

January 1992

Constitutions and Revolutions: The Impact of Unification and the Constitutions of the Five New German States on the Amendment of the COntitution of the Federal Republic of German

Christoph J. Partsch

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Christoph J. Partsch, *Constitutions and Revolutions: The Impact of Unification and the Constitutions of the Five New German States on the Amendment of the COntitution of the Federal Republic of German*, 21 *Denv. J. Int'l L. & Pol'y* 1 (1992).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Constitutions and Revolutions: The Impact of Unification and the Constitutions of the Five New German States on the Amendment of the Constitution of the Federal Republic of German

Keywords

Constitutions, States, Constitutional Courts, Constitutional Law, Legislation, Revolution, International Court of Justice, International Courts and Tribunals, Procedure

Constitutions and Revolutions: The Impact of Unification and the Constitutions of the Five New German States on the Amendment of the Constitution of the Federal Republic of Germany

CHRISTOPH J. PARTSCH*

I. INTRODUCTION

The changes in the foreign and domestic politics of Germany caused by unification have been and will continue to be reflected in the changes of the Constitution of the Federal Republic, also known as the Basic Law (*Grundgesetz*).¹ The constitutions² and draft constitutions³ of the five new states of the Federal Republic of Germany reveal the direction that the future Constitution of the Federal Republic of Germany will take. They also reflect the difficult history of two dictatorships and the problems of a society in transformation towards democracy. The *Einigungsvertrag*, the "Treaty between the Federal Republic of Germany and the German Democratic Republic on the Achievement of the Unity of Germany,"⁴ changed the present constitution of the Federal Republic of Germany and recommended amendments to the Basic Law.⁵ Most of the prior changes to the Basic Law resulted from negotiations with the

* The author was legal advisor to the committee "Constitution and Law" and to various other committees in the Parliaments of Saxony, Dresden, Federal Republic of Germany in 1991. The opinions expressed in this article are solely those of the author. He would like to express his gratitude to Mrs. Svetlana von Bismarck for her contributions to this article.

1. Grundgesetz der Bundesrepublik Deutschland of May 23, 1949 [hereinafter Basic Law] [GG] 1949 Bundesgesetzblatt [BGBl] I 1 (F.R.G.), translated in ELMAR M. HUCKO, *THE DEMOCRATIC TRADITION, FOUR GERMAN CONSTITUTIONS* 194-265 (1987).

2. Constitution of the State of Brandenburg, as adopted by plebiscite on June 14, 1992, 6 Gesetz-und Verordnungsblatt [GVBl] Brandenburg 121 (1992), to enter into force on Aug. 21, 1992, *Landesverfassung kann in Kraft treten*, DER TAGESSPIEGEL, Aug. 13, 1992 at 6; Constitution of the Free State of Saxony, as adopted by parliament on May 26, 1992, Drs. 1/1800, *Sächsischer Landtag beschlieszt Verfassung*, FRANKFURTER ALLGEMEINE ZEITUNG [F.A.Z.] May 27, 1992 at 1; Constitution of the State of Sachsen-Anhalt, as adopted by parliament on July 16, 1992, 31 GVBl Sachsen-Anhalt 600 (1992).

3. Draft Constitution of the State of Mecklenburg-Vorpommern of Apr. 30, 1992, Drs. 1/20000; Draft Constitution of the State of Thuringia of Apr. 10, 1991, Drs. 1/285.

4. *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands (Einigungsvertrag)* [Treaty between the Federal Republic of Germany and the German Democratic Republic on the Achievement of the Unity of Germany], Aug. 31, 1990, BGBl II 885; Gesetzblatt [GBl] G.D.R. I, 1627; Verfassungsgesetz [Verf.] art. 4., translated in 30 I.L.M. 457 (1991) [hereinafter Treaty of the Unity of Germany].

5. Treaty of the Unity of Germany, *supra* note 4, art. 4.

four former Allied powers, illustrated by the *Treaty on the Final Settlement with Respect to Germany*.⁶ The present recommendations will affect the internal constitutional structure of the present united Germany.

The five states of the former German Democratic Republic entered into extensive parliamentary and public debates on the shape of their future state constitutions even before discussions of reunification began.⁷ Due to their different political orientation, the constitutions and draft constitutions of these new states offer an intriguing spectrum of modern constitutional thinking in Germany. As a result, they will have considerable influence on the amendments to the Basic Law, which will shape the reunited Federal Republic of Germany as a part of the European Community.

6. Treaty on the Final Settlement with Respect to Germany, F.D.R.-G.D.R.-U.K.-U.S., 1990 BGBI II 1318, *reprinted in* 29 I.L.M. 1188 (1990) [hereinafter Treaty on Final Settlement]:

Article 1

(1) The united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin. Its external borders shall be the borders of the Federal Republic of Germany and the German Democratic Republic and shall be definitive from the date the present treaty comes into force. . . .

(2) The united Germany and the Republic of Poland shall confirm the existing border between them in a treaty that is binding under international law.

(3) The united Germany has no territorial claims whatsoever against other states and shall not assert any in the future.

(4) The Governments of the Federal Republic of Germany and the German Democratic Republic shall ensure that the constitution of the united Germany does not contain any provision incompatible with these principles. This applies accordingly to the provisions laid down in the preamble, the second sentence of Article 23, and Article 146 of the Basic Law for the Federal Republic of Germany.

(5) The Governments of the French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America take formal note of the corresponding commitments and declarations by the Governments of the Federal Republic of Germany and the German Democratic Republic and declare that their implementation will confirm the definitive nature of the united Germany's borders.

Article 2

The Governments of the Federal Republic of Germany and the German Democratic Republic reaffirm their declarations. . . According to the constitution of the united Germany, acts tending to and undertaken with the intent to disturb the peaceful relations between nations. . . are unconstitutional and a punishable offence. The Governments. . . declare that the united Germany will never employ any of its weapons except in accordance with its constitution and the Charter of the United Nations.

7. The committee to change the constitution, *Verfassungskommission*, started working on January 16, 1992 and according to an agreement between the parties is supposed to finish its work by March 31, 1992. *Scholz und Voscherau Vorsitzende der Verfassungskommission*, F.A.Z., Jan. 17, 1992, at 1.

II. GERMAN CONSTITUTIONAL HISTORY

Before 1871, the multitude of independent kingdoms, duchies, counties, and free cities that later formed Germany were unable to unite as a nation due to their strategic position in the center of Europe. Reluctant to abandon their statehood completely, these states preserved many of their former rights in the Constitution of the German Empire, which left the inclusion of a bill of rights to the state constitutions.⁸

Following Germany's defeat in World War I, the newly declared democratic republic, the Republic of Weimar,⁹ adopted a Constitution in 1919 that again reduced the power of the states, though they still retained considerable control.¹⁰ A bill of rights was added,¹¹ but the rights were subjective¹² and could not be vindicated by any court and could be limited by ordinary legislation. As a result, this constitution proved to be ineffective¹³ to withstand the burden of an economy crippled by the four victorious powers of World War I in the Versailles Treaty, a worldwide depression, and the advance of political extremism by the Communists on the one side and the National Socialists on the other.¹⁴ One of the first victims of Germany's move toward autocratic centralization was the state of Prussia.¹⁵ After gaining power in 1933, Hitler's National Socialists centralized the country and immediately abolished the states.¹⁶

8. HUCKO, *supra* note 1, at 36, 121. For a detailed description, see GORDON A. CRAIG, *GERMANY 1866 - 1945*, at 38-41 (1980). Most notably, foreign policy and defense were assigned to the Reich.

9. Weimar, the city of the writer Johann Wolfgang von Goethe, is a small town in Thüringen where the members of the National Assembly gathered in order to avoid the post-war turmoil of Berlin while writing the new constitution.

10. Constitution of the Weimarer Republic, arts. 5 and 12, *translated in* HUCKO, *supra* note 1, at 149, 152; CRAIG, *supra* note 8, at 419; ERICH RÖPER, *Verfassungsgebung und Verfassungskontinuität in den östlichen Bundesländern* 149, 152 (1991).

11. Gerhard Anschuetz, *Die Verfassung des Deutschen Reiches vom 11. August 1919*, 14 *KOMMENTAR* 507 (1933, reprinted 1965): arts. 109-165 ("Grundrechte und Grundpflichten") [fundamental rights and duties].

12. *Id.* at 506.

13. HUCKO, *supra* note 1, at 60.

14. HANS SCHNEIDER, *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* [Handbook of the Constitutional Law of the Federal Republic of Germany] (Josef Isensee and Paul Kirchhoff eds.) § 3(D), at 136. In the April, 1932 presidential elections 19.4 million votes were cast for Hindenburg, backed by democratic parties; 13.4 million for Adolf Hitler; and 3.7 million for Ernst Thälmann, the communist leader. The 5th Reichstag (Sept. 14, 1930) comprised of 577 parliamentarians, including 107 Nazis and 77 Communists; the 6th Reichstag (July 31, 1932) comprised of 608 parliamentarians, including 230 Nazis and 89 Communists; and the 7th Reichstag (Nov. 6, 1932) comprised of 584 parliamentarians, and included 196 Nazis and 100 Communists. *Id.* at 138.

15. On July 20, 1932, following bloody brawls between Nazis and Communists, the Chancellor of the Reich, Franz von Papen, deposed the Prussian Government and became its Reich Commissioner. CRAIG, *supra* note 8, at 561.

16. On April 7, 1934, *Vorläufiges Gesetz zur Gleichschaltung der Länder*, the "Preliminary Law to Coordinate the Länder" was passed, appointing commissioners for all Länder, and the *Gesetz über den Neuaufbau des Reiches*, January 30, 1934 [RGBI] I, 75, HERMANN KINDER, WERNER HILGEMANN, *LAW TO RESTRUCTURE THE REICH* 195. The bad results for the

After World War II, the Allied powers wished to "de-nazify" and to democratize Germany, as well as to remove it as a strong power from the European theater. The Allies decentralized Germany again and restored federalism either by restoring old states¹⁷ or by creating new ones.¹⁸ Ten states, *Länder*,¹⁹ were eventually established in the west to form the Federal Republic of Germany, with the Basic Law of May 23rd 1949, the *Grundgesetz*, as its constitutional basis.²⁰

In the Soviet-controlled East, five states were created:²¹ Mecklenburg-Vorpommern²² in the North, Saxony in the South-East, Thuringia in the South-West, Sachsen-Anhalt in the West, and Brandenburg in the area surrounding Berlin.²³ The Soviet Union forced the East German puppet regime to abandon the newly established states and the rather liberal Constitution of 1949, which was proven to be ineffective in constitutional reality, and to return to centralism.²⁴ Following the reform movement and the growing dissent in the Communist countries — best represented by the mass exodus of East Germans via Hungary and Austria,²⁵ the demonstrations in Leipzig, Dresden, and Berlin,²⁶ and by the opening of the Berlin Wall on November 9th 1989²⁷ — East German leaders reluctantly yielded to public pressure and prepared accession to the Federal

Nazis in the last election on March 5, 1933 prompted this decision because despite considerable harassment, communists and democratic parties obtained 81 and 268 votes as opposed to 288 for nazi parliamentarians. *Id.* at 576.

