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Multilevel Systems and Sub-National Constitutional Politics in Germany: a Qualitative Comparative Analysis

by

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Abstract

Are sub-national constitutional politics shaped by multilevel structures or by sub-national factors? That is the question I am tackling with in this paper. In order to answer this question I will examine 23 decision-making processes in German *Länder* and try to find out how far their outcome has been determined by multilevel and / or sub-national factors. Notably, I will refer to three policy areas in which the two levels of the German federal system interact in different ways. While the Basic Law determines the sub-national constitutional space with regard to capital punishment and the debt brake comprehensively and in detail, the *Länder* have significant constitutional leeway with regard to European integration. In addition – and maybe even more importantly – the paper explores unknown methodological territory. I apply a new empirical tool to the research question at hand by using Qualitative Comparative Analysis (QCA). Qualitative – or Configurational – Comparative Analysis is supposed to better contextualize the effects of causes for an outcome than conventional quantitative methods. Overall the study will bring to the fore that as far as political science is concerned the analysis of constitutional politics in the German Länder is still in its infancy. We have to refine our theoretical models and improve our empirical tools. Only then we will be able to better understand how the multilevel system, party politics, and constitutional features impact on sub-national constitutional politics.

Key-words

Sub-national constitutions, German federalism, German Länder, multi-level system, European integration, Qualitative Comparative Analysis

1. Introduction[I]

According to James A. Gardner there are "several grounds upon which one might plausibly think that in many places around the globe the conditions for subnational constitutionalism exist. Whether it has in fact arisen in such places, however, is another question" (Gardner 2007: 17 f.). Gardner's critical observation is based on the premise that a constitution as a written document does not necessarily live up to what we expect from constitutionalism as a "doctrine concerned with the form of government, the limitation of power, and the protection of rights relating to the different entities which comprise the nation (or the State)" (Pinheiro 2010: 8). In this perspective sub-national constitutionalism is nothing but the principle of national constitutionalism applied to the sub-national level (Gardner 2007: 3-4). The American tradition represents the paradigmatic example in this respect. In the USA, Gardner highlights, constitutionalism rests on two pillars: on the people's claim for self-governance and on the protection of liberty (Gardner 2007: 2-3). In this view a constitution is a "kind of charter of living". Accordingly, an "ideology of subnational constitutionalism (…) conceives of state, provincial, or regional constitutions as charters of self-governance self-consciously adopted by subnational populations for the purpose of achieving a good life by effectively ordering subnational governmental power and by protecting the liberties of subnational citizens" (Gardner 2007: 3).

This clearly is an intriguing and ambitious concept as it assumes that both national and sub-national constitutionalism makes the same claims about similar issues and should, hence, theoretically be dealt with in the same manner. As a matter of fact, for many scholars German sub-national constitutions are manifestations of territorially defined "identities" and important for the stability of the political order in general and the federal system in particular (Dombert 2012; Jesse et al. 2014: 53-55; Vorländer 2011; Lorenz 2011). In this perspective German Land constitutions not only set up the rules of the game for political self-determination but they also provide a means for social integration. In short: German Land constitutions are complimentary to the Basic Law because they have 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" (Art. 28 par. 1 Basic Law).[II] However, as far as German *Länder* are concerned the idea to ascribe sub-national constitutions

normative and ideological power raises a number of important questions which support Gardner's skeptical view on the chances to find constitutionalism in sub-national units. For example, as Patricia Popelier has pointed out, in multilevel systems – and German federalism is such a multilevel system – we can hardly speak of "self-governance" when we refer to sub-national units because we cannot clearly separate the different levels from each other (Popelier 2014). In addition, the majority of German Land constitutions have neither been adopted "self-consciously", nor have the sub-national "people" in all Länder agreed to their respective constitution in a referendum (Lorenz and Reutter 2012; Pfetsch 1990; Lorenz 2013). Finally, not all German sub-national constitutions include human rights or provisions in order to effectively protect liberty. In consequence, from this angle the crucial question is how in such an institutional setting constitutional change can occur. Or to put it differently: How is constitutional politics linked to multilevel structures?

In this paper I will tackle with this question. However, while respective research mostly focuses on national constitutions in federal states[III] I will address the question at hand by taking sub-national constitutional politics in the German Länder as empirical reference. More precisely, I will examine decision-making processes and try to find out how far their outcome has been shaped by multilevel and / or sub-national factors. Notably, I will refer to decisions addressing provisions on: the capital punishment, the debt brake, and European integration. The paper will not only deal with theoretical issues, though, but – maybe even more importantly – with methodological questions, as well. As a matter of fact, the paper is notably insofar innovative as it tries to provide an empirical answer to the research question at hand by using Qualitative Comparative Analysis (QCA). Qualitative – or Configurational – Comparative Analysis which has originally been designed by Charles C. Ragin[IV] is supposed to better contextualize the effects of causes for an outcome than conventional quantitative methods. In consequence, the paper not only tries to give an answer to the aforementioned research question but it also makes a pledge to introduce a new methodological tool to the study of constitutional politics. It goes without saying that such an attempt is open to further discussion and critique.[V]

In order to answer my research question I will, firstly, discuss the main approaches explaining constitutional change in German *Länder* (table 1). On this basis I will develop three hypotheses about causal links addressing constitutional change in German *Länder*. In a second step I will briefly present the method used for the analysis: the "crisp-set

Qualitative Comparative Analysis" (csQCA). Thirdly, I will use this method in order to compare respective decision-making processes and try to identify necessary and / or sufficient conditions that are supposed to explain the outcome of these processes. In my conclusion I will summarize my findings and indicate some possible theoretical and methodological trajectories for future research on sub-national constitutional politics. Overall I will pursue two goals with this paper: I will examine whether and how far sub-national politics are linked to the multilevel system and I will step on new methodological territory as far as the study of sub-national constitutional politics is concerned.

