Introduction

For almost forty years after the federal Constitution went into effect, little attention was paid to state (Land) constitutions in Germany. Amendments were made on numerous occasions, but these were almost always rather minor changes or technical corrections and did not arouse much controversy. At the end of the 1980s and the beginning of the 1990s, this changed dramatically for two major reasons. A scandal in Schleswig-Holstein in 1987 involving allegations that the prime minister (Minister-Präsident) had been guilty of a serious abuse of power (the Barschel/Pfeiffer affair) led to a thorough revision of that Land’s Constitution which included both far-reaching plebiscitary (direct democracy) features and provisions strengthening the parliament’s control over the government (cabinet). The reforms contained in this Constitution have since had a significant impact not only on the new Länder in the East but also on Bremen, Hamburg, Lower Saxony, and Rhineland-Palatinate in the West.

The second cause of a strong interest in Land constitutions was, of course, the collapse of the Wall, the re-emergence of five Länder which had ceased to exist in 1952, and the unification of Germany in October 1990. The result was a third generation of Land constitutions following the first generation before the Basic Law went into effect in 1949 and the second generation which followed that event during the 1950s. The Schleswig-Holstein Constitution of 1990 became an inspiration for the five new Länder in the East, and their constitutions, in turn, encouraged several of the old Länder in the West to revise their constitutions. In addition to Schleswig-Holstein, the old Länder had provided the new Länder in their constitution making with model structures and practices proven...
The Länder and German federalism

by time; now the new Länder were providing their western counterparts with innovative “modern” ideas for constitutional changes.¹

The Basic Law and the Länder

The Constitution of the Federal Republic, called the “Basic Law” (Grundgesetz) owing to its presumed provisional nature until unification was achieved, not only reintroduced a democratic and federal state in the western part of Germany but also forbade in Article 79 any amendments “affecting the division of the Federation into Länder, the participation on principle of the Länder in legislation or the basic principles laid down in Arts. 1 [concerning human dignity] and 20 [concerning democratic principles and the rule of law].”

Like the Bismarck Constitution but unlike the Weimar Constitution, the Länder constituting the Federal Republic are listed by name. This does not mean, however, that the component parts of the federation are constitutionally guaranteed. The reorganization of the Länder through consolidation, annexation, or redrawing of boundaries is constitutional; however, such changes are subject to Article 29 of the Basic Law, which presently requires popular referenda in such matters.

As in the Weimar Republic, the Länder are represented in the Federal Council (again called Bundesrat, as in the Bismarck Reich) by delegates appointed by the Land cabinets. However, with Prussia’s demise after 1945, four new “large” Länder emerged, two each in the North and South of the country. These Länder were given 5 votes each in the Federal Council; medium-size Länder with populations between 2 and 4 million received 4 votes and small Länder 3 votes (all cast as a block).² Government bills are introduced in the Bundesrat before going to the Bundestag. All bills require the approval of the Bundestag. The Bundesrat has a suspensive veto and an absolute veto, the latter regarding legislation affecting the Länder (approximately 60 percent of all bills). Bills affecting the Länder are those in particular that call for Land administration in accordance with the German federal tradition. Constitutional amendments require a two-thirds vote in both houses of parliament.³

Origins and legal framework of Land constitutions

At the Potsdam Conference in July and August 1945, the Four Allied Powers called for a “decentralization of the political structure and the
The development of local responsibility. This provision applied to local and regional structures. In the American, Soviet, and French zones of occupation, Länder were created and constitutions adopted in 1946 and 1947. The British delayed constitution making in their zone until the federal constitution had been adopted.

**Constitutional passage**

Thus, the Constitution of Hesse, the oldest of the still existing postwar Land constitutions, was passed by a constitutional assembly in October and by a popular referendum in December 1946. Bavaria’s Constitution was passed in June 1946 by a constitutional assembly and also in December by a popular referendum. A constitutional assembly passed the Constitution of the Rhineland-Palatinate in April, which was approved by a popular referendum in May 1947. Bremen’s Constitution was passed by the parliament (Bürgerschaft) in September 1947 and by a referendum in October. While the Saarland did not join the Federal Republic until 1 January 1957, its Constitution was passed by a constitutional assembly in November and accepted by the French military government in December 1947.

With the passage of the Basic Law in May 1949 by all of the Land parliaments except Bavaria’s, the British-occupied Länder began their constitution making. Land “by-laws” were passed by the parliament in Schleswig-Holstein in December 1949. Perhaps not surprisingly, given the British skepticism regarding plebiscitary processes, there was no popular referendum. Nevertheless, the Constitution of North-Rhine Westphalia, which also was located in the British Zone, was passed by a bare majority of the parliament in June 1950, followed by a popular referendum the same month. But in Lower Saxony, the “temporary” Constitution was passed by the parliament in April 1951 with no referendum, and the Constitution of Hamburg was passed in June 1952, also with no referendum. In both of these cases, however, approval in parliament was overwhelming.