17. Bavaria, Bremen, Hamburg, and Baden were restored.

18. Hessen, Niedersachsen (Lower Saxony), and Nordrhein-Westfalen were created.

19. RÖPER, *supra* note 10, at 153; their number was reduced to nine with the formation of Baden-Württemberg out of two states and increased again to ten when the Saarland joined the F.R.G. in 1957. Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 34 MARGIN No. 92 (14th ed. 1984). In addition, West Berlin maintained special status under Allied control.

20. HUCKO, *supra* note 1, at 194-265. The Basic Law begins with a strong bill of rights section outperforming its American counterpart in several aspects. For instance, with the exception of the freedom of expression, the German Basic Law grants more rights in a less restricted way, such as the right to privacy, the right to one's own papers, and the supervision of telephone-tapping.

21. Befehl Nr. 1 über die Organisation der Militärverwaltung zur Verwaltung der sowjetischen Besatzungszone in Deutschland of June 9th, 1945 [Command number one concerning the organization of the military administration to administer the Soviet occupation zone in Germany], *reprinted in v.Münch*, 285.

22. The other half of Pomerania is now in Polish territory.

23. The latter two formed the heart of Prussia, which was again abolished — this time by the Allied powers — as an ill-conceived scapegoat for the rise of Nazism. Gesetz Nr. 46 des Kontrollrats betreffend Auflösung des Staates Preussen vom Feb. 25, 1947 [law number 46 of the supervising council concerning the dissolution of the state of Prussia], AB1 des Kontrollrats Nr. 14, Mar. 31, 1947, at 262, *cited in RÖPER, supra* note 10, at 153.

24. *Id.* at 158.

25. Ferdinand Protzman, *Thousands Swell Trek to the West by East Germans*, N.Y. TIMES, Sept. 12, 1989, at A1.

26. *New Face, Old Politics*, NEWSWEEK, Oct. 30, 1989, at 52; PHIL. INQUIRER, Oct. 8, 1989, at A1.

27. Ferdinand Protzman, *Clamor in the East; East Berliners Explore Land Long Forbidden*, N.Y. TIMES, Nov. 10, 1989, at A1.

Republic of Germany.²⁸

In joining the Federal Republic, East Germany reintroduced the *Länder*.²⁹ The Basic Law presupposes that each state has its own constitution,³⁰ and so does the East German "Law to Reintroduce the *Länder*."³¹ Article 23(2) § 1 empowers the parliaments to write their own constitutions.

After East Germany acceded to the Federal Republic of Germany on Oct. 3, 1990,³² the obligation of the five new states to enact constitutions derives from the Basic Law as well. All five state parliaments enacted preliminary organizational statutes³³ and drafted constitutions of varying stages of development,³⁴ and Brandenburg, Sachsen-Anhalt and Sachsen have enacted constitutions.³⁵ The disputes surrounding these constitutions and drafts have influenced the constitutional committee, which by now has begun drafting the new Federal Constitution of Germany.³⁶

III. CHANGES IN THE BASIC LAW

The changes to the Basic Law have either been imposed by the Allies, after World War II, or were deemed necessary by the two German states themselves to achieve unification. In order to receive the consent of the Allied powers and to assure its neighbors of its peaceful intentions, the two Germanies agreed on important changes of the Basic Law. The two Germanies committed themselves to accept their borders after unification as definitive³⁷ in order to limit their military forces,³⁸ to finance

28. Basic Law, art. 23 formed the constitutional basis for the accession of the five new states to the already existing Federal Republic of Germany. Article 146 suggests forming a new German state by joining the Federal Republic and the German Democratic Republic under a new constitution, but this alternative was not chosen. Burkhard Bastuck, *Unity, Law, and Freedom: Legal Aspects of the Process and Results of German Unification*, 25 INT'L LAW. 251, 255 (1991).

29. *Verfassungsgesetz zur Bildung von Ländern in der Deutschen Demokratischen Republik (Ländereinführungsgesetz)* [Law of the constitution for the formation of the lands of the German Democratic Republic], July 22, 1990, art. 1(1), GBl I, Nr. 51 at 995.

30. Art. 28(I) § 1, Hans D. Jarass & Bodo Pieroth, *Grundgesetz für die Bundesrepublik Deutschland*, Kommentar, 370 art. 28 margin no. 1 (1989).

31. Art. 3(2) § 1; RÖPER, *supra* note 10, at 150.

32. Treaty of the Unity of Germany, *supra* note 4, at 457. According to article 1(1), the five new states join the Federal Republic, and according to article 1(2), the 11 Eastern and the 12 Western districts of Berlin form the new state of Berlin.

33. For example, *Gesetz zur Herstellung der Arbeitsfähigkeit des Sächsischen Landtags und der Sächsischen Landesregierung (Vorschaltgesetz)*, Oct. 27, 1990, Sächs GVBl, 1 (Law to Achieve the Working Capability of the Saxon Parliament).

34. Draft Constitution of the State of Brandenburg of May 5, 1991, 9 GVBl Brandenburg 96 (1991); Draft Constitution of the Free State of Saxony of June 1991, as published by The Committee For Constitution and Law; for Thuringia and Mecklenburg-Vorpommern, *see supra* note 3. RÖPER, *supra* note 10, at 151, n.7.

35. *See supra* note 3.

36. The committee began working on Jan. 16, 1992. Scholz und Voscherau Vorsitzende der Verfassungskommission, F.A.Z., Jan. 17, 1992, at 1.

37. Treaty on the Final Settlement, *supra* note 6, art. 1.

the withdrawal and the settlement of the Soviet military forces,³⁹ and to redefine the membership of a united Germany in NATO.⁴⁰ In treaties and negotiations with Poland⁴¹ and the new leadership in Czechoslovakia,⁴² Germany further sought to calm the fears and insinuations raised worldwide at that time.⁴³ The international obligation to change the Basic Law was fulfilled in article 4 of the Treaty on the Unity of Germany and was implemented upon ratification by both German parliaments.

A. *The Preamble*

The preamble of the former constitution of West Germany expressed the desire to reunite and the duty of the German people to exercise their right to self-determination. The former preamble characterized the Basic Law as a temporary constitution enacted for the benefit of those who

38. *Id.* art. 3(2). The article states the obligation to reduce the number of troops to 370,000 men. The present number is about 600,000. Robert C. Toth, *U.S. and Soviets in Accord on Cutting Arms in Europe*, L.A. TIMES, Oct. 3, 1990, at A1.

39. Treaty on the Final Settlement, *supra* note 6, art. 4(1) only states the obligation to settle by treaty the conditions for and the duration of the presence of Soviet armed forces as well as the conduct of their withdrawal.

40. *Id.* arts. 5 and 6; Volker Busse, *Das vertragliche Werk der deutschen Einheit und die Änderungen von Verfassungsrecht*, DIE ÖFFENTLICHE VERWALTUNG 345, 346 (1991).

41. *Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über die Bestätigung der zwischen ihnen bestehenden Grenzen*, BGBl II 1329 (1991) (Treaty concerning the Confirmation of the Boundary between the Federal Republic of Germany and the Polish Republic), Nov. 14, 1990, F.R.G.-Pol. Jochen A. Frowein, *Germany Reunited*, 51 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [Journal of Foreign Public Law and International Law] 333, 341 (1991).

42. *Vertrag vom 27 Februar zwischen der Bundesrepublik und der Tschechischen und Slowakischen Föderativen Republik über gute Nachbarschaft und freundschaftliche Zusammenarbeit*, 21 BGBl II 461 (1992) (Treaty of Good Neighborhood and Friendly Cooperation between the Federal Republic of Germany and the Czech and Slovak Federal Republic).

43. Regarding France, see Philip Jackson, *Fears of Germany Rekindled in France*, THE TIMES, Oct. 3, 1990 (quotes claim that more than 60% of the French are afraid of Germany). In contrast, another source cites only 27% of the French as feeling uneasy about unification. NORTH SPORTS FINAL EDITION, Oct. 3, 1990, at 18. Regarding Great Britain, see *Thatcher Anxious over German Domination, Congratulates Kohl*, Reuters, Oct. 3, 1990, available in LEXIS, Nexis Library, Current File.

Regarding Israel and the Jewish Community, see Douglas Devin, *A Few, Lonely Voices Fear the New Germany, The Face of the Colossus*, JERUSALEM POST, Oct. 3, 1990; *The New Germany*, JERUSALEM POST, Oct. 3, 1990. In a very unpleasant confrontation, the World Jewish Congress, later joined by many other Jewish Groups, attacked Chancellor Helmut Kohl for meeting Austrian President Waldheim on March 27, 1992. Kohl retorted by disclosing East German documents which showed the WJC conspired with East Germany's deposed dictator Honecker against unification - claims which the WJC pronounced as exaggerated by the East Germans. *Kohl Criticized for Waldheim Meeting, Responds Angrily to Major Jewish Groups*, WALL ST. J., Mar. 31, 1992 at A13.

Turkey's President Turgut Ozal joined anti-German critics and invoked Germany's Nazi past when Germany refused to deliver weaponry that Turkey needed to fight Kurdish separatists. *Turk Cites Nazism in Attack on Bonn over Kurdish Issue*, N.Y. TIMES, Mar. 30, 1992 at A6.

were denied their right of self-determination. These declarations referred not only to the population of the former German Democratic Republic but also to the vast stretches of originally German territory occupied by Poland and the Soviet Union after World War II. With the Treaty on the Unity of Germany, the declarations pertaining to reunification and self-determination were deleted and substituted by the statement that the Basic Law now applies to the whole German people. The legislature thereby declared the process of reunification complete and relinquished one fourth of the territory of former Germany in the borders of 1937.⁴⁴ In addition, the reference to the Basic Law as a temporary constitution was deleted.

