

2001

## Ten Years of Basic Law Amendments: Developing a Constitutional Model of German Unification

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### Recommended Citation

Mathew W. Pile, Ten Years of Basic Law Amendments: Developing a Constitutional Model of German Unification, 34 *Vanderbilt Law Review* 633 (2021)

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# Ten Years of Basic Law Amendments: Developing a Constitutional Model of German Unification

## ABSTRACT

*On October 3, 1990, West and East Germany officially united. Although several unification methods were possible, the unification occurred by East Germany acceding to the West German Constitution—the Basic Law—through a series of treaties. This “treaty route” to unification necessarily required amendments to the Basic Law.*

*The primary unification instrument, the Treaty on the Establishment of German Unity, detailed the Basic Law amendments that were immediately essential to effectuating unification. The treaty, however, also contemplated additional Basic Law amendments arising from the consequences of unification. In fact, in the ten years following German unification, the German legislature passed six Basic Law amendments that directly addressed unification issues.*

*This Note analyzes the unification amendments to the Basic Law, identifying both the positive and the negative constitutional effects of German unification. The Note organizes these constitutional effects into a Constitutional Model of German Unification. The Constitutional Model of German Unification: (1) identifies and explains the constitutional characteristics of unification, (2) proposes constitutional recommendations for future unifying States, and (3) predicts the content of future unification amendments to the Basic Law.*

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## I. INTRODUCTION<sup>1</sup>

On October 3, 1990, West and East Germany officially united to form a single, enlarged Federal Republic of Germany.<sup>2</sup> The unification occurred in accordance with the Treaty on the Establishment of German Unity (Unification Treaty) of August 31, 1990.<sup>3</sup> The treaty route to German unification<sup>4</sup> had been strongly endorsed by the East German elections of March 18, 1990.<sup>5</sup> In fact, the Unification Treaty itself was only one of several agreements that

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1. Unless otherwise noted, the Basic Law provisions cited in this Note are available in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz, eds., Supp. 8/91, 3/94, & 8/94); (Gisbert H. Flanz, ed., Supp. 6/95 & 6/99) [hereinafter CONSTITUTIONS]. The English translations of the Basic Law are also provided by this source, unless otherwise noted.

2. KONRAD H. JARAUSCH, *THE RUSH TO GERMAN UNITY* 177-78 (1994).

3. Treaty on the Establishment of German Unity, August 31, 1990, F.R.G.-G.D.R., 30 I.L.M. 457 (1991) [hereinafter Unification Treaty].

4. See *infra* Part II.C.

5. GERT-JOACHIM GLAESSNER, *THE UNIFICATION PROCESS IN GERMANY* 75 (Colin B. Grant trans., 1992).

was necessary to realize German unification.<sup>6</sup> The Treaty Establishing a Monetary, Economic and Social Union (May 18, 1990)<sup>7</sup> and the Treaty on the Final Settlement With Respect to Germany (September 12, 1990)<sup>8</sup> also contributed significantly to the unification process. During and following the 1990 unification Germany amended its Constitution or *Grundgesetz* (Basic Law)<sup>9</sup> thirteen times, affecting forty different articles of that document.<sup>10</sup> The Basic Law had been amended thirty-five times between its original promulgation on May 23, 1949, and German unification in 1990.<sup>11</sup>

This Note will develop a Constitutional Model of German Unification by analyzing the Basic Law amendments that occurred as a result of German unification. The constitutional model will identify and explain the implications of the unique positive and negative constitutional characteristics of German unification. The development of a Constitutional Model of German Unification is important for three reasons: (1) to provide an analytical framework within which future unifying States may evaluate and implement their own unification; (2) to propose a set of constitutional recommendations for future unifying States based on Germany's unification experience; and (3) to predict the content of future Basic Law amendments relating to unification.

Section II will describe the processes by which Germany amends the Basic Law and enters into treaties. This section will also explain the constitutional authority under which Germany entered into the unification process. Next, Section II will detail the constitutionally significant provisions of the Unification Treaty and the Treaty Establishing a Monetary, Economic, and Social Union (MESU Treaty).<sup>12</sup> Finally, this section will briefly describe the content of each of the thirteen Basic Law amendments since 1990.

6. See generally KONRAD H. JARAUSCH & VOLKER GRANSOW, *UNITING GERMANY: DOCUMENTS AND DEBATES 1944-1993* (1994).

7. Treaty Establishing a Monetary, Economic and Social Union, May 18, 1990, F.R.G.-G.D.R., 29 I.L.M. 1108 (1990) [hereinafter MESU Treaty].

8. Treaty on the Final Settlement With Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186 (1990). The World War II victors—the United States, the United Kingdom, the Soviet Union, and France—and West and East Germany concluded this treaty to establish the international conditions under which Germany could unite and to return to Germany its full sovereignty for the first time since World War II. *Id.* arts. 1-7.

9. The Basic Law was so named in 1949 to reflect West Germany's goal of future reunification. Edward M. Andries, *On the German Constitution's Fiftieth Anniversary: Jacques Maritain and the 1949 Basic Law (Grundgesetz)*, 13 EMORY INT'L L. REV. 1, 33 (1999). It was intended "to be a temporary framework for a new democratic system, not a definitive constitution." *Id.*

10. See *infra* Part III.

11. CONSTITUTIONS, *supra* note 1, at v (Supp. 8/91).

12. The Unification Treaty and the MESU Treaty were the only two unification treaties to which West and East Germany constituted the only two parties. The Treaty

Section III will: (1) identify the Basic Law amendments that resulted from unification; (2) detail the provisions of each amendment; (3) explain how each amendment relates to unification; and (4) describe how each amendment contributes to the Constitutional Model of German Unification.

Section IV will define the Constitutional Model of German Unification by: (1) identifying and explaining the seven constitutional characteristics of German unification; (2) proposing constitutional recommendations for future unifying States in light of Germany's unification experience; and (3) predicting the content of future Basic Law amendments relating to unification.

## II. AMENDING THE BASIC LAW AND CONCLUDING TREATIES: PROCESS AND SUBSTANCE

A discussion of the constitutional effects of German unification necessarily implicates two different procedures that will be discussed in this section: the passage of constitutional amendments and the conclusion of treaties. These two processes can be closely related; in fact, a constitutional amendment may be necessary to authorize participation in or fulfillment of a treaty. This raises two additional issues that will be discussed in this section: the sources of constitutional authority for Germany's participation in the unification process, as well as the identification of the essential provisions of the two unification treaties. This section will conclude by briefly describing the content of the Basic Law amendments since 1990.

### A. Amending the Basic Law

The legislative branch of the Federal Government is composed of two houses: the *Bundestag* (Federal Parliament) and the *Bundesrat* (Federal Council).<sup>13</sup> The *Bundestag* is a parliamentary assembly that represents the people of Germany.<sup>14</sup> The two major functions of this lower house are "to pass laws [and] to elect the Federal Chancellor."<sup>15</sup> The *Bundesrat*, on the other hand, is composed of *Land* (state)

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on the Final Settlement With Respect to Germany and other agreements, all involved other parties (typically the World War II victors) and involved completely different sets of obligations. See Treaty on the Final Settlement With Respect to Germany, *supra* note 8. The Unification Treaty and the MESU Treaty, therefore, are the most useful sources with which to analyze the constitutional obligations and goals of the united Germany.

13. SOCIÉTÄTS-VERLAG, FACTS ABOUT GERMANY 122 (1992).

14. *Id.* at 126.

15. *Id.*

representatives who are not elected by the people.<sup>16</sup> The consent of the *Bundesrat* for regular legislation is only required if the legislation concerns the "vital interests of the states" because *Bundesrat* members represent the *Länder* (states).<sup>17</sup>

In accordance with Article 79(2) of the Basic Law, however, *both* houses of the legislature must approve an amendment to the Basic Law.<sup>18</sup> An amendment must be passed "by two-thirds of the Members of the *Bundestag* and two-thirds of the votes of the *Bundesrat*."<sup>19</sup> The constitutional amendment must also be "explicit."<sup>20</sup>

### B. Concluding Treaties

Article 32 of the Basic Law governs the treaty-making power.<sup>21</sup> Article 32 not only allows the Federal Government to conclude treaties, but it also defines situations in which the *Länder* may conclude treaties with foreign states.<sup>22</sup> Both the unification treaties involve the Federal Government's treaty-making power so only the federal treaty-making power will be described in this Note.

Generally speaking, the Federal Government may conclude treaties involving three types of subjects: subjects over which it has exclusive legislative authority under Article 73 of the Basic Law, subjects over which it has concurrent legislative authority with the *Länder*, and subjects over which it has the power to enact general rules.<sup>23</sup> There is unresolved debate as to whether the Federal Government may conclude treaties in areas exclusively legislated by the *Länder*.<sup>24</sup> A non-binding agreement between the Federal Government and the *Länder* (referred to as the "Lindau Arrangement" of November 14, 1957), however, recognizes the practicality of allowing the Federal Government to conclude treaties that may incidentally affect issues of exclusive *Länder* legislative authority.<sup>25</sup>

16. *Id.* at 128.

17. *Id.* The *Bundesrat*, however, reserves the right to object to legislation passed by the *Bundestag*. *Id.* The *Bundestag* can override a *Bundesrat* objection. *Id.*

18. GRUNDGESETZ [Constitution] [hereinafter GG] art. 79(2) (F.R.G.), reprinted in CONSTITUTION, *supra* note 1.

19. *Id.* (italics added).

20. DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 26 (1994); see also GG, *supra* note 18, art. 79(1).

21. GG, *supra* note 18, art. 32.

22. *Id.*

23. Torsten Stein, *Conclusion and Implementation of Treaties in the Federal Republic of Germany*, in REPORTS ON GERMAN PUBLIC LAW 43, 47-49 (Rudolf Bernhardt & Ulrich Beyerlin eds., 1990).

24. *Id.* at 50-51.

25. *Id.* at 51-52.

The subject matter of a treaty determines whether the legislative branch must approve it.<sup>26</sup> The consent of the *Bundestag* (and perhaps of the *Bundesrat*) is required under Article 59(2) of the Basic Law for "[t]reaties which regulate the political relations of the Federation or relate to matters of federal legislation."<sup>27</sup> If consent of the legislative branch is required, the consent must be conveyed in the form of a federal statute.<sup>28</sup> The Basic Law does not require more than a simple majority to consent to a treaty, unless the resulting statute would amend the Basic Law.<sup>29</sup> As is the case with other federal legislation,<sup>30</sup> the subject matter of a treaty governs whether the *Bundesrat* must join the *Bundestag* in consenting to a treaty.<sup>31</sup> Therefore, the subject matter of a treaty resolves two issues: (1) whether the legislative branch must approve the treaty at all; and (2) if consent is required, whether the *Bundesrat* must be included in the approval process.<sup>32</sup>

### C. Sources of Constitutional Authority for German Unification

There is broad consensus that the constitutional authority for German unification could have derived from either Article 23 or Article 146 of the Basic Law.<sup>33</sup> At the time of its adoption, Article 23 provided for the possibility of a future German unification.<sup>34</sup> Article 146, on the other hand, indicated that a new constitution could be drafted should unification ever be considered.<sup>35</sup> The unification

26. GG, *supra* note 18, art. 59(2).

27. *Id.*

28. *Id.*

29. *Id.* arts. 59(2), 79(2).

30. See *supra* note 17 and accompanying text.

31. See GG, *supra* note 18, art. 59(2).

32. *Id.*

33. *Report on the Situation in the German Democratic Republic*, Eur. Consult. Ass., 42nd Sess., Doc. No. 6219 (1990); CURRIE, *supra* note 20, at 88-89; PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* 48-53 (1997); Albrecht Randelzhofer, *German Unification: Constitutional and International Implications*, 13 MICH. J. INT'L L. 122, 123-24 (1991); Paul M. Schwartz, *Constitutional Change and Constitutional Legitimation: The Example of German Unification*, 31 HOUS. L. REV. 1027, 1080-82 (1994).

34. "For the time being, this Basic Law shall apply in the territory of the *Länder* of Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hesse, Lower-Saxony, North-Rhine/Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern. In other parts of Germany it shall be put into force on their accession." GG, *supra* note 18, art. 23 (F.R.G.) (repealed 1990), available in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 237 (Ulrich Karpen, ed., 1988) (italics added).

35. "This Basic Law shall cease to be in force on the day in which a constitution adopted by a free decision of the German people comes into force." GG, *supra* note 18, art. 146 (F.R.G.) (amended 1990), available in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY*, *supra* note 34, at 306.



proceeded under Article 23 because the Article did not require a lengthy constitutional convention to achieve unification (as Article 146 seemed to require).<sup>36</sup>

Article 23 and Article 146 were not the only proposed methods for instituting German unification.<sup>37</sup> "Confederation" was another possible route to unification under the 1990 Basic Law.<sup>38</sup> This unification method allowed both German States to "preserve their individual structures and governments while gradually merging some specified functions."<sup>39</sup> Chancellor Helmut Kohl supported this method in his Ten-Point Plan of November 28, 1989.<sup>40</sup> A lack of political support defeated this option and Chancellor Kohl soon withdrew his proposal.<sup>41</sup>

Hans Modrow, the East German Prime Minister, suggested another early proposal for unification that enjoyed initial support.<sup>42</sup> Modrow proposed a "contractual community" between West and East Germany.<sup>43</sup> This idea, like Chancellor Kohl's confederation proposal, was eventually abandoned due to a lack of political support.<sup>44</sup>

#### D. Provisions of the Two Unification Treaties

This section will identify provisions of the Unification Treaty and the MESU Treaty that were most likely to produce amendments to the Basic Law, even if they have not done so yet. This is important because these treaties delineated the nature of the proposed relationship between West and East Germany. As such, these treaty

36. CURRIE, *supra* note 20, at 88. Article 23 was also chosen, instead of Article 146, because of the potential for "uncertainty and delay." *Id.* A constitutional convention would have also risked weakening the constitution's "desirable features." *Id.*

37. *Report on the Situation in the German Democratic Republic*, *supra* note 33, at 14; QUINT, *supra* note 33, at 47-48.