The most recent of the “original” West German constitutions is that of Baden-Württemberg, adopted in November 1953 by a constitutional assembly but without a referendum, after it was agreed to consolidate Baden, Württemberg-Baden, and Württemberg-Hohenzollern. The first Constitution of Berlin in 1946 was the work of the Allied command. Following the East–West split, a new Constitution for West Berlin was prepared by Germans and approved by the West Berlin parliament and Western Allies in 1950.

Once the five reconstituted Länder of the former GDR joined the Federal Republic in October 1990, their parliaments adopted temporary
constitutions and, except for Thuringia, established constitutional commissions to draft new permanent constitutions. They then devoted much of their efforts between 1991 and 1995 to debating, drafting, and approving new constitutions. By the end of August 1992, Brandenburg, Saxony, and Saxony-Anhalt had completed their constitution making. Saxony and Saxony-Anhalt relied on a two-thirds vote in their parliaments for final approval of their constitutions, while Brandenburg and the new Länder that followed held referenda. Mecklenburg-Vorpommern’s constitution went into effect in May 1993, although a popular referendum that approved it was not held until June 1994. Thuringia followed at the end with its constitution in October 1993, but a confirming referendum was not held until a year later at the time of the federal parliamentary election. A new Constitution for Berlin, which, because of the prior existence of West Berlin, is not considered to be among the “five new Länder,” was approved by referendum in October 1995. Given the strong possibility of a merger between Berlin and Brandenburg, this Constitution was expected to be short-lived; however, the failure in 1996 of the referendum proposal to consolidate the two Länder has changed that assumption.

The strong focus on constitution making in the East, together with the impact of the new Schleswig-Holstein Constitution of 1990, led to considerable discussion of constitutional issues throughout Germany, at least among legal experts, so that several of the “old” West German Länder began considering revisions or even new constitutions. Thus, Lower Saxony implemented, in effect, a new constitution in May 1993, and several other old Länder began considering constitutional changes thereafter.

To summarize the constitution making processes used by the sixteen German Länder in the fifty years after 1945, it can be seen that four procedures were used for accepting constitutions: first, approval by a constitutional assembly followed by a referendum (Bavaria, Hesse, and Rhineland-Palatinate); second, approval by the Land parliament followed by a referendum (Berlin, Brandenburg, Bremen, Mecklenburg-Vorpommern, North-Rhine Westphalia, and Thuringia); third, approval by a constitutional assembly only (Baden-Württemberg and Saarland); fourth, approval by the parliament only (Hamburg, Lower Saxony, Saxony, Saxony-Anhalt, and Schleswig-Holstein). Thus, all of the constitutions were passed first either by a constitutional assembly or by the parliament, and nine of the sixteen constitutions were approved as well in popular referenda.
Basic differences and similarities

Perhaps more significant than the ratification procedure was the “generation” of the constitution. The five Länder that passed the constitutions before the Basic Law went into effect in 1949 wrote “full constitutions” containing organizational structures as well as the whole array of political and social provisions, including basic human rights. Three of these constitutions – those of the Rhineland-Palatinate, Bavaria, and the Saarland – were influenced strongly by Christian thought in reaction to the value-neutral Weimar Constitution and the total disregard of Christian principles by the Nazi regime. The other two Länder – Bremen and Hesse – were affected more by socialist ideas that rejected the economic concentration that allegedly bore some responsibility for the rise of the Nazis.

The second generation of constitutions prepared after 1949 in Baden-Württemberg, Hamburg, Lower Saxony, North-Rhine Westphalia, and Schleswig-Holstein, consisted of documents that were focused more on organizational principles, since the Basic Law provided for basic human and individual rights. The third generation of constitutions in the new Länder followed the western models in large part, but they were also far more influenced by “modern” values, including social rights and state goals. The old Länder that have changed their constitutions since 1990 could also be said to have been influenced by the third-generation “modern” values.

In spite of these generational differences, there is a fundamental constitutional “homogeneity” between the federation and the Länder and among the latter. As in the United States, they all provide for the same basic political system – in this case, a single-chamber parliamentary system (Bavaria’s Senate was eliminated by referendum in 1998). They all must abide by the fundamental rights provided by the Basic Law. They tend to react to the same underlying societal trends, as in the case of demands for certain state goals such as environmental protection. And, above all, they are under the influence of national political parties that are generally well organized, disciplined, programmatic, and in control of Land governments and parliaments.

