Article

Between proportional and majority voting – the German electoral system in need of reform

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The following paper deals with current problems, traditions, philosophies, interests and constitutional adjudication of the German electoral system between proportional and majority voting (first past the post). The intertwined topics will be analysed in four sections:

1. A brief description of the German political system.
2. An explanation of the specifics of the German electoral system.
3. Some additional details of German electoral law.
4. The need for reform, and where does the German electoral system go from where it is now?

1. THE POLITICAL SYSTEM OF THE FEDERAL REPUBLIC OF GERMANY

The federal system is – next to democracy, rule-of-law and social-state principles – an excelling facet of the German constitutional system. The Federation (*Bund*) consists of 16 States (*Länder*), very different in size and economic structure. In the system of governance of the country, the States are represented in a Federal Council (*Bundesrat*), which may be looked at as being the Second House of Parliament. The States, through the Federal Council, participate in the legislative process and administration of the Federation and in matters concerning the European Union. The Federal Council consists of members of the State Governments, which appoint and recall them. Each State has at least three votes; States with more than 2 million inhabitants have four, States with more than 6 million inhabitants five, and States with more than 7 million inhabitants six votes. The composition of the Federal Council is, therefore, a compromise between the principle of equal representation of every State in the Federation – like in the United States of America, where each State has two senators – and proportionate representation of small States with less than 1 million inhabitants, middle size States, and the biggest State, which has 18 million inhabitants The voters have indirect influence only on the composition of the Federal Council – by voting for the State Parliaments which elect the State Governments. The Federal Council may initiate drafts, participate in different forms in legislation and may even veto drafts passed by the First House of Parliament, the Federal Diet (*Bundestag*). In effect, the Federal Council is balancing the Federal Power by combined State powers. According to State elections, it can balance party dominances in the First Chamber – and it may even obstruct federal governance and legislation. The construction of the federal system is designed by history, and it is the main tool of decentralization.

The federal structure of Germany is reflected in the *party system*: all political parties are composed of regional branches on the State level (including one party that concentrates on one State only). The regional party branches are of great significance, as both in national elections and in State elections these party branches propose candidates and the voters have to choose between regional party lists. (It is in elections to the European Parliament only that national party lists are admissible.) Party law and the system of party financing and accountability in Germany is Federal Law. It is governed by the constitution itself (Art 21) and by the Political Parties Act. The basic principles of party law are the free establishment of political parties, the freedom of citizens actively to take part in political parties, the principle of equal treatment of political parties, and neutrality of the State towards all parties. In addition, the so-called party privilege provides that only the Federal Constitutional Court can rule whether an individual political party is unconstitutional and ban it as illegal. Political parties in Germany are financed predominantly by public sources, in order to assist their work in participating in the formation of the political will of the people, namely in being the backbone of organizing elections. Their internal organisation must conform to democratic principles and they must publicly account for their assets and for the sources and uses of their funds.

The Federal structure of Germany is also reflected in the *electoral system:* elections are held on the federal level and in each State as well as in local communities. The States are basically free to establish their own electoral systems. They must, however, stick to some basic principles laid down in the Federal Constitution which govern democratic elections at all

levels of government.

2. THE GERMAN ELECTORAL SYSTEM

In a democracy it is the preeminent right of the citizens to vote in elections and directly to decide on political matters in referenda etc. Elections have two functions. First, they provide for a fair transfer of the people's will to institutions, like Parliaments (both on a federal and State level). Second, they guarantee a stable, functional and transparent government, which in day-to-day politics runs the country. Dozens of electoral systems in the world may be summarised in two basic types – *proportional representation* and *majority voting*.

- Historically, *proportional representation* was considered to be the one and only true democratic electoral system in Germany, namely by the underprivileged. Proportional representation provides for many good things; not least, it gives justice to political parties, especially smaller ones. But it does not produce strong representatives who are rooted in popular esteem in their respective communities, and neither does it produce strong majorities in Parliament as a solid basis for strong and efficient government.
- In *majority systems* (first past the post), however, many votes are "lost", and it is difficult for small parties to win seats in Parliaments at all, whereas – until today – strong Parliamentarian support of government is obtained.

