I. Notion and the Order of Appearance

1. Notion

Coalition agreements are resolutions which come into existence for a legislative period fixed by the agreement of two or more political parties. These parties are part of a ‘parliament’, which by a majority vote decides to form and support a government. Such practice, however, can be carried out only by a ‘hung parliament’ consisting of several political parties, each enjoying less than an evident absolute majority, and thus unable to form a government membered by a single political party.

2. The Order of Appearance

Once in existence, the coalition stands as agreed by the parties forming the government. The party members are obliged to co-operate in order to promote the interests of the government of the ‘multi-party-state’, in accordance with the constitution.¹ The important functions of these coalition agreements are the setting up of the elected government, the distribution of tasks and control over government policy, and the various ways to tackle important particular issues. The more these agreements seem to ‘suit the occasion’, the more ready they seem to resemble the accepted character of political treaties. The more far-reaching and complex their ‘rules’ become, the more likely they are to be publicly discussed and debated in detail. Therefore, it is not surprising that in the course of history, we see coalition agreements becoming

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more extensive, more formal and more public. Indeed, nowadays it has become a regular practice of the German representative government to reduce such coalition agreements to the level of written documents. When talking about 'coalition agreements', one has in mind these lengthy, well debated, written treaties. Nonetheless, the term 'coalition agreements' is also used to include *ad hoc* agreements on other issues, including realization of agreements during the session of parliament.

There are several types of coalition agreements. They include, for instance, verbal agreements intended to be signed at a later stage, memorials to be recorded, and agreements of some contractual nature — with or without the signature of those with the highest positions in government or political parties.²

The need for harmonious co-operation between the parties may call for the creation of a coalition committee. This committee may make decisions on matters of conflict between the governing political parties represented in the parliament. Indeed, such a move may even replace a formal 'coalition agreement' — as demonstrated in "Kressbronner Kreis" of 1967. This was a committee comprising the most outstanding politicians and the "majority fractions" during the great coalition of CDU/CSU and SPD.³ During the last decades, however, such practice seems to grow rarer partly due to the fact that the polarized issues are generally decided at cabinet level meetings or are discussed by the Chancellor and his ministers during coalition debates, in the presence of party representatives or with their consultation.⁴

II. The Evolution of the Coalition Agreements in the Federal Republic of Germany

There is little information and therefore only a limited understanding of the 'evolutionary history' of coalition bonds in the Federal Repub-

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⁴ See Wolfgang Rudzio, *Das politische System der Bundesrepublik Deutschland* (Opladen, 2nd ed., 1987) 268.
lic of Germany, because the ‘coalition debates’ of the first three ‘hung parliaments’ (coalition governments) led by Chancellor Konrad Adenauer (in 1949, 1953 and 1957) remained unpublished. Even though there were occasions on which discussions on important issues relating to ‘government instruments’ took place, nothing was made public. It was not until October 20th 1961 when, during the fourth electoral period, in which the CDU/CSU was deprived of their absolute majority in the German parliament, that an informal (unauthorised) version of the coalition agreements came to public attention, via the media. After the change of government to Willi Brandt and his ‘social-liberal’ coalition, the current practices of publishing thorough and precise information on coalition agreements affecting government policies was introduced. Such practice has also been adopted by the federal states of the Federal Republic of Germany while forming their respective governments. The agreements themselves may consist of hundreds of pages. Generally, in the political sphere, coalition agreements seem to be a solution to controversial political conflicts between different government members within the parliament.

III. Coalition Agreements as a Judicial Problem

1. The Report on Research and Discussion

As mentioned above, coalition agreements were first considered to be a topic for publication on October 20th, 1961. The decision to give the public access to reports on coalition agreements raised many questions and provoked considerable tension. However, it did encourage further research and discussion, although since 1958, under the influence of the


Austrian system of coalition bonds, the role and the weight of the political parties and their stipulation had anyway become an important subject both for public debate and for the study of public law. Nowadays, the perspectives of those early days enjoy full recognition and dominate both current commentaries and modern textbooks. The ‘prudent’ discussion appears to be very well balanced indeed, rarely causes any friction and even then only in connection with other political problems of the day. We must be aware of the fact that the role of political parties under the constitution in general is under “scientific” scrutiny. In this general context the points of interest concerning coalition agreements to be discussed here are the following: the first question is whether they are acceptable; the second, whether they are legally, or merely politically, obligatory; the third, what sort of identity or character they possess; and the fourth, whether they are actionable before or enforceable by a court of law.


