Developments

Germany's Mixed-Member Electoral System: A Victim of its Sophistication?

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To shape a legitimate electoral system is a tremendous challenge for any parliamentary body. It cannot evade the responsibility of enacting the requisite statutory rules since no other State organ has the authority to make determinations which are substantially of a constitutional character. How, and under what conditions, citizens choose their representatives pertains to the key issues in a democratic system. But it is a truism to state that a parliament is not a homogeneous body; it is normally composed of different groups with highly divergent interests. Groups representing large political parties tend to favor a majoritarian electoral system, following with greater or slighter variations the British model of first past the post where the highest number of ballots in a given constituency determines the winner of the seat in issue, even though the candidate may have obtained only a relative plurality.[1] Smaller parties, on the other hand, put their preferences on proportional representation, which ensures them a share of the seats corresponding to their share of the vote. To their regret, parties supported only by a low fraction of the electorate cannot, which is self-evident, impose their preferred option, having to wait for pressure to build up in the general public to promote their concerns. Thus, parliaments are neither neutral nor objective when they make determinations in electoral matters.

In countries where political traditions have been firmly established for decades or more, suggestions to change the electoral system are regarded with a high degree of suspicion. In some countries, constitutional rules exist that fix explicitly, in greater or lesser detail, the system to be adopted by the legislature.[2] Other countries, like Germany, have refrained from prescribing the system but lay down at least the basic principles that shall govern the balloting process. Thus, Article 38(1), first clause, of the *Grundgesetz* (hereinafter: Basic

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[1] Details given, also about historical background, by Paul Mitchell, *The United Kingdom: Plurality Rule Under Siege*, *in* THE POLITICS OF ELECTORAL SYSTEMS 157, 158–61 (Michael Gallagher & Paul Mitchell eds., 2005).

[2] *See, e.g.*, Arts. 56, 57 Costituzione [Cost.] (It.); C.E., B.O.E., Dec. 29, 1978 (Spain), Arts. 68, 69. Political scientists show little interest in these provisions. *See* Mario Caciagli, *Italy*, *in* ELECTIONS IN EUROPE: A DATA HANDBOOK 1027, 1034–42 (Dieter Nohlen & Philip Stöver eds., 2010); Joseph M. Vallès & Dieter Nohlen, *Spain*, *in* ELECTIONS IN EUROPE: A DATA HANDBOOK 1027, 1803, 1812–14 (Dieter Nohlen & Philip Stöver eds., 2010).

Law or BL) provides: "Members of the German *Bundestag* shall be elected by general, direct, free, equal and secret suffrage."[3]

Most of these criteria have not given rise to any major difficulties. There is common ground in construing general, direct, free and secret according to the plain meaning of these terms.[4] However, the concept of "equal" elections has been the cause of considerable differences of opinion. Two aspects of equality are generally distinguished. On the one hand, as far as the right of suffrage is concerned, every German citizen above the age of 18 has an equal right to vote.[5] No individual may be granted additional voting power. Modern Germany is still very much reminiscent of the Prussian three-class system, which remained in force until 1918.[6] Under that system, the population was divided into three classes according to the tax revenue produced by each class. Each of the three classes was allocated the same number of seats in the State parliament.[7] Ballot equality (*Zählwertgleichheit*) is thus uncontested.[8] By contrast, the question of whether there should also be outcome equality (*Erfolgswertgleichheit*) is highly controversial. In its early jurisprudence, the *Bundesverfassungsgericht* (hereinafter Federal Constitutional Court or FCC) ruled that under a system of majoritarian suffrage, outcome equality had to be implemented through the (more or less) equal size of the different electoral districts.[9] On the other hand, when proportional representation was chosen as the basis, outcome equality had to be realized by remaining faithful to that idea, and any departure required

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[3] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.).

[4] It is significant that WOLFGANG SCHREIBER, BWAHLG. KOMMENTAR ZUM BUNDESWAHLGESETZ 113–54 (8th ed. 2009), needs 41 pages to provide an interpretation of equality while confining himself to 21 pages (92–113) when commenting on the criteria general, direct and free. *See Id.*

[5] Bundewahlgesetz [BGW] [Federal Electoral Act], May 7, 1956, BGBL. I at 2313, art. 12 [hereinafter Federal Electoral Act], as amended by 19th Amendment Act of 25 November 2011 (Ger.). Only in cases of conviction for grave crimes may a person be deprived of the right to vote. *Id.* at art. 13(1).

[6] *See* THOMAS KÜHNE, DREIKLASSENWAHLRECHT UND WAHLKULTUR IN PREUßEN 1867–1914, at 21–26 (1994).

[7] *See* ERNST RUDOLF HUBER, III DEUTSCHE VERFASSUNGSGESCHICHTE SEIT 1789, at 86 (2d. ed. 1982).

[8] The relevant textbooks confine themselves to mentioning this proposition without any additional comment, see, for instance, Martin Morlok, *Commentary on Article 38 BL*, *in* II GRUNDGESETZ KOMMENTAR 989, margin n.97 (Horst Dreier ed., 2006); SCHREIBER, *supra* note 4, at 117, margin nn.45, 125, margin n.55; KLAUS STERN, I DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 305 (2d. ed. 1984).

[9] Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), Case No. 2 BvR 322/61, Aug. 26, 1961, 13 BVERFGE 127, 128 (Ger.); Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), Case No. 2 BvC 3/62, May 22, 1963, 16 BVERFGE 130, 140 (Ger.). This jurisprudence has been consistently confirmed. *See* Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), Case No. 2 BvC 4/88, Nov. 24, 1988, 79 BVERFGE 169, 171 (Ger.); Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVERFGE 335, 353 (Ger.); Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266, 295 (Ger.); Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), Case No. 2 BvC 2/06, Apr. 21, 2009, 124 BVERFGE 1, 18 (Ger.).

specific justification.[10] This approach has been maintained through today.[11] By pushing the principle of outcome equality to its extreme, both the federal legislature and the FCC have led Germany into disputes that culminated on 25 July 2012 when the FCC struck down the core provisions of the current Electoral Act regulating the allocation of seats (Article 6(1), first clause, and (5)). In other words, at the present time, although Germany still has an electoral law, this law has been crippled. It has been fragmented to such an extent that it could not serve its main purpose—to distribute seats after a national election. If, by any chance, the *Bundestag* were to be dissolved today, no replacement could be found. Fortunately, no impending threat of such an occurrence can be perceived. Since the next elections for the *Bundestag* are to take place in September or October of 2013, parliamentary consultations on how the system could be adjusted to the findings of the FCC are under way.[12]

B. The Judgment of the Federal Constitutional Court of 25 July 2012

The judgment of the FCC of 25 July 2012[13] had to rule essentially on two main objections raised against the current version of the Electoral Act as modified by the 19th Amendment Act of 25 November 2011,[14] a piece of poor legislative draftsmanship that set out the relevant provisions in such a convoluted manner that no ordinary citizen could understand them.[15] It is a text that nearly resists any attempt at translation.[16] Not even the judgment of the FCC was able to state its meaning in clear and straightforward terms.[17]

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[10] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvH 1/52, Apr. 5, 1952, 1 BVERFGE 208, 248–56 (Ger.). This requirement has also been emphasized many times, see judgments of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court)], Case No. 2 BvE 2/56, Jan. 23, 1957, 6 BVERFGE 84, 93 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 193, 197/79, May 22, 1979, 51 BVERFGE 222, 236 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 3/96, Apr. 10, 1997, 95 BVERFGE 408, 418 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266, 297 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 2/06, Apr. 21, 2009, 124 BVERFGE 1, 19 (Ger.).

[11] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin n.62 (Ger.).

[12] In mid-October 2012, it was reported that the political parties represented in the *Bundestag* had agreed on a reform. *See Bundestag könnte 2013 noch größer werden*, SPIEGEL ONLINE, Oct. 17, 2012, http://www.spiegel.de/politik/deutschland/neues-wahlrecht-parteien-wollen-ueberhangmandate-ausgleichen-a-861829.html.

[13] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT NJW) 2869 margin n.62 (Ger.).

[14] Federal Electoral Act, *supra* note 5, at 2313.

