

Conference on Strengthening Constitutional Democracy.
*The role of provincial/regional and local government:
Co - producing quality governance through innovation*
Cape Town, 19 – 21 August 2015

**Democratic Constitutionalism in the German States:
Legislatures, Sub-national Constitutionalism and Multilevel Systems**

Paper by

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Democracy means political self-determination¹ that is the people's right to take part in public decision-making. Constitutional democracies guarantee and limit this right. They provide the institutional set up to effectively use democratic rights and limit the way how this right is to be invoked. In representative democracies this means parliaments have to 'stand for' and 'act for' its people at the same time (Pitkin 1967; Reutter 2015). The 16 sub-national parliaments in Germany are supposed to accomplish this task by passing laws, making decisions, and by holding the executive to account. In particular German *Länder* enjoy constitutional autonomy. They have the prerogative to adopt and amendment constitutions. However, in the European and German multilevel system the capacity of German Land parliaments to effectively 'act for' its people is severely limited, if not suspended at all. However, this means that political self-determination – or in other words: constitutional democracy – is severely limited in the German states, if at all possible. In my paper I will address this question and explore how the German states addressed these issues and how they tried to strengthen constitutional democracy at the sub-national level.

I will firstly analyze the role German sub-national parliaments played in constitutional politics. All German states have constitutions. Yet, many scholars argue that in Germany sub-national constitutional politics takes place in the "shadow" of the Basic Law, the national constitution. In other words, even though from a legal perspective the German states do enjoy constitutional autonomy there seems to be no room for 'democratic constitutionalism' due to the overriding influence of the national level. In my paper I will explore this tension between the national and the sub-national level and explore how far German sub-national parliaments decided on frequency and scope of amendments to sub-national constitutions.

Secondly, I will address the question how German sub-national parliaments dealt with European integration. Since the early nineties 'Europe' turned into an important topic in the German states. Hence, it cannot come as a surprise that *Land* parliaments also wanted to have a say in European affairs. German sub-national parliaments asked, hence, for better and earlier information on European issues and they strove to not only control the implementation of European law but to actively shape European policies. However, the role German state parliaments played in European politics rather is characterized by an ambivalent development. More information, better resources, and expanded competences did not increase the leverage for sub-national parliaments in European politics.

1 This paper draws on a number of articles published in the last two years. Notably, section 2 of this paper is just a slightly revised part from Reutter 2015a.

Table 1: Structure and Content of German Land Constitutions

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

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

Sources: Flick 2008: 224 f.; Lorenz/Reutter 2012.

1. German Federalism, German Land parliaments and German sub-national constitutions

The German Basic Law (Art. 28) mandates that each German Land have to set up a political order conforming to the principles of a republican, democratic and social state governed by the rule of law within the meaning of the Basic Law. Due to this "principle of homogeneity" many scholars see Land constitutions "overshadowed by the Basic Law" (Möstl 2005). In this perspective the BL allots constitutional space to the *Länder*, prescribes the content of *Land* constitutions, and overrules regulations contradicting the BL (like the still existing death penalty in the constitution of Hesse). Yet and as pointed out, the *Länder* are supposed to be autonomous with regard to their constitutions. In Germany sub-national constitutions are regarded as necessary

preconditions for regional self-government and for the privilege to execute public authority. As a matter of fact, the German Länder filled out that space to different degrees and in varying ways (Lorenz/Reutter 2012). German sub-national constitutions differ among each other and compared to the Basic Law (table 1 and 2). Hence, this finding indicates that the Länder and the Land parliaments enjoy considerable leeway with regard to constitutional politics.

Table 2: Features of German *Land* constitutions (as of Dec. 2014)

	Age of constitution (in years)	Number of articles (year of adoption)	Number of amendments	Number of changed articles
BAV	68.1	189	16	57
BB	22.4	118	8	27
BER	65.0	102	42	168
BW	61.2	95	20	44
HB	67.2	156	27	122
HES	68.1	151	8	13
HH	68.7	77	16	131
LS	63.7	78	18	108
MW	20.1	81	4	12
NRW	64.5	93	20	36
RP	67.7	145	37	163
SA	22.6	123	1	3
SAT	22.5	102	1	9
SH	65.0	60	23	105
SLD	67.1	134	27	178
TH	21.2	107	4	7
Mean	52.2	113.2	17.0	73.9

Abbreviations: BAV = Bavaria, BB = Brandenburg; BER = Berlin; BW = Baden-Württemberg; HB = Bremen; HES = Hesse; HH = Hamburg; LS = Lower Saxony; MW = Mecklenburg West-Pomerania; NRW = North Rhine-Westphalia; RP = Rhineland-Palatinate; SA = Saxony; SAT = Saxony-Anhalt; SH = Schleswig-Holstein; SLD = Saarland, TH = Thuringia.

