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Irish Unity: Lessons from Germany?

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ABSTRACT

What lessons could Ireland learn from German reunification? Its study demonstrates the sheer legal complexities an Irish unification process would herald. Like German reunification, Irish unity would require the completion of negotiations at different levels: internal, bilateral and international, including at EU level. Irish unification would meet a similar degree of legal complexity. Thus legal techniques deployed in Germany—such as frontloading, transition periods and conflict rules—could usefully be employed in Ireland. Some of the substantive questions to be resolved would be very similar, for example questions around the merger of two distinct legal, administrative and judicial

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systems. Others, such as how to deal with the legacies of the past, would also arise, but are more context-specific and require bespoke solutions. Some issues are unparalleled, such as the need to introduce a completely different economic order in East Germany or the protection of a unionist minority in a united Ireland.

INTRODUCTION

This article asks the question: what lessons—if any—could Ireland learn from the reunification of Germany? It recounts the legal path to reunification and tries to disentangle its legal complexities. Its main contribution is to outline the legal path to German reunification as well as its aftermath in its historical and political context, and to thus expose some of the key legal challenges that a uniting Ireland might face. In line with the author's expertise, the article's focus is on legal and procedural questions.

The article shows that, like German reunification, Irish unity would require the completion of negotiations at different levels: internal, bilateral and international, including at the EU level. Irish unification would meet a similar degree of legal complexity to German unification. Some of the substantive questions to be resolved would be very similar, e.g. questions around the merger of two distinct legal, administrative and judicial systems. Others, e.g. how to deal with the legacies of the past, would also arise, but are much more context-specific and require bespoke solutions. And there are issues that are unparalleled, such as the need to introduce a completely different economic order in East Germany or the questions around national identity and protection of a unionist minority, which would undoubtedly dominate the process of Irish unification. For the latter, the German experience does not offer much help. Nonetheless, studying German reunification demonstrates the sheer legal complexities an Irish unification process would herald. Furthermore, the legal techniques deployed in the German context—such as frontloading, transition periods and conflict rules—could usefully be employed in Ireland as well.

The article analyses these potential lessons by first clarifying the broader legal context of both German and Irish unification before discussing the following substantive questions: the process of unification; the international negotiations—bilateral and multilateral—that would become necessary; changes to domestic law and the legal system; and legacy issues. The article

concludes with a reflection on the overarching theme of how time and timings are of the essence.

The following brief timeline of key (legal) events in the process of German reunification is intended to provide a useful background to the discussion in the article.

Timeline of German reunification
Summer 1989: Mass exodus of German Democratic Republic (GDR) citizens
4 September 1989: First Monday demonstration in Leipzig
18 October 1989: Honecker resigns
9 November 1989: Fall of the Berlin Wall
28 November 1989: Kohl announces ten-point programme
13 February 1990: Two-Plus-Four process commences
18 March 1990: First free elections in the GDR
12 April 1990: First freely elected GDR government takes office
28 April 1990: European Council in Dublin: European Communities pave the way for reunification
18 May 1990: Treaty Establishing a Monetary, Economic and Social Union signed
23 August 1990: GDR parliament declares the accession of the GDR to the Federal Republic of Germany on 3 October
31 August 1990: Treaty on German Unity signed
12 September 1990: Two-plus-four treaty signed (in force from 15 March 1991)
20 September 1990: Both German parliaments ratify the Treaty on German Unity
3 October 1990: Day of German Unity
14 October 1990: Elections to the state parliaments of the five East German *Länder*
2 December 1990: First pan-German federal elections

THE BROADER LEGAL CONTEXT: DIFFERENCES AND SIMILARITIES

Irish unification would follow the same broad legal pattern as German reunification: it would consist in the accession of an existing entity to an existing state. The current German state is the same Federal Republic of Germany that had been founded in 1949 and was colloquially known as West Germany.

German reunification meant that the GDR acceded to the Federal Republic. The same would be true for Ireland: the Good Friday/Belfast Agreement also envisages accession by the six counties that form Northern Ireland to the existing Irish state.

This accession model of unification means that the existing state—the Federal Republic of Germany or Ireland—continues to exist as a subject of international law, so that its international commitments, rights and alliances remain intact. Internally this also means that the existing state's constitution and legal system need not change, apart from adaptations necessitated by its accretion of territory and population. This commonality is also important when considering the international dimension to unification. In the case of Germany this required international negotiations with the four powers and bilateral negotiations between the two German states, as well as negotiations at European level. Irish unity would equally require multiple negotiations at multiple levels.

The German and Irish contexts differ, however, as far as the subjects of unification are concerned: whereas the GDR was a sovereign state and ceased to exist as such on 3 October 1990, Northern Ireland is part of the United Kingdom, which would continue to exist as a state after Irish unification. In other words, whereas German unification consisted in the absorption of one state in another, Irish unification would technically be a transfer of sovereignty over territory by one state to another. There are thus certain parallels with the accession of the Saarland to West Germany in 1957, which will be touched upon again in what follows.

The contexts also differ as far as the composition of their populations is concerned. While few people in Germany would have doubted the assumption underlying Willy Brandt's famous words *Jetzt wächst zusammen, was zusammen gehört* (what belongs together is now growing together),[1] in Ireland this sentiment would be shared primarily by nationalists, and by few unionists. Irish partition was the result of an attempt to preserve British (and Protestant) rule in parts of Ulster, ultimately resulting in the creation of Northern Ireland.[2] This ethnic[3] and sectarian dimension was missing in Germany, whose partition was the result of ideological differences between

[1] Apparently, Brandt never quite said it like this, but was happy with this inaccurate and rather poetic quote: see 'In der Erinnerung zusammengewachsen', *Frankfurter Allgemeine Zeitung*, 14 October 2014.

[2] This despite the fact that there was no majority of Protestants in counties Fermanagh and Tyrone.

[3] In this context, J.J. Lee uses the analogy of the *Herrenvolk* (master race) to describe Protestant British rule in Northern Ireland: *Ireland 1912–1985: politics and society:* (Cambridge, 1989).

the emerging political blocs of the Cold War era. Whereas the main challenges for a reunited Germany were economic, in the case of a united Ireland the most difficult issue to resolve would be the accommodation of British people as a minority ethnic group in a united Ireland. What both Germany and Ireland nonetheless have in common in this regard is that a smaller entity would join a bigger entity, raising questions about how those joining can be given agency in the process.[4]

PROCESS

When considering the process of unification, it is useful to draw a distinction between the decision for unification in principle (*whether* unification should take place) and the decision about the terms of unification (*how* unification should take place).

The German case differs from that of Ireland as far as the decision *whether* to reunify is concerned. This is due to the different constitutional frameworks in place.

