

COUNTRY REPORT

GERMANY



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Introduction¹

The West German Constitution was developed in a divided nation within the postwar period after world war two. In Western Germany, the allies such as France, England, and the United States strongly influenced implementing the Democratic political system. The German Constitution (Grundgesetz) was seen as an interim Constitution heading for the unification process, which happened in 1989. It was called a basic law to symbolize the temporary situation.

For a representative German democracy, the Constitution had a vital factor for national pride. Nevertheless, it had several "smaller" amendments. But the process of constitutional reforms was a parliamentary one - following the parliamentary rules and regulations. Here there was a limited chance for the inclusion of civil society. Germany, as a federal-state, also has constitutions in each of its provinces (Länder). These became a frontrunner in new amendment processes

Therefore, the research question is about civil society inclusion and constitutional deliberation at a national and Länder level. Firstly, the process will be described using a typology of the participatory Rhombus and the concept of invented and invited space) (Kersting 2014). Afterward, a focus will be on constitutional reforms in the Länder in the 2010s. Is there a learning process (institutional learning in federalism Kersting 2020)? Because it is included in constitutional referendums, there is a question if a lack of inclusion may affect on direct democratic integrity (see the concept in Kersting/Grömping 2020). Finally, a description of a deliberative process in the late 2010s will be analyzed. This bottom-up process included new deliberative participatory instruments and was included in the national parliament agenda. Is there a development from invited space to invented space?

Constitutional amendments in the German parliamentary system

The German Basic Law (Grundgesetz) was developed in August 1948 by a Constitutional Convention representing a group of prime ministers and experts. In Herrenchiemsee, these experts developed the draft Constitution in two weeks, following the Parliamentary Council from September to May 1949, with 65 delegates from the different provinces gathered in Bonn to write the provisional German Grundgesetz.

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The basic law describes the state structure and the separation of power, including a directly elected Bundestag and a second chamber, a Bundesrat, which consists of appointed delegates from the different Länder (provinces) to their population size. Further constitutional amendments should have a two-thirds majority in both of these parliaments. The constitutional court was installed, consisting of 6 judges- half of them selected by Bundestag and half of them by the Bundesrat.

The German Constitution can only be changed by a national law supported by two-thirds of the German national parliament (Bundestag) and a two-thirds majority in the second chamber Bundesrat. The federal system and the basic law's influence on the states' legal process cannot be changed. Basic human rights are defined in the first articles (especially article 1). Article 20 focuses on the state's structure. These articles are guaranteed by article 79§ paragraph three in the so-called eternal guaranty (Ewigkeitsgarantie).

Due to the temporary situation, the German national Constitution had a high number of 60 amendments and constitutional processes than other constitutional amendments in other democratic systems. Although Article 20 focused on the state's structure, most of the numerous constitutional changes were seen as pure policies. One of the most important constitutional changes focused on rearmament in 1956. Here, the neutral Germany, which had no own military army, developed a voluntary army and became a NATO member. In 1968 there was a significant constitutional change focusing on the state of emergency regulations (Notstandsgesetze). In 1969, substantial financial reform highlighted the critical role of the Länder compared to the national government. It discussed the role of and unfunded mandates and championed the independence of the autonomous Länder. Although this was regarded to stop under-financing and highlight the autonomy of the Länder, it led to a higher number of unfunded mandates. This regulation was abolished and reviewed in the 2000s (convexity). In the late 1960s, another important reform under the grand coalition between the Social Democratic Party and the Christian Democratic Party was lowering the voting age from 21 to 18 in the same year.

The next crucial phase of the constitutional reform came with the unification process. This process was not used to develop a new constitution. Still, only an implementation of the unity agreement (Einigungsvertrag) where the German Constitution's preamble was amended, and the area was extended by including the new five East German states. So, no elements of the East German Constitution (social rights)

were included in the new Grundgesetz. In 1992 the unification article was modified to Article 23 supporting the European Union.

Other amendments focused on the description of national goals such as sustainability in Article 28 in 1994. Other modified articles focused on the restriction of individual rights and the possibility of national surveillance to allow criminals' prosecution, such as article 13.