38. QUINT, *supra* note 33, at 47-48.

39. *Id.* at 47.

40. *Id.* The Ten-Point Plan, which was presented to the *Bundestag*, proposed an agreement between West and East Germany that would have eventually grown into a federation, but only after the German Democratic Republic had instituted a "democratically elected government." *Report on the Situation in the German Democratic Republic*, *supra* note 33, at 14.

41. QUINT, *supra* note 33, at 48. This lack of political support was evidenced by the overwhelming defeat of the proposal by the East German voters in the election of March 18, 1990. *Id.*

42. STEPHEN F. SZABO, *THE DIPLOMACY OF GERMAN UNIFICATION* 21, 26 (1992). Modrow assumed the position of Prime Minister in October 1989 after Erich Honecker stepped down as General Secretary of East Germany's Communist Party. *Id.* at 20, 36.

43. *Report on the Situation in the German Democratic Republic*, *supra* note 33, at 14.

44. *Id.* at 15. Unlike Kohl's plan that was soundly defeated by the East German vote in March 1990 Modrow's plan suffered a "virtually universal refusal from West German political society." *Id.*

provisions either required Basic Law amendment, recommended Basic Law amendment, or foreshadowed Basic Law amendment. A Constitutional Model of German Unification must consider the original intentions of West and East Germany as stated in the two unification treaties. Provisions of the Unification Treaty will be detailed first, despite chronology, because it was the primary instrument in structuring the unification process.

### 1. The Unification Treaty of August 31, 1990

Article 4 of the Unification Treaty detailed the *required* "Amendments to the Basic Law Resulting from Accession."<sup>45</sup> Treaty Article 4(1) provided the updated text<sup>46</sup> of the Basic Law Preamble.<sup>47</sup> Treaty Article 4(2) required that Basic Law Article 23<sup>48</sup> be repealed.<sup>49</sup> Treaty Article 4(3) mandated that a phrase<sup>50</sup> be added to Article 51(2) of the Basic Law.<sup>51</sup> Treaty Article 4(4) required a new Basic Law Article 135a(2)<sup>52</sup> dealing with the former East Germany's debt.<sup>53</sup> Treaty Article 4(5) mandated a new Basic Law Article 143,<sup>54</sup> dealing with transition periods for discrepancies between old East German law and the Basic Law.<sup>55</sup> Finally, treaty Article 4(6) provided the updated text<sup>56</sup> for Basic Law Article 146.<sup>57</sup> The Thirty-Sixth Amendment of September 23, 1990, amended the Basic Law exactly as required by Article 4 of the Unification Treaty.<sup>58</sup>

45. Unification Treaty, *supra* note 3, art. 4. A constitutional challenge alleged that Basic Law amendments could not be passed if their passage could only be effectuated by assenting to a treaty. BVerfGE 82, 316, (316) (an English translation of the holding is *available at* [http://www.virtual-institute.de/en/r8693/er8693\\_208.cfm](http://www.virtual-institute.de/en/r8693/er8693_208.cfm)). The Federal Constitutional Court rejected the challenge, holding that the "treaty route" to German unification "has its constitutional basis in Art. 23 clause 2 of the Basic Law in conjunction with the reunification directive of the Basic Law." *Id.*

46. *See infra* note 110 and accompanying text.

47. Unification Treaty, *supra* note 3, art. 4(1).

48. *See supra* note 34 and accompanying text.

49. Unification Treaty, *supra* note 3, art. 4(2)

50. *See infra* note 113 and accompanying text.

51. Unification Treaty, *supra* note 3, art. 4(3).

52. *See infra* note 114 and accompanying text.

53. Unification Treaty, *supra* note 3, art. 4(4).

54. *See infra* notes 115-16 and accompanying text.

55. Unification Treaty, *supra* note 3, art. 4(5). A constitutional challenge was filed claiming that Article 143 as contained in Article 4(5) of the Unification Treaty, was unconstitutional under Article 79(3) of the Basic Law: "Amendments of this Basic Law affecting the division of the Federation into *Laender*, the participation on principle of the *Laender* in legislation; or the basic principles laid down in Articles 1 and 20 shall be inadmissible." GG, *supra* note 18, art. 79(3). BVerfGE 84, 90 (90). The Federal Constitutional Court rejected the challenge. *See id.* at 94, 90 (90).

56. *See infra* note 119 and accompanying text.

57. Unification Treaty, *supra* note 3, art. 4(6).

58. *See infra* Part III.A.

Article 5 of the Unification Treaty recommended that the united German legislature consider "within two years" whether further Basic Law amendments would be necessary "in connection with German unification."<sup>59</sup> The treaty specifically recommended that four areas be considered for possible amendment: "the relationship between the Federation and the Länder . . . , [the] restructuring [of] the Berlin/Brandenburg area . . . , [the introduction of] state objectives into the Basic Law, and . . . the question of applying Article 146 of the Basic Law and of holding a referendum in this context."<sup>60</sup> This treaty recommendation contributed to the passage of the Thirty-Seventh, Thirty-Eighth, and Forty-Second Amendments.<sup>61</sup>

Article 25 of the Unification Treaty charged the Trust Agency "with restructuring and privatizing the former publicly owned enterprises to bring them into line with the requirements of a competitive economy."<sup>62</sup> At its conception in March 1990, however, the Trust Agency was intended to "preserve the 'peoples' property' rather than to reorganize or privatize it."<sup>63</sup> Article 25 of the Unification Treaty may have contemplated the privatization of East German enterprises but the Fortieth Amendment of December 20, 1993, privatized the railroads for all of Germany.<sup>64</sup>

Article 31(1) of the Unification Treaty assigned the task of "develop[ing] further the legislation on equal rights for men and women" to the united German legislature.<sup>65</sup> This provision, in conjunction with Treaty Article 5, contributed to changing Article 3 of the Basic Law under the Forty-Second Amendment of October 27, 1994.<sup>66</sup>

Article 34(1) of the Unification Treaty declared that "it shall be the task of the legislators to protect the natural basis of man's existence, with due regard for prevention, the polluter-pays principle, and cooperation, and to promote uniform ecological conditions of a high standard at least equivalent to that reached in the Federal Republic of Germany."<sup>67</sup> This provision, in conjunction with Treaty Article 5, contributed to the insertion of Article 20a into the Basic Law under the Forty-Second Amendment of October 27, 1994.<sup>68</sup>

59. Unification Treaty, *supra* note 3, art. 5.

60. *Id.*

61. *See infra* Parts III.B., III.C., and III.F.

62. Unification Treaty, *supra* note 3, art. 25(1).

63. PETER H. MERKL, GERMAN UNIFICATION IN THE EUROPEAN CONTEXT 275 (1993).

64. *See infra* Part III.E.

65. Unification Treaty, *supra* note 3, art. 31(1).

66. *See infra* note 274 and accompanying text.

67. Unification Treaty, *supra* note 3, art. 34(1).

68. *See infra* note 275 and accompanying text.

A pervasive feature of the Unification Treaty is the concept of "transition periods," or established periods during which eastern German law may deviate from the Basic Law or established periods during which the united German law may apply differently to western Germans and to eastern Germans. Treaty Article 4(5) which required a new Basic Law Article 143<sup>69</sup> is an example of a transition period for deviations between eastern German law and the Basic Law.<sup>70</sup> Treaty Article 30(2) which allowed eastern Germans to receive earlier retirement payments than western Germans for a defined period, is an example of a transition period for deviations in the applicability of the law.<sup>71</sup> The significance of transition periods will resurface in the Constitutional Model of German Unification.<sup>72</sup>

## 2. The Monetary, Economic, and Social Union Treaty of May 18, 1990

Article 16 of the MESU Treaty is entitled "Protection of the Environment."<sup>73</sup> This article is significant in three ways. First, Treaty Article 16(1) declared that "[t]he protection of human beings, animals and plants, soil, water, air, the climate and landscapes as well as the cultural and other material property against harmful environmental influences is a major objective . . ."<sup>74</sup> Furthermore, Treaty Article 16(1) resolved that the "aim [of West and East Germany] is the rapid establishment of a German environmental union."<sup>75</sup> Finally, Treaty Article 16(4) determined that "the environmental requirements of [West and East Germany] shall be harmonized and developed at a high level as quickly as possible."<sup>76</sup> Treaty Article 16 aided in the addition of Basic Law Article 20a under the Forty-Second Amendment of October 27, 1994.<sup>77</sup>

The "Protocol on Guidelines," supplementing the MESU Treaty, provided guidelines for the economic union of West and East Germany.<sup>78</sup> Most importantly for this Note, paragraph seven accounted for the privatization of public enterprises.<sup>79</sup> "Enterprises under direct or indirect state ownership . . . will be organized competitively as quickly as possible and transferred to private

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69. See *infra* note 116 and accompanying text.

70. Unification Treaty, *supra* note 3, art. 4(5).

71. *Id.* art. 30(2).

72. See *infra* notes 319-20 and accompanying text.

73. MESU Treaty, *supra* note 7, art. 16.

74. *Id.* art. 16(1).

75. *Id.*

76. *Id.* art. 16(4).

77. See *infra* note 275 and accompanying text.

78. MESU Treaty, *supra* note 7, Protocol on Guidelines A.II.

79. *Id.*

ownership as far as possible.”<sup>80</sup> This provision contributed to the passage of the Fortieth Amendment of December 20, 1993, dealing with the privatization of the railroads.<sup>81</sup>

#### E. *Identification of the Basic Law Amendments Since 1990*

The purpose of this section is to briefly identify and describe the Basic Law amendments since 1990. Not every Basic Law amendment since 1990 fulfilled a unification obligation or resulted from the consequences of the unification process. Nevertheless, there are two reasons for including a short description of every Basic Law amendment since 1990 at this stage. First, because most Basic Law amendments are considered routine and ordinary, they can be difficult to research. One objective of this Note is to facilitate future research involving these amendments by providing the date, general subject matter, and citation of each amendment. Second, if only selected amendments were listed, it would be difficult to challenge the forthcoming analysis. It is another objective of this Note to encourage future debate and discussion regarding these amendments, and a complete list of the amendments is necessary to do so.

The Thirty-Sixth Amendment of September 23, 1990, enacted the six changes to the Basic Law that were mandated by Article 4 of the Unification Treaty.<sup>82</sup>

The Thirty-Seventh Amendment of July 14, 1992, added a second sentence to Article 87d(1) of the Basic Law.<sup>83</sup> This change authorized the Federal Government to determine “[t]he question of public or private status” for air transport.<sup>84</sup>

The Thirty-Eighth Amendment of December 21, 1992, made eight changes to the Basic Law affecting Articles 23, 24(1a), 28(1), 45, 50, 52(3a), 88, and 115e(2).<sup>85</sup> This Amendment not only provided Germany with the constitutional authority to enter the Treaty on European Union,<sup>86</sup> but it also updated the Basic Law to refer to Germany’s participation in the European Union.<sup>87</sup>

80. *Id.*

81. *See infra* note 221 and accompanying text.

82. BGBl. II S. 885, <http://www.bgbl.makrolog.de>; *see also* CONSTITUTIONS, *supra* note 1, at 80, 91, 102, 158, 160, 161 (Aug. 1991) (discussing the changes under the Thirty-Sixth Amendment in English); Unification Treaty, *supra* note 3, art. 4.

83. BGBl. I S. 1254, *supra* note 82; *see also* CONSTITUTIONS, *supra* note 1, at vii (Mar. 1994) (discussing the change under the Thirty-Seventh Amendment in English).

84. GG, *supra* note 18, art. 87d(1) (F.R.G.).

85. BGBl. I S. 2086, [http://www.virtual-institute.de/de/r8693/r8693\\_230.cfm](http://www.virtual-institute.de/de/r8693/r8693_230.cfm); CONSTITUTIONS, *supra* note 1, at viii (Mar. 1994) (discussing the changes under the Thirty-Eighth Amendment in English).

86. Treaty on European Union and Final Act, Feb. 7, 1992, 31 I.L.M. 247 (1992).

87. *See infra* Part III.C.1.

