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**The *Grundgesetz* After 50 Years:
Analyzing Changes in the German Constitution**

Andreas Busch
Universitaet Heidelberg
Institut fuer Politische Wissenschaft
69117 Heidelberg, Germany
Andreas.Busch@urz.uni-heidelberg.de
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Fifty years after its original drafting, the German constitution has seen its text amended many times. Indeed, among OECD countries, the *Grundgesetz* has one of the highest rates of constitutional change. This paper analyzes these changes. It does so in a quantitative manner in its first section, before proceeding to ask how the numerous changes can be explained. Three approaches from the legal and political science literature are presented: one emphasizing historical-structural factors, one analyzing changes as constitutional revisionism, and an institutional approach which focuses on the conditions for constitutional amendment. The strengths and weaknesses of each approach are then compared and contrasted, before the article concludes with an assessment of the characteristics of German constitutional policy.

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ready been criticized in the discipline many years ago (Steinberg 1980: 390; see also Schaub 1984: 3f.), the number of systematic analyses on the changes in the constitution grew hardly above a handful: there are contributions by Roßnagel (1981), Bryde (1982), Schaub (1984) and Hofmann (1987) as well as Robbers (1989) and more recently Kenntner (1997). But this low count does not seem to be a problem characteristic of the discipline of constitutional law in today's Federal Republic: already in 1961, Karl Loewenstein complained in a lecture on the topic that "the problematique of constitutional change has been remarkably neglected in constitutional law, given its otherwise comprehensive scientific coverage." (Loewenstein 1961: 7).

Analysing the changes of the Federal Republic's *Grundgesetz*, however, is further complicated through the lack of a consolidated and critical edition of the history of its text. Scholars who embark upon this endeavour have to do a fair amount of digging to understand the changes in the Federal constitution over the last five decades. Although all editions of the text give the dates of the acts amending the constitution as well as the articles concerned, this may be of limited help if one has more specific questions: for example, what Article 142a (inserted in 1954 and deleted in 1968) had dealt with.² And by merely looking at the present form of Article 143 one does not realise that before "regulations on temporary deviations from constitutional provisions in the area acceding through unification" (since 1990), this part of the constitution had already dealt with measures against high treason (1949 until 1951) and regulations on the use of armed forces in case of domestic emergency (1956 until 1968). Even the more voluminous commentaries on the constitution (e.g. Sachs 1996) only talk about the changes in existing articles, but give neither the wording of previous versions nor the circumstances of and reasons for change; in the case of articles deleted from the constitution, even this is missing. To sum up, the scholar interested in the historical development of the *Grundgesetz* is faced with a difficult situation, which only a critical, annotated edition of the *Grundgesetz* in its present form could help overcome.³

²The article decreed that the treaties of May 1952 (Treaty on Germany and Treaty on European Defense Community) did not conflict with the constitution. This has been strongly criticised as a clear *loi d'occasion* (Loewenstein 1961: 59).

³An overview of the changed articles in the *Grundgesetz* together with an index and dates of change can be found in Schindler (1994: 1132-1137). Schaub (1984) gives a list of all proposed changes in the *Grundgesetz* up to 1978. The original text of 1949 can be found in Fischer (1989: 411-441), a version with the text changes in Hildebrandt (1992) - unfortunately only up to Oct. 1, 1991. Seifert (1977) also gives the text of all changes, but only up to the 34th act to change the *Grundgesetz* (August 1976). Although a fourth edition of his book came out in 1983 (under a different title), this is of no additional

1 Introduction

The fiftieth anniversary of the *Grundgesetz* in 1999 seems a good opportunity to look back on the development of the German constitution over the last decades. The *Grundgesetz* of the end of the century is no longer that of the year 1949 – at least literally. There is widespread agreement that it has been changed often – although Roßnagel (1981: 1) is wrong when he claims that “no constitution in the world” has been changed as often as the *Grundgesetz*.

There is much less unanimity, however, with respect to the – undoubtedly more interesting – question of the effects of these changes. Is the constitution’s anniversary “cause for a grateful look back” (Hesse 1990: 16), is the *Grundgesetz* “in its core untouched” and was “the constitutional consensus of 1949 [...] preserved until today” (Stern 1993: 32, 35)?¹ Can we say “the *Grundgesetz* has proven itself” (Ellwein 1974: 16), and can it be claimed that while “the overall profile of the constitution changed” (Hofmann 1987: 281), the “success of the *Grundgesetz*” is without doubt (Grimm 1989: 1311)? Those who put forward such generally positive evaluations are accused of being apologists. Thus critics maintain that the original constitution was “disfigured” in the last decades (Stuby 1974: 25), and the constitution’s democratic content was “systematically hollowed out” (Abendroth 1974: 143). More forcefully, the constitutional amendments are said to have created a “new constitutional reality” which has “aligned the constitutional order of the Federal Republic to that of an authoritarian state” (Seifert 1977: 33, 46).

