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Column 3

With this column, as announced, I would like to use the example of the electoral reform passed by the German Bundestag in 2023 (BWahlG 2023) to show you the tension between constitutional requirement and constitutional reality - inherent in this change in electoral law - with which the Federal Constitutional Court had to deal in response to complaints from the state government of the federal state of Bavaria, two parties represented in the Bundestag and several members of parliament.

The focus of the constitutional review was the question of the guarantee of electoral equality and equal opportunities for the parties through electoral law.

On July 30, 2024, the Federal Constitutional Court ruled on this change in electoral law by judgment and, in the reasons for the judgment, showed the design options that the constitution (the Basic Law) allows the legislature for the electoral law itself and its subsequent adjustments to changed needs - and which it does not.

You can find the press release (in English) at the following link:

https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2024/bvg24-064.html;jsessionid=9BA3A3E5D9CF63D0EB8B02B6166CA884.internet011

The judgment itself, with the reasons for the judgment, is available in full (in German) at:

https://www.bverfg.de/e/fs20240730_2bvf000123.html

In the following statements, I use the generic masculine to refer to the male and female forms. This is solely for reasons of simplification.

The Basic Law guarantees equal voting rights and the right to vote as follows:

Principle of democracy - Article 20 GG

(1) The Federal Republic of Germany is a democratic and social federal state.
(2) All state power emanates from the people. It is exercised by the people in elections and votes and through special legislative, executive and judicial bodies.
……..

The parties - Article 21 GG

(1) The parties participate in the political decision-making process of the people.
……..

The right to vote - Article 38 GG

(1) The members of the German Bundestag are elected in general, direct, free, equal and secret elections. They are representatives of the entire people, not bound by orders or instructions and subject only to their conscience.

(2) …….

(3) Further details are determined by a federal law.
……

The Bundestag - Article 42 GG

(1) ……..

(2) A majority of the votes cast is required for a decision of the Bundestag, unless this Basic Law provides otherwise. …….
…….

I. Current electoral law in the Federal Republic of Germany

According to Article 38 Paragraph 3 of the Basic Law, it is therefore up to the parties represented in the Bundestag and their respective majorities to determine the terms of the election by means of a simple law - in this case the Federal Election Law (BWahlG) and the Federal Election Ordinance (BWahlO) as an implementing regulation. The legislature has several alternative options for structuring the electoral law. A combination of direct and proportional representation currently applies. Each voter has two votes. In the constituencies of the individual federal states, direct candidates from the parties running for office stand for

election and are elected with the first vote. If one of them is directly elected, he or she enters the Bundestag (the parliament - first chamber). The second vote is used to elect the candidates that the parties have placed on their state lists in a democratic process according to a ranking order. As many candidates from each list enter parliament as their number – after counting – corresponds to the number of second votes cast for their party.

However, if a party receives more first and second votes in a constituency than the second vote result alone would justify the number of candidates entering the Bundestag, the direct mandates create so-called overhang mandates. They are not offset against the list places (second votes) or added to the list accordingly, i.e. the directly elected candidates enter the Bundestag in any case. In return and complementary, the other parties receive so-called compensatory mandates so that they are not disadvantaged in terms of numbers - according to the principles of proportional representation - which leads to an increase in the number of seats in the Bundestag after each election.

The second special feature is the 5 percent threshold. Parties whose candidates receive less than 5 percent nationwide via the second votes on the state lists are not represented in parliament, unless three of their direct candidates have been elected with the first vote result (basic mandate clause). In the latter case, not only the directly elected candidates enter parliament, but also the candidates on the state list “in tow” according to the percentage of second votes recorded below the five per cent hurdle.

If an independent candidate stands in a constituency and is directly elected with the most first votes, the second votes cast for a party are not taken into account, as the corresponding voters in the constituency would otherwise receive a “double vote” in the count value of their two votes cast. The Electoral Law Amendment Act also maintains this.