The Thirty-Ninth Amendment of June 28, 1993, dealt with Basic Law Articles 16(2), 16a, and 18.<sup>88</sup> This amendment created stricter requirements for political asylum.<sup>89</sup>

The Fortieth Amendment of December 20, 1993, made eight changes to the Basic Law affecting Articles 73(6), 73(6a), 74(23), 80(2), 87(1), 87e, 106a, and 143a.<sup>90</sup> These changes dealt entirely with federal railroad issues; most importantly, they effected the privatization of the federal railroads.<sup>91</sup>

The Forty-First Amendment of August 30, 1994, inserted two new articles into the Basic Law: Article 87f (dealing with postal affairs and telecommunications) and Article 143b (dealing with the German Postal Service).<sup>92</sup> Furthermore, this Amendment changed existing Articles 73(7), 80(2), and 87(1).<sup>93</sup>

The Forty-Second Amendment of October 27, 1994, made multiple changes to the Basic Law affecting Articles 3, 28, 29, 72, 74, 75, 76, 77, 80, 87, and 93.<sup>94</sup> The Amendment also added new Basic Law Articles 20a, 118a, and 125a.<sup>95</sup> Most significantly for this Note, Article 3 provided for gender equality and constitutional protections for the disabled.<sup>96</sup> Furthermore, Article 20a inserted constitutional protections for the environment.<sup>97</sup>

The Forty-Third Amendment of November 3, 1995, amended the third and fourth paragraphs of Article 106.<sup>98</sup> Article 106 deals with the apportionment of tax revenue, and it "is among the frequently amended articles of the Basic Law."<sup>99</sup>

The Forty-Fourth Amendment of October 20, 1997, revisited Articles 28(2) and 106.<sup>100</sup> The fifth and sixth sentences of Article

88. See BGBl. I S. 1002, *supra* note 82; CONSTITUTIONS, *supra* note 1, at viii-ix (Mar. 1994) (discussing the changes under the Thirty-Ninth Amendment in English).

89. See *infra* Part III.D.1.

90. See BGBl. I S. 2089, *supra* note 82; CONSTITUTIONS, *supra* note 1, at vii-ix (Aug. 1994) (discussing the changes under the Fortieth Amendment in English).

91. See *infra* Part III.E.1.

92. See BGBl. I S. 2245, *supra* note 82; CONSTITUTIONS, *supra* note 1, at ix-x (June 1995) (discussing the changes under the Forty-First Amendment in English).

93. See *id.*

94. See BGBl. I S. 3146, *supra* note 82; CONSTITUTIONS, *supra* note 1, at x-xvi (June 1995) (discussing the changes under the Forty-Second Amendment in English).

95. *Id.*

96. See *infra* notes 229-30 and accompanying text.

97. See *infra* notes 231-32 and accompanying text.

98. BGBl. I S. 1492, *supra* note 82; CONSTITUTIONS, *supra* note 1, at 1-3 (June 1999) (discussing the changes under the Forty-Third Amendment in English).

99. CONSTITUTIONS, *supra* note 1, at 1 (June 1999); see GG, *supra* note 18, art. 106 (F.R.G.).

100. BGBl. I S. 2470, *supra* note 82; CONSTITUTIONS, *supra* note 1, at 1-2, 3-4 (June 1999) (discussing the changes under the Forty-Fourth Amendment in English).

28(2) were amended, and three paragraphs—(5a), (6), and (7)—were added to Article 106.<sup>101</sup>

The Forty-Fifth Amendment of March 26, 1998, outlined the conditions under which “technical means” may be employed to monitor residences.<sup>102</sup> This Amendment added new Articles 13(3), 13(4), 13(5), and 13(6) to the Basic Law, while the old Article 13(3) became the new Article 13(7).<sup>103</sup>

The Forty-Sixth Amendment of July 16, 1998, resulted in a minor change to Article 39(1) of the Basic Law.<sup>104</sup> Article 39 governs *Bundestag* elections.<sup>105</sup>

The Forty-Seventh Amendment of November 29, 2000, provided the circumstances under which a German citizen may be extradited under Article 16(2) of the Basic Law.<sup>106</sup>

The Forty-Eighth Amendment of December 19, 2000, changed the second sentence of Article 12a(4) to allow women to choose to serve in armed military combat.<sup>107</sup>

### III. BASIC LAW AMENDMENTS RESULTING FROM UNIFICATION: IDENTIFICATION AND ANALYSIS

This section will: (1) identify the Basic Law amendments that resulted from unification; (2) detail the provisions of each amendment; (3) explain how each amendment relates to unification; and (4) describe how each amendment contributes to the Constitutional Model of German Unification.

#### A. *Thirty-Sixth Amendment of September 23, 1990*<sup>108</sup>

##### 1. Amendment Provisions

This Amendment, which instituted the German unification provisions, resulted in six changes to the Basic Law. The first change

101. *See id.*

102. *See* BGBl. I S. 610, <http://www.bundesanzeiger.de/bgbl1f/findex98.htm>; CONSTITUTIONS, *supra* note 1, at 3 (June 1999) (discussing the changes under the Forty-Fifth Amendment in English).

103. *Id.*

104. BGBl. I S. 1822, *supra* note 102. CONSTITUTIONS, *supra* note 1, at 4 (June 1999) (discussing the change under the Forty-Sixth Amendment in English).

105. GG, *supra* note 18, art. 39 (F.R.G.).

106. BGBl. I S. 1633, <http://www.bundesanzeiger.de/bgbl1f/findex00.htm> (translated by author).

107. “Sie dürfen auf keinen Fall zum Dienst mit der Waffe verpflichtet werden.” BGBl. I S. 1755, *supra* note 106 (translated by author).

108. *See supra* note 82 and accompanying text.

recognized the unification of Germany in a new Preamble.<sup>109</sup> It now reads:

Conscious of their responsibility before God and humankind,  
Animated by the resolve to serve world peace as an equal part of a  
united Europe, The German people have adopted, by virtue of their  
constituent power, this Basic Law.

The Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North-Rhine/Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law is valid for the entire German people.<sup>110</sup>

The second change to the Basic Law under the Thirty-Sixth Amendment was the removal of Article 23, the authority of which had allowed the German unification process to occur.<sup>111</sup> Therefore, no Article 23 existed until the Thirty-Eighth Amendment of December 21, 1992, which inserted a new Article 23.<sup>112</sup>

The third change to the Basic Law under this Amendment involved Article 51(2). The change added the words "and *Länder* with more than seven million inhabitants six votes" to the existing words of "[e]ach Land shall have at least three votes; *Länder* with more than two million inhabitants shall have four, *Länder* with more than six million inhabitants five . . . ." <sup>113</sup>

The fourth change added all of the language of Article 135a(2). Article 135a deals with "Old Liabilities," and the addition of Article

109. Prior to the Thirty-Sixth Amendment, the Preamble had stated:

The German people in the Länder of Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine/Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden and Württemberg-Hohenzollern, Conscious of their responsibility before God and men, Animated by the resolve to preserve their national and political unity and to serve the peace of the world as an equal partner in a united Europe, Desiring to give a new order to political life for a transitional period, Have enacted, by virtue of their constituent power, this Basic Law for the Federal Republic of Germany. They have also acted on behalf of those Germans to whom participation was denied. The entire German people are called upon to achieve in free self-determination the unity and freedom of Germany.

GG, *supra* note 18, preamble (F.R.G.) (amended 1990), available in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 34, at 226.

110. GG, *supra* note 18, preamble (F.R.G.).

111. See *infra* Part II.C.

112. See *infra* notes 141-47 and accompanying text.

113. GG, *supra* note 18, art. 51(2) (F.R.G.) (italics added); *id.* art. 51(2) (F.R.G.) (amended 1990) (italics added).



135a(2) has the effect of including the former East Germany's old liabilities under this provision.<sup>114</sup>

The fifth change to the Basic Law under the Thirty-Sixth Amendment inserted a new Article 143. Article 143 accounts for the legal transition of eastern Germany by providing time limits for when former East German law must conform to the Basic Law.<sup>115</sup> Article 143(1) now reads:

- (1) Law in the territory specified in Article 3 of the Unification Treaty may derogate from provisions of this Basic Law for a period not extending beyond 31 December 1992 in so far and as long as it is not possible for that territory to comply fully with the requirements of the Basic Law on account of different conditions existing there. Derogations must not violate paragraph (2) of Article 19 and must be compatible with the principles set out in paragraph (3) of Article 79.<sup>116</sup>

As promulgated in May 1949 the original Article 143 provided for the criminal punishment of any person who acted against Germany, its *Länder*, or its Federal President.<sup>117</sup>

Finally, the sixth change under the Thirty-Sixth Amendment replaced the old text of Article 146 with new text. Whereas the old text of Article 146 has already been discussed for its potential constitutional authority in the unification process,<sup>118</sup> the new Article 146 now reads:

This Basic Law, which is valid for the entire German nation following achievement of the unity and freedom of Germany, shall cease to have effect on the day on which a constitution adopted by a free decision of the German people enters into force.<sup>119</sup>

## 2. Relation to Unification

The Thirty-Sixth Amendment enacted the six changes required by Article 4 of the Unification Treaty.<sup>120</sup>

## 3. Contribution to the Constitutional Model of German Unification

Germany can rightfully be said to have fulfilled its constitutional amendment obligations under the treaties because it amended the

114. *Id.* art. 135a (F.R.G.).

115. *Id.* art. 143 (F.R.G.).

116. *Id.* art. 143 (F.R.G.).

117. *Id.* art. 143 (F.R.G.) (amended 1956; repealed 1968), available in CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II 327-28 (Arnold J. Zürcher ed., 1955).

118. See *infra* Part II.C.

119. GG, *supra* note 18, art. 146 (F.R.G.).

120. Unification Treaty, *supra* note 3, art. 4.

Basic Law to fulfill its sole amendment obligation under the two unification treaties.

The significance of this Act as an indicator of West Germany's commitment to unification, however, may be diminished by two factors. First, the changes required by Article 4 of the Unification Treaty were necessarily effectuated prior to unification. Therefore, the sole amendment obligation was fulfilled by the West German legislature prior to unification and during a time of great political support for German unification.<sup>121</sup> Had the unification treaties imposed *post-unification* amendment obligations, the united Germany may have been less likely to honor the amendment obligations due to the economic and social turmoil of the unification process.

Second, unification would not have occurred under Article 23 of the Basic Law without the Thirty-Sixth Amendment. Had West Germany failed to pass the Amendment, as detailed in Article 4 of the Unification Treaty, unification would have proceeded, if at all, at a slower pace under another unification method (probably through a constitutional convention under Article 146 of the Basic Law).<sup>122</sup> The West German legislature's only option was to pass the Thirty-Sixth Amendment and proceed with unification under Article 23 of the Basic Law because West Germany desired to unify quickly without dismantling the Basic Law during a constitutional convention.<sup>123</sup>

Three conclusions may be reached that aid in the development of a Constitutional Model of German Unification because Germany fulfilled its only amendment obligation under the unification treaties *prior* to formal unification: (1) Germany opted for an expedient unification route with some gradual features; (2) it was effective for West and East Germany to impose *pre-unification* amendment obligations, as opposed to *post-unification* amendment obligations; and (3) a better indicator of Germany's commitment to completing unification is to examine the Basic Law amendments that resulted from the consequences (as opposed to the obligations) of the unification process.

#### B. *Thirty-Seventh Amendment of July 14, 1992*<sup>124</sup>

##### 1. Amendment Provision

The Thirty-Seventh Amendment to the Basic Law added a second sentence to Article 87d(1). This article mandates that “[a]ir

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121. See *supra* note 5 and accompanying text.

122. See *supra* note 119 and accompanying text.

123. See *supra* note 34 and accompanying text.

124. See *supra* note 83, 84 and accompanying text.

transport shall be under direct federal administration;" the inserted second sentence states that "[t]he question of public or private status shall be determined by federal legislation."<sup>125</sup> This change allows the Federal Government to privatize air transport.<sup>126</sup>

## 2. Relation to Unification

In accordance with Article 5 of the Unification Treaty, the united German legislature formed a Joint Constitutional Commission to investigate the necessity of further amending the Basic Law to conform to the realities of unification.<sup>127</sup> Article 5 recommended consideration of "the relationship between the Federation and the *Länder* . . . , [the] restructuring [of] the Berlin/Brandenburg area . . . , [the introduction of] state objectives into the Basic Law, and . . . the question of applying Article 146 of the Basic Law and of holding a referendum in this context."<sup>128</sup> On October 28, 1993, the Joint Constitutional Commission issued its Final Report.<sup>129</sup> The Final Report recommended amendments to twenty-three Basic Law articles.<sup>130</sup> The single change under the Thirty-Seventh Amendment effectuated one of the Joint Constitutional Commission's recommendations.<sup>131</sup>

## 3. Contribution to the Constitutional Model of German Unification

In a technical sense, there is no question that the Thirty-Seventh Amendment resulted from the mandate of Article 5 of the Unification Treaty. In a practical sense, however, there are three reasons to doubt the Amendment's actual relationship to unification. First, the Joint Constitutional Commission issued its Final Report more than a year after the Thirty-Seventh Amendment's passage.<sup>132</sup> Although this fact alone does not destroy the possibility that the Amendment

125. GG, *supra* note 18, art. 87d(1) (F.R.G.).

126. *Id.*

127. CONSTITUTIONS, *supra* note 1, at vii (Mar. 1994). The Joint Constitutional Commission began its work on January 16, 1992. *Id.*

128. Unification Treaty, *supra* note 3, art. 5.

129. See JOINT CONSTITUTIONAL COMMISSION, FINAL REPORT, October 28, 1993, available in CONSTITUTIONS, *supra* note 1, at 13 (Mar. 1994) [hereinafter FINAL REPORT].

130. *Id.*

131. *Id.* In the end, nearly all twenty-three of the Joint Constitutional Commission's recommendations were passed as Basic Law amendments under the Thirty-Seventh, Thirty-Eighth, and Forty-Second Amendments. See *infra* notes 160, 272 and accompanying text.

132. The Thirty-Seventh Amendment passed on July 14, 1992, and the Joint Constitutional Commission issued its Final Report on October 28, 1993. See *supra* note 83 and accompanying text; FINAL REPORT, *supra* note 129, at 13.

actually resulted from the Joint Constitutional Commission, it at least casts some doubt on the Joint Constitutional Commission's role in the passage of the Thirty-Seventh Amendment.