To negotiate one’s way through the maze of opinions and form a well-founded and reasoned opinion seems not an easy task in the face of such contradictory assessments. This is all the more the case since there clearly is a lack of political science literature on the constitution, something already noted in the 1970s (Grimm 1978: 274). Students of constitutional law have also complained that political science and sociology have so far contributed little to our understanding of constitutional developments (Bryde 1982: 24, 112), a situation not much altered since (Benz 1993: 882).

On the other hand, political scientists should limit their soul-searching on this topic, for the criticism can be returned to constitutional lawyers themselves. Given the central role of the constitution for constitutional law, and given the numerous and substantial changes in the *Grundgesetz*, it is amazing to see how little has been published on this by legal scholars. Although the lack of research on the historical development of the constitution had al-

¹All translations from German sources are by the author.

Legislative period	1	2	3	4	5	6	7	8	9	10	11	12	13	Σ
Preamble											1			1
I		3			6							5	1	15
II		1			2		1			1	1	7		13
III		3			2	2	6					1	1	15
IV											1	2		3
IVa					1									1
V		2			1									3
VI		1			1									2
VII		2	1	2	11	6	1					23		46
VIII		2	2		2	1						7		14
VIIIa					2	1								3
IX		2	2		11	1						1		17
X	1	7			13							1	3	25
Xa					14							1		15
XI	2	4		1	3						3	4		17
Σ	3	27	5	3	69	11	8	0	0	1	6	52	5	190

Table 1: Amendments of the constitution by chapter and time

vary quite a lot in the extent to which they actually change the constitution: while some merely replace a few words in one paragraph of a single article,⁷ other acts change several articles at the same time, add whole chapters and articles to the constitution and abolish others at the same time.⁸ Obviously a more precise indicator is needed. If one counts on the basis of *articles changed*, then already much more differentiated results are obtained.⁹ In rare cases, there are reforms of the constitution in which there are several changes to an article at the same time – e.g. in the catalogue-like enumerations of legislative powers or in the parts of the constitution that deal with the distribution of tax revenues.¹⁰ These can only be fully appreciated if *every alteration in the text* is being counted.¹¹ Since this appears to be the most selective indicator, it will be used in the following analysis.

⁷Cf. the 35th act of December 21, 1983.

⁸Cf. the 17th act of June 24, 1968 (“emergency constitution”).

⁹This indicator is used e.g. by Bryde 1982 and Schaub 1984.

¹⁰E.g. in the 8th act of December 24, 1956.

¹¹This indicator is also used by Loewenstein (1961: 59).

This paper focuses primarily on the changes in the constitution since its drafting. Most prior work on this topic was published more than a decade ago, at a time of relative stability in the constitution. It remains to be seen whether their conclusions have been confirmed by the further developments, especially following German unification. The first part of the paper therefore analyses the constitution's structure and changes in a quantitative fashion. The second part deals with the question of how the great number of changes in the constitution can be explained. Three models will be presented and compared, before finally an assessment of the characteristics of German constitutional policy will be given.

2 Amendments in the Grundgesetz: quantitative analysis

Comparing today's Grundgesetz⁴ with the original text of 1949, it becomes evident at first sight that there were substantial changes in the constitution. While the Grundgesetz consisted of 146 articles in 1949, it had grown to 171 articles by 1980 (Kommers 1989: 141).⁵ Until 1994, another 12 articles had been added to bring the total to 183. 40 articles were added during the course of 50 years, three articles deleted, so that the net growth was 37 constitutional articles. As a consequence, the text length has been substantially altered: from 10636 words in 1949 it had grown to 17050 words by early 1994; after the changes initiated by the Joint Constitutional Commission in late 1994 and some further additions, the text length was 19121 words in the summer of 1998. The text of the Grundgesetz has thus nearly been doubled over that of 1949.

To analyse the changes in the Grundgesetz further, the question of the most suitable indicator has first to be dealt with. Three different measures are being used in the literature. The simplest is that of the *number of acts* amending the Grundgesetz – but at the same time it is the roughest measure.⁶ For the 46 such acts that have been passed prior to summer 1999

use, since there were no further changes in the constitution up to then. The relevant documents about the conditions under which the Grundgesetz was drafted can be found in Huber (1951), and the history of the drafting of individual articles is documented in Doemming/Füsslein/Matz (1951). More recently, a helpful edition of all stages of the text can be found in Bauer/Jestaedt (1997).

⁴All analyses in this section relate to the version of the Grundgesetz after passage of the 46th amending act of July 22, 1998.

⁵Unless further indicated, all calculations given in this section are by the author.

⁶It is used e.g. by Robbers 1989 or Grimm 1994: 376.