The possibility of an independent, non-partisan constituency candidate running for office is seen as an expression of a grassroots democratic option. It is constitutionally protected but has so far played practically no role in the history of the Federal Republic of Germany because all candidacies of individual candidates were unsuccessful in the first vote result. However, it should be noted that, according to the case law of the Federal Constitutional Court, independent constituency applications are considered to be the core of civil rights and thus a corrective to the prominent role of the parties in the political will-formation of the people. They prevent the political parties from monopolizing their right to nominate candidates. Article 21, Paragraph 1, Sentence 1 of the Basic Law allows the parties to be primarily involved in the

political will-formation of the people but does not give them a monopoly, but rather opens up civic engagement as a corrective with such individual candidacies.

II. Amendment to the electoral law - BWahlG 2023

The governing coalition has now passed a new electoral law in 2023 (Law amending the Federal Election Law - Federal Election Law 2023).

The aim of this amendment to the electoral law is to reduce the total number of members of the Bundestag to the original number of 630 members, of which 299 members will be directly elected with the first votes according to the "district election proposals in the constituencies", the rest with the second votes according to state election proposals (state lists). In addition, this new regulation is intended to abolish the basic mandate clause and introduce a new procedure, the so-called second vote coverage. According to this, constituency candidates with the most first votes will only receive a Bundestag mandate if it is covered by their party's seat quota determined from the second vote result.

The procedure provides that the total number of seats determined by the electoral law is first distributed among the parties and their state lists, i.e. each party receives the number of seats to which it is entitled according to the nationwide second vote result. These seats are then distributed among the state lists of the respective party based on their respective shares in the nationwide second vote result. The order in which these seat quotas are filled is then determined: the successful constituency candidates - i.e. those with the most first votes in their constituency - move fictitiously to the top of their party's respective state list in the order of their share of the vote and are considered first when the seats are allocated.

If the number of seats to which a state list is entitled according to the second vote result exceeds the number of its successful constituency candidates, the remaining seats are awarded to list candidates.

However, if the number of successful constituency candidates exceeds the total number of seats covered by the second votes from the state lists, the – competing – constituency candidates with the smallest first vote share will not be allocated a seat (second vote coverage procedure), they “drop out of the distribution” and will not be taken into account.

III. The ruling of the Federal Constitutional Court of July 30, 2024

In its judgment of 30 July 2024, the Second Senate of the Federal Constitutional Court (BVerfG) ruled that the second vote coverage procedure in the Federal Election Act (BWahlG 2023) (see section V. 2.2 below for details) is compatible with the Basic Law (GG), but the five percent threshold (see below Section V. 2.3.) is not currently compatible due to a violation of Article 21 Paragraph 1 and Article 38 Paragraph 1 Sentence 1 of the Basic Law. Until a new regulation is introduced, it will continue to apply in such a way (i.e. as before) that parties with less than 5% of the second votes will only not be taken into account in the allocation of seats if their candidates have received the most first votes in fewer than three constituencies.

IV. The court's considerations in summary

The second vote coverage procedure is compatible with the Basic Law. The legislature's decision to reform the electoral law is not tied to any special conditions. This is because the legislature can introduce innovations that were foreign to the previous electoral law and require voters, candidates and parties to rethink their approach. The second vote coverage procedure does not represent a departure from the basic principles of the previous electoral law. The legislature has decided, within the scope of its wide discretion, to retain constituency elections and proportional representation based on state lists. However, retaining a combination of proportional representation and constituency elections does not mean that the previous balancing procedure must also be retained and cannot be redesigned. The legislature may decide on a different combination and can redesign the balancing between the results of the constituency elections and the proportional representation that is necessarily associated with it.

The power to shape the system is limited by the electoral principles according to Article 38, Paragraph 1, Sentence 1 of the Basic Law. According to this, the members of parliament are elected in general, direct, free, equal and secret elections. The principle of equality of elections requires that all eligible voters can exercise their active and passive right to vote in as formally equal a manner as possible. In addition, the electoral legislator must ensure equal opportunities for the parties (Article 21, Paragraph 1 of the Basic Law). According to this, every party must be granted the same opportunities throughout the entire election process and thus equal chances in the allocation of seats. The parties' right to equal opportunities is closely linked to the principles of universality and equality of elections. The principles of equal voting rights and equal opportunities for parties are not subject to an absolute prohibition on differentiation. The legislature has a narrow scope for differentiation when regulating the electoral law.