In 2009 the regulations on unfunded mandates were restructured, and convexity was redefined. From now on, national legislation, which focused on higher costs for regional and local governments, could be challenged by the lower spheres of government. Furthermore, a debt stop (Schuldengrenze) was implemented in Article 109, paragraph three, which disallowed national governments and the other spheres to use further credits to consolidate the national and regional budget. Only because of national disasters and specific situations exemptions were allowed.

In Germany, the 16 states (Laender) do have their own Constitution. In most cases, a two-thirds majority in the state Parliament is necessary to change the Constitution. In some of the states, the referendum is requested for constitutional changes. In fact, in Baden-Württemberg article 64 of the Constitution as well as in Bavaria and Hessen referendum is compulsory for constitutional changes at this regional level (see Kersting 2016a; Schiller 2012).

In Germany's representative system at the national and regional level, policy-making processes are predominantly organized within the parliamentary debates. The Bundestag, as well as the regional parliaments in the lendar, can have the possibility to start a small number of Enquete Commissions. Here the members consist of parliamentarians as well as experts. These Enquete Commissions, in general, last for the whole legislative period. They are inviting academic experts as well as civil society organizations to inform the members of the commission. Enquete commissions focus on general topics and broader debates such as sustainability, digitalization, artificial intelligence, etc. They may lead to later parliamentary legislative initiatives.

The parliamentary process started with the executive government's initiative or the parliament that tabled the particular legislation and the law focusing on the constitutional amendment. Here, besides the debates in the parliament's arena, the parliamentary commissions play an important role. In the German Bundestag, parliamentary committees usually are not open to the public. They have a significant influence, and all legislation coming into the committees will be changed within this important institution. In the following process, committees can initiate public hearings.

Especially the committees for public affairs play an essential role when it comes to constitutional amendments. At these hearings, academic experts, as well as important organized interest groups, are participating. Depending on their amendment's content, relevant interest groups representing civil society are organizations, such as local government associations, churches, trade unions, employers associations, etc. In this neo-corporatist design, new civil society groups became more and more critical. All invited civil society organizations and academic experts presented oral and written expertise (affidavit) in the committees' public hearing. Finally, the changes in the legislation are discussed in the publicly open debates parliamentary arena. In case there is a two-thirds majority within the Bundestag as well as in the Bundesrat, the constitutional amendment will be implemented.

In the 1970s and the 1990s, a broad range of new participatory instruments was implemented (Kersting et al. 2009; 2016). But these focused on the local level (Vetter et al 2016). In the 2010s, national and regional parliaments try to incorporate broader deliberative democratic processes, democratic innovations, and formal discussions and debates.

Constitutional reforms in Germany- Northrhine-Westphalia (NRW) 2013-2016

On the 70th anniversary of the NRW constitution in 2013, the constitutional reform process started in North-Rhine Westphalia (NRW). These amendments should reform the Constitution from July 1950. At that time, it passed the Nordrhein-Westfalen Parliament, and a regional referendum legitimized it. In the following 70 years, 20 amendments were put in place. The 2013-2016 reform process focused on the voting age (16 or 18), the debt ceiling ("Schuldenbremse"), rights for members of the parliament, as well as the federal topic of unfunded mandates and subsidiarity.

The newly developed parliamentary committee (working from 2016-2018) agreed on consensual decision-making with a two-thirds majority and the highest transparency level. It had two hearings focusing on the democratic development in NRW and debt reduction ("Schuldenbremse"). The new legislation and amendments should be transferred to the NRW Parliament according to Art 69 of the NRW Constitution.

There were four working groups. Working group number one dealt with the relationship between government and parliament. The idea was to strengthen parliament against the national, supranational European Union. More rights to call for new elections were debated. The second working group discussed active and passive

voting age, electoral rights of European Union citizens, and the lowering of quorums in regional referendums. The third working group deliberated budget reduction and sanction (Schuldenbremse) (Art 83 NRW Constitution). The fourth working group concentrated on the regional constitutional court, its composition, and the chance to appeal (Normenkontrolle).

The Enquete included experts and representatives of all social groups to bring in their statements. The commission was ambitious in implementing a high level of publicity. The Internet could stream the Meetings, and protocols were freely accessible. A citizen could write or email comments to the commission and participate in an Internet-blog, which was seen as a participatory portal for the constitutional commission. It produced a relatively great number of mails, emails, but only very few blog entries. A new instrument, such as an ombudsman, partner-mandates (dual mandates), was recommended. None of these was, however, followed up in the subsequent discussion.

