



SARU 2019  
Summer Academy (Re-)Unification

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*The Legal Shaping of  
German Reunification*



## International and Constitutional Aspects

- Legal starting point
  - Constitution of the FRG
  - Constitution of the GDR
- Political background
- Achieving reunification – the constitutional battle
- NATO
- Two plus four treaty
- European integration
- Charter of the United Nations



## Point of departure: 1989

### Two non sovereign states

- **FRG: Federal Republic of Germany**
- **GDR: German Democratic Republic**
  
- Officially, **World War II hadn't even ended**; *a peace treaty was never signed*
- The **United Nations charter permits** any member of the world organization **to invade the territory** between the rivers Rhine and Oder should the Germans ever pursue an “aggressive policy”.
- The **Soviets reserved their right to represent the GDR**, if necessary, both internationally and vis-à-vis West Germany -- as if the East Germans were little more than a vassal state

## Constitutional background of the FRG: In lack of a "constitution"

Instead of a constitution Germany has a „**Basic Law**“ (Grundgesetz)

In 1949: The Basic Law was only intended for a **temporary use**







## The constitution of the FRG

### Reunification as constitutional goal

Preamble of the Basic Law (Grundgesetz) from 1949 to 1990:

“The whole German People remains **compelled to fulfill the Unity and Freedom of Germany** by virtue of its right to free self-determination.”

→ The jurisprudence of the Federal Constitutional Court of Germany therefrom resulted in a constitutional prerogative, which was **binding to all governmental entities**, to regain German Unity and work toward achieving this objective.



## Art. 23 of the Basic Law until 1989

### **Former Article 23 of the Basic Law for the Federal Republic of Germany**

**For the time being**, this Basic Law shall apply in the territory of the Länder of Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern. **In other parts of Germany it shall be put into force on their accession.**

## Constitutional Background of the GDR

### **Article 1 of the Constitution of the German Democratic Republic, Promulgated October 7, 1949**

**Germany is an indivisible democratic republic**, the foundations of which are the German Länder.

The (German Democratic) Republic decides on all issues which are essential to the existence and development of the German people as a whole, all other issues being decided upon by independent action of the Laender (states).

[...]

**There is only one German nationality.**





## Constitutional Background in the GDR (cont.)

### Constitution of the German Democratic Republic, April 6, 1968

#### Article 1

The German Democratic Republic is a **socialist state** of the German nation.

#### Article 8

(2) The **creation and maintenance of normal relations and cooperation between the two German states** on the basis of equality are a national concern for the German Democratic Republic. The German Democratic Republic and its citizens, moreover, seek to **overcome** the division forced on the German nation by **imperialism**, and to gradually reproach the two German states to the point of their **unification on the basis of democracy and socialism**.





## Constitutional Background of the GDR (cont.)

### Constitution of the German Democratic Republic, October 7, 1974

#### Article 1

The German Democratic Republic is a **socialist state of workers and farmers**.

#### Article 8

(2) The German Democratic Republic **will never undertake a war of aggression** or use its armed forces against the freedom of another people.

- The GDR and the Soviet government obviously had receded from the earlier position which was favorable to unification
- GDR and FDR were seen as two completely independent states

# Poland: Concerns about German expansion to now Polish territories

## Germany from 1871 – 1918

GERMANY, 1871



## International opinions and standpoints - the nightmare of a united Germany







## The EU, France and Germany



- Mitterrand in private conversation to Thatcher: Reunification would result in Germany gaining more European influence than Hitler ever had.
- German Unification is “a legal and political impossibility”
- Kohl has no understanding of other nations’ sensitivities and was exploiting German “national” feeling.
- Mitterrand's solution: Incorporating the unified Germany into European institutions
- England and France suspected that the FRG might establish a low-wage, deregulated economy in the former GDR

## European integration: Towards the treaty of Maastricht

### Trust built up during the last 40 years

Mitterrand to Thatcher: “But I can’t declare war on Germany“!

