Special Issue: The Basic Law at 60

The Basic Law at 60 – Reading the *Grundgesetz*

By Hubert Rottleuthner[*]

A. The Point of View of the Sociology of Law

Sociology of law usually applies three basic distinctions that also can be applied to the analysis of the *Grundgesetz* (Basic Law or constitution).

I. Three Basic Distinctions

A starting point of socio-legal analyses lies in the distinction between the normative and the factual or, in traditional terms, between the law in the books and law in action. This comes close to what is familiar in the German doctrine as the contrast between constitutional law and constitutional reality (*Verfassungsrecht/Verfassungswirklichkeit*). On the one hand we find "norms as such"; while on the other, however, we have to study whether and in which way these norms are applied, what use is made of them and what are the effects of these practices.

Another basic distinction brings into play formal and informal aspects analysing legal reality. Legal reality can, from a formal point of view, be studied as the compliance (or non-compliance) with legal norms and the application or use that is made of legal norms. Thus, we can describe social reality in correspondence (or non-correspondence respectively) with the legal sphere. However, we can examine the informal aspects of social practices without using legal norms as a descriptive frame of reference. In contrast to legislative acts that are formally regulated in the constitution, one can detect informal actions in the pre-parliamentary sphere (e.g. lobbying). There are many informal groups of leading executives or party members, *ad hoc* boards in emergency cases or commissions for special purposes, without any "formal" constitutional basis.

Finally, socio-legal research can be performed in a genetic or in a functional perspective, *i.e.*, we can focus on the origin and development of law, in our case the birth of the *Grundgesetz* in 1949. Or we can look, *inter alia*, at the functions and effects of legal enactments.

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II. Issues of Socio-legal Research

There are standard issues of socio-legal research, parts of which can also be found when we look at the Constitution in particular.

Research into the efficacy of law examines the degree to which legislative goals are achieved and at the ways the objectives were attained. In the case of the *Grundgesetz,* one often hears in formal speeches that the Constitution was a success. But how can we prove whether the Constitution was and still is efficacious? If efficacy means that the goals are achieved, what were the goals of the fathers (and the few mothers) of the *Grundgesetz*, and what were the goals of the legislators who often amended the German constitution during the last six decades? If certain objectives of the *Grundgesetz* could be identified, and if they have been attained, then was this "success" due to the constitution or, rather, to the jurisdiction of the Federal Constitutional Court, or the economic situation, or to the general political atmosphere? The *Grundgesetz* is comprised of many complex regulations that make it almost impossible to attribute some kind of causal contribution to a single norm. Or, if we take the *Grundgesetz* as a whole, what is/are the aim/aims of an entire constitution? Is it the protection of human dignity, as stated in the first article of the *Grundgesetz*? Or is it the realization of freedom and equality (Arts. 2 and 3)? Can all the other articles of the Constitution be understood as ancillary rules that serve to promote its most central goals? In addition, the *Grundgesetz* has been changed and amended 55 times during the last six decades. Therefore, the *Grundgesetz* of 1949 cannot be viewed as a "success", but rather, if any, the permanent changes of its rules have been the "success."

It can be substantiated that the efficacy of a whole constitution cannot be proved. Does this also hold for the (degree of) compliance with the constitution?[1] Who has to comply with the constitution? Who are its addressees? Surely, all state actors. However, the basic rights should also be valid among the citizens. Only an omniscient being might know the degree to which the norms of the constitution have been complied with. This lies far beyond the capacities of human sociologists of law. In the case of the Federal Constitutional Court, it does not make sense to apply the notion of compliance or transgression at all. No one is competent to review the FCC-decisions (in a restricted sense only the European Court for Human Rights). In the early years of the Constitutional Court, Chancellor Adenauer and his Minister of Justice Dehler put the Court under pressure by

[1] Hans Kelsen states that a legal norm is valid "if it belongs to a legal order that is by and large efficacious, *i.e.*, if the individuals whose conduct is regulated by the legal order in the main actually do conduct themselves as they should according to the legal order." *See* H.KELSEN, WHAT IS JUSTICE? 268 (1960). One should, in contrast to Kelsen, distinguish between the efficacy of a norm (or a whole legal order) i.e., whether its goals are achieved and the compliance with it. Compliance with norms does not necessarily lead to goal attainment.

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reproaching the Court for a breech of the law.[2] Later on, the acceptance of the Court grew with the exception of a few decisions that led to negative or highly controversial responses, most spectacularly perhaps the *Crucifix Case* or the *"Soldiers are Murderers" Case*.[3]

Regularly, instead of revealing a compliance rate of the *Grundgesetz* one rather counts the number of successful constitutional complaints and the number of laws that have been declared invalid by the Federal Constitutional Court. The rate of successful constitutional complaints is very low (less than 3%). This is interpreted as an indicator of an efficacious protection of basic rights by state authorities. However, there might exist a dark figure of violations of basic rights. There also might be barriers to the mobilization of the Court *via* constitutional complaints. It has been calculated that 611 laws have been declared invalid out of 175,000 laws issued by parliament in total.

Finally, a traditional topic of socio-legal research is "Knowledge and Opinion about Law." The figure of more than 6,000 constitutional complaints annually is taken as an indicator of a high level of legal consciousness among the German population. However, the low rate of success could lead to the conclusion that this legal knowledge is not very sophisticated. Furthermore, there is a sharp contrast between confidence in the *Grundgesetz* and knowledge of it. According to a survey by the Allensbach Institute,[4] 72% of interviewed people have "much" or even "very much" trust in the Constitution. Yet only 30% of those interviewed own a copy of the *Grundgesetz* and only 37% could state its birthday correctly despite the many celebrations reported in the media. Of those interviewed, 25% could quote the famous first sentence of art. 1 *("Die Würde des Menschen ist unantastbar")*, but 47% did not know it at all.

