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THE REUNIFICATION OF GERMANY: LEGAL GROUNDS AND OBSTACLES

Abstract

This article discusses the process of reunification of Germany with the emphasis on the changes in national law that took place to ensure the functionality of a state. In particular, it covers the creation of the Unification Treaty, and addresses the challenges that appeared before Germany and the European Communities due to unprecedented changes on the political map of the region. The aim of this paper is to trace the development of the legal grounds for the functioning of the reunited German state and identify how the European political community managed to tackle a unique enlargement of the Communities. The research question of this article is the following: how did the German Democratic Republic and the Federal Republic of Germany resolve a legal collision between their national laws to ensure the functioning of the united German state? The findings of the article indicate that the consistent policy of the Federal Republic of Germany towards the German Democratic Republic, together with the solid international support and provisional assistance of the Four Powers allowed the reunification of Germany to happen. The reunification itself is claimed to be the key for further resolving of a long-lasting territorial dispute between Germany and Poland, which helped to ensure the reliability of Berlin as a strategic political partner. This article also considers the efforts of certain German politicians from both sides, as well as the representatives of the European Communities, made to ensure a smooth and speedy transition of both parts to a successful German state.

Keywords: *Reunification of Germany, Staatvertrag, State Treaty between GDR and FRG, Dublin Council, Donnelly's interim report.*

Introduction

Today, we know Germany as one of the biggest political players in the international arena, a powerful industrial state with population of 82,9 mln people, GDP of $53,810 (OECD, 2021), the EU Member State with the biggest number of representatives in the European Parliament and the homeland of Ursula von der Leyen, the President of the European Commission (European Parliament, 2020). Yet, a little more than 30 years ago, the German people were divided by one of the most famous walls in the world – the Berlin Wall, and lived in two neighboring countries, being so close geographically yet so distant in political, economic, and social aspects of life. German separation in 1949 into the German Democratic Republic and the Federal Republic of Germany and its reunification in 1990 seems to be a unique European case of one nation living under opposing political, economic, and legal regimes.

Considering this context, it is interesting to observe the ways of adaption of national law that allowed the establishment of full control and sovereignty over the entire German territory. Moreover, the changes that took place also envisaged for the German Democratic Republic (hereinafter **– the GDR**) a process of becoming a part of, at that

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time, the European Communities (hereinafter – the **EC)** on privileged terms never seen before. With modern periodic bursts of breakaway tendencies, possible dissolutions, and unification movements within the European Union Member States, the process and the solution for this issue should be well known and understood in today's context of the supranational cooperation.

The Origins of Reunification

The wind of political change in Europe finally reached East Germany in summer 1989. Its outcomes were significant for various spheres: the flight of 344,000 people from East to West Germany in 1989 and another 190,000 in the first half of 1990; demonstrations and turmoil resulting in the removal on October 18, 1989, of Erich Honecker - a long-time, powerful communist leader of East Germany; the opening of the Berlin Wall on November 9, 1989; free elections on March 18, 1990, won by non-communist parties in favor of unification with West Germany (Harris, 1991).

From the very beginning and till the 1990s, the systems of both parts of Germany were not only drastically dissimilar but in opposition to each other. That is why it was clear for the ruling elites from both sides that the amalgamation of two quite different social, economic, and legal systems would not be accomplished easily and instantaneously. Thus, to ensure a functional and furtherly stable state, the legal background for its creation had to be well-prepared and thought-out. Following this, the first official step in the unification of Germany was a signing of a *Staatvertrag* – "Treaty concerning the Creation of a Monetary, Economic, and Social Union" between the GDR and the Federal Republic of Germany (hereinafter – **the FRG**) on May 18, 1990, generally known as the first "State Treaty" (Quint, 2012). The signing of this agreement also provisioned the introduction of the western Deutsche Mark (hereinafter D-Mark) in the GDR starting from July 1, 1990, as well as the partial merger of the two economic systems. It was a point of no return on the way of Germany unification. Indeed, with the adoption of the first State Treaty between the GDR and FRG —and particularly the sudden introduction of the D-Mark in the east—the major economic structures and problems of German unification were clearly predetermined. For this reason, some of the researchers even state that the first State Treaty was a more important step in German unification than the second *Staatsvertrag* – the Unification Treaty itself (Bofinger, 1997).

