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Cold War Identities: Citizenship, Constitutional Reform, and International Law between East and West Germany, 1967–75

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Abstract

Law became an important battleground in the Cold War between the two Germanys. In striving for international legitimacy, West Germany clung to ideas of legal continuity to the German Reich while the GDR bolstered the concept of an anti-fascist new beginning as its legal foundation. As national division continued, citizenship law became a tool for both German states in challenging the other Germany's authority over its respective citizenry. By the late 1960s, the GDR devised a citizenship law that effectively held East Germans hostage through the redefinition of citizenship. The GDR-citizenship law, moreover, repatriated former East Germans now living in the Federal Republic. The quest for legal supremacy thus profoundly affected ordinary Germans living east and west of the Iron Curtain. This article argues that the GDR government used citizenship and international law to its advantage in the attempt to pressure West Germany to recognize officially GDR sovereignty between 1967 and 1972. It demonstrates how the GDR forced the Federal Republic into action long before negotiations over Ostpolitik began in 1969. Citizenship law thus became a potent tool in the East German quest for international recognition and provoked intense responses in West German law-making.

Keywords

citizenship, Cold War, Constitutional Court, Germany, law-making, Ostpolitik

The Berlin Wall came to epitomize the restrictions on free movement of citizens in Europe after 1961. Yet, the German Democratic Republic (GDR) had already

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much earlier established an effective border regime to keep her citizens from leaving the state as numbers of East Germans escaping GDR rule continued to rise after 1949.[1] Prosecution of former East Germans, however, continued in many cases even after they had arrived in the Federal Republic of Germany (FRG). In the period from 1945–61, the East German and Soviet secret services staged hundreds of kidnappings of former East Germans in Berlin and the Federal Republic.[2] After the building of the Berlin Wall and the beginning of superpower politics of detente, these kidnappings of former East Germans were stopped. The border fortifications had meanwhile made escape from the GDR a highly dangerous endeavour. For former East Germans now living in the Federal Republic, a legal threat would soon replace the physical threat of sudden abduction from West Germany. Legal reform in the field of citizenship legislation now proved to be an important component in either restricting people's free movement, in case of the GDR, or demanding authority to speak for oppressed citizens in Eastern Europe, as exercised by the FRG.

After 1949, both German governments had initially claimed the right to represent German citizenship and thus, by extension, German statehood. By the mid-1950s, the GDR began to abandon this idea. GDR-authorities pointed to the new socialist beginning of an 'anti-fascist' East German state tradition since 1949.[3] To complete the split of the GDR from German national tradition, the GDR-government now attempted to implement the idea of a 'socialist nation'.[4] On 20 February 1967, the GDR finally proclaimed an independent citizenship law (*DDR-Staatsbürgerschaft*). With this reform of citizenship legislation, the GDR officially reversed the citizenship logic championed by the Federal Republic since 1949.[5] West German institutions had formally assumed authority over all former citizens of the Third Reich of 1937 claiming to represent German citizenship (*deutsche Staatsangehörigkeit*). This assertion of authority over 'all Germans' by the West German government explicitly included East Germans. This revisionist legal position was meant to reassure Germans now living in the GDR or Poland that they could find a home in the Federal Republic.[6] With its new independent citizenship law, the GDR hoped to end this continued legal incursion into East German state sovereignty and expose the FRG's revisionist legal policies in the international arena.

1 E. Sheffer, *Burned Bridge. How East and West Germans made the Iron Curtain* (Oxford 2011), 97–163.

2 See: A.L. Smith, *Kidnap City. Cold War Berlin* (Westport, CT 2002).

3 Despite its Cold War bias the most detailed description of GDR-legal positions is still: J. Hacker, *Der Rechtsstatus Deutschlands aus Sicht der DDR* (Cologne 1974), 133–48.

4 J. Palmowski, *Inventing A Socialist Nation. Heimat and the Politics of Everyday Life in the GDR, 1945–1990* (Cambridge 2009), 23–64.

5 'Gesetz über die Staatsbürgerschaft der Deutschen Demokratischen Republik (Staatsbürgerschaftsgesetz) vom 20. Februar 1967', *Gesetzblatt der Deutschen Demokratischen Republik*, No. 2, Part I (23 February 1967), 3–6.

6 This legal understanding also prepared the grounds for right-wing revisionist rhetoric. See: F. Roth, *Die Idee der Nation im politischen Diskurs. Die Bundesrepublik Deutschland zwischen Neuer Ostpolitik und Wiedervereinigung (1969-1990)* (Baden-Baden 1995), 146–93.

This article looks at how citizenship legislation in conjunction with the rise of international and human rights language formed part of the Cold War between the two German states in the period from 1967 to 1975. It argues that the GDR-government used citizenship law and the international law principle of a people's right to self-determination to put pressure on the West German government to finally accept the state sovereignty of the GDR. While Willy Brandt's social-liberal government eventually initiated far-reaching change in German–German relations, the development of legal competition in the field of citizenship law reveals that West German governments were increasingly forced to alter their stance towards the GDR if they wanted to keep German–German everyday contacts alive. The GDR-citizenship law treated all former East Germans as GDR-citizens, who had left the GDR 'unauthorized' by the government since 1949. This meant that former East Germans could now also be regarded again as GDR-citizens by other Eastern European states. Former East Germans therefore were no longer necessarily protected by their new citizenship if they travelled to the Eastern bloc after 1967. This new legal threat only ended shortly before the Basic Treaty between the German states was signed in December 1972, when regulations of the GDR-citizenship law were adjusted once more.

The strategic use of German citizens had begun years before the introduction of GDR-citizenship in 1967. Immediately after the building of the Berlin Wall, GDR-authorities and West German institutions had set up unofficial channels to negotiate the release of 'political prisoners' to the Federal Republic. Between 1962 and 1989, the GDR-government traded prisoners against West German payment or goods.[7] At the same time, the East German government started to challenge the West German claim of a continued existence of a single undivided German citizenship. West German government agencies soon realized the importance of this challenge. In August 1962, a Mister Baumgart, member of the Section Law in the Federal Ministry of All-German Questions, sent a secret report to his superior Minister Ernst Lemmer. Unknowingly, Baumgart outlined what would eventually become the GDR's citizenship strategy to put pressure on the West German government in the legal Cold War between the two Germanys. He reported the case of a naturalized West German, who had fled the GDR in 1957. For reasons of personal protection, the man remained unnamed in the report. In February 1962, the man applied for a visiting permit to see his mother in East Berlin. After being granted permission, he visited his mother on 24 February 1962. On his way home to West Berlin, he was arrested for exceeding the time granted by his visiting permit by 13 hours. An East German court subsequently sentenced him to three months in prison. On 14 June 1962, he was released.

7 J.P. Wölbern, 'Die Entstehung des 'Häftlingsfreikaufs' aus der DDR, 1962–1964', *Deutschland Archiv*, 41, 5 (2008), 856–67; M. Horster, 'The Trade in Political Prisoners between the Two German States, 1962–89', *Journal of Contemporary History*, 39, 3 (2004), 403–24.

Baumgart did not think this incident noteworthy just because the man had been imprisoned. In his words, the fact that in such incidents 'criminal cases due to the violation of existing regulations are set in motion are the least evil'. What concerned Baumgart was that the man had been released to East Berlin, not to West Berlin as would have been expected in the case of a West German citizen. When the man's attorney filed an official complaint to the office of the district prosecutor of Berlin-Mitte, the prosecutor responded that they still considered the man an East German citizen because he had illegally left the GDR. The East German Ministry of the Interior answered a second complaint of the attorney in the same manner. As the man had left the GDR without the mandatory permission of the government, the GDR-government considered him an East German citizen who should be released to the 'democratic Berlin'.