2. The Rules on Coalition Agreements

From time to time there is some opposition to coalition agreements, and this is usually based on the fact that the agreement in question can neither deprive state office holders of their legal rights nor set them free from their legal obligations. As a rule, the contractors of a coalition agreement are political parties in association with specific public tasks, as required by Article 1 of the German law on party politics (Art. 1 Part G), but not the organs of the State, namely the central government or other parts of a state organ. It is only the political parties — as parties to such a ‘treaty’ — which are bound by such agreements, and, in exceptional cases, also the parliamentary fractions if they conclude such an agreement. The right to exercise governmental power by the state, such as the power vested in the Chancellor or in the central government, is never affected.

The senior officials of the state organs try to act within the limits of their legitimate competence, as the political situation requires. This does not lead to a violation of the constitutional rules, provided the competence of the various ‘constitutional organs’ is not endangered. The remaining commitments made by the other offices of the state, namely those of the Chancellor, the central government and the two chambers of the Parliament — the Legislative House and Counsel (Bundestag and Bundesrat) — are considered both regular and admissible, from the point of view of the constitution. This is also the case

12 Gesetz ueber die politischen Parteien (Parteiengesetz) i.d.F. der Bek. vom 3.3.1989 (BGBl. I S. 327).
13 Otherwise only Ulrich K. Preuss, in Kommentar zum Grundgesetz fuer die Bundesrepublik Deutschland, Reihe Alternativkommentare, hrsgg. von Rudolf Wassermann (AK-GG), (Neuwied, 2nd ed., 1989), Part. 21 Abs. 1, Marg. 3 Nr. 60.
14 This is the dominating view, see for example Sasse, supra n. 9, at 724; Friauf, supra n. 9, at 307; Schuele, supra n. 9, at 29; Kewenig, supra n. 9, at 185; Wolf-Ruediger Schenke (1977) in Dolzer, supra n. 10, Art. 63 Marg. Nr. 34.
15 Steiger, supra n. 9, at 258; Karl-Heinz Seifert, Die politischen Parteien im Recht der Bundesrepublik Deutschland, (Koeln u.a., 1975), 427, 433.
17 For a different point of view see Schenke, supra n. 14, Art. 63 Marg. Nr. 31 following.
18 See for example Henke, supra n. 10, Marg. Nr. 12; Seifert, supra n. 15, at 432; Schuele, supra n. 9, at 42.
even when, according to Article 65(a) GG,\textsuperscript{19} the legal competence of the Chancellor is limited, or (according to Article 64 paragraph 1 Basic Law) the power of the Chancellor to form a cabinet is ousted.\textsuperscript{20} The basic laws are drafted to maintain a ‘multi-party’ democracy and they view the role of the political parties as the political will of the people (Article 21 Basic Law).\textsuperscript{21} This is especially the case when, at a coalition meeting, the will of the people is thought to form a parliament and to control it.\textsuperscript{22} In some ways the constitutional law tacitly implies that parties must meet before a decision is taken — a procedure which is followed when the Chancellor is nominated by the President and elected without any formal debate (Article 63 paragraph 1 Basic Law).\textsuperscript{23} In a similar manner the votes of the Federal States to the Counsel are guided by a coalition and cast at coalition meetings (Article 51 paragraph 3 sub-section 2 Basic Law).\textsuperscript{24}

The constitutional permissibility of coalition agreements is, generally, deemed not to extend to problems where such an agreement violates the constitutional law. Sasse names the example of an agreement of the governing parties empowering the leaders of the fractions to take part in all cabinet meetings. Such a provision is a violation of the fundamental principle of separation of powers — a principle guaranteed by Article 20 paragraph 2 Basic Law.\textsuperscript{25} It is not always unlawful to agree upon such a matter, but to generalize such a practice which may have alarming consequences at coalition meetings, would be contrary to Article 62 Basic Law. Furthermore the principles of democracy and

