

**SIXTY YEARS OF THE GERMAN BASIC LAW  
(CONSTITUTION OF THE FEDERAL REPUBLIC OF  
GERMANY 1949) AND TWENTY YEARS OF GERMAN  
REUNIFICATION — A SYNOPSIS**

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Sydney  
26 May 2009

Ladies and Gentlemen,

Just a few days ago, last Saturday, Germany celebrated the 60<sup>th</sup> anniversary of the promulgation of the Basic Law, an awkward name for what is otherwise known as a constitution. The fathers of this Basic Law wanted not just its name to be understood as something temporary and provisional, they just did not want to call it a constitution, and they certainly did not want it to become the new constitution for what everybody hoped would be a better Germany — united, democratic and free. But history decided otherwise as I hope to show.

During the celebrations on Friday and Saturday of last week our re-elected Federal President had this to say:

Human dignity is inviolable. This is the fundamental principle of our Basic Law. The fathers and mothers of our constitution took the best out of centuries of our legal history and of the history of our freedom rights and they accepted the lessons from the failure of the Weimar Republic and the crimes of the Nazis. The parents of the Basic Law created a solid order of a decent life for free citizens in a fair and just society.

They did indeed. And yet this was not the result of planned policies and concerted and coordinated political activities, but rather the random outcome of events that no one had foreseen and anticipated, in particular the fact that the unity of the four Allied powers, almost immediately

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after the crushing defeat of Nazi Germany, gave way to increasingly hostile mutual suspicions and antagonisms, which escalated into what was later known as the Cold War. Under these circumstances Germans in East and West felt they needed, under all circumstances, to avoid developments that would cement the division of their fatherland, but rather work on a provisional basis in order to keep the options open for national unity. On the other hand, West Germans could not afford to ignore the appeals of the Western Powers to start reorganising themselves as a state on a democratic basis for which a new constitution was an indispensable requirement. The Western powers, and especially the US Army, pushed for, and were eager to see, some sort of self rule in West Germany. Only then could the Allied Armies hope to be relieved of the costly responsibility as administrators of occupied Germany by civilian authorities like the US State Department, which later became the major driving force for West German statehood. This was especially so after the Soviet Union and the Western Powers quite rightfully suspected that each side was trying to mobilise its share of the spoils of the war against the other side.

Stalin reacted hostilely to all attempts to promote the re-emergence of a German state based on a democratic order. He tried instead to entice the West, and West Germans in particular, with the prospect of a neutralised Germany, which he naturally assumed would fall under Soviet influence.

Berliners were the first to suffer under the deterioration of relations between the four powers. For more than a year the Soviet Union interrupted overland transport links to and from Berlin, leaving the Western Powers in their sectors of divided Berlin the choice to either withdraw completely or to organise an airlift, not only for their own supplies but also to feed the population of Berlin living under their rule and who were at their mercy. The Western powers of course did not budge an inch and, after thirteen months, the Soviets reopened the land corridors, and the first of many threats to the liberty of West Berlin was averted.

Of course the Soviets wanted to evict the Western Powers from Berlin but could not openly say so without de-legitimising their own presence in Germany. Instead they argued that the Western Powers, by introducing a new currency in West Germany, undermined the basic agreement of Potsdam, whereby all decisions concerning Germany as a whole were to be taken jointly and by consensus.

There were more aggravating developments and, when in 1949 two German states emerged, it was not the result of careful planning but, as I already mentioned, rather a random outcome of permanent crisis management in the initial phase of the cold war.

Thus the promulgation of the Basic Law, which was a constitution in all but name, became the decisive stepping stone and the precondition of statehood in West Germany. After agreement on the text of the Basic Law had been reached between the members of the Parliamentary assembly on 8 May 1949, under the ever watchful eyes of the Western Powers, these parents of the Basic Law (as our Federal President had called this assembly) were convinced that whatever they had just reluctantly agreed on would be a provisional arrangement only. A provisional arrangement necessary because of the need for Germans to reorganise themselves as a nation state again, be it only to please and be in conformance with the intentions of the Western Powers. America in particular saw a need for a resurgent Germany acting as a bulwark against what was perceived as an aggressive communist threat. The Germans did comply after much prodding, but clearly hoped that the Basic Law would become obsolete in a not too distant future. In fact the Basic Law was one of the few constitutions that contained within itself the conditions for its suspension. In Article 146 it stipulated its own demise once Germans, in an act of self-determination, would promulgate a new constitution in freedom after being reunited in an act of self-determination. And yet the Basic Law not only outlasted national reunification — it was even instrumental in achieving it — and what started out as a provisional arrangement for a temporary republic eventually became the lasting constitution of a reunited Germany.