Second, authorizing the Federal Government to privatize air transport does not fit into any of the categories proposed by Article 5 of the Unification Treaty for consideration by the Joint Constitutional Commission.<sup>133</sup> Although Article 5 did not preclude the Joint Constitutional Commission from considering other constitutional needs arising from unification, the Joint Constitutional Commission remained within the categories listed in Article 5 for most of its other recommendations.<sup>134</sup> Concededly, privatization of air transport may have been an actual necessity arising from unification (as was privatization of the rail system under the Fortieth Amendment),<sup>135</sup> but there were external pressures to privatize air transport that were not present for the privatization of the railway system.<sup>136</sup>

Finally, the European Community (EC) pressured its Member States to privatize air transport.<sup>137</sup> The EC sought to "integrate national markets," with the added benefit of promoting competition.<sup>138</sup>

Therefore, in enabling the Federal Government to privatize air transport, Germany may have been acting with mixed purposes—easing the pressures of unification and EC membership with a single solution. Three conclusions contribute to the development of a Constitutional Model of German Unification: (1) the Joint Constitutional Commission may not have considered the pressures of unification in isolation; (2) the Joint Constitutional Commission may have had persuasive authority prior to the issuance of its Final Report; and (3) Germany may be more willing to amend the Basic Law to solve a problem of unification when the Amendment will also comply with an EC demand.

133. Unification Treaty, *supra* note 3, art. 5.

134. The eight recommendations that were passed under the Thirty-Eighth Amendment also did not appear to fit into any of the categories proposed by Article 5 for consideration by the Joint Constitutional Commission. See Section III.C.1. The Thirty-Seventh and Thirty-Eighth Amendments, however, are similar in that they can both be attributed to European pressures and unification pressures. See *supra* Part III.B.3; *infra* Part III.C.3.

135. See *infra* Part III.E.

136. Furthermore, privatization of the railway system did not occur pursuant to the recommendations of the Joint Constitutional Commission. See Section III.E.2.

137. See Jürgen Basedow, *Airline Deregulation in the European Community—Its Background, Its Flaws, Its Consequences for E.C.-U.S. Relations*, 13 J.L. & COM. 247, 253 (1994).

138. *Id.* at 247-48.

C. *Thirty-Eighth Amendment of December 21, 1992*<sup>139</sup>

1. Amendment Provisions

Eight changes occurred under the Thirty-Eighth Amendment that not only provided Germany with the constitutional authority to enter the Treaty on European Union,<sup>140</sup> but also updated the Basic Law to refer to Germany's participation in the European Union. The first change was the insertion of a new Article 23, which includes seven paragraphs. Article 23(1) provides the constitutional authority for Germany's participation in European integration, including its participation in the European Union.<sup>141</sup> Article 23(2) establishes that the *Bundestag* and the *Länder* "shall be involved in matters concerning the European Union."<sup>142</sup> Article 23(3) describes the role of

139. See *supra* note 85-87 and accompanying text.

140. Unlike the Unification Treaty, no clear constitutional authority existed for Germany to enter the Treaty on European Union. CURRIE, *supra* note 20, at 97. Article 23 had been abrogated from the Basic Law under the Thirty-Sixth Amendment, so the only possible authority for entering the European Union under the existing Basic Law might be found under Article 24(1). *Id.* Article 24(1) provided for Germany's participation in international organizations; however, the European Union arguably did not qualify as an international organization under Article 24(1). GG, *supra* note 18, art. 24(1) (F.R.G.); CURRIE, *supra* note 20, at 97.

Recognizing the difficulty in citing Article 24(1) as constitutional authority for entering the Treaty on European Union, Germany's "approval of the [treaty] was coupled with adoption of a new Article 23(1)." CURRIE, *supra* note 20, at 97. The new Article 23(1) expressly authorized entry into the European Union by allowing Germany to transfer some of its sovereign powers to the European Union. See *infra* note 141 and accompanying text.

Although the new Article 23(1) seemed to provide Germany with the required constitutional authority to enter the European Union, a constitutional challenge was filed on the basis that the new Article 23(1) violated other provision of the Basic Law. CURRIE, *supra* note 20, at 99. Specifically, the challengers argued that the new Article 23(1) violated Article 79(3) which suggests that massive changes (such as entry into the European Union) could only be authorized by a vote of the people. *Id.* at 98; GG, *supra* note 18, art. 79(3) (F.R.G.). The German Constitutional Court rejected the challenge in 1993, thereby allowing Germany's membership in the European Union under the authority of the new Article 23(1). BVerfGE 89, 155 (155-57).

141. "With a view to establishing a united Europe[,] the Federal Republic of Germany shall participate in the development of the European Union, which is committed to democratic, rule-of-law, social and federal principles as well as the principle of subsidiarity, and ensures protection of basic rights comparable in substance to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by law with the consent of the *Bundesrat*. The establishment of the European Union as well as amendments to its statutory foundations and comparable regulations which amend or supplement the content of this Basic Law or make such amendments or supplements possible shall be subject to the provisions of paragraph (2) and (3) of Article 79." GG, *supra* note 18, art. 23(1) (F.R.G.) (italics added).

142. GG, *supra* note 18, art. 23(2) (F.R.G.).

the *Bundestag* in the European Union's legislative process.<sup>143</sup> Article 23(4) details the extent to which the *Bundesrat* must be consulted in the Federal Government's decision-making regarding the European Union.<sup>144</sup> Article 23(5) describes the extent of the Federation's exclusive legislative jurisdiction in matters pertaining to the European Union.<sup>145</sup> Article 23(6) governs instances dealing with "the exclusive legislative jurisdiction of the *Länder*."<sup>146</sup> Finally, Article 23(7) requires the consent of the *Bundesrat* in all laws regarding the details of Articles 23(4), 23(5), and 23(6).<sup>147</sup>

The second change to the Basic Law under the Thirty-Eighth Amendment was the addition of Article 24(1a). Paragraph 1a provides for the participation of the *Länder* in international organizations: "Where the *Länder* have the right to exercise governmental powers and discharge governmental functions[,] they may with the consent of the Federal Government transfer sovereign powers to transfrontier institutions in neighboring regions."<sup>148</sup>

The third change to the Basic Law under the Thirty-Eighth Amendment was the addition of the third sentence to Article 28(1). The sentence reads: "In county and municipal elections persons who are nationals of member states of the European Community, too, may vote and shall be eligible for election in accordance with European Community law."<sup>149</sup>

A fourth change under the Thirty-Eighth Amendment provided a new Article 45. The previous Article 45 was repealed in August 1976.<sup>150</sup> The new Article 45 mandates the *Bundestag* to "appoint a Committee on European Union. It may empower the Committee to exercise the *Bundestag's* rights in relation to the Federal Government in accordance with Article 23."<sup>151</sup>

A new Article 52(3a) constituted the fifth change under the Thirty-Eighth Amendment. This article authorizes the *Bundesrat* to "form a Chamber for European Affairs whose decisions shall be considered decisions of the *Bundesrat* . . ."<sup>152</sup>

The Thirty-Eighth Amendment's sixth change added a second sentence to Article 88. The Federal Bank's "responsibilities and powers may, within the framework of the European Union, be

143. *Id.* art. 23(3) (F.R.G.).

144. *Id.* art. 23(4) (F.R.G.).

145. *Id.* art. 23(5) (F.R.G.).

146. *Id.* art. 23(6) (F.R.G.) (italics added).

147. *Id.* art. 23(7) (F.R.G.).

148. GG, *supra* note 18, art. 24(1a) (F.R.G.) (italics added).

149. *Id.* art. 28(1) (F.R.G.).

150. CONSTITUTIONS, *supra* note 1, at 99.

151. GG, *supra* note 18, art. 45 (F.R.G.) (italics added).

152. *Id.* art. 52(3a) (F.R.G.).

transferred to the European Central Bank, which is independent and whose primary aim is to safeguard price stability.”<sup>153</sup>

The Thirty-Eighth Amendment’s seventh change amended Article 50 to refer to the European Union: “The *Länder* shall participate through the *Bundesrat* in the legislative process and administration of the Federation in matters concerning the European Union.”<sup>154</sup>

Finally, the eighth change under the Thirty-Eighth Amendment updated the second sentence of Article 115e(2) to refer to the proper Basic Law articles.<sup>155</sup>

## 2. Relation to Unification

In accordance with Article 5 of the Unification Treaty, the united German legislature formed a Joint Constitutional Commission to investigate the necessity of further amending the Basic Law to conform to the realities of unification.<sup>156</sup> Article 5 recommended consideration of “the relationship between the Federation and the *Länder* . . . , [the] restructuring [of] the Berlin/Brandenburg area . . . , [the introduction of] state objectives into the Basic Law, and . . . the question of applying Article 146 of the Basic Law and of holding a referendum in this context.”<sup>157</sup> On October 28, 1993, the Joint Constitutional Commission issued its Final Report.<sup>158</sup> The Final Report recommended amendments to twenty-three Basic Law articles.<sup>159</sup> The eight changes under the Thirty-Eighth Amendment enacted eight of the Joint Constitutional Commission’s recommendations.<sup>160</sup>

153. *Id.* art. 88 (F.R.G.) (italics added).

154. *Id.* art. 50 (F.R.G.) (italics added).

155. “The Joint Committee shall not be empowered to enact legislation pursuant to paragraph (1), second sentence, of Article 23[;] paragraph (1) of Article 24[;] or Article 29.” GG, *supra* note 18, art. 115e(2) (F.R.G.). Article 115e(2) had previously referred to just paragraph (1) of Article 24 and Article 29. *Id.* art. 115e(2) (F.R.G.) (amended 1992).

The Joint Committee may, during times of defense, exercise the status of both the *Bundestag* and the *Bundesrat* should it determine that the *Bundestag* is unable to convene. *Id.* art. 115e(1) (F.R.G.).

156. CONSTITUTIONS, *supra* note 1, at vii (Mar. 1994). The Joint Constitutional Commission began its work on January 16, 1992. *Id.*

157. Unification Treaty, *supra* note 3, art. 5.

158. FINAL REPORT, *supra* note 129.

159. *Id.*

160. *Id.* In the end, nearly all twenty-three of the Joint Constitutional Commission’s recommendations were passed as Basic Law amendments under the Thirty-Seventh, Thirty-Eighth, and Forty-Second Amendments. See *supra* note 131 and accompanying text; *infra* note 272 and accompanying text.

In addition, German unification acted to "accelerate the process of European integration."<sup>161</sup> With German unification officially accomplished, Germany turned its attention to participating in the integration of Europe.<sup>162</sup> One scholar noted that it was "a symbolic act of profound significance" that Germany chose to seek European integration under an amended Article 23 because the prior Article 23 allowed Germany to accomplish German unification.<sup>163</sup> Therefore, insofar as Germany made European integration a higher priority after German unification, unification inspired an earlier passage of the Thirty-Eighth Amendment's provisions than would have occurred without unification.

### 3. Contribution to the Constitutional Model of German Unification

The analysis for the Thirty-Seventh Amendment's contribution to the Constitutional Model of German Unification also applies to the Thirty-Eighth Amendment.<sup>164</sup> In similar fashion, the Thirty-Eighth Amendment passed prior to the issuance of the Joint Constitutional Commission's Final Report.<sup>165</sup> Furthermore, the Joint Constitutional Commission's recommendations under this Amendment do not appear to fit into any of the categories proposed by Article 5 of the Unification Treaty for consideration.<sup>166</sup> Finally, European pressures to join the European Union, not just the pressures of unification, could also explain the Amendment.<sup>167</sup>

The Thirty-Eighth Amendment, however, adds one feature to the development of a Constitutional Model of German Unification: The constitutional effects of German unification will become increasingly difficult to identify as Germany also seeks to integrate with Europe.

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161. Andreas Falke, *An Unwelcome Enlargement? The European Community and German Unification*, in GERMAN UNIFICATION: PROCESS AND OUTCOMES 163, 169 (M. Donald Hancock & Helga A. Welsh eds., 1994).

162. TIMOTHY GARTON ASH, IN EUROPE'S NAME: GERMANY AND THE DIVIDED CONTINENT 384-88 (1993).

163. *Id.* at 385.

164. *See supra* Part III.B.3.

165. The Thirty-Eighth Amendment passed on December 21, 1992, and the Joint Constitutional Commission issued its Final Report on October 28, 1993. *See supra* note 85 and accompanying text; FINAL REPORT, *supra* note 129, at 13.

166. Unification Treaty, *supra* note 3, art. 5.

167. *See supra* notes 161-63 and accompanying text.



### D. *Thirty-Ninth Amendment of June 28, 1993*<sup>168</sup>

#### 1. Amendment Provisions

The Thirty-Ninth Amendment to the Basic Law, affecting three separate articles, created stricter political asylum laws. The first change repealed the second sentence of Article 16(2), which had guaranteed that “[p]ersons persecuted on political grounds shall enjoy the right of asylum.”<sup>169</sup>

The second change, inserting a new Article 16a, reaffirms that “[a]nybody persecuted on political grounds has the right of asylum.”<sup>170</sup> Article 16a(2), however, denies the right of asylum to anyone “who enters the country from a member state of the European Communities or another third country where the application of the Convention relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms is assured.”<sup>171</sup> Furthermore, Article 16a(3) grants authority to the *Bundesrat* to determine whether additional countries should be presumed not to have politically persecuted anyone.<sup>172</sup> Article 16a(4) describes the circumstances under which the court can suspend the termination of a person’s political protection in Germany.<sup>173</sup> Finally, Article 16a(5) declares that “[p]aragraphs 1 to 4 do not conflict with international agreements of member states of the European Communities among themselves and with [certain] third countries . . . .”<sup>174</sup>

The final change under the Thirty-Ninth Amendment updated Article 18. Article 18 had directed the reader to consult Article 16 for political asylum; now Article 18 refers the reader to Article 16a for political asylum.<sup>175</sup>

#### 2. Relation to Unification

The Thirty-Ninth Amendment of June 28, 1993, represented a radical change in Germany’s political asylum law. Prior to the Amendment, the Basic Law was the only constitution in the world to

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168. See *supra* note 88, 89 and accompanying text.

