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CONSTITUTIONAL MERGERS AND ACQUISITIONS: THE FEDERAL REPUBLIC OF GERMANY

*Fred L. Morrison**

Deutschland, Deutschland über Alles
Über Alles in der Welt

—August Heinrich Hoffmann von Fallersleben

The merger of the two Germanys on October 3, 1990, demonstrates the power of political ideas reinforced by constitutional language. The constitutional document of West Germany had always contained a cornerstone calling for reunification, echoing the call for a united Germany cited above. Like the corporate mergers which regularly took place over the past few years, this consolidation called forth a host of legal problems, many of constitutional dimension. It also illustrated again the intractability and universality of key constitutional issues around the world.

The unification of Germany began when the German Democratic Republic (Deutsche Demokratische Republik or DDR) divided itself into five states¹ (plus a part-state, East Berlin). These were then absorbed into the Federal Republic of Germany under the provisions of article 23 of its Basic Law (*Grundgesetz*), which permitted "any German state" to accede to the federal union. The former German Democratic Republic thus passed into a well-merited oblivion. As one of its last acts, however, the DDR entered into a Treaty of German Unity (*Vertrag zur deutschend Einheit*) with the Federal Republic that has interesting constitutional implications.

I. THE MERGER

A little history may be useful. Until well into the nineteenth century, "Germany" was little more than a geographic designation. German territory was ruled by a variety of princes, dukes, and sen-

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1. The five new states are: Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt and Thüringen.

ates, subject only to the rudimentary central authority of the Holy Roman Empire, which Voltaire once described as “neither holy, nor Roman, nor an empire.”² The passage quoted at the heading of this article—now part of the German national anthem³—was originally a plea for a Supremacy Clause, a call for national superiority over local fiefdoms, not for German superiority over foreign lands. This *Deutschland* was to be supreme over Saxony and Bavaria and all the other principalities. The sense of nation had emerged, but the nation-state was not yet there. Efforts toward creation of a German state in 1848-9 failed with the demise of the *Paulskirche* constitution, but a federalist state evolved in the period of Bismarck later in the century. In the Weimar Republic, which followed World War I, elements of federalism remained, only to be abolished by the Equalization Law⁴ of the Third Reich, which required state legislatures to have the same (Nazi-dominated) composition as the national government. Soon after, even this pretext of federalism, like the pretext of democracy, was either ignored or abolished.

In the aftermath of World War II, Germany was divided into four occupation zones. In the three Western zones, the Allies created state governments corresponding roughly to the larger states of Weimar Germany, although once-dominant Prussia was broken into its separate provinces. Russia maintained more direct control of its Eastern sector. With the encouragement of Britain, France and the United States, delegates of the western state legislatures met in Bonn in 1949 to draft a temporary constitution for their part of Germany, to be effective until reunification could take place. That document was called a Basic Law (*Grundgesetz*) and not a constitution (*Verfassung*) to emphasize its transitory character. The Basic Law retained many links with the constitutional traditions of Germany such as an administrative federalism and a parliamentary system. It also contained innovations suggested or demanded by the Western Allies, such as an explicit bill of rights, a guarantee of judicial review, and provisions to preclude parliamentary stalemate.

The Russians refused to permit their sector to participate. They soon responded with a constitution of a separate (and presumably permanent) German Democratic Republic. The DDR Constitution was revised and replaced in 1968. Over the years, the DDR abolished the traditional states in its territory and formed differ-

2. Voltaire, *Essai sur les Moeurs et l'Esprit des Nations*, lxx.

3. The passage technically is still part of the national anthem. Only the third verse, which speaks of “unity and law and freedom” is sung at official functions, because of the possibility for misunderstanding.

4. Gesetz zur Gleichschaltung der Länder mit dem Reich, [1933] Reichsgesetzblatt 153, 173.

ently constituted administrative districts, in part to weaken any claim of separatism.