B. Article 146

Article 146 of the new Basic Law represents the result of hasty political negotiations rather than precise legal craftsmanship. The old article 146 stressed the temporary character of the Basic Law by promising a general referendum on a constitution after reunification. Due to a lack of coordination between Foreign Minister Hans-Dietrich Genscher and Minister of the Interior Wolfgang Schäuble,⁴⁵ and in order to assure support by the opposition,⁴⁶ this article was not deleted from the Basic Law but amended by a formulation parallel to that of the preamble. It states that "the Basic Law now applies to the whole German People." As a result, the present form of article 146 still appears to refer to the Basic Law as a temporary constitution subject to substitution by a new constitution and a referendum, which is arguably inconsistent with the preamble and with the political will of the present German Government.⁴⁷ The present constitution, therefore, may be vulnerable to being overruled by a simple majority in a referendum or even in the German parliament.⁴⁸ Two views attempt to reconcile this inconsistency. One possibility is to subject the amended constitution to a popular referendum, and another is to simply disregard the possible inconsistencies in its wording.⁴⁹

C. Articles 51(II), 135a, and 143

The changes of the Basic Law articles 51(II), 135a and 143 involve the internal distribution of power in the federation, questions of finance, and the time-frame for adjusting the East German body of law to that of West Germany. Article 51(II) assures the bigger states in the Federation,

44. Henry Kamm, *Anxiety Tugs at Germany's Jews, Bitterness Sears the Die-Hard Nationalists, Sense of Mourning, Not Elation, For the Disappointed Expellees*, N.Y. TIMES, Sept. 25, 1990 at A10.

45. WOLFGANG SCHÄUBLE, DER VERTRAG [The Treaty] 120-21 (1991).

46. *Id.*; Busse, *supra* note 40, at 345-54.

47. This is the opinion of the opposition Social Democrats. SCHÄUBLE, *supra* note 45, at 120.

48. Busse, *supra* note 40, at 351, n.47e.

49. For the latter view, see Busse, *supra* note 40, at 352.

those comprising more than 7 million inhabitants, that the smaller states cannot form a two-thirds majority against them in the *Bundesrat*, the upper house of Germany's national legislature.⁵⁰ This provision assured passage of the Treaty of the Unity of Germany by the *Bundesrat* with the required two-thirds majority.

Article 135a provides that the new Germany reserves the power to extinguish or restrict claims against the former East German Republic and to deny or restrict claims by victims of the actions of the Communist regime.⁵¹

Article 143 was changed to avoid issues that threatened to delay the signing of the Treaty of the Unity of Germany by the two German states. Article 143 grants a period of adjustment to the East German body of law.⁵² East German law must comply with the constitutional requirements of the Basic Law by December 31, 1992. This applies most importantly to East Germany's more lenient criminal law regarding abortion, StGB article 153-155, which allows abortion once the mother has been informed about the medical risks.⁵³ The West German StGB article 218, which outlaws abortion, but creates exceptions that have virtually eroded the prohibition, was not to enter into force in the East.⁵⁴ Instead, the legislature was called upon to introduce a new law.⁵⁵ The new law advocated a more thorough information requirement for the mother but abandoned the exception-rule of StGB article 218. It was challenged before the Constitutional Court and will not enter into force until a decision has been rendered.⁵⁶ Until then, the East German StGB articles 153-155 will remain in force.⁵⁷

The most controversial effect of article 143 is the constitutional assurance that it gives to article 41, which declares the brutal expropriations by the Soviet Union between 1945 and 1949 irreversible.⁵⁸ When challenged in the Constitutional Court, the German government defended its consent to these regulations as necessary to assure the Soviet Union's agreement to unification.⁵⁹ This view was accepted by the Constitutional

50. *Id.* at 350. There are four states in this category: Baden-Württemberg, Bavaria, Lower Saxony, North Rhine-Westphalia.

51. *Id.*

52. SCHÄUBLE, *supra* note 45, at 229-50.

53. Rainer Beckmann, *Zur Verfassungsmässigkeit des Schwangerschaftsabbruchs im Einigungsvertrag* [Toward the constitutionality of abortion within the treaty], 2 M.D.R. 117, 118 (1991).

54. Treaty of the Unity of Germany, *supra* note 4, art. 9(II), in conjunction with annex II Ch. III, matter C, para. I, Nos. 1, 4 and 5; Beckmann, *supra* note 53, at 118; Nomi Morris, *Tough Challenge for Germany - A Unified Abortion Law*, S.F. CHRON., Feb. 11, 1992 at A10; Busse, *supra* note 40, at 351.

55. Treaty of the Unity of Germany, *supra* note 4, art. 31, para. IV §1.

56. *Der Bundesrat stimmt Fristenregelung mit Beratungspflicht zu*, F.A.Z., July 11, 1992 at 1; *Karlsruhe setzt eine knappe Frist für Anträge*, F.A.Z., Aug. 6, 1992 at 1.

57. Treaty of the Unity of Germany, *supra* note 4, art. 34, para. 4 § 4.

58. Basic Law art. 143(III).

59. Secretary of State Kastrup in his pleadings before the federal Constitutional Court.

Court in 1991.⁶⁰ The most bizarre effect of this rule is that those members of the German resistance movement against Hitler, whom the Nazis were unable to expropriate in the turmoil of the last days of the war, were subsequently expropriated by the Soviet or East German authorities as "capitalists, fascists or aristocrats" between 1945 and 1949, and will not be able to return to their homes. Those whose property was expropriated by the Nazis before 1945, along with other victims of Nazism like Jewish Germans, political opponents, and those whose property the East German Communists expropriated after 1949, are entitled to a return of their old property or indemnification.

The absurdity of this result of expropriation along with other factors suggest that the East German leaders, many still imbued with Communist ideas or connected to the East German secret police,⁶¹ succeeded in justifying the brutal results of the Communist reign of East Germany.⁶² This result is evidenced by the foreseeable decline of the Soviet Union as a political force coupled with the weak proof advanced for the foreign relations argument during the oral arguments in the Constitutional Court. Justifying these results was in accord with West German financial experts afraid of having to pay enormous amounts of compensation.⁶³

IV. FUTURE CHANGES OF THE GERMAN CONSTITUTION

Decisive changes of the German Federal constitution will take place within the next ten years. The German constitution will have to adapt to the changes caused by unification,⁶⁴ by the creation of the European

Judgment of Apr. 23, 1991, *Entscheidung des Bundesverfassungsgericht* [BVerfGe], 1 BvR 1170, 1174, 1175/90 (F.R.G.), *reprinted in* 44 *NEUE JURISTISCHE WOCHENSCHRIFT* [N.J.W.] 1597, 1598 (1991).

60. 44 N.J.W., *supra* note 59, at 1597.

61. Lothar de Maiziere, East Germany's first and last democratic prime minister, who signed the Unification Treaty for East Germany, had to step down from most of his political posts after unification due to charges that he had worked for the East German secret police, STASI. Rolf Soderlind, *East German Politician Faces New Stasi Allegations*, Reuters, Feb. 16, 1992, available in LEXIS, NEXIS Library, Current File.

62. Walter Leisner, *Das Bodenreform-Urteil des Bundesverfassungsgerichts*, 44 N.J.W. 1569 (1991).

63. "Der Bundesfinanzminister sitzt auf einem Pulverfass, denn es geht um viele Milliarden D-Mark. Mir hat er damit zu verdanken, wenn es nicht noch teurer wird." SCHÄUBLE, *supra* note 45, at 255. ("The Minister of Finance sits on a powder keg, since this is a matter of billions of D-Mark. He should thank me if it doesn't get more expensive").

64. The Basic Law, article 5, recommends the German legislative bodies to consider above all, but not exclusively, the following issues for amendment:

1. The inclusion of political aims into the Basic Law.
2. The application of Basic Law, article 146, and the question of a referendum on the new constitution.
3. The strengthening of federalism with possible changes of Basic Law, article 24(I). The old German states witnessed a constant erosion of their rights due to Federal supremacy clauses and due to the delegation of jurisdiction to the European Community and have therefore agreed to strengthen their role against the Federation. Eckart Klein, *Der Einigungsvertrag: Verfassung-*

Community,⁶⁵ and by Germany's new role in the world.⁶⁶ This article will

sprobleme und aufträge, 14 DIE ÖFFENTLICHE VERWALTUNG 569, 575-76 (1991). See also Busse, *supra* note 40, at 352-53. Among others the process of unification on a European scale has led the Länder to demand consultation and voting rights with regard to foreign relations. *Bundesstaat oder Staatenbund?, Streit über die ausserpolitischen Kompetenzen der Länder*, F.A.Z., Mar. 21, 1992, at 4; Klein, *supra*, at 576.

4. The forming of a new state by joining the states of Berlin and Brandenburg. *Id.*

Regarding these four points, article 5 constitutes an agreement between the major parties rather than between the two Germanies, with the Social Democrats and the Greens in favor of a new constitution, and the Christian Democrats and the Liberals in favor of a limited revision. Busse, *supra* note 40, at 352.

65. The ratification of the Maastricht treaty is accompanied by changes of the Basic Law. A bill to change the Basic law has been forwarded to the Bundesrat. This bill includes, *inter alia*, the insertion of a new article 23 to accommodate the rights of the Länder in a future, more integrated European Community, and to allow and regulate the transfer of powers from the German federal level to the EC, as a supranational entity; changes to article 24 regarding the transfer of powers from the state level; article 28 will be changed to allow citizens from other EC states to vote on a communal level; and article 88 will reduce the powers of the German Federal Bank in favor of a European one. *Bundesstaat oder Staatenbund?, Streit über die ausserpolitischen Kompetenzen der Länder*, F.A.Z., Mar. 21, 1992 at 4; *Der neue Europa Artikel im Grundgesetz, Nach der Einigung Deutschlands wird die Verfassung auf die Einheit Europas verpflichtet*, F.A.Z., July 22, 1992, at 4.

A further, rather complex change of the Basic Law regards its right to asylum in article 16. As immigration control will be abolished along with custom controls at intra-EC frontiers, Germany's very liberal right to asylum will have to be lowered to an EC average level. *Die Leute haben den Zirkus satt, CDU und CSU beharren auf Grundgesetzänderungen zum Asylrecht*, F.A.Z., Mar. 17, 1992 at 5.

66. This primarily concerns the question whether the German army should be allowed to participate in UN peace keeping actions or even in combat operations, such as the actions against Iraq. The German Ministry of Foreign Affairs and the oppositional Social Democrats have argued that the Basic Law would not permit the German army, *Bundeswehr*, to participate in such actions. They cite article 87a which allows the Bundeswehr only to act in defense of Germany or where the Basic Law contains an express provision. Many in the Christian Democratic Union and most legal scholars, however, interpret article 87 only to prohibit the internal use of the Bundeswehr, i.e. a prohibition to use it as a police force. Instead, they argue, the permission and the obligation to send troops under UN command derives from article 24(II). *Nahe dran am echten Krieg*, 30 DER SPIEGEL 22, 27-28 (1992); Albrecht Randelzhofer, in *Kommentar zum Grundgesetz* (Theodor Maunz and Günther Dürig eds.), Art. 24(II), Margin no. 44, 46 and 56 (Dec. 1989 update). This question will be clarified by the Constitutional Court in its decision on an action by the Social Democratic Party against the participation of German Navy units in surveillance of the coasts of Yugoslavia. *Organklage der SPD beim Verfassungsgericht eingebracht*, F.A.Z., Aug. 10, 1992 at 2. For a discussion of the constitutional problems, see generally, Thomas Giegerich, *German Contribution in the Persian Gulf*, 49 Zaö. R.V. 1, 38-40 (1989).