[15] The FCC itself called it 'hardly intelligible', judgments of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266, 316 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], 2 BvC 4/04, Jan. 15, 2009, 122 BVERFGE 304, 311 (Ger.).

Since its inception in 1949, the German Electoral Act had combined elements of proportional representation and majoritarian suffrage.[18] To this date, it has remained controversial which one of the two components dominates.[19] While the Electoral Act itself, in accordance with the jurisprudence of the FCC, characterizes the system as a regime of proportional representation (Article 1(1), second clause), where the choice of deputies is complemented by an element of personalization, other voices view the system as made up of two components with fairly equal weight.[20] No matter how this dispute is assessed, the fact is that the combination of the two windows has led to many difficulties. In its judgment on 25 July 2012, the FCC had to adjudicate mainly two controversial issues, the issue of the so-called "negative vote" and the issue of the constitutionality of overhang or surplus seats ("*Überhangmandate*").

On the one hand, the amended Electoral Act had not been able to put an end to the phenomenon of the "negative vote" which had become visible particularly in by-elections but which was also a frequent feature of any regular balloting process. As a consequence in particular of the recognition of *Überhangmandate*,[21] it could turn out that additional votes for a party list led to the loss of a seat.[22] Under normal conditions, on election day, this could neither be anticipated nor measured but could be calculated afterwards in situations where the margins had been tight. By contrast, in the case of bye-elections, exact forecasts could be made beforehand, resulting in recommendations to the electorate not to cast their vote for the preferred political party. In fact, in one case in 2005 relating

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[16] But see the official translation published by the Federal Director of Elections (*Bundeswahlleiter*), http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/bundeswahlgesetz_engl.pdf. It was recently withdrawn, presumably as a response to the judgment of the FCC of 25 July 2012.

[17] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin nn. 23–26 (Ger.).

[18] André Blais, *Introduction*, *in* TO KEEP OR TO CHANGE FIRST PAST THE POST? THE POLITICS OF ELECTORAL REFORM 1, 3 (André Blais ed., 2008) (observing that this was an attempt to have "the best of both worlds").

[19] While, for instance, Franz Urban Pappi & Michael Herrmann, *Überhangmandate ohne negatives Stimmgewicht: Machbarkeit, Wirkungen, Beurteilung*, 41 ZEITSCHRIFT FÜR PARLAMENTSFRAGEN, 260, 270 (2010), see both elements as equivalent, HANS MEYER, DIE ZUKUNFT DES BUNDESWAHLRECHTS. ZWISCHEN UNVERSTAND, OBITER DICTA, INTERESSENKALKÜL UND VERFASSUNGSVERSTOß *passim* (2010), characterizes the German electoral system as essentially proportional.

[20] This was controversial among the members of the Second Chamber of the FCC when their split vote prevented the Federal Electoral Act from being struck down. Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVERFGE 335, 356–81 (Ger.). *But see id.* at 379–80.

[21] Because of its negative connotation, the term "excess seats" should be avoided. For an explanation of the regime of surplus seats see immediately below. Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266 (Ger.).

[22] For an extensive discussion of the phenomenon of the negative vote see Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266 (Ger.).

to an electoral district in Dresden, it was found out that casting a ballot for the Christian Democratic Union (CDU) would produce negative consequences for the party. Accordingly, the electorate was informed and, following the advice given to them, they cast significantly fewer votes for the party than for its candidate in the district.[23] In an ensuing dispute, the FCC did not hesitate to call this paradox a violation of basic principles of Article 38 of the Basic Law, *inter alia* because of the disorientation it was bound to cause among voters. A system under which a vote cast for a political party harms that party instead of benefiting it, as desired by the voter, does not meet the requirements of clarity and equity and was also deemed by the FCC to breach the principle of "direct" elections.[24] Although the Amendment Act of 25 November 2011 had attempted to remedy that defect, the FCC found out that this attempt had failed. Accordingly, it declared the relevant provisions of the Electoral Act to be incompatible with the Basic Law.

The second issue of contention concerned the surplus seats directly. It touched upon one of the core elements of the German electoral system. Under this system, as practiced since 1953, every elector has two votes with which to choose the 598 members of the German *Bundestag*.[25] The elector will be confronted with two lists. The first list contains the names of all the candidates nominated in one of the 299 districts Germany is divided into for electoral purposes. While half of the members of the *Bundestag* are chosen nominally by the electorate, the other 299 members are chosen based on lists established by the political parties in each one of the *Laender* of Germany. The number of seats to be allocated through the party lists is calculated according to the share of votes the party concerned has obtained at the federal level, all the *Laender* lists being deemed to be joined for that purpose.[26] The two systems do not operate independently of one another. Essentially, the number of seats won by the nominal vote is subtracted from the share resulting from the proportional computation. Where a party has strong regional roots, it may be able to win all of the district seats so that, after the subtraction operation, it holds a number of seats exceeding its share of the vote obtained at the *Land* level. The party shall keep these surplus seats.[27] Logically, the surplus seats will increase the number of 598 seats determined by the Electoral Act. The FCC voiced considerable distrust with regard to the surplus regime. However, it refrained from striking the relevant provisions down, confining itself to observing that the new Electoral Act, to be introduced for the federal elections in 2013, must limit the number of surplus seats to 15.[28]

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[23] *Id*. at 276–77.

[24] *Id*. at 294–308.

[25] Federal Electoral Act, *supra* note 5, at arts. 1–7(establishing the current regulation).

[26] In English terminology, this may properly be called a "mixed-member electoral system."

[27] Federal Electoral Act, *supra* note 5, at art. 6(5).

[28] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin n.143 (Ger.).

The FCC additionally had to pronounce on the distribution of seats according to the remainder vote, counted comprehensively at the federal level. The relevant provision of the Electoral Act was also struck down because only the losses suffered by a political party by rounding down the votes, but not its potential gains by rounding them up, had been taken into account.[29] This part of the judgment, which focuses on the regulation's lack of consistency, does not touch upon any of the guiding principles of the electoral regime. It raises essentially a technical problem.

C. The Regime of Surplus Seats—Law and Practice

I. Law

The challengeable features of surplus seats are intimately linked to the general system of distribution of seats. As previously hinted, the shares of the competing political parties are calculated at the federal level. For a party to be taken into account for the allocation of seats, it must have obtained at least 5% of the ballots cast.[30] This clause of the Electoral Act was introduced to combat the pernicious impact of fragmentation of political parties, one of the causes of the debacle that led to the fall of the Weimar Republic.[31] In one of its early decisions, the FCC accepted that clause notwithstanding its insistence on outcome equality. It held that the aim of ensuring political stability was a legitimate reason to keep small parties not able to overcome the 5% hurdle away from the national parliament, in particular in view of the historical experiences Germany had gone through during the time of its first democratic republic.[32]

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[29] *Id*. at margin nn. 98–108.

[30] Federal Electoral Act, *supra* note 5, at art. 6(5).

[31] Ernst Friesenhahn, *Zur Legitimation und zum Scheitern der Weimarer Reichsverfassung*, *in* WEIMAR SELBSTPREISGABE EINER DEMOKRATIE, 81 (Karl Dietrich Erdmann & Hagen Schulze eds., 1981). For a statistical breakdown concerning the elections held during the time of the Weimar Republic from 1919 to 1933, see Jürgen W. Falter, *Wahlen und Wählerverhalten unter besonderer Berücksichtigung des Aufstiegs der NSDP nach 1928*, *in* DIE WEIMARER REPUBLIK 1918–1933, at 484, 486 (Karl-Dietrich Bracher, Manfred Funke & Hans-Adolf Jacobsen eds., 1987).

[32] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 2/56, Jan. 23, 1957, 6 BVERFGE 84, 92–94. The FCC had already approved of similar clauses in the electoral laws of individual *Laender*. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvH 1/52, Apr. 5, 1952, 1 BVERFGE 208 (Ger.). Without sufficient consideration, the 5% clause in the Law governing elections to the European Parliament was also approved, judgment of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 193, 197/79, May 22, 1979, 51 BVERFGE 222, 236 (Ger.). However, overturning its former ruling, the Court set aside the 5% clause for European elections in a highly controversial judgment. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 4, 6, 8/10, Nov. 9, 2011, 129 BVERFGE 300 (Ger.).