According to this, the legislature may combine proportional representation with elements of personal elections. If it decides to retain a combination of proportional representation and constituency elections, this does not mean that the previous compensation procedure must also be retained and cannot be redesigned. The legislature may decide on a different combination. The new regulation intended in the BWahlG 2023 guarantees the same counting value for all electoral votes and the equal chances of success of the first votes with the second votes. The criticism to the contrary, that the second vote coverage procedure violates a requirement of regionalization or constituency representation, finds no support in the Basic Law or the previous electoral law.

The five percent threshold is not fully necessary under the current legal and factual framework to ensure the work and functionality of the Bundestag as a justification. In its current form, it is not compatible with the Basic Law. Parties that could mathematically obtain seats in the Bundestag based on their second vote result are not taken into account in the seat allocation if they have achieved less than 5% of the valid second votes in the federal territory, which leads to unequal treatment compared to electoral votes for parties with a higher second vote result. The threshold clause is intended to prevent the parliament from being split into many small groups in order to ensure the functioning and working conditions of the Bundestag. It creates the conditions for groups of MPs with similar political goals in the Bundestag (factions) to have a certain minimum size in principle. The level of the threshold clause of 5% of the valid second votes nationwide is appropriate for this purpose.

However, it is not necessary to ignore a party in the seat allocation whose MPs would form a joint faction with the MPs of another party if both parties together reached the five per cent quorum. To achieve this, three elements are sufficient, which, according to the current legal and actual framework conditions in the German Bundestag, are fulfilled by the Union parties - the Christian Democratic Union (CDU) and the Christian Social Union (CSU), which is a regional party only active in the state of Bavaria: There is indeed a possibility that the CSU will not be considered in the allocation of seats in the next federal election because it does not exceed the nationwide 5% threshold. If it were considered, however, its MPs would be sufficiently certain to form a joint parliamentary group with the CDU MPs. The basis for this is long-term cooperation between the two parties.

This cooperation between the CSU and the CDU, which has existed uninterruptedly for 75 years now, is characterized by three elements: firstly, the intention to form a parliamentary group based on similar political goals, secondly, the fact that such a joint parliamentary group already existed in the Bundestag, and thirdly, the renunciation of competition between them by

only submitting state lists in different states. As of September 10, 2024, this cooperation will have existed uninterruptedly for 75 years now.

A mere list connection to jointly overcome the five percent hurdle of the barrier clause is not sufficient to be considered a cooperation that forms a parliamentary group.

However, the Federal Constitutional Court leaves open the extent to which the joint consideration of parties in overcoming the barrier clause is justified if only some of the three requirements are met. In any case, together they justify the preference for a cooperation such as that practiced by the CSU and CDU under the current legal and factual conditions. The legislature is obliged to design the barrier clause in such a way that, under the current legal and factual conditions, it does not go beyond what is necessary to ensure the functionality of the Bundestag. However, it is not limited to introducing the possibility of jointly considering two parties cooperating in the form described. Rather, it can also modify the barrier clause in other ways.

V. The court's considerations in detail

1. Preliminary remark - Georgia's complementary constitutional articles

In the following, I will refer to the reasons for the judgment and, in addition, the previous case law of the Federal Constitutional Court, to which the judgment expressly refers, and present the underlying arguments in the form of theses. The reader should always keep an eye on Georgia's constitution and hold these theses up to it like a mirror.

The Georgian constitution is, in terms of equal voting rights and equal opportunities for parties, a – albeit younger – “twin sister” of the Basic Law. It even goes beyond the Basic Law in that its constitutional articles grant and guarantee direct democratic rights to voters and citizens.

However, outsiders will notice two regulations in the Georgian constitution and the executive organic laws that deviate from the Basic Law, and the meaning of which is not immediately clear:

Article 37, paragraph 6 - Constitution of Georgia:

This constitutional article regulates the two-step allocation of seats after a parliamentary election, namely firstly - taking into account the five percent threshold - the allocation of seats to all parties based on the number of votes received according to a mathematical allocation

mechanism, and then a distribution of any remaining, still open contingent of parliamentary mandates primarily among the more successful parties in the order of the number of votes they received.