From a political point of view, due to Germany's past, a general anti-militarist attitude in the population, *Krieg, supra*, and the rather contradictory demands by the international community evidenced by the criticism of Germany for not participating in combat actions against Iraq, and yet the condemnation for political intervention against Serbian mass military attacks against light armed Croatian militias — attempts to change the Basic Law have failed so far. The continued bloodshed in Bosnia and Croatia, however, will probably change public opinion. Ian Murray, *Bonn Fails to Widen Role of the Army*, THE TIMES, Jan. 17, 1992; *Parteien uneins über UNO-Einsätze der Bundeswehr*, SÜDDEUTSCHE ZEITUNG, Jan. 17, 1992, at 2; CDU-MdB Karl Lamers, *Von deutscher Drückebergerei*, 12 DER SPIEGEL 22

have to limit its scope to the changes of the constitution that have already been dealt with in the constitutions and draft constitutions of the five new German states. The Treaty on the Unity of Germany, article 5, among others, recommends the German legislature to include political aims in the constitution.⁶⁷ The recommendation of the Treaty on the Unity of Germany will cause the political discussions that have been fought on this subject on a state level, and which mirror the slow process of integration of the Eastern states into a Western constitutional system, to be repeated on the Federal level, where the problems of integration will surface again. Therefore this article will first describe the constitutional doctrine of fundamental rights and state aims in state constitutions, and then will analyze its realization in the draft constitutions of the new states, and will finally describe the analogies that can be drawn on a Federal level.

A. *State Constitutions and Fundamental Constitutional Rights*

The inclusion of fundamental rights in the constitutions of the five new states — though not essential from a legal point of view — assures their citizens of the rights guaranteed by the Basic Law and serves as a means of identification with the new federal state. A constitution identifies the organs of a state: their creation, their relationships to each other, their powers, and their limitations. In addition, it identifies the fundamental rights of its subjects.⁶⁸ The Basic Law allocates the powers to the federal organs and guarantees fundamental rights without regard to the federal or state level.⁶⁹ Since the German federal tradition presupposes

(1992); FDP-MdB and Foreign Minister Hans-Dietrich Genscher, *Bald werden sich die Deutschen an Blauhelm-Einsätzen beteiligen*; Marc Fisher, *Germany Facing Harsher Criticism*, WASH. POST, Mar. 31, 1992, at A11. Only 22% in the East and 38% in the West are in favor of German participation in UN actions. Renate Köcher, *Viel Zündstoff für die Verfassungsdebatte*, F.A.Z., Dec. 4, 1991, at 5; Minister of Defense Volker Rühle "Das ist keine Drohgebärde," 30 DER SPIEGEL 32, 34 (1992).

67. German constitutional law has so far differentiated between political aims, *Staatszielen*, and fundamental rights, *Grundrechten*. Political aims do not accord rights to an individual but define objective standards to be met by the state. Konrad Hesse, 14 MARGIN No. 82, at 213 (1984). The translations of *Staatsziel* vary: "a norm describing a goal to be pursued by the state," Philip Kunig, *The Principle of Social Justice*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW* 187, 194 n.22 (Ulrich Karpen ed. 1988); or "state objective," Eckart Klein, *Human Rights of a 3d Generation*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW* 72 (Ulrich Karpen ed. 1988). In contrast, fundamental rights are subjective rights of a defensive or even positive character. Of a defensive character are the classical freedoms; of a positive character are the institutional guarantees, for example those that give private schools a right to state support. Basic Law art. 7. Private ownership is both, art. 14.

68. GEORG JELLINEK, *ALLGEMEINE STAATSLHRE* [General Government Theory] 505 (3rd ed. 1914); Peter Badura, *Direkte Teilhabe oder mittelbare Demokratie*, F.A.Z., Dec. 13, 1991, at 8. This is very similar to the American doctrine. THOMAS C. MARKS & JOHN F. COOPER, *STATE CONSTITUTIONAL LAW* 2-6 (1988).

69. Konrad Hesse, *Grundzüge des Verfassungsrecht in der Bundesrepublik Deutsch-*

statehood of the *Länder* in the fullest sense, the primary task of their constitutions is to define the organizational powers on a state level.

When allocating these different powers, the *Länder* are left with a wide margin of discretion that finds its limitations in the principle of homogeneity.⁷⁰ According to the principle of homogeneity, the *Länder* are obliged to observe the republican and democratic structure based on the rule of law, *Rechtsstaatsprinzip*, as well as on social justice, *Sozialstaatsprinzip*.⁷¹ The principle of homogeneity excludes, for example, the possibility of a state becoming a monarchy or redistributing the allocation of power but allows it to choose different electoral systems or government structures.⁷² The principle of homogeneity above all applies to the protection of fundamental constitutional rights, such as human rights, citizen's rights, or institutional guarantees.⁷³ As a result, state constitutions may not diverge from the tenets laid out by the Basic Law but are free to create new rights.⁷⁴

Nevertheless, fundamental rights are mainly protected by the Basic Law, which directly applies in the *Länder*,⁷⁵ and which preempts conflicting state law.⁷⁶ Therefore, legislatures need not enumerate fundamental rights in the state constitutions at all. Even mere references to the Basic Law appearing in some of the state constitutions⁷⁷ appears to be superfluous from a technical point of view.

Many *Länder* have nevertheless added fundamental rights sections to their constitutions, which rarely confer constitutional protection to substantial rights not already recognized by the Basic Law, including most notably minority rights⁷⁸ and social rights.⁷⁹ For instance, minority

land, 17 MARGIN No. 90 (1990); THEODOR MAUNZ & REINHOLD ZIPPELIUS, DEUTSCHES STAATSRICHT, 115 (28 ed. 1991); Badura, *supra* note 68, at 8.

70. MAUNZ & ZIPPELIUS, *supra* note 69, at 115.

71. Basic Law art. 28(1) §1; MAUNZ & ZIPPELIUS, *supra* note 69, at 114; Kunig, *supra* note 67, at 187, 189. A similar requirement upheld the 1949 Constitution of the G.D.R., art. 109(1) §1.

72. Judgment of Dec. 18, 1968, 24 BVerfGE 367, 390 (F.R.G.) (regarding monarchy); Judgment of June 10, 1953, 2 BVerfGE 307, 319 (regarding allocation of power); Judgment of Oct. 23, 1951, 1 BVerfGE 14, 44 (F.R.G.) (regarding electoral systems); Judgment of July 22, 1969, 27 BVerfGE 44, 56 (F.R.G.) (regarding government structures); MAUNZ & ZIPPELIUS, *supra* note 69, at 116.

73. Basic Law art. 28(3); MAUNZ & ZIPPELIUS, *supra* note 69, at 115.

74. Basic Law art. 142.; MAUNZ & ZIPPELIUS, *supra* note 69, at 115.

75. Hesse, *supra* note 69; MAUNZ & ZIPPELIUS, *supra* note 69, at 115.

76. Basic Law arts. 31, 142.

77. Constitution of Baden Württemberg, art. 2, one of the old states; Draft-Constitution of Mecklenburg Vorpommern by D. Poetzsch-Heffter — a reference to the fundamental rights is envisaged in the preamble, Sven Hölscheidt, *Verfassungsberatungen kommen gut voran*, 32 DAS PARLAMENT [Das Parl.], Aug. 2, 1991, at 7.

78. Constitution of Schleswig Holstein, art. . . for the Danish minority; Draft-Constitution of Brandenburg of May 31, 1991, art. 26, 2 GVBl No. 9, 96 (1991) for the Sorben (Wenden), a Slavic minority; Draft-Constitution of the Free State of Saxony of October 1990, arts. 6 and 6a for the Sorbs and the Silesians, a German minority whose mainland now belongs to Poland.

rights had already received a high level of protection in article 113 of the Constitution of Weimar.⁸⁰ Although social rights had not been afforded protection, the Constitution of Weimar nevertheless included rather contradictory liberal and socialist economic doctrines.⁸¹

The example of the state constitutions and drafts has rekindled the discussion of minority and social rights in the Basic Law.⁸² Although the Basic Law is unlikely to incorporate similar changes, the phrasing of old fundamental rights in the new drafts and the inclusion of new rights and state aims reflect the state of the German society and the changes it is undergoing. The language pertaining to these social rights in the drafts of the five new states is reminiscent of the past socialist regime, but it is this transitional language that represents the present state of their populations.⁸³ The slow adoption of Western constitutional doctrine mirrors this gradual change. In addition, the inclusion of fundamental rights helps to integrate and to stabilize the population,⁸⁴ still defiant of state authority after nearly sixty years of national-socialist and communist dictatorships.⁸⁵

In addition, state constitutions with fundamental rights stress the autonomy of the states against the federal authority and work towards strengthening federalism.⁸⁶ The creation of a strong identification with the state, instead of with the Federal Republic, will be more successful in the East due to several factors, such as historic frontiers, less exposure to modern media or a "circling-of-the-wagons mentality" in the face of perceived Western hegemony.⁸⁷ Confirming this trend, the reallocation of powers between the states and the federal institutions has been specifically mentioned in the recommendations for an amendment of the Treaty of the Unity of Germany.⁸⁸

79. See e.g. Draft Constitution of Brandenburg art. 26 (rights of the Sorbs), art. 29 (right to adult education), art. 47 (right to a home), art. 48 (right to work); Draft Constitution of the Free State of Saxony, art. 6a (rights of the Sorbs), art. 7 (right of a decent living), art. 9 (rights of children). According to the Saxon draft, however, these rights do not have the same force as fundamental rights.

80. OTTO KIMMINICH, *DEUTSCHE VERFASSUNGSGESCHICHTE* 492 (1970).

81. Schneider, *supra* note 14, §3.

82. Klein, *supra* note 64, at 576 (regarding minorities, i.e. the Frisian and Danish minority in the North of Germany and the Sorbs, a Slavic minority in the states of Brandenburg and Saxony). Thomas Darnstädt, *Schöne Worte fürs Volk*, 11 *DER SPIEGEL* 82, 90 (1992). MP for the Social Democrats, Hertha Däubler-Gmelin.

83. Saxony Minister of Justice, Steffen Heitmann, *Sind neue Länderverfassungen notwendig?*, F.A.Z., Mar. 21, 1992, at 4.

84. Speech of Marko Schiemann, Member of the Saxon-Parliament, at the constitution seminar of the Konrad-Adenauer-Endowment, Sept. 12, 1991, at 3.

