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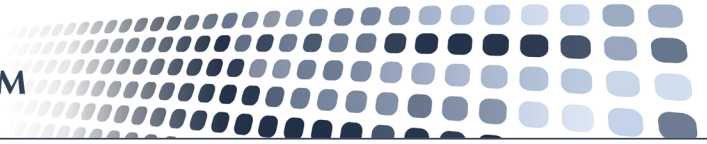
**Subconstitutionalism in a Multilayered System.
A Comparative Analysis of Constitutional Politics in
the German Länder**

by

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Abstract

Even though there have been some revaluations of the *Länder* in the last two decades German debates on federalism hardly take subnational constitutional politics into account. For example, textbooks on federalism deal with amendments of the German constitution, i.e. the Basic Law, but they mostly fail to address constitutional adjustments at the subnational level or causal interrelations between the two constitutional levels.

In this paper we will, of course, not be able, to fill that rather huge gap. Taking G. Alan Tarr's highly intriguing paper on "Subnational Constitutional Space" as a blueprint, we analyze German "subconstitutionalism" in three steps. First, we will describe and compare *Land* constitutions in order to highlight differences between them and similarities among them (1.). Second, we will present some explanations for these differences and similarities (2.), and finally we analyze some issues concerning changes of *Land* constitutions (3.).

Key-words

Germany, subnational constitutionalism, *Länder*, Basic Law



“Subconstitutionalism” understood as the arrangement between the constitution of a “superstate” and the constitutions of subordinate states (Ginsburg/Posner 2010) necessarily presupposes a multilayered system. In such a system sovereign rights are allocated among at least two levels. Obviously, such an arrangement has a number of significant political ramifications. For example, it affects and modifies the separation of powers, the leverage of governments in the political system, the role of parliaments, or minority rights (Tarr et al 2004; Tarr 2000; Tarr 1996; Williams/Tarr 2004; Thomsen 1989: 1064 f.). Regardless of these essentially political ramifications, political scientists rarely address “subconstitutionalism”. Mostly, political scientists either regard subnational constitutions as irrelevant or just take them as “minor twins” of the constitution of the respective “superstate”. This is notably true for the German case (Gunlicks 1998; Möstl 2005; Stiens 1997; Hölscheidt 1995; Reutter 2008b). Even though there have been some reevaluations of the *Länder* in the last two decades German debates on federalism hardly take subnational constitutional politics into account. For example, textbooks on federalism deal with amendments of the German constitution, i.e. the Basic Law, but they mostly fail to address constitutional adjustments at the subnational level or causal interrelations between the two constitutional levels.

In this paper we will, of course, not be able, to fill that rather huge gap. Taking G. Alan Tarr’s (2007; cf. also Williamson 2011) highly intriguing paper on “Subnational Constitutional Space” as a blueprint, we analyze German “subconstitutionalism” in three steps: First, we will describe and compare *Land* constitutions in order to highlight differences between them and similarities among them (1.). Second, we will present some explanations for these differences and similarities (2.), and finally we analyze some issues concerning changes of *Land* constitutions (3.).

Notably, we reject the idea that in Germany subconstitutional politics in the *Länder* exclusively took place in the “shadow of the Basic Law“ (Möstl 2005), as many assume. Land constitutions are not to be qualified as a sort of „derivative“ or second-class constitutional law only determined by the German national constitution. On the contrary, we believe *Länder* can only claim to having state quality if their constitutions are manifestations of popular sovereignty, are adopted in a formal process, determine the



political order in the *Länder*, and shape – at least partly – the relationship between the people of the *Länder* and the state. To put it differently: Land constitutions can only provide legitimacy to a political order if they are linked to the will of the people of the respective Land and if they effectively govern the political process. It goes without saying that in federal systems people of the *Länder* are not absolutely free in their will. They have to respect the constitutional framework of the “superstate”. In contrast to other studies we take subnational constitutions as being political rather than legal documents. Constitutions and their amendments are, hence, results of politics shaped and characterized by specific features (Lorenz 2008; Lorenz 2009; Benz 1993; Maravall/ Przeworski 2004; Dinan 2008).

Table 1: Lengths of Land Constitutions and Year of First Adoption

	Year when first constitution entered into force	Number of articles in the year of adoption	No. of articles in the year 2010
Land constitutions adopted before the Basic Law			
Hesse	1946	151	161
Bavaria	1946	189	194
Saarland	1947	134	128
Rhineland-Palatinate	1947	145	151
Bremen	1947	156	158
Land constitutions adopted after the Basic Law			
Schleswig-Holstein	1950	60	60
North Rhine-Westphalia	1950	93	94
Berlin	1950	102	102
Lower Saxony	1951	78	80
Hamburg	1952	77	77
Baden-Württemberg	1953	95	101
Land constitutions adopted after reunification			
Saxony-Anhalt	1992	102	101
Thuringia	1992	107	106
Brandenburg	1992	118	117
Saxony	1992	123	141
Mecklenburg-West Pomerania	1993	81	80
Basic Law	1949	146	192

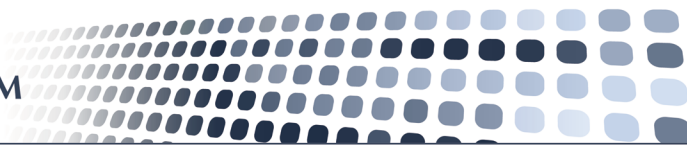
1. Subnational Constitutions and the German Basic Law: Homogeneity and Differences