At the same time, the discussions on the legal aspect of the Unification Treaty started. It was a major agreement, after the abovementioned first State Treaty, on the creation of the further legal ground of German unification. The negotiations brought together Günther Krause – the parliamentary state secretary in the Prime Minister's office and the leader of the CDU faction in the *Volkskammer* – the Parliament of the GDR, who previously was one of the representatives of the GDR in the negotiations on the first State Treaty, and the Interior Minister of Western Germany – Wolfgang Schäuble (Ritter, 2013).

The main question that was raised by the parties was if the GDR should accede to the FRG or whether both countries in collaboration should write a new, shared constitution, which later would have to be ratified by the people. Both sided of negotiations came to the conclusion that acceding was the most favorable option for them. This dichotomy created many discussions and different opinions in both the GDR and FRG on the advantages and disadvantages of each option: activists of the civil rights movement and some leaders of the Social Democratic Party in the East and the West mostly supported unification via a new constitution. According to them, a new constitution could bring more legitimacy and the possibility that under such circumstances, the citizens of the GDR would be better represented. On the other hand, the citizens and the political leaders of the political elite of the GDR were highly satisfied with their current constitution - the Basic Law, and spoke against a new constitution. Eventually, despite all obstacles and primary opposition in the GDR, this question was resolved in favour of the first approach – the creation of a common constitution. (Gunlicks, 1994).

The next question of the legal approximation was raised in the context of the future of the political bodies of both the FRG and the GDR. The FRG Interior Minister Schäuble emphatically advocated allowing GDR law to continue to apply initially, with FRG law being used only in exceptional circumstances. His position was built on the opinion that the immediate adaptation of the extremely complex West German legal order would have overwhelmed both the administration and the citizenry in the East and thereby complicated a flexible adaptation to the unprecedented situation in the legal sphere. Together with other West German officials, the Ministry of Justice advocated a totally opposite position, namely – an immediate, comprehensive legal unification on the basis of the FRG's law and the temporally limited adoption of GDR law only in exceptional circumstances. It is important to note that the business

community in the West also advocated for this development because they expected at least some legal certainty and predictability for their future investments in the East. In the end, in early August 1990, the representatives of the GDR supported the usage of West German law as the norm, and the continued validity of GDR law as the exception (Ritter, 2013). The signed treaty was extremely complex in and of itself and together with annexes, covered around 360 oversized pages (Grimm, Wendel, Reinbacher, 2019). This huge document clearly indicated that the unification of Germany was not only about the destruction of the Berlin Wall, but the work of hundreds and hundreds of politicians and lawyers, who, in the end, made it possible for Germany to become a functional state with a potential to become the EU's hegemon (Bulmer, Paterson, 2013).

Boundaries Issue

Another major problem was an absence of a treaty that established the boundaries of Germany. In 1989, the Federal Republic specifically stated in its Constitution that the boundaries were those of 1937. Meanwhile, a large number of residents in West Germany who were previously expelled from former German lands that at that moment were occupied by the Soviet Union and Poland, represented a significant political force within the Federal Republic. After a period of hesitation and equivocation by the federal chancellor, the Bundestag and the *Volkskammer* on June 21, 1990, adopted matching resolutions that gave formal recognition to the new eastern boundary with Poland. Thus, Germany relinquished claims to 114,549 km2 of the prewar territory east of the Oder and Neisse rivers.

On July 17, 1990, the foreign ministers of the Four powers – the United States, the Soviet Union, the Great Britain, France, together with Poland, and the two Germanies, met in Paris to settle the boundary question. They agreed that the reunited German state would remove from its legislation any language that suggested or implied the provisional nature of the Polish-German border. It was agreed that a newly unified country would comprise only of East and West Germany and Berlin. On November 14, 1990, the German and Polish foreign ministers signed a treaty guaranteeing the current border between Poland and Germany (Harris, 1991).