\textsuperscript{19} GG = Grundgesetz fuer die Bundesrepublik Deutschland vom 23.5.1949 (BGBl. S. 1), finally overruled by Gesetz vom 31.8.1990 (BGBl. II S. 889) - Basic Law of the Federal Republic of Germany.
\textsuperscript{21} BVerfGE 20, 56 (98 f.).
\textsuperscript{22} S. etwa Theodor Maunz (1960), in Maunz/Duerig, supra n. 20, Art. 21 Marg. Nr. 98; Preusss, supra n. 13, Marg. Nr. 60.
\textsuperscript{23} Sasse, supra n. 9, at 723; Art. 63 para. 1 GG seems to be a “Rechtsgrundlage von Koalitionsvereinbarungen”: Schenke, supra n. 14, Marg. Nr. 20 following.
\textsuperscript{24} Jarass/Pieroth, supra n. 20, Art. 52 Marg. Nr. 6; Wolf-Ruediger Bandorf, “Das Stimmverhalten im Bundesrat als Gegenstand von Koalitionsvereinbarungen”, (1977) ZRP (Zeitschrift fuer Rechtspolitik) 81, at 82 ff.
\textsuperscript{25} Sasse, supra n. 9, at 723; similarly Schuele, supra n. 9, at 104.
an independent judiciary require that Article 20 paragraphs 2 and 3 Basic Law is to be interpreted as a compulsion to publish all coalition agreements.\textsuperscript{26} This is to enable the public to have oversee and to have a degree of control over coalition agreements.

In any case, at least where there is no ‘conspiracy’ or ‘plot’ by the parties concerned, against the constitution, the legality of such agreements depends on the consequential results, and of course, the mere political gathering is not illegal.\textsuperscript{27} Even the breach of an agreement is not necessarily a breach of law. Yet the very possibility of a breach of the constitutional law suffices to impose a sanction. Constitutional law itself encourages suits, for example, when the rights of the constitutional organs are violated or the norms guiding the passing of legislation are infringed upon. This is also in line with the authorities based in the Constitutional Court decisions taken on fixing the election of the legislative chamber of the German parliament (\textit{Bundestag}) by coalition agreements.\textsuperscript{28}

3. \textit{Legal or Political Obligations?}

Coalition agreements bind the parties who have obligated themselves by such agreements as well as all organs which operate under their supervision or influence. Appealing such agreements marks the controversial contents of the ‘drafts’ produced by the coalition parties. Such agreements are capable of realizing government plans and manifesting the undertakings of the government. They offer their opponents and the public in general the opportunity of ascertaining whether the government is trustworthy or not. There remains, however, some room for doubt as to whether such consolidating power is of a political nature or a legal one. At a glance, it seems clear that rules on coalition agreements may be challenged before a tribunal, thus suggesting that the obligation shall be a legal one.

\textsuperscript{26} Schuele, \textit{supra} n. 9, at 51; Haeberle, \textit{supra} n. 9 at 627; Scheidle, \textit{supra} n. 9, at 110; Karl-Ulrich Meyn, \textit{Kontrolle als Verfassungsprinzip}, (Baden-Baden, 1982) 305; critics by Schenke, \textit{supra} n. 14, Marg. Nr. 35 following.

\textsuperscript{27} Kewenig, \textit{supra} n. 9, at 194.

The view that coalition agreements are juridically binding is supported by most of the old literature on coalition agreements. The aim is to attain a juridical goal with legal consequences. Such obligations may, however, either be accepted or rejected, depending on each individual case. This concept that the parties strive to bind themselves legally is controversial and hotly disputed. It is therefore, no coincidence that legal consequences and/or juridical sanctions are not provided for within coalition agreements. Indeed, it would be a violation of the Constitution to make agreements aiming to bind the parties legally or even to limit the power of the parties in office with the threat of judicial sanction. They may, however, be politically binding, suggesting that they have more of a political nature than a legal one. The loyalty to the Constitution does not require anything else given the fact that political parties are not organs of the State.