2. Explaining Sub-National Constitutional Politics in Germany: Theoretical Framework and Hypotheses

2.1. Federalism, *Länder* and Sub-National Constitutional Politics in Germany: Theoretical Approaches

It goes without saying that there is a vast and diverse amount of literature on constitutional change and on subconstitutionalism (Lorenz 2008; Williams 2011; Ginsburg and Posner 2010; Duchacek 1988; Dinan 2008; Tarr 2000; Delledonne 2012; Popelier 2014; Gardner 2007). However, as far as German Land constitutions are concerned the number of either theoretical or empirical studies is rather limited. There are, of course numerous legal studies (cf. eg. Stiens 1997; Pestalozza 2014; Dombert 2012) but only few political scientists have tackled with the question as to how and why sub-national constitutions have been altered in spite of the fact that the number of amendments vary greatly among the *Land* constitutions (table 1) (Lorenz and Reutter 2012; Flick 2008; Hölscheidt 1995; Reutter 2008a: 37 ff.; Reutter 2008b). But that is exactly the question this paper is tackling with. Notwithstanding the rudimentary research landscape we still can distinguish: structuralist, institutionalist, and actor-centered approaches that aim at explaining sub-national constitutional politics in Germany.

Table 1: Features of German Land Constitutions (as of Dec. 2013)

	Year when constitution entered into force	No. of articles (year of adoption)	No. of articles (2013)	No. of amendments (until 2013)[a)]	Amendments per year	Article change rate[c)]
BW	1953	95	101	20	0.33	0,70
BAV	1946	189	196	12	0.19	0,87
BER	1950	102	103	39	0.62	2,49
BB	1992	118	119	8	0.37	1,26
HB	1947	156	158	27	0.41	1,86
HH	1952	77	78	16	0.26	1,83
HES	1946	151	164	8	0.12	0,19
LS	1951	78	82	18	0.19	0,46
MW	1993	81	84	4	0.29	0,58
NRW	1950	93	97	20	0.31	2,19
RP	1947	145	154	37	0.55	2,41
SLD	1947	134	129	27	0.41	2,60
SAX	1992	123	124	1	0.05	0,14
SAA	1992	102	102	1	0.05	0,42
SH	1950	60	66	18	0.28	0,11
TH	1992	107	108	4	0.20	0,45

BW = Baden-Wurttemberg, BAV = Bavaria, BER = Berlin, BB = Brandenburg, HB = Bremen, HH = Hamburg, HES = Hesse; LS = Lower Saxony, MW = Mecklenburg-Westpomerania, NRW = Northrhine Westphalia, RP = Rhineland Palatinate, SLD = Saarland, SAX = Saxony, SAA = Saxony-Anhalt; SH = Schleswig-Holstein, TH = Thuringia

a) The newly drafted constitutions of Berlin, Lower-Saxony and Schleswig-Holstein have been counted as amendments; b) we counted the number of words with the windows word program; c) number of articles changed per year.

Source: my compilation; websites of Land parliaments.

(a) Structuralist approaches represent the prevailing view on German sub-national constitutional politics. They explain the content and the outcome of respective decision-making processes with the principles and the functioning of German cooperative federalism.[VI] In this perspective, the Basic Law ascribes the *Länder* only limited competencies as far as their constitutions are concerned[VII] because Art. 28 of the German Basic Law (BL) 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. Due to this "principle of homogeneity" many scholars see Land constitutions "overshadowed by the Basic Law" (Möstl 2005; Stiens 1997; Pestalozza 2014). From this angle, the BL is a superordinate legal framework authoritatively allotting constitutional space to the *Länder*, prescribing the content of *Land* constitutions, and overruling regulations contradicting the BL. As pointed out, according to this widespread view among respective scholars the BL "overshadows" sub-national constitutions which are at best of secondary importance and should have no relevance for politics. Furthermore, sub-national representative bodies have no say in policy-making, at all. In essence, this approach

"explains" respective sub-national constitutional politics "top down" either as a functional effect of cooperative federalism or as a sort of appendix to the Basic Law. In addition, such a multilevel system is supposed to cause intertwined decision-making, favor unitary policies and privilege the executives. European politics are to have the same impact (Reutter 2006; Reutter 2015). In this perspective "Europe" overrules the principle of subsidiarity and "colonizes" policy areas that the *Länder* used to regulate (e.g. higher education). This, once again, leads to: intertwined policy-making, an overriding influence of the executives, and shrinking legislative and thus constitutional powers of *Land* parliaments (Thaysen 2005; Abels 2011; Abels 2013).

However, as far as constitutional politics are concerned this approach shows important shortcomings and lacunae. Firstly, similarly to institutionalist theories structuralist concepts fail to include political parties and parliaments at the sub-national level into their concepts. They explain sub-national constitutional politics "top down" and ignore regional or political interests as well as political constellations at the *Länder* level (Lorenz 2013). Admittedly, actors play no explanatory role in this concept. On the contrary, it is the Basic Law and "Europe" that are to determine the frequency, the content, and the scope of sub-national constitutional amendments. Secondly, these concepts assume a sort of constitutional hierarchy in which the European, the national, and the sub-national level are separated. However, as Popelier (2014) has highlighted in multilevel systems it is not possible to clearly distinguish between levels. The different levels are mixed up, overlap each other, or create a sort of intermeshed structure. As far as constitutional politics are concerned Popelier, thus correctly points out: "[W]e cannot examine the constitutional system at one level without having regard for its impact on and interplay with the other levels" (Popelier 2014: 7). For my research question this means that when we examine sub-national constitutional politics we always have to take the impact other levels produce into account. Hence, when we analyze sub-national constitutional politics we have to bear in mind that the Basic Law might grant different degrees of constitutional space to different areas. This assumption can be brought to the fore when we describe how sub-national constitutions are affected by the Basic and European Law in the three policy fields I will include into the analysis: capital punishment, debt brake, European Union. I picked these three topics because they differ in one crucial dimension: The Basic Law rules out capital punishment, prescribes specific contents for debt brakes in Land constitutions, and says

nothing about how the Länder want to constitutionally deal with European integration. Hence, we should find some indications on how sub-national constitutional politics tackle with variations in a multilevel system.