Source: my compilation based on Pestalozza 2014b; www.verfassungen.de; websites of *Land* parliaments.

According to most scholars German Land parliaments are *quantités négligeables* having no effective say whatsoever in public policy-making in the German political system. Land parliaments have only limited legislative powers and not the means to effectively control the executives (Reutter 2008). Cooperative federalism, European politics and intertwined policy-making privilege the executives at the national and the subnational level and favor national policies (Lehmbruch 2000; Reutter 2006; Reutter 2014; Kropp 2010; Gunlicks 2003: 216 ff.). European politics are supposed to have the same impact on *Land* parliaments. In this perspective 'Europe' overrules the principle of subsidiarity and "colonizes" policy areas that the *Länder* used to regulate (e.g. higher education). This, once again, leads to: intertwined policy-making, an overriding influence of the executives, and shrinking legislative powers of *Land* parliaments

(Thaysen 2005; Abels 2011; Abels 2013). In short: multilevel governance and democratic self-rule at the sub-national level seem to be mutually exclusive concepts. Yet, it seems different with regard to constitutional politics. Constitutional politics is not only a permanent and important issue in the German *Länder*, but Land parliaments play an important role in this field. In order to bring the role to the fore parliaments play in constitutional politics we will examine in what sense German Land parliaments are involved in constitutional decision-making. We will mostly – but not only – refer to four *Länder*: Brandenburg, Saxony, Saxony-Anhalt, and Bavaria (Reutter 2014, 2015b, 2015c).

Table 3: German *Land* parliaments: basic features (as of: May 2015)

Land	# of Seats		c) Persons entitled to vote		duration of term years	Start of 1 st term	e) last election (current term)
	a) legally	b) effectively	Abs.	d) per seat			
BW	120	138	7,622,873	63,524	5	25.03.1952	27.03.2011 (15)
BAV	180	180	9,442,013	52,456	5	01.12.1946	15.09.2013 (17)
BER	130	149	2,469,716	18,998	5	11.01.1951	18.09.2011 (17)
BB	88	88	2,094,458	23,801	5	16.10.1990	14.09.2014 (5)
HB	83	83	487,599	5,875	4	13.10.1946	10.05.2015 (19)
HH	121	121	1,299,411	10,739	5	30.10.1946	15.02.2015 (21)
HES	110	110	4,392,213	39,929	5	01.12.1946	22.09.2013 (19)
LS	135	137	6,087,297	45,091	5	20.04.1947	20.01.2013 (17)
MV	71	71	1,373,932	19,351	5	26.10.1990	04.09.2011 (6)
NRW	181	237	13,262,049	73,271	5	20.04.1947	13.05.2012 (16)
RP	101	101	3,088,199	30,576	5	18.05.1947	27.03.2011 (16)
SLD	51	51	797,512	15,637	5	15.12.1947	25.03.2012 (15)
SAN	120	132	3,376,627	28,139	5	27.10.1990	31.08.2014 (6)
SAT	91	105	1,988,172	21,848	5	28.10.1990	20.03.2011 (6)
SH	69	69	2,239,615	32,458	5	08.05.1947	06.05.2012 (18)
TH	88	88	1,812,370	20,595	5	25.10.1990	14.09.2014 (5)

a) legally fixed minimum number; b) Date: May 2015; c) Date: last election before May 2015, d) number of persons entitled to vote divided through the legally fixed number of seats; e) date of the last election before May 2015, in (): current term.

Source: S. Mielke/W. Reutter, 2012: 24; www.election.de; www.bundeswahlleiter.de (Information provided by Land Returning officers).