After eliminating the ballots cast for parties remaining under the 5% threshold, the next step is to establish the general breakdown of votes according to the relative strengths of the parties. This process involves a distribution of the available seats among the sixteen German *Laender* pursuant to their electoral weight, which can be measured either by the number of persons entitled to vote or by the number of voters having actively participated in the election, which was the curious method chosen by the 2011 Amendment Act (Electoral Law, Article 6(1)).

Finally, at the *Land* level, the actual distribution of seats will take place (Electoral Law, Article 6(2)). It is at that level that the surplus regime produces its effect. If the subtraction of seats won by the nominal vote took place at the federal level, hardly any additional seats could emerge. No political party enjoys such general support among the electorate that it might fare better, across the entire German territory, through the nominal lists than through the second lists, the party lists.[33] In order to win surplus seats, a party has to rely on its regional strongholds, like the CDU in Baden-Württemberg, the *Christlich-Soziale* Union (CSU) in Bavaria or the *Sozialdemokratische Partei* (SPD) in North-Rhine Westphalia.[34] Thus, it is the electoral system's reliance on Germany's federal structure that lies at the heart of the surplus regime. All of this will have to be reviewed in view of the new Electoral Act required for the forthcoming 2013 elections.

II. Practice

The regime of surplus seats operates without any consequences detrimental to proportional representation where one of the large political parties, more or less the only ones able to reap a nominal seat, obtains close to 50% of the vote. In that case, when at the same time it wins all or almost all district seats, its share of the seats allocated in the *Land* concerned – comprehensively twice the number of nominal seats – will correspond to its share of the general vote, few if any additional seats being available for distribution in accordance with the percentage points recorded on the second list after the prescribed deduction. Accordingly, larger parties may derive a large part of their seats in the *Bundestag* from the first lists. Of course, if a political party succeeds in crossing the imaginary 50% line, which results from the logic of the system, half of the seats being provided on each one of the two lists, it will then obtain additional list of seats in harmony with its share of the vote, beyond the number of district seats it won.

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[33] At the 2009 federal elections, the CDU/CSU together obtained 33.8 % of the vote while the SPD remained confined to 23.0%. Through an exceptionally strong showing, the FDP (Free Democratic Party) took 14.6% of the vote. *See* Alan Crawford, *Merkel's CDU/CSU Won 33.8% of Vote, Final Election Results Show*, BLOOMBERG.COM (Oct. 14, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1NtBSHNfNZk.

[34] On the same occasion, in Baden-Württemberg, the CDU obtained 34.4% of the second vote, in Bavaria the CSU reached 42.5%, and in North Rhine Westphalia the SPD stood at 28.5%. *See Christian Social Union of Bavaria*, PRINCETON.EDU,
http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Christian_Social_Union_of_Bavaria.html

In the debates on the electoral system, it has generally been observed that the political situation in Germany has changed dramatically in recent years. Instead of three parties competing for votes, currently five to six parties can be found permanently on the political stage. The "grand old parties," the SPD and the CDU with its Bavarian affiliate CSU, are still the main political forces, and the "eternal third," the Free Democratic Party (FDP), continues as a group with heavy ups and downs.[35] But the race for positions three through six is very open. The Green Party has by now established itself as a political factor that can reliably count on a share between ten and twenty percent of the votes in national elections.[36] After German reunification, the new party "*Die Linke*" (The Left) came into existence as the fruit of a merger between the former Party of Democratic Socialism (PDS), which had its roots in the Party of Socialist Unity (SED) of the extinct German Democratic Republic, and some left wing splinter movements in West Germany. Lastly, the Pirate party has made its appearance in the most recent past, a group of young people with a sparsely defined political program.

Given this intensification of the political battle with the ensuing increased diversification of the vote, it may well be that, in a *Land* of the Federal Republic, a political party which has obtained no more than thirty-five percent of the total vote at that level wins nonetheless all of the nominal seats in the relevant districts. It will then be provided with half of the seats available for that *Land*, largely exceeding, through its nominal seats, its proportional share. For advocates of proportional representation in its pure form, this state of affairs creates uneasiness.[37] From the inception of the two-list system, however, the principle has persisted that surplus seats should be kept in existence. In fact, how could a political system oppose the will of the voters in a constituency who has expressed their preference for a specific candidate? Any repeal of such seats through subsequent computational exercises would be considered as highly illegitimate.[38] As of August 2012, the *Bundestag*

[35] While, as indicated, the FDP collected a record 14.5% of the vote in 2009. *See Germany: Political Volatility Sees Greens Rise*, SOCIALISM TODAY, http://www.socialismtoday.org/148/germany.html.

[36] The Green Party rose to 10.7% at the federal elections in 2009. *See Mixed results in German Federal Election*, GREEN PAGES (Oct. 15, 2009), http://gp.org/greenpages-blog/?p=1648. However, at the last Land election in Baden-Württemberg in 2011, it came in surprisingly as second with 24.2%. *See Landtagswahl 2011 in Baden-Württemberg*, LANDESZENTRALE FÜR POLITISCHE BILDUNG BADEN WÜRTTEMBERG, http://www.landtagswahl-bw.de/.

[37] The most fervent adversary of surplus seats, raising many sinister speculations, is Hans Meyer in several publications. *See, e.g.*, DEMOKRATISCHE WAHL UND WAHLSYSTEM, III HANDBUCH DES STAATSRECHTS 521, 537 (Josef Isensee & Paul Kirchhof eds., 3d. ed. 2005); WAHLRECHTSGRUNDSÄTZE, WAHLVERFAHREN, WAHLPRÜFUNG, III HANDBUCH DES STAATSRECHTS 543, 570–77; DIE ZUKUNFT DES BUNDESWAHLRECHTS *passim* (2010).

[38] *See, e.g.*, MICHAEL WILD, DIE GLEICHHEIT DER WAHL, 244 (2003). However, the "minority" group of four judges in the judgment of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVerfGE 335, 374 (Ger.), saw no inconvenient in denying a seat to the district candidates with the lowest scores.

had 620 members, notwithstanding the determination in the Electoral Act that, in principle, it consists of 598 members (Electoral Law, Article 1).

For a long time, the surplus seats did not give rise to major objections. Their number was low, and the general political landscape was not seriously reshuffled by them. From 1949 to 1990, only 17 such seats came into existence. However, since the first elections at the national level in the reunified Germany, the relevance of surplus seats has considerably increased. In 2009, the CDU/CSU group reaped no less than 24 surplus seats, providing the majority under Chancellor Merkel with a comfortable edge (332 seats) over the opposition, which could not boast a single surplus seat.[39] Yet, even without such additional seats, a solid majority would have been ensured (308 majority seats against 290 seats for the opposition). In 1998, by contrast, the SPD had been able to collect all of the 13 surplus seats allocated at that time.[40] Thus, it is by no means guaranteed that the CDU/CSU group will exclusively benefit from the surplus regime. In any event, however, the smaller parties have only theoretical chances to bring home such an additional yield. They must be satisfied if now and then one of their candidates obtains a (relative) majority in one of the electoral districts, their second-list score normally surpassing the low level of their first-list wins.

It is a recently discovered and curious phenomenon that the chances of winning surplus seats increase in the measure in which a party starts losing its dominant position in the political environment of a given *Land*.[41] A party which, like the CSU, had in the past continually achieved an absolute majority of the vote in Bavaria, cannot win any additional seats since only half of the seats granted to a *Land* are allocated via the first list on the basis of the nominal vote.[42] On the other hand, although a party may suffer a certain decline, it may still be able to win more nominal seats than it could claim on the basis of proportional computation where its proportional score amounts to a percentage between 30 and 50%. In Baden-Württemberg in 2009, the CDU obtained 34.4% of the vote, but succeeded in getting approval for its direct candidates in all but one of the 38 electoral

[39] Press Release, Roderich Egeler, President of Statistischen Bundesamtes, Gültiges amtliches Ergebnis der Bundestagswahl 2009 (Oct. 14, 2009), *available at* http://www.bundeswahlleiter.de/de/bundestagswahlen/BTW_BUND_09/presse/75_EndgueltigesErgebnis.html.