169. GG, *supra* note 18, art. 16(2) (F.R.G.) (repealed 1993).

170. *Id.* art. 16a(1) (F.R.G.).

171. *Id.* art. 16a(2) (F.R.G.).

172. *Id.* art. 16a(3) (F.R.G.).

173. *Id.* art. 16a(4) (F.R.G.).

174. *Id.* art. 16a(5) (F.R.G.).

175. *Id.* art. 18 (F.R.G.) (amended 1993); *id.* art. 18 (F.R.G.).

grant refugees the individual right of political asylum.<sup>176</sup> In order to understand the motivations behind this significant change, it is necessary to describe the German refugee situation, including the resulting social pressures following the fall of the Berlin Wall.

In the latter half of 1989 nearly two percent of East Germany's population emigrated to West Germany.<sup>177</sup> Many observers believed that West Germany could expect several million refugees from the former Communist Bloc alone.<sup>178</sup> Furthermore, although only ten percent of political asylum applicants were actually determined to have been politically persecuted, Germany was obligated under national and international laws to protect most of the denied applicants.<sup>179</sup> Despite the inevitable political posturing and exaggeration, Germany rightly expected an enormous refugee burden.<sup>180</sup>

This expectation resulted in political consequences. In the December 1990 elections, the controlling party (the Christian Democrats) led by Chancellor Helmut Kohl, advocated tighter asylum laws to ease the economic and social burdens of unification.<sup>181</sup> After Kohl's election victory, the opposing Social Democratic Party also began to support the tighter asylum policy.<sup>182</sup>

By 1992 the hardships of unification created intense feelings of xenophobia, especially among younger generations.<sup>183</sup> Some 2200 acts of ethnically motivated violence resulted in seventeen deaths in 1992 alone.<sup>184</sup> This xenophobic violence, however, inspired a massive public response in support of foreigners.<sup>185</sup> The widespread public response led to greater prosecution of violent, ethnically motivated offenders—so much so that these acts of violence began to dissipate by the beginning of 1993.<sup>186</sup> In the end, the tighter asylum policy found the requisite legislative support to pass the Thirty-Ninth Amendment in June 1993. Even more importantly, the Federal Constitutional Court upheld the constitutionality of the asylum amendment in a controversial 1996 decision.<sup>187</sup>

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176. Klaus Grosch, *Foreigners and Aliens*, in *MEET UNITED GERMANY* 230, 242 (Susan Stern ed., 1991).

177. *THE OXFORD COMPANION TO POLITICS OF THE WORLD* 350 (Joel Krieger ed., 1993).

178. Grosch, *supra* note 176, at 243.

179. *Id.*

180. *See generally id.* at 242-45.

181. JARAUSCH, *supra* note 2, at 192.

182. *Id.* at 207.

183. *Id.* at 209.

184. *Id.*

185. *Id.*

186. *Id.*

187. BVerfGE 94, 49 (52).

The court's decision prompted a renewed outcry against the asylum amendment. A variety of newspaper editorials detailed the prevalent feelings. For example, *Die Zeit* wrote: "[m]uch may have become easier—for us. What remains, however, is [the knowledge] that we have abandoned part of a culture of rights."<sup>188</sup> *Die Tageszeitung* echoed these sentiments: "The judges have . . . finaliz[ed] the reversal of an important element of the [good] old Federal Republic."<sup>189</sup> Finally, the *Frankfurter Rundschau* argued that the asylum amendment "turn[ed] a basic right into an empty shell robbed of its fundamental content."<sup>190</sup>

### 3. Contribution to the Constitutional Model of German Unification

Two different unification concerns (with constitutional implications) are raised by this discussion. First, with obvious legislative support for the Amendment and obvious popular disagreement, how was the issue of political asylum avoided in the unification treaties? The massive immigration had begun in 1989 before any of the unification treaties were concluded. Furthermore, the MESU Treaty had specifically dealt with social issues.<sup>191</sup> As the only country in the world with a constitutional right to political asylum, and with substantial immigration well underway, Germany's avoidance of the political asylum issue in the unification treaties is conspicuous.

Second, with such a bitterly yet unequally divided population, how did the German legislature view clear popular support for the asylum amendment? (Remember that a Basic Law amendment requires the support of "two-thirds of the Members of the *Bundestag* and two-thirds of the votes of the *Bundesrat*" under Article 79(2)).<sup>192</sup>

This discussion of the Thirty-Ninth Amendment contributes in two ways to the development of the Constitutional Model of German Unification: (1) the Amendment is an arguably negative constitutional consequence of avoiding the political asylum issue in the unification treaties; and (2) the Amendment is an arguably

188. THE WEEK IN GERMANY, *The Federal Constitutional Court Ruling on Asylum* (May 17, 1996), [http://www.germany-info.org/content/wk\\_dn\\_archive/wk\\_05\\_17\\_96.htm](http://www.germany-info.org/content/wk_dn_archive/wk_05_17_96.htm) (quoting DIE ZEIT, May 15, 1996, in English) (copy on file with the Vanderbilt Journal of Transnational Law).

189. *Id.* (quoting DIE TAGESZEITUNG, May 15, 1996, in English).

190. *Id.* (FRANKFURTER RUNDSCHAU, May 15, 1996, in English). One German leader commented "that the article no longer reads like a basic right, but instead like a provision preventing a basic right." SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 333 (1999) (quoting Franßen, the president of the Federal Administrative Tribunal).

191. MESU Treaty, *supra* note 7, arts. 17-25.

192. GG, *supra* note 18, art. 79(2) (F.R.G.) (italics added). See *supra* notes 18-20 and accompanying text.

negative constitutional reaction to the social and political pressures of unification.

E. *Fortieth Amendment of December 20, 1993*<sup>193</sup>

1. Amendment Provisions

The Fortieth Amendment resulted in eight changes to the Basic Law and dealt entirely with federal railroad issues. The first two changes involved Article 73, which identified the areas of "exclusive legislative jurisdiction" of the Federal Government.<sup>194</sup> First, the words "federal railroads and" were removed from Article 73(6), leaving only the words "air transport."<sup>195</sup> Second, a new Article 73(6a) was created to address federal railroads separately.<sup>196</sup>

The third change amended Article 74 (Areas of Concurrent Jurisdiction),<sup>197</sup> specifically Article 74(23). Instead of "non-federal railroads, except mountain railroads," the article now refers to "non-federal rail-bound systems, except mountain railways."<sup>198</sup>

The fourth change clarified the language of Article 80(2) without making any substantive alterations to the Basic Law. Article 80(2) requires the consent of the *Bundesrat* for all federal statutory orders involving "rules and rates . . . of postal and telecommunications services, rules governing rates for the use of federal railways[,] or [rules] concerning the construction and operation of railways."<sup>199</sup>

The fifth change under the Fortieth Amendment removed the reference to "the federal railroads" from Article 87(1).<sup>200</sup> Article 87 specifies the "areas of direct federal administration."<sup>201</sup> The sixth change, however, again placed the federal railroads under direct federal administration by creating a new Article 87e. Article 87e contains five paragraphs, the first of which declares that "[f]ederal rail transport shall be under direct federal administration."<sup>202</sup> Article 87e(2) describes when the Federal Government may administrate non-federal rail transport.<sup>203</sup> Article 87e(3) organizes the federal railways as "private enterprises."<sup>204</sup> Article 87e(4) dictates that the

193. See *supra* note 90, 91 and accompanying text.

194. GG, *supra* note 18, art. 73 (F.R.G.).

195. *Id.* art. 73(6) (F.R.G.) (amended 1993); *id.* art. 73(6) (F.R.G.).

196. *Id.* art. 73(6a) (F.R.G.).

197. *Id.* art. 74 (F.R.G.).

198. *Id.* art. 74(23) (F.R.G.) (amended 1993); *id.* art. 74(23) (F.R.G.).

199. *Id.* art. 80(2) (F.R.G.).

200. *Id.* art. 87(1) (F.R.G.) (amended 1993); *id.* art. 87(1) (F.R.G.).

201. *Id.* art. 87 (F.R.G.).

202. *Id.* art. 87e(1) (F.R.G.).

203. *Id.* art. 87e(2) (F.R.G.).

204. *Id.* art. 87e(3) (F.R.G.).

Federal Government must take into account the "transport requirements of the whole community" when "improving and maintaining the tracks of the federal railways" and when "providing [certain] services."<sup>205</sup> Finally, Article 87e(5) summarizes when the consent of the *Bundesrat* is required for matters involving the federal railways.<sup>206</sup>

The seventh change under the Fortieth Amendment inserted Article 106a. Article 106a, a single paragraph, "concerns the tax allocation for local passenger transport services."<sup>207</sup>

The final change under the Fortieth Amendment provided a new Article 143a. The first paragraph of this provision mandates that "[t]he Federation has the exclusive right to legislate on all matters resulting from the privatization of Federal Railways under its administration."<sup>208</sup> Article 143a(2) allows the Federal Government to execute all legislation that results from paragraph (1).<sup>209</sup> Finally, Article 143a(3) imposes a time limit (December 31, 1995) on the Federal Government's responsibility for "local passenger rail services of the hitherto Federal Railways . . . ." <sup>210</sup>

## 2. Relation to Unification

At the time of German unification, the infrastructure in eastern Germany was "antiquated" and "crumbling."<sup>211</sup> These descriptions included "the chief transportation medium," the railroad.<sup>212</sup> Immediately prior to unification one German leader estimated that the total cost of upgrading East German transport systems would be DM 200 billion.<sup>213</sup> By the end of 1995 DM 109 billion had already been spent on eastern German infrastructure (DM 28 billion on the railway system alone).<sup>214</sup>

The economic pressure was acknowledged in a 1996 decision of the Federal Constitutional Court which suggested that the Fortieth Amendment was intended to expedite the improvement of the railway

205. *Id.* art. 87e(4) (F.R.G.).

206. *Id.* art. 87e(5) (F.R.G.).

207. CONSTITUTIONS, *supra* note 1, at viii (Aug. 1994); GG, *supra* note 18, art. 106a (F.R.G.).

208. GG, *supra* note 18, art. 143a(1) (F.R.G.).

209. *Id.* art. 143a(2) (F.R.G.).

210. *Id.* art. 143a(3) (F.R.G.).

211. MERKL, *supra* note 63, at 255, 266.

212. *Id.* at 235.

213. *Id.* at 247.

214. Patricia J. Smith, *The Illusory Economic Miracle: Assessing Eastern Germany's Economic Transition*, in *AFTER THE WALL: EASTERN GERMANY SINCE 1989* 109, 112 (Patricia J. Smith ed., 1998).

in the former East Germany.<sup>215</sup> In its decision, which dealt with the construction of a high-speed railway between Hannover and Berlin, the Court recognized the Federal Government's authority to manage the railways under the new Article 87e of the Basic Law.<sup>216</sup> The court determined that quickly improving the transport network in eastern Germany was necessary, among other reasons, to "encourage investment in the area."<sup>217</sup> Therefore, the Court concluded, the Federal Government had properly exercised its authority under Article 87e.<sup>218</sup> The Court's decision indicates that the Federal Government intended to use Article 87e as a means of swiftly upgrade the eastern German railway system; an intent that is consistent with the economic and infrastructure pressures arising from unification.

### 3. Contribution to the Constitutional Model of German Unification

Both unification treaties addressed the issue of privatizing public enterprises.<sup>219</sup> Article 25 of the Unification Treaty provided for privatization through the Trust Agency, although it did not preclude other methods of privatization.<sup>220</sup> The MESU Treaty's "Protocol on Guidelines" did not suggest a method of privatization; rather, it stated the goal that "[e]nterprises under direct or indirect state ownership . . . will be organized competitively as quickly as possible and transferred to private ownership as far as possible."<sup>221</sup>

In light of these treaty provisions, what was the significance of a Basic Law amendment that organized the federal railways into private enterprises? First, neither unification treaty precluded privatization through Basic Law amendment.<sup>222</sup> The treaties did not tie Germany to one privatization method. They allowed Germany to mold its privatization method to the special circumstances surrounding each public enterprise. In this case privatization through Basic Law amendment was necessary because Article 87(1) of the Basic Law placed the federal railways under direct federal administration;<sup>223</sup> privatization required Basic Law amendment to

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215. Rainer Arnold, *The German Constitutional Court and Its Jurisprudence in 1996*, 11 TUL. EUR. & CIV. L.F. 85, 103-05 (1996) (discussing the case of BVerfGE 95, 1 (1)).

216. *Id.* at 103-04.