**Forty years of bonding in all areas** (schools, parliaments, army, economy, science, culture etc.)

### But also fears of the other European states

French observer: „Germany, a big nation, is again becoming a great nation .... [A]ll it lacks is the military arm. From the height of its power, its industrialists and merchants are looking far beyond the West, at the wide world. And France looks at Germany. It is the season of suspicion-thoroughly foreseeable after all.“

“Somehow, Kohl bought the Unification by giving up the „Deutsche Mark“ → European Monetary Union → currency (EURO) an highly political issue until today

## The „German question“

### Initial Point

- Germany **might not need European integration** any longer
- Germany feared to become the **dominating European power**

### The GDR and the European Union (former EC)

The former GDR **automatically became part of the EU without any amendment** of the Treaty of Rome

→ Principle of **moving treaty frontiers**

→ Helmut Kohl made clear that the **EU will not have to co-finance the costs** of adjustment in East Germany

→ Transitional rules

## Two plus four treaty on the Final Settlement with Respect to Germany

Signing in Moscow, September 12, 1990

„**Two**“: Federal Republic of Germany and German Democratic Republic

„**Four**“: Powers that occupied Germany at the End of World War II: responsible for Germany as a whole.

### Replacing Potsdam Agreement (1945):

- Germany did not have full national sovereignty
- Upon deposit of the last instrument of ratification, united Germany became fully sovereign on 15 March 1991

**Preamble:** Recognizing that thereby, and with the unification of Germany as a democratic and peaceful state, the rights and responsibilities of the Four Powers relating to Berlin and to Germany as a whole **lose their function**







## Achieving reunification – the constitutional battle

### **Overview: Three possible constitutional solutions**

- 1) Confederation
- 2) „New“ Constitution: Art. 146 Basic Law
- 3) Joining of the GDR area, Art. 23 Basic Law:  
Advantage: Fast solution

## Option 1: Confederation

- Confederation of the two German states / **loose community**  
→ Gradually merging certain functions
- **Intentions of the GDR reform parties:** more social and egalitarian, less aggressive capitalism
- But: Especially Helmut Kohl found that something more was possible.
- Nota bene: Kohl's 10 points included some kind of confederation.
- **Prerequisite** of the first possible solution: **A new GDR constitution**

**The Round Table draft:** A Round Table (composed equally of representatives of the reform movement and representatives of the SED and its allied organizations) was already working on a new democratic GDR Constitution. But the draft was **never finished** because the GDR people didn't want a new democratic GDR but a complete reunification.



## Option 2: Art. 146 Basic Law

### **Art. 146 (termination clause of the original Basic Law of 1949)**

This Basic Law shall cease to be in force at the day where a constitution is adopted by free decision of the German people.

- This clause can mean that a unification has to be accomplished by the **adoption of a new constitution by the people of both German states.**
- It was argued that a new constitution was necessary (Option 2 seen as the only option)



## Option 2: Art. 146 Basic Law (cont.)

### Did the Basic Law have a democratic deficit?

A new constitution **could also cure a democratic deficit in the adoption of the Basic Law** in 1949.

→ The Basic Law was **proposed by a Parliamentary Council** that had been chosen by the legislatures of the Länder. The Parliamentary Council consisted of **65 members**.





## Option 2: Art. 146 Basic Law (cont.)

### Did the Basic Law have a democratic deficit (cont.)?

From the **point of view of democratic theory**: An **extensive discussion of constitutional ideas** from both the FDR and GDR would have taken place

### Doubts from a practical point of view:

- The CDU/CSU government disliked the possibility that **GDR ideas might influence a new constitution**.
- Furthermore, democratic participation needs much time (and education?) – that's why it was **faster and easier to simply establish facts**



## Option 3: Art. 23 Basic Law (accession of new Länder)

### Points of criticism

- **Forfeiting the chance of fundamental reforms** not only in the GDR
- Some representatives of the eastern SPD didn't like this kind of **„capitulation“ of the GDR.**

**Discussion: What would have been the best choice?**



## Going with option 3

- The areas of the former German Democratic Republic (East Germany) were **incorporated into the Federal Republic of Germany**
- Though some articles of the constitutions were adopted, contributions of the experience of the GDR reform movement were not reflected

### **Straight talk: Wolfgang Schäuble (at that time German Minister of interior affairs):**

“This is the accession of the German Democratic Republic to the Federal Republic of Germany and not the reverse. We want to do everything for you. You are cordially welcome. We do not want to trample coldly on your wishes and interests. But **this is not the unification of two equal states.**”

→ From a legal point view there has never been a reunification but rather an „acquisition”.