Baumgart notified his superiors because he was worried by the fact that the GDR had begun to 'repatriate' former citizens even though they now held a West German passport. He wondered whether West German authorities could make the incident public. The Leipzig Fare was about to start and many West German businessmen were planning to travel to the GDR. Among them there would potentially also be some former East Germans. Yet Baumgart urged his superiors to keep the name of the man's East German attorney confidential at all cost. Shortly after his release to East Berlin, the man had escaped again to West Berlin over the barbed wire together with two other East Germans. During their escape, one of the three men was shot by the East German border control.[8] After the building of the Berlin Wall in August 1961, this was thus no longer a mere legal matter between the two German states.

Two years after this incident, the GDR publicly altered its stance on citizenship legislation. On 21 August 1964, a decree of the Council of Ministers stated that the GDR only granted exemption from prosecution to those former East Germans who had left the country before 13 August 1961.[9] Members of the Secretariat for State and Legal Questions at the Central Committee of the *Sozialistische Einheitspartei Deutschlands* (SED) now emphasized the 'intense usage of state and legal sciences in the daily political struggle'.[10] In the secretariat's opinion, the West German theory of a continued legal existence of the Third Reich and the claim to exclusively represent 'Germany' were the weakest elements in West German national identity. Until 1964, passports of the GDR as well as the Federal Republic merely stated 'German' in the 'nationality' section. As a further step away from All-German rhetoric, East German passports instead contained the phrase 'citizen of the German Democratic Republic' after 1964.

8 BArch/B 136/3926, report 'Vertraulich: Betr.: Staatbürgerschaft der "DDR"', 16 August 1962.

9 'Erlaß des Staatsrates der Deutschen Demokratischen Republik über die Aufnahme von Bürgern der Deutschen Demokratischen Republik, die ihren Wohnsitz außerhalb der Deutschen Demokratischen Republik haben', *Gesetzblatt der Deutschen Demokratischen Republik*, Part I, No. 10 (21 August 1964), 128.

10 BArch/DY30/IV A 2/13/1, report 'Zur Widerspiegelung der Fragen des Staates und des Rechts in Presse, Funk und Fernsehen'.

A letter from Joachim Herrmann to Walter Ulbricht illustrates the GDR government's plans for a 'general attack on the West German constitution' to be spearheaded by the Secretariat for West German Questions at the Foreign Ministry.[11] In this plan, the drafting of an independent GDR-citizenship law was only one of the first steps in the development of a larger constitutional reform. Lasting from 1968 to 1974, this reform resulted in a new GDR constitution, which was now solely based on principles of socialist law. While the first East German constitution had still been based on notions of the German people and nation, the new GDR constitution and thus by extension also GDR-citizenship gained its legitimacy from the socialist idea of people's sovereignty. GDR statehood was now theoretically based on the power of the socialist citizenry. As the new constitution stated in its preface, the 'people of the German Democratic Republic have given themselves this socialist constitution'.[12] Drawing on the international law concept of free self-determination of people, the GDR-government thus emphasized state sovereignty and national independence through this constitutional reform. At the same time, the GDR abandoned the concept of a united German nation as the constituent basis of the state from its new constitution.

With the proclamation of an independent GDR-citizenship law on 20 February 1967, the GDR was soon able to exert immense pressure on the bedrock of West German national identity: the notion of a continued, undivided German citizenship. The new GDR-citizenship was to symbolize the final break with German legal tradition and showcase the foundation of an independent socialist national identity.[13] In theory, GDR-citizens now no longer had a claim to German citizenship,

11 BArch/DD 2/249, letter Herrmann to Ulbricht, 22 September 1967.

12 The transition from All-German rhetoric to a focus on GDR-sovereignty becomes most obvious through a comparison of the first preface to the new GDR constitution from 1968 and the final version of 1974. 1968-version: 'Getragen von der Verantwortung, der ganzen deutschen Nation den Weg in eine Zukunft des Friedens und des Sozialismus zu weisen, in Ansehung der geschichtlichen Tatsache, daß der Imperialismus unter Führung der USA im Einvernehmen mit Kreisen des westdeutschen Monopolkapitals Deutschland gespalten hat, um Westdeutschland zu einer Basis des Imperialismus und des Kampfes gegen den Sozialismus aufzubauen, was den Lebensinteressen der Nation widerspricht, hat sich das Volk der Deutschen Demokratischen Republik, fest gegründet auf den Errungenschaften der antifaschistisch-demokratischen und der sozialistischen Umwälzung der gesellschaftlichen Ordnung, einig in seinen werktätigen Klassen und Schichten das Werk der Verfassung vom 7. Oktober 1949 in ihrem Geiste weiterführend und von dem Willen erfüllt, den Weg des Friedens, der sozialen Gerechtigkeit, der Demokratie, des Sozialismus und der Völkerfreundschaft in freier Entscheidung unbeirrt weiterzugehen, diese sozialistische Verfassung gegeben.' 1974-version: 'In Fortsetzung der revolutionären Tradition der deutschen Arbeiterklasse und gestützt auf die Befreiung vom Faschismus hat das Volk der Deutschen Demokratischen Republik in Übereinstimmung mit den Prozessen der geschichtlichen Entwicklung unserer Epoche sein Recht auf sozial-ökonomische, staatliche und nationale Selbstbestimmung verwirklicht und gestaltet die entwickelte sozialistische Gesellschaft. Erfüllt von dem Willen, seine Geschicke frei zu bestimmen, unbeirrt auch weiter den Weg des Sozialismus und Kommunismus, des Friedens, der Demokratie und der Völkerfreundschaft zu gehen, hat sich das Volk der Deutschen Demokratischen Republik diese sozialistische Verfassung gegeben.'

13 J. Palmowski, 'Citizenship, Identity, and Community in the German Democratic Republic', in G. Eley and J. Palmowski (eds) *Citizenship and National Identity in Twentieth-Century Germany* (Stanford, CA 2008), 73–91; I. von Münch, *Die deutsche Staatsangehörigkeit. Vergangenheit – Gegenwart – Zukunft* (Berlin 2007), 78–108.

but a socialist citizenship. Moreover, only the Council of Ministers had the authority to approve releases from GDR-citizenship. All applications for release were declined if GDR-citizens had applied for a foreign citizenship without first seeking governmental consent. This regulation also extended to all East Germans who had fled to Western Europe. The GDR-government thus claimed jurisdiction over all former East Germans. At the same time, it reinforced the split from German national tradition by treating West German applicants for GDR-citizenship as applications by foreigners, no longer granting special privileges.[14]

Ordinary East Germans, however, were greatly irritated by this shift in national policy. They did not understand why the familiar all-German rhetoric had suddenly been abandoned. Internal reports reflected this criticism. At town meetings organized to explain and discuss the new socialist constitution, local residents voiced their confusion about the sudden policy shift that declared Germany non-existent.[15] In response, the government drafted new entries for dictionaries and encyclopaedias. In these explanations, GDR-authorities declared East Germany a socialist state entirely detached from the Federal Republic and German nationalist tradition. The new entries also emphasized that a 'one-sided individual renunciation' of GDR-citizenship was forbidden.[16] East Germans were warned that an escape from the GDR would not end prosecution by GDR-authorities. Citizenship law was no longer just a legal matter. It was a potent threat to those considering escape.