Art. 28 of the German Basic Law lays down the principle of homogeneity. It enshrines the most basic rule shaping the relationship between the federation and the *Länder*



(Gunlicks 1998; Dinan 2008). It requires Land constitutions to conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of the Basic Law. Based on that constitutional stipulation, many take subnational constitutions as a sort of derivative or secondary constitutional law “overshadowed by the Basic Law” (Möstl 2005; Stiens 1997). In consequence, it seems just logical to assume a hierarchy between the two constitutional levels in Germany also because Art. 31 BL gives precedence to federal law over *Land* law. According to this legal perspective, the Basic Law allots constitutional space to the *Länder* in the sense that the constitution of the German “supersate” prescribes the content of and precedes or overrules regulations in *Land* constitutions. From such a “top-down” perspective we would expect two features characterizing Land constitutions: On the one hand *Land* constitutions are just “minor twins” of the Basic Law they should neatly fit into the constitutional framework created by the BL, and on the other hand they should be similar with each other. Surprisingly enough, though, both assumptions turn out to be false. Land constitutions differ not only from each other but also from the Basic Law. A comparative analysis brings these features to the fore.

Already the length or the size of constitutions – measured by the number of articles in the year of adoption – varies significantly (table 1).¹ While the Basic Law counted 146 articles in 1949, the length of Land constitutions varied between 60 (Schleswig-Holstein) and 189 articles (Bavaria) in the year of their adoption. These differences are at least partly due to the historical period in which Land constitutions came into being. As a matter of fact, constitutions taking effect before the Basic law came into force were on average longer than the ones passed in the early fifties (Gunlicks 1998: 111 ff.). The constitutions adopted in 1946/47 included on average 156 articles, those from the fifties were only half that long (they had on average 84 articles). Even though one might argue that the Basic Law helped to make Land constitutions of the early fifties shorter than the ones from the forties. However, the Basic Law did not have the same effect on Land constitutions passed after reunification in 1990. Those were again fairly longer than the ones from the forties. However, the Basic Law did not have the same effect on Land constitutions passed after reunification in 1990. Those were again fairly longer than the ones dating back to the fifties. Those had on average 107 articles. Already these differences highlight the fact that the BL can only be one factor explaining the shape and content of *Land* constitutions.



More importantly the content of Land constitutions vary significantly, as well (table 2). In order to make German Land constitutions comparable and examine which relevance a constitution gives to a specific matter, we use data originally compiled by Martina Flick. Flick counted the number of articles a constitution dedicates to matters like: basic rights, objectives of the state, state organs, financial issues etc. We regrouped and updated Flick's data under four headings: basic principles, state organs, state functions and other matters. Even though further research is necessary in order to improve and refine this rather simple content analysis our findings already allow some important conclusions.

While for example the Bavarian constitution dedicated 93 articles to such topics as:

Table 2: Structure and Content of German Land Constitutions

	Articles on								No of articles (year of adoption) Abs.
	Basic principles ^{a)}		State organs ^{b)}		State functions ^{c)}		Other matters		
	Abs.	(%)	Abs.	(%)	Abs.	(%)	Abs.	%	
Land constitutions passed before the Basic Law									
Hesse	65	(43,0)	41	(27,2)	35	(23,1)	10	(6,6)	151
Bavaria	93	(49,2)	47	(24,9)	38	(20,1)	11	(5,8)	189
Bremen	69	(44,2)	53	(34,0)	28	(17,9)	6	(3,8)	156
Saarland	65	(48,5)	33	(24,6)	31	(23,1)	5	(3,7)	134
Rhineland-Palatinate	77	(53,1)	28	(19,3)	32	(22,1)	8	(5,5)	145
Land constitutions passed after the Basic Law									
Schleswig-Holstein	9	(15,0)	27	(45,0)	21	(35,0)	3	(5,0)	60
North Rhine-Westphalia	30	(32,3)	35	(37,8)	24	(25,8)	4	(4,3)	93
Berlin	38	(37,3)	21	(20,6)	37	(36,3)	6	(5,9)	102
Lower Saxony	6	(7,7)	34	(43,6)	31	(39,7)	7	(9,0)	78
Baden-Württemberg	27	(28,4)	31	(32,6)	27	(28,4)	10	(10,5)	95
Hamburg	6	(7,8)	42	(54,5)	25	(32,5)	4	(5,2)	77
Land constitutions passed after reunification									
Brandenburg	55	(46,6)	34	(28,8)	25	(21,2)	4	(3,4)	118
Mecklenburg-West Pomerania	20	(24,7)	32	(39,5)	26	(32,1)	3	(3,7)	81
Saxony	51	(41,5)	31	(25,2)	31	(25,2)	10	(8,1)	123
Saxony-Anhalt	41	(40,2)	33	(32,4)	26	(25,5)	2	(2,0)	102
Thuringia	48	(44,9)	31	(29,0)	25	(23,4)	3	(2,8)	107

a) Basic rights and obligations, social life, foundations of the state; b) government, parliament, c) legislative, executive (incl. finances), and legal branch; d) conclusion and transitional provisions.