Soon after the promulgation of the Basic Law, Stalin continued to move cautiously but with determination. To the creation of the West German state he reacted by establishing a communist German state of his own, but he also continued to send signals to the West Germans, twice offering the prospect of a United Germany — neutralised, demilitarised and out of NATO. It wasn't until 1954 that the Soviets discontinued championing German unity, and the consolidation of East Germany became a major Soviet Foreign Policy objective, whereas West Germans and (at least in public declarations) her Western protectors, claimed reunification based on free and fair elections as the prime objective of their European policies, which, of course, was a total illusion under the conditions of the cold war.

So in 1954 the stage was set for 40 years of a divided Europe with an iron curtain that cut Germany in half. Europe's division was epitomised by Berlin's special status as a divided city where ultimate authority lay with a dysfunctional council of the four powers, which also was paralysed by the cold war.

West Berlin soon became a festering thorn in East Germany's thigh. Thousands of East Germans used the border crossings every year to escape to West Berlin and from there to West Germany. All in all three million East Germans had sought refuge in the West. Until 13 August 1961, the Soviets and their East German clients desisted from hermetically sealing off the West Berlin sectors as they had done with the inner German border. Then overnight in a surprise move, and despite assurances to the contrary, the East German border guards erected what would become one of the most infamous walls ever. The Berlin Wall was built, and, according to the Soviet and East German leaderships, it was there to stay.

I was a 13 year old when it all happened, and like most others of my generation who had never known a united Germany, was utterly convinced that this was the way that things would remain for the rest of our lifetime: a divided Germany in a divided Europe — Berlin, as of 13 August 1961, mutilated by the monstrous wall, which like no other symbol, was the one most often associated with the cold war. Nowhere was the iron curtain thicker and more impenetrable than right in the heart of Berlin. All in all more than 100 refugees would lose their lives, shot down by East German border guards during escape attempts. As for Germany's neighbours, their fear of a restless, potentially aggressive Germany seeking revenge and retribution was now effectively superseded by fear of a nuclear war or an aggressive expansion of the Soviet sphere of influence. However, the super powers did manage to keep the peace despite critical episodes such as various Berlin crises in 1958 and 1991, uprisings in Eastern Europe, the Cuba Missile crisis in 1962, repeated outbreaks of war in the Near East, KAL flight 007 in 1983 and so on. Peace and security in Europe were not only maintained, but both sides even managed — with ups and downs of course — to achieve limited political, and military security, as well as humanitarian progress and improved relations based on a balance of power and the respect of existing borders. The Helsinki process and the disarmament agreements of the Nixon era were the major milestones of this development. So in a way the unplanned outcome of World War II and the subsequent cold war have had a sort of balancing effect in

Europe, preserving the peace and political stability. But this stability was at the expense of the East Europeans, who had to endure Communist rule without the opportunity of democratic change. *And* it was buttressed by military deterrence through parity or mutually assured destruction (MAD). *And* Germany was right in the middle of it all. Germans were divided against their will; East Germans like other East Europeans were denied their basic democratic rights, including the right to free self-determination. In other words, as soon as the East/West antagonisms could be overcome, or the iron grip of the Soviet Union would ease, it did not take a prophet to predict that East Europeans would want to make use of their democratic rights so long denied to them. It would be then that the questions of the post-war order in Europe would need to be answered again.

And then, suddenly, in 1989 it happened. Within only a few months and under the watchful eyes of an incredulous worldwide TV-public, unpredicted and unforeseen events happened in rapid succession, which have had a similar impact on Europe as did the two world wars of the 20<sup>th</sup> century. But, surprisingly, this time everything went peacefully with the sad exception of the ethnic strife in former Yugoslavia a few years later.