[40] *See Geschichte der Überhangmandate im Deutschen Bundestag*, WAHLRECHT.DE (Nov. 1, 2009), http://www.wahlrecht.de/ueberhang/ueberhist.html.

[41] *See* MEYER, *supra* note 19, at 23, 101.

[42] The share of the vote won by the CSU in Bavaria has been impressive for decades but seems to deteriorate in the recent past: 1957: 57.2%; 1961: 54.9%; 1965: 55.6%; 1969: 54.4%; 1972: 55.1%; 1976: 60.0%; 1980: 57.6%; 1983: 59.5%; 1987: 55.1%; 1990: 51-9%; 1994: 51.2%; 1998: 47.7%; 2002: 58.6%; 2005: 49.2%; 2009: 42.5%. Breakdowns of the votes from 1949 to present can be found at http://www.bundeswahlleiter.de/de/bundestagswahlen/fruehere_bundestagswahlen.

districts of the *Land*.[43] Its share of distributed seats was thus increased to 45.2%, which was an augmentation of 10.8 percentage points over the percentage to which it would have been entitled to according to the proportional method. This is certainly an intriguing feature of surplus seats. It seems to fly in the face of justice if justice is seen exclusively in terms of proportional distribution of parliamentary seats.[44] On the other hand, it remains that such seats accrue only to political parties whose candidates are strongly rooted in their local constituencies. It would be wrong, therefore, to disqualify the surplus seats as a bonus for ailing parties:[45] They will invariably go to political parties that enjoy large, though not necessarily overwhelming, support among the population. Thus, they can be seen as a mechanism of assistance to parties that can legitimately vie for assuming governmental responsibility although not being able to enlist a majority of the voters.

D. The Legal Position Under the Basic Law

One can only conclude that the system, notwithstanding the intellectual simplicity of its premises, has acquired unnecessary features of complexity through implementing legislation that tried to realize outcome equality to its very extreme by even establishing a system providing for the distribution of the remainder vote with repercussions in all 16 *Laender*.[46] Outside observers are hardly able to understand the refined conclusions drawn by the FCC from the principle of equality of the vote. One is faced here with one of the frequent situations where the Basic Law itself, the plain meaning of its texts, is pushed to the sidelines. It is only the jurisprudence of the FCC which prevails in the doctrinal debates on the electoral system.

The FCC proceeds from the assumption that the electoral system of Germany is a system of proportional representation, only slightly modified by some elements intended to personalize the balloting process.[47] In fact, the Electoral Act provides in Article 1(1),

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[43] *Die Bundestagswahl 2009 in Baden-Württemberg*, LANDESZENTRALE FÜR POLITISCHE BILDUNG BADEN WÜRTTEMBERG, http://www.bundestagswahl-bw.de/bundestagswahlen.pdf.

[44] Heiko Holste, *Die Reform des Bundeswahlrechts: Wiedervorlage in Karlsruhe*, 31 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 8, 10 (2012) (calling it sarcastically an "irrational loser bonus").

[45] MEYER, *supra* note 19, at 109.

[46] No attempt will be made here to explain in detail the legal rules governing this additional aspect of the electoral regime.

[47] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 2/56, Jan. 23, 1957, 6 BVERFGE 84, 90 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 3/62, May 22, 1963, 16 BVERFGE 130, 139 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVERFGE 335, 358 (Ger.); Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266, 297 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin n.115 (Ger.).

second clause, that the members of the *Bundestag* shall be elected "in accordance with the principle of proportional representation combined with the personal election of candidates." It stands to reason that this determination must be respected. But it does not necessarily reflect the essence of the requirements to be derived from Article 38(1) BL. Undeniably, at the level of ordinary legislation, the principle of proportional representation has been emphasized through the clause providing for the subtraction of the seats directly obtained in the different constituencies from the share obtained in consonance with the list results (Electoral Act, Article 6(4)). But the contention that the Basic Law must be interpreted in line with its construction by the legislative bodies is not persuasive.[48] The FCC has entangled itself with its own jurisprudence, proceeding step by step on a path leading to the total elimination of legislative discretion.

The nature of the electoral system to be adopted for the members of the *Bundestag* came up quite naturally in the period between 1948 and 1949 during the deliberations on the constitution of the new democratic Germany before the *Parlamentarischer Rat* (Parliamentary Council), the body entrusted with drawing up the draft of the Basic Law.[49] It was clear to every one of the members of that body that the design of an electoral system was an issue of the highest importance; many members had served in the Reichstag when it was closed down by the Nazi government in 1933, and the failures of the Weimar Republic electoral system that gave rise to the Nazis were still vivid in their memories. Eventually, the opinion prevailed that as little as possible on the electoral process should be enshrined in the Basic Law itself, the better option being to leave the determination of the procedure to implementing legislation.[50] On a couple of occasions, the FCC has confirmed this finding.[51] The most plausible inference to be drawn therefrom would be to affirm the discretion of the competent legislative bodies to choose the system best suited to the needs of society. In fact, some of the relevant decisions explicitly state that the legislature would be free either to introduce a majoritarian system following the

[48] See criticism by Christofer Lenz, *Die Wahlrechtsgleichheit und das Bundesverfassungsgericht*, 121 ARCHIV DES ÖFFENTLICHEN RECHTS 337, 352 (1996); MEYER, *supra* note 19, at 15.

[49] The 65 members of the Parliamentary Council were elected by the *Länder* parliaments; the *Länder* had come into existence prior to the establishment of overarching governmental system of the Federal Republic of Germany.

[50] *See Summary of the Deliberations of the Parliamentary Council*, 1 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART, NEUE FOLGE 349 (1951); *see also* HARALD ROSENBACH, DER PARLAMENTARISCHE RAT 1948–1949 AKTEN UND PROTOKOLLE AUSSCHUSS FÜR WAHLRECHTSFRAGEN VII (6th ed. 1994).

[51] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVERFGE 335, 349 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266, 296 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 4/04, Jan. 15, 2009, 122 BVERFGE 304, 314 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 2/06, Apr. 21, 2009, 124 BVERFGE 1, 19 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 at margin n.54, 56 (Ger.).

British model or to opt for proportional representation. Such holdings can be found not only in decisions from the early years of the Federal Republic,[52] but also in the most recent pronouncements.[53] The FCC has even acknowledged that it would be permissible to introduce a *Grabensystem*, a gap or ditch system that would consist of electing half of the members of the *Bundestag* by nominal vote and the other half on the basis of party lists, but without any kind of offsetting.[54] Both systems would operate independently of one another, meaning that the smaller parties would suffer a tremendous disadvantage, their share of the seats of the *Bundestag* being more or less reduced by half.[55] In spite of the obvious advantages of such a system for the two larger parties, it has never materialized. More than half a century ago, in 1956, its introduction was seriously contemplated. Eventually, however, the potential beneficiaries shied away from initiating a legislative procedure, not only because of the resistance of the FDP, but also on account of the reaction of the public at large.[56] Generally, observers opined that to adopt the gap system amounted to a quasi-revolutionary *coup d'état*. The existence of smaller political parties had become an element of constitutional practice cherished by the electorate.[57] At that time, the existence of the FDP was viewed as a moderating element capable of putting a mitigating brake on any of the policies of the larger parties that would invariably need a coalition partner for the formation of a government. Accordingly, the FDP appeared as an element of compromise and moderation.

In spite of its point of departure, the discretionary freedom of the legislature to choose an electoral system according to political expediency, the FCC has constantly maintained that the choice of the system of proportional representation entailed strict systemic consequences.[58] Once the fundamental option had been made, the law was bound to

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[52] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvH 1/52, Apr. 5, 1952, 1 BVERFGE 208, 248 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 2/56, Jan. 23, 1957, 6 BVERFGE 84, 90 (Ger.).

[53] *See* cases cited *supra,* note 51.

[54] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVerfGE 335, 354 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVerfGE 266, 296 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 4/04, Jan. 15, 2009, 122 BVerfGE 304, 311 (Ger.).