From the mid-1960s, GDR-authorities linked citizenship reform to human rights and international law language promoted by the United Nations (UN). Since the establishment of the GDR, East German elites had devised socialist legal concepts to underline the legitimacy of their state. To this end, the SED also began to appropriate human rights discourses.[17] After the building of the Berlin Wall, international pressure on the GDR-government increased as it was accused of violating basic human rights. In reaction to the growing influence of human rights language within the UN, the GDR followed Soviet initiatives of establishing 'socialist legality' in a domestic and international perspective as part of de-Stalinization.[18] In 1964, the year in which the GDR introduced the term 'citizen of the German Democratic Republic' to its passports, the East German legal expert Hermann Klenner put forward a socialist interpretation of human rights. Klenner outlined that human rights were secured through political and

14 BArch/DY 30/J IV 2/3/1325, minutes of the meeting of the Central Committee of the SED from 23 August 1967.

15 BArch/DY 30/IV A 2/13/47, report Sekretariat für Staats- und Rechtsfragen beim ZK der SED, 2 February 1968.

16 BArch/DO 1/7670, letter detailing the drafting of a definition of 'citizenship' for publication in the general dictionary published by Dietz Publishing House, 11 January 1967.

17 P. Betts, 'Socialism, Social Rights, and Human Rights: The Case of East Germany', *Humanity*, 3, 3 (2012), 407–26.

18 J. Amos, 'Embracing and Contesting: The Soviet Union and the Universial Declaration of Human Rights, 1948–58', in S.-L. Hoffmann (ed.) *Human Rights in the Twentieth Century* (Cambridge 2011), 147–65; P.W. Sperlich, *The East German Social Courts. Law and Popular Justice in a Marxist-Leninist Society* (Westport, CT 2007), 120–43.

economic participation in 'real existing socialism' in the GDR.[19] The legitimacy of the new socialist constitution theoretically should be based on rights talk and 'all-people's discussion' following Soviet models.[20] The GDR-authorities thus organized extensive debates of the new constitution amongst the East German population.[21] These 'open debates' were meant to sanction the new constitution as being based on 'the will of the people'. This conceptual shift prepared the grounds for an independent definition of a socialist citizenship, which would find its basis in the new GDR constitution's legitimacy grounded in people's sovereignty.

The GDR also intensified its efforts to conform to international law standards and UN regulations. The East German League for People's Friendship, League for Human Rights, Association for International Law, and especially the League for the United Nations, now pushed the GDR's case for international recognition. The GDR appropriated the concept of the right to self-determination of people to strengthen its campaign for international recognition as a sovereign state.[22] Since the early twentieth century, the concept of self-determination of people had been used in de-colonization struggles across the globe.[23] After the Second World War, the notion that all people should possess the right to choose their own destiny was enshrined in international law. The UN Charter of 1948 as well as the International Covenant on Civil and Political Rights of 1966 now protected the principle of self-determination. At the same time as it drew on these accepted international law standards, the GDR-government ignored the fact that its population was not given a chance of free self-determination in free elections. Disregarding the lack of domestic civil rights, the East German government used the increased global impact of international law to stress the GDR's legal status as a fully sovereign state. In order to challenge the Federal Republic's 'revanchist policies' of claiming to be the only legitimate successor state of the Third Reich, the East German government stipulated that the 'people of the GDR' had chosen to be a sovereign people.[24] The GDR thus highlighted the right to self-determination of the GDR-people as it was enshrined in international law to be finally internationally recognized as a sovereign state.

It was in this context that the GDR abandoned all former all-German rhetoric. The State Secretariat for All-German Questions, the counterpart to the Federal

19 N. Richardson-Little, '"Erkämpft das Menschenrecht." Sozialismus und Menschenrechte in der DDR', in J. Eckel and S. Moyn (eds) *Moral für die Welt? Menschenrechtspolitik in den 1970er Jahren* (Göttingen 2012), 120–43.

20 B. Nathans, 'Soviet Rights-Talk in the Post-Stalin Era', in S.-L. Hoffmann (ed.) *Human Rights in the Twentieth Century* (Cambridge 2011), 166–90.

21 Official accounts estimated the involvement of 11,000,000 East Germans in discussion meetings. These meetings resulted in the submission of 12,494 proposals for amendments to the initial draft of the constitution and a total of 95 actual changes to the 1968-draft to the final version of the constitution of 1974. See: Sperlich, *The East German Social Courts*, 108.

22 BArch/DY 30/IV A 2/10.02/145, brochure 'Erklärung des Staatsrates der Deutschen Demokratischen Republik zur Rechtsentwicklung in beiden deutschen Staaten'.

23 M. Mazower, *Governing the World. The History of an Idea* (London 2012), 244–72.

24 BArch/DY 30/IV A 2/13/231, memorandum 'DDR – der legitime deutsche Rechtsstaat'.

Ministry of All-German Questions, was renamed the Council for West German Questions in an effort to coordinate all East German Western Operations. Propaganda brochures were published to prepare the political ground for the introduction of the new citizenship law. In 1966, preceding the promulgation of the new citizenship law by several months, the GDR-propaganda department began publishing pamphlets about GDR-citizenship. They were distributed in East and, as far as possible, West Germany, thus underlining the claim that GDR-citizenship was a topic relevant to all Germans.[25]

In the same year, the legal Cold War between the two Germanys heated up. On 29 July 1966, the West German parliament passed the Law on the Temporary Exemption from German Jurisdiction, which granted those Germans not living in the Federal Republic temporary immunity from legal prosecution. In preparation of talks between SED-cadres and members of the *Sozialdemokratische Partei Deutschlands* (SPD), the GDR-government had demanded full personal protection of SED-delegates during their stay in the Federal Republic. In response, the Bonn parliament passed legislation granting 'Germans living outside the territory governed by the Basic Law' one-week exemptions from being subject to West German law enforcement agencies.

The GDR-government reacted with outrage to this new legislation. It assumed legal authority over high-ranking SED-cadres and only temporarily exempted them from legal prosecution. In response, the GDR-government enacted the Law for the Protection of Citizenship and Human Rights of Citizens of the German Democratic Republic. This East German law threatened that all those who supported either the West German claim to solely represent Germany, the enlargement of West German jurisdiction to the territory of the GDR, or the prosecution of East German citizens would be sentenced to a maximum of five years imprisonment if caught.[26]

In 1967, the GDR finally had a first international diplomatic success in context with the UN. The East German League for the United Nations was admitted as equal member together with its West German counterpart to the World Federation of United Nations Associations (WFUNA).[27] Since the mid-1960s, the GDR had focused its attention on winning support for East German UN membership from revolutionary Third World countries and non-aligned states within the UN.[28] By the late 1960s, this strategy showed its effect. Encouraged by this success, the GDR formally applied for membership with the UN on 28 February and the WHO in

25 BArch/DD 2/249, letter Herrmann to Ulbricht from 30 January 1967.

26 See: 'Gesetz über die befristete Freistellung von der deutschen Gerichtsbarkeit', *Bundesgesetzblatt*, No. 22, Part I (3 August 1966), 453f. For the official GDR reaction see: 'Ein Dokument westdeutscher Rechtsanmaßung. Stellungnahme des Präsidenten des Obersten Gerichts, Dr. Heinrich Toeplitz, zum sog. Gesetz über die befristete Freistellung von der deutschen Gerichtsbarkeit', *Neue Justiz*, 14 (1966), 419.