There were no actual results in this process of constitutional reform. They could not agree on electoral rights (the voting age, voting rights for European Union citizen at Länder level, voting rights at the local election for non-European Union citizen), freedom of information (easy inspection of a file ("Akteneinsicht")), the right for interpolation, convexity ("Konnexität"), the quorums for referendums on norm control nor on the reduction of local and regional debt. Only a better earlier parliamentary information system, slight changes in the constitutional court's composition, and more influence were agreed on at the European Union level.

Constitutional reform process in Hessen (2015-2018)

The Constitution of Hessen was implemented shortly before the Bavarian Constitution on December 1. 1946 (see Kersting 2016). It was the first Constitution after the second world war. There were only eight changes in the Hessen Constitution in the time from 1946 to 2017. Regional referendums legitimized only four of these constitutional amendments. Some of these focused on less important or more symbolic aspects, such as defining regional goals like sustainability and support as a target. The need for referendums was often seen as a reason for the low number of Hessen's constitutional changes. So Hessen's Constitution was often regarded as outdated (Grundling 2019). Only in Hessen, the death penalty was still part of the Constitution. This had no consequences because national regulations and the predominant federal basic law strictly prohibited the death penalty.

In 1994, the referendum to reduce the voting age failed. From 2003 up to 2005, the action of the Green party requested an Enquete Commission to reform the Hessen Constitution. In this commission, over two years, several constitutional revenues were discussed and developed. Finally, these constitutional reforms were stopped by an alliance between the conservative parties and the Social Democratic Party. They insisted on Hessen's constitutional identity and traditions and rejected the Hessen Constitution's total revision despite strong and broad societal pressure from civil society (Grundling 2019).

Ten years later, Hessen's parliament implemented a new Enquete Commission supported by all major parties. This Constitutional Convent tried to change the Constitution of Hessen. It also tried to follow the historical constitutional convent of Herrenchiemsee and the Convention for the future and the Constitution of the European Union in the early 2000s. The main issues focused on abolishing the death penalty, recognizing voluntary work and legal framework, and quora for regional referendums (Volksbegehren und -entscheid), and the reduction of the passive voting age. The setting of the Enquete Commission allowed parliamentary representatives from all factions and one expert per faction.

The commission tried to include a broad public sphere following constitutional reforms in Thuringia, where a special parallel board with civil society representatives was placed aside from the current commission. A broader civil society should be informed directly and immediately. Furthermore, every citizen should have a chance to participate in the decision-making process. Although the process was accompanied by different schools starting a competition of ideas, universities were incorporated. And the day of the open parliament was planned. Furthermore, a special website (www.Verfassung-Hessen.de) was implemented, characterized by a high level of transparency.

Nevertheless, it was seen as a problem of populism and polarization after the migration crisis (2015), leading to a low participation level. National and regional media did not show a high level of recognition of the process (Wolf 2019). The parliamentary public relations efforts only had a small local and regional impact. Regional TV had only three transmissions in July, November as well as in November 2018. Furthermore, even judicial literature did not seem to recognize the process adequately (Grundling 2019).

As a result, there were only small changes in the Constitution. Additional initiatives of the opposition parties were rejected. The Left party (Die Linke) supported

the social right for adequate housing. The Social Democratic Party (SPD) strongly supported free education in schools and universities, and pre-schools. The Liberal Party (FDP) wanted to strengthen the parliamentary opposition and the reduction and limit of the prime minister's reelection, who is not directly elected in Hessen. Nevertheless, the result was a compromise because the ruling government coalition (Christian-democratic CDU and Green party) did not fully use its power.

After the Enquete Commission in the parliamentary process, the public hearing with representatives of the economic chambers, local government association, youth organizations, and other national interest groups agreed to the 15 proposals. It dismissed those proposals implemented by opposition parties. The 15th amendment included more rights for children, informational safety and security, abolishing the death penalty, and defining new Länder goals, such as sustainability, culture, voluntary work, sport, and infrastructural development. The passive voting age was reduced from 21 to 18 in the European Union, and European integration was strongly supported. Electronic announcement of laws was allowed. The independence of the national school was guaranteed. Furthermore, the regional referendum's quorum was reduced from 25% to 20% (but an additional support quorum of one-quarter of the population was introduced).