85. Heitmann, *supra* note 83, at 4.

86. MAUNZ & ZIPPELIUS, *supra* note 69, at 115.

87. Bavaria stands as the only example in the West to stress its autonomy.

88. Treaty of the Unity of Germany, *supra* note 4, art. 5.

B. *Constitutional Developments in the Five New States*

1. Developments After the 1989 Revolution and Before Reunification

Constitutional developments in the five new states have shown two trends, one trying to preserve a modified version of socialism and a perceived identity of East Germany, and the other preparing the five new states for accession to the Federal Republic of Germany and its liberal Basic Law. In the period between the opening of the Berlin Wall on November 9, 1989 and the accession to the Federal Republic on October 3, 1990, the one-party dictatorship of the SED⁸⁹ slowly ceded its place to a "Round Table" government, a transitional government of a motley opposition movement and of the old leaders, to be found in most countries that abandoned communism at that time.⁹⁰ The draft constitution of this "Round Table"⁹¹ favored independence from the Federal Republic of Germany and adhered to some socialist economic concepts, but it stressed the importance of human rights.⁹²

Fundamental rights in this draft constitution enjoy a higher level of protection than in the Basic Law.⁹³ In addition to increased social rights, regional Round Tables tried to find alternatives to the Basic Law's allocation of powers by reinforcing the role of parliament.⁹⁴ Some other draft constitutions, such as those written by the professors of the University of Leipzig or by the heads of certain administrative districts,⁹⁵ are blatantly

89. Sozialistische Einheitspartei Deutschland, Unified Socialist Party of Germany, that takes its name from the partially forced union between the social democratic party, SPD, and the Communist party, KPD, on Apr. 21 1946. The dissenting social democrats were persecuted and many of them were killed.

90. Peter Häberle, *Der Entwurf der Arbeitsgruppe "Neue Verfassung der DDR" des Runden Tisches*, 39 JAHRBUCH DES ÖFFENTLICHEN RECHTS NF 319-349 (1990).

91. The transitional government rejected reenactment of the 1949 Constitution. RÖPER, *supra* note 10, at 150 n.4.

92. Draft Constitution of the Working-Group "New Constitution of the GDR [!]" of a Round Table (Apr. 4, 1991), reprinted in 2 KRITISCHE JUSTIZ [Krit.J.] 226 (1990). The Draft Constitution addresses human rights in arts. 1-40; the right to work in art. 27; the unlimited possibility to expropriate in art. 31; the absence of employers' rights to defend against strikes in art. 39(5) and (6); and the independence of the G.D.R. in art. 41ff. See also Ulrich K. Preuss, *Introductory Remarks Regarding Expropriations*, 2 KRIT.J. 226 (1990). The history of this Draft Constitution is described in Uwe Thaysen, *DAS PARL.* 71, 257, 296 (1990).

93. This higher level of protection is reached by enumerating rights that the Basic Law includes only through interpretations by the Constitutional Court, or by scholars, but it does not specify or add any new rights not recognized by the Basic Law. An example of the former is the right to leave the country, Draft Constitution art. 6(1), or the right to obtain one's own data and the right to privacy, arts. 8(1) and 8(2). An example of the latter is the prohibition to discriminate on grounds of sexual orientation, Draft Constitution art. 1(2) § 2.

94. For the Draft Constitution by a Round Table in Mecklenburg-Vorpommern, see Hölscheidt, *supra* note 77, at 7.

95. Speech of Marko Schiemann, Member of the Saxony Parliament, before the Constitution Committee of the three middle administrative districts (*Bezirksverwaltungen*) of

socialist and attempt to save the old regime.⁹⁶ In contrast, the Round Table in Saxony decided to draft a constitution that was not only inspired by the Basic Law but also anticipated reunification.⁹⁷ In Mecklenburg-Vorpommern a second draft constitution avoided conflicts on fundamental rights or economic theories by limiting its scope to an organizational statute.⁹⁸ Only the revised form of the Saxon draft constitution and the drafts in Mecklenburg-Vorpommern survived to be considered by the state parliaments elected in the fall of 1990. This might be welcomed as a slow but steady retreat of the old regime and its ideologies or as a victory for the West German constitutional doctrine. On the other hand, the development of alternatives or ameliorations was neglected in favor of rather hasty, Basic Law-oriented draftsmanship.⁹⁹

As in the elections to the parliaments of the five new states, the sometimes Utopian grass roots optimism of the civil rights movements did not find a majority and their drafts were discarded. On the Federal Level, this development was mirrored by the fate of an alternative constitution¹⁰⁰ presented to the public by a motley group of left-wing and green prominent citizens from the West and the East. This constitution attempted to transform society into a peaceful ecological society with a grass root-based government.¹⁰¹ Its phrasing and content evoked the communist past of some of its authors, including the writer Christa Wolf.¹⁰² However, only a few of the proposals made by the group have been introduced into the discussion of the committee to change the constitution.¹⁰³

2. Constitutional Developments in the Parliaments

Since the 1990 parliamentary elections in the five new states, procedural rules such as the composition of the constitutional committees and voting requirements have gained importance. Constitutional committees were established in all five new states, although only Brandenburg created its committee through legislation.¹⁰⁴

In Saxony, Saxony-Anhalt, and Thuringia, the committees are com-

Dresden, Leipzig and Chemnitz, Apr. 18, 1990.

96. *Id.*

97. Concluding Remarks to the First Gohrlich Draft Constitution (1990).

98. Verfassung für Mecklenburg-Vorpommern, Draft by von Mutius and Starck (Apr. 1991), reprinted in KOMMISSIONS-DRUCKSACHE 15 (June 5, 1991).

99. Jürgen Schwabe, *Anmerkungen zum Verfassungshandwerk*, 10 ZEITSCHRIFT FÜR RECHTSPOLITIK 361-363 (1991).

100. See Volker Zastrow, *Schöne Ideen, Vorschläge eines "Kuratoriums" zur Grundgesetzreform*, F.A.Z., Jan. 15, 1992 at 10.

101. *Id.*

102. *Id.*

103. The oppositional SPD still favors a referendum. Zastrow, *supra* note 100, at 10. The ruling CDU, especially the Eastern CDU, ranks amending the constitution as a low priority in the face of daily problems. Interview with Stefan Heitman, Minister of Justice of Saxony, reprinted in Günter Bannas, *Ein langer Wunschzettel*, F.A.Z., Oct. 16, 1991, at 14.

104. 4th Draft Constitution of Brandenburg 26 (1991).

posed of members of the parliament in proportion to their representation. Legal experts also participate in their sessions. Following the distribution of seats in Brandenburg, fifteen members of parliament and fifteen non-parliamentarians, representing various social groups and nominated by the parties, serve on the committee.¹⁰⁵ In Mecklenburg-Vorpommern, eleven parliamentarians are accompanied by four experts nominated by the four parties represented in parliament; four experts from the civil rights movement not represented in parliament; one representative from the government; and legal advisors who do not vote.¹⁰⁶ The composition of the committees will be decisive features of the constitutions. Admitting representatives to these committees without any democratic legitimation may be in deference to the role civil rights movements played in the peaceful revolution in Mecklenburg. However, neither the civil rights groups nor the social groups represent the population to be governed by the constitution.¹⁰⁷

A point of dispute is whether to enact the constitutions by plebiscite or by vote in parliament. In addition, the parliaments must decide whether the vote should be on one constitution, on alternative constitutions, or even on each proposed article. This issue has been given widespread media attention, especially by the newspapers that are still dominated by socialists who hope to score points on such popular issues as the right to work.¹⁰⁸ The major parties have avoided taking a clear position in order to maintain their bargaining positions.

From a legal point of view, the parliaments have been given the powers of the *pouvoir constituant*, free to adopt a constitution.¹⁰⁹ Some have argued that reintroducing the Länder under the Basic Law reintroduced the former constitutions as well.¹¹⁰ The parliaments would then have to conform to the former law, requiring in Saxony, for example, a two-thirds majority to create a new constitution.¹¹¹ The Saxon constitution was finally adopted by a two-thirds majority vote in parliament with the consent of the oppositional Social Democratic Party.¹¹²

105. Hölscheidt, *supra* note 77, at 7.

106. Christian Starck, *Verfassungsgebung in den neuen Ländern*, 1 ZEITSCHRIFT FÜR GESETZGEBUNG 1, 8 (1992); Hölscheidt, *supra* note 77, at 7.

107. In Brandenburg the constitutional committee has now decided to continue its work without its non-parliamentarians. *Die CDU will die Verfassung mittragen*, F.A.Z., Dec. 21, 1991, at 4.

108. Interview with Professor Karl-Heinz Schönburg, reprinted in *Die grosse Furcht der Unternehmer vor sozialen Rechten, Brandenburgs Verfassungsentwurf geht diese Woche ins Landtagsplenum*, NEUES DEUTSCHLAND, Dec. 17, 1991, at 5. Neues Deutschland is the former party paper of the SED, formerly the ruling socialist party. In Saxony, the PDS attempted to force parliament by plebiscite to have a plebiscite on the constitution. 10 Informationsdienst PDS (May 19, 1992).

109. Albrecht Randelzhofer, Speech Given at a Seminar of the Konrad Adenauer-Stiftung in Berlin, Sept. 9, 1991 (not published).

110. RÖPER, *supra* note 10, at 168.

111. *Id.* at 168; 1947 Constitution of Saxony, art. 92(2).

112. *Sächsischer Landtag beschlieszt die Verfassung*, F.A.Z., May 27, 1992, at 1.

From a political point of view, given the distrust of authorities in the East and given that the constitutions of the five new states are supposed to have an integrating effect immediately, a plebiscite on alternative constitutions should be permitted. However, a plebiscite may cause embarrassment due to absenteeism of a population preoccupied with adapting to Western economic standards.¹¹³ In Brandenburg, the legislators dared to submit their constitution to a plebiscite, but although the constitution was accepted by an overwhelming majority, voter turnout was below 50%.¹¹⁴

The deadlines of the constitutions had to be postponed several times. Brandenburg designated October 15, 1991 for the second and third sessions in parliament, but eventually had to postpone the sessions following heavy criticism of its draft.¹¹⁵ Thuringia set the end of 1992 as the final date for its constitution.¹¹⁶ The other states have made informal commitments that had to be postponed. For example, Saxony's informal time schedule was similar to Brandenburg's,¹¹⁷ but even the sessions of the constitutional committee have been interrupted due to procedural disputes over the admission of legal advisors.

Similar problems occurred at the Federal level. The most important issue will be whether Basic Law article 146, or other concerns, require a general referendum on the final draft or on the amendments of the constitution.¹¹⁸ Procedural problems arose even before the constitutional committee convened for the first time.¹¹⁹ The ruling Christian Democratic Union (CDU) attempted to dissociate the time frame for the committee's final report from the year of general Federal elections in 1994 in order to prevent the oppositional SPD and other parties from utilizing populist constitutional issues.¹²⁰ The problem of advisors and special interest groups also reappeared as Members of the *Bundesrat* and the *Bundestag* requested to be included in the deliberations.¹²¹

113. Köcher, *supra* note 66, at 5. Prior to reunification, only 14% of the West German population was in favor of a reform of the Basic Law. After reunification, the upheavals in the East, and the ensuing debate on immigration policy in Western Europe, 26% of the West German and 58% of the East German population favored reform.