So let's look back to 20 years ago, more precisely to 9 November 1989, the day when the wall came tumbling down. Germans rejoiced everywhere; a long nightmare had come to an end.

Again this was a random development; nothing of this sort had been planned. It was a lack of functioning communication channels in an increasingly failing East German state that were the origin of the downfall of the wall. On 9 November 1989, the spokesman for the East German government, publicly discussing an easing of travel restrictions, mentioned that the new regulations would enter into force that very same night. He literally opened floodgates, and within a few hours Berliners from both sides of the wall rushed to the border and opened champagne bottles while sitting jointly on the coping of the wall.

The preceding months had witnessed many surprising events in Eastern Europe, and nowhere more so than in the Soviet Union herself, where Glasnost and Perestroika brought about the most fundamental changes since the Bolshevik revolution in 1917. And yet the events in Berlin took everyone by surprise, including Federal Chancellor Helmut Kohl, who was of course not aware that the 9 November would become another

fateful date in Germany's history. I say another, because this day, 9 November, has often been called a fateful day for German history.

On 9 November in:

- 1848 — Robert Blum one of the leaders of the republican movement in Germany was executed in Vienna.
- 1918 — Proclamation of the first German Republic.
- 1923 — Adolf Hitler staged a coup in Munich that was crushed by loyal Bavarian security forces.
- 1938 — During the infamously so-called 'Reichskristallnacht', Nazi persecution and discrimination against Jews turned very ugly and openly violent and brutal as large segments of the German Jewish population were attacked and brutalised, their places of worship, shops and community centres ransacked, and scores killed.

But 9 November 1989 was a day of unreserved joy; a day that a whole generation of Germans had thought would never come.

I mentioned that Federal Chancellor Helmut Kohl was surprised like everyone else in Germany. He had flown to Warsaw that morning and was the special guest at a banquet, which the Polish Prime Minister had hosted in his honour, when his spokesman informed him of the dramatic events in Berlin. He cut his visit short and rushed back to Germany where he realised that new opportunities to find new answers to the so called German question had suddenly become available, and that he needed to act shrewdly if he did not want to be overtaken by events. The borders between East and West Germany had been pushed wide open. The Soviets did not care (and the East Germans did no longer dare) to intervene. But how could the events now unfolding be managed in a way that would not undermine trust and revive age old fears of a reawakened nationalistic Germany menacing her neighbours and threatening peace and stability in Europe? These fears had never quite disappeared, despite loyal adherence of West Germany to the EU and NATO, and her unblemished record of 40 years as a democratic stronghold governed by the rule of law.

Helmut Kohl saw the need to act fast and decisively, and he published his now famous 10 points outlining his intention to use the existing security architecture in Europe as a basis to pursue policies so to achieve a condition of peace in Europe, which would allow the German

people to regain national unity. Ten months later Germany was reunited; reunited on the basis of the Basic Law of West Germany, or the Federal Republic of Germany, which would also become the official name of the reunited Germany. But how was this possible? Have I not just stated that the Basic Law had provisions in Article 146 ending its validity with reunification?

It did indeed, but it never stipulated that the only way to reunification would be exclusively through a constituent act of legislation. In fact, when the Basic Law was first drafted in the late forties, the French had not yet given up their idea of separating the western province of Saarland from Germany in an attempt to create a glacis between themselves and their much dreaded German neighbour. This idea had already been pursued after WWI, and after WWII the French again had put the Saar under separate rule. The fathers of the Basic Law had therefore foreseen an option in Article 23 of individual federal states joining the Federal Republic as additional members of the federation and that is how the Saarland rejoined Germany after the French had concluded in 1957 that separation would no longer add to their security. And while speculation flowed as to which way Germany would take in order to regain unity — a confederation of the two German states was mentioned as a possibility as well as the immediate summoning of a constituent assembly — more and more voices added to a choir of those who spoke out against abandoning the Basic Law, which over the last 40 years had given at least the West Germans the best German state to date in their history: democratic, ensuring rule of law, granting basic freedoms, federal and pluralistic, and allowing the transfer of national powers to multilateral structures like the EU or NATO.