217. *Id.*

218. *Id.*

219. See *supra* notes 62, 79-80 and accompanying text.

220. Unification Treaty, *supra* note 3, art. 25.

221. MESU Treaty, *supra* note 7, Protocol on Guidelines A.II.7.

222. See generally Unification Treaty, *supra* note 3; MESU Treaty, *supra* note 7.

223. GG, *supra* note 18, art. 87(1) (F.R.G.) (amended 1993).

address the extent to which the Federal Government could continue to administrate the railways after privatization.<sup>224</sup>

Second, neither unification treaty precluded privatization of former West German public enterprises.<sup>225</sup> The unification treaties implicitly contemplated the possibility of amending Article 87 of the Basic Law to meet the privatization goal of the MESU Treaty because Article 87 of the Basic Law listed the areas of direct federal administration in the former West Germany and because the unification treaties did not limit privatization to former East German public enterprises.<sup>226</sup>

This discussion lends three elements to the development of a Constitutional Model of German Unification: (1) the privatization provisions of the two unification treaties were flexible enough to allow the united Germany to privatize through Basic Law amendment; (2) the privatization provisions of the two unification treaties were flexible enough to provide for the privatization of former West German public enterprises, even though privatization of former West German public enterprises would require Basic Law amendments; and (3) Germany's constitutional solution to the economic problem of the eastern German railways may indicate a willingness to solve other major unification problems with Basic Law amendments.<sup>227</sup>

#### F. Forty-Second Amendment of October 27, 1994

##### 1. Amendment Provisions

The Forty-Second Amendment either changed or inserted information in fourteen different Basic Law articles.<sup>228</sup> The Forty-Second Amendment added two sentences to Article 3. The second sentence in Article 3(2) reads: "The state supports the effective

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224. *Id.* art. 87e (F.R.G.).

225. *See generally* Unification Treaty, *supra* note 3; MESU Treaty, *supra* note 7. Article 26 of the Unification Treaty transferred ownership of the former East German railroad (the *Deutsche Reichsbahn*) to the united Germany. Unification Treaty, *supra* note 3, art. 26.

226. GG, *supra* note 18, art. 87 (F.R.G.) (amended 1993).

227. The Forty-First Amendment of August 30, 1994, dealing with the privatization of postal affairs and telecommunication, does not fall into the category of Basic Law amendments designed to solve problems of German unification. Unlike the privatization of the German railways, the Forty-First Amendment was a product of European Community privatization pressures, not the direct product of German unification pressures. Constantine J. Zepos, Note, *Liberalizing the "Sacred Cows": Telecommunications and Postal Services in the EC*, 3 DUKE J. COMP. & INT. L. 203, 203 (1992). For postal affairs and telecommunications the European Community sought to remove drastic irregularities between Member States by requiring private competition. *Id.*

228. *See supra* note 94 and accompanying text.

realization of equality of women and men and works towards abolishing present disadvantages."<sup>229</sup> Furthermore, the second sentence of Article 3(3) reads: "No one may be disadvantaged because of one's impairment."<sup>230</sup>

The Forty-Second Amendment also added a new Article 20a to the Basic Law entitled "Protection of Natural Resources."<sup>231</sup> The article asserts that "[t]he [S]tate, also in its responsibility for future generations, protects the natural foundations of life in the framework of the constitutional order, by legislation and, according to law and justice, by executive and judiciary."<sup>232</sup>

The Forty-Second Amendment inserted a third sentence into Article 28: "The concession of self-government encompasses also the foundation of financial individual responsibility."<sup>233</sup>

Two changes under the Forty-Second Amendment affected Article 29. First, in Article 29(7), the Amendment increased from 10,000 to 50,000 the maximum number of inhabitants a *Land* may have in order for its borders to be changed by federal law.<sup>234</sup> Second, the Amendment inserted an eighth paragraph into Article 29, dealing with the conditions under which *Länder* may enter into State Treaties to alter their borders.<sup>235</sup>

The Forty-Second Amendment made three changes to Basic Law Article 72 (Concurrent Legislation of the Federation).<sup>236</sup> First, in Article 72(1), it replaced the words "as long as and to the extent that the Federation does not exercise its legislative powers"<sup>237</sup> with the words "as long and insofar as the Federation has not made use of its legislative competence by means of legislation."<sup>238</sup> Second, the

229. GG, *supra* note 18, art. 3(2) (F.R.G.).

230. *Id.* art. 3(3) (F.R.G.).

231. *Id.* art. 20a (F.R.G.).

232. *Id.*

233. *Id.* art. 28 (F.R.G.).

234. *Id.* art. 29(7) (F.R.G.).

235. *See id.* art. 29(8) (F.R.G.).

The *Länder* may regulate a restructuring of their territory or of parts of it, deviating from the norms of paragraphs 2 and 7 by means of [a] State Treaty. The affected communities and counties must be heard. The State Treaty requires confirmation by referendum in each participating *Land*. If the State Treaty concerns partial territories of the *Länder*, the confirmation may be limited to referenda within these partial territories. The second half of Sentence 5 does not apply. In a referendum the majority of votes decides, if it encompasses at least one-fourth of those who are entitled to vote in *Bundestag* elections; details are regulated by a federal law. The State Treaty requires the consent of the *Bundestag*.

*Id.* (italics added).

236. GG, *supra* note 18, art. 72 (F.R.G.).

237. *Id.* art. 72(1) (F.R.G.) (amended 1994).

238. *Id.* art. 72(1) (F.R.G.).



Amendment changed Article 72(2) to read: "The Federation has the right to legislate in this area, if and insofar as the establishment of equivalent living conditions in the Federal territory or the maintenance of legal and economic unity in the interest of the entire state requires legislative regulation."<sup>239</sup> Finally, the Amendment inserted a third paragraph into Article 72: "By means of federal law it can be determined that a federal legislative regulation, in the sense of paragraph 2, no longer exists [and] can be replaced by *Land* legislation."<sup>240</sup>

Article 74 (Areas of Concurrent Legislation) received seven changes under the Forty-Second Amendment.<sup>241</sup> The first two changes abrogated Articles 74(1)(5) and 74(1)(8), dealing with the transfer of German cultural property abroad and citizenship in the *Länder*, respectively.<sup>242</sup> The third change added the parenthetical "(without the right of opening contributions)" to Article 74(1)(18).<sup>243</sup> The fourth change dealt with Article 74(1)(24), but nothing in the language of Article 74(1)(24) changed.<sup>244</sup> The fifth and sixth changes added Articles 74(1)(25) and 74(1)(26), dealing with state liability and human biological matter, respectively.<sup>245</sup> Finally, the Amendment inserted a short second paragraph into Article 74: "Laws according to Paragraph 1 No. 25 require the consent of the *Bundesrat*."<sup>246</sup>

Four changes affecting Article 75 (Areas of Federal Framework Legislation) occurred under the Forty-Second Amendment.<sup>247</sup> First, the Amendment added a sixth area of federal framework legislation: "Protection of cultural patrimony against export abroad."<sup>248</sup> Second,

239. *Id.* art. 72(2) (F.R.G.). Article 72(2) had previously read:

The Federation has the right to legislate where

1. a matter cannot be effectively regulated by the legislation of individual *Länder*, or
2. regulation by a *Land* might prejudice the interests of other *Länder* or the country as a whole, or
3. the maintenance of legal and economic unity, especially uniform living conditions beyond the territory of any one *Land*, calls for federal legislation.

*Id.* art. 72(2) (F.R.G.) (amended 1994).

240. *Id.* art. 72(3) (F.R.G.) (italics added).

241. *Id.* art. 74 (F.R.G.).

242. *Id.* art. 74(1)(5) (F.R.G.) (amended 1994); *id.* art. 74(1)(8) (F.R.G.) (amended 1994).

243. *Id.* art. 74(1)(18) (F.R.G.).

244. *Id.* art. 74(1)(24) (F.R.G.) (amended 1994); *id.* art. 74(1)(26) (F.R.G.).

245. *Id.* art. 74(1)(25) (F.R.G.); *id.* art. 74(1)(26) (F.R.G.).

246. *Id.* art. 74(2) (F.R.G.) (italics added).

247. *Id.* art. 75 (F.R.G.).

248. *Id.* art. 75(1)(6) (F.R.G.). Notice that this new area of federal framework legislation was removed from the concurrent legislation of Article 74(1)(5) under the Forty-Second Amendment. See *supra* note 242 and accompanying text.

the Amendment added the statement "Article 72(3) applies accordingly" to the end of Article 75(1).<sup>249</sup> Third, the Amendment added a second paragraph to Article 75: "Framework legislation may contain only in exceptional cases detailed and directly applicable regulations."<sup>250</sup> Finally, the Amendment added a third paragraph to Article 75: "If the Federation enacts framework legislation, then the *Länder* are obligated to enact the required *Land* legislation within an appropriate time determined by law."<sup>251</sup>

The Forty-Second Amendment amended Articles 76(2) and 76(3), dealing with legislative bills.<sup>252</sup> These changes acted to balance the power between the *Bundestag* and the *Bundesrat*.<sup>253</sup> Prior to the changes, Article 76 had placed particular time limits on the *Bundesrat* without placing corresponding time limits on the *Bundestag*.<sup>254</sup> The legislative houses have comparable periods within which to respond to legislation submitted by the other house because of the Forty-Second Amendment.<sup>255</sup>

The Forty-Second Amendment added paragraph (2a) to Article 77: "Insofar as the consent of the *Bundesrat* is required for a law, if a request according to paragraph 2 sentence 1 has not been made or if the mediation procedure ended without a proposal for a change of the law resolution the consent is to be given in due course."<sup>256</sup>

The Forty-Second Amendment inserted two paragraphs into Article 80 (Delegated Legislation).<sup>257</sup> First, Article 80(3) reads: "The *Bundesrat* can present to the Federal Government proposals for the issuance of legal ordinances, which require its consent."<sup>258</sup> Second, Article 80(4) reads: "If by means of a federal law [or on] the basis of federal laws, the *Land* governments are empowered to issue legal ordinances, the *Länder* are also authorized to regulate by law."<sup>259</sup>

The Forty-Second Amendment added a second sentence to the second paragraph of Article 87 (Areas of Direct Federal Administration).<sup>260</sup> That sentence reads: "Social insurance institutions whose territorial competence extends beyond one *Land*, but not more than three *Länder*, shall be administered, in derogation

249. GG, *supra* note 18, art. 75(1) (F.R.G.).

250. *Id.* art. 75(2) (F.R.G.).

251. *Id.* art. 75(3) (F.R.G.) (italics added).

252. *Id.* art. 76(2) (F.R.G.); *id.* art. 76(3) (F.R.G.).

253. *Id.* art. 76(2) (F.R.G.); *id.* art. 76(3) (F.R.G.).

254. *Id.* art. 76(2) (F.R.G.) (amended 1994); *id.* art. 76(3) (F.R.G.) (amended 1994).

255. *Id.* art. 76(2) (F.R.G.); *id.* art. 76(3) (F.R.G.).

256. *Id.* art. 77(2a) (F.R.G.) (italics added).

257. *Id.* art. 80 (F.R.G.).

258. *Id.* art. 80(3) (F.R.G.) (italics added).

259. *Id.* art. 80(4) (F.R.G.) (italics added).

260. *Id.* art. 87 (F.R.G.).

of the first sentence, as direct corporations of public law, if the supervisory *Land* is designated by the participating *Länder*.<sup>261</sup>

The Forty-Second Amendment inserted a sentence into Article 93 (The Federal Constitutional Court, Jurisdiction).<sup>262</sup> Article 93(1)(2a) reads: "In case of disagreement, as to whether a law meets the requirements of Article 72(2), [the Constitutional Court decides] upon the request of the *Bundesrat*, a *Land* government, or the representation of the people of a *Land*."<sup>263</sup>

The Forty-Second Amendment inserted Article 118a, concerning the modification of the territories of Berlin and Brandenburg.<sup>264</sup> Article 118a reads: "The modification of the territory [comprising] the *Länder* Berlin and Brandenburg can be effected, by agreement, in derogation of the provisions of Article 29, with the participation of the voters of the two *Länder*."<sup>265</sup>

Finally, the Forty-Second Amendment inserted Article 125a (Continued Application of Law as Federal Law Within the Sphere of Concurrent Legislation and Framework Legislation).<sup>266</sup> Article 125a reads:

Law, which was enacted as federal law, but which, because of

- (1) the change of Article 74(1) or Article 75(1) could no longer be enacted, continues to be valid as federal law. It can be replaced by *Land* law.
- (2) Law, which was enacted on the basis of Article 72(2) in the form which was valid until November 15, 1994, continues to be valid as federal law. By means of a federal law it can be decided that it can be replaced by *Land* law. The same applies to federal law, which was enacted before this point in time, but which could no longer be enacted in accordance with Article 75(2).<sup>267</sup>

## 2. Relation to Unification

In accordance with Article 5 of the Unification Treaty the united German legislature formed a Joint Constitutional Commission to investigate the necessity of further amending the Basic Law to conform to the realities of unification.<sup>268</sup> Article 5 recommended consideration of "the relationship between the Federation and the

261. *Id.* art. 87(2) (F.R.G.) (italics added).

262. *Id.* art. 93 (F.R.G.).

263. *Id.* art. 93(1)(2a) (F.R.G.) (italics added).

264. *Id.* art. 118a (F.R.G.).

265. *Id.* art. 118a (F.R.G.) (italics added).

266. *Id.* art. 125a (F.R.G.).