The meaning of this regulation and this procedure is not clear to outsiders, however, from the point of view of equal voting and the equal counting value of the votes cast by the voters.

Art. 3 Paragraph 2, Art. 37 Paragraph 2 and Art. 45 Paragraph 1 - Constitution of Georgia:

To the extent that an organic law with a substantive constitutional character - declared as an implementing law - "shuts down" the civic, direct democratic and constitutionally guaranteed participation of voters in "votes, other forms of direct democracy", in "referendums" and in "legislative initiatives" until territorial unity is regained, with the argument that the prerequisite for this is that the "whole people" can participate in such votes and referendums, this law contains a contradiction in itself:

Because like the legislative initiatives themselves, the votes and referendums are also "legislative initiatives" in their effect, which, if successful, lead to corresponding parliamentary deliberations and, should a majority in parliament vote in favor of them, legislative decisions.

However, as Article 37 paragraphs 1 and 2 of the Constitution emphasize, the Parliament in its current composition is also only provisional in nature because of the still outstanding territorial unity of Georgia. The laws passed by its members are therefore only provisional in nature in terms of their temporal and territorial scope.

But let us first let the constitutional articles themselves have their say:

Chapter 1 - General provisions

Article 3 - Democracy

1. Georgia is a democratic republic.

2. State power in Georgia emanates from the people. The people exercise their state power through their representatives, through referendums and other forms of direct democracy.

……
4. Political parties participate in shaping and implementing the political will of the people. The activities of political parties are based on freedom, equality, transparency and internal democratic principles.

Chapter 2 - Basic rights

Article 24 - Right to vote

1. Every citizen of Georgia who has reached the age of 18 may take part in referendums and in elections of the state, autonomous republics and self-governing bodies. The free expression of the will of the voters is guaranteed.

Chapter 3 - The Parliament of Georgia

Article 37 - Parliamentary elections

1. After the restoration of full jurisdiction over the entire territory of Georgia, the Parliament of Georgia shall consist of two chambers: the Council of the Republic and the Senate. ……

2. Until the conditions provided for in paragraph 1 of this Article are created, the Parliament shall consist of 150 members elected for four years in general, free, equal and direct elections, elected in uniform multi-member constituencies using the proportional system.

3. ……

4. ……

5. The right to participate in the elections shall be enjoyed by a political party registered in accordance with the prescribed procedure, which has a representative in the Parliament at the time of the election or whose initiative is confirmed by at least 25,000 voters' signatures in accordance with the rules provided for by the organic law.

6. Mandates of elected members of the Parliament shall be awarded only among those political parties which received at least 5% of the votes cast in the elections. To calculate the number of seats that political parties receive, the votes received are multiplied by 150 and then divided by the sum of all votes received by political parties that received at least 5% of valid votes. The total number obtained is the number of seats that each political party receives in parliament. If the sum of the seats that all political parties receive is less than 150, the remaining seats are awarded in turn to the political parties that received the most votes.

7. The rule for electing parliament is determined by an organic law.

Article 39 - Member of the Parliament of Georgia

1. A member of the Parliament of Georgia is the representative of all Georgia, has a free mandate and cannot be recalled.

Article 45 - Creation of law and the rules of decision-making

1. The right to initiate legislation shall be vested in the following: the Georgian government, a member of parliament, a parliamentary faction, a parliamentary committee, the supreme representative bodies of the Abkhaz and Adjara autonomous republics, and a group of at least 25,000 voters. At the request of the government, the parliament shall consider draft laws submitted by it in an extraordinary session.

2. The reasons for the judgment of the Federal Constitutional Court on the Electoral Law Amendment Act 2023 - Theses

2.1. General electoral principles

Theses - reasons for the judgment

Marginal numbers 137, 147, 148, 157, 158

Article 38 paragraph 3 of the Basic Law assigns the legislature the task of further structuring the right to vote. The legislative power to shape the law is limited by the electoral principles according to Article 38 paragraph 1 sentence 1 of the Basic Law. In addition, the electoral legislature must ensure that the parties have equal opportunities under Article 21 paragraph 1 of the Basic Law. However, equality of choice and equal opportunities are not subject to an absolute prohibition of differentiation.