27 BArch/DZ 23/143, report 'Betr. Delegations- und Erfahrungsaustausch der Deutschen Liga für die Vereinten Nationen im Jahre 1967 und Planvorschalg für den Delegations- und Erfahrungsaustausch 1968', 2 November 1967.

28 BArch/DZ 23/143, 'Konzeption für das Vorgehen gegenüber der UNO', 17 July 1965.

May 1968. Alerted by the GDR's success, the West German government managed to block East German admission to the WHO at the last minute.[29]

In the early 1970s, a report composed by the West German *Christlich-Soziale Union* (CSU) retrospectively bemoaned the GDR's 'great aggression' within the UN. The memorandum moreover highlighted the GDR's inclusion of human rights language into its foreign policy. The report further stated that socialist states had realized new opportunities, which arose from changing majorities in the UN since the rise of Third World countries. The Western camp had left this Cold War battlefield to the socialist camp unchallenged.[30]

Why, then, did the West German government cling to its conceptions of a German legal national identity throughout the 1960s and after in spite of East German challenges? Since the foundation of the two Germanys, the Federal Republic had introduced far-reaching provisions in the field of citizenship legislation. Starting with the Law on the Affairs of Expellees and Refugees enacted on 22 May 1953, the West German government defined all persons as expellees who had lived within the borders of the Third Reich of 1937. This included all *Staatsangehörige* and *Volkszugehörige* living outside West German borders. In contrast to German citizens, *Volkszugehörige* were defined as persons who had 'in their homelands shown allegiance to German *Volkstum*'. This allegiance had to be proven by descent, language, education, and culture.[31] On 22 February 1955, West Germany's parliament enacted the first law on regulating citizenship. The new law outlined that all 'collective' and 'individual' acts of granting German citizenship to foreign citizens as part of Third Reich annexation policies between 1938 and 1945 remained valid. Unless individuals officially renounced this citizenship, the West German government presumed them to be German.[32] This inclusive approach based on Third Reich expansion policies caused domestic and international conflicts. West Germany's legal interpretation was diplomatically untenable and thus it soon had to amend its citizenship law.[33] While Austrian citizens were again excluded from automatic access to German citizenship, West German legislation remained expansionist towards the GDR and Poland as part of the Cold War. Until the 1960s, the claim to exclusively represent German citizenship domestically and internationally had developed into the legal core of the West German challenge to GDR sovereignty.

The GDR-citizenship law of 1967 thus forced the West German government's hand. On 22 February 1967, the Federal Ministry of All-German Questions issued

29 W.G. Gray, *Germany's Cold War. The Global Campaign to Isolate East Germany, 1949–1969* (Chapel Hill, NC 2003), 201.
30 Richardson-Little, '"Erkämpft das Menschenrecht"', 132.
31 'Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge (Bundesvertriebenengesetz)', *Bundesgesetzblatt*, Part I, No. 22 (22 May 1953), 201–21, 204.
32 'Gesetz zur Regelung von Fragen der Staatsangehörigkeit vom 22. Februar 1955', *Bundesgesetzblatt*, Part I, No. 6 (25 February 1955), 65–8.
33 'Zweites Gesetz zur Regelung von Fragen der Staatsangehörigkeit vom 17. Mai 1956', *Bundesgesetzblatt*, Part I, No. 23 (23 May 1956), 431–2.

a first internal statement to other ministries listing flaws in the legal logics of the new GDR law.[34] The ministry stated that the new GDR-citizenship law ended the validity of the citizenship law from 22 July 1913 in the GDR. Therefore, the new law violated the GDR constitution, which stated in Article 1 that there existed only a single German citizenship. The GDR election regulations enacted in 1958 also assumed 'German citizenship' as a precondition for electoral rights. Yet, GDR authorities had begun to refer to their citizens as 'citizens of the GDR' or 'state citizens of the GDR' since 1957. Thus, so the West German logic went, GDR law undermined itself.

The internal statement further compared GDR-citizenship, *Staatsbürgerschaft*, to citizenship in the Third Reich, which had also been termed *Staatsbürgerschaft*. The Third Reich had acknowledged Jewish Germans only as *Staatsangehörige*, but had denied them the full rights of *Staatsbürger*. This comparison of GDR terminology to Third Reich policies, however, was not further elaborated and it soon disappeared from West German internal institutional debates. West German experts seemed to deem such parallels unsuitable for public debate, focusing instead on criticizing socialist law and socialist *Staatsbürgerschaft*.[35]

The five-page memorandum went on to argue that, according to international law standards, GDR legislation was illegal. Ironically, in doing so, West German governmental officials implicitly highlighted their own government's circumvention of international law.[36] Based on scarce information, the memorandum assumed that the primary purpose of the legislation was the attempt to prove the existence of a GDR-*Staatsvolk* and to underline the independent statehood of the GDR. West German experts therefore attempted to prove the GDR's violation of international law because the preface of the GDR's citizenship law explicitly mentioned its compliance with international law. Based on provisions of the Hague Convention enacted on 12 April 1930, the memorandum argued that individuals asserted citizenship of the state in which they resided, or citizenship of the state to which the individual 'appeared to have the closest ties'. The GDR violated this prohibition by forcing GDR-citizenship onto individuals. The West German government, however, theoretically also presumed citizenship control over all Germans who had held German citizenship in the Third Reich in its borders of 1937 and even beyond. Therefore, the Federal Republic's official claim to represent 'all Germans' and thus also GDR-citizens also violated international law. The decisive difference between the two Germanys certainly remained the right of the individual to apply for foreign citizenship and return West German citizenship at their own will. Nonetheless, in the German–German legal competition, both sides were employing the same arguments to challenge each other's legitimacy.

The memorandum predicted that the GDR-citizenship law would change little for East Germans living in the GDR. But it clearly warned of the danger of the

34 BArch/B 136/6536, 'Bericht: Betr. Gesetz über die Staatsbürgerschaft der "Deutschen Demokratischen Republik" (Staatsbürgerschaftsgesetz)', 22 February 1967.
35 Ibid.
36 Ibid.

GDR using its law to 'repatriate' former East Germans now living in West Germany. More importantly, the law also categorized children as GDR-citizens who were born to former East German citizens in the Federal Republic, thus extending its reach to the second generation. It was also feared that former East Germans might be forcefully drafted into military service if they visited the GDR. In such cases, the individual would not be able to invoke the protection provided by West German citizenship.

The authors of the memorandum were also worried that former East Germans living in West Germany might use the new legislation in their favour. GDR law formally enabled its citizens to claim voting rights at age 18. In 1967, the West German voting age remained age 21. Moreover, former East Germans could theoretically refuse certain civic duties by pointing to their still existing GDR-citizenship.[37] Due to the high number of inquires, the Ministry for All-German Questions issued a standardized letter and an information sheet to answer all queries.[38] This fact speaks to the intense public impact of the GDR legislation among the West German population.

On 1 March 1967, Hubert Schnekenburger, Special Deputy to the Chancellor for Berlin, drafted another memo for the upcoming meeting of the cabinet committee for inter-German relations. Schnekenburger stated that the Federal Republic's options to respond to GDR legislation remained extremely limited. If the new GDR law was to be accompanied by restrictions in passport and visa regulations, the West German government could only act effectively in accord with the three Western allies. It seemed, however, highly unlikely that the allies would take action. Moreover, the only effective means to respond by way of economic sanctions and the restriction of exports of goods to the GDR was certain to meet with resistance from the Federal Ministry of Economy and the Ministry of All-German Questions.[39]

Two weeks later, Schnekenburger summarized the sparse results of West German investigations into the impact of the new GDR policies for chancellor Kurt Georg Kiesinger. West German governmental officials agreed that the GDR had once more sought to underline its independence and the existence of a GDR-*Staatsvolk*. Yet, West German governmental offices had still not been able to establish the exact effects of the new GDR-citizenship law. As no regulations had been published to date describing how the law would be implemented, Schnekenburger tried to outline possible scenarios for Kiesinger.