The prevailing view, therefore, is that coalition agreements are 'political treaties', agreed upon without the intention of being legally binding and are therefore only politically binding. Given this basis,
agreements must correspond to the maxim — *clausula rebus sic stantibus* — and be considered part of a political framework: it is implicitly understood that ‘in order to maintain political harmony’ and to face consequential results the coalition in question would be dissolved if and when political expediency so requires, and accordingly the corresponding agreements would automatically cease to exist, even if the necessary changes could be realized merely by a few suitable alterations.\(^{37}\) This concept alone corresponds with the ‘autonomy’ and interests of politics. On the one hand it is dependent upon parties’ mutual trust and readiness to compromise. On the other hand, it remains very flexible towards the frequent changes brought about by politics. The political meetings and agreements of politicians also bring serious political issues to light. This is important particularly when politicians abuse the faithfulness of the parties to the agreements and thereby hamper the possibility of future cooperation.\(^{38}\) This is why coalition agreements remain judicially unenforceable, why the breach of coalition agreements can only be penalized by outvoting the ‘abuser’ and why no attempt has ever been made to enforce coalition agreements by judicial means.

In view of the considerations above, coalition agreements are generally deemed to be political agreements. This does not, however, rule out the possibility of making agreements with certain provisions, which are intended to be legally binding. In such cases such legally binding agreements can also be enforced by a court of law. For all practical purposes, however, this seems to make no difference whatsoever.

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\(^{38}\) Herzog, *supra* n. 20, Art. 63 Marg. Nr. 10.
4. The Juridical Nature of Coalition Agreements

According to the prevailing view coalition agreements are, generally, agreements of a non-juridical nature. However, one bases one's view on the ancient doctrine — appreciated by the minority today — and in very exceptional situations particular areas of such coalition agreements can be of some contractual nature, so that questions as to their legal characterization are bound to arise. Most German lawyers, when dealing with this problem, feel that there is a distinct borderline between private law and public law. This distinction is very important because it decides whether a law suit is brought to the civil or administrative courts. Private law as a whole enables the individual — the plaintiff — to have a right of action against another individual: the conflicts at issue are solved by the 'instruments' of civil law. Public law is intended to regulate the legal system as a whole, particularly the affairs of the State, i.e. the competence and the obligations of the government. Thus, public law is a branch of law exclusively reserved for the State. Only in a few exceptional cases, does that State behave as a private individual on the basis of private law, (for example when buying stationary for its personnel). In general, however, it acts in accordance with the norms of public law, and its undertakings can be challenged by individuals before an administrative tribunal or the Constitutional Court.

Accordingly, the juridical nature of coalition agreements, that is the question of whether they are private law or public law contracts, has remained unresolved until today. They are often considered to be civil law contracts (contracts made and enforced according to the rules of private law) because the parties, as 'social groups', can make contracts with each other like any private association. The prevailing view, however, contradicts this on the grounds that the parties enjoy an exclusive legal status in order to be able to make coalition agreements, which they need for the fulfillment of their tasks in accordance with the constitution, (for example the election of the Chancellor, the co-operative undertakings of the fractions in the Parliament and the political changes brought by the government and the parliament.) This majority view stresses mainly the contents of the agreements at issue. Consequently, coalition agreements are qualified as public law agreements.

39 Henke, supra n. 36, at 158; for Austria see Marcic, supra n. 30, at 36.
40 For this prevailing view see Boege/Pauly, supra n. 31, at 647; Schenke, supra n. 14, Marg. Nr. 21, 24; Stern, supra n. 28, at 986.
The acceptance of the public-law-quality of coalition agreements leads us to the next question: are they contracts of constitutional or of administrative law? In a hardly correct version they are considered to be contracts of administrative law, — an interpretation which has been disputed even when preliminary questions are discussed at a coalition meeting. Today's predominant view is that coalition agreements are generally considered to be contracts of constitutional law, if they are to be considered contracts at all.