The constitution of the GDR of 1968—heavily amended in 1974—did not envisage a united Germany and thus did not make provision for it.[5] Only the Basic Law of the Federal Republic of Germany (*Grundgesetz*, GG) contained constitutional provisions that could accommodate reunification. From its inception, the Basic Law was shaped by German partition. Its original preamble expressly mentioned that the legal order created by the Basic Law should only apply for a transitional period. This was also reflected in its name: it was a Basic Law (*Grundgesetz*), not a constitution (*Verfassung*).

After considerable political debate, the Federal Republic of Germany decided to base reunification on Article 23 GG instead of Article 146 GG, which would have been an alternative route requiring a referendum. Article 23 GG defined the territorial scope of the Basic Law as extending to the (then) eleven West German *Länder*, but added that the Basic Law would apply in other parts of Germany after their accession to the Federal Republic. This had

[4] Northern Ireland currently has an estimated (and fairly stable) population of 1.9 million; Ireland has a population of 5 million and growing. East Germany in 1989 had a population of around 17 million and West Germany had around 61 million inhabitants.

[5] Interestingly, the first GDR constitution of 1949 claimed to apply to the entirety of Germany ('an indivisible, democratic Republic'); the GDR's national anthem, the so-called 'Becher-Hymne' with music by Hans Eisler, also expressed the hope that Germany would be united ('Deutschland, einig Vaterland').

also been the route by which the Saarland acceded to the Federal Republic in 1957.[6] Article 23 GG had two key legal consequences: first, it put the Federal Republic under a duty to accept the unilateral accession decision of another part of Germany,[7] and secondly, it would leave the Basic Law intact after accession.

German unification was thus effected by a unilateral act of the GDR, i.e. one expression of consent, formally given by the GDR's first (and only) freely elected parliament on 23 August 1990. By contrast, the Good Friday/Belfast Agreement stipulates that Irish unification requires 'consent, freely and concurrently given, North and South', i.e. two concurrent expressions of consent.

For the North, the Good Friday Agreement is more specific in that it stipulates approval by a (simple) majority of the people of Northern Ireland in a referendum. As far as Ireland ('the South') is concerned, the precise way in which consent is expressed is not prescribed by the Good Friday Agreement. Instead, the Irish constitution (Bunreacht na hÉireann) serves as the yardstick. Constitutional lawyers argue that technically Irish unification could be achieved without amendments to the constitution and thus without a referendum, which Article 46 of Bunreacht na hÉireann prescribes only for amendments.[8] However, this seems to undervalue the strong steer towards a referendum contained in the wording of Article 3 of Bunreacht na hÉireann, which states that 'a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island'.

Furthermore, the German example suggests that at least cosmetic amendments to the constitution would likely be required. Upon reunification, the Basic Law was given a new preamble; Article 23 GG, on which reunification was based, was removed and Article 146 GG—setting out how the Basic Law could be replaced—was reformulated; two transitional provisions were inserted and the weighting of voting rights in the Federal Council (Bundesrat) was adapted in view of additional *Länder* having joined.

[6] More on this: Wilfried Fiedler, 'Die Rückgliederungen des Saarlandes an Deutschland – Erfahrungen für das Verhältniszwischen Bundesrepublik Deutschland und DDR?', *Juristenzeitung* 45 (1990), 668–75.

[7] According to the West German Federal Constitutional Court, the Basic Law as a whole had to be understood as containing a duty to reunite Germany. This meant that the West German government was not in a position to give up the political aim of reunification or indeed to do anything that would thwart that constitutional objective; see BVerfGE 36, 1, 17.

[8] Oran Doyle and David Kenny, 'Models of Irish unification processes', 6, available at: http://dx.doi.org/10.2139/ssrn.3552375 (1 March 2022).

Coupled with Ireland's strong referendum culture, it is thus most likely that in the event of a referendum on Irish unification in the North, a concurrent referendum would be held in the South.

In the case of Ireland, the moment at which the decision for Irish unity is made would be clear: at the time concurrent consent to a united Ireland North and South has been given, presumably by way of two referendums held on the same day. In the case of Germany, the GDR's decision for reunification was not made directly by the people, but it is widely accepted that the first free elections of 18 March 1990 constituted a 'genuine expression of the right to self-determination' in favour of reunification.[9] A large majority of around 80 per cent of voters had opted for pro-unification parties.[10] Centre-right and centre-left parties differed not so much on the question of whether reunification should be happening but on how quickly this should occur. The great speed at which reunification took place in the end was also due to the centre-right 'alliance for Germany' winning the GDR elections.

In March 1990 the details of German reunification (the *how* question) were clear only in the broadest terms. Voters in the GDR knew that the GDR would disappear and that they would be joining the Federal Republic with the Basic Law as its constitution. They also knew that this would result in a radical transformation of the economic system, a new currency and more personal freedoms, and they hoped it would mean more prosperity. Its economic consequences—mass unemployment being the most obvious one—were not anticipated.

There seems to be agreement among commentators that a vote on Irish unification should be based on the informed consent of the electorate.[11] In other words, voters should be in a position to know as many details as possible about how unification would happen and what it would mean. Hence in practice much comes down to questions of sequencing: should a vote on Irish unity take place only after the details of what a united Ireland would look like have been agreed? Or should the vote take place with agreement on the process for future decision-making only? It has convincingly been argued that there should not be two referendums on Irish unification, with

[9] Joachim Frowein, 'The reunification of Germany', *American Journal of International Law* 86 (1992) 152–63: 153.
[10] The turnout stood at 93.4 per cent: see 'Bundesstiftung Aufarbeitung, Auf dem Weg zur ersten freien Wahl', available at: https://deutsche-einheit-1990.de/friedliche-revolution/auf-dem-weg-zu-ersten-freien-wahl/ (1 March 2022).
[11] Colin Harvey, 'Let "the people" decide: reflections on constitutional change and "concurrent consent"', *Irish Studies in International Affairs* 32 (2021), 382–405: 396.

an 'in principle' vote followed by a 'confirmatory' vote once a settlement for a united Ireland has been negotiated.[12] For one, it would add additional requirements to those in the Good Friday Agreement; it would also protract and obscure the process unduly.

O'Leary distinguishes the two likely approaches as the model approach and process approach respectively.[13] In a similar vein, the University College London Constitution Unit's report on unification referendums distinguishes these two approaches, but subdivides the process approach into two: one where the votes for unification are followed by a process of designing a united Ireland, which—once agreed—is followed by a transfer of sovereignty; and another where the sovereignty transfer swiftly follows the votes for unification and constitutional arrangements for a united Ireland are designed thereafter, while the united Ireland is governed by an interim constitution (which could be the current one).[14]

Each of these models has its advantages and drawbacks: the first would certainly best comply with the principle of informed consent, yet it would probably suffer in terms of legitimacy if—as is expected—political unionism refused to engage with the process of devising a model before a vote had taken place. Hence unionists might consider a model of governance devised in this manner as having been imposed on them by the South (or indeed by nationalists); a feeling similar to that of some East Germans. Furthermore, even a model approach would be limited to broadly answering the most pressing constitutional questions, and could not decide the many detailed questions regarding Irish unification that would need to be answered.