The situation with international treaties and relations, in general, was also not very clear at the beginning of the transition period. It was not only because of the significantly different and mostly even opposite views on the foreign affairs in both of the GDR and FRG, but also due to the fact that the FRG was already a Member of the European Communities and had a number of the obligation under their treaties. In addition, at that time, East Germany was a member of the Warsaw Pact, which was dominated by the Soviet Union, while West Germany was a member of the North Atlantic Treaty Organization (NATO). Consequently, the first question raised during the negotiations was on the states' right of assent when sovereignty rights were to be delegated or transferred to intergovernmental institutions, and in the regulation of the affairs of such institutions. In particular, the states wanted a stronger voice in the European Community, whose affairs, at the moment of the negotiations, were not of foreign relations nature but showed the character of European domestic policy. Thus, on December 21, 1992, a constitutional amendment to the Article 23 of a new Constitution specified the role of the states in European affairs and thereby limited the previously exclusive competence of the federal government in European policy matters. (Gunlicks, 1994). Yet, one of the main challenges was the way of including East Germany in the context and functioning of the EC. It should be acknowledged that German unification, as well as the reconciliation of Berlin with Warsaw, would not have been possible without the process of European integration. This is due to the fact that unification of the two German governments mostly came from Eastern Germans' transition to a stable and prosperous European Economic Community in which everyone may travel freely, enjoy civil rights, and where the sovereign rights of the states were respected. (Hailbronner, 1991).

The European Communities and the Reunification of Germany

The situation which the EC were facing in 1990 was both pretty unique and unexpected by the original drafters of the Treaties of Rome: none of the Member States previously joining Communities did this on the grounds of dissolution nor unification. However, the case of Germany was also distinguished due to a number of special provisions. Firstly, during the negotiations on the EEC Treaty, the German delegation, back in 1957, issued the following famous declaration: "The Federal Government proceeds on the possibility that in case of the reunification of Germany a review of the treaties on the Common Market and Euratom will take place." (Giegerich, 1991, p. 398)

At the same time, under the Constitutional Court's theory of the continuing German "Reich," the GDR was not even considered to be a separate state. As a result, the FRG always treated trade with the GDR as domestic one, since otherwise, it might have compromised the underlying constitutional view. One of the examples of that theory is the trade between the GDR and FRN. Under the EEC laws, the Federal Republic had to create a customs frontier to impose the Common Customs Tariff and other restrictions on trade with the GDR. To avoid that, a "protocol on internal German trade" was made an integral part of the EEC Treaty in 1957.[2] Under the protocol, the Federal Republic could continue to treat intra-German trade as domestic trade. The common EEC trade rules with non-EEC countries thus did not apply to goods traveling between the GDR and the Federal Republic, although such rules would apply to goods traveling between the GDR and other EEC countries. In this way, the GDR has always received some benefits of the EEC and, even before unification, was often referred to as a quasi-member of the Community (Quint, 2012). At the same time, in the context of German reunification, both the FRG and the GDR had to create a new state with its own national and international legislation. For this, one of the options was to use the rule of *tabula rasa*, when the newly created state does not have any international obligation, thus, has a chance to establish its foreign affairs in the ways it wanted to. Though, the implementation of such a principle would mean that the physical border inside Germany indeed disappeared, though the economic and political – the invisible ones – were still there. In this regard, the best and final steps were taken by the European Council.

Without taking a position on the substance of the ongoing debate, it managed to close the dispute when at its special meeting in Dublin on April 28, 1990, it proclaimed that the application of the Community Treaties to the FRG after unification would take place without revision. On that day, the Heads of all Member States and their Governments, acting on behalf of the States they represented and not as a Community agent, accepted extension. Later on, in order for the unification to be carried out while considering of Community legislation and for the Community to be informed of the course of negotiations, the Commission has, following the conclusions of the Dublin Council, followed the negotiations and was associated where Community interests were at stake.