- *Capital Punishment*: As a matter of fact, when the Basic Law came into being in 1949 there were already five *Land* constitutions allowing capital punishment: In Baden (Art. 85),[VIII] Rhineland-Palatinate (Art. 3), Bremen (Art. 121), Bavaria (Art. 47), and Hesse (Art. 21) the constitutions had come into force in 1946 or 1947. They allowed the death penalty to be applied if the crime had been most severe.[IX] While Rhineland-Palatinate, Bremen, and Bavaria eliminated the respective article from their constitutions in the nineties,[X] the constitution of Hesse still stipulates that capital punishment is possible if the crime is severe enough. Yet Art. 102 of the Basic Law overruled these provisions in the Land constitutions and since 1949 nobody has been sentenced to death any more in Germany.[XI] Hence, with regard to the death penalty, the *Länder* have no option at all. Even if a *Land* would reintroduce the death penalty this would be unconstitutional and not applicable.[XII] With regard to this issue the Basic Law allots no constitutional space to the *Länder*, at all (Hötzel 2010).
- *Debt Brake*: It is slightly different with regard to the debt brake. As is generally known, since 2009 the Basic Law includes strict rules with regard to budgetary deficits for the federation and the *Länder*. Art. 109 par. 3 BL now rules that in "principle" the budgets of the Federation and the *Länder* "shall be balanced without revenue from credits". Based in this provision the federation has to have balanced budgets without taking out any loans or producing any deficits from 2016 onwards and the *Länder* from 2020 onwards. Evidently, the European stability and growth pact has been the template for the debt brake in Germany (Ciagla and Heinemann 2012; Sturm 2011; Steinbach and Rönicke *2013*; Berlitt 2011; Buscher and Fries 2013). However, the *Länder* retained a limited leeway in this domain because they may "introduce rules intended to take into account (…) the effects of market developments that deviate from normal conditions, as well as exceptions for natural disasters or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity. For such exceptional regimes, a corresponding amortisation plan must be adopted" (Art. 109 par 3 BL). In other words if a *Land* abstains from amending its constitution the

respective provision of the BL applies directly (Sturm 2011).[XIII] As a matter of fact, the *Länder* reacted differently to the default set by the Basic Law. Until March 2014 half of the *Länder* altered their constitution accordingly, the other half did not. This brings another question to the fore: Why did some *Länder* vote for an amendment while others did not? Or following up on Robert F. Williams': Are constitutional politics "outside the scope of 'normal politics'?" (Williams 1999: 639). And in Germany "normal politics" mean party politics. As a matter of fact, just the Left party and the FDP sticked to the same policy in all *Länder*. The Left party always opposed respective constitutional bills; the FDP always supported such a debt brake. The other parties sometimes were in favor of a respective bill, sometimes they rejected it. Important for our research question is, however, the multilevel character of this issue. As pointed out, due to the Basic Law the *Länder* have only limited options in order to deal with this issues in their constitutions: Either the provision of the BL directly applies if a *Land* does not change its constitution or a *Land* alters its constitution but only as far as the Basic Law allows. In sum, in this case the BL allots constitutional space to the *Länder* because it is the cause for respective changes and it determines the content of respective amendments.

- *Europe:* European integration affected sub-national constitutional politics in several ways. Some constitutions entitled citizens of EU member states to participate in local elections; other constitutions mention Europe as a sort of public goal the state has to take into account in its policies; and two constitutions lay down that the parliament have the right to mandate their governments at the federal or the European level if the competency of a Land to pass laws is affected. Even though this is a controversial issue very much debated by legal scholars Bavaria and Baden-Wurttemberg included respective provisions in their constitutions (Eberbach-Born 2013: 289 ff.; Grimm and Hummrich 2005). Both entitle their parliaments to instruct their governments if parliamentary legislative prerogatives are affected.[XIV] In other words: If legislative competencies of the *Länder* are about to be transferred to the national or EU level, the *Landtage* of Bavaria and Baden-Wurttemberg can instruct their governments to oppose or support this policy. As pointed out, some legal scholars doubt that a parliament has the right to "order" its government in a mandatory fashion thus limiting core competencies of the executive. In addition, the political ramifications of such a

provision are unclear (Kropp 2010: 199 ff.). Nonetheless, the crucial point here is that the BL does neither prescribe nor exclude such provisions. Hence, this part of sub-national constitutional politics is yet not overshadowed by the national constitution. The BL does not allot constitutional space in this respect. It is part of the constitutional autonomy sub-national units have in the German federal state.

Overall this short review of respective areas already brings to the fore that the Basic Law allots constitutional space to the *Länder* to different degrees depending on the subject. In addition, in the German federal system the *Länder* enjoy constitutional autonomy. Hence, they are not to be deprived of the privilege to change their constitutions and pass amendments at their will. Both elements provide the *Länder* with constitutional leeway and give actors the chance to pursue their strategies. Hence, an empirical analysis has to account for multilevel systems affecting sub-national constitutional politics in different ways and to varying degrees.

(b) Institutionalist theories explain the number of constitutional amendments by the features of a constitution. For example, Martina Flick examined constitutional change in the German *Länder* in an institutionalist perspective without, however, being able to confirm the widespread hypothesis that the rigidity and the length of sub-national constitutions had significant effects on the number and scope of amendments (Flick 2008).[XV] This branch of theory sees formal or informal rules or structures determining the behavior of political actors. Or: We have to study just the institutions in order to explain social or political phenomenon because institutions constrain actions and define options as well as evolutionary paths. This concept can easily be applied to constitutional politics. In this perspective a constitution is nothing but an institution. A constitution sets the rules of the political game. It thus prescribes to parties how to act, it determines the majority necessary for an amendment, and it lays down the specific procedures. In addition, constitutions contain politically salient issues.

(c) Actor-centered approaches: Obviously, both institutionalist and structuralist approaches fail to include actors into their explanations. Actors just follow institutional rules or execute some "objective" premises. Notably Lorenz takes a different stance on the issue at hand, though (Lorenz 2013; Lorenz 2008). She stresses the role parties play in constitutional politics. Parties have the power to shape constitutions at the *Länder* level. At the same time they decide how to incorporate change linked to multilevel systems into sub-national

constitutions and they are able to overcome the institutionalist hurdles laid down in constitutions that demand supermajorities. Overall these are the elements supporting the view that there is a sub-national logic of constitutional politics. Actors, institutions, and decision-making processes are sub-nationally shaped in spite of the effect of multilevel systems, federal law, and European integration.

This short review of the prevailing theories and concepts trying to explain the scope, the frequency, and the content of sub-national constitutional change in Germany already makes clear that we need a specific methodological approach in order to do justice to the complexity of the respective decision-making processes. In order to find out how far the multilevel system affects sub-national constitutional politics and what role parties play in this policy field we need a methodological tool that is open and flexible enough to give the single cases its due share and still make cross-case comparisons possible. Qualitative comparative analysis provides this tool. However, before outlining the basic features of this method I will develop three basic hypotheses about sub-national constitutional politics in Germany.