The process approaches have the advantage of realistically being capable of involving unionists. At the same time, there is a danger of the process collapsing or its outcomes not being accepted by the public in a referendum called for approval, so that any default or interim rules devised in advance would become permanent. The German case shows that a constitution originally designed as a provisional one can morph into a permanent (and overall successful) arrangement. This suggests that reliance on a successful constitution

[12] Harvey, 'Let "the people" decide', 397.

[13] Brendan O'Leary, 'Getting ready: the need to prepare for a referendum on reunification', *Irish Studies in International Affairs* 32 (2021), 1–38: 26.

[14] UCL Constitution Unit, Working Group on Unification Referendums on the Island of Ireland, Final Report, May 2021, available at: https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/working_group_final_report.pdf (1 March 2022).

as an interim—as would be the case if Bunreacht na h'Éireann were used as an interim arrangement—can easily derail envisaged constitutional revision.

The Treaty on Unity contained a provision that mandated a review of the Basic Law within two years of reunification. This had been a concession made by the ruling centre-right government in order to obtain the Social Democrats' consent to German unification on the basis of Article 23 GG (the accession model). This consent was necessary to obtain the requisite majorities in the federal parliament for constitutional change. The Social Democrats would have preferred a slower process based on Article 146 GG—which would have required the adoption of a new constitution for a united Germany approved by referendum. Given their clear defeat in the GDR elections in March 1990, they accepted the German government's path to reunification, but under the condition that constitutional reform should be on the agenda thereafter. Consequently, Article 5 of that Treaty on Unity states that within two years the united Germany should revisit questions of amending the Basic Law due to reunification and in particular whether Article 146 should be applied, i.e. whether the Basic Law should be replaced with a new constitution. In the end, this constitutional compromise came to very little, primarily because the ruling Christian Democrats did not consider this a necessary process. Only minor constitutional change resulted from it.

In the case of Ireland, it would therefore be important to have a more robust procedure in place to ensure that the process of revision actually took place as independently from the whims of the government as possible. O'Leary's suggestion that the process should envisage a constitutional convention elected by proportional representation would go a long way in that direction, though inevitably this convention would have a nationalist/southern majority: it would be difficult to avoid a certain degree of path dependency in the drafting of a new constitution, so that much now contained in the Bunreacht might well be re-enacted. Safeguards to secure unionists' rights—particularly those resulting from the Good Friday Agreement—would need to be ascertained in advance, possibly in a bilateral agreement with the United Kingdom, to protect them from nationalist override. And even if that did not happen, such protections would be needed to prevent a situation in which nationalists would have to draft such protections, which again might become permanent for lack of agreement on alternatives and which consequently could be conceived of as having been illegitimately imposed on unionists. The German example shows that such a development can easily occur.

There would additionally be several international dimensions to Irish unification: negotiations between Ireland and the UK on the terms of the sovereignty transfer, but also negotiations at EU level and possibly with further international partners.

It should be reiterated that under public international law a united Ireland would not be a new state. Instead it would be legally identical with the state today known as Ireland, i.e. the state currently constituted by Bunreacht na hÉireann. The situation would thus be the same as it was for the Federal Republic of Germany. This does not mean that politically and in practical terms a united Ireland could not be a 'new state'.[15] A united Ireland could adopt a new constitution, new symbols, and indeed a new name if it so chose. Yet from an international law perspective, it would remain identical to today's Ireland, which means that a united Ireland would continue to be bound by any international law commitments undertaken by Ireland. The fact that Northern Ireland, as a sub-state entity, does not have treaty commitments of its own means that—with the exception of possible treaties on territory—most of the legal questions around state succession that plagued the negotiators of the German Treaty on Unity do not arise.[16]

International law constraints

At the time of reunification, the Federal Republic and the GDR were entangled in a complex web of international legal relations. The Allied Control Council established by the four powers to govern Germany after its defeat in the Second World War formally continued to exist, although it had been defunct since 1948. Both states were also embedded in the two opposing political and military blocs, most importantly through membership of NATO and the Warsaw Pact. The Federal Republic was also a member of the Western European Union and of the European Communities;[17] the GDR a member of

[15] As for example Jim O'Callaghan TD does in his paper 'The political, economic and legal consequences of Irish reunification', available at: https://jimocallaghan.com/wp-content/uploads/2021/03/Jim_Speech_Irish_reunification_.pdf (1 March 2022).

[16] On the fate of GDR treaties, see Stefan Oeter, 'German unification and state succession', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 51 (1991), 349–83.

[17] The Treaty of Rome contains numerous references to the partition of Germany, most importantly a protocol relating to German internal trade, which decreed that the treaty did not apply to trade between the GDR and the Federal Republic.

the Council for Mutual Economic Assistance. Furthermore, neither German state enjoyed full sovereignty in relation to reunification.

As far as West Germany was concerned, the three Western powers had terminated the occupation regime and restored the Federal Republic's sovereignty to a large extent by concluding the Convention on Relations between the Three Powers and the Federal Republic of Germany in 1952, in force since 1955.[18] That treaty, however, retained certain powers of the allies, notably concerning Berlin; Germany as a whole, including reunification; and an eventual peace settlement.

The Soviet Union for its part nominally granted the GDR full sovereignty in its internal and external affairs, including the relations with the Federal Republic, by way of a treaty.[19] On closer reading of that treaty one can, however, identify similar restrictions of sovereignty concerning the position of Germany as a whole and Germany unity.[20]

These international law constraints meant that unification could not be a purely intra-German affair. Instead it had to happen with the agreement of the former Allies. While the sovereignty of Ireland is beyond doubt, there are international legal constraints under which a uniting Ireland would need to operate: chiefly those arising from the Good Friday/Belfast Agreement and from EU membership.

The Good Friday Agreement—or more precisely the British-Irish Agreement underpinning it—already obliges a united Ireland to accept its birthright provision and to exercise the power of sovereign government with rigorous impartiality, 'founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities'. These guarantees and other questions would probably be the subject of bilateral negotiations between Ireland and the UK.

It is almost universally expected that a united Ireland would continue to be an EU member state. Hence a uniting Ireland would need to engage

[18] BGBl. II, Nr. 8, 1955, 301.