B. Durkheim's Perspective

The issues discussed above are standard issues of socio-legal research. The title of my contribution, however, indicates a deviation from traditional paths since I will turn to "norms as such." As a sociologist of law I will, paradoxically, take a close look at the law in the books taking no account of how it came into the books, how it is set into action and with what effects. In doing so I can refer to an authority of socio-legal thinking, namely Emile Durkheim (1858-1917), who used the law in the books as a means to reveal social structures.

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[2] *See* UWE WESEL, DER GANG NACH KARLSRUHE: DAS BUNDESVERFASSUNGSGERICHT IN DER GESCHICHTE DER BUNDESREPUBLIK 67 (2004).

[3] *See* BVerfGE 93, 1 [May 16, 1995]; BVerfGE 93, 266 [Oct. 10, 1995].

[4] FRANKFURTER ALLGEMEINE ZEITUNG, May 20, 2009.

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I. Law as an indicator of underlying social processes and structures

In *Les Règles de la méthode sociologique* (1895) Durkheim simply stated: "The law exists in the law books." No sociologist (of law) nowadays would dare say that. However, Durkheim's approach is not inadequate given the use that he makes of the law in the books. Law serves as an epistemological tool, as an indicator of processes and structures that are not directly observable. In his fundamental study *De la division du travail social* (1893), he uses codifications of legal norms as indicators of social solidarity, that is, of various types of social integration (mechanic/organic) which correspond with certain types of legal norms (repressive/restitutive). Restricted to literate societies, he establishes a developmental scheme that reaches from Hebrew law in the Old Testament to modern civil law.

Looking at social developments in a long term perspective, it might be reasonable to use written legal sources as means from which one can draw conclusions to presently unobservable social facts. But also for studies in recent social change, the use of laws might be useful, for example in the field of family law (in particular divorce regulations), the decriminalization of sexual matters in penal law, or the development of environmental law. Therefore, it makes sense to ask the question: Is the *Grundgesetz* a mirror of (West-) German history? What can we learn about six decades of German history by reading the *Grundgesetz* with its many changes?

II. Objections to Durkheim's Approach

Serious objections to Durkheim's approach can be raised.

First, reading "norms as such" does not admit any assumptions about the motives of the legislator. The abolition of the death penalty in Article 102 of the Basic Law could be understood as a reaction to the excessive use of capital punishment during the Nazi era.[5] In a Durkheimian manner one could interpret Article 102 as an indicator of moral progress. A closer look at the protocols of the Parliamentary Council (*Parlamentarischer Rat*) shows that the majority in favour of the abolition of the death penalty was reached only by a proposal of the right-wing member Hans-Christoph Seebohm,[6] who argued that not only the excessive number of executions in the years up to 1945, but also the excessive number of executions that took place following the War, renders the abolition necessary. This was one of his contributions in his fierce fight against the execution of Nazi criminals.

[5] This interpretation can still be found in a decision of the Federal Court of Justice (*Bundesgerichtshof*). *See* BGHSt 41, 317 (329) [Nov. 16, 1995]. The interpretation was previously utilized by the Federal Constitutional Court. *See* BVerfGE 45, 187 (225) (June 21, 1977].

[6] At that time Seebohm was Vice-President of the *Deutsche Partei*. Later he was a member of the CDU. From 1949-1966 Seebohm was Minister of Transportation in the Adenauer Government.

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The introduction of emergency laws in June 1968 could be seen, from a Durkheimian point of view, as a preparatory act in anticipation of menacing catastrophes or even a threat of war. In fact, the emergency legislation served the purpose to end prerogatives of the Western Allies. This cannot be read out of the text.

Second, the plurality of opinions within a society cannot be adequately represented in the legislative sphere. The *Grundgesetz* is not the mirror of public opinion research. Article 102 was introduced contrary to the pro-death penalty views of the vast majority of the people (in 1949 about 80% were in favour of the death penalty; the majority, however, opposed capital punishment against Nazi criminals). The attitudes towards capital punishment changed during the next six decades, while Article 102 of the Basic Law remained constant. Therefore, the Constitution cannot be used as a valid indicator of basic moral principles within a society.

Third, one cannot tell by looking at norms as such whether they are applied at all, whether they become a part of the law in action. The former Articles 23 and 144, which extended the validity of the *Grundgesetz* to "Groß-Berlin", were suspended by a secret agreement between the Western Allies and the Chancellors in office until 1990.

Finally, the *Grundgesetz* contains instructions for future legislation, for example in Article 131. Reading the *Grundgesetz* exclusively, one will never know what actually happened afterwards.[7]

III. Constitutional Change and Social Change

These systematic objections notwithstanding, let us enter Durkheim's chamber of horror: we are in a room where we have at our disposal the Basic Law with all its amendments – and nothing else. And now we are supposed to say something about the historical development of the Federal Republic of Germany.

The Basic Law has been amended 55 times. These alterations could be useful from a Durkheimian perspective. To what extent can constitutional changes be used as an indicator of social change? Prior to that, three systematic considerations should be taken into account.

First, while changes in the wording of the Basic Law can easily be identified, this is not the case when only the interpretation of a norm changes but its wording remains the same. This is a common practice of the Federal Constitutional Court. Since when does human

[7] Namely the issuing of the *Gesetz zu Art. 131 GG* (May 11, 1951) and the struggle between the Federal Constitutional Court and the Federal Court of Justice about the continuance of the civil service after 1945.

dignity also encompass prenatal and post-mortem phases of human life? When was the right to privacy (*informationelles Selbstbestimmungsrecht*) introduced and why?