2.2. Hypotheses

The following hypotheses that will be "tested" in the analysis are being deduced from the theories just presented. Overall they describe a sort of explanatory model combining the three theoretical threads just mentioned. However, to my knowledge this is the first attempt to translate these theoretical concepts into what QCA has coined "conditions", i.e. empirical features of configurations. By combining these elements I try to do justice to the fact that constitutional change normally has multiple causes. QCA gives credit to this kind of complex causal configurations.

Hypothesis 1 – Multilevel systems: As mentioned above, the prevailing view about sub-national constitutional politics is that it is "oveshadowed" by the Basic Law. In consequence, the *Länder* should have no leeway at all as far as their constitutions are concerned. At the same time we found that the Basic Law allots constitutional space to varying degrees to the *Länder* depending on the issue at hand. From that assumption we can deduce: If the theory of multilevel systems and cooperative federalism is correct we should find that the aforementioned differences should somehow systematically affect sub-national constitutional politics. Or to put it more concretely: The more unitarian a national

constitutional provision is the more homogeneous sub-national constitutional politics should look like.

Hypothesis 2 – Institutions as a cause for constitutional change: As mentioned above the institutionalist theory takes a specific stance on the issue at hand: Its basic assumption is that the features of a constitution explain why and how often the very same legal document is amended. From this angle, it seems logical that the larger the majority required for an amendment the less likely it is that a change will occur, all else being equal (Lutz 1994; Roberts 2009; Lorenz 2008: 28 ff.). The causal link between these two configurational elements can, hence, be put like a traditional hypothesis and runs as follows: The more "rigid" a constitution is the fewer amendments we should find. As a matter of fact, Lutz was able to confirm this hypothesis in his seminal article (Lutz 1994: 358 and 360 ff.). However, as far as national constitutions are concerned Lutz' findings have been challenged by other scholars. Thus, Lorenz found in statistical terms the rigidity of a constitution not very good at predicting the frequency of constitutional change. On the contrary, using data from 38 countries for the period between 1993 and 2002 Lorenz sees her assumption confirmed (Lorenz 2008: 72 f.). Martina Flick (2008) drew similar conclusions referring to German Land constitutions. She was not able to confirm Lutz findings, as well. Hence, it might be worthwhile to reexamine the causal link between rigidity and constitutional politics based on a qualitative comparative analysis.

Hypothesis 3 – Politics: In most cases the institutional set up prescribes a supermajority for a constitutional amendment to be passed. In most cases two thirds of the members of a Land parliament have to vote in favor of such an amendment. In other words parties that compete with each other and which support and oppose the incumbent government at the same time have to cooperate. However, it is difficult to measure such a consensus. I assume that it is telling whether such a supermajority is already being mustered before the bill has been submitted to the floor of a parliament. Or: the larger the majority among the parties that submit a bill to a parliament the more likely it is that this bill will be adopted. Obviously, an important threshold in this respect is the necessary supermajority. Hence, if the parliamentary parties submitting the bill already muster more than this majority I believe it as very likely that the amendment will eventually be adopted.

Overall these are elements supporting the view that there is a sub-national logic of constitutional politics which, however, are linked to multilevel systems. Actors, institutions,

and decision-making processes are sub-nationally shaped but multilevel federal law and European integration also come into play in order to explain constitutional change. We have, hence, a fairly complex configuration combining a "bottom-up" with a "top-down" perspective. Before being able to analyze these causal links and identify sufficient and necessary conditions I have to explain the method I will use in order to find out how far these features can explain the outcome at hand.

3. Qualitative Comparative Analysis: An Introduction

Basically, there are three ways to verify or "test" the aforementioned hypotheses: with case studies, with statistical techniques, and with qualitative comparative analysis.[XVI] As pointed out I will try to find out whether the multilevel system, institutional factors, or sub-national actors have been the cause for constitutional change by using the last method. Furthermore, in order to analyze the causes for sub-national constitutional change in Germany I will refer to a specific variation of Qualitiative Comparative Analysis, to crisp-set Qualitative Comparative Analysis (csQCA)[XVII] which Charles C. Ragin who invented this method took as a tool to "simplify complex data structures in a logical and holistic manner" (Ragin 1987: viii; cf. also: Rihoux and De Meur 2009: 33 ff.). As this method is not very well known I will provide a short introduction and describe the steps to be taken. This short introduction is neither a detailed description of this method nor a manual for social scientists. I will just highlight the major elements of this method and indicate how I used it for the analysis of constitutional politics in the German *Länder*.

According to leading scholars QCA is not only a technique in order to analyze data but an encompassing research approach that is "based on specific requirements on core issues of research design, such as case selection, variable specification, and set membership calibration" (Schneider and Wagemann 2010: 2). In line with this broad understanding QCA may be used in order to summarize and check the coherence of data, to "test" hypotheses, or theories, or conjectures, and to develop new theoretical concepts (Berg-Schlosser et al. 2009: 15 ff.). In this paper I will address all aspects but will mostly use QCA as a technical tool in order to summarize and check the coherence of data. Hence, I will not be able to exploit the whole potential of this method and limit my analysis to some important aspects. The most basic goal of QCA, though, is to produce "a meaningful

interpretation of the patterns displayed by the cases under examination" (Wagemann and Schneider 2007: 3).

Sehring et al. (2013) see case orientation, a holistic view of cases, and detailed knowledge of cases as typical features of QCA. The logical basis of csQCA is Boolean algebra which knows "true" or "false" as the only possible conditions.[XVIII] Hence, csQCA allows identifying necessary and sufficient conditions in order to explain outcomes, and "mapping out similarities and differences between various configurations of conditions and cases" (Marx and Dusa 2011: 104). According to Marx and Dusa (2011: 104-106) QCA consists of three central features (cf. also: Sehring et al. 2013; Wagemann and Schneider 2007; Schneider and Wagemann 2010): It is case oriented, it is comparative, and it is systematic.