[19] Vertrag über die Beziehungen zwischen der Deutschen Demokratischen Republik und der Union der Sozialistischen Sowjetrepubliken vom 20. September 1955 http://www.verfassungen.de/de45-49/freundschaftsvertragddrsu55.htm; the content of that treaty had previously been announced by the Soviet Union in the sovereignty declaration of 25 March 1954, which made express reference to the four-power agreement, see 'Erklärung der Sowjet-Regierung über die Beziehungen zwischen der Sowjet-Union und der Deutschen Demokratischen Republik vom 25. März 1954', *Archiv des Völkerrechts* 5 (1955), 160–1.

[20] See Article 5 of that treaty as well as its preamble.

in multilateral negotiations with the EU institutions and other EU member states to facilitate the accession of Northern Ireland.

Bilateral negotiations

As pointed out above, legally speaking the question *whether* there would be a reunification of Germany was entirely within the hands of the GDR. However, the question of *how* precisely reunification would unfold remained open and needed to be agreed between the two German states. This was done on the basis of two bilateral treaties: the Treaty on an Economic, Monetary and Social Union, in force from 1 July 1990, and the Treaty on Unity, in force from 3 October 1990. The latter treaty contained numerous transitional provisions and conflict clauses to smooth the transition from one legal system to another. Together these treaties resulted in a phasing of reunification, with economic integration preceding political and legal unity.

This approach differed from that of the accession of the Saarland in 1957. In that case, a treaty between France and Germany decreed that formal (political) accession to Germany was to be followed by a three-year transition period (later shortened to 2.5 years) during which the Saarland would remain in the French economic sphere as part of the French customs zone and with the French franc as a currency. Only after this had been agreed did the parliament of the Saarland formally declare its accession to the Federal Republic.[21]

Treaty on an Economic, Monetary and Social Union

The Treaty on an Economic, Monetary and Social Union pursued its three eponymous goals. It contained a detailed programme for legislation for the newly elected parliament of the GDR, which helped to achieve a degree of legal conformity between the two states in the final months until reunification. Countless pieces of GDR legislation had to be revoked; a vast amount of new legislation—typically modelled on West German equivalents—had to be enacted. It also required amendments to West German legislation.

To bring about economic union, the treaty contained a prohibition of planned economic governance, the introduction of competition between private market actors and free pricing, transfer of ownership of most state-owned companies to a trust agency, tax reform and an adoption of West

[21] Fiedler, 'Die Rückgliederungen des Saarlandes an Deutschland', 672.

German budgetary policy based on macroeconomic balance.[22] It also provided that the GDR would become part of the EU's customs territory.

The treaty further contained the applicable exchange rates for the currency union. This was a costly exercise for West Germany as the West German government agreed to a 1:1 exchange rate for all wages, pensions and smaller savings amounts, even though the realistic value of the GDR currency was considerably below that.[23] Finally, the treaty effected social union by replacing the GDR's unitary welfare model with the West German Bismarckian model of social insurance.[24]

The Treaty on an Economic, Monetary and Social Union meant that most of the economic change needed for reunification had been frontloaded. By the time reunification occurred on 3 October 1990, much of the necessary economic legislation was already in place so that there was no sudden economic transition at that point in time. In fact, in legal terms reunification had already been partly achieved.

Treaty on Unity

With economic questions largely out of the way, the Treaty on Unity effected the GDR's accession to the Federal Republic under international law. The bulk of the treaty contains highly complex provisions concerning the internal effects of unification. The treaty therefore reads more like a piece of domestic constitutional and legislative reform than an international treaty. This is due to a number of factors: first, the treaty was not the result of an international negotiation between sovereign equals, but drafted by West German civil servants and legal experts with little substantive input from the East; secondly, it was drafted in the expectation that it would become applicable domestically as federal legislation;[25] thirdly, one of the two states concluding the treaty was set to be abolished, so that a more traditional drafting spelling out the parties' respective obligations under the treaty would not have made much sense.[26]

[22] According to the Basic Law, 'macroeconomic balance' (*gesamtwirtschaftliches Gleichgewicht*), which according to the stability law of 1967 (*Stabilitätsgesetz*) means that economic policy must pursue (and balance) four aims: price stability, high rates of employment, a trade balance and growth.

[23] Ian Kershaw, *Roller-coaster: Europe 1950–2017* (London, 2018), 379.

[24] Astrid Rosenschon, 'Zum System der sozialen Sicherheit in der DDR, Die Weltwirtschaft', *Die Weltwirtschaft* (1990), 91–100.

[25] That is the fate of treaties ratified by the *Bundestag*; see Article 59 (2) GG.

[26] Notwithstanding, the treaty states in Article 44 that the rights conferred on the GDR by the treaty could be claimed and enforced by the five new *Länder*.

In parallel to the bilateral negotiations with the Federal Republic, the GDR took unilateral steps to prepare the ground for reunification. The re-establishment of the five states (*Länder*) of the GDR on 22 July 1990[27] is an important example of this, as it enabled the GDR's territorial structure to fit into that of the Federal Republic. All that was left for the Treaty on Unity was to reunite Berlin as a state (*Land*). The treaty furthermore dealt with the dissolution, replacement and reform of the many administrative bodies in the GDR.[28]

The most important features of the Treaty of Unity of relevance to Irish unification concerned the constitutional reforms outlined above, which the treaty brought about directly. It also extended the reach of federal law to East Germany and dealt with the fate of existing legal relationships. Its most innovative features were the complex transitional arrangements featuring instructions to the various legislators and governments; phasing out and phasing in of legislation; and certain short-term fixes, e.g. to ensure representation of East Germans in the federal parliament until the next election.

Given that Northern Ireland is a sub-state entity with no independent treaty relations, the Treaty on Unity's intricate set of rules on the GDR's international legal obligations are of little relevance to this article.[29]

Lessons for Ireland?

A treaty between the UK and Ireland could usefully employ the same techniques as the two inter-German treaties: a mix of directly applicable rules, e.g. on the process for drafting a new constitution; postponement of the entry into force of certain existing legal provisions in the part of Ireland where these would first be introduced; instructions to the new all-Ireland legislature; provisional arrangements (e.g. a continuation of Stormont for a specific

[27] The five *Länder* had been abolished by the GDR in 1952.

[28] Articles 13–20.

[29] Dieter Papenfuß, 'The fate of the international treaties of the GDR within the framework of German unification', *American Journal of International Law* 92 (1998), 469–88: 474; Oeter, 'German unification and state succession'; on the unsettled character of the international law on state succession more generally, see Arman Sarvarian, 'Codifying the law of state succession: a futile endeavour?', *European Journal of International Law* 27 (2016), 789–812. Furthermore, the political collapse of the GDR meant that, except for the recognition of the Eastern border, the obligations under various treaties in force between the two German states would have little bearing on the accession negotiations. Except for a 1963 agreement that allowed West Berliners to cross the border there were no treaty relations between the Federal Republic and the GDR until Willy Brandt's Ostpolitik bore fruit in the early 1970s. The important Basic Treaty of 1972, which established diplomatic relations between East and West Germany, had been preceded by the 1970 Treaties of Moscow and Warsaw, in which the Federal Republic formally recognised the Oder-Neiße line as the Eastern border of Germany, and by a 1971 treaty with the GDR on transit.

period). All of these could be coupled with conflict rules and phasing-in and phasing-out arrangements.