Chapter	No. of articles 1949	No. of changes	Changes per article
Preamble	1	1	1
I	19	15	0.79
II	18	13	0.72
III	12	15	1.25
IV	4	3	0.75
IVa	-	1	
V	8	3	0.38
VI	8	2	0.25
VII	13	46	3.54
VIII	9	14	1.56
VIIIa	-	3	
IX	13	17	1.31
X	11	25	2.27
Xa	-	15	
XI	31	17	0.55
Σ	147	190	1.20

Table 2: Intensity of change in the various chapters of the Grundgesetz

that since 1949, three whole chapters have been added to the constitution. These are the chapters IVa (Joint Committee), VIIIa (Joint Tasks) and Xa (Defense).

3 How can we explain the numerous changes?

The task of a constitution is that of securing a “basic order” (Hesse 1994) or a “framework” (Böckenförde 1992) for a state. As the state’s foundation, constitutions establish the “rules of the game” for the political process. Such rules, however, have to be of a certain permanence – indeed, that is what is characteristic of rules. Were they to be changed continuously and were each game to be played according to different rules, there wouldn’t be much of a point of talking about rules (Brennan/Buchanan 1993). Constitutions therefore are designed for longevity. Thus they are an institutional answer to the demand for stability. Constitutional provisions should not be at the disposition of the government or the parliamentary majority of the day. Nevertheless, few will doubt that there is in principle a need to adjust a constitution, for norms which may have been adequate at the time of its

Counted in this way, the German Grundgesetz has been altered 190 times between its proclamation and the summer of 1998 (cf. Table 1). On average, each article in the constitution has been changed somewhat more than once – 1.2 times, to be precise (cf. Table 2), – and there were 3.8 changes in each of the last fifty years of the Federal Republic’s existence. Obviously, these are just averages. As a closer analysis of the two tables demonstrates, there are great differences in the intensity of constitutional emendation – both over time and with respect to the chapters that were amended.

2.1 Amendments over time

As Table 1 shows, there are two clear peaks in the distribution of constitutional changes over time: the fifth (1965–69) and the twelfth (1990–94) legislative periods, each of which saw in excess of 50 changes in the text of the constitution. There were also a lot of changes in the second legislative period (1953–57). Overall, two thirds of the changes (126) fall into the period between the first and the seventh legislative period, and one third (63) into the time since German unification. Between 1976 and 1990, that is for almost 15 years, there were no changes in the Grundgesetz – with one exception: in 1983 there was a change in Article 21.¹² Thus we can distinguish three periods very clearly: a long period in the first 25 years of the Federal Republic in which there were regular changes in the constitution, a period of 14 years with nearly complete stability in the text, and finally a period of intense change around the time of German unification.

2.2 Amendments according to chapter

There are also clear distinctions with respect to sectoral change. As Table 2 demonstrates, the chapters VII (Federal Legislative Powers) and X (Finance) have been regularly subjected to change: there were 46 and 25 alterations in the text, respectively. The focus on these chapters is further emphasized by the fact that these are not particularly large chapters in the Grundgesetz – if one calculates the number of changes per chapter, there are clear maxima here with on average 3.54 (Federal Legislative Powers) and 2.27 (Finance) changes per article. Most of the other chapters in the constitution do not vary a lot in terms of their intensity of change, measured in this way. Two chapters clearly display above-average stability: chapters V (President) and VI (Government) have been changed very little. Lastly, it remains to be said

¹²This change demanded from political parties to report not only on the origins of their funds (old version), but also on the uses of their funds.

into the constitution in 1949 as a temporary solution, to be abolished upon the passage of new regulations for the respective parts of criminal law.¹⁵ In the case of the fiscal constitution, only provisional regulations had been set down in the constitution of 1949, which had to have their validity extended twice before a permanent formulation could be agreed upon.¹⁶ Lastly, there are also a number of constitutional amendments which clearly qualify as a product of the historical situation: the regulations on *Lastenausgleich* (the system of financial compensation for losses suffered in World War II), on liabilities of the *Reich*, and on legislative powers concerning war graves and liabilities resulting from the war (cf. Bryde 1982: 129).

On the other hand, the structure and character of the *Grundgesetz* is also mentioned as a cause for the repeated amendments. The permanent need for change is blamed on the German constitution's tendency to achieve "comprehensive regulation not by means of abstract and elastic formulations, but by casuistic regulation of details" (Bryde 1982: 121). This is particularly true in the areas of the fiscal constitution and the separation of powers between the *Bund* and the *Länder*. Taken together with the observation that a large part of the changes in the *Grundgesetz* takes place in precisely these chapters (cf. Table 2), some authors conclude that the impression of a high degree of dynamism (based on purely quantitative analysis) has to be somewhat qualified (*ibid.*; see also Grimm 1989: 1307).

From a historical-structural point of view, we can conclude, the many changes in the German constitution are perceived as a process of "supplementing and completing a constitution that initially was consciously incomplete" and that "only won its full identity with the peak of the changes in the 1960s and 1970s." (Robbers 1989: 1324).