The West German Basic Law provided two different mechanisms for additional areas to join it. Article 23 not only provided that the Basic Law would initially be effective in the western states, but also that: "In other parts of Germany, it will take effect upon their joining [the Federal Republic]." This permitted their unilateral accession to the institutions of West Germany. The other provision, article 146, allowed a wholly new constitution to be adopted by popular vote "of the German people." It provided that the Basic Law would cease to have effect whenever the whole German people adopted a constitution in a free election, presumably without conformity to the other procedures for amendment of the Basic Law itself. Neither provision carefully delimited the scope of "other parts of Germany" or "the German people."

The supposed transitory character of the West German Basic Law and the alleged permanence of their own "constitution" led East German commentators to disparage the "incomplete" character of the West German constitutional structure. The events of late 1989 demonstrated that the democratic character (and, perhaps, the economic success) of West Germany could prevail over such sterile formulations. But equally, the open-ended constitutional invitation to all Germans and German states to enter into the Federal Republic seems to have had a psychological effect in continuing the belief that a "single Germany" was only temporarily divided.

In the early days after the overthrow of the old regime in East Germany, there was some discussion of the framing of a new all-German constitution (using the formula of article 146 of the Basic Law to completely replace the 1949 Basic Law) in order to create a new beginning for a united Germany. Such thoughts rapidly gave way to an accession of the eastern area (subdivided into states) using the article 23 method. Time may have been the critical factor; the rapidly deteriorating economic condition in the East seemed to compel immediate action. The existing interpretations of constitutional guarantees and procedures also provided greater legal and political certainty in a time of potential instability. The article 23 methodology also provided a clear continuity of the international personality of the German Federal Republic as the "surviving state" in the merger. This was particularly important to insure that no renegotiation of German membership in the European Communities could be requested.

East Germany was divided into five states, plus East Berlin. The five eastern states joined the ten western ones; the two Berlins

merged to form a sixteenth state in the expanded Federal Republic.⁵

In addition to the accession, the two German governments negotiated a Treaty of German Unity, ratified by the parliaments of both nations in late September of 1990, which has a number of remarkable provisions. It amends several articles of the Basic Law; it requires Parliament to amend several other articles within two years; it temporarily suspends the operation of several constitutional provisions in the eastern area and provides that another provision will not be applied at all in certain circumstances. It also deals with that central issue of constitutional argument everywhere: abortion.

This treaty, with its annexes and protocol, runs to more than 1,000 typed pages. Most of that volume is dedicated to two annexes which deal with the unification of the East and West German legal systems. Procedures are established which will allow German law to be brought into force in an orderly way, so that reasonable expectations are not upset, nor unrealistic transitional steps demanded.

No one seems to question that the treaty will continue to be binding, even though the East German treaty partner faded into history on October 3, 1990. Since that date, it has ceased to be an agreement between sovereign states and is merely an agreement between Germany and itself. It may thus lose its status as international law, but will continue to have effect in German law. Under the Basic Law, the ratification of treaties takes place by statute, rather than by a distinct "advice and consent" process.⁶ Constitutional amendments use the same statutory procedure, merely requiring a special majority.⁷ Therefore, passage of the law ratifying the treaty with the special majority required for constitutional amendment had the effect of amending—and suspending—large portions of the Basic Law.

The treaty contains six constitutional amendments which take effect immediately.⁸ One of these merely rewrites the preamble to the Basic Law to include the new states.⁹ Several others are of broader importance:

5. West Berlin always had an anomalous position in preunification law, because of the continuation of occupation authority there. Some West German laws applied there, while others (e.g., the conscription law) did not. In the new structure, it will have a status equivalent to that of the other states.

6. Basic Law, art. 59, paragraph 2.

7. *Id.*, art. 79. Certain constitutional principles, federalism and the basic protection of human dignity are unamendable. See art. 79, para. 3.

8. *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über der Herstellung der Einheit Deutschlands*, [1990] *Bundesgesetzblatt*, Teil II, 889.

9. *Id.*, art. 4, para. 1.

- Article 23 of the Basic Law, the provision which was used to accomplish this merger, is repealed.¹⁰ It might be called "the clause which ate itself," since once utilized, it appeared to have no further purpose. In reality this repeal was intended as an external political message: Germany is again, in the view of its Basic Law, complete. Austrians need not worry about a future *Anschluss*, at least not about one which would be constitutional in German law.