[55] Obviously, the relevant percentages could also be changed, the election of nominal candidates being confined, *e.g.*, to one third of the seats. *See* Josef Isensee, *Funktionsstörung im Wahlsystem: das negative Stimmgewicht—Denkbare Lösungen eines Dilemmas*, *in* DEUTSCHES VERWALTUNGSBLATT 269, 276 (2010).

[56] *See* WILD, *supra* note 38, at 88.

[57] *Id.*

[58] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 2/56, Jan. 23, 1957, 6 BVERFGE 84, 90 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 3/62, May 22, 1963, 16 BVERFGE 130, 140 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 912/71, Oct. 11, 1972, 34 BVERFGE 81, 100 (Ger.); Bundesverfassungsgericht [BVerfG - Federal

remain on that course. Any departure required specific justification.[59] Although the FCC has never reneged on its holding that even first past the post was constitutionally permissible, it has constantly examined the two-vote system with its implication of surplus seats with a high degree of distrust.[60] A dramatic culmination point was reached in 1997 with a judgment[61] where the judges of one of the chambers of the FCC split into two groups of four, the first group holding that surplus seats were constitutionally permissible though having to be kept within certain limits,[62] while the second group pronounced itself unreservedly against the lawfulness of such seats.[63] Given the equal weight of the two groups, no finding as to the unconstitutionality could be made, as provided by Article 15(4), third clause, of the Act on the FCC.

It is submitted that the line of reasoning generally pursued by the FCC with regard to surplus seats should be abandoned. Two major reasons militate for such a radical shift.

In the first place, the conclusion that the choice of the system by the responsible parliamentary bodies requires consistency has no valid foundations. In many of its decisions, the FCC speculates about the possible consequences of the adoption of one or

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Constitutional Court Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVERFGE 335, 390, 392 (dissenting). Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin nn.116–22 (Ger.), employs more cautious formulations. The key sentence of the judgment of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 912/71, Oct. 11, 1972, 34 BVERFGE 81, 100 (Ger.), reads: "When the legislature opts for the proportional system, it submits thereby in principle to the requirement of outcome equality of every electoral vote as the specific elaboration of the principle of equality of suffrage under the proportional system . . . ."

[59] *See, e.g.*, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266, 297 (Ger.) ("Any differentiations require for their justification invariably a special, well founded, 'compelling' reason.") This was reiterated in the decision of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 2/06, Apr. 21, 2009, 124 BVerfGE 1, 19 (Ger.).

[60] Ample proof of this distrust is provided by the large number of decisions in which the FCC discussed the lawfulness of surplus seats. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 9/56, July 3, 1957, 7 BVERFGE 63, 74 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 3/62, May 22, 1963, 16 BVERFGE 130, 139–40 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Nov. 24, 1988, 79 BVERFGE 169, 171–72 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVERFGE 335, 358–63 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266, 294 (Ger.)

[61] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVERFGE 335 (Ger.).

[62] *Id*. at 349–67.

[63] *Id*. at 367–407

the other system.[64] Matters of legislative discretion are transformed into constitutional arguments without any convincing reason. In that sense, the Court loses sight of the constitutional background.[65]

The decision of the framers to leave the electoral system open, thereby entrusting ordinary legislation with making the requisite determinations, must be taken seriously. Their silence cannot be interpreted as an implicit prohibition of first past the post as has been suggested by some voices in the legal literature.[66] An examination of the *travaux préparatoires* reveals that the issue was highly controversial, the CDU suggesting with regard to the first federal elections in 1949 the introduction of a plurality (majority) system while the SPD favoured proportional representation.[67] The United Kingdom and the United States, which still held their powers and responsibilities resulting from Germany's surrender in 1945, strongly favoured a plurality system modeled on the British first-past-the-post regime of single-member constituencies. They even intervened in the drafting process, rejecting the first draft drawn up by the Parliamentary Council.[68] Under these circumstances, no agreement on specifying the main elements of the electoral system at the constitutional level was possible. No matter how one may appraise such external constraints, the fact is that the Parliamentary Council did not exclude any legitimate option within the framework determined by the principles of Article 38(1) of the Basic Law.

By holding that the choice of proportional representation is a systemic determination that requires consistency, the FCC follows a curious logic that has no legitimacy from the viewpoint of constitutionality. Systemic consistency may be required as an inference of equality and non-discrimination, which is not the issue with regard to the choice of the electoral system.[69] Almost half a century ago, a short study appeared bearing the title, *Von der Verfassungsmäßigkeit der Gesetze zur Gesetzmäßigkeit der Verfassung*.[70] The FCC construes indeed the Basic Law in accordance with an ordinary law of implementation,

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[64] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVERFGE 335, 362–63 (Ger.); *see also* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin nn.92–97 (Ger.).

[65] Criticism from the viewpoint of political science by Herbert Kleinert, *Anmerkungen zum* Wahlrechtsstreit—Ein *Problem gelöst, ein anderes bleibt. Oder: Ein Blick über die Grenzen lehrt Gelassenheit*, 43 ZEITSCHRIFT FÜR PARLAMENTSFRAGEN 185, 187 (2012).

[66] MEYER, *supra* note 19, at 98; *see also* Meyer, *supra* note 37, at 537.

[67] ROSENBACH, *supra* note 50, at XXXV.

[68] *See id.*

[69] On the issue of "*Folgerichtigkeit*," see, for example, Paul Kirchhof, *Allgemeiner Gleichheitssatz*, *in* VIII HANDBUCH DES STAATSRECHTS 697, 818–30 (Josef Isensee & Paul Kirchhof eds., 3d. ed. 2010).

[70] WALTER LEISNER, VON DER VERFASSUNGSMÄßIGKEIT DER GESETZE ZUR GESETZMÄßIGKEIT DER VERFASSUNG *passim* (1964).

thus resorting to a method which reverses the normative hierarchy. It opines that the determinations made through the Electoral Act, explicitly in Article 1(1) of that Act, must be respected: Proportional representation requires consequential implementation. From a logical viewpoint, this rigidity appears to be erroneous. Proportional representation in its pure form would require establishing the German territory as a single territorial district so that any differentiations resulting from the federal structure as the basis for the allocation of seats are completely done away with. Yet many intermediate systems between first past the post, the system of relative plurality, and proportional representation in such rigid form are conceivable and may be advisable on legitimate grounds. The two systems are not opposed to one another as irreconcilable antipodes. Rather, the transition from one to the other must be seen as a continuum.[71] No explanation has been given by the FCC for why, in principle, no variations of proportional representation should be permissible under the terms of the Basic Law, apart from the 5% threshold. In fact, notwithstanding the rigidity of the principled position taken by the FCC, until very recently the system of surplus seats had always been confirmed, notwithstanding the objections raised against it.[72]

The departure from the orthodoxy of proportional representation began with the clause contained in the Electoral Act of 1953[73] (Article 9(4)) denying any seats to political parties that have not reached at least 5% of the vote at the federal level. To prevent parliamentary representation to freely constituted political groups competing for political power parties raises serious questions in a free pluralistic society. The relevant clause was indeed challenged already in the early years of the Federal Republic of Germany, as being designed to deny a political voice to minorities outside the mainstream.[74] However, the primary function of elections is not to faithfully reflect all of the political currents and tendencies in society. Rather, elections must prepare the ground for the formation of a stable government capable of effectively discharging the manifold tasks confronting the nation.[75] As previously hinted, at the initial stage of the Federal Republic of Germany, politicians were still haunted by the fragmentation of the *Reichstag* under the Weimar Constitution, believing that the continual internal fights in that body, facilitated by the multitude of small and even tiny parties, was a determinative factor in the erosion of

[71] Persuasively demonstrated by Lenz, *supra* note 48, at 346. This is also acknowledged by Meyer, *supra* note 37, at 535.

[72] *See supra* note 58.

[73] Federal Electoral Act, *supra* note 5, at 470.

[74] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 2/56, Jan. 23, 1957, 6 BVERFGE 84 (Ger.).