Up until that point, West German government agencies had not been able to detect any immediate effects of the GDR-citizenship law. Remaining suspicious, Schnekenburger cited the East German Minister of the Interior Dickel's assertion that GDR-citizenship would be exercised independent of the individual's current

37 Ibid.
38 BArch/B 136/6536, 'Formbrief Bundesministerium für gesamtdeutsche Fragen zu Anfragen über DDR-Staatsbürgerschaft'.
39 BArch/B 136/6536, report 'Betr.: Staatsbürgerschaftsgesetz der SBZ und Frage der Gegenmaßnahmen bei Einführung von Paß- und Visumzwang', 28 February 1967.

residence. This implied that all Germans who had fled the GDR since 7 October 1949 were now perceived as GDR-citizens. Schnekenburger was concerned that the new law could be used to increase everyday German division. GDR-authorities could use the legislation to complicate access to West Berlin through the introduction of mandatory visa and passport regulations. The fact that all non-GDR-citizens were now perceived as foreign nationals, Schenkenburger argued, could further stall Bonn's Ostpolitik.[40]

Schnekenburger based his report on monthly internal security information. Experts from the Federal Ministry of the Interior predicted no increased danger to persons that had not been previously threatened by prosecution. Referring to the decree of the GDR-State Council from 21 August 1964, West German internal security experts assumed that only former East Germans who had fled after the building of the Berlin Wall had to expect 'difficulties'. Moreover, persons wanted for espionage or economic crimes would have to be cautious. Under the existing Cold War conditions, the experts reiterated that the Federal Republic had no means to protect former East Germans if they were pressed into their 'duties as GDR-citizens' on travels to the GDR. The report also stated that due to the 'unpredictability of the authorities in Middle-Germany [*Mitteldeutschland*, S.G.]' absolute security on travels through Eastern Europe could not be guaranteed.[41]

One month after the GDR-citizenship law came into effect, the Federal Ministry of All-German Questions issued another 12-page memorandum. In response to an inquiry of Schnekenburger from 15 March 1967, the report outlined the content of the new law, its predicted implications for the GDR and the Federal Republic, aspects of international law as well as possible countermeasures to be taken by the West German government. While the Federal Intelligence Service (BND) assumed that the East German government had first sought approval from the USSR, reactions of other Eastern European countries remained difficult to predict. Any assumptions about the effects of the GDR-citizenship law were further complicated by the fact that the law had not yet been accompanied by any official regulations of how it was supposed to be employed in everyday practice.[42]

The West German government therefore decided to engage directly with East Germany's international law rhetoric. The GDR had highlighted the intrusion of West German legislation into her state sovereignty. In turn, the West German government pointed to missing provisions in the new GDR-legislation that rendered the law undemocratic. In particular, West German experts emphasized missing regulations regulating dual-citizenship and the enforcement of citizenship on individuals within and outside the GDR. The memorandum argued that if the GDR were a sovereign state according to international law, a fact still very much disputed by West German politicians in 1967, it would still be violating that same international law. But such arguments were dismissed as excessively

40 BArch/B 136/6536,' report 'Betr.: Gesetz über die Staatsbürgerschaft der "DDR"',15 March 1967.
41 BArch/B 136/6536, excerpt from 'Innere Sicherheit – Informationen zu Fragen des Staatsschutzes'.
42 BArch/B 136/6536, report 'Gesetz über die Staatsbürgerschaft der Deutschen Demokratischen Republik" (Staatsbürgerschaftsgesetz)', 21 March 1967.

theoretical and politicians reverted to the more straightforward refusal to acknowledge the statehood of the GDR, thus simply negating the East German government's ability to enact any citizenship legislation. At the same time, chancellor Kiesinger changed direction in foreign policy by no longer directly demanding German unification. Using the argument of a people's right to self-determination, Kiesinger demanded free elections in the GDR for humanitarian reasons. If East Germans voted for GDR independence in free elections, Kiesinger stated, the Bonn government would respect this expression of self-determination.[43]

The West German government, however, faced a fundamental problem when it drew attention to the undemocratic nature of the GDR-citizenship law. By doing so, the Bonn government exposed itself to further criticism in the international arena. After all, West Germany was theoretically enforcing automatic citizenship upon all persons and their offspring living in the borders of the Third Reich of 1937. Adding to the existing political difficulties, West German courts actually proceeded to acknowledge GDR-legislation in the fields of civil and penal law. In the international arena, it was therefore complicated to justify the partial acceptance of East German jurisdiction and law-making in some areas while refusing to acknowledge the legitimacy of all East German constitutional law-making.

In its conclusion, the memorandum even acknowledged the notion that the GDR-citizenship was theoretically legitimate if one assumed state sovereignty of the GDR. But this was merely speculation. This assumption, moreover, would still exclude former East Germans now living in the Federal Republic. Implicitly, this logic insinuated that the West German assertion of citizenship authority over all GDR-citizens was actually illegal as well. As West German governmental officials anticipated that the Hallstein-Doctrine could not be effectively sustained internationally for much longer, they began to try and develop new arguments against the division of German citizenship. Legal arguments seemed to have reached their limits of persuasiveness. The Federal Republic would therefore have to revert to contesting East Germany's legal policies politically in the future. In case the Federal Republic were to be forced to acknowledge the GDR as a second German state, West German authorities were prepared to argue that there was no longer a need for the GDR to abolish the 1913-citizenship legislation. If needed, the Federal Republic could then always attack the GDR-citizenship law as 'unpatriotic'.[44]

Such were the theoretical political preparations for worst-case scenarios. By March 1967, however, West German government agencies had not been able to detect any immediate effects of the new legal situation on everyday life. However, many former East Germans had voiced their anxiety to travel to the GDR. On 6 March 1967, the East Berlin lawyer Vogel, who was a key figure in organizing the trade in political prisoners, had conveyed to West German border guards that the

43 Gray, *Germany's Cold War*, 198.

44 BArch/B 136/6536, report 'Gesetz über die Staatsbürgerschaft der Deutschen Demokratischen Republik" (Staatsbürgerschaftsgesetz) ', 21 March 1967.

GDR-authorities would not exercise any travel restrictions. Yet, the report did not place much trust in such promises, and neither did many former East Germans. West German officials therefore concluded that the immediate intention of the new GDR legislation was to create the largest possible psychological impact. The new legislation was meant to serve as 'sword of Damocles' intimidating former East Germans. The report assumed that the GDR-government hoped to discourage German–German exchanges and human contact to counter nascent West German policies of detente between the two Germanys. In 1966, 1.5 million West Germans had visited the GDR and 1.2 million had travelled to a country in Eastern Europe. It was in the Federal Republic's best political and economic interest that this exchange continued.

The same report then continued to discuss how to meet the East German challenge in the field of international law. To counter the GDR's advances in international law rhetoric, the Minister of the Interior Paul Lücke contemplated appealing to the UN. In a question and answer session in parliament, the Member of Parliament Liehr had prompted Lücke to consider filing an official protest before the General Assembly. But the very idea of putting the issue to the UN seemed to suggest West German acknowledgement of GDR sovereignty and statehood. Therefore, the memorandum advised against appearing before the UN council. In conclusion, the report alerted to the possibility of former East Germans being extradited to the GDR by Eastern European countries.[45] In spring 1967, West German officials deemed this an unlikely scenario. The events of summer 1967 would prove them wrong only a couple of months later.