Amendments

All of the older Land constitutions were amended between 1946 and 1995, ranging from three times in Hesse to thirty-two times in the Rhineland-Palatinate. From the beginning of 1995 through 1997, there were one or more amendments to the constitutions of Baden-Württemberg, Bavaria,
Berlin, Brandenburg, Bremen, Hamburg, Rhineland-Palatinate, and the Saarland. The Basic Law has been amended fifty times.\(^\text{10}\)

There is no common method of amendment among the Länder; however, no amendments are possible without action by their parliaments. Some Länder follow the example of the federal Basic Law which calls for an amendment process requiring a two-thirds vote of the Bundestag and Bundesrat, with the difference that the Länder have only one legislative chamber. In others, voters at large are involved in the amending process through initiatives and/or referenda. No Land constitution gives the people sole authority to amend. Legal challenges to amendments can be taken to the Land constitutional court before a referendum is held.

The focus of amendments has been on adjusting Land law to federal law, just as most amendments to the Basic Law have been concerned with German federalism. Amendments to Land constitutions have served to bring their texts into conformity with Federal Constitutional Court decisions. However, several Land constitutions contain provisions which are not in conformity with the federal Basic Law and, therefore, have been superseded by the Basic Law’s supremacy clause in Article 31.

Many changes in Land constitutions have been responses to demands to strengthen the parliament through petition committees, investigative committees, or through other means of parliamentary control. Some more recent amendments reflect newer concerns, such as protecting the environment or personal privacy and liberty by restricting the dissemination of data.\(^\text{11}\)

### The legal framework for Land constitutions

According to German legal theory, the Länder are “states” that enjoy considerable legal autonomy within the German federal system. They are not derived from the federation but rather are recognized by it.\(^\text{12}\) They are not “states” in the sense of international law,\(^\text{13}\) even though they do have limited powers in certain areas of foreign policy.\(^\text{14}\) As states, the Länder have constitutional autonomy, namely, the right to create their own constitutions.\(^\text{15}\) But this autonomy is exercised within a legal framework provided by the federal Basic Law;\(^\text{16}\) that is, Land autonomy exists simultaneously with the necessity of federal “homogeneity.”\(^\text{17}\) Thus, Article 28, para. 1, requires the constitutional order in the Länder to conform to the principles of a republican, democratic, and social state of law. While federalism and, therefore, multiple Länder are guaranteed by Article 79, para. 3, individual Länder are not. Thus Article 29 provides for boundary changes,
which could include the consolidation of Länder, but only by federal law that is confirmed by a popular referendum in the areas affected. In contrast to the American Constitution, at least until 1925 and after, the Länder are also required by Article 79, para. 3, to accept as their own all federally protected basic rights contained in Articles 1–20. They may, however, add new or other rights that do not violate the federal constitutional rights. There is also, of course, a federal supreme law-of-the-land clause, Article 31, which can serve as a barrier to Länder constitutional provisions. Finally, Article 93, para. 1, sentence 4a, provides for an individual constitutional complaint before the Federal Constitutional Court which could be used to challenge a Länder constitution.¹⁸

While these various restrictions are rather formidable, but hardly surprising in their content, they do not prohibit the Länder from engaging in some degree of experimentation and, as we shall see below, creating some controversy.

**Land parliaments and legislation**

**Land parliaments**

Since a referendum in 1998 eliminated Bavaria’s corporative Senate, which was composed of various professions, crafts, and social groups, all parliaments in the German Länder have one house. These are called the Landtag in the territorial states, Abgeordnetenhaus in Berlin, and Bürgerschaft in Bremen and Hamburg. Seven Länder constitutions prescribe the size of the parliament, which varies from fifty-one members in the small territorial Land of Saarland to 231 in the most populous Land, North-Rhine Westphalia. The Land parliaments are now mostly elected for five years; however, in Bremen, Hamburg, Hesse, Mecklenburg-Vorpommern, and Saxony-Anhalt the term is for four years. Except for Baden-Württemberg and Bremen, the parliamentary period can end earlier by self-dissolution or, in a few cases, by popular referendum at the initiative of the prime minister or parliamentary president.

Most voters probably look to the Land parliaments as the major instrument for reflecting the public will. All elections to the Land parliaments must be “general, direct, free, equal and secret,” in accordance with the Basic Law. In all Länder elections are based on a system of proportional representation with a minimum of 5 percent of the total vote required in order to obtain seats in parliament. This strongly favors political parties,
which are mentioned explicitly in Article 21 of the Basic Law and in some Land constitutions.