The various conflicting views are not only evidence of contradictory opinions of legal scholars in general, but they also repeatedly prove that coalition agreements are of a political nature, for they, in a Procrustean way, fit into juridical categories. Thus, one can share the conclusion of Klaus Stern (in his detailed text-book on public law of the Federal Republic of Germany) that coalition agreements are 'contractual undertakings' of the constitutional law without being legally binding. This paradox is merely the symptom of the actual problem of fitting institutions of a political nature into a juridical framework.

5. The Administration of Law on Coalition Agreements

Even if one assumes that coalition agreements are contracts of civil law, or of administrative law, or of constitutional law, the question as to whether, in a case of infringement, the contractual parties would be entitled to legal redress still remains. For those who share the minority view that coalition agreements are civil law contracts, the answer seems to be clear: civil courts have the jurisdiction to hear cases arising from the breaches of civil law contracts (Article 13 GVG). For those who believe that coalition agreements are a matter of public law, the consequence seems to be equally clear: an 'infringement' of such an agreement

42 Sasse, supra n. 9, at 726; Friauf, supra n. 9, at 308; Scheidle, supra n. 9, at 41; Weber, supra n. 9, at 99.
is not judicially actionable. One could, of course, consider whether such issues could be brought before an administrative court, yet even this is not permissible when taking into account the fact that such courts have the jurisdiction to hear cases merely of an administrative nature but not on constitutional issues (Article 40 paragraph 1 VwGO\textsuperscript{45}). Consequently the possibility of going to the administrative courts in the case of an infringement of a coalition agreement depends on the very nature of the agreement and the parties of the agreement: Are they created by the constitution or by administrative law? ‘Constitutionally created’ may be interpreted to mean entities which are automatically formed by the Constitution. These include the departments (‘organs’) as well as the political parties, even though the latter are not organs of the state — at least as far as any specific involvement with the constitutional machinery is concerned. Consequently, administrative tribunals are deprived of the required jurisdiction to settle disputes on such constitutional questions (i.e. whether the constitutional rules on a given coalition agreement have really been honoured) — a situation quite regular and not infrequent.

According to Article 13 BVerfGG\textsuperscript{46} complaints may be brought before the Constitutional Court when the requirements of constitutionality — stated and described above — are met. Unlike the constitutional organs, the political parties — which form a government — are deprived of such rights, neither are they entitled to claim the protection of Article 93, paragraph 1, subparagraph Basic Law, nor even that of Article 13 subparagraph 5 BVerfGG which are reserved for the above mentioned constitutional organs. Therefore, according to general opinion, neither at an administrative tribunal, nor at the Constitutional Court, is there a right of action in such cases.\textsuperscript{47} Such a right is not constitutionally guaranteed: according to Article 19 paragraph 4 Basic Law the right to bring a suit to court is guaranteed by the constitutional law to private citizens whose constitutional rights have been violated by an adminis-

\textsuperscript{45} Verwaltungsgerichtsordnung (VwGO) i.d.F. der Bek. vom 19.3.1991 (BGBL. I, S. 686).


\textsuperscript{47} See for example Maunz in Maunz/Duerig, supra n. 20, Art. 65 Marg. Nr. 20; Sasse, supra n. 9, at 728; Weber, supra n. 9, at 104, 132; Herzog, supra n. 20, Art. 63 Marg. Nr. 12; Schenke, supra n. 14, Marg. Nr. 22; besides Ulrich Battis/Christoph Gusy, Einfuehrung in das Staatsrecht, (Heidelberg, 3rd. ed., 1991), Marg. Nr. 143.
trative organ of the State. This guarantee does not exist when such rights are infringed by other private individuals (or even by political parties as social groups). Thus, for example, no such guarantees are found when contracts or other agreements are breached by private individuals or unincorporated groups. Consequently there exists no possibility of legal action in relation to coalition agreements. This also contradicts the opinion that coalition agreements are 'contracts' of some juridically binding or juridical nature. Furthermore, German civil law hardly ever recognizes norms which cannot be enforced, or infringements which are non-actionable. From the point of view of constitutional law, for instance, phrases or clauses such as 'non-actionable contracts or treaties' are superfluous. This is also shown by the fact that political parties intend to avoid all kinds of court actions relating to coalition agreements. If the parties of a coalition were obliged to make their agreements legally binding, for example, by reducing their agreements to written legal documents, the result would be exactly the opposite of what the supporters of that practice have been trying to achieve: the political parties will begin to avoid making written legal documents on important issues.