- Article 146, the alternative "merger" provision, is also amended to indicate that the current Basic Law now is "valid for the whole German people with the fulfillment of the unity and freedom of Germany."¹¹ Again, this is intended to delimit the maximum territory of the German state.

- New rules are established for apportioning seats in the Upper House of the German Parliament, the *Bundesrat*.¹² Each state formerly had three, four, or five votes, according to population. The amendment will give the four largest states, all in the West, an additional sixth vote. (Representatives in the Upper House are delegates of the state governments; each state casts all of its votes in a block). This will partially offset the additional voting power of the five relatively small eastern states.

- The German Parliament is expressly given power to repudiate or reduce obligations incurred by the DDR and its subordinate bodies.¹³ This provision was added to a nearly obsolete provision which had permitted a similar repudiation of the debts and obligations of the Third Reich.

- In addition, there is an express provision for deviations from the requirements of the Basic Law in the former East German territory.¹⁴ Only the basic principles of human rights and the amendment process remain inviolable. Special provisions regarding the division of powers (and of taxes) between the federal and state governments can be suspended until the end of 1995; and other provisions can be disregarded until the end of 1992. A separate provision regulates the distribution of tax revenues, to guarantee sufficient funds for the new states to carry out their obligations.¹⁵ More extensive and detailed provisions of the treaty deal with questions of abortion and property rights, which are discussed below.

The most important exception, however, is the suspension of the guarantees of tenure in the civil service for public employees of the former DDR.¹⁶ The underlying cause involved both doubts about the future attitude and political fidelity of some former DDR officials and a belief that the East German bureaucracy was bloated. (Among other techniques for resolution of this question is a special new early-retirement scheme—sometimes known as the "weapon of retirement"—which will temporarily lower retirement age to 57 in the eastern sector!)¹⁷

10. *Id.*, art. 4, para. 2.

11. *Id.*, art. 4, para. 6.

12. *Id.*, art 4, para. 3 (amending Basic Law, art. 51, para. 2).

13. *Id.*, art 4, para. 4 (adding a new para. 2 to art. 135a of the Basic Law).

14. *Id.*, art. 4, para. 5.

15. *Id.*, art. 7.

16. *Id.*, art 6 (suspending for an indefinite period art. 131 of the Basic Law, with respect to the added territory).

17. *Id.*, art 30.

II. A PREVIEW OF COMING ATTRACTIONS

The Treaty promises that other constitutional amendments will be recommended to Parliament for passage.¹⁸ The time available before October 3 was too short for details to be made final and political differences to be accommodated. This agenda includes:

- a change in the relationship between the federal government and the states.
- a possible change in the border between the city-state of Berlin (which will merge East and West Berlin) and surrounding Brandenburg.
- consideration of the possibility of adding an affirmative list of "goals of the state," in addition to the more traditional list of human rights. This undoubtedly flows from the tradition in many East European countries of articulating many laudable goals as unenforceable constitutional aspirations. Transfer of such aspirations into an effective, enforceable constitution will be a difficult challenge.
- consideration of the question of the application of article 146, which would permit the adoption of an entirely new constitution by popular vote. The tentative way in which this obligation is formulated may indicate the limited likelihood of a new constitutional convention.

None of these issues appears to be particularly pressing. Since the treaty obligation is only to recommend that the appropriate legislative bodies consider the issues during the next two years, they may see little progress beyond a few legislative hearings.

Two other issues present more formidable legislative problems. They are the abortion issue and the return of (or compensation for) property taken by the DDR.

One of the toughest problems of German unification was that of abortion. East German law freely permitted abortion. In West Germany abortions are permitted only to protect the life or health of the mother, when the fetus is deformed, in cases of rape, and—in limited circumstances—for "social reasons," e.g., the inability of the mother to care for the child.

