THE CONSTITUTIONALITY OF ELECTION THRESHOLDS IN GERMANY

Abstract

Germany is often thought of as the home of the hurdle or threshold requirement : parties that fail to obtain 5% of the votes in an election are excluded from sitting in Parliament. This idea has been widely copied throughout the world, although the level of 5% has not been chosen everywhere and various other variations on the theme exist. Recently, however, doubts have started to emerge in Germany itself about the hurdle. It remains constitutionally valid in federal and State elections, but the Federal Constitutional Court has recently held it invalid in European elections. Its decision deserves endorsement, although it had a range of justifications for holding the hurdle invalid – some remarkably insightful, some rather less praiseworthy.

1. Introduction

While many countries in which proportional representation is used have in their electoral laws, as a measure to prevent the multiplication of small political parties, a formal hurdle requirement expressed as a percentage of votes that must be won to obtain any representation – and some type of mathematical or "natural" minimum-percentage hurdle, however small, is implicit in proportional representation systems anyway – it is probably true to say that the "artificial" five-percent threshold in federal and State elections in Germany is the best known of the lot. Although it is not the oldest in

the world,[1] it is certainly well-established, having been introduced – undemocratically[2] – for the first national post-War elections in 1949 and maintained (with certain variations) ever since.

The essential shape of the mixed-member proportional system, as it is referred to in New Zealand which has adopted it,[3] consisting of one-half local constituency members and the other half of party-list seats distributed on a proportional basis, is quite well known. Section 1 (1) of Germany's *Federal Elections Act* describes the system as one of 'proportional representation combined with voting for a person' : an elector has two votes, one for a local constituency member and one which determines the proportionate make-up of the *Bundestag*. That second vote is therefore the decisive one as far as the final make-up of the legislature is concerned and is designed to ensure that proportionality is achieved by "correcting" the results from individual constituencies. Under s 6 (3), however, a hurdle of 5% is established, and parties are not eligible to benefit from second votes unless they reach it or, alternatively, win three individual constituencies. Section 2 (7) of Germany's *European Elections Act*, until held invalid by the decisions reviewed here, created a similar hurdle for European elections in Germany (without the exception for winning three constituencies, as there are no constituencies in the European elections).

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[1] Ernst Becht, *Die 5%-Klausel im Wahlrecht : Garant für ein funktionierendes parlamentarisches Regierungssystem?* (1990), 29, shows that the earliest hurdles were in certain Swiss cantons before the First World War – as high as 20% in Valais/Wallis. In Holland and Romania hurdles were introduced in 1917 and 1926 respectively. In Germany the only example before the Second World War (*ibid.*, 138-143) was in a law of the State of Württemberg in 1920, which was however declared invalid by the *Staatsgerichtshof* in March 1929 (RGZ 124, 1*) in proceedings brought by two parties including the Nazi Party. See further Hellmut Röhl, „Die Bekämpfung der Splitterparteien in Gesetzgebung und Rechtsprechung" DVBl 1954, 557, 559f.

[2] The Allied Military Governors, exercising their supreme authority in what was still an occupied country, put a hurdle into the elections law at the suggestion of the State Premiers, who were all from the larger parties – even though the indirectly elected Parliamentary Council, responsible for adopting an election law for the first Bundestag (after finalising its major work, the Basic Law itself), had omitted a hurdle from the electoral law after its Main Committee deleted from the draft Basic Law an affirmation of the constitutionality of a hurdle. See Velma Hastings Cassidy (ed.), *Germany 1947 – 1949 : The Story in Documents* (1950), 306-316; *Parlamentarischer Rat : Verhandlungen des Hauptausschusses* (*s.d.*), 9 February 1949, 629-631; JöR 1 (n.F.) (1951), 1, 352; Hans-Dieter Kreikamp (ed.), *Akten zur Vorgeschichte der Bundesrepublik Deutschland* Vol. 5 (1989), 314f, 490, 514, 526f, 530 fn 75, 550f; Michael Antoni, „Grundgesetz und Sperrklausel : 30 Jahre 5%-Quorum – Lehre aus Weimar?" ZParl 1980, 93, 93-97.
Ulrich Wenner, *Sperrklauseln im Wahlrecht der Bundesrepublik Deutschland* (1986), 105, draws the reasonable conclusion that, with the requirement for political parties to be licensed by the occupying powers about to cease in 1949, the hurdle was suggested to them by the State Premiers because the latter saw it as a useful means of replacing that entry barrier.

[3] For debates on the New Zealand hurdle, see *Report of the Electoral Commission on the Review of the M.M.P. Voting System*, 29 October 2012, Parliamentary Paper E.9/2012, 13; New Zealand Parliamentary Debates, House of Representatives, 24 June 2015, 4732-4749.

In the 2013 *Bundestag* election, two parties, the long-established Free Democrats and the novice Alternative for Germany, scored 4.8% and 4.7% of the vote respectively, and thus both just missed out on representation in the *Bundestag*. With these two parties both missing out by such narrow margins, along with the usual assortment of smaller parties missing out by bigger ones, about 15.7% of voters (6.86 million people) found that their votes had no effect because of the hurdle.[6] In past elections the figure for disregarded votes had generally hovered around three to six per cent.,[7] and this sudden jump clearly gives pause for thought about lowering the hurdle – not that that step is likely to appeal to the many detractors of the two parties which missed out in 2013, nor to the existing parties represented in the *Bundestag*.