3.2 The approach of constitutional revisionism

While the position described in the previous paragraphs sees the development of the *Grundgesetz* as a fleshing out of a provisional arrangement to achieve a full constitution, a competing position interprets that same process to one of continuously dismantling the intended constitutional order of 1949. It is not historical and structural forces that are at work, but rather a conscious political strategy of "constitutional revisionism" (Seifert 1977:

¹⁵The incorporation took place in Article 143 of the *Grundgesetz*. Bauer/Jestaedt (1997: 30) therefore oppose the usual counting of the act to amend the criminal law of 1951 as the first act amending the constitution – as is usually done.

¹⁶See third amending act of April 20, 1953, fifth amending act of December 25, 1954 and sixth amending act of December 23, 1955.

drafting, may no longer be functional due to social, economic or political change (Loewenstein 1961: 21). The *Grundgesetz* has been changed 190 times in 50 years, as was demonstrated above. Undoubtedly, this is a degree of change that requires explanation (Bryde 1982: 121). In this chapter of the paper, three approaches will be presented and tested for their explanatory power, two of them from constitutional law, one from political science.

3.1 The historical-structural approach

As was already mentioned above, the analysis of the changes in the *Grundgesetz* is not a very prominent topic amongst German constitutional lawyers. That is why it shouldn't come as a surprise that there are no detailed theories about the reasons for the many amendments. The constitutional law literature mentioned above is dominated by an approach that focuses on the special circumstances under which the *Grundgesetz* was drafted and that sees the changes as a process primarily characterized by catching-up. The great incidence of changes can thus primarily be explained by the filling of "constitutional gaps" (Loewenstein 1961: 21).

One of the main facts discussed is that Germany lacked full sovereignty at the time the constitution was drafted. There were a number of matters in the prerogative of the Allied Powers that the new constitution was not allowed to deal with, but that a "normal" constitution would deal with. Examples are regulations concerning defense or emergency measures which are completely lacking in the 1949 version of the *Grundgesetz*. Thus the numerous changes in the *Grundgesetz* that eventually incorporated these matters into the constitution are interpreted as "postponed constitution drafting" (*nachgeholte Verfassungsgebung*).¹³ The incorporation of matters like the use of nuclear energy and the setting up of an administration for air traffic control can be interpreted in a similar way.¹⁴ Besides these limitations of sovereignty, the great haste (for political reasons) that was characteristic of the conditions under which the *Grundgesetz* was drafted, is often mentioned. One consequence was that on many matters there was no final agreement which led to their being changed in due time, or that temporary solutions were incorporated (Kommers 1989; Beyme 1996: 45). Examples here are the law of high treason and the fiscal constitution. Since the Allied Powers had repealed the political parts of criminal law, the law of high treason had to be incorporated

¹³Cf. Bryde (1982: 120, 136), Hofmann (1987: 298; approvingly quoted by Kenntner 1997: 453) and Grimm (1994: 376).

¹⁴Cf. Articles 74, Nr. 11a and 87c, added in the tenth act of December 23, 1959 and Article 87d, added in the eleventh act on February 6, 1961.

the origin of modern constitutionalism is closely linked with the doctrine of popular sovereignty, and if we distinguish between *pouvoir constituant* and *pouvoir constitué* (Sieyès), then the constitution can be thought of as a means of circumscribing the powers of the state. It thus logically follows that any *change* in the constitution has to be ratified by the people – in a meeting or through an assembly elected for this purpose. Even if considerations of (im)practicability have – in most countries – led to an amendment procedure that is somewhat less demanding: the concept of the participation of the sovereign people in the process of constitutional amendment remains “characteristic” in most Western democracies (Bryde 1982: 52).

The *Grundgesetz* is an exception here, since the legislature can change the constitution without any popular participation whatsoever. The constitution’s “rigidity” is only achieved through an increased quorum, namely the necessity of a two thirds majority of the members of the *Bundestag* and two thirds of the votes of the *Bundesrat*.¹⁸ Such a monopolisation of amendment power by the legislature is rare among constitutional democracies – besides the Federal Republic, it is only the case in Portugal if we look at the 16 countries of the European Union.¹⁹

But although such a procedure is rooted in a constitutional rather than a democratic tradition, the standard literature on the German political system emphasizes above all the difficulties of constitutional amendment. Schmidt (1992: 90ff.) speaks of the “high barriers [...] erected by the constitution’s fathers to protect it”, and the necessity to “overcome high barriers of consensus”. Hesse and Ellwein (1997: 397) emphasize the difficulties of obtaining the necessary majority, and Arend Lijphart (1999: 220) places Germany into the category with the highest degree of constitutional rigidity. Klaus von Beyme (1996: 45; 1984: 12) writes of “high” and even “unusually high barriers to amendment”.