**Parliamentary law making**

While Land parliaments are responsible for law making, the extent of their legislative powers depends largely on the powers granted to them by the federal Basic Law. At first glance, these powers appear to be extensive. As we saw in Chapter 2, Article 30 (somewhat like the US Constitution’s Tenth Amendment) states that the Länder are responsible for the exercise of government powers unless the Basic Law provides otherwise. Article 70 also confers legislative powers on the Länder except where such powers are given to the federation. Federal powers are then listed in Article 73, concurrent powers in Article 74. The federal parliament also has the right to pass framework or skeleton laws that the Länder must then “fill in.” Given that the federal government has acted in virtually all areas of concurrent powers, thus excluding Land actions through the federal supremacy clause in Article 31, and has also taken advantage of its framework powers, there is not a great deal of legislative activity left for the Länder to pursue independently. They do retain autonomy in the areas of culture (e.g., education, electronic media, museums, and support for the performing arts, etc.), police, and local government law, and they engage in numerous economic activities including various activities abroad. Of course, where they have some leeway, they adapt federal laws, including especially framework laws, to local regional conditions for administration by the Land bureaucracy.

In 1992 and 1993 a Joint Constitutional Commission met to discuss proposals for changes in the Basic Law as a result of unification. One focus was German federalism. With respect to the legislative powers of the Länder, Article 72, which deals with concurrent powers, was made more precise in order to limit federal preemptions to specific laws rather than to allow the federation to absorb a broad function based on a partial preemption. Another change was to alter the language of Article 72, para. 2, to grant the federation power to pass legislation for the maintenance of equivalent rather than uniform living conditions in the country. Article 75, which provides for federal framework laws, was revised to make more precise the language that grants the federation powers to pass framework legislation regarding higher education.

Other changes relevant to German federalism were made in Articles 24 to grant the Länder the right to transfer with approval of the federal
government certain sovereign powers to transnational border authorities for the purpose of dealing with common problems. Also Article 28 was changed to provide local governments with more autonomous financial responsibility and to grant voting rights in the local elections to citizens of member states of the EU living in Germany.

Direct democracy

All German constitutions declare the people sovereign, as in “[a]ll state [government] authority derives from the people” (Article 20, para. 2 of the Basic Law). But this provision of the Basic Law continues to state that “[i]t shall be exercised by the people by means of elections and referenda and by specific legislative, executive, and judicial organs.” There is no provision for referenda in the federal Basic Law, except in Article 29 which refers to the reorganization of Land boundaries. There was a heated discussion about the old Article 146 of the Basic Law and whether it required a referendum on a new or revised federal constitution before or after unification (in fact, there was no referendum, and the five new Länder joined West Germany by accession under the old Article 23). However, with these exceptions, the Federal Republic’s Basic Law, like the United States Constitution, provides for a representative republic.

In contrast, most of the Länder provided from the beginning for some form of popular initiative and referendum. In accordance with British tradition, Hamburg, Schleswig-Holstein, and Lower Saxony did not (but Schleswig-Holstein’s new Constitution of June 1990 now contains the most far-reaching plebiscitary features of any “old” Constitution). By 1997 all Länder had constitutional provisions for referenda.

One of the most vigorously discussed features of the new constitutions in the East following unification has been their provisions for direct democracy, although this exists in the old Länder as well. One reason for the debate was the effort by the political left to introduce some plebiscitary features into the federal Basic Law. These efforts were rejected in 1993 by the government coalition parties, the Christian Democrats (CDU and CSU) and the Free Democrats (FDP), and were dropped as a result. (An attempt by the SPD–Green coalition government to gain a two-thirds majority in the Bundestag and amend the Basic Law to allow direct democracy failed in the summer of 2002, owing the opposition by the CDU/CSU and a majority of the FDP.) But another reason has to do with the low thresholds in the East for initiating petitions and referenda and for approval of the latter.
There are two-step and three-step procedures in the Länder that have plebiscitary features. The older constitutions generally had two steps only: the Volksbegehren (petition for a referendum) and the Volksentscheid (referendum). The new constitutions in the East, except Thuringia, follow the thoroughly revised 1990 Constitution of Schleswig-Holstein by providing for three steps. First, there is a provision for a “people’s initiative” (Volksinitiative or, in Saxony, Volksantrag, and, in Thuringia, Bürgerantrag), a petition to place certain items or a specific proposal on the Land parliament’s agenda for consideration. The new Schleswig-Holstein Constitution requires only 20,000 signatures for an initiative, or slightly less than 1 percent of the eligible voting population, which is considered to be very low. This set the stage for Brandenburg’s identical requirement of 20,000, Saxony’s requirement of 40,000, and Mecklenburg-Vorpommern’s requirement of 15,000 signatures, the latter two of which constitute slightly more than 1 percent of the population. Saxony-Anhalt’s requirement of 35,000 signatures is about 1.6 percent of its population. These low requirements have been criticized by some for their potential abuse by extremist groups or even by opposition parties.