On 3 August 1967, the GDR finally enacted and published specific stipulations for the application of her new citizenship law. Next to the predicted legal implications, West German institutions now knew that GDR-regulations also expected all former East Germans to register their marriages. This applied regardless of the place of residency. Essentially, these regulations demanded that second or third generation children of former East Germans ask permission before getting married in the Federal Republic.[46] In 1971, the Ministry of Inner-German Relations, formerly the Ministry of All-German Questions, answered an inquiry of the Federal President Gustav Heinemann regarding the issue of registering marriages. The responsible official by the name of Staab emphasized that he was not aware of any second or third generation East Germans now living in the Federal Republic who had actually applied for permission from GDR-authorities to get married. Nonetheless, such developments illustrated just how deeply the legal Cold War had begun to affect the everyday lives of Germans.[47]

45 Ibid.
46 'Durchführungsbestimmungen zum Gesetz über die Staatsbürgerschaft der Deutschen Demokratischen Republik vom 3. August 1967', *Gesetzblatt der Deutschen Demokratischen Republik*, Part I, No. 11 (1967), 3.
47 BArch/B 141/1746, letter Staab (Bundesministerium für innerdeutsche Beziehungen) to Wemmer (Bundespräsidialamt), 24 September 1971.

In the summer of 1967, news of the first West German citizens arrested in Eastern Europe and extradited to the GDR reached the pages of the West German press.[48] Amongst these cases, the imprisonment and sentencing of Annamarie Derlig, a former SED-member and governmental official who had escaped to the FRG in 1960, received special attention.[49] Worried by these developments, West German politicians alerted their fellow-countrymen not to travel to Eastern Europe.[50] Conservative politicians attributed the growing number of arrests of West German citizens in Eastern Europe to renewed Cold War confrontations.[51] Articles in the West German press swiftly followed this line of argument paying special attention to how these arrests affected the agendas of West German politicians in the ongoing domestic debate over German-German relations. Next to Derlig's case, West German media reported that an estimated 64 West German citizens were being held prisoner in Eastern Europe.[52] Two teachers from Solingen by the surnames Lehmann and Kadur had been jailed in Bulgaria for trying to help Lehmann's sister escape from the GDR. When they returned to the Federal Republic and were asked to comment on their imprisonment, they estimated that they had shared their prison floor with about 40 imprisoned Germans.[53]

Trying to grapple with the situation, West German media reports resorted to traditional explanations for this increase in arrests. Focusing on speculations that arrests were due to fabricated accusations of espionage or support for failed escape attempts, most commentators overlooked a crucial detail: some of the arrested West German citizens were being extradited to the GDR and not returned to the Federal Republic. In the particular case of Derlig, her prior employment as a GDR-governmental official seemed to suggest that the East German secret police had arranged her arrest as revenge. But this explanation obscured some of the more important legal aspects of Derlig's arrest on her way home from her summer holidays in Hungary at the Hungarian–Austrian border, her court trial in East Berlin in which she was sentenced to three years and 10 months in prison, and her eventual extradition to the Federal Republic in 1968.

Giselher Wirsing was one of the few commentators to explain extraditions of West German citizens to the GDR with a shift in East German legal Cold War politics. Reminding his readership that the GDR-government was in the process of drafting a new constitution, Wirsing alerted his readers in *Christ und Welt* to the fact that the arrests of the summer of 1967 were not a political 'demonstration

48 'Bonn: Ostblock-Reisen: "Gewisse Sorge"', *Der Spiegel* (28 August 1967); 'Deutsche Touristin in Ungarn festgenommen', *Frankfurter Allgemeine Zeitung* (4 August 1967).
49 'Annemarie Derlig in Zone verurteilt', *Frankfurter Allgemeine Zeitung* (30 January 1968); 'Annemarie Derlig', *Frankfurter Allgemeine Zeitung* (2 September 1968).
50 'Bonn spricht von persönlichem Risiko bei Ost-Reisen', *Frankfurter Allgemeine Zeitung* (19 August 1967); 'Festnahmegefahr schreckt Touristen ab', *Frankfurter Allgemeine Zeitung* (16 August 1967).
51 See: 'Marx vermutet Aktionen östlicher Geheimdienste', *Frankfurter Allgemeine Zeitung* (14 August 1967); 'Mahnung', *Frankfurter Allgemeine Zeitung* (19 August 1967); 'Bonn: Ostblock-Reisen: "Gewisse Sorge"', *Der Spiegel* (28 August 1967).
52 'DDR: Republikflucht: Teure Genossen', *Der Spiegel* (4 September 1967).
53 'Lehmann und Kadur wieder zuhause', *Frankfurter Allgemeine Zeitung* (18 August 1967).

without consequences'.[54] Wirsing recognized the international legal dimension of these new conflicts. Few commentators had paid careful attention to the introduction of the GDR-citizenship law. As a result, they failed to recognize that the GDR-authorities now, once again, considered those former East Germans who had escaped to West Germany and had become naturalized West German citizens to be legal GDR-citizens.[55] Although not yet publicly acknowledged, former East Germans were now living under the constant threat of being prosecuted by the GDR. Wirsing's colleague Peter Jochen Winters had warned against 'Ulbricht's own Hallstein-Doctrine' in January 1967, but to little avail. Winters had demanded a reinforcement of the West German position of non-recognition.[56] But it would take several more months before West German authorities realized that there was little they could do about GDR-legal reform.

Given the effects of GDR-legal reforms, the West German national government had to coordinate its response with state governments across West Germany. In December 1967, the Federal Ministry of the Interior circulated a confidential directive to the Ministries of the Interior of West German states advising them how to react to the new legal situation. The national ministry stated that all persons treated as GDR-citizens following the GDR-citizenship law remained German citizens according to West German law.[57] All persons who qualified for GDR-citizenship, but not for German citizenship following the 1913-citizenship law still valid in the Federal Republic, had to be treated as foreigners.[58] 'For political reasons it seemed inadvisable', however, to discuss this development in public. The state-level Ministries of the Interior were advised to apply 'most generous' criteria in processing applications for living permits from those persons who did not qualify as Germans following West German law.[59]

This approach though was not unanimously accepted. In response to the directive, the Minister for All-German Questions Herbert Wehner criticized this solution. He urged the Minister of the Interior Lücke to acknowledge all GDR passport holders as German citizens without further discussion. This also meant the acknowledgement of all those non-German GDR-citizens, who had applied for GDR-citizenship between 1949–67, as West German citizens. If this was not done, Wehner argued, the West German government would be seen to accept the existence of a GDR-*Staatsvolk*.[60]

54 G. Wirsing, 'Riskante Reise. Helmut Schmidts Schnellinformationen', *Christ und Welt*, 20, 34 (1967), 1.

55 'Gesetz über die Staatsbürgerschaft der Deutschen Demokratischen Republik', 3–6.

56 P.J. Winters, 'Absage an Deutschland. Ulbrichts eigene Hallstein-Doktrin', *Christ und Welt*, 20, 1 (1967), 1.

57 BArch/B 136/6536, report 'Ausländerrechtliche Fragen im Zusammenhang mit dem "Staatsbürgerschaftsgesetz" der SBZ, Dienstanweisung', 4 December 1967.