The West German law was the result of a decision of the Constitutional Court which required parliament to provide a measure of legal protection to the fetus.¹⁹ In the early 1970s, when the Social Democratic Party and the Free Democrats held a majority in parliament, the Parliament enacted an amendment to the Criminal Code which would have permitted abortion at the request of the mother, during the first trimester of pregnancy. A parliamentary minority from the Christian Democratic Union and several state governments (also aligned with the CDU) brought an immediate challenge, under procedures which allowed an "abstract review" of constitutionality. In a decision which took a tack opposite to that

18. *Id.*, art. 5.

19. Decision of 25 February 1975, 39 Entscheidungen des Bundesverfassungsgerichts 1 (1975) (BVerfGE 39, 1).

of the United States Supreme Court, the West German Constitutional Court found that the fetus was constitutionally entitled to some legal protection from the fourteenth day after conception, at the latest.²⁰ It based this decision on the constitutional protections of human dignity contained in the Basic Law. The Court imposed an interim solution which depended on the presence of certain "indicators" before an abortion could be performed, and required the Parliament to enact new legislation.

In 1976, the Parliament enacted the present form of the West German abortion law, which closely paralleled the interim solution established by the Court.²¹ The issue had both religious and political overtones, since the Christian Democratic Union (CDU) is as its name implies associated with religious groups. In East Germany, in contrast, abortions had virtually become a normal means of birth control.

Each side was insistent on maintaining its own law on this subject. The West German government, now led by the Christian Democrats, sought to enforce the Constitutional Court's mandate throughout the country. The East German CDU, leading its government, did not fully share the religious or ethical outlook of its western ally. The issue was made critical by the fact that, at least in parts of Berlin, the applicable law could vary depending on which side of the street the doctor's office was located. Despite the fact that East and West Berlin will be united under a common municipal administration, the old law will remain applicable in the eastern sector. Since parts of the Basic Law are suspended in the former Eastern zone, even the judgment of the Constitutional Court requiring protection for the fetus might not be applicable there.

The solution reached in the unity treaty simply postpones the controversy. It leaves the East German law in place in the eastern area, immunized against constitutional attack, subject to the obligation of the federal parliament to enact new all-German legislation within two years. The text of the abortion provision is worth noting because of its convolution. In translation, it reads:

It is the responsibility of the all-German legislature to adopt a regulation by December 31, 1992, which will protect pre-natal life and provide for the resolution of the conflict situations of pregnant women in a constitutional way, especially through legally secured entitlements of women to counselling and social assistance, better than is currently the case in both parts of Germany. In order to achieve this goal there will immediately be established, throughout [the former DDR territory],

20. For a more thorough discussion of this decision in relation to the United States law, see *Kommers, Abortion and the Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255 (1977).

21. The current version is to be found in § 218 of the German Criminal Code.

a comprehensive network of counselling offices, operated by different providers with financial assistance from the federal government. The counselling offices are to be staffed, and financially supported so that they can fulfill their task of advising pregnant women and giving them necessary assistance—even after the birth takes place. If there is no resolution of the issue within the prescribed time period, the substantive law [of East Germany] will continue to apply within [its former territory].²²

The result is thus a compromise. Abortions will remain freely available in the east until the new German parliament adopts a new acceptable, nationwide regulation. There is a promise of uniform regulation within two years; it is written in language which clearly opposes elective abortion. The ability of Parliament to enact such legislation will depend, however, on the election of a parliamentary majority supporting that course of action. While the Christian Democratic Union party in the western area clearly favors a more restrictive abortion law, its counterpart from the eastern area might well join with other political groups to block passage of such legislation through the *Bundestag*. Two factors seem to work in the other direction. First, the *Bundestag* is now under a constitutional and treaty obligation to resolve this issue by the end of 1992; the efficacy of that obligation should not be underestimated. A German legislator might see his or her function as merely deciding how best to implement this constitutional command. Second, any CDU government which held the issue strongly could make the issue one of party loyalty and parliamentary confidence. In such events, members of parliament—even those who opposed the position—might well vote for more restrictive laws.²³

Postponement of the issue may well serve the immediate purpose of unity. It will, however, be a divisive issue in the first years of a united Germany.