Within the parliamentary process, 15th amendments were agreed on. Here, most of the ruling Green party and the Christian Democratic Party and the other parties' incorporation were visible. In the obligatory national referendum, together with the regional election (Landtagswahl) in October 2018, the voter turnout was 67,3%. The question of data security and infrastructure got more than 90% support. The lowest support was reducing the voting age down to 18 with only 70,3% and the digital announcement of laws with only 81,4%. The compromise between the different parties has led to a small number of constitutional changes, but it was regarded as a relatively successful and not a political scandal (Grundling 2019:37; Wettläufer in NvWZ 2019: 358ff).

Conclusions

The constitutional reform process in Germany follows a path of dependency and has to be understood historically. Although there are more and more attempts, the constitutional review processes are not very inclusive. The historical context strongly influenced the constitutional process in Germany as well as in the German Länder. After the end of the war in spring 1945 and after the allies' negotiation process, the first

Länder Constitution was set in place at the end of 1946 in Hessen and Bavaria. It can be seen that these early Constitution are more focusing on obligatory direct democratic instruments for constitutional amendments and policy-making. Later constitutions in the different Länder, as well as the German Basic Law (Grundgesetz) from 1949, are more robust, concentrating on the representative system. This can be regarded as an effect of the late 1940s. Strong left-wing social movements predominated, and ruling politicians and governments were skeptical about direct democratic instruments, leading possibly to "socialist experiments".

In the east German constitution number of social rights and stronger elements of expropriation were included. In this regard, the verdict of a later German president was influential, where he noted that direct democracy could be regarded as a "bonus for dictators". It is clear that referendums in the Weimar Republic did not play this vital role for the right-wing parties (Jung 1995; Kersting 2016a). Four of them were implemented, but none of them was successful. But it can be shown that right-wing propaganda of Nazis was used to manipulate the citizen in this turbulent time of the late 1920s. In this regard, after the Nazi regime, a representative system and a "non-direct, but also non-deliberative, non-participative Constitution was regarded as leading to more stability.

Even in unification, German nations did not have this magic moment of a referendum legitimizing and supporting the new united German Constitution. Despite the positive experiences with roundtables in the GDR and to a certain extent, intense political scandals, such as the political crisis of representative democracy in Schleswig-Holstein with its Barschel affair, did not lead to any standard referendum process at the national level. Only at the local level, democratic innovations became obvious (Kersting 2016b; Vetter et al. 2016).

The unification included West German regulations and laws without incorporating even favorable East German structures and ideas. Forty years after unification, this kind of incorporation is often criticized and seen as one reason for the undemocratic populist movement in East Germany in the late 2010s. The German basic law (Grundgesetz) was changed more than 60 times from 1949 in the following 70 years. There is high trust and national pride in the Constitution.

In Germany, the conservative elements of constitutions that are not targeted for short-term party politics and societal trends are visible. But the demand for political participation and constitutional deliberation is apparent already in the 1990s at the local level new. Participatory instruments were implemented in the 1990s in most of the

German Länder (Kersting 2017). The governments of Baden-Wuerttemberg introduced a state minister for participation in civil society. In the mid-2010s, various anniversary for Laender constitutions, besides NRW and Hessen, Rhineland Palatinate had within its constitutional deliberation-process a broad range of participatory instruments, Enquete commissions had a large number of hearings and Internet platforms. In most Länder (such as in Hessen and NRW), there was no broad marketing process for the constitutional deliberation and no strong inclusion of schools and universities, leading to relatively low participation rates. This was better in Rhineland Palatinate, but constitutional amendments were limited. For a short period, Saxony designed a platform for all political processes.

In Northrhine Westphalia, the constitutional reform process's partisan strategic behavior caused frustration and a lack of legitimacy. This constitutional referendums may have negative effects of direct democracy integrity and enhance the crisis of legitimacy (see Kersting/Grömping 2020) The ruling government was not re-elected. Hessen's better results showed that the early inclusion of associations and civil society helped avoid broad protests (see copyright article 13 protests) (Grundling 2019:38). Nevertheless, both triggered a bottom-up process in the invented space, where citizen assemblies with randomly selected participants discussed the future of democracy in 2019. The president of the Bundestag supported the results, and some products were set on the parliamentary agenda.

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