If the parliament does not act on the proposal within a certain period (e.g., three–six months), interested citizens may complete a petition (Volksbegehren) for a popular referendum on a specific bill. Here the signature requirements are much higher (though still considerably lower than in most West German Land constitutions, where they are generally between 10 and 20 percent), ranging from 80,000 in Brandenburg (about 4 percent of eligible voters) to 450,000 or 12.5 percent in Saxony. If the parliament does not accept the proposal within a set period (e.g., two months), then, third, a referendum will be held on the bill (an alternative bill might be added by the parliament). In striking contrast to the United States, qualified majorities are required for approval of legislative referenda (e.g., a majority of those voting but at least one-fourth of eligible voters in Brandenburg and Saxony-Anhalt, a majority and one-third in Mecklenburg-Vorpommern and Thuringia, but only a majority of those voting in Saxony). In the western constitutions, approving majorities for referenda must constitute typically one-fourth or one-third of the eligible electorate.

It should also be noted that in contrast to the United States, no petitions or referenda are permitted that deal with judges, constitutional decisions, the bureaucracy, or with budgets, taxes, public employee salaries, political finance, or other financial matters. It has been argued that it is hypocritical to deny the people the right to vote in a referendum on questions of
finance, since most public policy issues today involve public finances. Some voices are also skeptical of direct democracy in general, because of the belief that most issues of public policy are too complicated to be settled by public referenda.26

Others suggest that the provisions for direct democracy in the constitutions of the Länder really have the effect of encouraging the political parties to take up the issues raised and place them on the parliamentary agenda. According to this view, plebiscitary features serve to promote public discussion. Some fears have been expressed that plebiscitary features may also lead politicians to avoid difficult decisions in favor of referenda, thus undermining the representative system. There is no evidence so far, however, that this is likely to happen.27

Legislative control

Some observers argue that a more important function than law making exercised by Land parliaments today is control of the executive, in particular the government (cabinet). The nature and extent of this control vary by Land constitution.

In the city-states the parliament elects the entire cabinet: in Berlin, first the lord mayor, then the cabinet; in Bremen and Hamburg, first the Senat (cabinet), which then elects the lord major. In six Länder the parliament elects only the minister-president (prime minister), whose cabinet appointees then require parliamentary approval. In seven Länder the parliaments do not control the prime minister’s formation of the cabinet, which is also the case at the federal level. In all of the Länder, the governments can call for a vote of confidence. Except in Bavaria, the parliaments can also initiate a vote of no-confidence by majority vote of the members. In such cases a government falls only if a majority of parliament can select a new minister-president. This is called a “constructive” vote of confidence, which applies at the federal level as well. In Schleswig-Holstein the government can dissolve parliament if it calls for and fails to receive majority support. Berlin, Hesse, the Rhineland-Palatinate, and the Saarland have a “destructive” vote of confidence, that is, the parliament must provide an alternative within a certain period or be dissolved. Bavaria makes parliamentary control of the government difficult in that the parliament can force the minister-president to resign only indirectly through the state constitutional court.

Of course, routine control of the executive also exists through parliamentary scrutiny of the budget (a key control device), question time for
ministers, petition committees, and investigative committees. However, the strong party discipline in German parliaments can frustrate efforts, especially by the opposition, to control government actions. This occurs despite the fact that all German constitutions proclaim parliamentary delegates to be free in their decisions and not subject to mandates.

Land executives, judiciaries, and social institutions

The executive

Governments (cabinets) stand at the apex of the executive branch in the German Länder. In seven Länder, for example, the prime minister alone appoints and dismisses the other cabinet ministers. In contrast to the general bureaucracy, the ministers have political leadership responsibilities. The constitutional powers of the minister-president are weakest in the three city-states and stronger in the territorial states, especially Schleswig-Holstein. In that Land and in Berlin, the head of government may also continue in office beyond the legislative term, although in practice the lord mayor of Berlin resigns at the end of that period. In twelve Länder the minister-president is constitutionally responsible for general policy guidelines (Richtlinienkompetenz); in the other four Länder the principle of ministerial responsibility and collegiality obtains.

Constitutional provisions regarding administration of the Länder are generally brief. In Bavaria ministries of the cabinet are listed; in other Länder ministries are determined by law or need. As noted above, the Länder administer most federal laws on their own responsibility. While this aspect of German federalism is outlined in some detail in the federal Basic Law, the Land constitutions are silent on the subject. Most constitutions contain brief, general provisions regarding the rule of law, democracy, obligations of public servants, salary, and the like, and the constitutions of all territorial states have sections that guarantee the right of local self-government. They also contain provisions regarding Land finances, including the financing of local governments.