[75] All of these arguments were already considered with thorough attention in the judgment of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvH 1/52, Apr. 5, 1952, 1 BVERFGE 208, 248 (Ger.).

governmental authority.[76] Under this historical premise, the FCC declared the 5% threshold to be unobjectionable, in spite of its departure point that the choice of proportional representation required outcome equality with regard to the balloting process.[77]

Concerning the surplus seats, the FCC originally proceeded from the assumption that they were just a marginal phenomenon, not susceptible of putting a decisive hallmark on the election process and therefore not constituting a disturbing element affecting the requirement of outcome equality. At the same time the Court cautioned as early as 1957 that surplus seats could be deemed to be admissible only within certain limits,[78] which were not specified in detail. Eventually, the 25 July 2012 judgment abandoned the vagueness of the earlier holdings, stating that the new regulation needed to fill the vacuum left by the invalidation of the key provision of the Electoral Act in its 2011 version must provide for a limit of 15 surplus seats.[79] The FCC itself acknowledges that this limit, which corresponds roughly to half of the seats a political party must obtain in order to overcome the 5% hurdle, may seem to have been chosen with some degree of arbitrariness.[80] It does not even attempt to give a rational explanation for that number. The observer has the impression that the FCC has confined itself to articulating its uneasiness about, and distrust of, surplus seats without being able to identify the true grounds for its dictum. Thus, it has failed to comply with its judicial duty to provide appropriate reasons for its determination.

It is hardly persuasive to leave surplus seats in a grey zone between constitutional acceptability and illegitimacy. If surplus seats are objectionable, then they must be abolished once and for all without any restriction. On the other hand, if they constitute a legitimate complement to the system of proportional representation, institutional mechanisms should be sought which are suited to keep them as a complement. To decree that a ceiling of fifteen seats must be introduced smacks of arbitrariness, as the FCC itself has acknowledged. Hardly any mechanism is conceivable that would, without leading to new complexities, ensure compliance with the borderline drawn by the FCC.

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[76] KARL-DIETRICH BRACHER, DIE AUFLÖSUNG DER WEIMARER REPUBLIK: EINE STUDIE ZUM PROBLEM DES MACHTVERFALLS IN DER DEMOKRATIE, 84–86 (5th ed. 1971).

[77] See text accompanying *supra* note 32.

[78] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 9/56, July 3, 1957, 7 BVERFGE 63, 75 (Ger.); *see also* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 3/62, May 22, 1963, 16 BVERFGE 130, 140 (Ger.).

[79] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869, at margin nn.143–44 (Ger.).

[80] *Id.* ("The Chamber realizes that the number of 15 surplus seats, an act of judicial particularization of the law, cannot completely be supported by reasons.").

In the first place, the rigid idea of outcome equality (*Erfolgswertgleichheit*) should be abandoned. This concept stands in stark contrast to the many findings of the FCC itself to the effect that the German legislature is free to choose any appropriate electoral system.[81] If first past the post is compatible with Article 38(1) of the Basic Law and if the intermediate regime of a ditch system, according to which the two lists would operate as independent systems, does not meet with any objections either, the slight modifications of proportional representation resulting from the acceptance of surplus seats can hardly be deemed to infringe the electoral principle of equality of the vote. The jurisprudence of the FCC lacks consistency. The basic propositions it proclaims as deriving from Article 38(1) of the Basic Law, in no way lead to the rejection of surplus seats. If total rejection of proportional representation is permissible under first past the post, and if the ditch system with its incisive consequences for smaller parties is also a viable option, slight variations of proportional representation cannot be rejected. In the legal literature, various writers have advocated such a conclusion *a maiore ad minus*.[82] The constant jurisprudence of the FCC stands like a *rocher de bronze*, which prevents embarking on any paths that would circumvent the holy dogma of outcome equality. To date, the FCC has rarely ever withdrawn from positions taken in earlier decisions. Such new orientations, even by explicit acknowledgment, have occurred, but only in very rare instances.[83]

It is true, on the other hand, that the electoral system of a nation having embraced pluralist political freedom must be fair and equitable. Any attempt to misuse the electoral regime for manipulative purposes must therefore be deemed to infringe core principles of the Basic Law. For that reason, the FCC made a painstaking effort in 1957 to justify the 5% clause.[84] The reasons it adduced were legitimate; they have stood the test of time and find confirmation in the legislation of other countries resting on the same political paradigms.[85]

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[81] See text accompanying *supra* note 54.

[82] See references in the opinion of the four dissenting judges concerning the judgment of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVerfGE 335, 373 (Ger.); Dirk Ehlers & Marc Lechleitner, *Die Verfassungsmäßigkeit von Überhangmandaten*, JURISTENZEITUNG 761, 762 (1997); Lenz, *supra* note 48, at 345.

[83] The most outstanding example is the distancing of the FCC from the "*Halbteilungsgrundsatz*," the principle according to which income taxes must not exceed 50% of the taxable revenue. The principle was proclaimed in a decision of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvL 37/91, June 22, 1995, 93 BVERFGE 121, 138 (Ger.), but abandoned by a decision of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2194/99, Jan. 18, 2006, 115 BVERFGE 97, 114 (Ger.). The second relevant example is the departure of the FCC from the 5% clause concerning elections to the European Parliament. Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin n.143 (Ger.).

[84] See text accompanying *supra* note 32.

[85] Detailed references are given by Dieter Nohlen & Philip Stöver, *Elections in Europe*, *in* ELECTIONS IN EUROPE 69, 92 (2010).

In terminology, the FCC seems to have moved away from the earlier formulations where systemic consistency was explicitly presented as a constitutional requirement. All of the more recent decisions emphasize the necessity of justifying any departure from the ground rule of proportional representation, trying to soften the standard of "compelling" ("*zwingend*") reasons to "appropriate" ("*sachlich legitimiert*").[86] Yet, the yardstick applied still remains *Erfolgswertgleichheit* ("outcome equality"), which, it is submitted, has led the FCC onto the wrong path.

It is much easier to apply outcome equality as the appropriate yardstick than to inquire into the fairness and equity of an electoral regime. Outcome equality provides a rather rigid yardstick. On the other hand, fairness constitutes a flexible standard, the application of which is essentially left to the decision-making power of the legislature. In this regard, the jurisprudence of the FCC would appear amply to transgress the boundary line between legislative discretion and constitutional requirements. The judgment of 25 July 2012, in particular, is filled up with speculations about any possible consequences entailed by the acceptance of surplus seats under contemporary conditions.[87] It may well be that today surplus seats come into being under circumstances that had not been foreseen by anyone. But the system as such could never be challenged as embodying manipulative tendencies. On the contrary, the considerations that have led to the instauration of the German mixed-member system are basically sound and remain unobjectionable.

The original idea was to foster a close relationship between members of the *Bundestag* and the electorate, at least with regard to candidates running in the different electoral districts. It was assumed that persons nominated by the political parties for the first list would have to be firmly rooted in the societal environment of their districts. Democracy would therefore not remain an abstract, somewhat hollow concept, but rather a living reality.[88] In order to win the seat in issue, candidates would have to devote special care to

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[86] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 3/96, Apr. 10, 1997, 95 BVERFGE 408, 418 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266, 297 (Ger.); *see also* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin n.58, 127 (Ger.).

[87] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin n.62 (Ger.).

[88] The argument has been generally accepted in the jurisprudence of the FCC. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 9/56, July 3, 1957, 7 BVERFGE 63, 74 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 3/62, May 22, 1963, 16 BVERFGE 130, 140 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 89/74, Mar. 9, 1976, 41 BVERFGE 399, 423 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVERFGE 335, 358 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 3/96, Apr. 10, 1997, 95 BVERFGE 408, 412 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 28/96, Feb. 26, 1998, 97 BVERFGE 317, 327 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin n.133 (Ger.).

the needs and wishes of the inhabitants of their constituency, thereby vitalizing the idea that democracy springs up from the grassroots level, as indicated in Article 20(2) of the Basic Law: "All state authority is derived from the people."

Concerning the choice of district candidates, the political parties have far less influence than with regard to establishing the *Laender* lists, where normally the party bureaucracies wield decisive influence.[89] In this sense, the district nominations embody a piece of bottom-up democracy, in full conformity with the objective of Article 38(1) that elections must be direct, although the political parties are also structurally present in the selection of the district candidates. Admittedly, list candidates are also elected directly, but in every one of the electoral districts, the voters know the identity of the person to whom they entrust their confidence, whereas no forecasts can be made as to which candidates on the second list will ultimately make his/her way to the *Bundestag*.