The constitutionality of the five-percent hurdle in State and federal elections was confirmed by the Federal Constitutional Court as long ago as 1956 and 1957 respectively,[8] and it is generally thought that there is at present no prospect of any reversal of that decision.[9] The Court confirmed the hurdle, in the face of a challenge under the general right of equality in Art. 3 (1) of the Basic Law, on the well-known ground that the hurdle assisted in the construction of stable governments, but also because it aided in producing a legislature that was capable of legislating. Notably, given its reasoning in the

[6] See the figures at http://www.bundeswahlleiter.de/de/bundestagswahlen/BTW_BUND_13/veroeffentlichungen/BTW2013_Erg-Flyer_Internet.pdf

[7] http://www.bpb.de/politik/wahlen/bundestagswahlen/175680/die-fuenfprozenthuerde

[8] BVerfGE 4, 375; BVerfGE 6, 84. An overview of the early decisions may be found in Donald Kommers/Russell Miller, *Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed., 2012), 254f. In addition, in BVerfGE 48, 271, 276 the Federal Constitutional Court held that it was in order for a party to make reference to the hurdle in election campaigning (by, for example, urging people not to vote for a party which is unlikely to clear the hurdle, which would waste the vote).

[9] Martin Morlok, „Chancengleichheit ernstgenommen – die Entscheidung des Bundesverfassungsgerichts zur Fünf-Prozent-Hürde bei der Europawahl" JZ 2012, 76, 78; Rudolf Wendt, „Sperrklauseln im Wahlrecht?" in Matthias Ruffert (ed.), *Dynamik und Nachhaltigkeit des öffentlichen Rechts : Festschrift für Professor Dr Meinhard Schröder zum 70. Geburtstag* (2012), 438-443.
However, Hans Herbert von Arnim, „Was aus dem Urteil des Bundesverfassungsgerichts zur Fünf-Prozent-Klausel bei Europawahlen folgt" DöV 2012, 224, 226 says that the State hurdles might be vulnerable, particularly if State Premiers become directly elected, but I am not aware of any proposals to do that. A recent 4-3 decision of the State Constitutional Court of Schleswig-Holstein confirming the exception from the five-percent hurdle for national minority parties (the Danish party in that case) is noted in DöV 2014, 126 and available in English at http://www.schleswig-holstein.de/DE/Justiz/LVG/Entscheidungen/Dokumente/LVerfG_9_12_engl.pdf?__blob=publicationFile&v=4. All seven Judges expressly endorsed the general five-percent hurdle at State level despite the disagreement about the exception for minorities.
A better point is made by Haug, „Muß wirklich jeder ins Europäische Parlament? Kritische Anmerkungen zur Sperrklausel-Rechtsprechung aus Karlsruhe" ZParl 2014, 467, 487 and by Hans-Jürgen Papier, „Die Legitimität der Fünfprozentklausel" in Torsten Oppelland (ed.), *Das deutsche Wahlrecht im Spannungsfeld von demokratischer Legitimität und politischer Funktionalität* (Berlin 2015), 16-18 – namely, that now that about 16% of votes have failed in one federal election and two parties missed out so narrowly, it may be time for the legislature to consider whether the hurdle should be lowered. There is a constitutional requirement to keep the hurdle under review if circumstances change (BVerfGE 120, 82, 106). Clearly the case for doing so will be immeasurably improved if something similar happens at the next elections.

later cases to be considered here, the Court specifically rejected the argument that the constructive vote of no-confidence watered down the executive's dependence upon the legislature and thus the need for a five-percent hurdle : not only would the constructive-vote device not apply at the start of the legislative term or if a vacancy arose in the office of Chancellor by death or resignation – more importantly, the legislature still had to be capable of legislating, not merely selecting a government.[11]

Given the state of the law in Germany, this article does not deal directly with the constitutionally valid hurdle at State[13] and federal elections, but with European elections. For here the Federal Constitutional Court has recently struck down the hurdle, even one as low as 3%, on the basis that it infringed the basic right to equality.[14] Electoral equality requires that each citizen's vote should count equally as far as possible and not be arbitrarily disregarded and, from the parties' point of view, means equal opportunity for large and small, young and old. In making these decisions, the Court went so far as to reverse an earlier decision of 1979 which had held the hurdle valid in European elections.[15] The Court's point that European elections are different because the executive does not need the confidence of the elected legislature to retain office, making it less important to ensure the smooth functioning of the legislature than it is when the executive must retain the legislature's confidence, is particularly vulnerable to criticism in relation to the European Parliament given that the Court took a very minimalist view of the role of the Parliament, almost to the point of mis-stating its powers. Despite this defect in the reasoning, the decision as a whole, it will be argued here, can be justified on other grounds.

There are at least two goals that might be pursued by hurdles : ensuring the workability of the legislature and reducing the number of parties competing with the established parties by increasing entry barriers.[16] First, electoral hurdles over and above the "natural" mathematical hurdle (such as the quota in Hare systems) probably do enhance the functioning of the legislature, although the tendency to party concentration that appears to exist even in many modern democracies may mean that its

[11] BVerfGE 6, 84, 93f.
[13] Following the decision of 1998 in BVerfGE 99, 1, a different path of reasoning, focussing instead on the specific provisions for equality in elections found in Artt. 28 (1) and 38 (1) of the Basic Law for State and federal elections respectively, is applied in relation to State elections.
[14] BVerfGE 129, 300 (5% hurdle, European elections); BVerfGE 135, 259 (3% hurdle, European elections). There was also a later decision on costs (BVerfGE 137, 345).
[15] BVerfGE 51, 222.
[16] Tatiana Kostadinova, "Do Mixed Electoral Systems Matter? : A Cross-National Analysis of the Effects in Eastern Europe" (2002) 21 *Electoral Studies* 23, 27.

efficacy and the need for it are exaggerated – how the *Bundestag* would look today if there had never been a five-percent hurdle in Germany is an interesting counter-factual which one day political scientists or historians may wish to investigate. It is not necessarily the case that the opposite tendency, that of fragmentation, would have prevailed in Bonn as it did under Weimar.[17] At any rate, to the extent that electoral hurdles do significantly enhance the functioning of the legislature and thereby also of the executive, they serve a legitimate end. The question is whether the price paid for doing so is too high.