Second, the constitutional complaint (*Verfassungsbeschwerde*) was only inserted into the Basic Law in 1969 (Article 93 (1) [4a] and [4b]). Does that mean that it did not exist before? No, the constitutional complaint existed before. It was not regulated on the constitutional level but on the level of parliamentary acts (*einfachgesetzlich*), namely in §§ 90 of the Federal Constitutional Court Act. This cannot be inferred by merely observing the Basic Law and its alterations. Another example is the very first amendment to the Basic Law from 1951, when Article 143, stipulating criminal liability for treason (*Landesverrat*) and high treason (*Hochverrat*), was taken out of the constitution. Instead, these norms were inserted into the penal code (StGB).[8] The *Fünf-Prozent-Hürde bei Bundestagswahlen* (the five-percent requirement for parties to enter Parliament), a very important regulation, cannot be found in the Constitution but was inserted via the *Bundeswahlgesetz* (Federal Election Law) in 1953.

Third, one can never be certain that the constitution's framers and amending legislatures react to social change or if they instead intend to initiate change. A good example of this is Article 3 (2) [1], which reads: "Men and women shall have equal rights." It is a coincidence that we can find in Durkheim's chamber of horror a text from the Weimar Constitution stipulating in Article 109 that all Germans are equal before the law and that men and women should, in principle, enjoy the same civic rights and have the same civic duties. The regulations in the Basic Law go explicitly beyond that. If one would tell the story of the development of equal rights, one could identify Article 3 of the Basic Law as a milestone. However, Article 117 (1) of the Basic Law granted the legislature additional time, until 31 March 1953, to adapt conflicting regulations in the ordinary law. In that sense the Basic Law anticipated parliamentary action. But what happened leading up to the March 1953 deadline? The Basic Law as such does not give any account of the dramatic events that followed. What in fact happened was – nothing. It was only after July 1957, thus four years after the deadline had expired, that a statute on equal treatment of women and men (*Gleichberechtigungsgesetz*) entered into force to correct gender discrimination throughout the ordinary law.[9] In the meantime the courts had to give their rulings on the basis of Article 3 (2) of the Basic Law. The *Gleichberechtigungsgesetz* contained a regulation that stipulated the primacy of the husband / father, which was declared unconstitutional by the Constitutional Court in 1959.[10] In order to learn about these

[8] *Strafrechtsänderungsgesetz* of 31 August 1951, BGBl I, 747. The provisional character of art. 143 was indicated in section 6 of this article. The fact that it disappeared from the Basic Law suggests that it was regulated in a law on the federal level (*Bundesgesetz*).

[9] *Gleichberechtigungsgesetz* of June 18, 1957 (BGBl I, 609, in force since July 1, 1957).

[10] Stichentscheid des Vaters in Fragen der elterlichen Gewalt: § 1628 BGB a.F.; Alleinvertretungsanspruch des Vaters bei der gesetzlichen Vertretung des Kindes: § 1629 para 1 BGB a.F. These two provisions were declared unconstitutional by the Federal Constitutional Court on July 29, 1959 (BVerfGE 10, 59).

occurrences we have to look beyond the Basic Law. On that occasion, one should be allowed to ask the question, if in these cases "the Basic Law" as such was a success.

For our purpose of an analysis of the Basic Law from a Durkheimian perspective, the many amendments to the Constitution (as noted, 55 in number) are of great utility. The mentioned systematic objections notwithstanding, we can inquire, if constitutional change reflects social change.[11]

However, a brief excursus is necessary. In the case of the Constitution of the United States of America from 1787 the situation is quite different. The text of the Constitution has never been changed; it was amended several times: first in 1791, including 10 additional rights ("Bill of Rights"). In the course of the next 200 years only 17 more amendments followed, and these amendments do not reveal much of the history of the USA: 1865: abolition of slavery; 1869: universal suffrage (irrespective of race - but what was the reality?); only in 1920: women's suffrage; 1919 to 1933: prohibition of alcohol; 1951: restriction of the presidency to two terms; and 1971: lowering of the age of suffrage to 18 years. That is not much.

In Japan one would experience a real disaster with Durkheim. The Japanese Constitution of 1946/47 has never been amended! There has been a discussion for some time now about whether Article 9 (demilitarisation) should be changed and if a norm about the protection of the environment should be inserted. Is a constitution as constant as Japan's an indicator of an entirely static society?

The critical objections against the Durkheimian perspective we mentioned earlier were prompted by the insights of contemporary witnesses or comparative historians invading Durkheim's chamber of horror and spreading information obtained from sources beyond the text of the constitution (for example, based on the motives of the legislators, opinions in the population, non-compliance or ignorance of constitutional norms, and the knowledge of regular parliamentary legislation [*die einfachgesetzliche Rechtslage*]). The purpose of this investigation, however, is to fully engage in a Durkheimian perspective. We must, therefore, be strictly naïve. We have nothing but the text of the Basic Law with all its changes and their dates at our disposal. Insights based on knowledge about contexts or the experience of contemporaries will not be taken into consideration.

[11] In view of the numerous alterations of the Basic Law one should, in contrast to Horst Dreier, not perceive it as a sacred text. Die Zeit 20/09 v. 7.5.2009. One could, however, understand article 1 and 20 as sacred insofar as they are unalterable according to art. 79 para. 3 (*Ewigkeitsklausel*).

IV. Changes to the Basic Law

The current Basic Law consists of 187 articles and a preamble. The numbers run up to 146 with several articles given subsidiary labels (for example "Article 12a" or "Article 16a" or "Articles 87a through 87f"). The overall maximum number of articles was 193; six articles were abrogated in the course of the last decades and never reinserted, leaving those still-existing articles as blank place holders. Some of the articles where changed several times. Out of the maximum number of 193 articles plus the preamble only 84 articles have never been changed since 1949. This means that over 60 years nearly 43% of the constitutional norms remain unchanged.[12] Starting in 1951, 55 statutes modifying the Basic Law have been enacted, the last on 12 July 2009. These statutes changed the articles (or the preamble) of the Basic Law 213 times. These changes concerned:

- the abrogation of entire articles; the vacant numbers were later used to insert entirely new constitutional norms (this happened twice with Article 143);
- new articles with new numbers are inserted, mostly by adding the above-mentioned subsidiary labels;
- new sections are added to existing articles; and
- sequences within sections or sentences are changed, sometimes single terms[13] are changed within articles.