The judiciary

Länder constitutions do not say much about the organization of courts. This has been left to legislation. The major exception concerns rather detailed provisions regarding the Land constitutional courts (Staatsgerichtshof
or Verfassungsgerichtshof). All courts of first instance, excepting the Federal Patents Court, are Land courts. These are divided among local and regional courts, labor courts, administrative courts, finance courts, and social courts (for various social insurance and welfare cases). Land courts of appeal on the facts exist for regular courts as well as for labor, administrative, and social courts. Federal courts for each of these general categories of law are courts of final appeal on points of law. The most important and best known is the Federal Constitutional Court in Karlsruhe, which has decided many cases dealing with German federalism.

In accordance with the Continental tradition, virtually all judges in Germany are career judges, or, in some federal courts and Land constitutional courts, professors of law rather than former attorneys as in Anglo-Saxon countries.

**Institutions of society**

All of the new constitutions contain the traditional protection of certain institutions of society (Einrichtungsgarantien), such as marriage and family; churches and religion; and vocational training, education, schools, and universities. In some constitutions these are included in the sections on basic rights, in others they are contained in separate sections.

Although constitutional references to institutions of society are usually routine and noncontroversial, Brandenburg insisted on provisions protecting both marriage and the family as well as “other permanent forms of common living arrangements.” The new Constitution of Berlin also contains this clause. Some critics have argued that this creates a legal contradiction and probably violates the Basic Law, which protects marriage and the family, while others, though recognizing problems of definition, were more positive in their assessment. This dispute seems to have been resolved in July 2002, when the Federal Constitutional Court upheld the law passed by the SPD–Green coalition government in 2001 allowing homosexual marriages.

**Basic rights, social rights, and state goals**

**Classical basic rights**

As indicated above, the Länder are bound by the basic rights contained in Articles 1–20 of the federal Basic Law. For that reason some Länder have not
bothered to include these rights in their constitutions and have merely indi-
cated that the rights of the federal Constitution apply to them as well. Thus,
Article 4 of the Mecklenburg-Vorpommern Constitution states that “Law
making is bound by the Basic Law for the Federal Republic of Germany,”
and there is no list of conventional basic rights. The other new Länder and
Berlin have more or less repeated the rights listed in the Basic Law.

While the Länder are bound by the Basic Law, they are not prohibited
from adding to the list of federal rights.35 Examples can be found in all the
new constitutions in the eastern Länder, the most common of which are
data protection and protection of the environment. Environmental protec-
tion was added recently to the federal Constitution, while data protection
is provided by federal statute law and constitutional interpretation.

In Article 39 of the Brandenburg Constitution, which deals with the
environment in considerable detail, the final paragraph states that Bran-
denburg will work toward preventing the development, manufacture, or
storage of chemical, biological, or nuclear weapons. In Article 40, para. 5,
the Constitution commits Brandenburg to working toward returning military
installations to civilian use. These are questionable provisions, given
that the federal government has legislative responsibility for such activi-
ties.36 Several other rights have also been added by individual Land consti-
tutions, such as equality provisions for the handicapped or for those who
have a different “sexual identity” (Brandenburg) or “sexual orientation”
(Thuringia).37 Some constitutions also protect animals against inhumane
treatment or avoidable suffering, and Brandenburg even mentions plants
as worthy of respect.38 Not only are art, science, research, and teaching
mentioned in all of the constitutions as objects of protection; art and
culture, as well as sport, are to be promoted by public funds.

While additions to the basic rights provided by the federal Constitution
are clearly acceptable in principle, the weakening of federal rights is more
problematic. An example is provided in the Constitution of Branden-
burg, which contains a provision (Article 31, para. 2) that permits statu-
tory restrictions on research that is injurious to human dignity or
destructive of the natural foundations of life. This implies restrictions on
gene technology and nuclear research and probably violates Article 5,
para. 3 of the Basic Law.39

**Social rights and state goals**

The most controversial provisions of the constitutions in the new Länder
concern social rights and state goals.40 Both can be found in the Basic Law
and in constitutions of the old Länder, but the vigor with which they were pursued in the East raised numerous questions. Social rights, both in the old and the new constitutions include, for example, the right to employment; the right to unemployment compensation; the right to worker protection; the right to education and training; the right to public support in case of illness, old age, or emergency; the right to social security; and the right to housing.

Some combination of these social rights can be found in all of the new constitutions; however, in contrast to the older constitutions of the West, they are often expressed as “state goals.” The two can thus be distinguished more easily in form than in content. However, some provisions are more obviously state goals than social rights, such as the right to death with dignity and the protection against physical or psychological force in marriage, in the family, and in other living arrangements (Brandenburg Constitution).