The principle of equality of choice takes into account the equality of citizens presupposed by the principle of democracy. It ensures the equality of citizens that is required by the principle of democracy, by allowing all eligible voters to exercise their active and passive right to vote in as formally equal a manner as possible. Because of its connection with the principle of democracy, it is to be understood in the sense of strict and formal equality.

The principle of equal voting rights means that the vote of every eligible voter must have the same counting value and the same legal chance of success. All voters must be able to have the same influence on the election result with the vote they cast. The requirement of equal chances of success has different effects depending on the design of the seat allocation procedure.

The Federal Constitutional Court has specified the equal chances of success for proportional representation and speaks of the requirement of equal success value. The aim of the proportional representation system is that all parties are represented in the body to be elected in a ratio that is as close as possible to the number of votes. In addition to the equal counting value and chance of success, the equal success value is therefore added to the proportional representation system.

In proportional representation, the success value of a vote corresponds to the quotient value of dividing the number of seats of a party by the second votes for that party. Deviations from this value are irrelevant if they are rounded values and are an inevitable consequence of the calculation procedure.

Margin numbers 157, 158

The principle of direct election requires that voters choose the representatives themselves. It excludes any electoral procedure in which another authority is involved which finally selects the representatives at its own discretion and thus excludes their direct election.

This principle requires an electoral process in which voters can see before voting which people are applying for a parliamentary mandate and how their own vote will affect the success or failure of the candidates. The principle of immediacy does not depend on whether the vote actually has the effect intended by the voters. The possibility of a positive influence on the election result corresponding to the intention of the respective voters is sufficient.
In order to guarantee the constitutionally required openness of the process of political will formation, it is essential that the parties participate in political competition on an equal footing as far as possible. From this insight, the constitutional principle of equal competitive opportunities for political parties, which can be derived from Article 21 Paragraph 1 of the Basic Law, takes on its own character. Every party must in principle be given the same opportunities in the entire electoral process and thus equal chances in the distribution of seats.

The right of political parties to equal opportunities is closely linked to the principles of universality and equality of elections. Therefore, in this area - just as with the equal treatment of voters guaranteed by the principles of universality and equality of elections - equality must be understood in a strict and formal sense. If public authorities intervene in party competition in a way that has a knock-on effect on the parties' chances in political competition, their discretion is subject to particularly narrow limits.

Theses - previous case law of the Federal Constitutional Court (in particular BVerfGE 146, 327 ff.)

The principle of equal voting rights and equal opportunities for parties are not subject to an absolute prohibition on differentiation. However, the formal nature of equal voting rights and equal opportunities for parties means that the legislature only has a narrow scope for differentiation when regulating the electoral law - according to a strict standard.

Differentiations always require a specific, objective and constitutionally legitimate reason to justify them, and one that is weighty enough to balance the equality of the right to vote.
This includes, in particular, the objectives pursued by the election. This includes safeguarding the character of the election as an integration process in the political decision-making process

of the people and, related to this, safeguarding the functionality of the parliament to be elected. A large number of small parties and voter associations in a popular representation can lead to serious impairments of its ability to act. Therefore, the election not only aims to create a popular representation in the first place, but also to produce a functioning representative body.

The question of what serves to ensure functionality and what is necessary for this cannot be answered uniformly for all popular representations to be elected, but is measured according to the specific functions of the body to be elected. In addition, it depends on the specific conditions under which the respective popular representation works and on which the probability of dysfunctions occurring depends.

It is fundamentally the responsibility of the legislature to balance conflicting goals with constitutional status and the principle of equal voting rights. It has only a narrow scope for differentiation within the framework of equal voting rights. This is because it must be ruled out that the parliamentary majority - in order to maintain its own power - acts on its own behalf and does not allow itself to be guided by considerations of the common good when making electoral legislation, i.e. creates regulations that weaken the conditions of political competition.