A time series illustrates the frequency of the modifications, counting the number of articles which were changed. It shows that there are phases of inactivity (for example, between 1957 and 1967, and between 1977 and 1989).

[12] Those articles which were modified in a mere editorial manner were not counted as changes, for example the replacement of the phrase "*vollziehenden Gewalt*" with "*Exekutive*" in Article 1 (3) and replacing the phrase "*das Gleiche*" with "*das gleiche*" in Article 81 (2) and (3).

[13] The statute of 19 March 1956 changed, as mentioned before, the word "*Verwaltung*" in Article 1 (3) to "*vollziehende Gewalt*." Statute of 20 December 1993 changed the term "*Bundeseisenbahnen*" to "*Eisenbahnen des Bundes*" in Article 74 (23). Modifications of that kind will not be counted here. This does not, however, apply to the replacement of the word "*Fernmeldewesens*" by the term "*Telekommunikation*" in Article 73 (7) and Article 80 (2) (statute of 30 August 1994) because this modification indicates a technical development.

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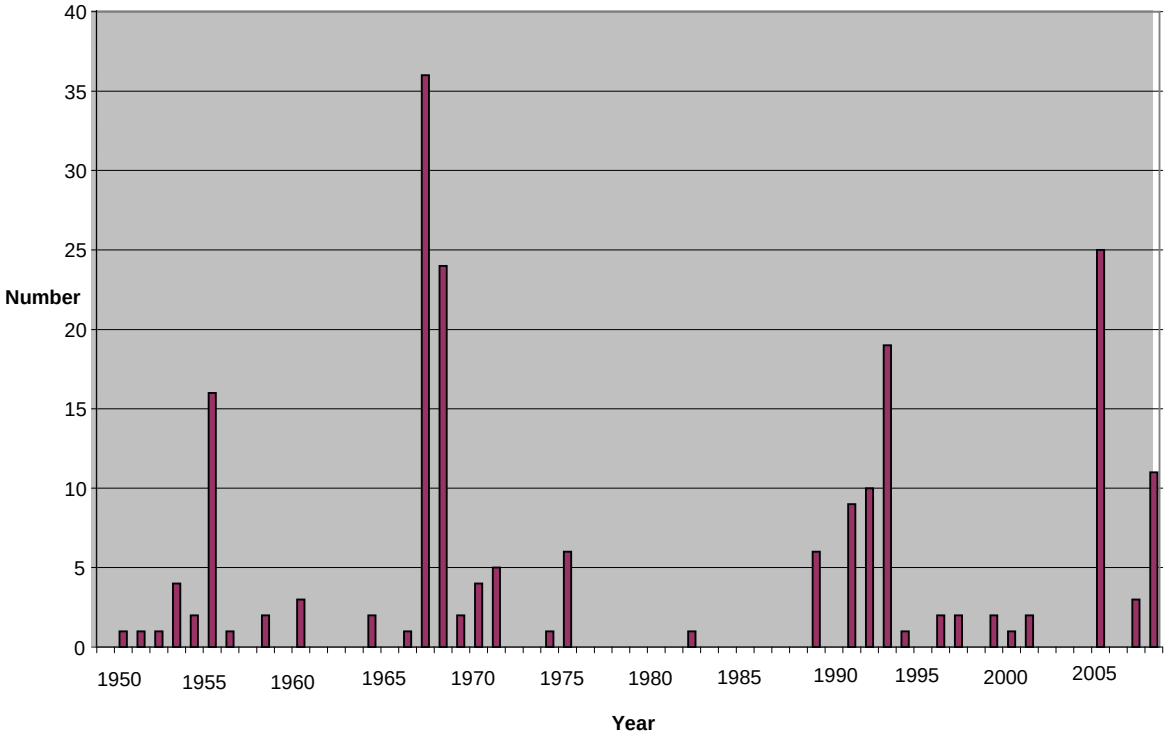
Fig. 1: Number of Changed Articles of the Basic Law (1949 – 2009)



Some of the remarkable changes include:

- 1956: regulations on military organisation (*Wehrverfassung*);
- 1968: state of emergency regulation (*Notstandsverfassung*) (with a minor addendum in 1969);
- In 1990, it seems that a number of *Bundesländer* were integrated in the Federal Republic of Germany – an event that is only reflected in few changes of the Basic Law (namely to the preamble, and art. 23, 51 para 2, 135a, 143 and 146). Interestingly, changes between 1992 and 1994 are not related to the consequences of reunification of Germany! With the exception of Article 118a (reorganisation of the *Bundesländer* Berlin and Brandenburg in 1994) and, presumably, also the extension of the scope of Article 3 (2) imposing on the state the duty to promote equal treatment of women and men by positive measures (also 1994);

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- 1992: air transport regulations (*Luftverkehrsverwaltung*), EU-regulations applying also to the *Bundesländer*;
- 1993: revision of the right to asylum, Article 16a; legislative competences of the federal state (*Bund*) and the *Bundesländer*, in particular concerning railway regulation (*Eisenbahnverwaltung*);
- In 1994 the number of changes increases again: reorganization of mail and telecommunication; Article 3 is changed to provide equal treatment in regard to disability; Article 20a is added to provide protection of natural resources; reorganization of the federal territory; legislative competences and legislative procedure;
- Several changes seem to suggest increasing international integration, in particular within the European Union (1954: on the validity of international treaties, especially in 1992 with regard to Article 23; 2006: Article 109 (5) and participation of the *Bundesländer*: Article 23 (6), and Article 52 (3a);
- Once in a while, constitutional rights have been amended (apart from three amendments to the regulations on military organisation (*Wehrverfassung*) in 1956 and six amendments within the state of emergency regulation (*Notstandsverfassung*) in 1968).