Sources: Flick 2008: 224 f.



basic rights and obligations, regulations on social life etc., the constitutions of Hamburg and Lower Saxony (both passed in the fifties) needed just six articles for the same matters (table 2). Arguably, at first sight this might be explained by the fact that the passing of the Basic Law limited the space the Land constitutions of Hamburg and Lower Saxony could fill. However, the constitutions of the new *Länder* bring to the fore that the differences were not only due to the legal framework but also to social and political factors. In other words, constitution makers transformed social and political issues into varying stipulations according to historical circumstances. That is why those constitutions adopted after historical “ruptures” – i.e. after the end of WWII and the revolution in the GDR – were significantly longer. By guaranteeing encompassing political and social rights the “new” political forces tried to make sure that the new democratic system would work perfectly well.

In addition, constitution-building in Baden-Württemberg and Berlin was very much shaped by regional and political circumstances, as well. Baden-Württemberg’s constitution reflected the amalgamation of three former autonomous *Länder* and the political compromises that had to be made in order to realize this territorial reform. In addition, it included and still includes relatively extensive parts on issues like religion and education only briefly dealt with in the Basic Law. In this sense, there seems to be constitutional space left open by the Basic Law rather than deliberately allotted to *Länder*. That pretty much corresponds with the understanding that in Germany the central state just recognizes the constitutional autonomy of the *Länder* within the federal system. In consequence, the legal autonomy of the *Länder* neither derives from the federation nor is it allotted by the federation to the *Länder* (Gunlicks 1998: 113).

West Berlin is another good example in this respect. Until 1990 this city-state was constitutionally not a full member of the Federal Republic of Germany. Until German reunification West-Berlin’s supreme power rested with the Allied Forces. The Berlin constitution of 1950 which – symbolically – claimed to be a constitution for both parts of the city, included extensive basic rights also in order to prove the supremacy of Western democracy to its Eastern counterpart. Reunified Berlin stuck to this legacy. In 1995 it adopted a new constitution by referendum without reducing these extensive basic rights. On the contrary they even had been enlarged although the political and legal context had radically been changed.

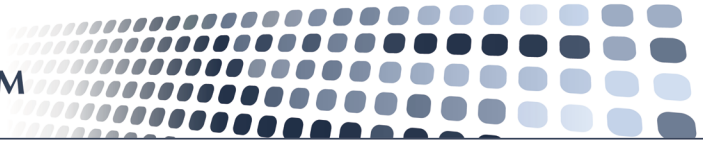


Table 3: Land Constitutions and Direct Democracy

	Year when first constitution entered into force	Year when direct democracy was included into the constitution	No. of petitions for a referendum	No. of referendums
Land constitutions adopted before the Basic Law				
Hesse	1946	1946	1	0
Bavaria	1946	1946	18	5
Saarland	1947	1979	0	0
Rhineland-Palatinate	1947	1947	1	0
Bremen	1947	1947	4	0
Land constitutions adopted after the Basic Law				
Schleswig-Holstein	1950	1990	5	2
North Rhine-Westfalia	1950	1950	2	0
Berlin	1950	^{a)} 1995	4	2
Lower Saxony	1951	1993	2	0
Hamburg	1952	1996	12	5
Baden-Württemberg	1953	1974	0	0
Land constitutions adopted after reunification				
Saxony-Anhalt	1992	1992	3	1
Thuringia	1992	1994	4	0
Brandenburg	1992	1992	8	0
Saxony	1992	1992	4	1
Mecklenburg-West Pomer.	1993	1993	1	0

a) The Berlin constitution of 1950 provided the possibility for referendums but the bill necessary in order to transform the constitutional stipulation into a practical consequence had never been passed. The respective article was been deleted in 1964.

Source: Rehmet 2009.

At the same time this points to an important function of Land constitutions in Germany. They are sometimes used in order to infuse change into a supposedly static constitutional order. That is the reason why many Land constitutions nowadays include more political and social rights than the Basic Law. Based on respective stipulations in Land constitutions applied to the Federal Constitutional Court and made it clarify the status of these rights. According to several rulings of the Federal Constitutional Court, the *Länder* may provide more encompassing rights to its people than the Basic Law (Lorenz 2011). In this perspective, Land constitutions not only complete and enlarge stipulations of the Basic Law but they also create an intra-federal dynamics into constitutional politics.

The way direct democracy was constitutionally dealt with is another example showing that the conventional narrative about German constitutional history is far too simple (table 3). This narrative typically takes the Basic Law as an anti-Weimar constitution. In this



perspective the parliamentary council that drafted the Basic Law and was composed of representatives of the *Länder* was driven by one overarching aim: to avoid all the loopholes of the Weimar constitution. The Basic Law was to make the so called Bonn Republic constitutionally as stable as possible. Therefore, the Basic Law created a representative system in a very strict sense by limiting the role of the people to its most basic right, i.e. to vote. In other words there are no elements of direct democracy in the Basic Law. Surprisingly enough, though, most Land constitutions passed in 1946/47 *included* parts on direct democracy. It were only those Land constitutions adopted in the early fifties which mirrored the federal model and established purely representative systems. Constitutional assemblies drew, hence, very different “lessons from Weimar” (Jung 1994). This is also true for the East German *Länder*. When they drafted their constitutions in the early nineties they followed up on the idea of the *demos* as a main political force and codified various instruments of direct democracy. These stipulations in the East German constitutions triggered a constitutional dynamics in the West German *Länder*, as well. All West German *Länder* successively amended their constitutions accordingly after 1990. Today, all *Land* constitutions include elements of direct democracy like referendums, law proposals and the like. Once again, these differences were not due to the BL (alone) but rather due to historical and regional circumstances and processes of policy-learning between federal units.