There can be no serious doubt, however, that the parties already represented in Parliament welcome a further consequence of the five-percent hurdle, namely the strangling of some start-ups at birth – and restricting competition for the sake of reinforcing an oligopoly is patently not a legitimate goal in a pluralistic electoral system. For it is not just in counting the vote that smaller parties are disadvantaged : a voter's vote is completely disregarded if given to a party that falls at the hurdle, and most people who take the trouble to vote in a system where voting is not compulsory will hardly be content with that.[18] Thus, one of the major hurdles confronting start-ups and smaller parties as a whole is to convince voters to risk a wasted vote. Reinforcing the existing parties' cartel has been an ulterior purpose of the hurdle since it was introduced at federal level in 1949.[19] It would be naive to believe that the major parties introduced and defended the hurdles for European elections with an eye solely to those elections, rather than also to the elimination of new competitors which without a hurdle

[17] Would a hurdle have saved Weimar? Mathematically it produces very mixed results if applied to the historical election results and leads sometimes to no major change, sometimes to the strengthening of governments in office and sometimes even to their weakening : Becht, above n 1 at 147-149; and see Walter Pauly, „Das Wahlrecht in der neueren Rechtsprechung des Bundesverfassungsgerichts" AöR 123 (1998), 232, 255f. However, wholly mathematical calculations ignore the fact that voters are less likely to waste their votes on parties that may completely fail to gain representation because of a hurdle (below, n 18) and thus the true effect of a hurdle on the actual behaviour of the voters is not easy to determine : Antoni, above n 2 at 105-109.
With a hurdle, Weimar might have collapsed anyway but been replaced not by the Nazis but by something less vicious. The Nazi Party, actually represented in the *Reichstag* from 1924, did not manage more than 5% of the votes for the *Reichstag* until 1930. That long wait for national representative success might have lowered its profile and depleted its finances to such an extent that it would not have been available to take over after the collapse. On the other hand, the Nazi Party might have kept its head above water long enough through its State representation to last until it surmounted the hurdle federally.

[18] Markus Kotzur & Felix Heidrich, „Ein (Bären-)Dienst an der europäischen Demokratie? Zur Aufhebung der Drei-Prozent-Sperrklausel im Europawahlrecht" ZeuS 2014, 259, 264; Martin Morlok/Hana Kühr, „Wahlrechtliche Sperrklauseln und die Aufgaben einer Volksvertretung" JuS 2012, 385, 389; Rainer Wernsmann, „Verfassungsfragen der Drei-Prozent-Sperrklausel im Europarecht" JZ 2014, 23, 25.

[19] See above, n 2.

might first obtain a foothold and a platform enabling them to attempt to surmount the hurdle in federal or State elections.[20]

Assessing the Court's decision is no easy task given that there are not only good arguments on both sides, but also because doing so quickly leads one into the unsurprisingly complicated and contested terrain of democratic theory and the purposes of representation. Not only that : the European Parliament's role is still developing; it represents a diverse range of countries, while Germany is only one (although the biggest); and it has a role (how extensive will be indicated below) both in selecting the E.U.'s "government" and in legislating. In this field, however, modern thought tends strongly towards promoting inclusion and diversity in the representation of interests and viewpoints, both in general and as a means of ensuring that historically disadvantaged minorities' interests are not neglected.[21] As the majority of the Supreme Court of Canada said in *Figueroa* v. *Canada*,[22] in which it struck down certain other disadvantages imposed upon small parties, the promotion of diversity in the electoral system is intrinsically valuable. Accordingly the strongest justification is needed for any provision that restricts diversity, and the conclusion drawn here will be that such a justification does not (yet) exist.

[20] Nevertheless some scholars do claim that the members of the *Bundestag*, in deciding on the electoral system for the European Parliament, are not deciding *in propria causa sua* : Bernd Grzeszick, „Demokratie und Wahlen im europäischen Verbund der Parlamente : zum Urteil des BVerfG über Sperrklauseln bei Wahlen zum europäischen Parlament" EuR 2012, 667, 672f. This is technically true given that one cannot be a member of both Parliaments at the same time, but the connexions between national and European parties are so close that this technicality cannot decide how closely we examine laws regulating the electoral system for pro-existing-party bias.

[21] See, for example, the overview in Nadia Urbinati/Mark Warren, "The Concept of Representation in Contemporary Democratic Theory" (2008) 11 *Annual Review of Political Science* 387.

[22] [2003] 1 SCR 912, 935.

2. The Court's decisions

a. European hurdle upheld in 1979

The failed 1979 challenge was brought by a private citizen and an obscure political party whose name translates as "League for Free Peoples". They relied on the principles of equality referred to earlier (electors were not treated equally if their votes were disregarded, and smaller parties were also not treated equally by the hurdle). The justification for the hurdle at national level, the avoidance of excessive fragmentation, was, they claimed, also not available because seven of the nine member states had no such rule in their electoral legislation and accordingly the German provision would do little to prevent fragmentation at the European level.

