.

In Art.5 the Federal Republic of Germany declares that she and her citizens renounce all claims against the Three Western Powers relating to their exercise of the Four Power rights and responsibilities, and further declares that the Federal Republic of Germany assumes responsibility for decision on and satisfaction of all claims for compensation of damages resulting from occupation.

E. Other Important Changes in Berlin

1. The establishment of a constitutional court

The original wording of Art.72 of the Constitution for Berlin already provided for a constitutional court (Verfassungsgerichtshof) but Art.87a suspended this provision[132]. Art.1 para.11 of the Twenty-second Law on Amending the Berlin Constitution[133] proposes a constitutional court with nine members. The competences of the Court on the Land level are specified in sec.14 of the Law on the Constitutional Court of November 17, 1990[134] similar to those of the Federal Constitutional Court on the federal level[135].

Certain problems may arise with regard to Art.72 para.2 sub-sec.4 of the Constitution[136], in ascertaining the Court's jurisdiction over constitutional complaints insofar as a constitutional complaint is not brought before or will not be brought before the Federal Constitutional Court (emphasis added). The second alternative raises the question whether the initial complaint to the Berlin Constitutional Court will subsequently become inadmissible, a result not required by the Basic Law, which permits competing procedures[137], or whether even the eventual intention to present the complaint to the Federal Constitutional Court renders it admissible from the beginning, a result which for obvious reasons could not be

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[132] See Pfennig/Neumann (note 23), commentary to Art.87a.

[133] *Supra* note 116.

[134] GVBl. Berlin 1990, 2246–2252.

[135] Arts.93 and 100 of the Basic Law.

[136] *Supra* note 134; see also the identical provision of sec.14 no.6 of the said law (note 135).

[137] Cf. e.g. I. von Münch, Grundgesetz-Kommentar, Vol.3 (München 2nd ed. 1983), Art.142 note 10, and Vol.1 (München 3rd ed. 1985), preface to Arts.1–19 marginal note 38.

put into practice. Most probably, the legislature intended that a subsequent complaint to the Federal Constitutional Court will have a terminating effect on the procedures already pending before the Berlin Constitutional Court.

2. *The election of the House of Representatives*

On December 2, 1990, it was not only the first time for the people of entire Berlin to participate in an election to the Bundestag[138], but also the first time in 44 years that they could freely elect a common House of Representatives.

The necessary legal preconditions were set by the amendment of Art.87a and b of the Berlin Constitution[139] and the pursuant changes of the electoral laws and regulations of Berlin[140]. The most important provision in this context is sec.1 para.2 of the Law Amending the Berlin Electoral Law, declaring that the citizens of the districts of Berlin (East) are entitled to vote[141].

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[138] *Supra* III.A.

[139] Twenty-third Law Amending the Constitution of Berlin (Dreiundzwanzigstes Gesetz zur Änderung der Verfassung von Berlin) of October 5, 1990; Art.87b of the Twenty-second Law on Amending the Constitution had to be reformulated after the Federal Constitutional Court on September 29, 1990 – 2 BvE 1/90 – declared »Listenverbindungen« as proposed by the Federal Electoral Law unconstitutional.

[140] Law Amending the Electoral Law of the Land (Gesetz zur Änderung des Landeswahlgesetzes) of September 3, 1990 (GVBl. Berlin, 1881) and Second Law Amending the Electoral Law of the Land (Zweites Gesetz zur Änderung des Landeswahlgesetzes) of October 6, 1990, GVBl. Berlin, 2140; Verordnung zur Änderung der Landeswahlordnung of September 25, 1990, GVBl., 2079.

[141] For an exact specification of the voters see sec.1 para.2, referring to the Länderwahlgesetz of the German Democratic Republic, sec.8, DDR-GBl. 1990 I, 960.