In order to highlight the role Land parliaments play in subnational constitutional politics I provide four arguments. The first argument refers to the deliberative competencies of parliaments. The second one points to the fact that German Land parliaments eventually decide on most of the amendments, the third one refers to the notion that Land parliaments are “working parliaments” in which standing committees determine the decision-making process, and the final describes constitutional politics as a means of party competition.

Table 4: Land parliaments and constitutional politics in Brandenburg, Saxony, Saxony-Anhalt and Bavaria

	Brandenburg (1992-2013)	Saxony (1992- 2013)	Saxony (1992-2013)	Bavaria (1946-2014)
Number of proposed amendments	21	29	5	89
• Introduced by ruling parties	0	0	0	11
• Introduced by parties in opposition or the people ^{a)}	16	28	4	69
• Jointly Introduced by ruling parties and parties in opposition	2	1	1	7
• Introduced by government	3	0	0	2
Amendments passed	8	1	1	^{c)} 12
Number of speeches ^{b)}	214	388	29	696
Number of bills forwarded to committees	13	29	1	64

a) Including popular initiatives; b) the number of speeches includes oral addresses made in parliament; c) the Bavarian Landtag passed 12 amendments, however some of these amendments have been split up for the referenda.

Source: my compilation; homepages of the *Land* parliaments.

Firstly, many argue that parliaments are first and foremost venues for public discourses and public deliberation. In spite of the fact that these high-flying expectations are rarely matched in reality we still can try to corroborate whether and how far German Land parliaments are places where public discussions about constitutional politics took place. As a matter of fact, sub-national parliaments possess a quasi-monopoly in this policy-field. Each decision on a constitutional amendment has to be dealt with in a *Land* parliament. As a rule Land parliaments deliberate publicly on respective bills. There has been no amendment not discussed in the plenaries of the Land parliaments regardless of the differences between the standing orders managing the legislative process in parliament. For example in Brandenburg, Saxony-Anhalt and Bavaria each bill introduced in parliament has to be presented by a member of parliament and objected by another one – even if the bill is voted down in the first reading which happened in Brandenburg and Bavaria a number of times. In the Landtag of Saxony the bills are discussed in the second reading. The same procedural requirements apply to people’s initiatives that aimed at changing Land constitutions. Thus, in each case Land parliaments had to take a decision on the bill. For example between 1992 and 2013 the *Landtag* Brandenburg processed 21 of such bills; eight of these bills succeeded. All others have been rejected but they were still debated in the plenary. In Saxony 29 bills have been put to the floor of the *Landtag*. Just one altered the constitution. In Saxony-Anhalt only five bills have been introduced into parliament in order to alter the constitution, once again just one attempt succeeded. And in Bavaria 89 bills have been submitted to the Landtag between 1946 and 2013. Overall this means that in almost each term *Land* parliaments discuss constitutional matters

and decide upon constitutional issues. In other words *Land* parliaments are the most important venues or forums in which the basic order of a Land is continuously dealt with and decided upon. This deliberative competency reflects in the fact that 1,327 speeches have been made defending, criticizing, or overtly rejecting the 144 bills introduced into the four parliaments.

Secondly, *Land* parliaments not only deliberate on constitutional issues on a permanent basis but they also decide upon most amendments exclusively. There are only two *Länder* in which each constitutional amendment has to be put before the people: Hesse and Bavaria. In Berlin a popular referendum is obligatory if the amendment affects stipulations pertaining to direct democracy. So far in the German *Länder* there were 37 referendums of which 25 were obligatory and took place either in Bavaria or Hesse (Rehmet 2013). In all other *Länder* the parliaments have the final say if a constitution was to be amended. There is no second chamber or another institution with the power to amend a constitution. The same is true for the three *Länder* included in table 4. Even the two proposed amendments going back to people's initiatives – one in Brandenburg, one in Saxony – were eventually decided upon by the parliament. They were not put before the people due to a lack of supporting signatures. Only in Bavaria we found 2 amendments going back to people's initiatives and passed in a referendum in spite of the fact that the Landtag had opposed the amendments.