Comparing them to the barriers erected in other countries qualifies these assessments strongly. In the Netherlands, for example, both chambers of

¹⁸Cf. Article 79 No. 2 GG. The Western Allies had initially planned that an amendment of the *Grundgesetz* should require a referendum on the level of the *Länder*. Two thirds of the *Länder* should have to agree (each with a simple majority) to pass an amendment. See the text of the *Frankfurter Dokument Nr. 1* in Huber (1951: 198).

¹⁹In all other states, the citizens can either vote in a (sometimes optional) referendum, or in a general election that is mandated between the first and the second vote on the amendment in parliament. The United Kingdom – as a state without a written constitution – is a special case which also makes constitutional change without stated popular consent possible. See Gabriel/Brettschneider 1994: 464f. and Article 44 of the Austrian Federal Constitution; Chapter 8, Article 15 of the Swedish Constitution; Article 67 of the Finnish Parliamentary Law.

30). For the many changes had led to a “systematic hollowing-out of the constitution’s democratic content” (Abendroth 1974: 143). While at the time of its conception, the constitution’s position had been one “to the ‘left’ of societal reality” (Ridder 1975: 17), its “anti-fascist, anti-militarist and anti-monopolist foundations” had in the meantime been watered down and disfigured through re-interpretations (Stuby 1974: 20).

In this view, the main thrust of developments to come was already present in the first change of the constitution – the abolishment of Article 143 (high treason) –, which constituted the start of “repression [...] of ultimately all efforts critical of society” (ibid.: 22). Consequently, the development of the “state fragment”, the Federal Republic, towards a fully-fledged state – mainly brought about through the incorporation of defense and emergency regulations into the constitution – is strongly criticized (cf. Abendroth 1966: 47). These amendments created “more or less a new constitution” (Seifert 1974: 35). The peak of the growing concentration of power at the federal level was supposedly reached with the introduction of the financial reforms in 1967 and 1969 – among them the executive’s authorization to take out loans (Article 109 No. 4 GG) which is seen to symbolize the “too far reaching self-emasculation of Parliament” (Neumark 1967: 43), and is regarded as an “instrument for the state-monopolistic programming of the economy” (Stuby 1974: 23). Changes in the constitution were not limited to the content, but even “traditional institutions of the constitution had been liquidated almost unnoticed”, as demonstrated by the deletion of Article 45 in 1976 (Seifert 1977: 12).¹⁷

Summarizing the position we can say that its supporters interpret the constitutional changes as a continuous process of bringing the Federal Republic’s constitution into line with that of an authoritarian state, since the many negative amendments by far outweigh the very few positive ones (Seifert 1977: 31f., 46).

3.3 An institutional approach, or: the myth of the difficult amendability of the *Grundgesetz*

A third position focuses on the importance of institutions to explain the number of constitutional changes. The task of a constitution is to balance “stability” and “flexibility”. In institutional terms, the tension between the two goals is characterized by the fact that constitutions are in principle amendable, but that – compared to laws – amendment is more difficult. Since

¹⁷Article 45 created a “Permanent Committee” that represented Parliament in the time between two legislative periods.

Rank	Country	Institutional difficulty	Rate of change (per year)
1	New Zealand	0.5	13.42
2	Austria	0.8	6.3
2	Portugal	0.8	6.67
3	Sweden	1.4	4.72
4	Germany	1.6	2.91
5	Greece	1.8	1.32
5	Luxemburg	1.8	1.8
6	Finland	2.3	0.86
7	France	2.5	0.19
8	Denmark	2.75	0.17
8	Iceland	2.75	0.21
9	Belgium	2.85	2.3
10	Ireland	3	0.55
11	Japan	3.1	0
12	Norway	3.35	1.14
13	Italy	3.4	0.24
14	Spain	3.6	0.18
15	Australia	4.65	0.09
16	Switzerland	4.75	0.78
17	U.S.A.	5.1	0.13

Table 3: Constitutional change in international comparison

parliament have to express their wish to change the constitution. They are then dissolved, and a general election is held. The new parliament then has to pass the amendment with a two thirds majority in both houses, and the king has to ratify it.²⁰ The Danish constitution requires even more: both parliament and the administration have to indicate their wish to amend the constitution, followed by a general election. If the new parliament passes the amendment, there has to be a referendum within six months, in which – in addition to a simple majority of the votes – 40 per cent of those entitled to vote have to approve the amendment.²¹ In federal states, such procedures are often further complicated by bringing the constituent states into the game. Amending the constitution in the United States, for example, requires a two-stage process, initiated either by a two-thirds majority in both houses of Congress, or by the approval of two thirds of the state legislatures followed by the investiture of a Constitutional Convention. In the second stage, the amendment requires the approval of three quarters of the state legislatures, or the approval of Conventions in three quarters of the states of the Union.²² This procedure is so (politically and otherwise) complicated that constitutional amendments are a rare thing: “Americans have availed themselves of the amending process only seventeen times since 1791, when the first ten amendments were adopted.” (Ginsberg/Lowi/Weir 1997: 88).²³ In the light of such restraint, one is not too surprised to find an American observer, “committed to a ‘great outlines’ approach to constitutional craftsmanship”, sees the *Grundgesetz* as an “amendable charter” characterized by “an immense amount of constitutional tinkering” (Kommers 1989: 142).