Social rights and state goals, unlike the classical basic rights, are not generally enforceable in a court of law. To the extent that the new constitutions, Brandenburg’s in particular, did not make this clear, some legal experts have predicted that the courts will be busy in the future trying to decide what is and is not legally enforceable. This carries with it the potential of turning over policy making to judges and removing it from the legislatures.

As can be seen from the examples above, social rights concern entitlements of the modern welfare state that must be included in state budgets (which will remain critically tight in the East for decades to come) and paid for from taxes. These are matters for governments and legislative bodies, not for the courts. State goals usually consist of social rights as well; but they may also refer to other matters, in particular protection of the environment, gender equality, culture, and the aged and handicapped. If expressed as state goals, the new constitutions sometimes qualify their implementation by wording indicating that the Land “is obligated, within the limits of its ability, to realize (or bring about or promote)” (Brandenburg); “contributes toward” (Mecklenburg-Vorpommern); “recognizes the right of each person to” (Saxony); “works within the limits of its powers” (Saxony-Anhalt); or “has the obligation, according to its abilities and within the limits of its powers, to bring about the state goals listed in this constitution” (Thuringia).

Social rights and state goals – and even classical rights – are often mixed together; however, in some constitutions (e.g., Mecklenburg-Vorpommern and Saxony-Anhalt), the first two are clearly separated from classical rights.
As noted above, the constitution of Brandenburg in particular has been criticized severely by legal experts for failing to make a clear distinction between the enforceable classical “negative” rights and, according to their supporters, the “more modern” “positive” rights.

Some critics dismiss social rights and state goals as mere populist rhetoric to make people feel good. More serious criticisms are that they are too vague, that they ignore the supremacy of federal law, that they are left-wing efforts to make good real or imagined deficits in the Basic Law, and, above all, that they raise unrealistic expectations by making promises that cannot be kept.48 Pointing to Brandenburg’s guarantee of the right to employment, one constitutional expert shows how difficult and unrealistic this promise is in a free-market society. He argues that such state goals are “time bombs” waiting to explode when the promissory note comes due, and he refers to them as “current fashions” that have the effect of weakening the responsible legislative bodies.49

However, some commentators have been very sympathetic to these social rights and state goals. One common view is that in spite of the inadequacy of the actual services and benefits promised in the German Democratic Republic (GDR) constitutions, often provided at below standard if at all, many East Germans after unification longed for the security which they felt they enjoyed under the communists. Huge job losses and growing claims for the return of property confiscated or appropriated by the communists in particular led to demands for the right to employment and housing. The new Länder emphasized more than their western counterparts social rights and state goals in order to deal with the concerns and calm the fears of their populations50 and, in the process, bring the constitutions closer to the people.51 Another view is that the modern state has to deal with new challenges, such as environmental protection, that were ignored in the past,52 and it must focus on more than the classical rights that grant freedom from the state; instead, the state today helps to create and secure the conditions of freedom. Regarding the right to employment, for example, “so long as appropriate work cannot be found, there is a claim to job training, further education, and financial support. All of the provisions of the Brandenburg Constitution make clear without illusions that the state has no power to create jobs and that there exists no individual legal claim . . . against the state.”53

One problem with this view is that there are indeed people who have illusions about social rights and state goals. In both Mecklenburg-Vorpommern and Thuringia, the reformed Communist party (PDS) led a campaign against the Constitution before the popular referendum on the
ground that it did not guarantee sufficiently the right to employment and housing. In Mecklenburg-Vorpommern 40 percent of those voting (65 percent of eligible voters) cast their ballots against the Constitution, and in Thuringia about 30 percent of those voting (75 percent of eligible voters) opposed the Constitution.

Other rights and duties

Alongside rights provided by Land constitutions are provisions concerning duties. Citizens have the duty to attend school, raise their families, seek employment, lend assistance in emergencies, serve on juries, be loyal to the democratic state, and, in some cases, serve the common good while participating in the economy.

The role of the Länder in cultural, economic, and welfare activities is also reflected in Land constitutions. Provisions concerning primary, secondary, higher education, and adult education can be found in some constitutions. Religious instruction is usually protected. Performing arts are to be protected and promoted in some Länder. Several constitutions devote a section to the economic and social order. While economic liberty is guaranteed, there may be provisions protecting the middle class and agriculture. Socialization and land reform are also mentioned in some constitutions.