All this is well-known – one would expect major features of election law to be regulated in the Constitution because it is the "supreme law of the land". It is binding on all State organs, including Parliament itself, and the Constitution is protected by a threshold of provisions to amend it: in most countries, a higher than just relative majority of Parliamentary votes is required for an amendment, or even a referendum. But the expectation that the constituent power regulates the principles of election law fails in Germany. According to Article 38 Basic Law, Deputies shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and accountable only to their own conscience. These are the basic commandments of the representative democracy – in contrast to all forms of direct democracy – and binding upon federal, State and local elections. That's all! These principles are further elaborated in election laws (on both the federal and State levels), and in an extensive body of constitutional case law (on both levels) which is binding upon the respective legislatures.

Criticisms can be directed at the system. The almost complete silence of the Constitution towards electoral law gives Parliament a free hand to design the law as it deems fit. In principle, Parliament is free to adopt a pure proportional representative or pure majority voting system. It did not do so, but decided to go for a mixed system. Furthermore, the States in the Federation are basically free to establish their own electoral systems, as long as they follow the principles of democratic voting, as mentioned. They could follow the Federal model or deviate significantly from it. They more or less followed the Berlin model, although there are some differences from State to State. Indeed, to anchor the frame of election law would have prevented the possibility of political power being been used for particular interests. Furthermore, if basic elements of the electoral system were vested in the Constitution, one would not have to face some 22 amendments to the Federal Election Law (FedELaw). Some of them were absolutely required – eg after reunification of the country in 1990 – but some seem to have been quite unnecessary, at least in retrospective. Finally, the Federal Constitutional Court would not have to – or self-authorize itself to – design the Federal Election Law by case law (on the basis of a thin constitutional foundation), which effectively "is the Federal Election Law".

Although Germany has faced many amendments to the law, the frame of a *mixed personal proportional election system* has remained untouched. It is a compromise between proportional representation and majority elections in single member constituencies. Federal proportionality dominates State proportionality, which is combined with majority vote in local constituencies. Only from the grammar – personalised proportional representation – can one see that it is primarily a proportional representation: "personalised" is the attribute and "proportional" representation is the subject. The German electoral systems aspire to equality of effective chances for every vote and equal treatment of the parties: this mixed proportional majority system has long been accepted by voters, although mostly not fully understood and thereby the cause of some problems due to its complicated structure when it comes to matters of detail.

Once again, it should be stressed that the German electoral system tries to combine the virtues of proportional representation and the direct election of individual representatives in the constituencies. The proportional representation aspect guarantees a fair share of seats to all parties, reflecting the share of votes cast for the parties in the elections. On the other hand, every candidate able to secure a majority of the votes cast in one of the 299 constituencies directly wins a seat in Parliament. Each voter has two votes to cast: the first vote for one of the individual candidates in his or her constituency (who are party candidates nominated by the local members but may also be without party affiliation), and a second vote for one of the party lists. In order to combine the two systems the seats won in the 299 constituencies by party candidates are deducted from the share of seats which the party as such has won for its party lists according to its share of second votes. Therefore the proportional representation part of the electoral system ultimately determines each party's share in Parliament. It is a personalised proportional representation system because, in effect, it is a proportional representation system with half of the Deputies elected in the constituencies by a simple majority. Germany shares the tradition of constituency Members of Parliament which forms the core of the first past the post system of British elections. The number of members directly elected in the constituencies by majority vote is deducted from the seats the party won in

the proportionate part of the election. This deduction of the constituency seats guarantees that in the end the party does not get more than its share, but at the same time all those who won their constituency become Members of Parliament.

As one may have guessed by now, such a combination of very distinct electoral systems always is in acute danger of producing inconsistencies, which may be unconstitutional in view of the equality principle. One problem is that of "overhang mandates". The second is the (necessary?) barriers to prevent many small parties from sending members into Parliament.