²⁰Constitution of the Kingdom of the Netherlands, Articles 137–139. See Article 195 of the Belgian Constitution for a comparable procedure.

²¹See chapter 88 of the Danish Constitution. A good overview of requirements for constitutional amendment within the countries of the European Union can be found in Gabriel/Brettschneider 1994: 464f.

²²Article V of the Constitution of the United States of America.

²³It should be noted, however, that the doctrine of “implied powers”, together with the tradition of an extensive interpretation of general clauses such as the “interstate commerce clause” (Article I, chapter 8) has created a functional equivalent in terms of constitutional flexibility which made an adaption of the constitution to changed circumstances possible (cf. Ginsberg/Lowi/Weir 1997: 117f.)

Faced with difficulties to find the necessary majority for a constitutional amendment, the assumption of “implied powers” was pondered by some in the Federal Republic during the debates about the defense amendment in order to avoid an amendment of the constitutional text. This was rejected for fear of defeat before the Constitutional Court in the face of the unambiguity of Article 79 No. 1 GG. In 1956, however, when the compromise on the defense amendments was hammered out, the SPD insisted on the insertion of Article 143 into the constitution explicitly ruling out an “implied powers” construction for the future

the law of high treason was changed in 1951, not even the Communist opposition in the *Bundestag* criticized changing the constitution by deleting Article 143 *per se*. Their strong criticism was directed against a number of regulations in the new law and above all against the implied enhancement of status for the provisional arrangement that was the Federal Republic: for the Communists held it that "no high treason was possible against such a merely state-like structure."²⁸ The new regulations concerning high treason, however, were no different from the old ones contained in the *Grundgesetz*, except being more detailed. The claim that by deleting regulations on high treason from the *Grundgesetz* it was intended to reduce protection for the constitution simply does not stand up to the historical facts. A similar case is the alleged liquidation of a core institution with the abolishment of the *Ständiger Ausschuss* (permanent committee) of Article 45. Its task had been that of representing the interests of the *Bundestag* in the time between two parliamentary terms. But the abolishment of Article 45 took place simultaneously with a change in Article 39, which now stated that a parliamentary term only ended with the assembly of a new Parliament. Consequently, there was no longer any time "between" two parliamentary terms, which simply rendered the *Ständiger Ausschuss* superfluous. These examples demonstrate the bias that characterizes the position of constitutional revisionism, which is also evident in its almost complete neglect of changes in the *Grundgesetz* that expanded citizens' rights.²⁹ It is taken to the extreme when the introduction of a right of resistance against anybody who undertakes it to abolish the constitutional order (Article 20 No. 4) is interpreted as intended to potentially justify lynch-law (Seifert 1974: 37).

The approach which focuses on historical-structural factors can, as was demonstrated, explain many constitutional changes that were a consequence of Germany's special historical situation after 1945, such as the amendments concerning defense or emergency measures and many of the interim arrangements. Although most of the works advocating this approach were written in the early 1980s, it certainly would not pose a problem to incorporate the new "wave" of constitutional changes following unification by interpreting them as another special historical situation. But a great number of constitutional changes have no connection with historical circumstances, such as the con-

German constitutional law.

²⁸ Communist representative Fisch in the 158. session of the 1. Bundestag, see *Stenographische Berichte* p. 6299 C.

²⁹ An example are the introduction of a popular right to file before the constitutional court about violation of basic rights in 1969 (Article 93 (1) 4a) or the lowering of the voting age in 1970 (Article 38 (2)).

A systematic comparison of 20 OECD countries concerning procedure and frequency of constitutional amendments is instructive (Lutz 1994). It can be demonstrated that there is substantial variation on both counts, and that the *Grundgesetz* is among those constitutions where amendments are most easily possible. As Table 3 demonstrates, the German constitution displays a low rate of “difficulty” in terms of the amendment procedure, indicating that it is relatively easy to change.²⁴ In addition, the data show a clearly inverse relationship between this “difficulty” and the frequency of change in the constitution: the lower the procedural hurdle, the more often a constitution is amended.²⁵ The *Grundgesetz*, with an average annual rate of nearly 3 changes per year,²⁶ is in the top group, ranking fifth among twenty countries.

An internationally comparative perspective can thus convincingly demonstrate that – quite to the contrary of received wisdom – the German constitution is relatively easy to change. Assumptions about the height of the hurdles to be passed should be accordingly corrected. At the same time, it becomes evident that institutional requirements seem to play an important role in the changes in the *Grundgesetz*. From this point of view, it seems that the *frequency* of change is to a large extent a function of the *conditions* for change. This entails a considerable qualification of approaches that see German constitutional change as primarily shaped by forces of historical necessity or political will of the governing majority.