A treaty between the UK and Ireland would also need to settle the precise terms of a transfer of sovereignty over Northern Ireland. It would need to specify a date for that transfer and resolve basic procedural points: when the first all-Irish elections would take place and under what electoral system, how Northern Irish voters would be represented in the interim, etc. It would also need to regulate questions concerning sovereign debt, pensions, the fate of British military installations and so on. In many regards this would be déjà vu from the Anglo-Irish Treaty of 1921 and not unprecedented. Those aspects would certainly be more complex than in the case of the German Treaty on Unity, where the other treaty party was about to vanish and the Federal Republic assumed the GDR's legal obligations.

Additionally, the UK may wish to enshrine the rights of unionists in a united Ireland in such a treaty. The German example shows that international law commitments resulting from existing relationships and from international agreements preparing or immediately following unification constrain the choices available internally. For instance, the Soviet Union's insistence that the land reforms it instigated during occupation could not be reversed cut against the grain of West German policy towards expropriations, but had to be accepted in the end and was enshrined in a constitutional amendment. It is possible, and indeed likely, that a treaty on Irish unity—negotiated between the UK and Ireland—would be used to transfer some of the specific obligations in the Good Friday Agreement currently resting on the UK to a united Ireland, relating to policing, economic, social and cultural issues, etc.[30]

Notably, such a treaty could be used to enshrine specific protections for unionists, and to reconfigure the overall Ireland–UK relationship, notably as far as the East–West institutions are concerned. It might also spell out concrete human rights obligations for Ireland, which a constitutional convention—should a process route be chosen—would then need to implement. Restrictions of rights to 'citizens', which are common in Bunreacht na hÉireann, would probably have to be replaced;[31] depending on whether

[30] If a substantive revision of the Good Friday Agreement were to happen, this might result in a further procedural complication: after, all the Good Friday Agreement is not a simple bilateral treaty, but a multi-party agreement approved by referendums, so any revision of its substantive terms would arguably require popular consent.

[31] David Kenny, 'The Irish constitution, a united Ireland, and the ship of Theseus: radical constitutional change as constitutional replacement', 17–18, available at: https://dx.doi.org/10.2139/ssrn.3399054 (1 March 2022).

attempts at drafting a Northern Irish Bill of Right progress, this bill may have to be incorporated, at least in substance.

In terms of process, the negotiations could also be used to accord a formal role to the Northern Irish institutions. The two parts of Germany negotiated directly with one another as sovereign states. By contrast, Irish unification would be effected by way of a sovereignty transfer from the UK to the Irish state so that technically there would be no need to involve the Northern Irish executive or assembly in any of this. However, there are good reasons to at least try to bring the Northern Irish institutions—should they be functioning at that point in time—into the negotiations. There is additionally (and alternatively) a strong case for incorporating elements of deliberative democracy such as citizens' assemblies. Otherwise the people of Northern Ireland would not be represented in any meaningful way, particularly given that any UK government negotiating on their behalf would most probably not incorporate anyone representing a Northern Irish constituency.

Multilateral negotiations

Given the restrictions on German sovereignty outlined above, international negotiations with the four allies were necessary in order to allow a reunited Germany to attain full sovereignty, in particular over Berlin, but also regarding the vague reservations concerning 'Germany as a whole'. The three Western allies and the Soviet Union assumed that these restrictions would be lifted once a formal peace treaty with Germany had been agreed.[32]

These two-plus-four negotiations resulted in a final settlement of the German question: an end to restrictions on German sovereignty and clarity over a reunited Germany's territorial borders,[33] i.e. a final recognition of the Oder-Neiße line as its permanent Eastern border. The two-plus-four treaty also makes provision for the withdrawal of Soviet forces from German territory and contains various constraints on the German military, mainly relating to troop sizes and nuclear weapons. Crucially, the treaty affirms the right of a united Germany to belong to alliances—i.e. to NATO—which had been

[32] See Kai Hailbronner, 'Völker- und europarechtliche Fragen der deutschen Wiedervereinigung', *Juristenzeitung* 45 (1990), 449–57: 451.

[33] The Convention on Relations between the Three Powers and the Federal Republic of Germany of 1955 had expressly left the final determination of the border question open, even though the Federal Republic had in the meantime recognised the Oder-Neiße line as the eastern border of Germany.

a difficult topic in the negotiations. The two-plus-four treaty was part of a larger package, which resulted in four further treaties between the united Germany and the Soviet Union as well as the border treaty with Poland.[34] A further important issue for the Soviets was that land reforms—i.e. expropriations of land owners—that had occurred between 1945 and 1949 could not be reversed.[35]

Ireland is not under comparable constraints. Given that the United Kingdom would continue to exist as a subject of international law after unification, there might however be a need for the United Kingdom to renegotiate or at least clarify the territorial scope of some of its treaty commitments, and the same may be true for a united Ireland.

The most important multilateral issue concerns Ireland's EU membership, which would continue after unification. In 1990, the position as regards a united Germany's membership of the European Communities (now European Union) was relatively straightforward.[36] Article 10 of the Treaty on Unity declares that the law of the European Communities should apply in the former GDR. This was an expression of the fact that the GDR had acceded to an existing member state of the Communities. According to Article 227 EEC Treaty (now Article 355 TFEU), the law of the European Communities applied on the territory of the member states, including Germany. Any enlargement of territory through reunification therefore meant that the territorial application of EEC law automatically extended to it. To make unification work in practice, interim measures were deemed necessary. These were contained in a Council Regulation, which allowed for certain temporary derogations from European Community law in the former GDR.[37] The Council expressly stated that it had been unable to adopt permanent transitional measures in time for German reunification, so that interim measures were taken. The institutions adopted further transitional measures when the initial interim measures expired on 31 December 1990.[38]

[34] Martin Ney, 'Der 2+4 Prozess aus der Sicht des Rechtsberaters', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 75 (2015), 619–34: 620.

[35] Christian Bickenbach, 'Verfassungsrechtliche Vereinigung und staatliche Wiedervereinigung—25 Jahre Deutsche Einheit', *Juristische Schulung* (2015), 891–5: 895.

[36] For details see Thomas Giegerich, 'The European dimension of German reunification: East Germany's integration into the European Communities', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 51 (1991), 384–450; Christian Tomuschat, 'A united Germany within the European Community', *Common Market Law Review* 27 (1990), 415–36.

[37] Council Regulation 2684/90 [1990] OJ L 263, 1.

[38] Altogether ten Council regulations and eleven Council decisions, all published in [1990] OJ L 353.