- *Case studies* accept the fact that outcomes are rarely due to just a single variable. Accordingly, case studies give the complexity of causal links its due share and understand cases rather in a configurational sense. QCA shares this premise. It believes in a holistic view on cases. In order to accomplish this goal in QCA cases are transformed into complex "configurations" including complex causal conditions. The comparative method focuses, hence, on "configurations of conditions; it is used to determine the different combinations of conditions associated with specific outcomes or processes" (Ragin 1987: 14; cf. also Rihoux and Ragin 2009). It goes without saying that case selection is a crucial element also for this method (Berg-Schlosser and De Meur 2009; King et al. 1994: 51 ff.; Geddes 2003: 89 ff.).
- *Comparative* is QCA because it strives to go beyond single cases. Studies using QCA attempt to identify cross-case patterns using Boolean algebra, which is the "algebra of logic" and the "algebra of sets" (Ragin 1987: 85). It is, hence, not probabilistic, but deterministic. To put it differently: QCA tries to keep the complexity of cases and still attempts to find general patterns in different cases. QCA is, therefore, a tool to generate general explanations about causal relations among different cases. Or as Charles C. Ragin has put it: The goal of csQCA is to "integrate the best features of the case-oriented approach with the best features of the variable-oriented approach" (Ragin 1987: 84). QCA thus tries to avoid the pitfalls of strictly inference-oriented quantitative studies that tend to limit their analysis of causal links to two variables: the

independent and the dependent variable. QCA has the capacity to examine complex configurations. This is the more important as social phenomena normally do have more than just one cause or a cause may trigger more than just one effect. That is the reason why case studies are still very popular among political scientists. Cases are "intrinsically complex, multifaceted, often with blurred boundaries" (Rihoux and Ragin 2009: XVIII). With QCA we are able to account for such complex configurations that are "a specific combination of factors (…) that produces a given outcome" (Rihoux and Ragin 2009: XIX). In addition with QCA we can identify necessary and sufficient conditions for an outcome. Insofar QCA avoids the pitfalls of the prevailing approach of quantitave social science that tries to disaggregate cases into isolated variables as well as single case studies that stresses the idiosyncratic nature of a case. In essence, QCA "allows for equifinality or multiple conjunctural causation" (Marx and Dusa 2011: 105; cf. also: Ragin 1987, Schneider and Wagemann 2007: 19-30).

- Finally, QCA is *systematic* because it uses the "Boolean logic" in order to identify cross-case patterns, explores causal conditions, and reduces the information gathered on single cases in such a way as to make them comparable (Marx and Dusa 2011: 105 f.). With Boolean logic it is possible to minimize the case description and come to the leanest equation that has to be interpreted by the researcher. Hence it fosters parsimonious explanations. In addition, QCA aims at exploring and understanding relations between sets. Most statements in social sciences can be reformulated in this sense. For example, if we say that stable democracies normally presuppose a huge middle class for being stable then all stable democracies are a subset of all states with such a middle class. But by reformulating the aforementioned statement as a set relation social scientists can easier link empirical findings to general theories. This is one reason why QCA is supposed to better link theory to data than quantitative methods. In addition, causal relations can be restated as set relations. Necessary conditions are a subset of the causal condition; "sufficiency" indicates that the causal element is a subset of the outcome (Berg-Schlosser et al. 2009: 6 ff.; Schneider and Wagemann 2007: 19 ff.). With QCA we are able to better understand and conceptualize "the relation between the different causes and how they combine in a given context" (Sehring et al. 2013: 2, cf. also: Schneider and Wagemann 2007: 31 ff.).

Overall, we can say that Qualitative Comparative Analysis is a method that tries to bridge the gap between quantitative and qualitative research (Berg-Schlosser et al. 2009: 3 ff.; Fiss 2014). In addition QCA is able deal with an intermediate number of cases (between 5 and 50). Five cases that each study using QCA should include as a minimum seem to be too many for purely qualitative research. Fewer than fifty cases, however, seem too few for statistical techniques (Schneider and Wagemann 2007: 19 ff.; Fiss 2014: 6). Hence, originally QCA was supposed to cover the intermediate number of cases even though in the meantime we also find studies including up to 200 cases.

As already pointed out, QCA covers various methodological approaches. The approach I will use in this paper is called "crisp set Qualitative Comparative Analysis" (csQCA). csQCA knows only two options for determining which element is member of a set or not: an element is either "in" or it is "out", meaning it is either member of a set [1] or it is not a member of a set [0]. Thus, determining the criteria for membership is a crucial part of csQCA. Furthermore, csQCA rests on comparing all logical combinations of conditions that are part of a data set with those that have been identified in case studies. As csQCA just knows dichotomous values the number of all possible combinations can be calculated by 2^k (k = number of conditions). Not all logically possible combinations can always be found in reality, though. In other words if we have four conditions we will get 16 logically possible configurations (= 2^4). These 16 logical configurations then have to be checked against the cases described by the original data. Based on this operation we might find out whether a given cause is logically associated with a specific outcome and how many cases this logical configuration is able to explain. Please note, that csQCA not only allows to include conditions lead to the outcome to be explained but it can identify the causes that make the outcome impossible, as well. In addition we also can examine effects if the conditions are not present.

One last remark on terminology is necessary, though. Eventually the causal links are to be expressed in Boolean logical terms (Rihoux and De Meure 2009: 34 f.; Schneider and Wagemann 2007: 31 ff.). The basic conventions of Boolean algebra are that uppercase letters indicate that a condition is present [1], while lowercase letters mean that it is absent [0]. As basic operators Boolean algebra uses "AND" which is, oddly enough, represented with the sign for multiplication [*], and "OR" which is represented by [+]. The arrow symbol links a set of conditions with the outcome we want to explain. For example, let us

assume that amendments (Outcome = 1) in the German *Länder* occur if and only if the Basic Law prescribes respective changes (MLS = 1), constitutional rigidity is low or absent (RIG = 0), and party consensus encompassing (CON = 1). This could be expressed in Boolean terms as follows MLS*rig*CON → O.[XIX]

4. Sub-National Constitutional Politics and csQCA

The research question of this paper shares main features with csQCA just described. Firstly, the analysis covers only a limited number of cases. Overall I include 23 decision-making processes covering three issues: the debt brake, capital punishment, and Europe (see appendix). In order to find cross-case patterns we need a method that is able to retain the complexity of these processes, which is a major advantage of QCA. Secondly, both my research question and QCA assume that outcomes may have multiple causes and causes may trigger different effects. It is even feasible to assume that different combinations of factors lead to the same result (Sehring et al. 2013; Marx and Dusa 2011: 105; Schneider and Wagemann 2007). And that methodological premise of QCA very much fits with the aforementioned research question which refers to structural, institutional, and political conditions that might influence sub-national constitutional decision-making. With QCA we can take into account the complexity of such case "configurations" and we can identify "necessary" and "sufficient" conditions for a respective outcome (Schneider and Wagemann 2007: 90 ff.). As far as my research question is concerned this for example could mean that sub-national constitutional amendments can have their causes in the Basic Law, in the rigidity of a sub-national constitution, or in political constellations in the *Land* parliament. The Basic Law or the structure of the multilevel system can, hence, be a sufficient condition for sub-national constitutional change or a necessary one. At the same time, sub-national constitutional change can fail to happen due to the rigidity of a constitution or because the parties were not able to muster the required supermajority.