## Going with option 3 (cont.): International effects

- The practical result of that model is that **the now expanded Federal Republic of Germany continued to be a party to all the treaties it had signed prior to the moment of reunification**, and thus inherited the old West Germany's seats at the **UN, NATO, the European Union etc.**
- Also the same **Basic Law** and the same **laws that were in force in the Federal Republic** continued automatically in force, but now **applied to the expanded territory.**



## Would about today? Is a new constitution necessary or possible?

- Even today there are **discussions whether a new constitution should be adopted** – because Art. 146 Basic Law said nothing about when such a new constitution must be adopted.
- However, others argue that Art. 146 should be deleted because it has no function any more. Some even claim that Art. 146 is invalid because it is obsolete. Argument: Art. 146 is a **dangerous possibility**.
- Another question is whether a new constitution has to be adopted due to the progressing European integration accompanied by a loss of competences of the national states.

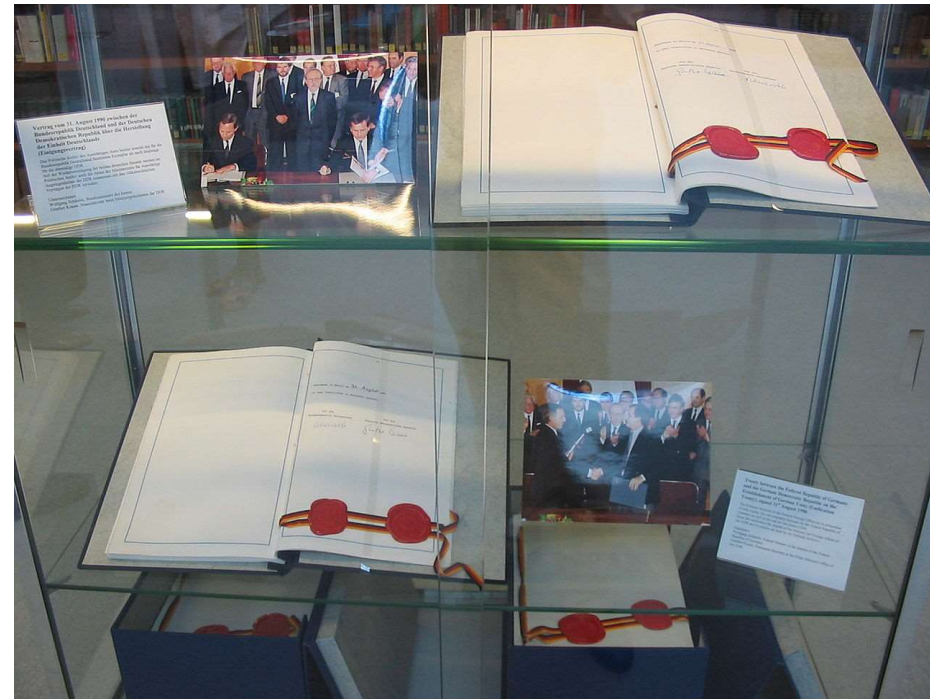
## The (Re) Unification Treaty

### Article 1: Länder

(1) Upon the accession of the German Democratic Republic to the Federal Republic of Germany in accordance with Article 23 of the Basic Law taking effect on 3 October 1990 the Länder of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia shall become Länder of the Federal Republic of Germany. [ . . . ]

(2) The 23 boroughs of Berlin shall form the Land Berlin.