Thirdly, *Land* parliaments belong to the type of “working parliaments”. In this kind of parliament committees play an important role in legislative decision-making. This is also true in constitutional politics. In the four parliaments of Brandenburg, Saxony, Saxon-Anhalt and Bavaria there were only few amendments not dealt with in committees. In Brandenburg 13 proposed amendments have been forwarded to committees; in Saxony all such bills were discussed in committees. In Saxony-Anhalt four out of five bills passed this stage of a legislative process. And in Bavaria 25 out of 89 bills just saw a first reading, hence had not been passed on to a committee. This clearly confirms that also in constitutional politics Land parliaments correspond to the type of working parliament. Furthermore, the committees apparently predetermine the final decision. Since the committees reflect the political composition of the parliament as a whole the plenary will follow recommendations expressed by respective committees.

Finally, constitutional politics are an important arena for party competition in two respects. On the one hand, notably minority parties try to challenge the government and ruling parties by introducing bills knowing that most of these bills will be dead on

arrival. In Saxony, Brandenburg, and Saxony-Anhalt minority parties submitted 48 bills to the floor of the parliament. Only three of these bills eventually triggered a constitutional amendment. In addition, these three propositions have been changed considerably in the course of the parliamentary process. Ruling parties did not introduce a single bill in this policy field. On the other hand, legislative strategies in this policy field differ significantly from the general pattern. As a rule, in parliamentary forms of governments the executives put most of the bills to the floor of the parliament. Constitutional politics is an exception to this rule. Most strikingly, in Brandenburg and Saxony parties in opposition introduced most of the bills striving to amend the constitution (table 6). Overall, constitutional politics seem to be a field in which parties in opposition receive attention and can sharpen their profile.

These findings show that *Land* parliaments play an important role in constitutional politics. Land parliaments have to muster the majorities, they constantly deliberate on constitutional issues, and they provide a venue for minority parties as far as constitutional politics are concerned. In other words the *Länder* are not only legally entitled to fill out the constitutional space allocated to them but they actually shape the preconditions for constitutional democracy. It is different, however, with regard to the role Land parliaments might play in multilevel systems. Here the question arises, whether Land parliaments can “act for” its citizens.

2. Land parliaments and politics in multilevel systems

As already pointed out, due to the functional principles of policy-making in multilevel systems Land parliaments are supposed to be *quantités négligeables*. As a matter of fact there is ample evidence supporting this view (Schneider 1979, 42; Greß and Huth 1998, 46). Furthermore, in almost each policy field there is what has been coined a third level of federalism, i.e. a dense net of formal and informal networks of consultation in order to plan and coordinate the policy-making process (Scharpf 1989; Kropp 2010, 130ff.). Under these circumstances parliamentary parties seem to not have many options: they can only ratify agreements made by their governments with the federation and/or with other *Länder*. Otherwise they risk a toppling of their government. It appears, hence, almost an understatement to claim that *Land* parliaments have only limited legislative competencies and hardly the means to effectively control the executives. European politics is supposed to have the same – negative – effects on *Land* parliaments. ‘Europe’ is accused of colonizing important policy areas that used to belong to the *Länder*. This transfer of power from the *Länder*

to the European level, once again, leads to intertwined policy-making, privileges the executives at the different levels, and diminishes or even eliminates any power *Land* parliaments might have had in former periods (Thaysen 2005; Abels 2011; Auel 2005, 2011).

Elsewhere I discussed if and how far this dominating view adequately catches the role *Land* parliaments play in the German federal system (Reutter 2006; Reutter 2008, 26ff.). Yet, we still can conclude that multilevel systems make it difficult for *Land* parliaments make decisions binding for the people that have legitimized the very same parliament. The two sides of the democratic coin seem not to match any more. The reason for this is that intertwined policy-making includes decisions that transgress the legal and political boundaries a subnational parliament is necessarily based upon. To put it differently: While a *Land* parliament might 'stand for' its people, it is not able to effectively 'act for' its people in matters of European politics. Nonetheless, it goes without saying that *Land* parliaments try to influence decisions at the European level and control activities of their governments (Abels/Eppler 2011; Auel 2011; CoR 2009, 2013). However, my hypothesis that *Land* parliaments cannot legitimize politics in European affairs focuses on the effects of these activities and how these effects are to be evaluated from the angle of representative theory.