Finally, the governmental systems of the *Länder* vary substantially, as well (table 4). E.g. until 2000, the Bavarian parliament consisted of two chambers, including a Senate which did not mirror the logic of the federal upper chamber at all. The Bavarian Senate consisted of representatives of social groups. It was, therefore, rather a legacy of a corporatist system. Furthermore, contrary to the federal level the Land constitutions of Berlin, Hesse, Rhineland-Palatinate, and the Saarland do not include a constructive vote of no confidence. And eight Land parliaments not only have to elect the prime minister like the Bundestag at the federal level but also to confirm members of the cabinet (either each minister individually or the cabinet as a collective body). The Bavarian *Landtag* even lacks the right to bring down a government by a vote of no confidence. It can neither oust the prime minister nor the government by a parliamentary vote. According to the Bavarian constitution, the prime minister „has to step down“ if the political circumstances inhibit a trustful cooperation between him (or her) and the Bavarian *Landtag* (Art. 44 par. 3 of the

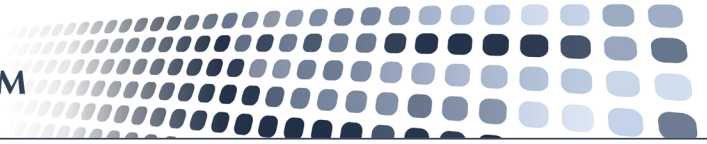


Table 4: Land parliaments and Land governments: Constitutional regulations

	Land parliament has to ...				Ousting of prime ministers possible with ...	
	elect the head of government	confirm the cabinet	confirm single ministers	confirm the ousting/ appointment of new ministers	vote of no confidence	constructive vote of no confidence
BW	✓	✓	...	✓	...	✓
BAV	✓	✓	...	✓
BER	✓	✓	✓	...
BRB	✓	✓
BRE	✓	...	✓	✓	...	✓
HAM	✓	✓	...	✓	...	✓
HES	✓	✓	...	✓	✓	...
MV	✓	✓
LS	✓	✓	...	✓	...	✓
NRW	✓	✓
RP	✓	✓	...	✓	✓	...
SLD	✓	✓	...	✓	✓	...
SY	✓	✓
SAT	✓	✓
SH	✓	✓
TH	✓	✓

Abbreviations: BW = Baden-Württemberg, BAV = Bavaria, BER = Berlin, BRB = Brandenburg, BRE = Bremen, HAM = Hamburg, HES = Hesse, MV – Mecklenburg-West Pomerania, LS = Lower Saxony, NRW = North Rhine-Westfalia, RP = Rhineland Palatinate, SLD = Saarland, SY = Saxony, SAT = Saxony-Anhalt, SH = Schleswig-Holstein, TH = Thuringia.

Bavarian Constitution). Formally this turns the Bavarian system into a non-parliamentary form of government (Steffani 1979; Reutter 2009: 194 ff.).

To wrap up our findings und draw some preliminary conclusions: When the German *Länder* adopted their constitutions they did not just copy a federal blueprint but made their own choices. The same is true for later amendments of the constitutions. Full-fledged constitutions or just "instruments of government", own catalogues of basic rights or mere references to the rights guaranteed by the Basic Law, including instruments of direct democracy or adhering to the national default of a strictly representative form of government – these were some of the issues the constitutional assemblies of the *Länder* had to decide upon. Arguably, the BL played an important role for the content of German *Land* constitutions. Legally, the BL actually defined the constitutional space of *Länder* and shaped



the content of Land constitutions. However, the existence of the BL can neither explain the differences between *Land* constitutions nor the differences between *Land* constitutions and the BL.

Theoretically, this supports an understanding of Land constitutions as manifestations of regional popular sovereignty. And sovereignty is not imaginable if constitutions are determined by external factors like the BL. To put it differently: We can only explain the shape and the content of subnational constitutions in Germany, if we complete our analysis by looking at other reasons than the BL. “Subconstitutionalism” in Germany can only be understood and explained if we combine a top-down perspective with a bottom-up perspective and thus make a first step towards a multilayered theory on subnational constitutional politics.

2. Explaining Differences between Land Constitutions in Germany and how Ideas Travel in a Multilayered System

According to G. Alan Tarr it is a crucial first step to describe differences between and similarities among *Land* constitution. “However, the really interesting inquiry is explaining the reasons for the differences among subnational constitutions, i.e. why subnational units have made more or less use of the constitutional space available to them” (Tarr 2007: 15). The Basic Law, as we have seen, is only one factor explaining such differences. As pointed out, we suggest an approach that combines a top-down with a bottom-up perspective, taking into account how constitution-making and constitution-amending took place in the *Länder*. This leads to questions like how ideas travel between constitutional assemblies, how institutions and procedural rules shape the outcome of constitutional reflections, how political parties influenced constitutional regulations and how political constellations and compromises during constitution-making influence later constitutional changes. By stressing the bottom-up perspective we will focus on: (1) historical circumstances or the era, in which subnational constitutions were discussed and adopted; (2) procedural rules, and (3) different political majorities in the assemblies (Tarr 2007: 15). In other words: We assume that it has been ideas, institutions and interests that shaped *Land* constitutions (apart from the Basic Law, of course).