Differentiating regulations must be suitable and necessary to pursue their purposes (principle of proportionality). The extent to which they are permitted therefore also depends on the intensity with which the - equal - right to vote is interfered with. Established legal convictions and legal practice can also be taken into account. However, the legislature must base its assessment and evaluation not on abstractly constructed case scenarios, but on political reality.

The principles of equal voting rights and equal opportunities for parties are violated if the legislature has pursued an objective with the regulation that it is not permitted to pursue when designing the electoral law, or if the regulation is not suitable and necessary to achieve the objectives pursued with the respective election.

The legislature is obliged to review a norm of the electoral law that affects equal voting rights and equal opportunities and, if necessary, to amend it if the constitutional justification of this norm is called into question by new developments, for example by a change in the factual or normative bases assumed by the legislature or because the forecast made when the norm was issued regarding its effects has proven to be incorrect.

2.2. Second vote coverage procedure - reasons for the judgment

Theses - reasons for the judgment

Refutation of the criticism of the Electoral Law Amendment Act

Margin numbers 175, 176

Under the second vote coverage procedure, no mandates are awarded before the equalization. First, the 630 seats are distributed among the parties and their state lists. The order in which each of these seat quotas is filled is then determined. Successful constituency candidates move to the top of the state list in the order of their share of the vote. Only in the last step do all candidates receive their mandates in this order.

Margin number 175, 176

The criticism that the legislature did not opt for either a pure majority or a pure proportional system overlooks the fact that the legislature may combine proportional representation with elements of personal election. Constituency representatives are not delegates of their constituency, but according to Article 38 Paragraph 1 Sentence 2 of the Basic Law, representatives of the entire people and are responsible only to their conscience.

Marginal numbers 185, 186, 196, 197

According to the second vote coverage procedure, the constituency election is not the only decisive factor for obtaining a mandate. Rather, the second vote coverage procedure ensures that every member of the Bundestag is legitimized for his or her party by the second votes. According to this concept chosen by the legislature, it is not the list member without a constituency victory who is weaker and insufficiently legitimized for a mandate, but the constituency winner without list coverage.

There is also no contradiction in the fact that successful constituency candidates have priority over the candidates on the state list when it comes to seat allocation. Even if the constituency election no longer directly results in a mandate as it did before, this does not lead to its insignificance, as successful constituency candidates move to the top of their party's respective state list. The constituency election thus continues to convey democratic legitimacy (principle of democracy and electoral equality). Just as the second vote coverage strengthens the legitimacy of the first vote election, the additional success in the first vote election increases the legitimacy of the representatives who hold the seats for a party.

To the extent that it is claimed that the electoral legislator has violated the federal principle, it is ignored that the legislator is entitled to take federal interests into account, but is not obliged

to do so. In particular, there is no obligation to design the electoral law in such a way that, as a result of the election, constituency candidates from each state enter the Bundestag in proportion to their population. Equal voting requires that the constituencies be as equal as possible, but it does not guarantee any specific results. Nor does the possibility of a federal proportional distortion lead to a different assessment.

In addition, the demand for regional representation cannot be derived from the federal principle. An electoral law that takes federal interests into account allows a party to restrict itself as a state party to just one state. However, this does not affect whether a party concentrates on winning second votes or constituencies. Even if a state party wins all or almost all constituency mandates in a state (as has been the case in Bavaria to date), it does not become the representative of this state in the Bundestag according to the concept of the Basic Law.

Margin number 198

Regardless of the question of what conclusions could be drawn from the majority principle, it is not affected by the fact that constituency candidates with the most votes do not receive a mandate, but merely receive priority over list candidates. The majority principle makes no statement about what is achieved with a majority.

Margin number 199 ff.

The second vote coverage procedure does not violate the equality of elections according to Article 38 Paragraph 1 Sentence 1 of the Basic Law. It does treat votes for a successful independent candidate and votes for a candidate nominated by a party differently; this is, however, justified. By allowing independent candidates to be nominated for constituency elections, the legislature is ensuring that all eligible voters, regardless of political parties, have the right to nominate candidates as the core of the citizen's right to actively participate in elections. There is an objectively legitimate reason for this conceptually necessary exception to the requirement of second vote coverage for independent constituency candidates and the "better position" that this provides, which can balance the balance between electoral equality.