Constitution making in the new Länder

In spite of the focus in the constitutions of the new Länder on social rights and state goals, their constitutions are similar to those of the "old" western Länder. All provide for democratic, parliamentary systems. The one-house legislature is elected every five, rather than four, years in Brandenburg, Saxony, and Thuringia. These same states mention explicitly the opposition, as did Schleswig-Holstein when it revised its Constitution in 1990. The Brandenburg constitution also calls for public meetings of its committees, which is not typical in German parliamentary bodies, and it provides for a minimum committee membership for all party groups in the parliament. In Brandenburg a majority of deputies can withdraw confidence in any minister, whom the minister-president must then remove from office. This and other provisions of the Brandenburg constitution have been criticized by West German legal scholars.
Conclusion

Just as all American state constitutions provide for a similar political system with a directly elected governor and a two-house legislature (with the exception of Nebraska, which has a unicameral legislature), all of the German Länder have provided for single-chamber parliamentary systems. In some Länder the constitution was approved by a qualified vote of the parliament, in others by a referendum, and in still others by both a parliamentary vote and a referendum. In the first generation of Land constitutions before the Basic Law “full constitutions” were written, while in the second generation after 1949 less attention was paid to the basic rights which had been provided by the Basic Law and which included the Länder. The third generation of constitutions in the five new Länder were influenced more by “modern” values such as social rights and state goals, which aroused a good deal of controversy at least among constitutional scholars in the West. While direct democracy was authorized in several of the older Länder, this alternative has become more available since the revisions of the constitution of Schleswig-Holstein in 1990 and the passage of the constitutions of the five new Länder which largely followed the Schleswig-Holstein model. As a result more “plebiscitary” democracy, whether in the form of referenda, the direct election of mayors, or other applications, has become a focus of discussion and controversy since the beginning of the 1990s. Some other differences are less dramatic. For example, just as in the American states the powers of the governors vary, in Germany the heads of government of the city states have somewhat fewer powers than their counterparts in the territorial Länder. In some German Länder elections are held every four years, in others every five years. The number of cabinet ministers varies, as do their titles and areas of responsibility. In spite of all these and other differences, the autonomy the Länder possess is exercised within a legal framework provided by the Basic Law, which requires a considerable degree of “homogeneity.”

Notes


1 Andrea Stiens, Chancen und Grenzen der Landesverfassungen um deutschen Bundesstaat der Gegenwart (Berlin: Duncker & Humblot, 1997), pp. 308–310.
2 Article 51, Basic Law.
4 Potsdam Agreement, sec. 2, para. 9.
6 For a detailed discussion of the constitutions of these three Länder, see Hans von Mangoldt, *Die Verfassungen der neuen Bundesländer* (Berlin: Duncker & Humblot, 1993).
10 Ibid., pp. 59 and 63.
13 See, for example, Niedobitek, *Neuere Entwicklungen*, p. 2.
The following section is based on Arthur B. Gunlicks, “The New Constitutions of East Germany,” *German Politics* 5, no. 2 (August 1996), pp. 262–275; see also the excellent discussion on direct democracy at the local and Land levels in Germany today in Susan E. Scarrow, “Party Competition and Institutional Change,” *Party Politics* 3 (October 1997), pp. 451–472.

For a table showing the date of acceptance of referenda at the local and Land levels into the constitutions of the Länder from 1970 through 1996, see Scarrow, “Party Competition,” pp. 462–463.


Brandenburg Constitution, Article 26, para. 2.


Thuringian Constitution, Article 32; Brandenburg Constitution, Article 39, para. 3.


The discussion about social rights and state goals in the East was influenced by the proposals for a new East German Constitution made by “the Roundtable” in the winter of 1990, before the results of the March parliamentary elections which made clear that a large majority of the population wanted unification with West Germany, not a new East German Constitution. See Bernd Guggenheimer and Tine Stein (eds), Die Verfassungsdiskussion im Jahr der deutschen Einheit (München: Carl Hanser Verlag, 1991), Section IV; Christoph Fedderson, “Die Verfassunggebung in den neuen Ländern: Grundrechte, Staatsziele, Plebiszite,” Die öffentliche Verwaltung (December 1992), p. 990.


Hans von Mangoldt, a leading constitutional expert, has expressed strong criticism of such provisions as being mere vague declarations without any practical effect. See his Die Verfassungen, p. 14.

Peter Häberle suggests that while the distinction between enforceable and
nonenforceable rights needs to be maintained, the traditional dualism may not be all that convincing anymore. Peter Häberle, “Die Verfassungs-bewe-


47 Von Mangoldt, Die Verfassungen, p. 33.


50 Karl-Peter Sommermann, “Die Diskussion,” pp. 78–79, 85. For a view that the focus on various rights was a reaction against almost six decades of dictatorship, see Dietlein, “Die Verfassunggebung,” p. 402.


52 Ibid., p. 9 and Sommermann, “Die Diskussion,” pp. 78–79.

53 Rosemarie Will, “Die Grundrechtsgewährleistungen und die staatssorgani-
sationsrechtlichen Regelungen der neuen Verfassungen im Vergleich,” Kriti-
sche Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 76 (1993), pp. 469, 482.


56 Ibid., p. 79.