Table 5: Adoption of Land Constitutions

Land	Entry into force on	Adoption of the constitution by			
		Constitutional Assembly		Referendum	
		Percentage of the votes cast	Percentage of all members	Percentage of votes cast	Percentage of all eligible voters
American Zone					
Bavaria	08.12.1946	90,7	75,5	70,6	49,6
Bremen	22.10.1947	96,4	81,0	72,4	45,1
Hesse	01.12.1946	93,2	91,1	76,8	48,8
French Zone					
Rhineland-Palatinate	18.05.1947	69,3	55,1	52,9	35,2
Saarland	17.12.1947	98,0	96,0	-	-
British Zone					
Hamburg	^{d)} 01.07.1952	97,3	89,2	-	-
Lower Saxony	01.05.1951	77,5	71,8	-	-
Northrhine-Westfalia	11.07.1950	53,1	50,9	61,8	40,8
Schleswig-Holstein	12.1.1950	91,8	64,3	-	-
New Länder^{e)}					
Brandenburg	21.08.1992	82,8	81,8	94,0	44,8
Mecklenburg-Westpomerania	23.05.1993	85,5	80,3	60,1	38,4
Saxony	06.06.1992	87,4	82,5	-	-
Saxony-Anhalt	18.07.1992	75,5	75,5	-	-
Thuringia	16.10.1994	84,6	84,1	74,2	50,5
Special Cases					
Berlin	01.10.1950	100,0	80,0	^{d)} 75,1	48,0
Baden-Württemberg	20.11.1953	89,5	64,2	-	-

Source: Reutter 2009: 48.

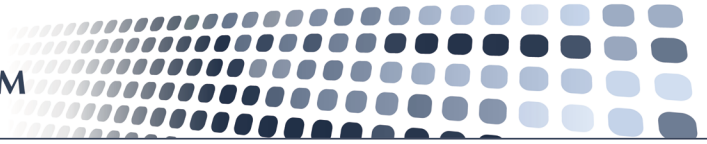
(1) **Ideas:** As already pointed out, the era in which Land constitutions were adopted had had significant effects on the shape and the content of the constitutions. Since 1945 three periods might be distinguished (table 1).

- In the five *Länder*^{II} in which the constitutions had come into force *before* the Basic Law the respective debates were shaped by regional political configurations. Some of these ideas originally developed at Land level have traveled bottom-up to the federal level. For example, Karlheinz Niclauß (2008) found evidence that the debates on second chambers that took place in the constitutional assemblies of the



Länder influenced the discussions in the parliamentary council. Adolf Birke (1977) came to similar conclusions when he reconstructed the respective debates on the constructive vote of no confidence in the different constitutional assemblies. He found that it was not only the parliamentary council that shaped the discussions in the constitutional assemblies of the *Länder* but quite often also the other way round. From that the question arises how the respective ideas traveled between the two constitutional levels in Germany. The first and most obvious reason was that many members of the parliamentary council also belonged to constitutional assemblies of the *Länder*. But it will be the task of future research to explore this matter further.

- Between 1950 and 1953, six *Länder* adopted their constitutions. The constitutional assemblies in Schleswig-Holstein, Lower Saxony and Hamburg focused on regulations concerning the organization of state power. Also the constitutions of Baden-Württemberg and North Rhine-Westphalia had only few articles on basic rights, while regulations about social life and the economic system (incl. family, education, religion) were dwelled upon more extensively. As already pointed out, this was mostly due to the perception that the Basic Law seemed to make basic rights in a *Land* constitution superfluous. The exceptions to this rule – Berlin and Baden-Württemberg - bring to the fore that constitutions also have an important symbolic function in a multilayered system. They represent the political identity of a *Land* and manifest the sovereignty of its people. In addition, these examples make clear that constitutional ideas were institutionally and historically filtered. The lessons drawn from the failure of the Weimar Republic led to different solutions.
- The reunification of Germany implied an amalgamation of territories in which different constitutional ideals had grown. East German constitutions mirror an inclination to the Rousseauian ideal of democracy, to extensive human right catalogues and regulations on public objectives. These differences were ignored at the federal level. Therefore, constitution-making in the new *Länder*, once again, referred to the symbolic function. It had to balance out missing constitutional debates at the federal level. This deficit at the federal level led to extensive social



rights in the constitution in Brandenburg or to the mentioning of parliamentary opposition in some constitutions.