Acknowledging the German precedent, the European Council has already confirmed that current Irish EU membership would extend to Northern Ireland in the case of Irish unification.[39] While unification as such is within Ireland's *domaine réservé*, its implementation would have to be EU-law-compliant, so a uniting Ireland's choices are constrained. Like Germany in 1990, Ireland would be under duties of consultation to keep other EU member states informed of developments, and duties of coordination to effect unification in a way that is least disruptive to the way the EU works.[40]

There are further constraints resulting from the division of competences between the EU and its member states. This is where the case of Ireland would differ from that of Germany, for the simple reason that the EU has accrued additional powers since 1990. This would most importantly be the case for questions relating to currency. Germany introduced a currency union before political unification happened. As the GDR's currency was going to disappear with reunification, this was a step that would have happened anyway. In the case of Irish unification, the matter is not quite as clear-cut. The pound sterling would continue to exist as a currency and could in theory be used in parallel in the North, at least for a certain time. However, euro zone membership would mean that Ireland could not act unilaterally, e.g. on the applicable exchange rates or a temporary operation of two currencies on its territory.

Other questions to be coordinated would concern the speed with which EU law would need to be reintroduced to Northern Ireland and any transitional rules that might help in this regard. Another question is whether a united Ireland could persuade other EU member states to grant EU citizenship rights to Irish residents who make use of their birthright to (exclusively) hold British citizenship.[41] No such issue arose in the German context, where citizens of the GDR had always been deemed to be citizens of the Federal Republic.[42]

The EU might also want to take steps to adapt the Protocol on Ireland/Northern Ireland. With a united Ireland, that protocol would become largely redundant. There would however be a need for transitional arrangements for

[39] See minutes of the special meeting of the European Council held on 29 April 2017, EUCO XT 20010/17, available at: https://data.consilium.europa.eu/doc/document/XT-20010-2017-INIT/en/pdf (1 March 2022).
[40] Giegerich, 'The European dimension of German reunification', 410.
[41] Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, *Bordering two unions: Northern Ireland and Brexit* (Bristol, 2018), 68.
[42] According to the Federal Constitutional Court, the GDR was not a foreign state, so West Germany was constitutionally prohibited from recognising the GDR as a state and GDR citizens were considered part of the German people (Staatsvolk) and thus citizens of West Germany, BVerfGE 36, 1, 17.

Northern Irish traders dealing with Great Britain. Furthermore, Ireland may want to secure the continued guarantee of the Common Travel Area as found in Article 3 of the protocol.

LAW AND LEGAL SYSTEM

A crucial challenge of the unification of two jurisdictions concerns the merger of two separate legal orders. This requires a number of choices to be made: how many legal systems the newly united state should have; whether and how far existing law and legislation should continue to apply or whether they should be replaced with entirely new legal rules; and which legal order's laws should prevail.

The overall approach to German unification was to slot East Germany into the existing West German legal order. As outlined above, suggestions that the united Germany should adopt a new constitution were not followed.[43] Instead, West Germany's Basic Law survived the process of reunification with only minor amendments. While short-term exigencies—notably the fear that the window of opportunity for reunification might close[44]—militated in favour of keeping the Basic Law in place, its preservation without much discussion should be considered a regrettable development. Constitutional reform confirmed by a subsequent referendum would have given Germans East and West a greater degree of agency over reunification, which by and large was an event that was happening to them rather than one they were actively able to shape; and it might have demanded that West Germans adapt to at least some changes to their status quo, which—in stark contrast to their East German compatriots—they did not have to grapple with. The polemical—and incorrect—parallels drawn at the time to the *Anschluss* of Austria to the German Reich in 1938 were thus never fully dispelled.[45]

[43] There had been attempts at drawing up a new constitution for a reunited Germany, notably a draft by the 'curatorium for a democratically constituted confederation of German states', a pan-German group of broadly left-leaning intellectuals; see Christopher Banditt, 'Das "Kuratorium für einen demokratisch verfassten Bund deutscher Länder" in der Verfassungsdiskussion der Wiedervereinigung', *Deutschland Archiv* (2014), available at: www.bpb.de/193078 (1 March 2022).

[44] See Heinrich-August Winkler, 'Rebuilding of a nation: the Germans before and after unification', *Daedalus* 123 (1994), 107–27: 115; Matthias Herdegen, 'Art. 146' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz* (Munich, 2020), para. 20.

[45] See e.g. Jörg Roesler, 'Der Anschluß als historisches Ereignis in der Weltgeschichte: Praktiken, Probleme, Folgen', *94 UTOPIEkreativ* 1998, 51–9.

Broadly the same approach also dominated the unification of the laws and legal systems of the two Germanys. Given the demise of the GDR and the non-compliance of its legal system with basic rule of law requirements, the decision to transfer West German (federal) law and legal structures to the East was easily made. The Treaty on Unity opted for the overall aim of achieving legal unity (*Rechtseinheit*) and West German continuity alongside political unity.

The Treaty on Unity did this by way of a general clause that all federal law would apply in East Germany from unification onwards.[46] This covered the majority of policy fields, such as private law (contracts, torts, family law, property law); civil procedure; criminal law and procedure; social security law; welfare law; labour law; environmental law; the administration of justice; immigration law; traffic by air, road and sea; public finances; and postal and telecommunications services.

It is hardly surprising that this move necessitated countless (temporary) exceptions, so that in practice much federal law was phased in.[47] The Treaty on an Economic, Monetary and Social Union had already prepared some of the groundwork and the Treaty on Unity added further transitional arrangements. These took different forms: provisions that postpone the entry into force of legislation or specific articles of the Basic Law to the former GDR; provisions that instruct the federal legislature and state legislatures to enact legislation to address certain transition questions; provisions that instruct the *Länder* governments to agree on certain questions of transition by way of treaty;[48] and short-term fixes ensuring the democratic representation of the East Germans until have had a chance to elect new representatives to the federal parliament and the parliaments of the *Länder*.

Existing GDR legislation continued to apply as *Land* legislation of the five new *Länder* provided that it fell within their legislative competence,[49] under the proviso that it was compatible with the Basic Law and directly applicable EU law. Additionally, the treaty identified individual pieces of GDR legislation that continued to apply as federal law.

[46] Article 8 of the Treaty on Unity.

[47] Reinhard Göhner, 'Auf dem Weg zur Rechtseinheit', *Jahrbuch Bitburger Gespräche* (1991/92), 1–9.

[48] In certain domains within the competence of the *Länder*, such as education and broadcasting, common rules are often agreed by way of treaty (Staatsvertrag).

[49] Provision is also made for GDR legislation to continue to apply as *Länder* legislation even if it falls within federal competence, but where there are no federal rules on the subject matter concerned.