Helmut Kohl, the chief architect of German unity from the beginning, showed a clear preference for not convening a constituent assembly as was stipulated in Article 146 of the Basic Law, but rather he wanted the new federal states to be constituted in East Germany, which should then declare accession to the existing West German Federal Republic in conformance with Article 23.

In his memoirs, Helmut Kohl explained that he was always convinced that the new constitutional order of a united Germany should rest on the solid and tested base of the Basic Law. However, invoking Article 146 would have required the summoning of a constituent assembly composed of members from both German parliaments, or of deputies emerging from free and fair elections in both parts of Germany. Such a

procedure, according to Helmut Kohl, would have contained enormous risks because, unlike constitutional reforms by way of changes to the Basic Law, which always required a two-third majority in both chambers of parliament, a constituent assembly could decide with a simple majority of votes cast.

Such an assembly would have been free to agree on a totally different kind of constitution, which, in Helmut Kohl's view, would have offered opportunities to all those who wanted to create a different kind of republic. In particular, Helmut Kohl was concerned that such a constitution might contain elements of direct democracy whereas the Basic Law almost totally relies on representation. He was of course bearing in mind that plebiscites, with their tendency to simplify complicated issues, were part of the demise of the Weimar Republic. Thus one of the main advantages of the Basic Law, which was implementing the lessons learned from the failure of Weimar, would have been put in jeopardy. There would also have been risks for the validity of international agreements and contracts. Helmut Kohl suspected that the leader of the opposition favoured a constituent assembly because that would have afforded him an opportunity to lead Germany out of NATO without the need to formally leave the alliance.

So again, what Helmut Kohl wanted to avoid was giving all those well meaning philanthropists in politics, as well as in academia, who did not see their ideals realised in the Basic Law as it was, and whom he did not always trust to have the necessary realism and wisdom, an opportunity to fundamentally change the character of the new German Republic. Thus the question whether to use Article 23 or Article 146 was basically identical to the question of how do we protect the most human and freest state in German history?

But favouring Article 146 would also have had negative practical consequences for the process leading to unity. For one, Helmut Kohl and his government quite rightly assumed that the opportunity to regain national unity for Germany, which had suddenly opened before them, would not last forever and therefore time was of the essence. Convening a constituent assembly and waiting for it to agree on a new constitution would have taken at least two years. And, in view of the enormous economic, political and diplomatic tasks ahead, there simply wasn't time for such an effort. Until the East German federal states finally declared adherence to the Federal Republic in conformance with Article 23, assuring the continued validity of the Basic Law and the

political continuation of the old West German Federal Republic, the way towards national unity remained highly contested. The division lines between those who favoured Article 23 and Article 146 ran right across parties, civil society and regions. But Helmut Kohl and his government did prevail in the end. When, finally, free and fair elections were held in East Germany, the East German Alliance — which was favoured and supported by Helmut Kohl, and which had made clear that it would opt for accession rather than a constituent assembly — won an overwhelming majority, and that decided the issue once and for all.

What was it then that made this provisional Basic Law so special? A Basic Law which was only agreed after much prodding from the Western Allies and which was in the eyes of its authors not intended to last a minute longer than absolutely necessary?

For one, this Basic Law worked well, unlike its predecessor, the Constitution of Weimar. Many of its authors were all too well aware that the shortcomings of the Weimar Constitution were partly to blame for the destruction of the democratic order in Germany during the thirties. Despite the fact that Hitler and his Nazi party never won an absolute majority in free and fair elections, the constitution did not have enough safeguards to prevent Hitler, a self-confessed enemy of the democratic order, from assuming the highest office legally. One other weakness was the authority of the Reichspräsident, who, if unclear majorities in a splintered parliament paralysed the chancellor and his government, could effectively oust governments and overrule them with directives and decrees and thus circumvent the democratic process. Therefore, the Basic Law redistributed checks and balances based on the Weimar experience. Let me quote just four examples:

1. Radical extremists and their parties can now be banned from participating in the democratic process, but such a ban would be controlled and open to scrutiny by a court of justice. This is the most direct consequence drawn from the German failure vis-à-vis the threat for democracy posed by the Nazis, which eliminated, quite legally, the democratic state of the Weimar Republic.
2. The strongest constitutional executive organ under the Basic Law would now be the Chancellor or Prime Minister elected by absolute majority of Parliament, who, once elected, could only be dispossessed by the election of a successor, avoiding periods of uncertainty due to shifting majorities. The state president

would be stripped of political power and serve as notary public of the state.