3.4 Comparing and assessing the approaches

The three different approaches outlined above for explaining changes in the *Grundgesetz* are rather different in their explanatory power.

The approach focusing on constitutional revisionism seems the least convincing. Many of the accusations raised by its supporters appear unfounded upon closer scrutiny.²⁷ Two examples may serve to demonstrate this: when

amendment concerning emergency measures (Schaub 1984: 55f.).

²⁴This indicator measures the relative difficulty of an amendment procedure. It varies in the countries under consideration between a simple vote of parliament passed with absolute majority (New Zealand) and the procedure in the United States described in the text. Author’s calculations after the index given in Lutz 1994. I am grateful to Donald Lutz for access to hitherto unpublished material.

²⁵The rank correlation coefficient between the two variables is $r = -0,785$.

²⁶The Lutz data go only up to 1992, which is why there is a discrepancy with the rate of change given in chapter 2 on page 7.

²⁷Cf. also Beyme 1996: 46. Anyway this approach seems strongly time-bound and a phenomenon of the 1970s *Zeitgeist* which today has no longer any serious followers in

of inertia within an established system, however, it seemed highly unlikely to him that there should be much change with respect to the basic institutional “rules of the game”. Lastly, changes in the catalogue of Basic Rights seemed out of the question to him, and in general he expected the number of changes to go down in the future since a “full constitution” had been created in the meantime without any major gaps.

4.1 The *Grundgesetz*: Still stable in its foundations and flexible in its catalogues?

Although the unexpected development of German unification carried with it a great number of constitutional changes, Bryde’s first two hypotheses can be corroborated: the composition and the competences of the organs of the state remained unchanged, except for the introduction of regulations concerning further European integration and a re-weighting of votes in the *Bundesrat* as a consequence of the greater number of *Länder* following German unification. And the main focus of changes indeed was – as expected – in the chapters dealing with legislative competences (23 changes), *Bund* and *Länder*, and implementation and administration of laws (7 changes each) (see Table 1 on page 6).³² The constitution’s flexibility in its catalogues thus still exists – and it has been further increased. Provisions that are changed or newly introduced often grow into a degree of detail more associated with legal than with constitutional regulations. This appears often to be the consequence of long-winded negotiations in the “grand coalition state” which is Germany (Schmidt 1996). While it enables compromises in principle, it does so at the cost of disabling any future flexibility short of another constitutional amendment.³³

Concerning the “stability of the foundations”, however, the expectations have been confounded – at least to some degree. In recent years, three acts³⁴ have made changes in the chapter on Basic Rights, while in the previous 45 years only two acts had done so – the seventh (defense) and the 17th (emergency measures). Besides extending the scope of the Article 3 (Equality),³⁵

³²There was less change than expected in the chapter dealing with the fiscal constitution. This was, however, not for want of a need for change – quite to the contrary: the Joint Constitutional Commission assumed this to be too complicated a set of questions to deal with it in the two years allocated to it (see the commission’s report, p. 114).

³³Examples are the changes of Articles 13, 16a and 23 GG.

³⁴The 39th, 42th and 45th amending acts.

³⁵The legal relevance of this extension is contested by some, cf. Seifert/Hömig 1995: 76 as well as the (negative) assessment of the Joint Constitutional Committee in its report (1993: 52f.)

tinuous changes concerning legislative powers of the *Bund* and the *Länder*, or changes in the fiscal constitution. The argument of changing technical and social circumstances does also not appear to be too convincing: for other countries have managed the transition to “modern” times without a similar amount of constitutional amendments. In this respect, it seems more instructive to look at the structural particularities of the German constitution. It is certainly not subject to Talleyrand’s alleged demand that constitutions should be “brief and opaque”: rather, it contains detailed regulations (e.g. of periods of time)³⁰ and enumerations, especially in chapter VII and Articles 106 and 107 which literally enforce periodic constitutional amendments. We must keep in mind that “there is a direct relationship between a constitution’s precision of regulation and its need for change.” (Grimm 1994: 333f.).

This need for change, however, can only be translated into actual change because of institutional provisions. As the institutional approach demonstrates, the German constitution is among the most easily amendable in OECD countries. The latter approach also has the advantage of not being exclusively focused on Germany, but of inquiring about general principles of constitutional change. Its result is: the more easily constitutions can be changed, the more often they will be changed. The explanation of the many changes in the *Grundgesetz*, we can conclude, it thus best given by a combination of structural and institutional factors. We can therefore hypothesize that the need for change in the *Grundgesetz* has not been pacified yet and that there will be constitutional amendments in the future as well.