„5 New Länder“ → traditional internal federal structures are maintained



## The (Re) Unification Treaty (cont.)

### Article 3: Entry into Force of the Basic Law

Upon the accession taking effect, **the Basic Law of the Federal Republic of Germany** [...] **shall enter into force** in the Länder of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia and in that part of Land Berlin where it has not been valid to date, subject to the amendments arising from Article 4, unless otherwise provided in this Treaty.

### Article 12: Treaties of the German Democratic Republic

(1) The Contracting Parties are agreed that, in connection with the establishment of German unity, **international treaties of the German Democratic Republic shall be discussed with the contracting parties concerned with a view to regulating or confirming their continued application, adjustment or expiration**, taking into account protection of confidence, the interests of the states concerned and the treaty obligations of the Federal Republic of Germany as well as the principles of a free, democratic basic order governed by the rule of law, and respecting the competence of the European Communities. [...]



## The (Re) Unification Treaty (cont.)

### The end of the GDR

- On **October 3<sup>rd</sup> 1990 (now unification day)**, the **German Democratic Republic ceased to exist**, and five new Federal States on its former territory joined the Federal Republic of Germany. East and West Berlin were reunited, and joined the Federal Republic as a full-fledged Federal City-State
- → Absorption of the GDR
- The FRG remained the same legal personality that was founded in 1949
- Officially the Federal Republic was identical with the „German Reich“, although its actual power extended only over a part of the territory and population of the „Reich“.



## The (Re) Unification Treaty (cont.)

### **New Preamble of the Basic Law (changed by the Unification Treaty)**

**Preamble since 1990 with an additional sentence:** “Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. **This Basic Law thus applies to the entire German people.**”

## NATO

NATO and the Warsaw Pact in the Cold War: **About 1.5 million soldiers from nine countries face each other along this front which is running through Germany.**

In early December 1989, Bush erected the highest hurdle when he stated that the United States would only agree to reunification if the new Germany became member of the NATO



## Germany and its eastern neighbors



## Two plus Four Treaty

### Art. 6

“The **right of the united Germany to belong to alliances**, with all the rights and responsibilities arising therefrom, **shall not be affected** by the present Treaty.”

### Art. 5

(1) **Until the completion of the withdrawal of the Soviet armed forces** for the territory of the present German Democratic Republic and of Berlin in accordance with Article 4 of the present Treaty, **only German territorial defence units** which are not integrated into the alliance structures to which German armed forces in the rest of German territory are assigned will be stationed in that territory as armed forces of the united Germany. During that period and subject to the provisions of paragraph 2 of this Article, **armed forces of other states will not be stationed** in that territory or carry out any other military activity there.

## Amending Art. 23 GG

Art. 23 GG was changed in 1992 in order to fight fears of Germany's neighbours in Europe



### [European Union – Protection of basic rights – Principle of subsidiarity]

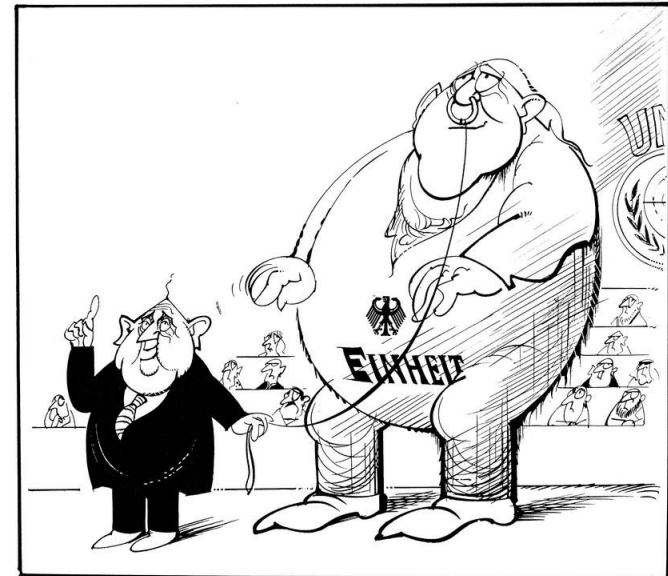
(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

## Amending Art. 146 GG (in force since 1990)

### Article 146 [Duration of the Basic Law]

This **Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people**, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

- To fight fear of a reemergence of German nationalism
- There are no more territories that can join Germany



»Er wird friedlich und vollkommen harmlos sein!«



## Reassuring the rest of Europe (and the world)

### Two Plus Four Treaty

#### Article 1

(2) The united **Germany and the Republic of Poland shall confirm the existing border** between them in a treaty that is binding under international law.