It is certainly paradoxical that the Federal Constitutional Court nevertheless upheld the five-percent hurdle in 1979 for European elections only to strike it down in 2011 (and then go on to strike down even a three-percent hurdle in 2014). The European Parliament has become more, not less central to the governance of the European Union, as it now is, in that period, in ways which will be considered in detail later; at first sight it seems that, as the European Parliament's functions expand, the Court demands less coherence and capacity to function from it rather than more.

In 1979 the Court certainly could not refer to any need for the European Parliament to be in a position to elect or confirm a government, and its role in legislation was much more restricted than it is today. What is now known as the ordinary legislative procedure, in essence agreement between Parliament and Council (the representatives of the national governments), did not even exist in 1979; rather, the European Parliament then had largely advisory and debating functions only. The standard arguments in favour of the hurdle were therefore not available, and the Court was reduced to relying upon generalities such as that 'if the popular assembly is divided into many small groups, the formation of a majority would be rendered more difficult or impossible'[23] – but how exactly, or indeed whether, such a lamentable state of affairs in the talking shop would have affected the overall functioning of the European Economic Community, as it then was, and its associated entities was not, and could not be

[23] BVerfGE 51, 222, 236.

explained. The Court did point to the fact that many of the Parliament's suggestions for amendments were adopted by the Commission, to Parliament's rights to ask questions of the Commission's members and to certain financial powers – not extending to a withdrawal of the means necessary to keep any essential functions in operation.[24] But in 1979 these considerations were nowhere near as strong as those in favour of the five-percent hurdle for the federal and State legislatures, which the government needs not only to get its legislation through but for its very existence.

However, for the Court in 1979 the Parliament's weakness was a reason to try to strengthen it through ensuring that it was not unnecessarily divided into microscopic groups :

> Community law contains, and demands to a great degree, special economic regulations and detailed rules; special expertise is needed to assess them adequately. In this, the Council and the Commission have an advantage to begin with having regard to the bureaucratic apparatuses which they can make use of. For this very reason it is necessary to create a counterbalance in the shape of a workable Parliament which is capable of [monitoring the other bodies].[25]

This reminds us incidentally that the European Parliament of the 1980s should not be entirely dismissed out of hand, despite its dearth of "hard" powers – not only talking, but also investigating and asking questions is not a pointless activity in an open society. It would be possible, at any rate, to put forward the view that the European Parliament, while it was establishing itself among European institutions after 1979 as a serious and democratically legitimate actor, needed to be as strong as possible, or at least not unduly weak owing to excessive fragmentation.[26]

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[24] BVerfGE 51, 222, 243-245.
[25] BVerfGE 51, 222, 247.
[26] While the Court did not say so, this perspective is implied by Johann Hahlen, „Europawahlgesetz verfassungskonform" DöV 1979, 283, 285 and expressly stated by Felix Arndt in Ulrich Karpenstein/Franz Mayer (eds.), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (2nd ed., 2015), 450.

b. Five-percent European hurdle struck down in 2011

In May 2011, the Court held invalid the five-percent hurdle in European elections provided for by s 2 (7) of Germany's *European Elections Act* on a challenge brought by several individual electors behind whom lay a number of small political parties such as the Pirates and the Ecological Democratic Party along with the campaigning group "More Democracy Inc.".[43] The question had become live again partly because of a decision in 2008 striking down a hurdle at local government level,[44] which will not be considered here owing to limitations of space. As the Court stated in its majority decision in 2011, seven parties (alongside the five large and medium-sized parties that were elected) had been excluded from representation in the European Parliament by reason of the hurdle at the previous elections, when without it they would have been elected. The majority pointed out that the European Parliament was already very diverse, and had at that time 162 parties; it was not obvious that matters would deteriorate if, instead, there were 169.[45] (As is well known, the parties group themselves, once they enter the Parliament, into larger organisations of more or less like-minded parties from the various countries of the Union.)

The Court referred to the strict standard of justification required for legislation that interfered with electoral equality. It emphasised the self-interest of the parliamentary majority and the temptation for it to attempt to secure its own power rather than serve the common good.[46] As always, it was necessary to consider not an abstract system, but the real circumstances of the body to be elected, and, as the plaintiffs had pointed out, it could hardly be overlooked that the German five-percent hurdle made a very minor contribution to reducing the number of parties in the European Parliament.

Furthermore, the European Parliament had developed the system for integrating numerous parties from different countries into broad ideological groups (of which there were seven at the time of the decision). Various political and financial incentives existed for parties to join a group, even if – or

[43] BVerfGE 129, 300.
[44] BVerfGE 120, 82 (prelude in BVerfGE 107, 286).
[45] Haug, above n 9 at 475 points out that the Court's decision is not capable of generalisation : if all European nations abandoned hurdles then the number of small parties might increase by forty or eighty. This may well be true, but the Court's answer would presumably be that in that case the constitutionality of the German hurdle could be re-assessed under those changed circumstances.
[46] BVerfGE 129, 300, 322f.

especially if – they had only a few representatives in the European Parliament. Experience and journal articles on the functioning of the European Parliament to which the Court referred had shown that this integrating system worked to a considerable extent, even when new countries joined the Union, and made parliamentary business manageable.

Studies had also shown, the Court said, that most votes in the European Parliament were decided by an agreement between the two largest groups, which together commanded a majority, and a few small parties would not be likely to disturb this. Nor would there usually be difficulties in negotiations with the Council and Commission over such things as legislation; while the European Commission's representatives do need to be able to count on a majority in Parliament, a few ungrouped members would not change this. The greater degree of consensus in the European Parliament was assisted by the fact that it was not divided along familiar adversarial government/opposition lines.

Above all, though, the five-percent hurdle was not suitable for importation from the *Bundestag* to the European Parliament because of their different functions.