As already pointed out, since the early nineties 'Europe' turned into an important topic in the German *Länder*. Hence, it cannot come as a surprise that *Land* parliaments also wanted to have a greater say in European affairs. Numerous declarations reflect this greater interest as well as resolutions of the Conference of European Regional Legislative Assemblies, CALRE (Landtag Rheinland-Pfalz 2009). *Land* parliaments ask for better and earlier information on European issues and they strive to not only control the implementation of European law but to actively shape European policies. To put it differently: They try to transform themselves from 'policy-takers' into 'policy-makers' (Auel 2011; Sprungk 2011). However, the role *Land* parliaments play in European politics rather is characterized by an ambivalent development. On the one hand *Land* parliaments have enlarged their rights of information, established committees on European affairs, and since the passing of the Lisbon treaty they can participate in the early warning system. Some even want *Land* parliaments to 'mandate' their governments. They want to provide *Land* parliaments with the power to give their governments legally binding instructions (Voßkuhle 2012; Papier 2010; Eberbach-Born 2013, Reutter 2013). On the other hand, what we find is that the impact *Land*

parliaments have on European politics has decreased. More information, better resources, and expanded competences did, hence, not produce more power in European politics. And these ambivalent developments can be brought to the fore at different levels. It is manifest as far as (a) the management of information is concerned, (b) in the activities of the committees on European affairs, and also with regard to (c) the early warning system.

Table 5: *Land* Parliaments: Rights of Participation in EU Affairs (as of: March 2012)

	EU Reference in the Land constitution	Enacted Laws	Non-legislative inter-organ agreements (date of agreement or of parliaments' vote)	Committee on European Affairs (year of establishment)	Participation in Subsidiarity Network of the Committee of the Regions	Brussels based observer
BW	Preamble, Art. 34a	03.02.2011	–	2006	X	X
BAV	Art. 3a	3/4.9.2003	3/4.9.2003	1990	X	X
BER	Art. 50	–	23.06.1994	1990	–	–
BB	Preamble, Art. 94	–	07.10.2010	1994	–	–
HB	Art. 65 and 79	–	28.01.2010	1992	–	–
HH	Art. 31 para 1	–	10.01.2011	1998	–	–
HES	–	–	22.03.2011	1995	X	X
LS	Art. 25	–	14.09.1994	1994	X	–
MV	Art. 11 and 39	–	20.04.2005	1994	–	–
NRW	–	–	27.04.2010	1995	X	X
RP	Art. 74a, 9, 89b (7)	–	04.02.2010	1991	–	–
SLD	Art. 60 and 76a	–	06.05.2009	1990	–	–
SN	Art. 12	–	20.04.2011	1994	–	–
SAT	Art a para 1 and 62 para 1	–	15.04.2005	1990	–	–
SH	Art. 22	17.10.2006	–	1995	X	X
TH	Preamble; Art. 67 para 4	–	23.05.2011	1990	–	–

Source: based on Abels 2011, 285f.; translation WR.

(a) *Management of Information*: According to Gabriele Abels (2011) German Land parliaments have continuously expanded their information rights in European affairs since the early 1990ies (table 5 and 6). The information flows have been formalized, expanded and made permanent. Some *Länder* even set up a constitutional obligation for the government that has to inform the parliament as early and as extensive as possible. In most *Länder* the parliament and the government signed an agreement (table 6); in some cases stipulations managing this issue have been included into the constitution. There is no study, though, examining in detail if *Land* parliaments receive all necessary information. So we can only gather some scattered findings and draw

some tentative conclusions (cf. also the essays on the German *Land* parliaments in Mielke/Reutter 2012a). Regardless of the increased relevance of Europe for the *Länder*, European affairs seem only rarely trigger parliamentary debates, let alone controversies. For example, between 1996 and 2001 in the *Landtag* of Baden-Württemberg only 47 items exclusively dealt with European politics (out of 1,227 items that had been put on the agenda of this subnational parliament in the respective term). In addition, these 47 items drew very little attention from the members of parliament (Eisele 2006, 247ff.). In other *Land* parliaments ‘Europe’ seem to be of little interest, as well. Searches in the databases of *Land* parliaments produce only few results. In the 4th legislative term (2004/09) the *Landtag* of Brandenburg, for example, dealt with ‘Europe’ only in 15 out of 88 plenary sessions. Furthermore, European affairs cover less than 1 % of the minutes of all plenary meetings in this term (<http://www.landtag.brandenburg.de>). In the *Landtag* of Northrhine-Westphalia in the 15th term only seven hits show up if one searches the database with the keyword ‘Europe’ (<http://www.landtag-nrw.de>). It goes without saying that this kind of research is no sound basis for any conclusion, at all. Nonetheless they support the findings those studies looking into European Affairs Committees.