→ German-Polish Border Treaty (1990): Oder-Neisse line

#### Article 3

(1) The Governments of the Federal Republic of Germany and the German Democratic Republic **reaffirm their renunciation of the manufacture and possession of and control over nuclear, biological and chemical weapons.** They declare that the united Germany, too, will abide by these commitments. [...]

(2) [...] The Government of the Federal Republic of Germany undertakes to **reduce the personnel strength of the armed forces of the united Germany to 370,000** (ground, air and naval forces) within three to four years. [...]



## Reassuring the rest of Europe (and the world)

### Two Plus Four Treaty

#### Article 7

(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**.



## The border guard cases

### The border guard cases

- Introduction
- Order to fire
- Deaths on the border
- Cases
- Human rights vs. GDR law; positivism vs. natural law
- Non-Retroactivity of Criminal Laws

## The legal shaping of the reunification

### The German Border Guard Cases

#### Order to fire

- Use of deadly force was termed the „Schießbefehl“ („**order to fire**“ or „command to shoot“)
- 1952 – regulation issued to East German police that **"failure to obey the orders of the Border Patrol will be met by the use of arms."**
- GDR **formally codified** the use of deadly force in 1982 at the State Border Law



## The legal shaping of the reunification

### The German Border Guard Cases

#### Order to fire

- 1966 – General Heinz Hoffmann, GDR defence minister: *“...anyone who does not respect our border will feel the bullet.”*
- 1974 – Erich Honecker, Chairmann of the GDR National Defence Council: *“Firearms are to be ruthlessly used in the event of attempts to break through the border, and the comrades who have successfully used their firearms are to be commended.”*



## The legal shaping of the reunification

### The German Border Guard Cases

#### Order to fire

- Standard procedure: less than 100 meters away, first order: „**Stop, stand still, or I will shoot!**“; further away or on the Western side of the border fence: guard was authorised to shoot without warning
- Border guards were under **considerable pressure to obey the “Schießbefehl”**
- Failure to shoot or suspicion that a shooter had deliberately missed was punished

## The legal shaping of the reunification

### The German Border Guard Cases

#### Deaths on the border

People killed crossing the East German borders before and after 13 August 1961

	Before 13.08.61	After 13.08.1961	Total
Inner German border	100	271	371
Berlin border/Wall	16	239	255
Baltic Sea	15	174	189
GDR border guards	11	16	27
Soviet troops	1	5	6
Aircraft shot down	14	3	17
Total	160	753	916



## The legal shaping of the reunification

### The German Border Guard Cases

#### The Cases

- In the border guard cases, East German soldiers who had killed fugitives or other trespassers on the GDR or East Berlin border **were tried on charges of homicide.**
- Between 3.10.1990 and 6.2.1997 **a total of 78 persons were sentenced** and 45 were acquitted.



## The legal shaping of the reunification

### The German Border Guard Cases

#### The Cases

In the first of the border guard cases to come before the Bundesgerichtshof the defendants, **two young soldiers** of the GDR Border Guard Troops, **shot at a 20 year-old East German** trying to escape over the wall to West Berlin during the night of 1.12.1984. When the fugitive climbed the wall on a ladder he had brought with him, one of the defendants shouted at him to freeze and, after firing some warning shots in the air, both of the soldiers fired at him with automatic rifles in order to stop the escape, even at the cost of the fugitive's life. The man, hit by bullets in his back and knee, fell from the ladder. He was not brought into the People's Police Hospital until shortly before 5.30 am, where he died at 6.20 am.