As a result of the position taken by Member States at the Dublin Council, Community law automatically applied upon entry into force of the Unification Treaty. It is, therefore, for the Community to take specific measures should it regard the application of transitional measures as being necessary. At the same time, the accession of the GDR to the Basic Law of the FRG came in hand: since it was in conformity with Community law, the accession itself should have facilitated the process of legislation approximation and proper functioning of the law on the territory of GDR (Jacqué, 1991). The immediate application of EEC law to the newly added German lands follows from Article 227 EEC Treaty, which provides that the EEC Treaty is applicable to the member states in their respective territories unless special provisions apply. The principle of 'moving frontiers', therefore, may be applied to supranational organisations like the EEC in the same way as to states (Hailbronner, 1991)

So, as a result, for quite understandable political reasons, Member States preferred to include the East Germany to the territories covered by the EC law without any treaty revision.

One of those who recognized the political reality and helped Germany on its last steps of reunification was the President of the Commission Jacques Delors. His idea was to push Germany into the ongoing integration processes. It was he who took the opportunity to assist with German membership in the Economic and Monetary Union. He also inspired the creation of the Temporary Committee, pointing out that, after the fall of the Berlin Wall, it was possible that East Germany might join the EEC. In response to it, the Parliament created a Temporary Committee whose task was to analyze the impact of GDR integration into the EEC, make a constructive contribution to the German unification process, and to adapt the EEC itself to the new geopolitical landscape.

With the help of the Temporary Committee, the Parliament adopted Donnelly's interim report in July 1990. It specified the need to develop European integration in parallel with German reunification, and emphasized the importance of preventing derogations and transitional measures granted to the former GDR from weakening central EEC objectives, including the full achievement of the single market.

From the other side, simultaneously with the establishing of the Temporary Committee, some of the European Council representatives were afraid of possible Germany's return to expansionist policies. Contrary to their fears, Helmut Kohl, the Chancellor of the FRG, did not have such ambitions. He believed that the result of the reunification would be 'European Germany', not 'German Europe' (Smith, 2009). And, in the end, it worked out perfectly.

[2] Protokoll über den innerdeutschen Handel und die damit zusammenhangenden Fragen, of Mar. 25, 1957, BGBI II 984.

At the same time, there was agreement within the Community that essential parts of the EEC legal order could not be applied before the GDR's industrial and economic system were on the same level as the other member states. These interim measures, taken by the Council, concerned almost all areas of industry, trade, and agriculture. It was also stipulated that at the end of the interim regime, the EEC legal order would apply to the whole German territory. Thus, even though it was only the FRG that was a contracting party of the Treaty of Rome, it became clear that all provinces and regions from now on were also bound as being constitutional subdivisions of the Federal Republic (Hailbronner, 1991).

The next and the final step of German unification was signing the Treaty on the Final Settlement with respect to Germany of September 12, 1990, the Article 7 of which marked the end of the rights and responsibilities of the Four Powers in relation to Berlin and Germany as a whole. Under the treaty, the Four powers terminated their rights and responsibilities relating to Berlin and to Germany as a whole. The Treaty entered into force on March 15, 1991, when the Soviet Union was the last party to deposit its instrument of ratification (Frowein, 1992). However, the four powers had already suspended operation of their rights in a declaration that took effect on October 3 with German unification.[3] From this day on, Germany finished its reunification process, and Berlin became the only representative for all German people on the international arena.

Conclusion

The reunification of Germany is considered to be one of the most important political events of the 20th century. After being divided for almost half a century, the people from both sides of the border felt the need to restore their united statehood and initiated the unification process. However, due to the diverse background, both the GDR and the FRG faced certain challenges on their way to united Germany.

Due to the continuous national policies and foreign assistance, both states managed to sign the State Treaty and the Reunification Treaty, resolve the long-lasting boundaries issue with Poland, and ensure the effective membership of every region of Germany in the European Communities. It shows that with the joined efforts from both sides, the political will and available resources, as well as the foreign assistance, the GDR and FRG managed not only to merge back into a single state, but create a ground for its further political leadership, economic development and prosperity within EC and, consequently, the EU. It is also important to acknowledge the uniqueness of the EC enlargement in question and consider this as a precedent in the context of international and national law.

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