This original concept has not lost its *raison d'être* by virtue of the profound transformations modern society has witnessed.[90] One of the most fervent advocates of strict proportional representation, Hans Meyer, has argued that local representation is a thing of the past that has no basis in the sociological reality of our time.[91] He therefore rejects the design of the two-vote system, holding that party allegiance is the primary criterion relied upon by voters casting their ballot.[92] It may well be true that the political parties have de facto won the upper hand in all political processes, not only in Germany but also in most other European countries.[93] However, the conceptual premises of the constitutional order of Germany diverge considerably from the factual position. Although the Basic Law recognizes political parties as participants "in the formation of the political will of the people" (Article 21(1)), they are essentially no more than instruments serving the people in the actual exercise of their democratic rights. In particular, they do not enjoy a monopoly. In the last analysis, the electorate selects individual candidates, not political parties, and the *Bundestag* is composed of individual human beings, not political parties (Article 38(1) of the Basic Law).[94] Consequently, to determine that half of the seats of the

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[89] *See* Nir Atmor, Reuven Y. Hazan & Gideon Rahat, *Candidate Selection*, *in* PERSONAL REPRESENTATION: THE NEGLECTED DIMENSION OF ELECTORAL SYSTEMS 21, 28 (Joseph P. Colomer ed., 2011); Matthew Soberg Shugart, "Extreme" *Electoral Systems and the Appeal of the Mixed-Member Alternative*, *in* MIXED-MEMBER ELECTORAL SYSTEMS: THE BEST OF BOTH WORLDS? 25, 35–36 (Matthew Soberg Shugart & Martin P. Wattenberg eds., 2001).

[90] *See, e.g.*, Pappi & Herrmann, *supra* note 19, at 270.

[91] MEYER, *supra* note 19, at 8, 11; *see* Meyer, *Demokratische Wahl und Wahlsystem*, *supra* note 37, at 534.

[92] Similar arguments are advanced by Sophie-Charlotte Lenski, *Paradoxien der personalisierten Verhältniswahl*, 134 ARCHIV DES ÖFFENTLICHEN RECHTS 473, 479–500 (2009); Christoph Möllers, 1 *Wahlrecht: Das missverstandene Systemargument im Streit um die Überhangmandate*, RECHT UND POLITIK 1, 7–8 (2012).

[93] *See, e.g.*, JAAP WOLDENDORP, HANS KEMAN & IAN BUDGE, PARTY GOVERNMENT IN 48 DEMOCRACIES (1945–1998): COMPOSITION, DURATION, PERSONNEL, 1–10 (2000).

[94] Text accompanying *supra* note 3.

Bundestag shall be allocated in single-member districts is a decision fully in line with the political philosophy of the Basic Law.[95]

This same philosophy supports also the proviso of the Electoral Act that surplus seats shall be maintained even when their number exceeds the share a party has won on the basis of the relevant *Land* list. Any attempt to deprive persons having obtained the (relative) majority in an electoral district would appear as an affront to the democratic principle. At first sight, it may appear contradictory that surplus seats will primarily go to political parties that have lost their dominating positions, collecting no more than between 30% and 50% of the proportional vote according to the second list. However, this is an unintended side effect of the regime of overhang seats. Furthermore, if indeed the intention pursued is to provide the strongest parties, even those below an approval rate of 50%, with a bonus, this cannot be characterized as an illegitimate maneuver. It follows the logic of first past the post or of the ditch system where structurally the largest parties are provided with additional seats because of their strength. It is therefore hardly understandable why the FCC has rejected such an objective as constitutionally unacceptable. Again the FCC was blinded by its fixation with the principle of outcome equality, which, it should be reiterated again, has no validity under the auspices of free choice of the electoral system.

In recent years, some authors have formulated the reproach that the two-vote system lends itself too easily to manipulative purposes, and that the voters are resorting to strategic vote splitting.[96] Indeed, this has become a current feature for a couple of years. Whereas during the foundational years of the Federal Republic, voters were, in their great majority, unaware of the relative importance of their first and their second vote, they have progressively become conscious of their decisional power. They know that to cast a ballot for a district candidate nominated by one of the smaller parties who has no chance whatsoever to get elected is a wasted ballot.[97] Therefore, they may cast their first vote for a candidate of a friendly political party that might later form a coalition with their own preferred political party, hoping that that candidate will win the district seat, perhaps even in the form of a surplus seat. Mainly, the FDP has benefited from such strategic thinking inasmuch as it was crystal clear on election day that their aim was to enter into a coalition

[95] Federal Electoral Act, *supra* note 5, at art. 1(2).

[96] Lenski, *supra* note 92, at 502; MEYER, *supra* note 19, at 36, 59, 72–74, 100. A first hint was given by the FCC itself in its decision of Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 9/56, July 3, 1957, 7 BVERFGE 63, 75 (Ger.).

[97] However, where a political party has no allies—like the party "Die Linke" (The Left) or the "National Democratic Party" (NPD) on the extreme right hand side of the political spectrum—voters have no such choice.

with the CDU/CSU. Well-advised supporters of the FDP therefore gave their first vote to the CDU/CSU, putting their crosses for the FDP only on the second list.[98]

As an observer, one may wonder why such strategic casting of the two ballots should be stigmatized as "manipulation." By such conduct, voters do nothing else than make use of the opportunities that the electoral system offers them.[99] The contention that this amounts to an infringement of the principle of outcome equality fails dramatically. Every voter has the same opportunity to cast his/her ballot by splitting the two votes. No one is obligated to cast the vote twice for the same political party, both on the first and on the second list. Splitting is an integral element of the system and does not confer a double vote on those making use of that opportunity, in violation of the principles of equality and non-discrimination.[100] The bitterness with which this doctrinal battle has been fought is largely explained by partisan political considerations. In 2005 and 2009, the strategy of vote splitting was largely used, as already pointed out, for the benefit of the FDP: Its first list nominations obtained generally far fewer votes than its *Laender* lists.[101] There can be no doubt that adherents of the CDU, knowing that their candidates would win in the district balloting, massively cast their second vote for the FDP, which had already been identified as the partner in the governmental coalition to be formed after the elections. No trace of manipulation can be detected in these strategies, which have their source in enlightened individual decisions. The fact is, on the other hand, that no similar configuration existed on the left hand side of the political spectrum. The SPD did not have a potential coalition partner related to it by ties of confidence. The Green Party is much too independent to need, or to request, such electoral assistance.[102]

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[98] Thus, in 2009 the FDP obtained 9.4% of the first list votes but 14.7% for their second lists, Der Bundeswahlleiter, *Endgültiges Ergebnis der Bundestagswahl 2009*, http://www.bundeswahlleiter.de/de/bundestagswahlen/BTW_BUND_09/ergebnisse/bundesergebnisse/index.html, the gap was also considerable, but on a lower level, 4.75% against 9.8%. *See* Der Bundeswahlleiter, *Wahl Zum 16 Deutschen Bundestag Am 18 September 2005*, at 6, 10, *available at* http://www.bundeswahlleiter.de/de/bundestagswahlen/BTW_BUND_05/downloads/ergebnisse_2005/heft3_mit_grafiken.pdf.

[99] Formally acknowleged by the FCC in Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 2/06, Apr. 21, 2009, 124 BVERFGE 1, 21 (Ger.). *See* Isensee, *supra* note 55, at 276; Hans-Dieter Klingemann & Bernhard Wessels, *The Political Consequences of Germany's Mixed-Member System: Personalization at the Grass Roots?*, *in* MIXED-MEMBER ELECTORAL SYSTEMS THE BEST OF BOTH WORLDS? 279, 285–88 (Matthew Soberg Shugart & Martin P. Wattenberg eds., 2001).

[100] For the contrary view, see MEYER, *supra* note 19, at 100, 108.

[101] *See supra* note 98.