114. *Id.*

115. DER TAGESSPIEGEL, Sept. 17, 1991, at 7; F.A.Z., Dec. 19, 1991, at 5.

116. Thüringer Landtag Drucksache 1/285 1 (Apr. 10, 1991) (referring to art. 18(2) of the Preliminary Constitution).

117. Radio Interview with Christoph Partsch, Legal Advisor in the Parliament of the Free State of Saxony, on Sachsen Radio, July 1991.

118. Darnstädt, *supra* note 82, at 82, 90, and 93.

119. *Uneinigkeit über den Zeitplan der Verfassungskommission*, F.A.Z., Nov. 8, 1991, at 2.

120. *Id.*; Darnstädt, *supra* note 82, at 82, 90.

121. *Id.*; *Vogel fordert mehr direkte Demokratie*, SÜDDEUTSCHE ZEITUNG, Jan. 17, 1992, at 2.

3. Selected Aspects of the Contents of the State Constitutions

a. Plebiscites

The drafters of the Basic Law witnessed the constant threat to parliamentarism posed by the disapproval of its constituency in the Weimar Republic,¹²² so they incorporated purely indirect democracy into their document.¹²³ In contrast, the new states have all incorporated various forms of plebiscites into their draft constitutions in an attempt to enable democratic participation by an electorate that has little experience in democratic politics. The Western state constitutions also included plebiscitarian elements, but they proved to be prohibitive in constitutional reality.¹²⁴ In accordance with growing criticism in the West, especially by environmentalists and the parties of the left,¹²⁵ and in an attempt to mark a difference with the old regime, all the draft constitutions contain varying elements of direct democracy.

The constitution of conservatively-ruled Saxony¹²⁶ permits citizens to demand that parliament enact a statute by collecting 40,000 signatures.¹²⁷ Should parliament refuse or neglect to enact the statute, a minimum of 450,000 signatures is necessary to initiate a referendum.¹²⁸ In the final draft, the CDU proposed, as a bargaining chip, a requirement that at least 50%(!) of the eligible votes would be necessary to pass a referendum.¹²⁹ This nearly prohibitive obstacle was dropped, and instead the number to initiate a referendum was raised from 200,000 to 450,000.¹³⁰ In addition, the Saxon draft constitution proposes that a referendum may be initiated by one-third of the members of parliament on a statute already voted on, but not yet promulgated.¹³¹

In Brandenburg, governed by a coalition of the Social Democrats and the Eastern Green Party, only 20,000 signatures are needed to demand that parliament enact a statute,¹³² and initiating a referendum requires only 80,000 signatures.¹³³ An affirmative vote by at least one quarter of

122. CRAIG, *supra* note 8, at 416-17.

123. Wolfgang Graf Vitzthum, *Citizens' Participation in State Functioning*, in RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW 159-60, 169 (Christian Starck ed., 1987).

124. Graf Vitzthum, *supra* note 123, at 171-72.

125. *Id.*

126. In Saxony, the center-right CDU forms the government alone.

127. Constitution of the Free State of Saxony, art. 71(1).

128. *Id.*, art. 72(2).

129. *Id.*, art. 72(5). The Gohrischer draft demanded a majority of at least one-third of the eligible votes; the SPD, the oppositional Social Democratic party, demanded a majority of at least one-fifth; the PDS, the party succeeding the formerly ruling communist SED, proposed a simple majority of the votes.

130. Compare Draft Constitution art. 72(5) with Constitution art. 72(2).

131. Constitution of the Free State of Saxony, art. 73.

132. Constitution of the State of Brandenburg, art. 76(1).

133. *Id.*, art. 77(3).

the eligible votes is sufficient to pass the act.¹³⁴ In addition, the Brandenburg constitution permits 150,000 signatures to demand enactment of a statute, 200,000 signatures to initiate a referendum, and a two-thirds majority of at least half of the eligible voters to dissolve parliament.¹³⁵

Although the states differ in population,¹³⁶ the rift between the requirements of the two states is apparent. While the obstacles to a plebiscite were shifted to an earlier stage in the Saxon constitution, Brandenburg entrusts a mere one quarter of its electorate to bypass the legislative mechanism of its otherwise representative democracy. To grant a fraction of the population considerable influence appears to be dangerous in a society that has found it easier to adapt to Western materialism than to Western democratic thinking.¹³⁷ But even in Saxony, the communist PDS lost no time and had no difficulty in obtaining the required 40,000 signatures to demand a referendum.¹³⁸ Especially in a time of economic reconstruction, the population in the five new states tends to cherish such "advantages of the old system" as the alleged absence of unemployment and the availability of kindergartens.¹³⁹ In addition, a rather quixotic voting pattern by the citizenry in the five new states¹⁴⁰ undermines confidence that the Eastern population will master the responsibilities of direct democracy. For example, the PDS is apparently the only party with confidence of obtaining the required votes from its still well organized supporters, and it favors the elimination of all minimum requirements in plebiscites.¹⁴¹

Finally, some plebiscitarian characteristics in the state constitutions might conflict with the Basic Law and, therefore, might be considered unconstitutional. Article 2(4) of the Brandenburg constitution, for example, puts legislation by plebiscite on equal ground with legislation by parliament. The Basic Law, however, interpreted in accord with the principle of homogeneity, gives priority to a representative democracy at the state level, while accepting certain forms of plebiscites.¹⁴² State law that decisively alters the distribution of powers is unconstitutional.¹⁴³ To give

134. *Id.*, art. 78(2).

135. *Id.*, arts. 76(1), 77(3), 78(2). The numbers in the draft constitution had been slightly lower, 100,000 and 150,000. Draft Constitution arts. 78(1), 79(3).

136. Saxony has 3.71 million citizens; Brandenburg has 1.95 million; Saxony-Anhalt has 2.23 million. Starck, *supra* note 106, at 17.

137. Köcher, *supra* note 66, at 5.

138. They obtained 47,037 signatures. *Kein Volksentscheid zu Sachsens Verfassung*, NEUES DEUTSCHLAND, May 26, 1992.

139. *Id.* A similar development can be witnessed in other countries recently liberated from Communism, such as Poland. *Many Poles Now See '81 Martial Law as Justified*, N.Y. TIMES, Dec. 22, 1991, at A8.

140. Compare the smooth voting patterns in the Western state to the rather abrupt and incoherent changes in the Eastern states. Köcher, *supra* note 66, at 5.

141. Alternate Draft Constitution of the Free State of Saxony, art. 72(5), proposed by the PDS and the Eastern Green Party.

142. Jarass & Pieroth, *supra* note 30, at 370.

143. MAUNZ & ZIPPÉLIUS, *supra* note 69, at 114, 438.

plebiscites equal effect would reduce the parliament's power decisively and transform Brandenburg into a direct democracy. As a result, Brandenburg constitution article 2(4) might be declared unconstitutional by the court. In addition, the Brandenburg constitution grants plebiscitarian rights to foreigners and stateless persons as well.¹⁴⁴ This would clearly conflict with the present Basic Law.¹⁴⁵

On the Federal level, these developments began to take shape when the Social Democratic Party demanded more elements of direct democracy in the new constitution.¹⁴⁶ Opponents argue that plebiscites on a federal level would allow minorities to take advantage of absenteeism and push through populist or even minority views.¹⁴⁷ The shift of power from the states to the Federal level has decreased resistance to plebiscites on the state level. However, such resistance remains strong at the Federal level, rendering the implementation of plebiscites at the Federal level improbable.

b. Fundamental Rights and Political Aims

The constitutions in the five new states attempt to mix traditional and newly developed fundamental rights with political aims. Fundamental rights, *Grundrechte*, are subjective rights of a defensive or even positive character,¹⁴⁸ while political aims, *Staatsziele*, do not accord rights to an individual but define objective standards to be met by the state.¹⁴⁹ Except for one of the Mecklenburg-Vorpommern draft constitutions, all of the new states have chosen to include fundamental rights sections similar to that of the Basic Law in order to stress the rights East Germans are now able to enjoy. Careless rewording of Basic Law articles in the state constitutions and blind copying of negligent formulations in the Basic Law are possible disadvantages of this practice.¹⁵⁰ Some of the new

144. Peter J. Winters, *Keine grundsätzliche Immunität, Brandenburgs Verfassungsentwurf*, F.A.Z., Dec. 19, 1991, at 4. The draft constitution left this open to interpretation since it did not define "citizens," *jede Bürgerin und jeder Bürger*, as entitled to start a plebiscite in article 78(1) or to vote in article 23(1). Schwabe, *supra* note 99, at 363. The Constitution in article 76(1) uses *Einwohner*, resident, and article 22(1) uses *Bürger* as well.

145. Judgment of Oct. 31, 1990, 80 BVerfGE 37-59, 60-81 (decision of the Constitutional Court on voting rights of foreigners on the community level in Hamburg and Schleswig-Holstein).

146. *Vogel fordert mehr direkte Demokratie*, SÜDDEUTSCHE ZEITUNG, Jan. 17, 1992, at 2.

147. Zastrow, *supra* note 100, at 10; Badura, *supra* note 68, at 8.

148. The classical freedoms are defensive by nature, and the institutional guarantees that give private schools a right to state support, for example, are positive. Basic Law art. 7. Private ownership is both, art. 14.

149. Hesse, *supra* note 67, at 213.

150. Schwabe, *supra* note 99, at 362, 363. For an example of careless rewording, see Saxon draft constitution art. 7(6), which reduces the state's duty to observe a political aim by profuse definition; Brandenburg draft constitution arts. 23(1) and 78(1) do not define the legal term citizen and use it differently, *jede Bürgerin* as opposed to simply *Bürgerin*. For an example of careless copying, see Saxon draft constitution art. 17(1), which copies the unfortunate wording of Basic Law art. 3(1) ("*..vor dem Gesetz gleich*") that appears to ex-

states have decided to delete fundamental rights that have been implied into the Basic Law by the Constitutional Court.¹⁵¹ These clarifications appear to help avoid misconceptions about the existence of such rights.¹⁵² Unfortunately, other unwritten fundamental rights that may be even more important to East Germans, such as the right to leave the country, have also been left out.¹⁵³

The principle of homogeneity permits states to grant additional, or more extensive fundamental rights, and some of the new states have chosen to do so.¹⁵⁴ Brandenburg's draft created a variety of new fundamental rights, such as the right to social security, to a home, to work,¹⁵⁵ to political participation,¹⁵⁶ to education for adults,¹⁵⁷ and to co-determination in factories.¹⁵⁸ Several of these rights are remnants of the old East German concept of socialism, though the population and the politicians are slow to admit that the advantages from these rights are non-existent.¹⁵⁹ For instance, the right of political participation is ill-defined and superfluous,¹⁶⁰ and the general right to social security is already included in the *Sozialstaatsprinzip*, the principle of social justice.¹⁶¹ The right to co-determination is forwarded by the Social Democratic Party on a federal

clude the legislature from the principle of equality. The same equivocal definition is found in Brandenburg draft constitution article 13. The Round Table draft article 2 had replaced law, *Gesetz*, by public authority, *öffentliche Gewalt*.