(b) *European Affairs Committees (EACs)*: *Land* parliaments have started to set up EACs in the early nineties. Once again, we find an ambivalent picture. Even though all *Land* parliaments demanded special committees dealing with European matters EACs seemingly developed only few activities and, apparently, had only little impact. In some *Länder* the jurisdiction of the original committees had to be enlarged due to the small workload (Reutter 2008, 327ff.). The *Landtag* of North Rhine-Westphalia has established a respective committee in 1995 for the first time. However, it did not believe European affairs important enough for a committee in 2005. In Berlin in the year 2012 the committee on ‘Europe, federal affairs and the media’ has convened 17 times. In these 17 sessions the committee dealt with a total of 87 items of which just 20 concerned European affairs. And between 1999 and 2004 the EAC of the *Landtag* in Hessen devoted just 16 hours to subjects exclusively related to European politics (<http://www.parlament-berlin.de/>; Bauer 2005, 644; Johne 2000, 332ff.).

Table 6: Rights on Information for *Land* parliaments (as of May 2014)

	Art. in Land Constitution	Act	Agreement between government and parliament	Ruling in standing orders	Limits with regard to importance of the issue for the Land	Scope (limited / extensive)
BW	34a	Yes	—	—	Yes	Extensive
BAY	70, 55	Yes	Yes	Yes	Yes	Extensive

BER	50	—	—	§§ 21, 21a	Yes	Extensive
BB	94	—	Yes	—	Yes	Limited
HB	79	—	Yes	—	Yes	Limited
HH	31	—	Yes	—	Yes	Limited
HES	—	—	Yes	—	Yes	Extensive
MV	11, 39	—	Yes	—	Yes	Limited
NDS	25	—	Yes	—	Yes	Limited
NRW	—	—	Yes	—	No	Limited
RP	89b	—	Yes	Yes	No	Extensive
SLD	76a	—	Yes	—	Yes	Limited
SN	50	—	Yes	—	Yes	Limited
ST	62	Yes	Yes	—	Yes	Extensive
SH	22	Yes	Yes	—	Yes	Extensive
TH	67	—	Yes	—	yes	Extensive

a) limited = confined to documents pertaining to the early warning system; extensive = documents covering all topics

Quelle: Landtag Brandenburg – Parlamentarischer Beratungsdienst, Information der Landesparlamente durch die Landesregierung in EU-Angelegenheiten im Vergleich. Bearbeiter: Rolfdieter Bohn und Markus Sturzebacher, vom 23. Mai 2014.

(c) *Early Warning System (EWS)*: Finally, for a very long time *Land* parliaments asked for an active and early involvement in European decision-making (Abels 2011, 281ff; Stuttgarter Erklärung 2010). With the Lisbon treaty these hopes did become reality – at least partly (Abels 2011, 283ff.; Eberbach-Born 2013). Because according to Article 6 of the Protocol no. 2 of the Lisbon Treaty subnational parliaments with legislative powers could initiate a process of subsidiarity control. When European acts infringe upon rights and competencies of a *Land*, hence, its parliament can start a monitoring process that eventually could force the European Commission to withdraw a respective bill. However, the process is extremely cumbersome, not to be controlled by a single *Land* parliament, and produced hardly any real effect (Europäische Kommission 2011, 2012; for a general discussion of the EWS cf. Buzogány/Stuchlik 2011; CoR 2013). To begin with, *Land* parliaments can only mandate their *Land* governments that have to submit a respective proposal to the *Bundesrat*, the federal council. According to Birgit Eberbach-Born (2013, 289ff.) there are three ways *Land* parliaments addressed this issue. In three *Länder* (Bavaria, Hamburg and Hesse) agreements make it illegal for *Land* parliaments to instruct their *Land* governments. In most *Länder* the government has to take opinions of its parliament into account if the government has to vote on a respective subject in the federal council or at the European level. Only Baden-Württemberg and Bavaria have constitutionally provided their parliaments with the right to instruct their governments, if legislative matters are to be transferred from the *Länder* to the federal or the European level. In Thuringia the government is supposed to not deviate from parliamentary recommendations in such matters. Regardless of

these different regulations the federal council (Bundesrat) has only eight weeks time to come to a respective decision and articulate 'reasoned opinions' with regard to European acts. Overall, the *Bundesrat* has used the instrument of 'reasoned opinions' very restrictive. So far there has only been one case in which the European Commission has withdrawn a proposed law.