3. Parties competing for seats in parliament, but not winning seats based on direct representation, now need at least 5% of the proportional vote to be counted, thus avoiding the splintering of the political landscape, which was so disastrous during the Weimar Republic.
4. Very significant was the decision of the Basic Law to create an ultimate arbiter in the form of a constitutional court, which is now the highest authority in all constitutional matters. With an innate sense of self-restraint, all constitutional judges have, however, avoided assuming the role of a super appeals court or micro manager of day-to-day politics and legislation.

One question that I am regularly asked by Australian lawyers is whether our legal system contains a bill of rights, and the answer is yes, it does. In fact the individual and collective freedom, civil, and human rights contained in Articles 1–19 could justifiably be called the core of the Basic Law, as these basic rights bind all state and government authorities, whose supreme duty is defined as the protection of human dignity and human rights. The next question I am asked is whether or not there is a lesson to be drawn for Australians discussing the need for a similar catalogue, often in quite controversial terms, and I am cautious in answering with a clear yes or no. We Germans fared well with our constitutionally guaranteed freedoms and rights. But there are of course fundamental differences in the constitutional law systems of our two countries. Probably it does help to look at experiences others have had, consider the peculiarities of the respective legal systems, and then decide what conclusions, if any, can be drawn from that. Others are more outspoken. Chris Michelsons, a law professor in Sydney, wrote an article in last week's Canberra times where he concluded, and I quote:

[T]hree key lessons can be identified. First since 1949, the [Basic Law's] basic rights catalogue has strengthened the law making process in parliament. Due care is taken by [MPs] that new legislation complies with basic rights requirements.

In Australia, a federal charter of rights would have a similar effect. It would create a helpful reference point ... to examine proposed laws in the House of Representatives and in the Senate. Legislation would be debated not only according to

how it meets international standards, but on the basis of the Australian sense of human rights. Second, the basic rights catalogue of the [Basic Law] has increased the accountability of [MPs] to the German people. In Australia, too, a federal charter of rights would enhance the accountability of elected representatives and the transparency of the democratic processes. A charter of rights would ... have the benefit of requiring Parliament to reconsider laws that do not respect human rights. ...Third, the German experience suggests that most of the concerns that commentators have voiced in relation to an Australian charter of rights lack foundation. Critics here have argued that such a federal charter would effectively enable courts to make laws by interpreting legislation in a way that is contrary to the intentions of parliament. ...In Germany, the [supreme constitutional court] has ... stay[ed] out of politics and [passed judgement on the basis of] an apolitical analysis of the law.

I quote this view without comment, but I recommend this article for anyone wishing to dig deeper into the matter.

I could now come to the conclusion of my lecture here but, being a diplomat, I would like to add some remarks on the foreign relations aspects of this double anniversary of unification and the Basic Law.

To begin with, let me explain what I would call Germany's predicament in the 19<sup>th</sup> and 20<sup>th</sup> centuries. One of our federal presidents once famously remarked that there were all kinds of fatherlands; Germany was a difficult one and with this he was right on target. I add to this another famous quote from another president, Poincaré, who was the French President of the Council during WWI. He said there were 20 million Germans too many in Europe. He didn't mean it as bloodthirsty as it may sound. What he really meant was to say that Germany burst out of the categories of typical European nation states, which were either small like Belgium and the Netherlands with up to 15 million citizens or medium sized like the UK and France with up to 50 million inhabitants. Germany, with her more than 70 million and a highly efficient industrial base and no clear focus on where her real interests were in Europe, could look very menacing to her neighbours when she suddenly appeared as the latecomer among nation states in the second half of the 19<sup>th</sup> century.