In order to correctly use csQCA for the analysis of respective decision-making processes different steps are to be taken and "good practices" have to be complied with (Schneider and Wagemann 2010). As a matter of fact, there are various guidelines and examples showing how such an analysis is supposed to be done (Wagemann and Schneider 2007, Schneider and Wagemann 2010; Rihoux and De Meur 2009; Schneider and

Wagemann 2007: 85-172; Sehring et al 2013). As a matter of fact I will not be able to perform all the steps in the recommended way but I will describe every one as detailed as possible.

The analysis requires data describing the combinations of features that are supposed to cause the outcome to be explained. Or to use QCA terminology, we have to create a complex configuration in which "conditions" are causally linked to the outcome. As pointed out, I assume three conditions determining whether respective decision-making processes have led to an amendment: the multi-level system, the rigidity of sub-national constitutions and the capacity to create consensus among parties before the formal legislative process has been set in motion. These features of the case configurations are theoretically grounded and difficult to operationalize. In order to be as transparent as possible I will describe how I designed the original data sheet (appendix) and how I dichotomized the respective values. It has to be noted that this transformation of empirical data into dichotomized values makes it mandatory to determine how theoretically complex causal relations can empirically be described in an adequate manner. These data have, then, to be translated into membership scores as QCA is "the examination of set-theoretic relationships between causally relevant conditions and a clearly specified outcome" (Wagemann and Schneider 2007: 3). In QCA terms this transformation of data into membership scores is called: calibration of sets which is supposed to be based rather on theoretical arguments than on empirical qualifications (Schneider and Wagemann 2010: 7).

For the analysis this means:

- Outcome: The outcome is straightforward and consists either in a constitutional change [1] or not [0]. Hence, the goal is to find out whether and under what conditions a sub-national constitution has been changed or whether we can identify configurations which exclude amendments. However, I do not take into account the specific content of respective amendments which clearly is something future research has to address in a more adequate manner. For example the precise provisions on debt brakes could vary between *Länder* and correspond more or less to the stipulations in the Basic Law.
- Impact of the multilevel system: Far more difficult to "measure" – or to "calibrate" – is the impact the Basic Law respectively the multilevel system may have on sub-

national constitutional politics. The crucial point here is whether the Basic Law includes provisions that either apply directly or overrule respective stipulations in *Land* constitutions. Debt brake and capital punishment do have such an effect on sub-national constitutional politics. Both define exhaustively and in detail the constitutional space of the *Länder*. In these cases I ascribe the value "1" to the condition. It is different with regulations triggered by European integration. Here the Länder are free and not bound neither by national nor by European rules [0].

- Rigidity: Flick (2008: 232-234) defined the rigidity of a constitution by adding up two requirements: the share of votes actually cast and the share of members of parliament necessary for an amendment to be passed. For example the *Landtag* of Baden-Württemberg can pass an amendment if the majority of the cast votes is in favor of the amendment and if at least two thirds of all members of the *Landtag* attended the vote. The sum of 1/2 and 2/3 equalizes to 7/6 which is 1.17. In most cases the constitution can be changed with a supermajority of two thirds of all members of the respective parliament and only if two thirds of all members are present at the vote. In consequence the rigidity in most cases is 1.33 (2/3 + 2/3). Even though constitutional rigidity does not show great variations among *Länder* it seems logical to regard the two-thirds majority of all members of a Land parliament as a sort of crucial threshold because this forces the parties in parliament to find a consensus beyond party lines. Hence, when the index of Flick is 1.33 I will ascribe this condition the value [1]. If the rigidity is less than 1.33 the condition will get an [0].
- Party consensus: As pointed out, parties in parliament have to muster the necessary majority for each amendment. As a rule incumbent governments cannot rely on such a supermajority allowing them to change the respective Land constitution at will simply because they lack this kind of majority. In consequence, respective bills not only have to be endorsed by ruling parties but also by parties in opposition. In other words: We need a sort of "oversized coalition" including parties that eventually strive to unsettle the government in the next election. However, it is difficult to measure such a consensus. Sometimes it might be based on a package deal, sometimes it might be due to the fact that all parties support the amendment

in the first place. I take a consensus as given when parties submitting a respective bill already can muster the necessary majority, i.e. if they represent more seats than necessary for the amendment being passed. Even though this might seem trivial or a matter of course it still tells us something about the capacity of the legislative process to create such a majority if this is lacking.

Table 2: Data Matrix: Features on 23 Decisions in German Land Parliaments

	Explanatory Conditions			
	MLS	CON	RIG	Outcome
CASE-ID	Issue	Share of seats for parties that submitted the bill	Rigidity	Amendment
BAV_DB_1	1	1	1	1
BAV_DB_2	1	0	1	0
BW_DB_1	1	0	0	0
BW_DB_2	1	0	0	0
BB_DB_1	1	0	1	0
HB_DB_1	1	0	1	0
HH_DB_1	1	0	0	0
HH_DB_2	1	0	0	1
HES_DB_1	1	0	0	1
MW_DB_1	1	0	1	1
LS_DB_1	1	0	1	0
LS_DB_2	1	0	1	0
NRW_DB_1	1	0	1	0
RP_DB_1	1	1	1	1
SAX_DB_1	1	0	1	1
SH_DB_1	1	0	1	1
SH_DB_2	1	0	1	0
TH_DB_1	1	0	1	0
RP_DP_2	1	0	1	0
HES_DB_2	1	0	0	0
BAV_EU_3	0	1	1	1
BW_EU_3	0	1	0	1
BW_EU_4	0	1	0	1

The table in the appendix shows the original data and provides some additional information that might be telling for the cases in question. Table 2 represents just the dichotomized data matrix for the conditions laid out in chapter 2, i.e. for the effect I ascribed to the multilevel system (MLS), the degree of consensus (CON), and how rigid the constitution is (RIG). In QCA terms this step is called "calibration" – in quantitative studies it is "measurement" – and is clearly a crucial step in determining the quality of the

analysis. And it goes without saying that this being the first attempt to use QCA for constitutional politics the way I "calibrated" the different conditions is clearly open to critique and improvement. In order to analyze the data matrix we have to transform table 2 into a truth table. A truth table can tell us whether a combination of conditions is logically valid or not and whether logically valid configurations are empirically existent. The truth table for this study is composed of one column for each condition, one column for the outcome and a column for the cases fitting the configuration. In addition, the table shows how often the explanatory conditions triggered the respective outcomes. Each row of the truth table contains one logically possible configuration. As each condition can take the value 1 or 0 we have eight possible configurations (2^3).