> The five-percent threshold clause is justified in relation to elections to the German *Bundestag* largely because it is necessary to construct a stable majority for the election of a workable government and to maintain it in office, and this goal would be endangered if the Parliament were divided into many small groups. Therefore the legislator may qualify, to a certain extent, the aim of the system of proportional representation to ensure that voters' political opinions are represented as thoroughly as possible. A similar requirement does not exist under the European treaties on that level. The European Parliament does not elect a government which requires its continual support.[47]

The Court went on to consider this in detail : the budget, it said, could be approved unless the Parliament objected to it by a three-fifths majority,[48] and the approval of the Commission's President by the Parliament was a one-off affair.

[47] BVerfGE 129, 300, 335-339.
[48] BVerfGE 129, 300, 338f.

c. Three-percent hurdle also rejected

The *Bundestag* responded to this decision with a new law restoring the hurdle, but at the level of three per cent – a measure agreed to by all the parties represented there with the exception of the party called "the Left", a mixture of east German post-communists and left-deviationist former Social Democrats.[49] The legislation passed with a noticeable lack of debate and in a rush.[50] Perhaps the other parties were encouraged to hope that some Judges might defect to the other side if the hurdle were lower by the fact that the five-percent hurdle had been held unconstitutional in 2011 only by a 5-3 majority[51] – the minority simply took the obvious contrary view that without a hurdle there was a sufficient danger of disruption to the workings of the European Parliament and that its complete inability to function should not be required to justify a hurdle[52] – and there was even one near-dissentient in 2011 who, mysteriously, recorded only agreement with the decision but not with the reasoning, or at least not all of it.[53] The explanatory memorandum attached to the Bill, dated 4 June 2013, referred to the European Parliament's resolution of 22 November 2012[54] in favour of having the approaching election run with nominations of a lead candidate from each European party grouping (*Spitzenkandidaten* – the word also entered English discussion) and stated that this development had not been foreseeable at the time of the Court's 2011 decision. As a result of it, declared the explanatory memorandum, 'finding a majority in the European Parliament, as will be necessary, will become more difficult, as it can no longer be assumed that the previous parliamentary practice of building consensus between the two big parties, which regularly receive well over 60% of the seats, will be continued smoothly'.[55] No resort was had to imaginative alternatives to save the hurdle that are sometimes

[49] Debates of the German *Bundestag*, 13 June 2013, 31437.
[50] von Arnim, „Kritisches zur Kritik der Sperrklausel-Rechtsprechung des BVerfG" DVBl 2014, 1489, 1493f.
[51] Jennifer Prommer, Case Note to BVerfGE 135, 259, ZJS 2014, 317, 317.
[52] They did not say so in as many words, but the summary here, adapted from Schönberger, „Das Bundesverfassungsgericht und die Fünf-Prozent-Klausel bei der Wahl zum europäischen Parlament" JZ 2012, 80, 81, 83f, puts it concisely and accurately.
[53] BVerfGE 129, 300, 346. This near-dissentient left no record of the reasons for this difference (hence the inability to say on what point or points the difference arose), nor even of his or her name. This does occur in Germany occasionally with the intention of not detracting from the authority of the main judgment and given that there is no long tradition individual judgments there; nevertheless it is odd : Dirk Ehlers, „Sicherung der Funktionsfähigkeit des europäischen Parlaments mittels einer Sperrklausel im deutschen Wahlrecht" ZG 2012, 188, 188; Schönberger, above n 52 at 81.
[54] P7_TA(2012)0462.
[55] *Bundestag* Printed Paper 17/13705, 6. I have also consulted the *Bundestag* debates (above, n 49), but there is little illumination there. Accord Walter Frenz, „Die Verfassungskonformität der Drei-Prozent-Klausel für Europawahlen" NVwZ 2013, 1059, 1061.

suggested,[56] most notably the provision of an alternative vote to allow those votes that are initially given to parties that fall at the hurdle to be counted for the voter's second choice; this would of course come at the cost of some considerable extra complexity in printing the ballot paper and casting and counting the votes and also the danger of making it easier to vote for small parties in the knowledge that one's vote would not be wasted. The alternative vote might however also encourage voters to vote for joke parties or otherwise treat their primary vote as less important than it really is.[57]

The new hurdle was, as was only to be expected, again challenged by a motley collection of minor parties including the far-right National Democratic Party of Germany. The major parties' hope was, of course, that the three-percent hurdle would be low enough to pass constitutional muster but still high enough to achieve the most important objectives of the five-percent hurdle; whether its most important objective is the elimination of competition from start-ups or the avoidance of unworkability in the European Parliament may indeed be questioned. Why, we might ask, are German politicians so concerned with the workability of the European Parliament that they would run the risk of being rejected not once, but twice by the Court, especially given that Germany provides only a fraction of its members?

All cynicism aside, however, it is not possible to dismiss out of hand as a mere fig leaf the argument that things had changed because the European Parliament had begun pushing its claims for a greater share in power as part of the drive to reduce what is often referred to as the Union's democratic deficit.[58] Developments since the case have shown that there was something in the argument that things might change. In the 2014 election each larger grouping in the European Parliament put for-

[56] von Arnim, above n 9 at 225; Frank Decker, „Ist die Fünf-Prozent-Sperrklausel noch zeitgemäß? Verfassungsrechtliche und -politische Argumente für die Einführung einer Ersatzstimme bei Landtags- und Bundestagswahlen" ZParl 2016, 460; Joachim Linck, „Zur verfassungsnäheren Gestaltung der 5%-Klausel" DöV 1984, 884.