Following its overall rationale to ensure legal continuity and certainty, the Treaty on Unity stipulated that GDR court judgments and administrative decisions continued to be valid, although it did open up the possibility of their reversal if they did not comply with rule of law standards.

The most drastic changes for most GDR citizens certainly happened due to the introduction of a market economy, including the necessary legal framework. They had very little time to practise living in this new order, which may well have contributed to the frustration with unification soon felt by many of them.

By contrast, for most West Germans not much changed. Probably the most (and only) important change from a West German perspective concerned a reform of abortion legislation, which was liberalised, though it still meant a regression from the perspective of East German women.[50] Apart from that, West Germans had to pay extra tax, the so-called solidarity surcharge. There are only a handful of examples of transfers from East German law to the West, most of them of little importance as the following two trivial examples show. One is the adoption of a 'green arrow' at traffic lights, which allows drivers to turn right at a red light. Another—more famous—example is the more cheerful looking East German little red and green man (*Ampelmännchen*) at pedestrian crossings' traffic lights, who was soon adopted in the West as well.

If Irish unification were to happen, similar questions over law and legal system would arise. In the German case there was no question that the GDR's legal order was irreparably deficient in rule-of-law terms, so the adoption of the West German legal system was the obvious result. Northern Ireland too has a history of rule-of-law deficits, which might make it politically difficult for nationalists North and South to. accept the adoption of Northern Irish criminal law and procedure. At the same time, there are aspects of the legal system—e.g. private law or tax law—in relation to which there might be no concerns, so that there would be no default law to which a united Ireland would turn. A huge amount of detailed work would thus be necessary, and a few pointers will need to suffice at this point.

Northern Ireland operates its own legal system based on Northern Irish common law. The court system is separate from those in England/Wales and Scotland, but the UK Supreme Court is the final court of appeal. Many aspects of Northern Irish law—private law and criminal law in particular—are

[50] For more details, see Uwe Wesel, *Rechtsgeschichte der Bundesrepublik Deutschland* (Munich, 2019) 228–33.

devolved. However, many areas are at least partly determined on a UK-wide basis, such as terrorism legislation, company law, most human rights law (still) and most of the law originally deriving from the EU. Both systems also have split legal professions—solicitors and barristers—with different systems of legal training. Irish law and Northern Irish law have common ancestry—they were part of the same legal system until partition. Over the past 100 years there has been deviation, but also common development, notably in fields determined by EU law such as environmental protection and consumer protection.[51]

There are broadly two approaches that a united Ireland could take where law and the legal system are concerned. It can either strive for legal unification—as did Germany—or retain two separate legal systems. The retention option would still require three key adaptations: first, the Irish Supreme Court (or whichever apex court a united Ireland would have) would need to be designated the final court of appeal; secondly, Northern Irish law would have to be compliant with the constitution of a united Ireland and would have to be interpreted accordingly; thirdly, Northern Irish law would need to be compliant with EU law (again), which, depending on the amount of time passed since Brexit, may or may not be a challenge. The retention option may certainly prove attractive for a transitional period, if for example a decision is made to retain devolution to Northern Ireland in a united Ireland for a specific period, in which case it would even be unavoidable. In the longer term, however, it would be highly unusual for a small state of seven million people inhabiting a small land area to operate two distinct legal orders.

Hence the unification option is the more likely long-term outcome. In other words, the two legal systems would be reunited with one court structure. In technical terms, this could be accomplished with similar techniques to those employed in the German case: frontloading, transitional periods and transitional law. As happened in Germany, where certain adaptations had been frontloaded, there may be a need for the Oireachtas on the one side and the UK parliament and/or Stormont on the other to legislate to adapt legislation in anticipation of Irish unity.

The more difficult decision would be whose laws to adopt: should there be a one-size-fits-all approach, meaning that Northern Ireland would apply Irish law from a certain point in time onwards? Or should there be a case-by-case

[51] Consumer protection is a reserved matter where goods are concerned, but the UK legislature transposed the same EU Directives as did the Irish legislature.

decision as to whether Irish or Northern Irish or entirely new law should be chosen to govern a certain field? And how would the common law be dealt with? Furthermore, this would raise the question of when these decisions would be made. Would there be insistence on dealing with these matters in a UK–Irish treaty—as was the case in Germany—or would that be for a constitutional convention, or indeed a new all-Ireland parliament, to decide?

LEGACY ISSUES

The legacy of 40 years of non-democratic, totalitarian rule in the GDR has occupied the courts and many state and non-state bodies over the past three decades. First steps had already been taken during the short-lived period where the GDR was ruled by a freely elected parliament and government, and this process then continued in the united Germany.

Forty years of totalitarian rule in the GDR left a legacy of injustices primarily committed against the GDR's own citizens. Some of these related to the new property regime first introduced by the Soviets and carried over by the GDR. Others were the consequence of the GDR's paranoid security apparatus, notably the practice of systematically spying on its own people by the Stasi,[52] as well as the brutally enforced border, where hundreds of attempts at irregularly crossing resulted in fatalities. Additionally, countless GDR citizens had been on the receiving end of the state's strategy of victimisation, such as denied educational and career opportunities for non-conforming citizens and their family members.

This legacy of injustice—commonly referred to as *Unrecht* (literally 'wrong', though the term conjures up the stronger image of 'unjust law')—came to occupy the judiciary and specifically created authorities for many years. The early 1990s witnessed spectacular criminal prosecutions and convictions related to killings at the border. Two groups of people were prosecuted: border guards who had fired shots at persons crossing the border and killed them; and those politically responsible, including Erich Honecker, the former leader of the GDR.[53]

[52] Stasi is the 'nickname' for the Ministerium für Staatssicherheit (ministry for state security).

[53] Honecker's trial was suspended, however, after he became too ill. He was never convicted, but his successor, Egon Krenz, was sentenced to 6.5 years in prison. On these trials in more detail see Wesel, *Rechtsgeschichte der Bundesrepublik Deutschland*, 233–41.