267. *Id.*

268. CONSTITUTIONS, *supra* note 1, at vii (Mar. 1994). The Joint Constitutional Commission began its work on January 16, 1992. *Id.*

*Länder* . . . , [the] restructuring [of] the Berlin/Brandenburg area . . . , [the introduction of] state objectives into the Basic Law, and . . . the question of applying Article 146 of the Basic Law and of holding a referendum in this context."<sup>269</sup> On October 28, 1993, the Joint Constitutional Commission issued its Final Report.<sup>270</sup> The Final Report recommended amendments to twenty-three Basic Law articles.<sup>271</sup> Fourteen of those recommendations gained the necessary votes to amend the Basic Law under the Forty-Second Amendment of October 27, 1994.<sup>272</sup>

The changes affecting Articles 3 and 20a were recommended and passed in state objective language; Article 5 of the Unification Treaty had recommended consideration of whether state objectives should be inserted into the Basic Law.<sup>273</sup> Furthermore, both gender equality and the environment had been specifically addressed in the unification treaties (Article 31(1) of the Unification Treaty for gender equality;<sup>274</sup> Article 34(1) of the Unification Treaty and Article 16 of the MESU Treaty for environment).<sup>275</sup>

The changes affecting Articles 28, 72, 74, 75, 76, 77, 80, 87, 93, and 125a all relate to the "relationship between the Federation and the *Länder*."<sup>276</sup> Article 5 of the Unification Treaty had recommended consideration of whether Basic Law amendments should be made in this regard.<sup>277</sup>

The insertion of Article 118a related to the "restructuring [of] the Berlin/Brandenburg area . . . ." <sup>278</sup> Article 5 of the Unification Treaty had recommended consideration of whether a Basic Law amendment should be made in this regard.<sup>279</sup>

269. Unification Treaty, *supra* note 3, art. 5.

270. FINAL REPORT, *supra* note 129.

271. *Id.*

272. *Id.* In addition, the Joint Constitutional Commission recommended all eight of the Thirty-Eighth Amendment's changes, as well as the only change under the Thirty-Seventh Amendment. See *supra* notes 131, 160 and accompanying text. The Joint Constitutional Commission, however, did not issue its Final Report until after both the Thirty-Seventh and Thirty-Eighth Amendments had passed. See *supra* notes 132, 165 and accompanying text.

As mentioned, the Joint Constitutional Commission made 23 recommendations for Basic Law amendment. See CONSTITUTIONS, *supra* note 1, at ix (Mar. 1994). This Note, in various places, seems to refer to 24 recommendations; however, one of the recommendations (amending Article 28) occurred in two phases under the Thirty-Eighth and Forty-Second Amendments. See *supra* notes 149, 233 and accompanying text.

273. Unification Treaty, *supra* note 3, art. 5.

274. *Id.* art. 31(1).

275. *Id.* art. 34(1); MESU Treaty, *supra* note 7, art. 16.

276. Unification Treaty, *supra* note 3, art. 5.

277. *Id.*

278. *Id.*

279. *Id.*

Finally, the changes to Article 29 could be justified by two provisions of Article 5 of the Unification Treaty: "the relationship between the Federation and the *Länder*" and the "restructuring [of] the Berlin/Brandenburg area."<sup>280</sup> Article 29 details the methods of restructuring *Laender* territories, as well as the extent of the Federal Government's involvement in that effort.<sup>281</sup>

### 3. Contribution to the Constitutional Model of German Unification

This section will develop three themes that contribute to the development of a Constitutional Model of German Unification: (1) the limits of the Joint Constitutional Commission recommendations; (2) the significance of the environmental state objective in Article 20a; and (3) the significance of the gender equality state objective in Article 3(2).

#### a. The Limits of the Joint Constitutional Recommendations

In three instances, the Forty-Second Amendment amended the Basic Law to a greater extent than the Joint Constitutional Commission had recommended. First, the Joint Constitutional Commission did not recommend a change to Article 74(1)(24).<sup>282</sup> Second, the Joint Constitutional Commission did not recommend the insertion of the words "Article 72(3) applies accordingly" at the end of Article 75(1).<sup>283</sup> Finally, the Joint Constitutional Commission did not recommend the insertion of Article 125a(2).<sup>284</sup>

In two instances, however, the Basic Law has never been amended to the extent recommended by the Joint Constitutional Commission. First, the Joint Constitutional Commission recommended the insertion of an Article 20b: "The State respects the identity of ethnic, cultural and linguistic minorities."<sup>285</sup> Second, the Joint Constitutional Commission recommended more substantial changes to Article 75 than were actually passed under the Forty-Second Amendment.<sup>286</sup>

280. *Id.*

281. GG, *supra* note 18, art. 29 (F.R.G.).

282. FINAL REPORT, *supra* note 129. As discussed, the language of Article 74(1)(24) was not changed under the Forty-Second Amendment; however, it was still officially listed as an amendment. See *supra* note 244 and accompanying text.

283. See generally FINAL REPORT, *supra* note 129.

284. *Id.*

285. *Id.* at 15. This recommendation is phrased in state objective language. For a discussion regarding the significance of state objective language in the Basic Law, see *infra* notes 301-03 and accompanying text.

286. FINAL REPORT, *supra* note 129, at 21. Primarily, the Joint Constitutional Commission recommended two additional changes to the areas of federal framework legislation. First, it sought to limit the definition of "general principles governing

## b. Environment

The insertion of an environmental state objective under the Forty-Second Amendment had not been the first attempt at adding a Basic Law provision concerning the environment.<sup>287</sup> Three pre-unification attempts had failed.<sup>288</sup> First, in 1973-74 the social-liberal government proposed an "environmental fundamental right," which was not adopted because such a fundamental right lacked "individual enforceability."<sup>289</sup> Second, in the early 1980s an expert commission recommended the insertion of an "environmental statement of public policy" into the Basic Law.<sup>290</sup> The *Bundestag* voted down the recommendation, with opponents noting that an environmental amendment to the Basic Law was unnecessary because the national legislature could already address environmental issues through legislation.<sup>291</sup> Finally, between 1987 and 1990 a parliamentary group introduced a bill that would have added a Basic Law "environmental statement of public policy."<sup>292</sup> Despite widespread support for the concept, negotiations broke down amidst disagreement over the content of the statement.<sup>293</sup>

This contentious history raises the following question: Why did unification finally produce an environmental state objective in Article 20a of the Basic Law? Two commentators remarked that "there seem[ed] to be a consensus and a willingness to act," considering the "disastrous environmental conditions in the territory of the former [East Germany]."<sup>294</sup> In fact in 1990 alone eastern Germany emitted eleven times more sulfur dioxide, and eight times more dust, than western Germany.<sup>295</sup> Furthermore, seventy-eight percent of eastern Germany's rivers and lakes were either totally unfit for drinking water or only fit for drinking water with the use of "extremely complex technology."<sup>296</sup>

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higher education" in Article 75(1)(1a). *Id.* Second, it sought to add an entirely new area of federal framework legislation under Article 75(1)(2): "the general legal relations of the press." *Id.*

287. Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1, 24-30 (1992).

288. *Id.*

289. *Id.* at 24.

290. *Id.* at 26.

291. *Id.*

292. *Id.* at 27.

293. *Id.* at 29.

294. *Id.* at 44.

295. Jan C. Bongaerts, *Towards a Cleaner Germany: Post-Unification Environmental Policy*, in MEET UNITED GERMANY 161, 167-68 (Susan Stern ed., 1991).

296. *Id.* at 169.

The European Union also pressured Germany to improve the environmental situation in eastern Germany.<sup>297</sup> Eastern German air pollution, for example, quadrupled the European Community average, with eastern Germany emitting more sulfur dioxide than any other European country.<sup>298</sup> The Commission<sup>299</sup> allowed eastern Germany to deviate from European Community environmental standards until 1996 (for water, air, and ground pollution), but this unrealistic timeframe only served to heighten the need for Germany to act quickly.<sup>300</sup>

A final question presents itself as a result of this discussion: How does a state objective amendment to the Basic Law help to solve the environmental problem? The answer lies in the German conception of the Basic Law. One scholar notes that Germans "insist on enforcing the letter, not merely the spirit, of the Basic Law."<sup>301</sup> Furthermore, "there is less margin in Germany for tolerance of uncertainty or ambiguity in constitutional matters."<sup>302</sup> Therefore, an environmental state objective in the Basic Law "would produce actual effects."<sup>303</sup>

### c. Gender Equality

The first sentence of Basic Law Article 3(2) states that "[m]en and women shall have equal rights."<sup>304</sup> The Forty-Second Amendment added a state objective to Article 3(2): "The state supports the effective realization of equality of women and men and works towards abolishing present disadvantages."<sup>305</sup> One commentator argues that the amended Article 3(2) "contains a mandate to the state to guarantee the equal placement of women . . . in society."<sup>306</sup> Therefore, the amended Article 3(2) adopts "a factual equality approach," requiring "the elimination of sex-based

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297. Falke, *supra* note 161, at 180.

298. *Id.*

299. The Commission is a European Union institution, composed of twenty Commissioners, charged with four principle functions: (1) to ensure that the treaties governing the European Union are properly applied, (2) to make recommendations concerning the European Union treaties, (3) to participate in the European legislative process, and (4) to perform other duties as assigned by the Council. TOM KENNEDY, *LEARNING EUROPEAN LAW: A PRIMER AND VADE-MECUM* 64, 66-67 (1998).

300. Falke, *supra* note 161, at 180.

301. Andries, *supra* note 9, at 33.

302. *Id.* at 34 (quoting Donald P. Kommers).

303. Brandl & Bungert, *supra* note 287, at 30.

304. GG, *supra* note 18, art. 3(2) (F.R.G.).

305. *Id.*

306. Monica Bhattacharyya, *From Nondifferentiation to Factual Equality: Gender Equality Jurisprudence Under the German Basic Law*, 21 *BROOK. J. INT'L L.* 915, 936 (1996) (quoting a representative of the Joint Constitutional Commission).

discriminatory laws [and] the activist reform of discriminatory social practices."<sup>307</sup>

Despite the stated intentions of the amended Article 3(2), however, fundamental inconsistencies exist between the amended Article 3(2) and Article 12a. Article 12a governs compulsory military service, and it provides two examples of sex-based discrimination in derogation of the amended Article 3(2). First, under Article 12a(1), only "men who have attained the age of eighteen years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a civil defen[s]e organization."<sup>308</sup> Under Article 12a(1), women who have reached the age of eighteen *cannot* be required to serve, except under the limited circumstances and in the limited roles prescribed by Article 12a(4).<sup>309</sup>

The second example of sex-based discrimination in Article 12a concerns the limited role of women in the military under Article 12a(4), which was recently amended by the Forty-Eighth Amendment of December 19, 2000.<sup>310</sup> Prior to the Forty-Eighth Amendment women could "on no account be assigned to military service involving armed combat" under Article 12a(4).<sup>311</sup> Both before and since the Forty-Eighth Amendment, women may only be compelled to serve during a "state of defen[s]e" in which certain health system needs "cannot be met on a voluntary basis." Even then, women can only be compelled to serve in "the civilian health system or [to] the stationary military hospital organization."<sup>312</sup> Since the Forty-Eighth Amendment, women may not be required to serve in armed combat, although they may now volunteer for armed combat.<sup>313</sup>

307. *Id.* at 916.

308. GG, *supra* note 18, art. 12a(1) (F.R.G.).

309. *See infra* note 312 and accompanying text.

310. *See supra* note 107 and accompanying text. The Forty-Eighth Amendment changed the second sentence of Article 12a(4) to read: "They [women] may on no account be required to serve in armed combat." GG, *supra* note 18, art. 12a(4) (F.R.G.).

The Forty-Eighth Amendment is not discussed separately because its relation to unification is tenuous at best. At best, the Forty-Eighth Amendment is a direct result of the Thirty-Eighth and Forty-Second Amendments rather than a direct result of unification. Therefore, at best the amendment is a direct result of unification.

311. GG, *supra* note 18, art. 12a(4) (F.R.G.) (amended 2000).

312. *Id.*; *id.* art. 12a(4) (F.R.G.).

313. GG, *supra* note 18, art. 12a(4) (F.R.G.). On January 11, 2000, the European Court of Justice (ECJ) issued a judgment on the gender equality issue in Kreil v. Germany. Case 285/98, Kreil v. Germany, Court of Justice of the European Communities (Jan. 11, 2000) (summary available in English at <http://europa.eu.int/cj/en/cp/aff/cp0001en.htm>). The Court held that German legislation prohibiting women from holding any position in the military requiring the use of firearms is "contrary to the Community principle of equal treatment for men and women." Press Release No. 1/2000, Kreil v. Germany, Court of Justice of the European Communities (Jan. 11, 2000) (available in English at <http://europa.eu.int/cj/en/cp/aff/cp0001en.htm>). The Court acknowledged that some exceptions might apply for "special combat units." *Id.*



The inconsistencies between the amended Article 3(2) and Article 12a violate both aspects of "factual equality."<sup>314</sup> Article 12a is a "sex-based discriminatory law"<sup>315</sup> because it imposes compulsory armed military service on only one gender. Furthermore, Article 12a promotes a "discriminatory social practice"<sup>316</sup> because it only allows the military to place women in the healthcare field (a traditional social role for women during times of war) unless the women volunteer for armed combat under the recently amended Article 12a(4). Therefore, so long as Articles 3(2) and 12a remain in their present forms, the sincerity of factual gender equality is questionable.