[57] Martin Morlok in Horst Dreier (ed.), *Grundgesetz – Kommentar* Vol. II (3rd ed., 2015), 1101; Wendt, above n 9 at 455f.

[58] However, Wernsmann, above n 18 at 26 disagrees, and in „Der Spiegel", 3 June 2013, 15, a group of public teachers of law published an appeal to the legislature to respect the authority of the Court's decision of 2011. Frenz, above n 55 at 1060f, dissented.

ward a *Spitzenkandidat*, and the European Parliament succeeded in having the winning *Spitzenkandidat*, Jean-Claude Juncker, appointed by the Council as President of the Commission, over strong resistance from some heads of national governments, most notably the British Prime Minister.[59]

Nevertheless, the Court was not impressed by the move towards *Spitzenkandidaten*, even though it had occurred since the 2011 decision, nor by the reduction of the threshold to 3%. The Court delivered a short but dense majority judgment (again of five Judges; three dissented) in which it repeated its earlier jurisprudence on the question, claimed that there was no provision still for the Commission to be dependent upon the continued confidence of the Parliament and came up with an interesting new argument : if the European Parliament were rendered unworkable by the lack of a threshold, that could be corrected by national Parliaments. It could not be rendered unworkable to such an extent that it would not even be able to change its own electoral method to render itself workable again, as might happen with a national legislature – for the European Parliament did not set its own rules. Thus there was no reason to take prophylactic measures unless they were clearly required. It was therefore better to await developments and see what the changes to take effect at the 2014 election would achieve in practice, both as regards the Parliament's composition, procedures and style and as regards the voters' behaviour faced with a more powerful role for their elected Parliament.[60]

Although the Court again split 5-3, again only one Judge, Peter Müller, published a dissenting judgment explaining his views. (The two previous dissentients were no longer on the Court.) Mostly Justice Müller simply contradicted the conclusions of the majority, but, although he had been a State Premier for twelve years, it is difficult to agree with the view he expressed[61] that the parties in the *Bundestag* setting the rules are not those immediately affected by them and thus there was less need to invalidate self-serving decisions. For it is not only the case that the large parties also run teams for the European elections; he did not consider whether they might be concerned to ensure that their status is not challenged at the national level by smaller parties that obtain a foothold and a profile in German political life through the European elections.[62]

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[59] See, for example, Hermann Schmidt *et al.*, "Does Personalisation Increase Turnout? *Spitzenkandidaten* in the 2014 European Parliament Elections" (2015) 16 *European Union Politics* 347, 348-352.
[60] BVerfGE 135, 259, 291, 296.
[61] BVerfGE 135, 259, 303f.
[62] See also above, n 20.

A look at the legal basis for the European Parliament's voice in the choice of the Commission President highlights why the Court was cautious but also leads us to question some of its reasoning. Article 17 (7) of the Treaty on European Union indicates how the Commission's President and members are to be elected, more or less :

> Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.
>
> […]
>
> The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.[63]

The Court was not willing to assume that these ambiguous words about the powers of the European Parliament in relation to the European Council (the combined heads of the national governments) in the selection of the President of the Commission (the Union's government/cabinet) would have any particular effect until they had been introduced and tested by experience. Any changes in style as a

[63] 'As from 1 November 2014, a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union' – Article 16 (4) of the same Treaty.

result of these studied ambiguities might take some years, even several legislatures, to reveal themselves – as one of Germany's leading M.E.P.s, Reinhard Bütikofer of the Greens Party, had stated in the oral proceedings before the Court.[64]

The functions of the European Parliament and its relationship to the Commission as the Union's "government" remain a story in progress. The European Parliament has won the first round by the successful implementation of the *Spitzenkandidat* system in 2014, but the battle is not necessarily over. Not so the 2014 German elections to the European Parliament : held without a threshold, they saw success for thirteen parties, seven of which obtained only one seat. Only five parties would have succeeded with a five-percent hurdle and only six with a three-percent hurdle (the Free Democrats being that sixth party; they obtained three seats with 3.4% of the vote). The least popular successful party achieved only 0.6% of the vote.[67] That minuscule percentage elected Martin Sonneborn from the joke party "The Party", which has called for re-building the Berlin Wall and has a youth wing called the Hintner Youth (named after one of its leading functionaries) with the official salutation "Hi Hintner!" and a uniform modelled on that of the old East German communist youth organisation. Nevertheless, representatives of five of the seven single-M.E.P. parties joined one of the supra-national European groupings.[68] They included small but perfectly serious parties (including some successful plaintiffs), such as the Pirates, the Independent Electors, the Alternative for Germany and the Ecological Democratic Party – as well as one far-right member.

3. Assessment

While the striking down of the hurdle should be welcomed as a means of promoting inclusion and diversity, there are a number of points where the Court has left itself vulnerable to justified criticism. The majority judgments of 2011 and 2014 are, first of all, remarkable for their complete failure to

[64] BVerfGE 135, 259, 295.
[67] See Andreas Holzapfel (ed.), *Kürschners Handbuch : Europäisches Parlament – 8. Wahlperiode 2014 bis 2019* (2014), 2, 12.
[68] von Arnim, above n 50 at 1500; the fears were held by such as Haug, above n 9 at 475f. Nor have the two largest parties lost their joint majority – at least not yet – with a consequent reduction in the ability of the Parliament to function and jeopardisation of the European project, as was feared by Walter Frenz, „3%-Klausel als europäischer Mindeststandard beim Wahlrecht" DöV 2014, 960, 961.