151. For example, the right to privacy, *allgemeines Persönlichkeitsrecht*, developed from Basic Law arts. 1 and 2. Judgment of June 3, 1980 54 BVerfGE 148, 153, 208, 217; Judgment of Feb. 8, 1983 63 BVerfGE 131, 142. The extent of this right is difficult to phrase in an article. Part of the right to privacy, the unwritten right to one's own papers, *Recht auf informationelle Selbstbestimmung*, was developed in Judgment of Dec. 15, 1983, 65 BVerfGE 1, and has been included in Brandenburg draft article 12 and Saxon draft article 32.

152. Rita and Frank Taubenfeld, *Problems of Designing Stable Democracies*, 24 INT'L LAW. 689, 706, 707 (1990). The authors arrive at the curious conclusion that there is no right to privacy in the Federal Republic, only the right to one's own papers, even though both rights are implied. Cf. 54 BVerfGE 148, 153 and 65 BVerfGE 1.

153. The Round-Table draft article 6(1) specifically provided for this right.

154. Whereas Basic Law article 8 extends the right to assemble only to Germans, Brandenburg draft article 24(1) and Saxon draft article 22 extend this right to everyone.

155. Brandenburg Draft Constitution arts. 45, 47 and 48.

156. *Id.*, art. 22.

157. *Id.*, art. 29. Article 36 even grants a right to vacations for professional, cultural or political education for adults.

158. *Id.*, art. 50.

159. For a description of the old communist attitude towards social rights as a tool to combat capitalism and towards constitutions as a mere description of a transitional phase in society, see Karl-Heinz Schönburg, *Die grosse Furcht der Unternehmer vor sozialen Rechten*, NEUES DEUTSCHLAND, Dec. 17, 1991, at 5. In the Eastern states, 90% of the population would like to have a right to a home, 83% a right to a place in kindergarten, 85% a right to work. Köcher, *supra* note 66, at 5.

160. Such a right is included in the *Allgemeine Handlungsfreiheit*, the general freedom to act, which is a right interpreted into the Basic Law article 2(1). Judgment of Jan. 16, 1957, 6 BVerfGE 32, 36.

161. See generally Kunig, *supra* note 67, at 187-204.

level,¹⁶² but the right is already included in federal statutory law to a reduced degree.¹⁶³ The final Brandenburg constitution attenuated the rigor of these rights by ambiguous wording that could be interpreted as merely defining state aims.¹⁶⁴ The Saxon constitution attempts to accommodate similar demands from its electorate with western constitutional doctrine by a slightly confused phrasing referring to some of these social rights as political aims.¹⁶⁵

Some of the social rights incorporated in the state constitutions infringe on federal constitutional law and, therefore, must be considered unconstitutional. For example, Brandenburg draft constitution article 51 prohibited the lockout of workers, a subject matter that is Federal concurrent legislation.¹⁶⁶ The final constitution does not contain lockout provisions.

On the Federal level, demands for including social rights have resurfaced in the constitutional committee.¹⁶⁷ Brandenburg's Social Democrats have retreated from rhetoric appealing to a population still imbued with socialism, and they now lean toward opinions more consistent with Western constitutional doctrine. Nevertheless, the effects of their promises linger on.¹⁶⁸ Those who support the inclusion of social rights in the constitution remain unimpressed by the economic effects of those rights and the collapse of socialism.¹⁶⁹ The state draft constitutions demonstrate that some inclusion as political aims might be considered. However, this will depend on whether the new Federal constitution will be subjected to a public referendum. In that case, the doctrinal difference between political aims and fundamental rights should be stressed in order to avoid a dilution of the normative force of the latter.¹⁷⁰ In addition, the question

162. DAS GRUNDSATZPAPIER FÜR DEN SPD VORSTAND, ZUR VERFASSUNG DES DEUTSCHEN STAATES [The Basic Paper of the Executive Board of the SPD, Regarding the Constitution of a German State], reprinted in 26 RECHT UND POLITIK 207, 212 (1990) [hereinafter Basic Papers of the SPD].

163. Judgment of Mar. 1, 1979, 50 BVerfGE 290.

164. See art. 45(1) (right to social security); art. 47(1) (right to a home); art. 48(1) (right to work); art. 21(1) (right to political participation); art. 29(1) (right to education); art. 50 (right to co-determination).

165. For example, article 7 bears the title, "Decent Living Conditions as a *Staatsziel*," and recognizes the right to work, art. 7(1), and the right to a decent residence, art. 7(1), as political aims.

166. Basic Law art. 74.

167. Günter Bannas, *Dem Verfassungsausschuss stehen zähe Beratungen bevor*, F.A.Z., Oct. 16, 1991, at 14.

168. *Opinion of the Liberal Party, FDP*, F.A.Z., Dec. 19, 1991, at 5.

169. Ninety percent in the East and sixty-six percent in the West favor a right to a home; eighty-three percent in the East and sixty-six percent in the West favor a right to kindergarten; eighty-five percent in the East and forty-nine percent in the West favor a right to work. Köcher, *supra* note 66, at 5.

170. Basic Papers of the SPD, *supra* note 166, at 208. Inconsistent with this demand, the Brandenburg constitution enumerates ambiguously worded articles under the heading "2nd Main Chapter: Rights and Political Aims."

whether the Basic Law should remain neutral on economic issues¹⁷¹ will be resolved when social rights or the prohibition of lock outs are forwarded again.¹⁷²

Similarly the inclusion in the state constitutions of environmental protections¹⁷³ will influence the shaping of the Federal constitution. In addition, private interest groups like animal rights and ecological movements have proposed to include such interests as "co-creationship" or the "preservation of the natural resources of life" as political aims.¹⁷⁴ As a result, the constitutional committee no longer disputes inclusion of some protection of the environment as a state aim in the Federal constitution.¹⁷⁵

In addition, the new states' drafts reveal trends that will enrich the discussion on the amendments of the Basic Law. The attention that the state constitutions give to minorities and foreigners¹⁷⁶ will probably result in a change of standing for foreigners in the Basic Law as well.¹⁷⁷ Families and children may also benefit from the attention given to them in the state constitutions.¹⁷⁸

Moreover, real or perceived shortcomings of the Basic Law will be open to discussion again. For instance, the Basic Law's conditional prohibition of private primary schools,¹⁷⁹ an "un-liberal" and "un-dogmatic"

171. Judgment of Mar. 1, 1979, 50 BVerfGE 290, 336; Hesse, *supra* note 67, at no. 22 (Das Grundgesetz lässt bestimmte Fragen, etwa solche der Wirtschaftsverfassung bewusst offen, um hier freier Auseinandersetzung und Gestaltung Raum zu lassen) [The Basic Law leaves open certain questions, for example, that of constitutional guidelines for the economy, with the intention of enabling free discussion and modelling]; Volker Kröning, *Kernfragen der Verfassungsreform*, 5 ZEITSCHRIFT FÜR RECHTSPOLITIK 161, 162 (1991).

172. Hartmut Kliemt, *Im Wettlauf der Gruppenwünsche, Die verletzlichen Chancen für eine gute Wirtschaftsverfassung in der Demokratie, Das Grundgesetz der Bundesrepublik hat sich bewährt*, F.A.Z., Feb. 1, 1992, at 15.

173. *E.g.* Brandenburg art. 39; Mecklenburg-Vorpommern draft art. 10; Saxony art. 10; Saxony-Anhalt art. 35; Thuringia draft art. 19.

174. *Tierschützer fordern "mitgeschöpflichkeit als Staatsziel*, F.A.Z., Feb. 26, 1992, at 1; Darnstädt, *supra* note 82, at 90.

175. Bannas, *supra* note 167, at 14. All parties in the FRG now agree to include such a political aim. BERLINER MORGENPOST, Nov. 17, 1991, at 4.

176. *See e.g.* Brandenburg draft art. 26 (Sorbs), art. 24 (the right to assemble applies to foreigners as well), and art. 23 (might include foreigners, though unconstitutional under the present Basic Law); Saxon draft art. 6, 6a (Sorbs and other minorities), art. 22 (the right to assemble applies to foreigners as well). The Basic Law grants the right to assemble only to German citizens, art. 8, and the right of foreigners to assemble is guaranteed by art. 2, *Allgemeine Handlungsfreiheit*, but can be limited by legislation.

177. At the same time, the very liberal right of asylum will probably be reduced. Sixty-seven percent in the East and seventy-four percent in the West are in favor of such a reduction. Köcher, *supra* note 66, at 5.

178. *E.g.* Brandenburg art. 27 (protection of marriage, family, unmarried hetero- or homosexual couples, and single parents), art. 28 (rights of children); Saxony art. 9 (protection of children as a political aim). The Basic Law protects the institutions of marriage and family, art. 6(1). Children are protected by arts. 1-19 but not specifically. Illegitimate children have a right to equal treatment in accordance with art. 6(5).

179. Art. 7(5).

remnant of anti-elitist thought after World War II, will be open for discussion. Although the state drafts decline to explicitly allow private primary schools, most treat private schools benevolently.¹⁸⁰

Surprisingly, neither the state constitutions nor the constitutional committee at the federal level attempt to reform or to reformulate the ambiguous wording of the Basic Law.¹⁸¹

4. Alternative Concepts of a Constitution: The Case of the State of Brandenburg.¹⁸²

Brandenburg's draft constitution differed most from those of the other states as well as from the present Basic Law. It revealed a different, but interesting, concept of society, including proposals from the opposition parties at the Federal level. Brandenburg's draft constitution — and many of the dissenting opinions in other state draft constitutions — appeared to come close to violating federal law in order to put pressure on the process of amending the Basic Law.¹⁸³ This was, therefore, both a constitutional and a political challenge.¹⁸⁴

The Brandenburg draft demonstrates the gradual transition from communist constitutional doctrine to that of a modern, liberal democratic society more than any other state constitution. Communist constitutional doctrine perceives constitutions as a momentary description of the state of progress of a society towards socialism.¹⁸⁵ Such a constitution tends to portray the relations between its citizens and towards the state more or less truthfully¹⁸⁶ and puts little emphasis on fundamental rights.¹⁸⁷ The Brandenburg draft heavily emphasized fundamental rights, but many of its articles still tended to reorganize society as a whole and to educate its citizens. For example, Brandenburg draft article 13(2) stated that every-

180. Anxious to invite private schools to oppose their state schools, which are still dominated by the teachers of the old regime, Brandenburg and Saxony have given private schools a right to be admitted.