58 For the drafting of the 1913-citizenship law see H. Sargent, 'Diasporic Citizens: Germans Abroad in the Framing of German Citizenship Law', in K. O'Donnell, R. Bridenthal and N. Reagin (eds) *The Heimat Abroad. The Boundaries of Germaness* (Ann Arbor, MI 2005), 17–39, 25–30.

59 BArch/B 136/6536, report 'Ausländerrechtliche Fragen im Zusammenhang mit dem "Staatsbürgerschaftsgesetz" der SBZ, Dienstanweisung', 4 December 1967.

60 BArch/B 136/6536, letter Herbert Wehner to Paul Lücke, 23 January 1968.

In the following months, West German governmental offices worked to 'preserve the unity of citizenship within the territory of the German Reich'.[61] On 15 July 1968, Ministerialrat Seifert, acting in his position as the official in charge of addressing the new legal situation within the Federal Ministry of the Interior, summarized the result of debates in the government's Inner-German Committee. In response to GDR-legislation, he explained, the West German government should declare as void any legal implications of the GDR-citizenship law for former East Germans now living in the Federal Republic.[62] West German legal experts argued that only a sovereign state could introduce an independent citizenship. As the Federal Republic did not acknowledge the GDR's sovereignty, German citizenship remained regulated by the 1913-citizenship law and provisions of the Basic Law.[63] The experts thus advised the government to disregard GDR legislation entirely. At the end of his report, however, Seifert suggested a clandestine reform of West German citizenship regulations following GDR law.[64] In many respects, the 1913-law no longer met modern legal standards by 1968 and West German officials were carefully admitting to this.

Yet, the West German position of completely neglecting the GDR's existence as a sovereign state in international affairs had already become untenable by the late 1960s. When the newly elected social-liberal coalition under Willy Brandt commenced negotiations over *Neue Ostpolitik* with the GDR in 1969, the German–German controversy over citizenship became a potent bargaining chip of the East German government.[65] The new restrictions outlined in the GDR-citizenship law threatened continued German–German family contacts, a cornerstone of Egon Bahr's concept of 'change through rapprochement', which underpinned *Neue Ostpolitik*. Acting as one of Brandt's closest political advisors, Bahr hoped to keep feelings of German national unity alive through everyday contacts between East and West Germans. Long-term, these contacts, which Bahr hoped to increase through the acknowledgement of the GDR's state sovereignty, should undermine the legitimacy and stability of the GDR. The threat to former East Germans from the new GDR-citizenship law threatened their contacts with family members still living in the GDR and thus endangered Bahr's concept. In German–German negotiations, the GDR therefore managed to pressure the West German government in the acceptance of the 'two states in one nation' formula in exchange for better travel conditions between the FRG and GDR. However, the issue of citizenship had to be excluded from the Basic Treaty first. Both governments issued statements, which accompanied the signature of the treaty, in which they expressed their divergent views of the issue of citizenship. While the GDR once again stipulated the

61 BArch/B 136/6536, minutes 'Betr. Staatsbürgerschaft der SBZ', 1 April 1968.
62 BArch/B 136/6536, report Seifert 'Betr.: Staatsbürgerschaftsgesetz der "DDR", hier: Behandlung der Angelegenheit im Kabinettssauschuss für innerdeutsche Beziehungen', 15 July 1968.
63 Ibid., 6–8.
64 Ibid., 9.
65 See: C. Fink and B. Schaefer (eds), *Ostpolitik, 1969–1974. European and Global Responses* (Cambridge 2009).

existence of an independent GDR-citizenship, the Bonn government continued in its position that only a single, undivided German citizenship existed.[66]

The West German acknowledgement of GDR statehood under the 'two states in one nation'-paradigm, however, still enabled the official international recognition of the GDR by members of the Western alliance after the ratification of the German–German Basic Treaty in December 1972. Finally, both German states became also members of the UN in 1973, which concluded the GDR's campaign for international recognition of its state sovereignty. In turn, the GDR removed all stipulations from her citizenship law, which had threatened former East Germans now living in the Federal Republic or other Western countries with prosecutions by GDR-authorities since 1967.[67] Now that the GDR had succeeded in pushing for some legal recognition by West Germany, the GDR-citizenship regulations were altered again in 1972. Emphasizing East German independence, the GDR-government renounced all special relations to the Federal Republic. All of a sudden, the GDR now denied all former East Germans whom it had legally 'repatriated' after 1967 the right to GDR-citizenship and to their possessions. From 1972 onwards, the GDR-government argued that no special all-German connections or inner-German regulations existed.[68] This argument supported the notion of full national independence and state sovereignty. With the amended Law on the Regulation of Citizenship Questions, the GDR released all former citizens who had left the country between 7 October 1949 and 31 December 1971 from GDR-citizenship. The same regulations applied to second and third generation children of former GDR-citizens.[69] When the Basic Treaty was signed on 21 December 1972, the threat of prosecution, which had haunted former East Germans living in the Federal Republic since 1967, had once again disappeared.

Despite the removal of any immediate legal threat to former GDR-citizens living in the Federal Republic, the East German attack on fundamental West German legal concepts caused reverberations within West German jurisprudence. Indeed, it could be argued that it led to a conservative backlash in domestic law-making. In 1973, West German domestic conflicts over Ostpolitik reached their peak in a lawsuit filed by the Bavarian government before the Constitutional Court.[70] In a spectacular verdict, the judges decided to approve the Basic Treaty as being in accordance with constitutional law. Yet, the court strongly reaffirmed nationalist legal concepts. The court thus reacted to the previous East German advances on the Federal Republic in international law and citizenship legislation.

66 'Erklärungen zum Grundlagenvertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik', *Bulletin des Presse- und Informationsamtes der Bundesregierung vom 8. November 1972*, 155 (1972), 1842–4.

67 BArch/DY 30/11331, report 'Verhandlungen Grundlagenvertrag', 11 October 1972.

68 BArch/DY 30/J IV 2/3J/1544, 'Sekretariat des ZK der SED, Argumentation zu Staatsbürgerschaft', 18 October 1972.

69 Archiv der Sozialen Demokratie (ASD), 1/GJAA000349, Nachlaß Gerhard Jahn, report 'SPD-Bundestagsfraktion, AK I: Staatsangehörigkeit der DDR-Bürger', 18 October 1972.

70 K.J. Grigoleit, *Bundesverfassungsgericht und deutsche Frage. Eine dogmatische und historische Untersuchung zum judikativen Anteil an der Staatsleitung* (Tübingen 2004), 180–225.

The court's verdict shook the West German legal system to its core as it reaffirmed that the Federal Republic was not a new state founded after 1945, which had newly organized the West German territory as a sovereign state. Rather, the court argued, the Federal Republic was a temporary political system (*Staatsform*) to bridge the transition to German reunification, which would see the territorial and constitutional reinstitution of a sovereign Germany.[71] In the late 1940s, West German legal experts and leading politicians had constructed a complex legal argument that defied existing realities of the early Cold War.[72] They agreed that the Federal Republic was the extension of the German Reich of 1937, prior to Nazi annexation of foreign territories. In doing so, they hoped to promote their agenda of reuniting the German nation-state.[73] Since the foundation of the Federal Republic, this so-called *Identitätslehre* had remained contested among legal professionals. It outlined the idea of a direct legal continuity between the Third Reich of 1937 and the Federal Republic after 1949. While the vast majority of legal experts saw West Germany as being the legitimate legal *successor* of the Reich by 1973, only very conservative jurists had declared the Federal Republic as legally *identical* to the Reich.[74]

Countering the GDR's success of being recognized as a second German state by the Basic Treaty, the court's verdict now explicitly emphasized the legal validity of the *Identitätslehre*. The judges accepted the ratification of the treaty by pointing to the prerogative of the Bonn government to decide independently on matters of foreign policy. However, the court ruled that it continued to be the constitutional duty of all West German government officials to work towards national unification. Thus the court ruled that politicians were free to conclude that official recognition of the GDR would promote plans to unify the country. Yet, despite politicians' freedom in this regard, this would not affect the legal validity of the theory that the Federal Republic and the Third Reich of 1937 were legally identical.[75] In fact, it was in this verdict that the court discussed this theory in great detail for the first time. This gave the *Identitätslehre* unprecedented legal importance. In particular, judges emphasized that German citizenship remained undivided and solely represented by the Federal Republic.