Most of these alterations led to a restriction of constitutional rights with the exception of the amendment of Article 9 (3) in 1968 (protection for industrial action); Article 3 (2) [2] was extended in 1994: duty of the state to take positive measures in regard to equal treatment (of women and men); and Article 3 (3) [2]: protection of disabled persons (1994).

Constitutional rights that were restricted include:

- Article 16a: Asylum (1993);
- Article 13: wire tapping (*Lauschangriff*) (1998); and
- Article 16: extradition within the EU (2000).

The amendment of Article 12a (2000), which allowed women to join the armed forces, might be characterized as both a restriction and an expansion of rights.

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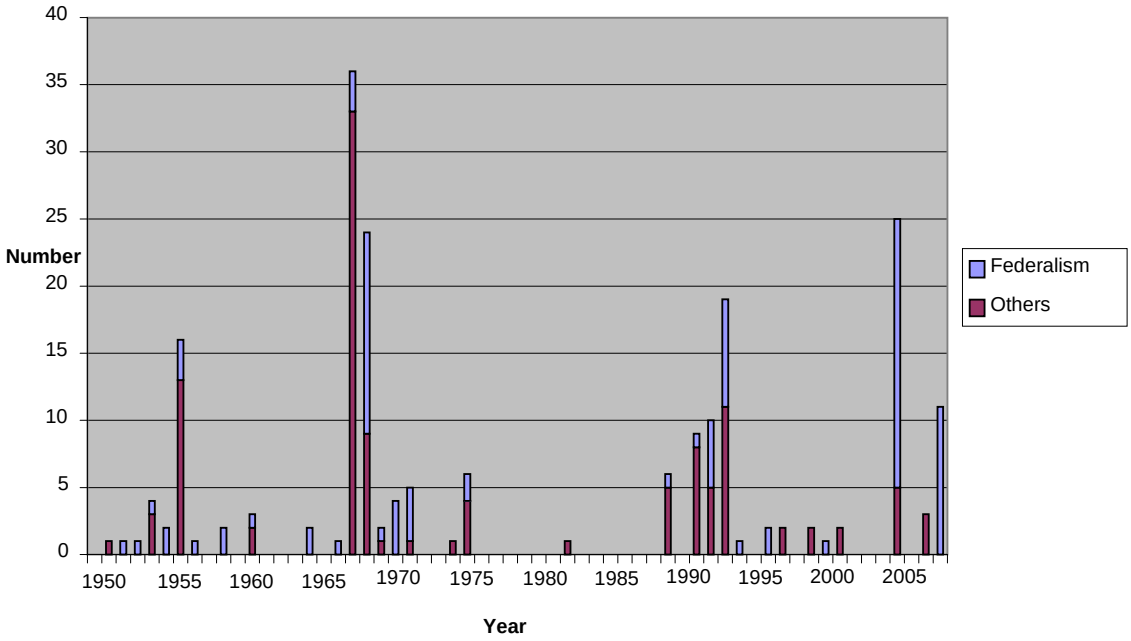
Further minor changes refer to:

- Organization of courts (1968, 1969) and competences of the Federal Constitutional Court (1969, 1994, 2006);
- Installation of a Committee on Petitions in the German *Bundestag* (1975);
- Regulation of political parties (*Parteienrecht*) (1983);
- Privatization of railways (1993), mail services (1994), telecommunication (1994);
- Berlin as capital city (2006);
- Quorum for *Normenkontrollverfahren* (abstract judicial review) (2008);

The most frequent, most extensive and most detailed changes are concerned with regulations on the structure of Germany as a federal state:

Fig. 2: Number of Changes of the Basic Law (1949 – 2009) – In Particular: Regulations on Federalism



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The various changes concerning the federal structure of the state dealt with the following questions.

a) Legislative Competences of the Federal State (Bund) and the Bundesländer (ausschließliche-, konkurrierende- and Rahmengesetzgebung[14]). Some of these regulations reveal new issues that indicate technical and other societal changes. The new competences involve nuclear energy (1959, 2006), air traffic (1961), joint tasks (*Gemeinschaftsaufgaben*) referring, for example, to universities (1969), protection of animals (1971, 1972, 2002), protection of the environment (1972), and regulation regarding explosives (*Sprengstoffrecht*) (1976). In 1993 the privatization of railways and of telecommunication becomes apparent. In 1994, too, the issue of genetic engineering appears, first in Article 74 (with more precise regulations to follow in 2006). In 2006 we find regulations on international terrorism as a matter of exclusive legislative competences (*ausschließlichen Gesetzgebung*) of the federal state (*Bund*) in Article 73 (1) [9a]. At the same time German objects of cultural value were protected against the export to foreign countries in Article 73 (1) [5a]. Article 74 tells us that in 2006 regulations were issued on closing times for shops (*Ladenschlussregeln*), housing allowances, and building subsidies; and that coal-mines still exist. Animals and trees enjoy protection and there is an attempt to regulate noise pollution. In 2006 we also learn about the existence of admission to universities (*Hochschulzulassungen*) (Articles 72 (3) [6] and 74 [33]).

b) The regulation of legislative procedures is a common and much discussed issue between the federal state (*Bund*) and the *Bundesländer*, that is, the German *Bundestag* and the *Bundesrat*.

c) Constitutional rules regulating fiscal policy (*Finanzverfassung*) in relation to the federal structure of the state were subject to frequent changes (allocation of tax payments, distribution of war compensation (Kriegsfolgelasten), definition of a fixed threshold for national debts (*Verschuldensgrenze*) in 2009).

d) A number of modifications regarded the reform of the territory or administrative structure of (some) *Bundesländer* (1969, 1976, 1994).

e) Over the last years the relationship of the federal state (*Bund*) and the *Bundesländer* with the European Union was subject to a number of amendments to the Basic Law (2006 and 2008).