4 Concluding considerations

This paper, not least for restrictions of space, cannot aim at giving a comprehensive appreciation of fifty years of constitutional policy in the Federal Republic. It can, however, test whether expectations concerning future developments of the constitution that were raised in previous analyses of the *Grundgesetz* ten to fifteen years ago were fulfilled. Only Brun-Otto Bryde (1982: 136–138) put forward explicit hypotheses. His analysis can be summarized as follows: stability in the foundations, flexibility in the catalogues.³¹ Bryde expected further changes in the more casuistically-styled parts of the *Grundgesetz* such as those governing the relationship between *Bund* and *Länder*, legislative powers and the fiscal constitution. Given the high degree

³⁰Cf. Articles 38, 39, 51, 76 and 77 GG.

³¹This means the largely enumerative parts of the constitution that deal for example with the distribution of legislative powers or tax revenues.

of substantial constitutional changes like restrictions of Basic Rights, can be interpreted in two ways: it can be an expression of an alienation from the constitution, or it can signal agreement. The first case would be a worrying sign of an endangered “*Verfassungsgefühl*” (Loewenstein), a lack of communal thinking within the state’s population. Further integration through increased participation could help to strengthen that communal feeling again and clarify the shared responsibility of all citizens towards the conservation and development of their constitution. In the second case, it would surely be good if agreement towards constitutional change could be actively expressed. Thus in any case popular participation in constitutional amendments would be preferable over the present state of affairs – and also theoretically justified as protection of the people from “its representatives if they agree” (Bryde 1982: 54).

It has to be kept in mind, however, that the special characteristics of the *Grundgesetz* mentioned above make some qualifications necessary. Specifically the very detailed regulations of federal relations (legislative powers, fiscal matters) as well as the mentioning of specific periods of time and numbers make for an increased need for change in the German constitution. Continuous referenda about such matters could quickly reverse the intended effect of raising legitimacy. Since it does not seem appropriate to exclude certain parts of the constitution from popular participation, it seems preferable to introduce a facultative referendum which would be triggered by a motion supported by a quarter of the members of the *Bundestag*.³⁸ The many more or less unanimously passed constitutional changes of a more technical nature could thus be spared from having to undergo a referendum, while a sufficiently large minority of representatives would be allowed to refer a contested constitutional amendment to the people. The constitution of the Federal Republic of Germany would thus become more like most other European constitutions and would make the transition from a constitutional to a democratic tradition.

³⁸Such a referendum is optional rather than obligatory. Provisions for such referenda can be found e.g. in the constitutions of Denmark, Greece or Italy (Butler/Ranney 1994: 30f.). Only the Danish case provides for a parliamentary *minority* to trigger a referendum. Contrary to the solution proposed here, in the Danish case this is only applicable for normal legislation, since constitutional amendments require a referendum anyway (see above, page 13).

the right to asylum (Article 16a) and the inviolability of the home (Article 13) have been substantially restricted. While these changes were subject to considerable political debate, in neither cases was there a political mass mobilisation on the scale characteristic of the amendments in the 1950s and 1960s.³⁶

4.2 Completing the normalisation of the *Grundgesetz*

In the fifty years of its existence, the Federal Republic of Germany has undergone a number of processes of normalisation. From a “construction akin to a state” (Carlo Schmid) it grew into a normal state over time. This process was completed domestically with German unification and in terms of foreign policy with the Two-plus-Four Treaty. In parallel, the “Basic Law”, through the addition of missing provisions, grew from an interim arrangement into a full constitution. I would like to argue that these developments should be complemented with a process that normalises the German citizenry’s relationship with its constitution.

The *Grundgesetz* was adopted in 1949 without a referendum,³⁷ and in 1990 no referendum was held to legitimize the now all-German constitution. Thus for the foreseeable future, the German people is likely to have foregone an opportunity to exercise its power of adopting a constitution. In practice, this power often doesn’t correspond to the theoretical fiction anyway (Beyme 1968). But that is why one has to ask whether popular participation should not be at least the case of the constitution is amended. Karl Loewenstein remarked nearly forty years ago that none of the (already then) numerous constitutional amendments – with the exception of that on defense – “had inspired the least bit of interest in the public” (Loewenstein 1961: 60). He wondered whether this not meant having to draw the conclusion “that the *Grundgesetz* as supreme order had remained alien to the great mass of people to whom it addressed itself”? Others have likewise asked how “the ‘will’ and the ‘popular sentiment’ towards the constitution can come to exist and be maintained, if citizens don’t have an opportunity to contribute to constitutional amendments and revisions?” (Steinberg 1980: 392).

The low degree of political mobilization mentioned above, even in the case

³⁶On the latter controversies see Baring 1969, esp. pp. 261–293, Schwarz 1981 and Schaub 1984: 187ff., 213ff. as well as Oberreuter 1978 and Ellwein 1973: 458–470.

³⁷Quite contrary to present positions, the SPD was then opposed to a referendum in order to emphasize the transitional character of the *Grundgesetz*, while the CDU favoured a referendum because of the principle of popular sovereignty. The SPD’s position prevailed (Eschenburg/Benz 1983: 509).

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