Two years later, the court retreated from this highly controversial decision. It revised its position with regard to the territorial dimensions of the Federal Republic as defined by law. In a verdict on the East Treaties in 1975, the judges conceded that former German Eastern territories, including Ostpreußen and all territories

71 M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland Band 4: Staats- und Verwaltungsrechtswissenschaft in West und Ost 1945–1990* (Munich 2012), 25–37.
72 B. Diestelkamp, *Rechtsgeschichte als Zeitgeschichte. Beiträge zur Rechtsgeschichte des 20. Jahrhunderts* (Baden-Baden 2001), 25–66, 67–84.
73 Ibid.
74 Grigoleit, *Bundesverfassungsgericht und deutsche Frage*, 180–225.
75 'Nr. 1: 31. Juli 1973: Grundlagenvertrag Bundesrepublik Deutschland und Deutsche Demokratische Republik', in Mitglieder des Bundesverfassungsgerichts (eds) *Entscheidungen des Bundesverfassungsgerichts*, Band 36 (Tübingen 1974), 1–37, 15ff.

East of the Oder-Neiße-Line, currently belonged to the USSR and Poland.[76] The judges thus accepted international Cold War realities. Yet, the court's far more popular verdict of 1973 had already become the most important reference of right-wing conservatives pushing for unification within the borders of 1937.[77]

The entire debate on the legal nature of the German states and the question of German citizenship could have been dismissed as purely academic and part of Cold War rhetoric. For as long as the Cold War divide continued to exist, however, it had a profound impact on Germans living in East and West Germany. In an international perspective, the politicization of international law in the two Germanys became even more apparent. With its Eastern European allies, the GDR signed treaties regulating changes of citizenship immediately after the introduction of the GDR-citizenship law. Starting with a treaty between the USSR and GDR, GDR-citizens were free to choose between GDR and USSR citizenship if they had legal claims to both of them.[78] In turn, Western allies of the Federal Republic had repeatedly criticized the legal notion of a continued existence of the Third Reich in its borders of 1937.[79] Yet, conceding to West German demands, NATO states disregarded the validity of GDR passports until the 1960s. This non-recognition of GDR passports by NATO, which characterized East German citizens as 'stateless' or 'presumed German', nonetheless acknowledged that East Germans held a different legal citizenship status than West Germans. Such treatment of East Germans implicitly equalled an acknowledgement of a separate East German citizenship.[80] By the mid-1960s, NATO states stopped this treatment of East Germans. Especially the US government now saw the total West German rejection to acknowledge any kind of GDR state sovereignty as a serious obstacle to its own foreign policies towards Europe and the USSR.[81] In the legal Cold War between the two Germanys, both states thus acted very differently in relations to their allies than they did in a German–German perspective.

76 'Nr. 16: 7. Juli 1975: Verträge von Moskau und Warschau (Ostverträge)', in Mitglieder des Bundesverfassungsgerichts (eds) *Entscheidungen des Bundesverfassungsgerichts*. Band 40 (Tübingen 1976), 141–79.

77 Roth, *Die Idee der Nation im politischen Diskurs*, 146–93.

78 BArch/DY 30/J IV 2/3/1403, 'Protokoll zur Sitzung des ZK der SED vom 07.05.1968'. See also: BArch/DO 1/10926, Ministerium des Inneren, Sekretariat des Ministers und Büro des Ministers, Rechtsabteilung.

79 National Archives II (NARA), RG 59, Entry 5389, LOT 70D448, Box 2, Folder 'Germany – Frontiers 1960-1963' (Assistant Legal Advisor for European Affairs (L/EUR) at the Department of State).

80 For the treatment of East Germans by the Allied Travel Office, see: M. Thomas, '"Agression in Felt Slippers": Normalisation and the Ideological Struggle in the context of Détente and Ostpolitik', in M. Fulbrook (ed.) *Power and Society in the GDR 1961–1979. The 'Normalisation of Rule'?* (New York, NY 2009), 33–51, 37–41.

81 H. Klitzing, 'To Grin and Bear It. The Nixon Administration and Ostpolitik', in Fink and Schaefer (eds) *Ostpolitik, 1969–1974*, 80–110, 80f.; G. Niedhart and O. Bange, 'Die "Relikte der Nachkriegszeit" beseitigen. Ostpolitik in der zweiten außenpolitischen Formierungsphase der Bundesrepublik Deutschland im Übergang von den Sechziger- zu den Siebzigerjahren', *Archiv für Sozialgeschichte* 44 (2004), 415–48, 434–8.

German–German legal conflicts represented part of larger shifts in the field of international law after 1945. In the context of the foundation of the UN, Cold War conflicts were increasingly framed in the language of human rights and international legal standards by the 1960s.[82] In this climate, the GDR drew on accepted UN standards of state sovereignty and the right to self-determination of people. Especially for the two Germanys, the UN became a battleground for international recognition after German defeat in 1945 and long before both states were officially admitted UN members in 1973. Amidst large-scale efforts of legal reform taking place across the Eastern and Western Cold War blocs in the late 1960s and 1970s, the two Germanys rebuilt their legal foundations next to the modernization and, in the case of the GDR, introduction of new legal codes on a domestic level. When the superpowers moved to politics of detente, international legal frameworks became a core part in the organization of the everyday Cold War next to the continuous military threat in the Cold War Germanys.

In the period from 1967 to 1972, citizenship law became a central part of the GDR's strategy to pressure the Federal Republic to officially recognize the GDR as a sovereign state. Yet, the GDR's victory of being internationally recognized was short-lived. The East German government used international law to its advantage in the late 1960s and early 1970s capitalising on shifts in the UN caused by Third World liberation movements.[83] The acknowledgement of international law and human rights charters were essential components in the attempt of the GDR-government to be internationally recognized. By the 1980s, this official adherence to international law standards in foreign relations would open up possibilities for social dissent and liberation movements in the GDR and across the Eastern bloc.[84]

Biographical Note

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82 See: S.-L. Hoffmann (ed.) *Human Rights in the Twentieth Century* (Cambridge 2011); J. Eckel and S. Moyn (eds) *Moral für die Welt? Menschenrechtspolitik in den 1970er Jahren* (Göttingen 2012); L. Wildenthal, *The Language of Human Rights in West Germany* (Philadelphia, PA 2013), 1–16.

83 Mazower, *Governing the World*, 244–72.

84 For the importance of international law and human rights in Cold War politics since the 1970s see: S. Snyder, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (Cambridge 2011). See also: Hoffmann (ed.), *Human Rights in the Twentieth Century*; Eckel and Moyn (eds), *Moral für die Welt?*.