The other great compromise involved the constitutional provisions protecting property against expropriation.²⁴ During its existence, the communist DDR had engaged in a wide variety of expropriations. The earliest round, in 1945-49, had involved the

22. Treaty of German Unity, *supra* note 8, at art. 31, para. 4.

23. Another possibility would involve the invocation of a "legislative emergency" under article 81 of the Basic Law. This provision was inserted in 1949 at the insistence of the Western allies to prevent the kind of legislative paralysis which had sealed the fate of the Weimar Republic. It has never been used. It would involve the Federal Chancellor seeking an affirmative vote of confidence (by passage of the new abortion law). If that was rejected (and no other Chancellor was elected), the Federal President could call new elections. If he did not do so, the President and Chancellor could declare a legislative emergency. Then the Federal government could enact the law without the approval of the *Bundestag*, if the *Bundesrat* (Upper House) agreed. All of this would thus be dependent upon the *Bundestag* not replacing the Chancellor, the President not calling a new election, and the *Bundesrat* agreeing to the bill. The chances are remote. But if there is any current issue likely to create a legislative stalemate—for which article 81 was designed—it is surely the abortion question.

24. Basic Law, *supra* note 6, at art. 14.

formal collectivization of most of East German agriculture. Later deprivations of property included outright expropriation and the seizure of property of exiles and refugees. Less direct deprivations were brought about as the establishment of low fixed rents, coupled with high taxes and expenses, led to "abandonments" of property. (It was not uncommon for the legally limited rents a landlord could collect to be less than the cost of the heat he was required to provide!)

For former (or nominal) owners of property in the East, unification brought with it hope for the protection or recovery of property in the East, in accordance with article 14 of the Basic Law. While the Basic Law recognized a power of eminent domain—even for socialist nationalizations—it also required compensation and guaranteed the right to judicial review. The result would have been a litigator's dream, with potential suits respecting virtually every parcel of property in the entire former DDR.

The treaty implements an agreement between the two governments which, in effect, partially suspends the guarantee of property rights.²⁵ It splits the nationalizations into several categories.

- Nationalizations which occurred in the period 1945-1949 are to be treated as "irreversible." In these cases the previous owners will be entitled neither to return of their property nor immediately to compensation. The new government will, however, "consider" making them eligible for payments from a fund previously used to assist those whose property was damaged or destroyed during the war. These nationalizations can formally be distinguished from later expropriations on several grounds. They were in part undertaken by the Soviet occupation authorities, for whom the German government is not liable. They also antedate the enactment of the Basic Law.

- Property which was placed in trusteeship because its owners fled the DDR is to be returned.

- Other property is to be returned to its owners, subject to several important qualifications. If the character of the property has changed (e.g. by construction of a housing project on it), there will be a claim to compensation only. Special rules apply to 1972 confiscations, which are being "unwound" in the process of privatization. Exchanges and compensation may replace return of property.

All of this is further modified by the treaty itself, which permits the Parliament to nullify or reduce the obligations of the DDR.²⁶ Since the obligation to compensate arises from the actions of the DDR, the Federal Parliament may be able to reduce or eliminate it.

The result is a peculiar and pragmatic mixture. Supposed guarantees of vested rights give way to social reality. Social reality has, however, awarded far more protection than one would have

25. Treaty of German United, *supra* note 8, at Annex III.

26. *Id.* at art. 4, para. 4 (amending Basic Law, art. 135a).

thought possible only a year earlier. The political process will balance the competing interests. Given the rigidity of the German system of constitutional interpretation, formal action was necessary to allow any sensible result.

III. CONCLUSION

As in any merger and acquisition, the surviving entity emerges larger, and potentially stronger. The care devoted to preparation of a major legal analysis of the legal impact of merger is impressive.

The flexibility of the Basic Law, which permitted the suspension or alteration of major constitutional limitations, is noteworthy in light of this major political event. If it had been less flexible, the political forces for unification might well have fractured it. Yet that flexibility might equally be exercised in less favorable ways.

The most significant element is, however, the preservation of democratic processes and human rights standards in this constitutional adjustment. Indeed, the record of the former West Germany on these key constitutional issues was one of the reasons for retention of a known quantity—the Basic Law—instead of opting for a unknown new constitution to govern a newly united Germany.