IV. The Dividing Line between Juridical and Political Doctrines

Teachers of constitutional law have dedicated much effort to the attempt to lay down disciplinary rules — as specific 'land marks' of political procedures — in order to guide coalition meetings. These undertakings have been considered to be a mere experiment. Such a specific doctrine is bound to be unacceptable because it does not match the autonomous character of political-party procedures. The exercise of political powers is regulated by the other obligations of legally and judicially sanctionable intentions. The requirements of a juridical contract, (i.e. contract of a juridical nature) due to its stable and lasting continuity, contradict the requirement of political proceedings which must ad hoc be adopted to changing circumstances. This is because the shifting of powers and 'party-compliant' flexibility are required elements of political life. The specific efforts made by 'law' and 'lawyers' in an attempt to categorize coalition agreements as long lasting enforce-

49 Seifert, supra n. 15, at 432; Kwenig, supra n. 9, at 203.
able obligations or contracts do not harmonize with these necessarily flexible conditions. Nevertheless, it would be a great error to suppose that the disregarding or the infringement of coalition agreements remains without sanction simply because these agreements lie beyond the jurisdiction of a court. The loss of support for the parties by the members of the parliament (or the provincial legislative assemblies) is a good example of such non-juridical, yet effective, sanctions imposed on the ‘breachers’—a practice not uncommon during an election campaign. Voting against government policy would, no doubt, also be an effective sanction. Besides, the lack of sound political morals is bound to disappoint the electors/voters both in the political spheres and among the public in general, leading to the withdrawal of power (vested in the respective offices). Thus, it can be clearly seen that such sanctions are both equivalent to, and can practically be more effective than, judicial decrees of any kind.50 It is logical (and therefore important to remember) that in a constitutional state where both politics and law play equally important roles, priority should not be given to judicial decisions alone; nor should everything be too simply categorized as judicial norms or ‘instruments’ of the judiciary.

V. The Concluding Opinion on Coalition Agreements in a Multi-Party State

The character or nature of coalition agreements in party politics is often an issue of lively controversy and debate even among the party members themselves. Such controversy is of course absent in countries with majority rule where various groups within the ruling party try to find internal solutions to the conflicts which inevitably arise in politics— as do cabinet members and other ‘protagonists’. Coalition agreements show the need to reach compromises in a parliamentary system. This is particularly the case when such parliaments are based upon and guided by the basic principles of proportional representation. Both the coalition agreements and conflicts between the parties involved show even more clearly the need to make compromises. The disputes surrounding coalition agreements arise due to problems such as the abuse

50 Schroeder, supra n. 36, Marg. Nr. 1; Herzog, supra n. 20, Art. 63, Marg. Nr. 13; Schenke, supra n. 14, Marg. Nr. 26; Haeberle, supra n. 9, at 626.
of power by the coalition parties or their elected representatives. Conflicts on coalition agreements may reflect fundamental, controversial issues of the ruling political parties. They may indicate the differences of opinion between ‘old partners’ seeking to find new solutions to the existing problems and crises of government.

Such conflicts may also be symptomatic of political and social change in general. This is certainly the case when political reforms are about to take place. In this respect coalitions indicate that political differences are healthy and should remain in existence since they are bound to expose decisions made by the ruling parties for the inspection and criticism of the minority parties. Coalition agreements could then be said to hinder the possibility of any abuse of power by the majority parties. There remains little doubt that neither a legal system nor the courts of a state would be fully capable of solving the deep-rooted problems which arise in government, even if they made the greatest effort to do so. Thus the ‘non-interference’ of law with coalition agreements allows politics to maintain its unique ‘authority’ and wisely limits the power of the legal system in the handling of political conflicts.