As mentioned above, there were 55 instances all together that changed and amended the Basic Law. These changes affected 206 articles, that is, about 3 or 4 articles per year. What can be noticed is that 100 articles, almost 50%, were revised during the government

[14] Former version of Article 75; Article 125b of the Basic Law.

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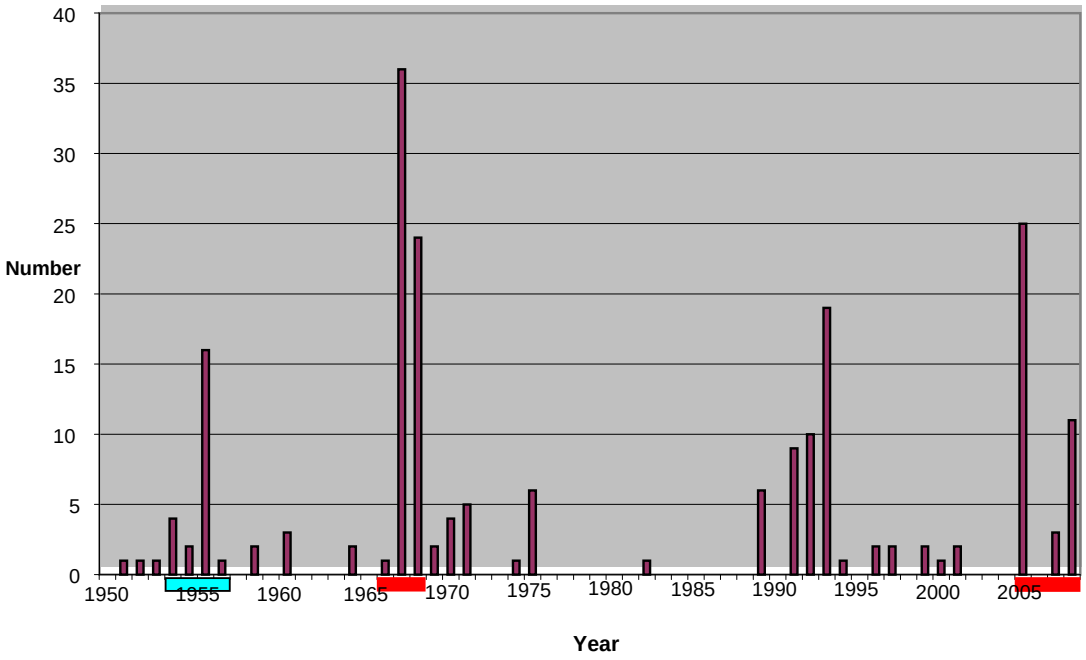
of grand coalitions (CDU/CSU and SPD). However, a two-thirds majority of the coalition of CDU/CSU, FDP, DP and BHE existed also in the second legislative period from 1953-1957. This coalition had 333 of 487 seats (68%). During these four years the number of alterations was above average (a total of 23 or nearly six each year). However, when the regulation on military organisation (*Wehrverfassung*) was passed in 1959 the number of dissenting votes was only 20.[15]

Fig. 3: Number of Changes of the Basic Law (1949 and 2009) – Indicating Periods of Grand Coalitions or Other Periods with a Governing Two-Thirds Majority in Parliament



During the government of the first grand coalition from 1 December 1966 to September 1969, the state of emergency regulation (*Notstandsverfassung*) was adopted in May 1968, and regulations on fiscal policy (*Haushaltswirtschaft*), joint tasks (*Gemeinschaftsaufgaben*) and distribution of taxes were issued in 1969. Under the second grand coalition (11 November 2005 until 22 November 2009) extensive new regulations were issued in the context of the reform of the federal structure of Germany (*Föderalismusreform* 2006).

[15] The SPD then had 151 seats. At that time, the KPD had no seat in the German *Bundestag*.

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Times of grand coalitions were evidently times of extensive changes to the Basic Law. Astonishing, however, is the number of alterations during the years from 1992 to 1994. There were changes, as previously mentioned, that were not related to German reunification. At that time the Kohl government (a coalition of CDU/CSU and FDP) had more than 60% of the seats in the German *Bundestag*. Under SPD Chancellors (Brandt 1969-1974; Schmidt 1974-1982; Schröder 1998-2005) relatively few revisions of the Basic Law were enacted. But these insights are, again, based on knowledge (about governments and government coalitions) that lies beyond the horizon of a Durkheimian perspective.

Our knowledge about historical contexts prevails again and hampers, if not ridicules, our efforts to read the Basic Law with the eyes of Durkheim. One should, however, not give up on Durkheim. His approach can be defended in view of the very broad time span he had in mind, spanning over centuries and even millennia, from the Code Civil backwards to the Second Book of Moses, so to say. Drawing a conclusion that would be restricted to a very narrow time span, in the sense of Durkheim, one could summarize the small period of the past 60 years as follows. Notwithstanding their number and scope, the alterations of the Basic Law do not reveal much about the real social situation in Germany or actual changes in German society, compared to the insights and knowledge of contemporary witnesses and comparative historians. If we only observe the norms we can easily be misled. The chronology of the regulations on military organization (*Wehrverfassung*) and the state of emergency regulation (*Notstandsverfassung*) could easily be interpreted as a remilitarization of West Germany and its preparation for military measures (an argumentation that would be in line with the propaganda of the former GDR regime against the West German administration). And what then happened in 1990, following this line, was perhaps an occupation of new territories. Luckily, however, the preamble uses the words “free self-determination” when declaring how “the unity and freedom of Germany” was achieved. My conclusion is that the changes to the Basic Law are a very poor, and even insufficient, indicator for the actual development of the German society.