(2) **Institutions:** Notwithstanding some striking differences, constitution-making in the Länder followed similar institutional trajectories. Preceded by a “preparliamentary” stage, in which interest groups, legal scholars, or individuals could freely participate, constitutional debates became quickly “parliamentarized”, i.e. they were channeled into formal assemblies. As soon as constitutional assemblies had been set up the debates had to follow formal and procedural rules and mainly took place in committees and other institutional structures. Plenary meetings of the respective constitutional assemblies were supposed to resolve existing controversies and provide the upcoming constitution with the largest majority possible. Even though in most cases the constitutions were adopted by large majorities, in North Rhine Westfalia the parliament mustered just a majority of 53.1 percent (table 5). And that was even worse if a constitution required a referendum. Once again, the percentage of votes cast in favor of a constitution looks in most cases quite impressive; very often it lies beyond 70 percent. However, there are just one people that approved their constitution with a majority of the eligible voters: In the year 1994 in Thuringia 50.5 percent of all voters cast their vote in favor of the constitution. In all other Länder only a minority of the eligible voters approved the constitution. In Rhineland-Palatinate only 35 percent of the voters were in favor of the constitution. Again, it will be up to future research to explore whether and how far these differing institutional and procedural rules had any effect on the content and the legitimacy of a constitution. So far we would assume three possible effects: First, with the institutionalization the debates become more “rational” and technical. In an institutional setting, experts will play a more important role. Second, discussions that take place in parliament privilege political parties. They are represented in parliaments, have developed respective ideas and concepts, and can also mobilize support for their positions. Thirdly, referendums seem to be of rather secondary importance for the content and the stability of constitutions.

**Table 6: Political Composition of Constitutional Assemblies in the *Länder* (Percentage of Mandates)^{a)}**

Land	Year	^{b)} Christian Parties	^{c)} Social Democrats	^{d)} Liberal Parties	^{e)} Communist Parties	^{f)} Green Parties	^{g)} Others
American Zone							
• Bavaria	1946	60,6	28,3	1,7	5,0	-	4,4
• Bremen	1946	15,0	65,0	4,0	4,0	-	12,0
• Hesse	1946	38,9	46,7	6,7	7,8	-	-
French Zone							
• Rhineland- Palatinate	1946 22.10.1947	55,1	36,2 96,4	1,6 81,0	7,1 72,4	-	- 45,1
• Saarland	1947	56,0	34,0	6,0	4,0	-	-
British Zone							
• Hamburg	1949	18,3	54,2	14,2	4,2	-	9,2
• Niedersachsen	1947	20,1	43,6	8,7	5,4	-	22,1
• Northrhine Westphalia	1947	42,6	29,6	5,6	13,0	-	9,3
• Schleswig- Holstein	1947 01.05.1951	30,0	61,4 77,5	0,0 71,8	0,0 -	-	8,6 -
New Länder							
• Brandenburg	1990	30,7	40,9	6,8	14,8	6,8	-
• Mecklenburg- West Pomerania	1990	43,9	31,8	6,1	18,2	0,0	-
• Saxony	1990	57,5	20,0	5,6	10,6	6,3	-
• Saxony-Anhalt	1990	45,3	25,5	13,2	11,3	4,7	-
• Thuringia	1990	49,4	23,6	10,1	10,1	6,7	-
Special Cases							
• Berlin	1950	20,0	58,5	13,1	8,5	-	-
• Baden-Würtbg.	1952	41,3	31,4	19,0	3,3	-	5,0

a) At the beginning of the assembly; b) CDU, CSU, BCSV, CDP, CVP; c) SPD, SP, SPS; d) FDP, DP, LDP, DVP, DPS; e) KPD, KPS, PDS; in Berlin the representatives of the East German SED did not accept their mandate; f) Bündnis 90/Die Grünen; Neues Forum; g) WAV, BDVP, Z, NLP/DP, DP, DKP, SSW, BHE.

Quelle: W. Reutter, *Föderalismus*, op. cit, p. 62.

Source: Reutter 2009: 48.

(3) **Interests:** As just pointed out, political parties played a crucial role in constitutional assemblies. Based on the guidelines of the Western Allies or the decisions made by the respective Land parliaments parties recruited members, developed programs and drafts for constitutions, integrated social interests, provided the venues for debates and – most importantly – had to make sure that the drafts received the necessary majorities in constitutional assemblies (Pfetsch 1985: 133; Pfetsch 1990).

In most cases the majority of the legal members of a Land parliament were sufficient in order to adopt a constitution for the first time. Christian-democratic parties owned such a

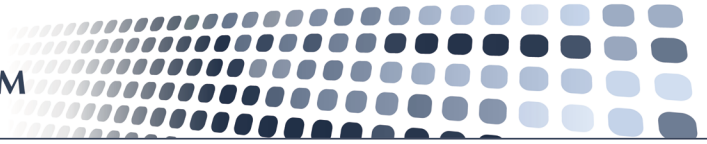


majority in four *Länder*, the SPD mustered such a majority in Berlin, Bremen, Hamburg, and Schleswig-Holstein (table 6). And these majorities left their imprints on the constitutions. In those *Länder*, where christian-democratic parties dominated Christian values received a prominent role in the constitution. It was different in Bremen, Hesse, and Berlin where the social democracy owned a majority in the Land parliaments. In these *Länder* regulations on the economic system and the social order found a more prominent place in the constitution than in *Länder* with a weak social-democratic party. Political parties also held different views on a “good political order” or on the role direct democracy was supposed to play.

Even though these are still tentative thoughts on the reasons why Land constitutions differ from each other they show the necessity to combine a top-down with a bottom-up perspective. It is under this premise that the multilayered underpinning of constitution-making in the German *Länder* can be adequately dealt with and included into a prospective theory on subnational constitutional politics in Germany. The relevance of the bottom-up perspective is once more proven if the changes of German Land constitutions are examined.