To start with the first problem, "overhang mandates", a party, rather its candidates, may win more constituencies than would have been its proportional share of votes for its party list. So there is the issue! Until recently, this party could keep all the constituency seats won by its candidates because a constituency mandate is a mandate of the people. But in this case the number of directly won constituency seats exceeded the party's proportional share of second votes – and these were "sips too many" according to the proportional vote. The Federal Constitutional Court deemed them not to be unconstitutional per se, but it demanded legislation which would prevent the phenomenon of "overhang mandates" from becoming excessive. According to a ruling of 1995 they should not constitute more than 5 per cent of the number of seats, whereas a new ruling of 2012 said that they should not constitute more than 2.5 per cent. Why this is so, only the court knows. An amendment to the Federal Election Law of 2013 implemented the court's order, trying to eradicate the problem. Every party now keeps all their directly won constituency seats. But if these add up to more than the party's proportional share of second votes, then the number of seats in the Federal Diet is increased until the proportional share of seats won by all parties matches at least the number of constituency seats. To put it bluntly, the parties who did not succeed in gaining more directly won seats than the proportional share benefit from the success of those parties who were excessively strong in first votes. After the boosting of the House, it is now guaranteed that in all cases the constituency seats can be deducted from the number of seats won by the party according to proportional representatives.

The second problem is the *barrier to prevent many small parties from sending members* into Parliament. In the distribution of seats among State lists, only parties that have obtained at least 5 per cent of the valid second votes cast in the electoral area (which is the Republic of Germany), or have won a seat in at least three constituencies, shall be taken into consideration (Art 6, para 3 of the Federal Election Law). The legislator found that this barrier is necessary to foster stable conditions for electing from the House a functional Government and to guarantee the forthcoming support of the general public. The Constitutional Court held that regulation to be legitimate under the Law. However, German Election Law for the European Parliament covered a similar provision requiring at least 3 per cent. The court declared that provision void (but with a small majority of 5:3 votes) since it would violate the equality principle. It put forward the argument that the barrier was not yet necessary to ensure the functionality of the European Parliament. The Parliament was on its way to gaining a profile as the antagonist of the European Commission, which is the governing body of the European Union. The situation, however, was not comparable yet with that of the Federal Diet. It is true that the European Union does not legislate in full competence and does not elect the Commission. The court therefore held – in order to not conflict with its ruling on the 5 per cent barrier in the national frame – that exceptions from the principle of equal chances of votes are constitutional only for important reasons.

In any event the new Election Law did not touch upon the 5 per cent barrier. The new element is that of balancing out the "overhang mandates" by enlarging the number of seats in the Federal Diet until each party's share of seats is high enough to accommodate all the seats won by proportional representation plus the "overhang mandates" won by majority vote. Each and every compromise has its victims. In the case of German electoral law it is the hitherto relatively moderate number of seats in the Federal Diet. It used to be 589 and is now 631. The number could be much higher, and it is the equilibrium between seats won in constituencies and by proportional representation What one gains is finally the veritable "squaring of the circle", almost total proportionality between the national vote and seats in Parliament as determined by the second votes and locally elected members who represent their constituency at the same time.

3. SOME DETAILS OF GERMAN ELECTORAL LAW

There are some intricacies and technicalities of the German electoral system, *following the steps to arrive at the final composition of the German Parliament.* Again the following two principles of German electoral law has to be kept in mind: a won seat is a won seat. Proportionality in the Federation must be maintained under all circumstances.

(i) First step

Each constituency shall elect one member. The candidate obtaining the majority of the votes cast shall be considered elected (Art 5 FedELaw). This is the first vote, the personal vote. The remaining distribution of seats happens on the State level, but mostly imprinted by the number of second (list-) votes counted on the federal level. The second vote is the proportionality vote. This is the reason why Art 6 FedELaw is entitled "Election by State list". It is very complex.