C. Social Change, Constitutional Change, and the Jurisdiction of the Federal Constitutional Court

In order to support this thesis the rarely transparent veil of ignorance will be lifted. Turning Durkheim around, we will now take a look at important incidents and developments in the history of the Federal Republic of Germany and then see if the Basic Law has responded to them. Thus, 60 years of German history in the dull mirror of the Basic Law.

An attempt to outline principal tendencies and fundamental problems in the historical development of Germany is rather bold. What should be mentioned, what should be highlighted, what should be left out? The politically motivated selection of events by chronicles published on the occasion of the 60th anniversary of the Federal Republic of

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Germany is alarming enough. For my analysis I will choose a few topics that could have been of importance for the constitution in order to see if a response in the Basic Law can be discovered.

What was the reaction to the Nazi Period? How was it dealt with after 1949? The lessons learned from the NS past are not explicitly mentioned in the Basic Law. In order to learn, in this respect, about the significance of Article 1 (human dignity) or the importance of the federal structure of Germany (as a way of balancing and controlling state power) one has to take a look at the protocols of the Constitutional Assembly (*Parlamentarischer Rat*).

An explicit reference to the Nazi past is made in the Basic Law in Articles 131 and 132 (status of civil servants) and in Article 134 (*Reichsvermögen*). But what happened to Article 139 that declared the "liberation laws" of the Allies as untouchable by the German Constitution?[16] More information can be found in the collection of the decisions of the Federal Constitutional Court. Important decisions in regard to the NS past include: the decision concerning the banning of the SRP of 1952,[17] the decision concerning the status of civil servants ("*Beamtenurteil*") of 1953,[18] the decision on the Gestapo ("*Gestapo-Beschluss*") of 1957,[19] the decision on Hannah Arendt of 1971.[20] From this it is possible to conclude that, in general, the decisions of the Federal Constitutional Court give a much better account of the historical development of Germany than do the modifications to the Basic Law.

The only way in which the cold war is reflected in the Basic Law is in the regulations on military organization (*Wehrverfassung*). Apart from this all penal provisions on political crimes were removed from the Basic Law in 1951. Here, too, the Federal Constitutional Court has more to offer, including: decisions on rearmament,[21] the decision on the communist party (KPD) of 1956,[22] and the *Elfes*-decision of 1957.[23]

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[16] R.Herzog, argues that Art. 139 has become obsolte, in: GRUNDGESETZ – KOMMENTAR, Art. 139 margin number 4 (Maunz/Dürig eds., 53rd ed. 2007).

[17] BVerfGE 2, 1 [Oct. 23, 1952]. The Sozialistische Reichspartei (SRP) was declared a successor of the NSDAP.

[18] BVerfGE 3, 58 [Dec. 17, 1953].

[19] BVerfGE 6, 132 (Febr. 19, 1957].

[20] BVerfGE 32, 173 (Nov. 4, 1971].

[21] BVerfGE 1, 396 [July 30, 1952]; BVerfGE 2, 79 [Dec. 8, 1952]; BVerfGE 2, 143 (March 7, 1953].

[22] BVerfGE 5, 85 [Aug. 17, 1956].

[23] BVerfGE 6, 32 (Jan. 16, 1957].

A "united Europe" is mentioned in the first preamble of the Basic Law, as is the objective of "secure and lasting peace in Europe" in Article 24 (2). The relevance of the military and economic orientation towards the West (*Westintegration*) is minimized. The military question was brought in connection with the European Defense Community in 1954 (Article 142a) which was, as we know, never realized.[24] The Treaties of Rome of 1957 did not prompt the Basic Law to react. The European Communities are mentioned in 1970 (in Article 108) and 2006 in Article 109 (5) in connection with fiscal discipline (*Haushaltsdisziplin*). Only in 1992, after the signing of the Maastricht Treaty, the EU is mentioned in several articles of the Basic Law (Articles 23, 28, 45, 50, 52).[25]

The Eastern Policy (*Ostpolitik*) of the Brandt government was subject to several and controversial debates in the German *Bundestag* and to a decision of the Federal Constitutional Court.[26] There is no trace of it in the Basic Law.

The economic development of the Federal Republic of Germany is not mirrored in the Basic Law as the legal superstructure. What happened to Article 14 (3) (expropriation) and to Article 15 (collectivisation)? No response to the laws concerning shop organization (Betriebsverfassung) and co-determination (*Mitbestimmung*).[27] Not a word about the situation in the labour market, with migrant laborers, of the oil crisis, of the fundamental reforms of the social security system, on the financial markets or the development of the media. Only in June 1967 the foundations for the so called *Stabilitätsgesetz* were laid out in Article 109 of the Basic Law, obliging the federal state (*Bund*) and the *Bundesländer* to take account in their fiscal policy the demands of an economic equilibrium. On 2 July 2009, legislation was rapidly enacted for stopping state indebtedness (Articles 109, 109a, 115, 143d).

German reunification, as mentioned before, is reflected in only a few changes of the Basic Law, a fact that prompts politicians every now and then to express their regret that, despite the existence of Article 146, a referendum on the constitution has never taken place.[28]

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[24] The EDC broke down in Paris on August 30, 1954.

[25] A year later the Federal Constitutional Court had to rule on the Treaty of Maastricht on February 7, 1992 (in force since November 1, 1993). *See* BVerfGE 89, 155 [Oct. 12, 1993].

[26] BVerfGE 36, 1 [July 31, 1973] (Grundlagenvertrag).

[27] But the Federal Constitutional Court was invoked on the matter of workers' participation (*Mitbestimmungsgesetz*) of 1976. *See* BVerfGE 50, 290 [March 1, 1979].

[28] Thus, for example, Franz Müntefering (SPD) on April 11, 2009 in the newspaper *Bild am Sonntag*.