3. Constitutional Change: On the Inadequacy of Institutional Theories in Order to Explain Constitutional Amendment Rates in the German *Länder*

The analysis of the “ease with which subnational units can either revise or amend their constitution” (Tarr 2007: 15) shows once again that Basic Law has only a limited impact on subnational constitutional politics in Germany. Of course, sometimes amendments of the Basic Law or rulings of the constitutional court triggered changes of Land constitutions, as well (e.g. in the financial system). But to look at the Basic Law is neither necessary nor sufficient in order to explain the amendment rates in the German *Länder* (table 7). This leads us to the assumption that institutionalist theories are inadequate in order to explain constitutional amendment rates in the German *Länder*. To put it differently: It is not the constitutional framework that counts for the differences between the amendment rates. We rather think that actor-centered approaches, highlighting interest struggles and the flow of

**Table 7: Land Constitutions: Amendment Rates (until 2010)**

	# of changes until 09/1990		# of changes between 10/1990 and 12/2010		# of changes until 12/2010	
	# of bills	Change every ... year	# of bills	Change every ... year	# of bills	Change every ... year
BW	15	2,5	4	5,1	19	3,0
BAY	5	8,8	6	3,4	11	5,8
BER	20	2,0	17	1,2	41	1,6
BRB	-	-	6	3,1	6	3,1
HB	6	7,2	12	1,7	23	3,5
HH	5	7,7	5	4,1	12	5,9
HES	2	21,9	5	4,1	7	9,2
MV	-	-	2	8,8	3	8,8
NDS ^{b)}	9	4,4	7	2,9	17	3,7
NRW	14	2,9	5	4,1	19	3,2
RP	29	1,5	9	2,3	36	1,7
SLD	17	2,5	5	4,1	24	2,9
SAN	-	-	0	-	0	-
SAT	-	-	1	18,5	1	18,5
SH	8	5,1	8	2,5	22	3,8
TH	-	-	4	4,3	4	4,3
BL	35	1,2	22	0,9	57	1,1

Abbreviations: see table 4.

ideas, are far more promising. Testing assumptions about the causes for amendments of national constitutions we conclude that there seems to be an original logic of subnational constitutional change in Germany. In any case, the changes of Land constitutions seem to contradict two of the most common assumptions about the causes for constitutional change.^{III}

(1) It is almost a commonplace to assume a causal link between constitutional rigidity and the number of changes of a constitution. In other words, most often it is hypothesized that the higher the hurdles for constitutional change the less frequent a constitution is changed (Roberts 2008; Lutz 1994; Flick 2008; Lorenz 2005, 2008). This assumption has been applied to German Land constitutions as well (Pestalozza 2005: 26). German Land constitutions have been changed between indefinitely (Saxony) and 1.6 years (Berlin). And these differences cannot be explained by stipulations in the Land constitutions themselves. As a matter of fact, there is not much of a difference as far as the rigidity of subnational constitutions is concerned. In most cases Land constitutions can be changed with a

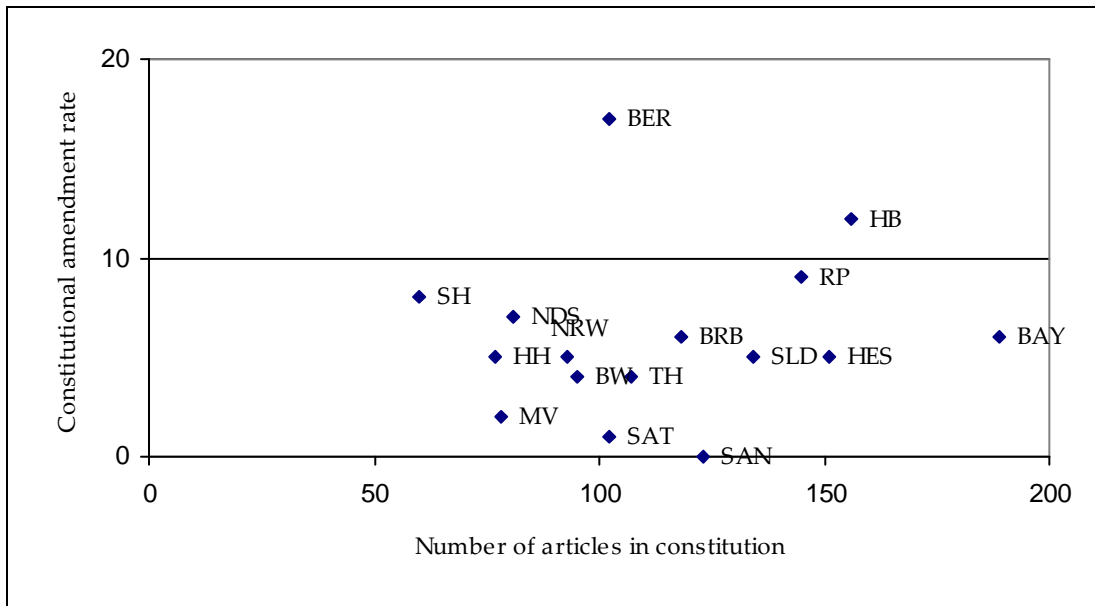


majority of two thirds of the members in parliament. In Bavaria and Hesse a subsequent referendum is obligatory, and in Baden-Württemberg and Hamburg a constitutional amendment requires just the half of all MPs (even though two third of the votes actually cast has to be in favor of the constitutional change).^{IV} In short: The constitutional rigidity is quite similar in the German Länder (Flick 2008). But even though we find similar constitutional rigidities in the German Länder, the constitutional amendment rates vary significantly. Correspondingly, the constitution of Hamburg can comparatively easily be amended and has only been altered twelve times between 1949 and 2010 (table 7). At the same time *Land* constitutions including a higher rigidity have been changed more often. A statistical analysis confirms this impression. There is no significant correlation between constitutional rigidity and the frequency of constitutional change.