Marginal numbers 202, 212, 215

The requirement of direct election pursuant to Article 38, Paragraph 1, Sentence 1 of the Basic Law is also not violated by the second vote coverage procedure. This requirement is to be applied formally and uniformly to both the first and second vote elections. The same applies to equal opportunities. If candidates decide not to stand for a party, they are taking advantage of

the option that is intended as a corrective to the prominent role of the parties (see marginal number 202). This does not constitute a disadvantage for parties.

2.3. Barrier clauses – reasons for the judgment

Marginal numbers 154, 155

If a party has received less than 5 percent of the valid second votes and is therefore not taken into account in the seat allocation, there is no seat quota to which the constituency mandate of a successful candidate from this party could be credited. The mandate of an independent candidate cannot be taken into account in the seat quota of a party from the outset. The rule that the second vote of the voters of a successful independent candidate is not taken into account avoids double voting weight and is therefore not objectionable.

In addition, first votes also influence the composition of the Bundestag if a party receives less than 5 percent of the valid second votes in the seat allocation, but the basic mandate clause comes into play in its favor. In this case, the first votes affect the composition of the Bundestag, since without the constituency mandates the party would not be taken into account. The basic mandate clause does not, however, justify double voting weight, because the constituency mandates can be counted towards the party's seat quota. In this case, however, electoral equality is impaired due to the different weighting of the second votes for such a party compared to the second votes for a party without three constituency mandates that is below the five percent hurdle.

Margin numbers 164 – 167

If the legislature regulates special access hurdles for consideration in the allocation of seats according to proportional representation (threshold clauses), these also represent a differentiation that requires justification. In this respect, too, the strictly formal requirements of electoral equality apply. The constitution does not contain any substantive criteria that the legislature would have to use for differentiation. The legislature alone determines which election result constitutes the significance of a party in the sense that it should be represented in parliament. The Federal Constitutional Court strictly examines whether the criterion that the legislature has chosen to consider parties as significant is based on legitimate reasons. In doing so, it only examines whether the constitutional limits have been observed, but not whether the legislature has found expedient or legally desirable solutions.

An access barrier as a differentiating regulation must be suitable and necessary to pursue its purposes. The constitutional assessment is also based on the intensity of the interference with

the - equal - right to vote. The compatibility of barrier clauses with the principle of equal suffrage and equal opportunities for political parties cannot therefore be assessed once and for all in the abstract, but is based on the legal and factual framework conditions.

The same applies to modifications to a barrier clause, because they always result in further differentiation between parties. Such modifications, for example in the form of a basic mandate clause, treat two groups of parties with the votes allocated to them, both of which do not meet the requirements of the barrier clause, unequally, as one group is nevertheless taken into account in the allocation of seats. Just like the barrier clauses themselves, exceptions to them cannot be assessed once and for all in the abstract, rather the respective specific factual and legal circumstances must be taken into account here too.

Marginal numbers 219 – 249

The threshold clause of the Electoral Law Amendment Act is in its current form incompatible with the Basic Law. It impairs the principle of equal voting rights. Such an impairment can be justified by the aim of ensuring the Bundestag's ability to work and function. The threshold clause currently amounting to 5 percent is in principle a suitable means for this, but in the proposed amendment, under the current legal and factual framework, it is not fully necessary to ensure the Bundestag's functional conditions. The legislature must therefore currently choose a milder means to ensure the integration function of the election.

The key factors in assessing the admissibility of a threshold clause in the election to the German Bundestag are the central functions assigned to it in the constitutional order of the Basic Law. Its task is to elect and continuously support a government capable of taking action, which requires the formation of a stable majority. This cannot be separated from the Bundestag's control function, which includes information and participation rights and is exercised to a large extent by members of the opposition. The Bundestag is also the main legislative body, so it is assigned the essential task of discussing and deciding on laws. It is the constitutional place for debate on all matters of interest to the community. As the European Union continues to develop, the Bundestag must also assume responsibility for integration in accordance with Article 23 of the Basic Law.