Table 3: Truth Table for 23 Decisions

	MLS	CON	RIG	O	Freq0	Freq1	Cases
1	1	1	1	1	0	2	BAV_DB_1; RP_DB_1
2	1	1	0	-	-	-	-
3	1	0	0	C	4	2	BW_DB_1; BW_DB_2; HH_DB_1; HES_DB_2; HH_DB_2; HES_DB_1
4	1	0	1	C	9	3	BAV_DB_2; BB_DB_1; HH_DB_1; LS_DB_1; LS_DB_2; NRW_DB_1; SH_DB_2; TH_DB_1; RP_DB_2; MW_DB_1; SAC_DB_1; SH_DB_1
5	0	1	1	1	0	1	BAV_EU_3
6	0	0	1	-	-	-	-
7	0	1	0	1	0	2	BW_EU_3; BW_EU_4
8	0	0	0	-	-	-	-

MLS = Impact of Multilevel system
CONS = Consensus among parties
RIG = Rigidity
Freq0 = Number of configurations without an amendment
Freq0 = Number of configurations with an amendment
Calculated with TOSMANA 3.1

According to the truth table (table 3) there are three configurations that led to an amendment (rows 1, 5, and 7). Formally this can be put as follows: MLS*CON*RIG + mls*CON*RIG + mls*CON*rig → O. However, as the outcome occurred with and

without MLS and RIG they can neither be regarded as "necessary" nor as "sufficient". Only "CON" figures in all three configurations as a condition. Still, we cannot conclude that consensus is a necessary condition because apparently the outcome also occurred when this condition was not present (rows 3 and 4). However, CON is sufficient because the constitution has always been amended when CON figured as condition.

Still, these are preliminary conclusions because the number of cases eventually explained by the different configurations is very low. Even though each case explained with a configuration matters for QCA (Berg-Schlosser et al. 2009: 9) it is telling that eventually only five outcomes could be unequivocally linked to the conditions. And that includes negative outcomes which only found inconsistent explanations. Therefore, the truth table rather than providing an answer to my research question raises conceptual and methodological issues which are the reason why I deviate from the recommended "good practices". Methodologically, three aspects are to be mentioned in this respect.[xx] Firstly, there are three "logical remainders", that are rows with a configuration without empirical reference. These configurations are laid out in rows 2, 6 and 8. These remainders can be due to case selection, the configurations of conditions or – even more likely - due to the fact that mostly a supermajority is constitutionally required. Anyway, logical remainders happen in many studies using QCA. Secondly and as already mentioned, two configurations lead to contradictory outcomes (rows 3 and 4). Both combinations "MLS*cons*rig" as well as "MLS*cons*RIG" triggered in sum 13 cases an amendment and in 5 cases the outcome did not occur. Normally, these contradictions are to be resolved by adjusting the configurations, including new or removing existing causal conditions, adding new cases, or recalibrating the data (Rihoux and De Meur 2009: 48 ff.; Ragin 1987: 113 ff.; Marx and Dusa 2011: 109 ff.). However, this would mean to change the model that is to explain the outcome. Thirdly, I believe the calibration of conditions far from being perfect. Future research using this kind of method will have to think about how to describe respective conditions.

5. Conclusion

Maybe James A. Gardner is right in his skeptical view on sub-national constitutionalism. Nonetheless, at least in Germany Land constitutions are supposed to

positively impact on the stability and the functioning of democracy (Lorenz 2011; Vorländer 2011; Dombert 2012). The more surprising it is that we still do not know very much about the causes of sub-national constitutional change (Lorenz and Reutter 2012). The same lacunae Ran Hirschl spotted in research on comparative constitutional law can be found in studies on sub-national constitutional politics. Many respective studies still lack a consistent and encompassing theory and what Hirschl (2005: 12) coined "coherent methodology". In my paper I try to fill this gap by using QCA – at least a little bit. It has to be pointed out, though, that to my knowledge this is the first time that QCA has been used in order to analyze constitutional politics in the German *Länder*. It might, hence, not come as a surprise that such an approach still faces methodological and theoretical problems. It surely does not fulfill the criteria for "Good Practices" (Wagemann and Schneider 2007; Schneider and Wagemann 2010). Nonetheless analyzing constitutional politics in German *Länder* with QCA brought some important aspects to the fore and highlight challenges for future research.

Firstly, the analysis of the aforementioned 23 decision-making processes did not create a clear cut answer to the question about the causes for constitutional change. Neither rigidity nor the different impact I ascribed to the multilevel system turned out to be necessary or sufficient conditions neither for the amendments nor for failed decisions. The only feature that was necessary for any kind of positive outcome was consensus. This, of course, is hardly a surprising result, but it stresses once more that any theory explaining constitutional change in sub-national units has to take actors into account. Insofar the results of our analysis very much reflects observations made by Dirk Berg-Schlosser et al. (2009: 10) who state that conclusions of any empirical analysis depend on how the conditions have been operationalized and on which cases have been selected. "Yet, if several competing theories try to explain the same result, QCA techniques will quickly disqualify the theories that are unable to discriminate correctly between cases with and without the outcome under study. This will be indicated by the presence of so-called contradictory configurations (…)" (Berg-Schlosser et al. 2009: 10).

Secondly, party consensus seems a crucial element for explaining amendments as well as for failed attempts to change sub-national constitutions. Such a consensus is only possible if parties agree to cooperate. However, there are also five amendments without such a consensus. This might raise the question as to how parliaments can influence the

outcome of respective decision-making processes. Hence, it will be up to future research to find out under what conditions parties in parliament are inclined to compromise either before or after submitting a bill to parliament. This might be due to the content of the bill, to package deals, but also to tradition or to the structure of the party system.