A further set of judicial proceedings concerned the restitution of property to its original owners, who had lost it due to land reforms carried out in the Soviet occupation zone. The Soviet Union insisted in the two-plus-four negotiations that restitution of property lost during land reform in the Soviet zone would be excluded in the future. Consequently, only a few weeks before reunification, the GDR passed legislation excluding former owners of affected land from restitution. The Treaty on Unity carried that legislation over into federal law, which was later reformed in 1992. It also added a provision into the Basic Law that ensured that this exclusion of restitution could not be challenged. The Federal Constitutional Court consequently upheld the legislation as constitutional.[54]

While the criminal trials brought some individuals to justice and may have provided some consolation for the relatives of the victims, the far more pervasive activities of the Stasi, which had created an enormous network of official and unofficial employees who would spy on their relatives, friends, colleagues and neighbours, could not comprehensively be addressed by way of criminal law. Instead, the federal government and legislature put in place a federal commissioner for Stasi records (*Bundesbauftragter für die Stasi-Unterlagen*), who presided over an agency that was in place from 1990 until 2021.[55] The agency kept the enormous amount of Stasi records and granted access to citizens who were the subject of those files, as well as researchers and journalists with a professional interest in them. Access was often granted to redactions only, but nonetheless the agency contributed enormously to understanding of how the GDR functioned. In 1998 the Federal Republic additionally established a federal foundation tasked with the study of the GDR regime.[56]

The federal government recognised that individuals who had otherwise been wronged by the GDR regime, e.g. by way of politically motivated criminal prosecution and imprisonment or other sanctions such as forced labour or expulsions from university or school, deserved to be rehabilitated. Hence the federal legislature passed two pieces of legislation. The first concerned the rehabilitation of those with a criminal record resulting from political persecution; the second facilitated the rehabilitation of those subject to other forms of sanction, e.g. those that affected their professional life.[57]

[54] BVerfGE 94, 12.

[55] The files are now part of the Federal Archive.

[56] Bundesstiftung Aufarbeitung; see https://www.bundesstiftung-aufarbeitung.de// (1 March 2022).

[57] Erstes und Zweites SED-Unrechtsbereinigungsgesetz; see Sabine Leutheusser-Schnarrenberger, 'Bewältigung der rechtlichen Probleme der Wiedervereinigung', *Deutsch-deutsche Rechtszeitschrift* (1994), 290–7.

The legacy of the 'Troubles' remains a major political and societal issue that would not disappear in a united Ireland. The UK government's announcement of July 2021 that it would introduce legislation time-barring any further investigations and prosecutions concerning the Troubles[58] and the widespread opposition to this step within Northern Ireland was a recent reminder of this. Assuming that the UK government succeeds in passing the envisaged legislation, it is likely that it will want to try to secure its continued operation in a united Ireland, e.g. by introducing a clause to this effect into a UK–Irish treaty. This might prove difficult for any Irish government to agree to, but also from the point of view of Irish law. After all, the Criminal Law (Jurisdiction) Act 1976 gives Irish courts jurisdiction over Troubles-related crimes committed in Northern Ireland from 1 June 1976 onwards.[59] Under Irish law, prosecution of these crimes has not been time-barred, and it may indeed be incompatible with Ireland's obligations under Article 2 of the European Convention on Human Rights to agree to such time-barring. The same is of course true for non-criminal investigations, which—as time goes on and the original perpetrators die—are becoming ever more important. How a united Ireland would deal with the legacy of the Troubles would almost inevitably become a difficult issue.

OVERARCHING THEME: TIME

The example of German reunification reveals the importance of time in a number of ways. In a technical sense, the process of German unification shows examples both of frontloading and of postponing the legal, political and economic effects of reunification. As explained, reunification was effected in a stepped way through the Treaties on Economic, Monetary and Social Union and Unity respectively. Both treaties then employed transitional provisions allowing a softening of the political, legal and economic changes that were occurring.

For the Irish context, the main lesson to be learnt is around such transitional periods. This applies both to technical questions and to major constitutional ones. For instance, if a process approach to Irish unification is taken, a lot could be said for the temporary continuation of devolution

[58] UK Government, *Addressing the legacy of Northern Ireland's past*, July 2021, CP 498.
[59] Mary Redmond, 'The Criminal Law (Jurisdiction) Act 1976 and the Constitution', *Irish Jurist* 13 (1978), 1–36.

to Northern Ireland as well as power-sharing before a permanent constitutional settlement is found.[60]

Germany also shows how time pressure can quickly become the source of a permanent and perhaps sub-optimal outcome. After the fall of the Berlin wall, the German government appears to have realised that the window of opportunity for achieving reunification might be closing very quickly. It therefore moved fast and was able to muster enough international and domestic support to seal the deal. That happened despite prudent voices urging a slower process that would have allowed East Germany to coexist with the West for a number of years—whether entirely independently or as part of a confederation—before making an informed decision as to whether reunification was in everyone's interest. In a similar way, the academic discussion in this journal and others about how best to plan for Irish unification needs to consider how best to design an Irish unification carried out in haste.[61] Political expediency brought about by imagined or real time pressure may well speed up the process considerably.

CONCLUSION

It was the aim of this contribution to work out possible lessons from the reunification of Germany for a united Ireland. The focus was on legal and constitutional questions. Many other questions—on the economy, the costs of unification, social policy in a united Ireland, the future of education, policing, societal and cultural impacts, etc.—had to be largely ignored.

While Irish unification would occur in its own idiosyncratic context, the German experience can provide lessons about the enormous legal complexities of a unification process. Such a process would have to take place at several levels—domestic, bilateral, European and international—which would overlap and inform each other, and thus would need to be carefully coordinated. These

[60] See e.g. Neale Richmond's proposal that devolution should continue for 10 years: Neale Richmond TD, 'Towards a New Ireland', 18, available at: https://www.finegael.ie/towards-a-new-ireland (1 March 2022); devolution would be possible according to Article 15.2.2 of Bunreacht na h'Éireann. Introduction of a federal model—similar to Germany's—would probably require a revision of the constitution. Whether long-term devolution—or indeed federalisation—would be a suitable solution for a small state like Ireland is highly doubtful, notably because it is questionable how this would better serve the protection of unionist interests given that unionists would not be in a majority in the North after unification.

[61] John Doyle, Cathy Gormley-Heenan and Patrick Griffin, 'Editorial: Introducing ARINS—Analysing and Researching Ireland, North and South', *Irish Studies in International Affairs* 32 (2) (2021), vii–xvii.

complexities can be eased somewhat by frontloading and postponing certain decisions. The use of transitional provisions or a temporarily continued operation of a dual legal regime can buy time.

A process of unification would place Irish state capacity under enormous stress. West Germany was a state of 60 million with a correspondingly sized civil service; the Irish state has a population of five million, also with a correspondingly sized civil service. While one might argue—though this is by no means certain—that Irish unification would in some regards be more straightforward, e.g. regarding the economy, the continued employability of Northern Irish civil servants or the rule of law, it would be hard not to conclude that relatively speaking the Irish state would be under more strain than the West German state was in 1990, simply because many of the technical questions that need to be resolved arise regardless of the size of a state that is trying to unite with another entity.

The main lesson therefore is to be prepared. For legal scholars, the German experience can help to draw up a research agenda on Irish unification. Detailed work would need to be undertaken on the EU and international law aspects of Irish unification. A mapping exercise across all fields of domestic law would reveal differences, commonalities and best practices. This could provide a basis for necessary decisions on how to create a unified legal system. Most importantly perhaps, concrete and workable proposals for a new constitution with a specific focus on the protection of minority rights would need to be worked out.