(ii) Second step

How many seats are available in a given State to be distributed to parties (Art 6, para 1 FedELaw)? For the distribution of seats to be occupied on the basis of State lists, the second votes cast for each State list (16 states) shall be added up. The second votes of such votes are disregarded as cast their first votes for a successful constituency candidate (Art 6 FedELaw) or cast their votes for candidates, who are nominated by parties, which did

not make it to collect 5 per cent of votes Federation-wide (Art 6, para 3 FedELaw).

(iii) Third step

Now one has the numbers of all votes for a given State. How many of all seats are available for the State list, and how should they be allocated to the parties in a given State? To distribute the State number of votes to seats, first of all the total number of seats in Parliament must be allocated to the States on the basis of the respective proportion of registered voters, with the calculation procedure following Sainte-Lague/Schepers (Art 6, para 2 FedELaw). It was previously based on the calculation of Hare-Niemeyer, and before that the d'Hondt procedure. Some States in Germany for the State election use Sainte-Lague, others Hare-Niemeyer, others d'Hondt. So it does not really make a difference in proportion-counting, and the rest can be left to the experts of statistics.

(iv) Fourth step

If any "overhang mandates" do occur, which means that a party in a given State constituency won more seats than available on the State list, the total number of seats in the Federal Diet is enlarged to that number, which covers all such mandates. In addition – to follow the proportionality principle – the number of seats of the other parties increases accordingly until they are proportionate to the number of seats with the "overhang mandates" (Art 6, para 5 FedELaw).

(v) Fifth step

Finally, there is a "proportional representation securing regulation" ("emergency clause" or "correction clause", Art 6, para 7 FedELaw). If a party wins more than 50 per cent of second votes in the Federation, and this is not reflected in the final number of seats, the number of seats is raised until it has received one seat more than half of the seats.

4. GERMAN ELECTORAL LAW, THE NEED FOR REFORM AND THE WAY FORWARD: PARTICIPATION, DIRECT DEMOCRACY AND THE ROLE OF THE FEDERAL CONSTITUTIONAL COURT

A glimpse into the future may focus around four points. First, the German electoral law is complex but just if one wants primarily to find a compromise between proportional representation and majority vote. It is coherent and consistent. The majority of voters would not understand the details, but they are used to it and have faith in its correctness and functionality. The States generally follow the system (some of them with slight deviations when it comes to alternatives in the pattern of representative-majority mixture with priority of representation). There is a tradition of feeling that this system is truly democratic. To give an example how State election Laws may vary, one may refer to the City-State of Hamburg with roughly 2 million inhabitants. People vote according to a combined "multi-candidates-constituencies-majority and list system". To have more than just one candidate in a constituency avoids "overhang mandates" and fosters proportionality.

Second, politicians and constitutional scholars and lawyers are currently concerned about the function of the Federal Constitutional Court. It is true that it has to decide on elections and electoral law-matters on a very slim constitutional basis. However, in the separation of powers model, the court is a part of the judiciary. On the other hand, its power to interpret and apply the Constitution with a final judgment makes it a political heavyweight in the equilibrium of State organs. The adjudication of the court actually designed the details of the Election Law, and it is extremely difficult to attempt prognoses for the court's decisions. It seems that its "political activism" curtails the impact of the democratically legitimised Parliament.

Third, for a number of reasons people are increasingly dissatisfied with the representative system, and not only in Germany. In many countries, including Germany, there are trends which strive for more participation and new forms of direct democracy. The latter is not easy to handle in a large state, and the country´s unpleasant historical heritage does not favour referenda. It seems that the country needs amendments to the electoral system, but there should not be radical changes.

Finally, could the electoral system of Germany be recommended to other countries which are in a process of democratic state-building? The mixed majority-representation-system is complex and not very transparent, but it is reliable. However, it requires stable and democratically organised political parties and the trust of voters in a fair and just procedure. Besides, there has to be confidence of voters to be able to implement their constitutional rights in the courts. This, of course, requires an independent and strong judiciary. Therefore, basically the electoral system after some negative spin-offs are amended can be recommended provided there is trust in the state, in the Constitution and in the rule of law.

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