Thirdly, it has to be pointed out that we still have to find out how to combine the impact of multilevel systems and the actor-centered approach. Patricia Popelier has rightfully highlighted that in a multilevel "environment subnational constitutionalism is not merely defined by the power of subnational authorities to adopt their own constitution" (Popelier 2014: 19). Even though Popelier stresses the involvement of sub-national units at the national or European level this also highlights how the different levels are intermeshed. However, based on the analysis we still do not know how the German federal system affects sub-national constitutional politics and how we are supposed to "measure" such an effect. Or: why is there still a provision about capital punishment in the constitution of Hesse while Bavaria, Rhineland-Palatinate, and Bremen changed their constitutions accordingly – in spite of the fact that for all *Länder* the same legal framework was in place? That is to say, that the very same multilevel structure led to different outcomes. This raises theoretical and empirical questions.

Overall, the study made clear, that as far as political science is concerned the analysis and the explanation of constitutional politics in the German *Länder* are still in its infancy. There are important and intriguing concepts, though, but so far we are not able to theoretically conceptualize and empirically examine how the multilevel system, party politics, and constitutional rigidity affect sub-national constitutional politics in a systematic manner.

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II For an English translation of the Basic Law see: <https://www.btg-bestellservice.de/pdf/80201000.pdf>

III Cf. Benz 2013; Behnke and Benz 2009; Benz 2011; Benz and Colino 2011; Lorenz 2008: 28 ff.

IV The first seminal study on this method was published in 1987; since then this approach has been changed and improved; cf. Ragin 1987; 2000; 2010; Rihoux and Ragin 2009; Schneider and Wagemann 2007.

V An extensive list of publications on the topic can be found on the homepage of COMPASSS (COMPArative Methods for Systematic cross-caSe analySis): <http://www.compasss.org>.

VI For a general overview on the German federal system cf. e.g. Kropp 2010; Laufer and Münch 2010.

VII We explain this argument in more detail in: Lorenz and Reutter 2012.

VIII In 1952 Baden, and Wurttemberg-Baden amalgamated with Wurttemberg-Hohenzollern into: Baden-

Wurttemberg whose constitution entered into force in 1953; it did not include a provision on capital punishment.

[IX] Between 1946 and 1949 in Baden, Bavaria, Bremen, and Hesse nobody has been sentenced to death. Only in Rhineland-Palatinate and Wurttemberg-Baden a number of criminals had been executed. In Berlin capital punishment remained possible until 1990. This was due to the status of the Land until 1990. In Berlin the supreme power rested with the Allied powers until unification. Hence, in theory the Allied powers could have applied the death penalty which, however, they never considered after the Basic Law had come into being.

[X] The provisions on the death penalty have been eliminated in 1994 (Bremen), 1998 (Bavaria), and 1991 (Rhineland-Palatinate).

[XI] However the Allied Powers executed war criminals until 1951 on German soil. In addition, it should be noted that the East German constitution allowed death penalty until 1987.

[XII] This is also due to European and international treaties and human rights conventions.

[XIII] Art. 31 Basic Law stipulates: „Federal law shall take precedence over Land law."

[XIV] Since January 1, 2014 Art. 70 par. 4 of the Bavarian Constitution stipulates: „Ist das Recht der Gesetzgebung durch die Übertragung von Hoheitsrechten auf die Europäische Union betroffen, kann die Staatsregierung in ihren verfassungsmäßigen Aufgaben durch Gesetz gebunden werden. Ist das Recht der Gesetzgebung durch ein Vorhaben der Europäischen Union betroffen, hat die Staatsregierung bei ihren verfassungsmäßigen Aufgaben die Stellungnahmen des Landtags maßgeblich zu berücksichtigen." The respective provision in the Constitution of Baden-Württemberg reads as follows (Art. 34a par 2): „Sollen ausschließliche Gesetzgebungszuständigkeiten der Länder ganz oder teilweise auf die Europäische Union übertragen werden, ist die Landesregierung an Stellungnahmen des Landtags gebunden. Werden durch ein Vorhaben der Europäischen Union im Schwerpunkt ausschließliche Gesetzgebungszuständigkeiten der Länder unmittelbar betroffen, ist die Landesregierung an Stellungnahmen des Landtags gebunden, es sei denn, erhebliche Gründe des Landesinteresses stünden entgegen. Satz 2 gilt auch für Beschlüsse des Landtags, mit denen die Landesregierung ersucht wird, im Bundesrat darauf hinzuwirken, dass entweder der Bundesrat im Falle der Subsidiaritätsklage oder die Bundesregierung zum Schutz der Gesetzgebungszuständigkeiten der Länder eine Klage vor dem Gerichtshof der Europäischen Union erhebt. Im Übrigen berücksichtigt die Landesregierung Stellungnahmen des Landtags zu Vorhaben der Europäischen Union, die Gesetzgebungszuständigkeiten der Länder wesentlich berühren."

[XV] The seminal study using the aforementioned variables is: Lutz 1994; cf. also Lorenz 2005.

[XVI] I cannot discuss the different methodological schools in detail; for a brief review of this issue cf., Ragin 1987: 1 ff.; Schneider and Wagemann 2007: 19 ff.

[XVII] The label QCA covers three main methodological variants. The original version is called csQCA (cs stands for „crisp set Qualitative Comparative Analysis"); "multi-value" and "fuzzy set" versions are known as "mvQCA" and "fsQCA"; Rihoux and Ragin 2009, p. XIX f.

[XVIII] Short introductions into this field of mathematics can be found in: Ragin 1987: 89 ff.; Rihoux and De Meur 2009: 34 ff.; Schneider and Wagemann 2007: 31 ff.

[XIX] There are three software packages (QCA-DOS, TOSMANA and fsQCA) that can be downloaded and used for free. All three software packages can compute csQCA and can be retrieved either from: <http://www.compasss.org/software.htm> or <http://www.socsci.uci.edu/~cragin/fsQCA/software.shtml>. There are also manuals for the software, cf. Cronqvist 2006; Ragin et al. 2006a and 2006b; Drass 1998; Drass and Ragin 1992. I used TOSMANA.

[XX] For a discussion of critiques focussing on QCA and notably on csQCA cf De Meur et al. 2009.

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