As long as Germany balanced out the risks and opportunities on her eastern and western borders, stability would prevail in central Europe,

and the greatest achievement of Bismarck, the principal architect of the first unified German State in 1871, was just that — a skilful balancing act that would keep Germany's neighbours from uniting against her, allowing a forty year period of peace unknown to previous generations. Bismarck knew that Germany was, and always would be, stronger than any of her nine neighbours, but he also realised that Germany would never be able to withstand the combined forces of all her neighbours once united against her. Sadly this wisdom was lost under Bismarck's successors.

When prior to WWI Germany managed to antagonise the major European powers, and was to fight a war against almost all her neighbours with only shaky support coming from two precarious monarchies, the Ottoman Empire and Austria-Hungary, Germany and her Allies were squarely beaten. Austria-Hungary and the Ottoman Empire disintegrated and Germany became impoverished and unable to shoulder the incredible burden of paying the indemnities and reparations stipulated in the peace treaty of Versailles. World War I has been called a tragic European fratricide and most disturbingly, despite nine million human lives lost, it was *not* the war to end all wars and it did *not* achieve what victors and vanquished had hoped for, and that was to create a new balance of power in Western and Central Europe, preventing further armed conflict.

Rather it prepared the way for one more world war. Without trying to belittle the ruthlessness of Nazi-Germany in brutalising her European neighbours, I think it is also fair to quote Winston Churchill, who spoke in his memoirs of the folly of the victors to point out how terribly wrong Europe had developed in the twenties and thirties of the last century, and thus prepared the way for WWII.

World War II ended in Europe on 8 May 1945 when the German High Command of the Wehrmacht declared their unconditional surrender to the Allies, and that also was the end of Germany as it was known until then by the rest of the world. All German government and parastatal functions ceased with immediate effect and the Allied Forces assumed total control.

But that was not the answer to Germany's and Europe's predicament. The answer lay rather in European integration — with the priority being the multilateralising of Europe's coal and steel industries because they are the main prerequisites for armament. Then what was required was the gradual creation of a trade, custom's tariff and currency union, and

eventually the EU as we know it today. This process was facilitated by the division of Germany. West Germany resembled in size and structure the two main Western European powers, France and the UK, who now considered Germany manageable. Strong bonds were established and all three countries were to become each other's most important trading partners, creating a mutual zone of affluence, economic stability and eventually an area of joint security interests. But not only that. In view of an aggressive Soviet Union pursuing world revolution, which was perceived as the main security threat, the Europeans, with West Germany being central to these efforts, pooled their defence capacities with those of the North American democracies and forged the North Atlantic Alliance. It is worth noting that at the heart of this Alliance was the desire of our Western neighbours to never again be threatened militarily by a restless and ultra-nationalistic Germany. It was therefore not surprising to see some of the old fears resurfacing when discussions started on how and when Germany might reunite and where and how this united Germany would define its future role in Europe. And that in turn created uncertainties in the political arena. Helmut Kohl described in his memoirs that, with the exception of Ireland and Spain, all other partners in the European Union had at least questions, if not reservations, when he announced his intention to use all peaceful means available to him to pursue national unity for Germany at the European summit in Strasbourg in December 1989.

This was, as I mentioned earlier, one of the decisive elements to shape Helmut Kohl's determination to act fast but in a reassuring way. He made it clear to our partners in NATO, EU, and the UN that the new Germany would be identical to the Germany that our partners had learned to trust and to rely on, and that there would be no wavering nor negligence in our commitment to the integration of Europe and to NATO. Based on these assurances, unity was eventually achieved with not only toleration but active support by most of our partners and the international community at large. I believe that the three German governments, who have been in charge since then, have been able to reassure our neighbours, that, yes, Germany was once again larger and more powerful than her neighbours, but that it was also committed to shoulder her share of the responsibilities and would shun nationalistic special paths or a 'Sonderweg' isolating Germany from her European neighbours.

I hope I have been able to convey the message that we feel deeply grateful for what the Basic Law has achieved for us. It has stood the

test of time, but it also needed adjustments. It was not the constitutional panacea, and it has not spared us deep conflicts over constitutional issues, but the instruments provided for conflict resolution have proven to be efficient and unifying. And lastly, it was successful enough that in the end, rather than opting for something new with the advent of national unity, Germans relied on what they knew and trusted.

Thank you all for your kind attention.

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