[102] However, it is striking that the Green Party, too, scored much better on its second than on its first lists. In 2005, the percentages were 5.4 and 8.1 respectively. *See* Der Bundeswahlleiter, *Wahl Zum 16 Deutschen Bundestag Am 18 September 2005*, at 6, 10, *available at* http://www.bundeswahlleiter.de/de/bundestagswahlen/BTW_BUND_05/downloads/ergebnisse_2005/heft3_mit_grafiken.pdf. In 2009, the score was 9.2 to 10.7 respectively. *See* Der Bundeswahlleiter, *Endgültiges Ergebnis der Bundestagswahl 2009*,

Finally, it can hardly be maintained that the surplus regime produces irrational results and must therefore be rejected as inherently arbitrary. It is true that surplus seats do not necessarily accrue to political parties that will be called, on the basis of their overall electoral success, to form the federal government. This de-linkage results from the division of the federal territory into electoral zones constituted by the 16 *Laender*. It is within the framework of the *Laender* that surplus seats are allocated while a parliamentary majority for the election of the Federal Chancellor is required at the federal level.[103] Nonetheless, this does not detract from the legitimacy of the idea to provide a party which, through winning a high number of nominal seats exceeding its proportional share, has demonstrated its widespread acceptance by the electorate, with an extra bonus intended to increase the stability of the political system. Surplus seats stand at the opposite end of the rationale that justifies the 5% threshold. While this latter clause is designed to solidify the governmental system by eliminating splinter parties from the parliamentary stage, surplus seats are intended to attain a similar effect by increasing the weight of the top runners.

Although it cannot be denied that the intentions pursued by the legislative bodies do not always materialize,[104] the ensuing gap between expectations and actual outcomes does not reach the quality of a constitutional defect.[105] What matters is that the Electoral Act has never been used as an instrument of manipulation. In law, surplus seats have been an integral component of the German electoral system since 1953.[106] The fact that their actual importance has augmented since Germany's reunification does not cast a shadow over them since they are not irreconcilable with the basic tenets of that system. Contrary to the constant jurisprudence of the FCC, the principle of equal suffrage does not require outcome equality on account of the choice of a system of proportional representation. Surplus seats could only be deemed to infringe the Basic Law if they were intended to, or

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http://www.bundeswahlleiter.de/de/bundestagswahlen/BTW_BUND_09/ergebnisse/bundesergebnisse/index.html.

[103] Article 63(1) of the Basic Law provides: "The Federal Chancellor shall be elected by the *Bundestag* without debate on the proposal of the Federal President." GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDEGESETZ] [GG] [BASIC LAW] (Ger.).

[104] They materialized, for example, at the federal elections of 2009 when the CDU, for which Angela Merkel was the top candidate, obtained 24 surplus seats which gave a comfortable majority to the coalition government of CDU/CSU and FDP.

[105] In a somewhat naive manner, Lenski, *supra* note 92, at 501, argues that the legislature had expected that voters would regularly cast their vote in an uniform manner.

[106] *See* Electoral Act of 8 July 1953, *Bundesgesetzblatt* 1953 I, 470, at Article 9(4). For the actual practice see *Geschichte der Überhangmandate im Deutschen Bundestag*, WAHLRECHT.DE (Nov. 1, 2009), http://www.wahlrecht.de/ueberhang/ueberhist.html.

did in fact amount to, falsifying the will of the electorate. This has never been alleged, and can indeed not be proven.

E. Reform of the Electoral Act

Different solutions are conceivable to prevent any undesirable side effects of surplus seats.[107] If the number of seats available for distribution within the framework of the individual *Laender* is determined beforehand on the basis of the number of the voters entitled to take part in the elections, instead of a calculation resting on the number of voters actively casting their ballots, any subsequent modifications of the allocation on the basis of the attribution of surplus seats in other *Laender* are excluded. With a view to maintaining the maximum of 598 seats of the *Bundestag*, it could also be thought of subtracting the surplus seats already at the first stage of the computational process at the federal level so that the contingent for distribution according to the scores obtained on the second lists would accordingly be reduced from the very outset. It is obvious that the political parties will consider the pros and cons of either solution with the greatest care.

To the extent that surplus seats are kept as a traditional and well-proven element of the German electoral system, the issue of the size of the constituencies will rise to considerable relevance.[108] The principle of electoral equality stands in the way of granting advantages to people in thinly populated areas, thereby discriminating against the population of larger agglomerations.[109] Currently, the Electoral Act allows departures from the average size of a constituency of up to 15%, providing that if the departure amounts to more than 25% the boundaries must be redrawn (Article 3(1), 3), which means that discrepancies in the range between 15% and 25% are tolerated. This margin would appear to be excessive, notwithstanding the fact that because of the increasing mobility of the population some flexibility is necessary. Constituencies cannot be newly tailored at a quick pace. A departure of 15% in either direction should be the allowable maximum.

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[107] For a comprehensive discussion see MEYER, *supra* note 19, at 68.

[108] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 3/62, May 22, 1963, 16 BVERFGE 130, 136 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Nov. 24, 1988, 79 BVERFGE 169, 171 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/95, Apr. 10, 1997, 95 BVERFGE 335, 353 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1, 7/07, July 3, 2008, 121 BVERFGE 266, 295 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 2/06, Apr. 21, 2009, 124 BVERFGE 1, 18 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 3/11, July 25, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2869 margin n.60 (Ger.).

[109] As already indicated, the FCC emphasized already in early decisions of 1961 and 1963 that to the extent possible the size of the population in the different constituencies should be "approximately" equal. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Aug. 26, 1961, 13 BVERFGE 127, 128 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 3/62, May 22, 1963, 16 BVERFGE 130, 140 (Ger.).

F. Concluding Observations

It is not the objective of the above considerations to make a plea for the preservation of surplus seats. The intention was to show that the FCC errs in establishing a rigid framework of sophisticated rules under the auspices of outcome equality. Since the Basic Law has left the choice of the electoral system open, the legislative bodies are free to choose any appropriate and fair balloting mechanism. A system modeled on first past the post and a system of proportional representation are the two extreme ends of a continuum on which many intermediate mechanism, including the regime of surplus seats, find their legitimate place.

G. Post Scriptum

In October 2012, the political parties represented in the *Bundestag*, with the exception of "The Left," agreed on a new formula for dealing with the issue of surplus seats. The gist of this formula is simple. All the parties that on election day have not benefited from such seats shall obtain compensatory seats intended to adjust the size of the different groups in the *Bundestag* to their exact share of the vote.[110] The main problem now is constituted by equitable regional distribution. It is generally expected that, at the next elections in September 2013, the Bavarian party CSU will fall far below the 50% mark but will still be able to win almost all of the relevant district seats, thereby being allocated a considerable number of surplus seats.[111] If the envisaged compensation scheme should operate within Bavaria and not at the federal level, the Bavarian deputies would reach a number largely surpassing the weight of the Bavarian population in Germany as a whole. Details have not yet been settled in this regard; no documents exist to be indicated as reference sources.

The consequences of this political agreement must be called outright worrying. In 2002, the number of seats had been cut down from 656 to 598 precisely with the aim of facilitating parliamentary work.[112] The new compensation scheme could increase the number of deputies considerably, according to certain calculations, up to 700.[113] Thus, the *Bundestag* might not be significantly smaller than the European Parliament, whose

[110] A common proposal was introduced by all parties represented in the Bundestag, with the exception of "The Left," on 11 December 2012. *See Bundestag* document 17/11819 (2012).

[111] In 2009, the CSU obtained 42.5% of the vote in Bavaria according to the *Land* list but won all seats available on the first lists, which resulted in three surplus seats. Should its general approval rate shrink even further, it might still be able to take all of the direct seats.

[112] *See* Report of the Committee of Elders, DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 13/1803, at 7–8.

[113] Severin Weiland, *Bundestag nach der Wahlrechtsreform: Größer als Nordkorea*, SPIEGEL ONLINE, Oct. 18, 2012, http://www.spiegel.de/politik/deutschland/bundestagsfraktionen-einigen-sich-auf-neues-wahlrecht-a-863199.html.

maximum size has been set at 750 members.[114] Apart from the difficulties arising for parliamentary processes, the financial costs entailed would by no means be negligible. No service will be done to the vitality of the democratic principle by such a bloating of the main legislative body. Unfortunately, the ill-conceived jurisprudence of the FCC will have to be blamed as one of the main causes of this unwelcome development.

[114] Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253, art. 14(2).