181. Schwabe, *supra* note 99, at 362.

182. Brandenburg is governed by the Social Democratic Party and the Eastern Green Party. As a result, it is the only Eastern state not ruled by the CDU or a coalition of the CDU and the FDP. Its premier, Manfred Stolpe, SPD, has been accused of cooperating with the former Secret Police, STASI, but so far has refused to step down. Rolf Soderlind, *East German Politician Faces New Stasi Allegations*, Reuters, Feb. 16, 1992, available in LEXIS, Nexis Library, Current file. The oppositional CDU so far has not succeeded in placing a convincing opposition leader in Brandenburg. Lothar de Maiziere renounced his post as party leader after similar allegations were made as against Stolpe. *Id.*

183. *Land ohne Geheimdienst*, 34 DER SPIEGEL 50, 50-53, Aug. 19, 1991; Professor Josef Isensee, quoted in *Sind neue Länderverfassungen notwendig?*, F.A.Z., Mar. 21, 1992, at 4.

184. CDU Member of the Brandenburg Parliament Blechinger, quoted in *Sind neue Länderverfassungen notwendig?*, F.A.Z., Mar. 21, 1992 at 4.

185. Schönburg, *supra* note 159, at 5.

186. Taubenfeld & Taubenfeld, *supra* note 152, at 706 n.28, at 707 n.30.

187. The fundamental rights contained in the Constitution of the German Democratic Republic, although superficially impressive in number, were merely declarative and were not enforceable as subjective rights.

one owed everyone else recognition as equals, but the extent of this third-party norm appeared questionable.¹⁸⁸ The adopted constitution did not include this article. Another example of social organization is Constitution article 46, which imposes an affirmative duty upon everyone to defend others from imminent attack, pursuant to the laws.¹⁸⁹ Both of these norms attempt to educate the Brandenburg citizens rather than to protect them against the state. In addition, the inclusion of various social rights, such as the right to work, to a home, or to a place in kindergarten, contributes to the idealistic, if not utopian, character of the constitution.

Burdening the constitution with policy formulations furthers the misconception of the role of a constitution. To achieve the new social norms, the Brandenburg draft exhorted political action. Article 9(2) assured that the state would abolish criminal punishment for abortion during the first trimester of pregnancy. Draft article 2(6) stated confusingly that Brandenburg would assert its already existing rights in the federation.¹⁹⁰ Article 12(3) asserted that Brandenburg would not accept an intelligence service working against subversive activities as a reaction to the formerly omnipotent and omnipresent Eastern secret service, *Staats-sicherheitsdienst*, the Stasi.¹⁹¹ Neither of these draft articles were adopted into the final constitution.

Although the Brandenburg draft constitution was hailed as the most progressive German constitution by some,¹⁹² it failed to distinguish sufficiently between fundamental rights and political aims.¹⁹³ The lack of any distinction between fundamental rights and political aims in the Brandenburg draft constitution further undermined its credibility. Oblivious to economic and social conditions, the social rights may not have been fulfilled. The disenchantment resulting from a constitution that makes more promises than it can keep might be detrimental to fundamental rights as well.

Furthermore, some norms in the draft constitution conflicted with the present Basic Law and contributed to a lack of credibility because

188. Schwabe, *supra* note 99, at 363; Christian Starck, *Constitutional Definition and Protection of Rights and Freedoms*, in *RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW* 19, 47 (Christian Starck ed. 1987).

189. According to the law, everyone must help out when there are accidents, catastrophes, and emergency hardships.

190. Critics have called it a comical article. Schwabe, *supra* note 99, at 363.

191. Stephen Kinzer, *Germans will see Stasi Files*, *N.Y. TIMES*, Nov. 15, 1991, at A6; Ralf Georg Reuth, *Es wird manche überraschungen geben, die Akteneinsicht in der Gauck-Behörde*, *F.A.Z.*, Dec. 27, 1991, at 5.

192. Minister of Interior Ziel (SPD), *quoted in*, *F.A.Z.*, Dec. 19, 1991; Gustav Just (SPD), Head of the Constitution Commission, *quoted in*, 34 *DER SPIEGEL* 50, Aug. 19, 1991.

193. The heading for Brandenburg draft articles 5-56 is "Fundamental Rights and Political Aims," with no further distinction regarding the character of each article. Saxony's draft, to a lesser degree, suffers from the same confusion. For instance, it has different article headings, but phrases fundamental rights and political aims in a confusingly similar fashion. *See e.g.* arts. 7, 9.

they may have been unenforceable. The provision in the Brandenburg draft banning a secret service conflicted with the Basic Law because the article violated the principle of the "defendant democracy."¹⁹⁴

The assurance of cultural autonomy for Sorbs¹⁹⁵ beyond state borders is controversial at best and tarnishes the otherwise remarkable protection of minorities in the constitution.¹⁹⁶ Also, the anti-nuclear and anti-military stance¹⁹⁷ conflicts with federal jurisdiction on this subject matter. It should be added, however, that some constitutions in the western states, introduced shortly after World War II, also contain social rights,¹⁹⁸ such as the prohibition of lock outs, that have been interpreted by the courts as having no force. Nevertheless, including daily politics and utopian strategies in a constitution dilutes its normative force.

Finally, a constitution hindering the ability of a democratically elected government to act will defray its credibility. The Saxon draft constitution's dissenting opinions featured a number of institutions that would have slowed or thwarted decision making. The citizens commissioner, *Bürgerbeauftragter*, was supposed to represent the citizens against the government.¹⁹⁹ If the government did not follow the recommendations of the commissioner, a committee had to be formed to resolve the conflict.²⁰⁰ Similar types of commissioners have been envisaged to ensure human rights, the protection of the environment, equal rights, and the affairs of foreigners.²⁰¹ These commissioners have been branded as parliamentary escapism or as rulers without a majority.²⁰² Even more prob-

194. The concept of a defendant democracy was introduced as a reaction against the Weimar Constitution's neutral stand against its own enemies. The concept gives the Constitutional Court, among others, the power to eliminate parties opposed to democracy. Basic Law art. 21(2). In addition, basic rights can be forfeited. Basic Law art. 18. Günther Dürig, *An Introduction to the Basic Law of the Federal Republic of Germany*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW* 11, 15-16 (Ulrich Karpen ed. 1988).

This article was taken out of the final draft of the constitution. Winters, *supra* note 144, at 4.

195. Brandenburg Constitution art. 25(2).

196. Saxon constitution art. 6(a) is similar but excludes the controversial language.

197. Article 39(9) states that Brandenburg will attempt not to accept nuclear arms on its territory. Equally ripe for conflict was draft article 56, which stated that Brandenburg would abolish lifelong confinement in prison and would grant participatory rights to inmates, a subject matter of federal jurisdiction. Brandenburg constitution article 54 no longer contains such a provision.

198. Uwe Thaysen, *Verfassungsrechtliches Licht im Osten?*, *DER TAGESSPIEGEL*, May 27, 1992, at 7.

199. Art. 53 (Dissenting opinion of the Social Democratic Party).

200. Art. 53(a)(5).

201. Art. 53 (Dissenting opinion of the Green Party and the PDS).

202. Thaysen, *supra* note 199, at 7 (Dietrich Rauschnig at the Hearings of the Saxon parliament, June 15, 1991). However, similar types of commissioners exist in many states for the protection of the right to one's own papers and for the protection of soldiers on the federal level. Basic Law art. 45(b). These federal commissioners are justified by the difficulty of the executive to control use the right of one's own papers against itself and with the problematic position of soldiers when defending their rights against their superiors.

lematic are committees formed to resolve conflicts in which the political parties are not represented according to their strength.²⁰³ A senate-like institution, representing communities,²⁰⁴ would certainly slow down legislation, as would a committee to assess the impact of new technologies on nature and society.²⁰⁵ Although some of these institutions might help decrease the growing alienation between the politicians and their electorate, they may lead to a growing immobility of the parliament or to the rule of a minority even more dangerous to the credibility of a democratic constitution. Nevertheless, faced with the necessity to achieve a two-thirds majority for the constitution, Brandenburg's ruling politicians had to dress down most of their controversial demands.²⁰⁶

V. CONCLUSION

The reunification of Germany has led to important changes in the country as well as in the German Federal Constitution. Germany once again had to pay a very high price for starting World War II, and its constitution now reflects the end of this development. Contradictory expectations from Germany's neighbors regarding its participation in international military actions find their parallel in the constitutional debate on such actions. At the same time, Germany prepares for further integration into the European Community.

With regard to internal politics, the controversies about the draft constitutions of the five new states have shown a deep concern for attaining a very high level of fundamental rights as well as a high level of social rights. The former concern originates from a deep distrust of government and is easily comprehensible in light of East Germany's recent history. Nevertheless, it should be noted that the rest of the East European countries have shown far less concern and readiness to master their past through constitutional safeguards. The concern about social security shows a contradictory dependance on government by a population that had been forced to renounce individualism and entrepreneurship.

On the federal level, these conflicting messages now have to be taken into account when amending the Basic Law. The new amended German Federal Constitution will stress the importance of preserving the environment, and of creating an economy with a strong sense of social justice and perhaps with more elements of direct democracy. However, sudden or abrupt changes in the German constitutional system will not occur because a two-thirds majority is needed to pass any of the amendments.²⁰⁷ Given

203. Art. 49(a)(2) (Dissenting opinion by the SPD, the Green Party and the PDS).

204. Art. 3(a) (Dissenting opinion of the Green Party; *See Zum Landtagsentwurf der Verfassung des Freistaates Sachsen, DIE GEMEINDEKAMMER*, Dresden, June 18, 1991.

205. Art. 47(a) (Dissenting opinion of the SPD).

206. *Sind neue Länderverfassungen notwendig?*, F.A.Z., Mar. 21, 1992 at 4; *Beratungen in Potsdam über die Landesverfassung für Brandenburg*, F.A.Z., Mar. 3, 1992, at 4.

207. Basic Law art. 79(2); Andreas Thewalt, *Schon jetzt lässt der Wahlkampf grüssen*, BERLINER MORGENPOST, Nov. 17, 1991, at 4.

the present distribution of power, the Christian Democrats and the Liberals in government are far from reaching such a majority with the Social Democrats, the Green Party and the PDS. The conflicts over the new Federal constitution have shown, however, that both sides are willing to compromise. The integration of the Eastern and Western parts of Germany will have to be achieved by reaching a common economic level.²⁰⁸ Nevertheless, the debate over amendments to the Basic Law kindled by the draft constitutions in the five new states will also have an integrating effect on the reunited Germany.

208. Kröning, *supra* note 171, at 165.