The first war the German *Bundeswehr* was actively involved in, namely the Kosovo War that took place in the spring of 1999, left the Basic Law unaffected, but not the Federal Constitutional Court.[29]

Social problems and social movements are not visible in the alterations of the Basic Law. The feminist movement has an anchor in Article 3 (since 1994 reinforced in its paragraph 3). Article 117, however, did not lead to the enactment of regulations in family law.[30] The Basic Law took no notice of the debate on abortion (but this debate prompted two decisions by the Federal Constitutional Court[31]). The student movement in 1968 had no effect on the Basic Law. The problems, such as the reform of the universities[32] or the *Berufsverbote*,[33] were dealt with in Karlsruhe before the Federal Constitutional Court. The situation was similar for the Anti-nuclear movement[34] and the movements for the decriminalization of certain sexual offences, especially within the gay community.[35]

The issue of homeland (internal) security (*innere Sicherheit*) comes in cycles in the history of the Federal German Republic:[36] first the communists, then the terror of the RAF,[37] then organized crime, now international terrorism. It is not clear which threats and dangers led to the incorporation of the *Lauschangriff* (wire tapping) into Article 13. In any case, since 2006, the fight against international terrorism lies within the exclusive legislative competence (*ausschließliche Gesetzgebung*) of the federal state (Article 73 (1) [9a]).

To repeat, the major decisions of the Federal Constitutional Court give a much better picture of the historical and social development of the Federal Republic of Germany than does the Basic Law. The decisions mirror important parts of the historical development of

[29] Here, too, the Federal Constitutional Court had to be engaged. On March 25, 1999, the Court dismissed a complaint of the PDS. *See* BVerfGE 100, 266-270. In May, 1999, the Federal Constitutional Court dismissed the urgent motion of a soldier against being called to participate in the Kosovo war. (Az. 2 BvQ 17 (1999) unpublished).

[30] BVerfGE 3, 225 (Article 117) [Dec. 18, 1953]; BverfGE 10, 59 [July 29, 1959]; BVerfGE 48, 327 [May 31, 1978]; and BVerfGE 84, 9 [March 5, 1991].

[31] BVerfGE 39, 1 (Febr. 25, 1975]; BVerfGE 88, 203 [May 28, 1993].

[32] BVerfGE 33, 303 [July 18, 1972]; BVerfGE 35, 79 [May 29, 1973].

[33] On the "Radikalenerlass" *see* BVerfGE 39, 334 [May 22, 1975], which the EGMR declared invalid September 25, 1995 (Az: 7/1994/454/535, NVwZ 96, 365).

[34] BVerfGE 69, 315 [May 14, 1985]; BVerfGE 73, 206 Nov. 11, 1986].

[35] In 1957 the Federal Constitutional Court had still declared the criminal liability of homosexuality constitutional. *See* BVerfGE 6, 389 [May 10, 1957]; and on same-sex marriage cf. BVerfGE 105, 313 [July 17, 2002).

[36] *See* A.Klose/H.Rottleuthner, *Gesicherte Freiheit?*, 152 PROKLA 377-398 (Sept. 2008).

[37] *See* BVerfGE 46, 160 (Schleyer) 8Oct. 16, 1977].

Germany. However, the decisions of the Federal Constitutional Court of Germany do not reflect each concrete step of the development while the Basic Law maps out the big lines. A strict division between the general and the particular does not exist. Some major developments are, in fact, reflected in the Basic Law. Others are not. Moreover, many alterations to the Basic Law entail very detailed regulations, for example of legislative competences in a federal state or of fiscal policy (*Finanzverfassung*). These regulations reveal almost nothing of the historical development in Germany.

To give an account of the recent German history in a Durkheimian sense, we would favour a room equipped with the some 120 volumes of decisions of the Federal Constitutional Court. Why is the Basic Law such a dull mirror of the historical development of the Federal Republic of Germany? An examination of the Basic Law and its numerous alterations can illustrate the way in which constitutional law is used.

First, modifications of the Basic Law are mainly used to readjust and balance problems related to the federal structure of the state. If there is any historical explanation for this, One has to go back all the way to the Golden Bull of 1356, at least.

Second, sometimes the aim is to protect norms that could also be regulated at the level of parliamentary acts (*einfachgesetzlich*) from being changed easily (for example, by simple majority): prohibition of death penalty (1949); protections for industrial action Article 9 (1968); and constitutional complaint (1969). Nowadays, for example, there are attempts of all kinds of groups to be included in Article 3 of the Basic Law (equality). There is some kind of run on the status as victim, even if these groups are already recognised and protected by the *Allgemeine Gleichbehandlungsgesetz*, for example sexual orientation.[38]

Third, sometimes the purpose of alterations to the Basic Law is to serve as a constitutionally legitimate ground for parliamentary acts (*einfachgesetzliche Regelungen*). Most likely this seems to be the case when constitutional rights are to be restricted: Article 10 (wire tapping) (1968); Article 16 a: Asylum (1993); and Article 13: wire tapping (*Lauschangriff*) (1998).

[38] For example consider a legislative initiative of the *Bundesländer* Berlin, Bremen and Hamburg, directed at the inclusion of "sexual orientation" into the Basic Law (as addendum to Article 3 (3) [1]; now as BR-Drs. 741/09 of September 29, 2009. The motivation was to safe the regulation from being altered when the political or societal climate changes. From all the features indicated in the *Allgmeine Gleichbehandlungsgesetz,* only "age" is not mentioned in the Basic Law. The initiative of the three *Bundesländer* was repelled by the majority of the *Bundesrat* in November of 2009.

Fourth, in a few cases, wide-ranging regulations are inserted in order to deal with new topics: regulation on military organisation (*Wehrverfassung*); and state of emergency regulation (*Notstandsverfassung*), which has so far remained *law in the books*.

Speaking of the *Grundgesetz* as a "success" might be adequate insofar as the many alterations were rarely used for essential regulations on fundamental issues. However, it is not a waft of great history that suffuses the numerous changes of the Basic Law.