The Forty-Second Amendment contributes five features to the development of a Constitutional Model of German Unification: (1) Germany fulfilled the constitutional amendment recommendations under Article 5 of the Unification Treaty; (2) the Joint Constitutional Commission possessed actual persuasive authority, not binding authority, in shaping the Basic Law to conform to the necessities of unification; (3) unification forced the adoption of long-contested amendments, such as the environmental state objective; (4) the nature of the Basic Law ensures that the state objective amendments will have actual weight; and (5) the Basic Law inconsistencies regarding gender equality diminish the positive effect of fulfilling the constitutional recommendations under Article 5 of the Unification Treaty.

#### IV. THE CONSTITUTIONAL MODEL OF GERMAN UNIFICATION

The Constitutional Model of German Unification includes three elements: (1) the constitutional characteristics of unification; (2) constitutional recommendations for future unifying States; and (3) predictions of future Basic Law amendments relating to unification.

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On December 19, 2000, the German legislature passed the Forty-Eighth Amendment, authorizing women to serve in armed military combat. *See supra* note 107 and accompanying text. On January 2, 2001, 244 women reported for duty in the German armed forces. *First Women Allowed into Combat Forces*, CNN, January 2, 2001, <http://www.cnn.com/WORLD/europe/germany/01/02/women.army/index>.

The Forty-Eighth Amendment exemplifies the extent of Germany's willingness to participate in European integration, a process that was first introduced into the Basic Law under the Thirty-Eighth Amendment. *See supra* notes 161-63 and accompanying text. Furthermore, the Forty-Eighth Amendment directly addresses factual gender equality, a concept that was introduced into the Basic Law under the Forty-Second Amendment. *See supra* note 307 and accompanying text.

314. Bhattacharyya, *supra* note 306, at 916.

315. *Id.*

316. *Id.*

### A. *The Constitutional Characteristics of German Unification*

#### 1. Expedient and Gradual Unification

Article 23 of the Basic Law allowed East Germany to accede to the West German Basic Law without the time-consuming process of a constitutional convention (as Article 146 would have required).<sup>317</sup> This unification method, as opposed to other proposed methods, allowed formal unification to occur swiftly while great popular support existed for the unification goal.<sup>318</sup> This ensured two things: (1) unification would definitely occur—it would not be abandoned once the hardships of a slower unification method became apparent; and (2) unification would not be hampered by the remnants of a contractual relationship or confederation.

Expedient unification, however, included two gradual components. First, multiple treaties effectuated German unification. Therefore, the MESU Treaty allowed West and East Germany to experience monetary, economic, and social union before finalizing political union in the Unification Treaty.<sup>319</sup> Second, the unification treaties instituted transition periods for discrepancies between laws and application of laws.<sup>320</sup> Most importantly, the Thirty-Sixth Amendment inserted a transition period directly into Article 143 of the Basic Law.<sup>321</sup>

#### 2. Fulfillment of the Constitutional Obligations of Unification

Germany fulfilled all of its Basic Law amendment obligations under the unification treaties. Article 4 of the Unification Treaty detailed the only Basic Law amendments *required* by unification,<sup>322</sup> and Germany passed these changes prior to unification under the Thirty-Sixth Amendment of September 23, 1990.<sup>323</sup>

Germany positioned itself for success in this regard in two ways. First, the unification treaties did not require any *post-unification* Basic Law amendments.<sup>324</sup> This allowed unification to proceed under Article 23 of the Basic Law only *if* West Germany successfully passed the required constitutional changes. Given the overwhelming

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317. See *supra* Part II.C.

318. *Id.*

319. See *supra* Part II.D.

320. See *supra* notes 69-71 and accompanying text.

321. GG, *supra* note 18, art. 143 (F.R.G.).

322. Unification Treaty, *supra* note 3, art. 4.

323. See *supra* Part III.A.1.

324. See *generally* Unification Treaty, *supra* note 3; MESU Treaty, *supra* note 7.

support for unification, there was little danger of the required constitutional changes not passing into the Basic Law. Furthermore, by not requiring post-unification amendments Germany protected itself from later failing to perform its constitutional unification obligations had the hardships of the unification process ever prevented later constitutional amendments from passing.

Second, the unification treaties provided constitutional flexibility in Germany's approach to the inevitable problems arising from unification. Just as the unification treaties did not *require* post-unification Basic Law amendments, they also did not *preclude* post-unification Basic Law amendments to address problems relating to unification.

### 3. Fulfillment of the Constitutional Recommendations of Unification

Germany also fulfilled the constitutional recommendations of the unification treaties. Article 5 of the Unification Treaty contained the only recommendations for post-unification Basic Law amendments.<sup>325</sup> Under the authority of Article 5 the deliberations of the Joint Constitutional Commission resulted in more than twenty Basic Law changes under the Thirty-Seventh, Thirty-Eighth, and Forty-Second Amendments.<sup>326</sup> Although the Thirty-Seventh and Thirty-Eighth Amendments might have passed without the Joint Constitutional Commission, the Forty-Second Amendment is entirely attributable to the work of that body.

### 4. Basic Law Internal Inconsistency

Although it is a positive feature of the unification process that the Joint Constitutional Commission possessed actual persuasive authority in recommending amendments to the Basic Law under Article 5 of the Unification Treaty, one of the Joint Constitutional Commission's recommendations resulted in a Basic Law internal inconsistency. The Forty-Second Amendment's state objective of gender equality in Article 3(2) is inconsistent with the gender inequalities in Article 12a.<sup>327</sup> This inconsistency remains even after the passage of the Forty-Eighth Amendment on December 19, 2000.<sup>328</sup>

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325. Unification Treaty, *supra* note 3, art. 5.

326. *See supra* Parts III.B.1., III.C.1., & III.F.1.

327. GG, *supra* note 18, art. 3(2) (F.R.G.); *id.* art. 12a (F.R.G.).

328. *See supra* notes 308-16 and accompanying text.

## 5. Unification as an Impetus for Long-Contested Amendments

The circumstances of unification also resulted in one Basic Law change that had been long-contested: the environmental statement of public policy. Although the environmental "state objective" is significant because it resulted from the deliberations of the Joint Constitutional Commission, it is also significant because it passed *despite* a long, pre-unification history of political disagreement. German unification, particularly the horrific environmental conditions in eastern Germany, consolidated support for this type of public policy statement. This indicates one further point about unification: whereas unification could have rendered political cooperation ineffective, it forced political cooperation with respect to the environmental "state objective."

## 6. Constitutional Reactions to Unification Consequences

Despite the remarkable comprehensiveness of the unification treaties, the drafters necessarily reserved some issues for later resolution. Germany passed two Basic Law amendments in response to consequences of unification: the Thirty-Ninth Amendment of June 28, 1993,<sup>329</sup> and the Fortieth Amendment of December 20, 1993.<sup>330</sup>

The Thirty-Ninth Amendment created stricter political asylum requirements in Germany. It is an arguably negative constitutional reaction to the social and political consequences of German unification in two ways. First, mass immigration, as a foreseeable consequence of unification, should have been addressed in the unification treaties. Second, Germany passed the Amendment despite a lack of clear popular support for the Amendment.

The Fortieth Amendment, on the other hand, was a positive constitutional reaction to the economic consequences of unification. Germany intended the privatization of the railway system through Basic Law amendment to provide the Federal Government with a quick method for rebuilding the dilapidated eastern German railways.<sup>331</sup> This included the added benefit of encouraging investment in eastern Germany.<sup>332</sup> Therefore, Germany demonstrated its commitment to unification by taking serious constitutional steps to solve the economic problems of the eastern German railway system.

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329. See *supra* Part III.D.

330. See *supra* Part III.E.

331. See *supra* notes 215-18 and accompanying text.

332. See *supra* note 217 and accompanying text.

## 7. European Integration as a Constitutional Factor in Unification

A minor but persistent point in the development of this Constitutional Model of German Unification is the role of European integration. European integration and German unification have affected one another. German unification, on the one hand, sped up the process of European integration.<sup>333</sup> European integration, on the other hand, influenced the passage of the Thirty-Seventh and Thirty-Eighth Amendments to the Basic Law.<sup>334</sup> This discussion highlights a further point: Germany will be more willing to amend the Basic Law when the goals of German unification and European integration coincide.

### *B. Constitutional Recommendations for Future Unifying States*

Although no two unification scenarios will ever be identical, the following general unification recommendations will still apply in many instances.

- If unification is popularly desired and practically feasible, effectuate total unification—monetary, economic, social, and political unification—through constitutionally valid procedures as quickly as the situation allows. Make use of gradual means, such as multiple treaties and transition periods, to ease the unification, so long as doing so would not prevent total unification.
- Do not impose post-unification amendment obligations unless there is a safeguard against future non-compliance. In other words, impose only pre-unification amendment obligations unless total unification could not occur without post-unification amendment obligations and guarantees of future compliance. As an alternative to post-unification amendment obligations, provide detailed recommendations for future constitutional amendments and a mechanism through which the recommendations will be seriously considered.
- Fulfill constitutional amendment obligations. For pre-unification amendment obligations, ensure that unification cannot proceed until the required constitutional amendments are passed. Although post-unification amendment obligations are not recommended, do not ignore them if they are included in the unification agreement. Fulfill post-unification constitutional obligations if they are still in the interest of the unified State. Otherwise, alter the unification agreement through constitutional means and with popular participation.

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333. See *supra* notes 161-63 and accompanying text.

334. See *supra* Parts III.B.3, III.C.3.

- Do not pass recommended constitutional amendments or other constitutional amendments intended to solve a unification problem, unless: (1) all constitutional provisions will be facially and substantively consistent after the amendment is passed; (2) the amendment will achieve actual, measurable results; and (3) the amendment would not eliminate a relied-upon protection of an individual right.

### C. *Predictions of Future Basic Law Unification Amendments*

#### 1. General Predictions

- Germany will pass additional amendments that address difficulties arising from German unification; however, these amendments will become increasingly difficult to identify as resulting solely from unification. The problems encountered as a result of unification will become less discernible from other problems encountered by the united Germany. Consequently, the most influential Basic Law amendments have already passed with respect to the Constitutional Model of German Unification.
- Germany will pass more state objective amendments to the Basic Law. The gender equality and environmental state objectives, although resulting from the recommendations of the Joint Constitutional Commission, will inspire more state objective amendments. Germany, however, will only enact further state objective amendments after it can evaluate the effectiveness of the first two state objectives. A possible topic for future state objectives is protection for ethnic, cultural, and linguistic minorities.<sup>335</sup>
- European integration will continue to influence the Basic Law. Pressure from the European Union, on the one hand, will result in amendments in specific areas. Germany, on the other hand, will eventually be called upon to participate in a European organization that exceeds the authority of the new Article 23. Germany, as one of the more ardent supporters of European integration, will revise the Basic Law to allow participation in that future European organization (as it did in the Thirty-Eighth Amendment).<sup>336</sup>

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335. This is the one state objective recommendation of the Joint Constitutional Commission that the German legislature never adopted. FINAL REPORT, *supra* note 129, at 15.

336. See *supra* Part III.C.

## 2. Specific Predictions

Germany will reinstate a less restricted form of the individual right to political asylum. The Thirty-Ninth Amendment constituted the low point in the unification process, contributing no positive characteristics to the Constitutional Model of German Unification. The importance of reinvigorating the right to political asylum, however, will diminish as the European Union continues to expand. First, the European Union could one day include many of the eastern European States from which Germany sought to protect itself with the Thirty-Ninth Amendment. Second, the European Union could assume the role of protecting political asylum seekers, thereby removing the need for individual Member States to possess such laws.<sup>337</sup> In light of these possibilities, reinstating an absolute right to political asylum may only serve a face-saving role for Germany.

Germany will resolve the gender equality inconsistencies between Articles 3(2) and 12a of the Basic Law. This might have been more likely and less difficult, however, prior to the passage of the Forty-Eighth Amendment of December 19, 2000.<sup>338</sup>

## V. CONCLUSION

It has been more than ten and a half years since German unification occurred on October 3, 1990. For Germany, where all critical state principles are included in the Basic Law, there is no better way to evaluate the overall success of unification than to evaluate the constitutional effects of unification. Of thirteen Basic Law amendments since 1990 six amendments directly resulted from unification.<sup>339</sup> Of those six amendments, only one full amendment<sup>340</sup> and one change in another amendment<sup>341</sup> provided negative components to the Constitutional Model of German Unification. Considering the unprecedented nature of German unification, the Constitutional Model of German Unification illustrates Germany's undisputed good faith in effectuating the unification, as well as the overall success of the unification process.

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337. ASH, *supra* note 162, at 400-01. The European Union was reluctant to fulfill this role after unification; however, the possibility still exists as integration progresses. *Id.*

338. *See supra* notes 310-13 and accompanying text.

339. This refers to the Thirty-Sixth, Thirty-Seventh, Thirty-Eighth, Thirty-Ninth, Fortieth, and Forty-Second Amendments.

340. This refers to the Thirty-Ninth Amendment.

341. This refers to the inconsistencies between Articles 3(2) and 12a of the Basic Law under the Forty-Second Amendment.

Moreover, because Germany's good faith resulted in a successful unification, future unifications between other unifying States will not be unprecedented. Future unifying States can be guided by Germany's unification experience through understanding, and adapting to, the positive and negative constitutional effects of German unification. Therefore, German unification not only accomplished a long-desired domestic goal, but it also provided an enduring model for all future international unifications.

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\* J.D. Candidate, May 2001, Vanderbilt University Law School; B.A. Western Washington University. I dedicate this Note to my wife Tanya for her love and encouragement. I thank my parents, Kim and Steve Pile, for supporting my studies in Germany in 1990-1991, as well as my host parents, Sascha and Stephanie Foraschick, for exposing me to many unification experiences.



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