engage with the 1979 decision upholding the five-percent hurdle, which is barely mentioned. It is true that there is officially no doctrine of binding precedent in Germany. While § 31 (1) of the *Federal Constitutional Court Act* reverses this inherited position somewhat in relation to that Court and declares that its decisions 'bind […] all Courts', the Court is not formally bound by its own decisions despite this statute.[69] It is nevertheless remarkable that the decision of 1979 is considered only in the judgment of the two dissenters, Justices di Fabio and Mellinghoff, who make the point that the majority, 'despite important increases in the functions of the European Parliament and its political importance',[70] reverse the decision of 1979. It is unusual enough for the German Federal Constitutional Court to reverse itself;[71] an explanation, at least, was certainly in order.[72]

Secondly, the European *Direct Elections Act*, which sets the framework for the electoral legislation of the individual countries, provides in Article 3 that 'Member States may set a minimum threshold for the allocation of seats. At national level this threshold may not exceed five per cent of votes cast.'[73] In addition, on 22 November 2012 the European Parliament passed a resolution calling on member countries to establish, under Article 3, 'appropriate and proportionate minimum thresholds for the allocation of seats so as to duly reflect the citizens' choices, as expressed in the elections, while also effectively safeguarding the functionality of Parliament'.[74] The *Bundestag* made specific reference to this resolution and Article 3 in its explanatory memorandum introducing the three-percent hurdle.[75] It is of course true that German electoral legislation must be judged under German constitutional

[69] See Robert Alexy and Ralf Dreier, "Precedent in the Federal Republic of Germany" in N. MacCormick and R. Summers (eds.), *Interpreting Precedents : A Comparative Study* (1997), 26f, 48.
[70] BVerfGE 129, 300, 346f. See also Jörg Geerlings/Andreas Hamacher, „Der Wegfall der Fünf-Prozent-Klausel bei Europawahlen" DöV 2012, 671, 677.
[71] Justin Collings, *Democracy's Guardians : A History of the German Federal Constitutional Court 1951 – 2001* (2015), 303.
[72] Schönberger, above n 52 at 85. Alexy & Dreier, above n 69 at 57, call 'silent overruling' infrequent and something that 'might well be criticised by legal scholars as not meeting appropriate standards of juristic rationality, which includes consideration of precedent'. One possible justification that the Court might have referred to is suggested by Wernsmann, above n 18 at 25 : in the 1979 election only one party fell at the hurdle, whereas in 2004 nine and 2009 seven parties did, and so the intensity of the distortion of the electors' choices was much greater.
[73] Official Journal of the European Communities, 21 October 2002, L283 – available on line at : http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002D0772&rid=7
According to „Der Tagesspiegel", 8 November 2016, 10, there are again thoughts of a unified European electoral law for E.U. elections, and including a hurdle of 3% to 5%. Only time will tell whether this move, led, according to the report, by the German government, will come to anything.
[74] P7_TA(2012)0462, para. 4.
[75] *Bundestag* Printed Paper 17/13705, 6, 8 – referred to above, n 55.

law;[76] as a decision of the Council (that is, the combined national heads of government), Article 3 is itself open to criticism that it represents a big-party cartel, while a parliamentary resolution is not binding on anyone. Nevertheless, European legislation expressly authorises, and a resolution of the Parliament to which the election is held expressly calls for, what the German Court has now found invalid for Germany![77] And many European countries (although not the United Kingdom or Spain) do indeed have such a hurdle, while the smaller ones such as Luxembourg and Estonia do not need one as they have so few seats that a substantial "natural" hurdle exists anyway.[78]

Thirdly, the Court should be anxious not even to appear arguably to say to voters that the European Parliament is not as important as a real parliament. It is tempting to see the Court's two decisions as evidence that it has a somewhat negative assessment of the European Parliament as a body which does not really deserve its name.[80] Despite some utterances of the Court in the *Lisbon Treaty Case* of 2009 which indicate that it does indeed perceive qualitative differences between national parliaments and the European Parliament both in theoretical terms and in terms of representativeness,[81] such a conclusion about the present judgments would be superficial, and the majority of the Court should be taken at their word. In the media, however, it is easy to find statements such as one in the leading

[76] Thomas Felten, „Durfte das Bundesverfassungsgericht die Drei-Prozent-Hürde bei der Europawahl überprüfen? Eine Bestimmung des Kooperationsverhältnisses zwischen Bundesverfassungsgericht und Europäischem Gerichtshof in Bezug auf die Überprüfung von Sperrklauseln bei der Europawahl" EuR 2014, 295, 306. Indeed, in BVerfGE 123, 267 the Federal Constitutional Court famously tested the Lisbon Treaty itself against the requirements of German constitutional law (and affirmed these principles in NJW 2016, 2473). In BVerfGE 104, 214, 218f the Court held that whether a political party was to be prohibited as unconstitutional and thus rendered unable to take part in European elections in Germany was a matter of German and not European law. Nevertheless some scholars argue that the Federal Constitutional Court should have sent the case to the European Court of Justice : Silvia Pernice-Warnke, „Das Urteil des Bundesverfassungsgerichts zur Drei-Prozent-Sperrklausel im Europawahlrecht – bundesverfassungsrechtliche und europarechtliche Fragestellungen mit Prüfungsrelevanz" Jura 2014, 1142.

[77] Bernd Grzeszick, „Weil nicht sein kann, was nicht sein darf : Aufhebung der 3%-Sperrklausel im Europawahlrecht durch das BVerfG und dessen Sicht auf das europäische Parlament" NVwZ 2014, 537, 538; Grzeszick, above n 20 at 675; Schönberger, above n 52 at 82; Wernsmann, above n 18 at 24.
The European Courts have as yet not passed judgment on a hurdle for European elections (Felix Arndt in Karpenstein/Mayer (eds.), above n 26 at 450), although the European Court of Human Rights approved a hurdle as high as 10% at national level in *Yumak* v. *Turkey* (2008) 48 EHRR 61.