## The legal shaping of the reunification

### The German Border Guard Cases

#### International Human Rights vs. GDR Law

- Defendants: **actions were justified by the laws of the GDR** in force at the time of the incidents, Section 27 para. 2 GDR Grenzgesetz (Border Statute)
- Federal Court: rejected the defendants argument that Section 27 Border Statute could provide an acceptable justification, **applied its own interpretation**
- Federal Court also pointed out that GDR was **bound to international treaties** stating the right to leave one's country
- Federal Court also invoked the idea of a **natural law**



## Problems of privatization

- Introduction
- Legal basis and political conditions
- Treuhandanstalt
- Conclusion

## Introduction

- After the opening of the East German border on November 9, 1989, the government of the GDR and BRD **wanted to proceed quickly with reunification.**
- The economic changes that culminated in **the mass privatization of East German enterprises** involved a more complicated social and legal reorganization..
- The process of economic unification began with the **signing of the Treaty on the Monetary, Economic and Social Union** on May 18, 1990.



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## Legal basis and political conditions

- **Expropriations in the GDR**
  - Huge expropriations in the GDR directly after WW2 in **the soviet zone**
  - Many more expropriations in the GDR **until 1990** for various reasons
- **Socialist economy**
  - Economy of the GDR was based on **state owned enterprises**
  - Agriculture, trade and craft also were organized in forms of “**people's property**”.





## Legal basis and political conditions

- Abrupt structural change of the social and economic system was connected with **heavy cuts in production and employment.**
- Large sectors of the East German industry were **unable to find customers in competitive markets.**
- **First step: transformation** of the state-owned combines and enterprises **into private law companies**, joint stock companies or limited liability companies
- **Second step:** creations of an **agency for the administration of the people's property** (“Treuhandanstalt”)



## Legal basis and political conditions (cont.)

- The **privatization task** of the Treuhandanstalt was **overshadowed by the complex and difficult problem of the restitution of property**
- **Joint Declaration of the Governments of the BRD and of the GDR** concerning the Settlement of Open Property Questions from June 15th, 1990 → incorporated into the Unification Treaty

## Treuhandanstalt

- Treuhandanstalt – privatization agency for eastern Germany
- At end of 1994 it officially ended its operations.
- 1990 became the owner of all of the shares of East Germany companies and became responsible for preparing them for sale to the private sector
- Duties of Treuhandanstalt
  - Privatization through sale of shares or asset shares
  - Assurance of the efficiency and competitiveness of businesses
  - Decommissioning and liquidation of assets





## Treuhandanstalt (cont.)

- The Treuhandanstalt was organizationally an agency, a public institution ("bundesunmittelbare Anstalt des öffentlichen Rechts"), but in substance a gigantic combined enterprise.
- It was operating with a businesslike management and in the forms of private law.
- The contracts of the Treuhandanstalt and the purchasing parties were subjected to the requirements of competition and cartel law.
- The Treuhandanstalt was operating under the rule of budget law and was supervised by the budget committee of the Bundestag which had installed a subcommittee for the matters of Treuhand enterprises.
- Privatization was carried through by private law contracts with the new owner



## Treuhandanstalt (cont.)

- Privatization was carried through by private law contracts with the new owner
- To begin the privatization process, an interested investor submitted a plan of investment.
- The Treuhand decided whether or not to sell the firm
- As fewer willing investors were found, the Treuhand often was forced to sell at very low prices, or to close many East German companies for which no buyer could be found.
- The Treuhand was forced to liquidate many East German companies and many East German jobs.
- As the 1995 unemployment rate in East Germany was 13 percent.
- East Germans blamed the Treuhand for their problems.
- Symbol of the brute force of capitalism.



## Conclusion

- German privatization was a mammoth task that has been, by traditional measures, quite successful.
- There are several areas, however, in which the legal structures chosen by the German privatizers have created problems for the German people.
- It is too late for Germany to employ alternative mechanisms, but today's privatizers can learn a great deal from the decisions of the privatizers who have engaged in the world's largest such venture.