The barrier clause in the Electoral Law Amendment Act is suitable for ensuring the Bundestag's functionality. In this respect, it is irrelevant whether it excludes parties whose content is geared towards particular interests or who are hardly willing to find compromises and form coalitions. Independently of this, the threshold clause creates conditions that serve the ability of the

Bundestag to work. The level of 5 percent of the nationwide valid second votes is also appropriate for this.

The Federal Constitutional Court justified the admissibility of the nationwide threshold clause in the 1953 electoral law on the grounds that splitting the people's representatives into many small groups could make it difficult or impossible to form opinions, while large parties facilitate cooperation within parliament. This is based on the fact that a balance is already being struck between different social groups and their concerns. Clear majorities in parliament that are aware of their responsibility for the common good are necessary for the formation of a government that is capable of taking action both internally and externally and for managing the substantive legislative work.

It remains to be seen whether such a justification for the threshold clause is outdated or not.

The current results of the state elections on September 1, 2024, in Saxony and Thuringia show, in legal terms, that parties that have been involved in the formation of stable governments for decades in the history of the Federal Republic of Germany are failing because of threshold clauses, while parties whose willingness to compromise and ability to form coalitions are questionable are recording poll ratings well above 5 per cent.

In any case, under the current political conditions, the threshold clause does not fulfil its intended function.

The threshold clause is, however, justified insofar as it secures the working and functional conditions of the Bundestag (the work in the committees, the formation of the will in the parliamentary groups) and, on the other hand, creates the conditions for associations of MPs with similar political goals in the Bundestag to generally have a certain minimum size. The Bundestag takes up the conditions created by the threshold clause within the framework of its autonomy of rules of procedure in accordance with Article 40 Paragraph 1 Clause 2 of the Basic Law for the formation of parliamentary groups. The formation of parliamentary groups by members according to their common political goals is fundamental to the ability to work and function. A threshold clause ensures this requirement so that parliamentary groups always have a certain minimum size.

Examples in parliamentary history reflect the importance of common political goals in a parliamentary group. From 2005 to 2007, members of the PDS and the Party for Work and Social Justice - The Electoral Alternative (WASG) formed a parliamentary group, THE LEFT.

They had previously stood together on the PDS's open electoral lists and intended to merge into one party, which was later carried out. In December 2023, the departure of some MPs from the DIE LINKE party in the course of the re-founding of the Bündnis Sahra Wagenknecht (BSW) party led to them also leaving the parliamentary group. A joint pursuit of similar political goals was no longer possible.

According to the rules of procedure, parties can also form a parliamentary group without approval if they are not in competition with each other in any country due to similar political goals. This provision of the rules of procedure refers to the 75-year-old parliamentary group community of the CDU and CSU, which appear in public as "sister parties".

The legislature is obliged to change a norm of the electoral law affecting equal voting rights and equal opportunities if its constitutional justification is called into question by new developments. Barrier clauses can therefore be justified with regard to one representative body at a certain point in time, but not with regard to another or at another point in time.

Actual changes in voting behavior do not lead to a different assessment of the threshold clause. A different constitutional assessment could possibly be necessary if the number of votes lost due to the threshold clause reached a level that would impair the integration function of the election.

Under the current factual and legal framework, the design of the threshold clause in the Electoral Law Amendment Act is not fully necessary. In order to ensure the work and functionality of the Bundestag, it is not necessary to ignore a party in the allocation of seats whose members would form a joint parliamentary group with members of another party if both parties together achieved the five percent quorum.

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Dear citizens of Georgia,
You now have enough arguments and points of view at hand with which you can critically examine the constitution and constitutional reality in Georgia. Don't be put off and put your finger in open wounds if you spot them. Every constitution should be reviewed from time to time, as *Thomas Jefferson* emphasized for the American constitution two hundred years ago, and every generation must continually rewrite its own constitution.

In the next columns we will begin with a general overview of European Community law (European law) and the material guarantees of Union law, before turning to Union lawmaking and cooperation between the European Court of Justice on the one hand and the national courts on the other, in particular cooperation with the national constitutional courts.

(signed) Dr. Kammerer

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