Nonetheless, according to Birgit Eberbach-Born the EWS worked well for the *Landtag* of Thuringia. The *Landtag* of Thuringia had no problems at all to meet the eight week deadline; it also produced a fairly high number of comments on European proposals, and the *Land* government followed up on parliamentary statements and introduced them with great success into the federal council (Eberbach-Born 2013, 304ff.). However, according to Eberbach-Born (2013, 310f.) these activities tell us nothing about the effects of respective statements. Because so far, only one 'yellow' card has been produced (Monti II directive), but in this procedure the *Bundesrat* did not participate. In the end, the *Landtag* of Thuringia was able to express concerns and critique but was not able to effectively influence European decision-making. Nonetheless, Eberbach-Born still ascribes some merits to this instrument because the EWS could allow subnational parliaments to develop a better understanding of European decision-making. More importantly, *Land* parliaments start to circumvent the formal procedure of the EWS and directly present their concerns to European institutions, especially to the European Commission as part of the Commission's political dialogue with national parliaments.

Overall, however, it has to be pointed out that *Land* parliaments are neither legally nor politically linked to European institutions – at least not formally. *Land* parliaments can at best mandate their *Land* governments. But this means *Land* parliaments remain mediated in European politics. They can neither directly 'act for' their people nor can they European institutions hold to account.

Land parliaments cannot effectively and democratically represent their citizens in European affairs. That is the overall conclusion. 'Standing for' and 'acting for', these two crucial dimensions of parliamentary representation, simply seem not to match in European politics. They are rather parts in a dialogue of the deaf. On the one hand, *Land* parliaments can claim to be as socially descriptive as any other parliament. They provide similar structures and show the same shortcomings as the *Bundestag*. They even add a regional underpinning to the representative function of the political system

as a whole. Insofar *Land* parliaments 'stand for' their citizens as one might expect from a representative body. On the other hand in European affairs *Land* parliaments necessarily fail to translate this sociological dimension into binding decisions regardless of the fact that *Land* parliaments did make significant progress as far as European affairs is concerned. They have enlarged their rights on information, they succeeded in setting up committees on European affairs, and they even received a voice in the early warning system. Arguably, these changes may reevaluate Europe as a topic in German *Land* parliaments. This might even become a part in a European parliamentary field (Fossum/Crum 2012; Maurer 2011; Abels/Eppler 2011). Nonetheless, these changes do not fuel the democratization of the European decision making process. In European affairs, *Land* parliaments cannot 'act for' their people. They can neither effectively hold their governments to account as they do in the national realm nor can they transgress their legal and political boundaries. Their legitimacy is territorially limited. In consequence, they remain 'mediated' in all matters transgressing territorially defined boundaries.

3. Conclusion

My findings show that there is no clear cut answer to the question on the effects of sub-national constitutional democracy. At least in Germany I received a mixed message. On the one hand we saw that the Länder were able to shape and amend their constitutions. Land parliaments played an important role in this respect. They provided the venue for debates and decided on amendments. Thus, we can conclude that the Länder and their people have the means to set up the rules for political self-government. In other words: they have the power to establish and adjust constitutional democracies in the Länder. On the other hand, we found a sort of democratic incongruence: parliaments are territorially based bodies of representation. They derive the legitimacy from a territorially defined constituency and can only act in a democratic way if their decisions apply to their people. However, societies of these Länder are shaped by decisions made by bodies neither legitimized nor to be controlled by Land parliaments. And it is very much open to discussion whether this blind spot of constitutional democracy in multilayered systems can be brought to light in a multilayered parliamentary field (Crum/Fossum 2013).

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