(2) A second hypothesis states that the longer a constitution actually is the more often it will be changed (among many others, Lutz 1994; Flick 2008). That seems quite logical. If you have more articles and regulations in a constitution the need for changes seems to increase necessarily. But already the scatter plot brings to the fore that there is no link between these two variables (figure 1). The longest constitution, the one from Bavaria, has only been changed 6 times since 1990, while constitutions that were much shorter (e.g. from Berlin, Lower Saxony) had been changed far more often. In other words: The length of a constitution does not affect the number of changes.



Figure 1: Length of Constitutions and Constitutional Amendment Rates (1990-2010)



4. Is There a Genuine “Logic of Subnational Constitutional Politics in Germany”? – Some Tentative Conclusions on Future Research on Constitutional Politics in Multilayered Systems

The basic questions arising from our findings and reflections are: Is there a genuine “logic of subnational constitutional politics”? And how does the fact that constitutional politics in the German *Länder* takes place in a multilayered system affect German subnational constitutional politics? From our findings and reflections four tentative conclusions can be drawn.

Firstly, we explored the relationship between the national and the subnational constitution and addressed the question as to how far the Basic Law determines the constitutional space allotted to the *Länder*. Even though the „principle of homogeneity“ (Art. 28 BL), requires the constitutional order in the *Länder* to conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of the Basic Law we brought to the fore that Land constitutions differ significantly from the Basic Law and each other. In consequence, the aforementioned principle of homogeneity can at best partly explain the content and shape of *Land* constitutions. The



differences highlighted in our first part confirmed this assumption. Theoretically this links constitution-making to popular sovereignty. As sovereign entities, the people in the *Länder* cannot be deprived of their right to adopt constitutional stipulations that differ from the BL and from other Land constitutions. However, even though the Basic Law cannot rule out constitutional stipulations contradicting the Basic Law it inhibits that these stipulations in *Land* constitutions can come into effect. We have, hence, clearly to distinguish between the making of constitutions on the hand and their effect on the other.

Secondly, we not only assumed two distinct spheres of popular sovereignty and governmental authority (Tarr 2007: 4) but also discussed tentatively varying factors explaining the contents and shape of subnational constitutions in Germany. In order to explore how the *Länder* filled their constitutional space we referred to historical, procedural, and political factors, i.e. to ideas, institutions and interests. It will have to be the task of our future research to explore how these factors contributed to the making and the shaping of constitutions in multilayered systems. From our preliminary findings and reflections it should be evident that we privilege actor-centered approaches and we think it crucial to combine a top-down with a bottom-up perspective.

In a third step, we analyzed changes of *Land* constitutions. Our findings show that constitutional amendments in the *Länder* cannot be explained by the Basic Law. Even more importantly, none of the variables highlighted in seminal studies on national constitutions can satisfactorily explain the number and dynamics of constitutional change in the German *Länder*. So, we assume that not only the making but also the amendment of Land constitutions in Germany follows its own rules. Once again, that points to the bottom-up perspective frequently referred to in our paper.

Finally, our future research will strongly depend on methods of comparative constitutional politics (Law/Versteeg 2010) and should include theoretical findings of research on constitutional change in multi-layered systems which, however, until now focus at the federal proceedings (Benz/Behnke 2009; Hönnige/Kneip/Lorenz 2011; Benz/Colino 2011). In order to explore the role of interests and institutions as well as the importance of ideas we will have to rely on comparative case studies. With these methodological tools we will embark on the project to build a theory on subnational constitutional politics in multilayered systems.



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^I We operationalize the length of a constitution by the number of articles in the year of adoption. This is not the best indicator, though. It would be better to also include the number of paragraphs or even words. In addition, we excluded the constitutions of Baden, Württemberg-Hohenzollern, and Württemberg-Baden as well as the constitutions of the *Länder* of the GDR. The Land constitutions of the GDR went out of force in 1952/3. The three *Länder* of the Federal Republic amalgamated in 1952 and adopted a new constitution in 1953.

^{II} As a matter of fact, there were eight *Länder* that adopted a constitution before the Basic Law came into force. However, three *Länder* – Baden, Württemberg-Baden and Württemberg-Hohenzollern – amalgamated into Baden-Württemberg that adopted its new constitution in 1953. Furthermore there were preliminary constitutions in Berlin and Hamburg as well as constitutions in the then five *Länder* of the GDR. None of these constitutions will be included in the analysis.

^{III} There are, of course, other assumptions about the reasons for constitutional change; cf. Elster et al. 1998; Lorenz 2010.

^{IV} There are a few exceptions, though. In Hesse you have to have a simple majority but also a referendum on the constitutional change; in Bremen you needed 100 percent of the votes in the parliament until 1994, since then Bremen has joined the other *Länder*. In Baden-Württemberg, Hamburg and Lower Saxony (until 1993) a simple majority of the members of the Land parliament was sufficient.

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