[78] Felten, above n 76 at 302f, 307; on the position in national elections, see *Yumak* v. *Turkey* (2008) 48 EHRR 61, [64], [129].

[80] Kotzur/Heidrich, above n 18 at 261, 270. Even some would-be-Machiavellian suggestions have been made on the basis of its decisions on the hurdle, such as that the Court is full of Eurosceptics or concerned only to bolster its own power by weakening Europe : these are to be found in Haug, above n 9 at 477 and are dealt with in von Arnim, above n 50 at 1495; Oliver Lembcke/Enrico Peuker/Dennis Seifarth, „Wandel der Wahlrechtsrealitäten – zur Verfassungswidrigkeit des § 2 Abs. 7 EuWG" DöV 2012, 401, 401.

[81] BVerfGE 123, 267, 374f, in which the Court pointed to the limited representativeness of the European Parliament, compared it to a second chamber like a federal Senate and noted the fact that it did not represent a single people but a collection of separate peoples.

serious newspaper of Berlin to the effect that the Federal Constitutional Court has held that there is no hurdle for European elections because the European Parliament, 'unlike the *Bundestag*, is only on its way to becoming a proper legislature'.[82]

It is certainly sometimes, perhaps often, a delusion of grandeur to think that Courts shape public discourse by sending messages to the public through their judgments. Most people do not read Courts' decisions. In this case, however, there may be something in the idea that the wrong message could be received : many German voters know of the five-percent hurdle, and under voluntary voting that translates into even more voters. The Court's decision was also extensively reported in Germany only a few months before the 2014 election, and continues to be mentioned in the press from time to time.[83] While very well-informed voters will also know of the present limits and future possibilities of the European Parliament, those who do not study the subject intensively will hardly be motivated to vote,[84] or to cast a serious vote, if they believe that the highest Judges of their country consider the European Parliament a second-class outfit.

It is already the case that voters tend to use the elections to the European Parliament to experiment with political parties outside their usual range of choices, for reasons that may well include a perception that the election is of lesser importance, or merely as a convenient opportunity to give their national government a swift kick in the pants ("second order elections").[85] It is quite legitimate for voters to experiment with new parties, but that should not happen because they consider the elections or the legislature to be elected second-rate. This is particularly so for a body such as the European Parliament, which is still in the process of developing its powers and which, like most youths, wants and needs above all to be taken seriously. And the youth's promise should also not be forgotten. The

[82] „Der Tagesspiegel", 1 November 2015, 8, available on line at : http://www.tagesspiegel.de/themen/agenda/wahlrechtsreform-in-der-eu-die-kleinen-sollen-draussen-bleiben/12531630.html
[83] See above, n 82, for an example.
[84] Yet there was a slight increase between 2009 and 2014 in participation in European elections in Germany (from about 43% to 48%). Pernice-Warnke, above n 76 at 1151f even suggests that this might be because of the Court's decision of 2014, but far more likely is natural variation and/or the *Spitzenkandidat* system.
[85] Jan Hoffmann, „Ohne Hürden? Europawahlen" NVwZ 2014, 630, 630; David Judge & David Earnshaw, *The European Parliament* (2nd ed., 2008), 73-76; Schmidt *et al.*, above n 59 at 349; Ingeborg Tömmel, *The European Union : What It Is and How It Works* (2014), 157.

Federal Constitutional Court should be looking to the future of the Parliament as a major and the only directly elected organ of the European Union with growing functions.[86]

The idea floated by the Court in the 2014 decision that any unworkability in the electoral method can be corrected by outside bodies is much more worthy of endorsement – in Europe, we shall not have the situation in which Parliament becomes so unworkable that it cannot make itself workable again. It would have been better if the Court had hit on this idea from the beginning, in 2011, rather than started with the pronouncement that the European Parliament's powers are more limited than those of a national legislature, which may in turn imply that voting for it is a less serious task or may be used for extraneous purposes such as expressing a view on the government of the voter's nation.

Fourthly, finally, and most importantly, it must be questioned whether the European Parliament is indeed as limited in its powers as the Court depicts it to be. The first point under this heading is that the Court appears to be taking as its comparator a very much idealised picture of "real" national legislatures[87] : government has not changed hands on the floor of the *Bundestag*, for example, since 1982, when Dr Kohl became Chancellor. In the United Kingdom there was no successful vote of no-confidence between 1924 and 1979, and there has been none since then. To what extent this is due either to the electoral systems is not now the point; the point is that "real" national legislatures only very infrequently exercise their theoretical powers, the possession of which was apparently taken by the Federal Constitutional Court as the hallmark of a real parliamentary legislature.

Secondly, the Court does play down to a remarkable extent, almost although not quite to the point of mis-statement, the powers that the European Parliament does already have, both formal and informal.[88] As we saw above, the hurdle in federal and State elections was and remains justified not only by the need to elect and maintain in office stable governments, but also by the need for the legislature to be able to legislate. It is here that the Court's reasoning is most vulnerable, because since the

[86] Walter Frenz, Case Note to BVerfGE 135, 259, DVBl 2014, 512, 513, goes so far as to say that the Court's decision is 'less Eurosceptical than in fact nihilistic in the sense of a denial of all positive developments on the E.U. level'. A similar criticism in less striking language is made by Wendt, above n 9 at 448 and by Haug, above n 9 at 477.

[87] Having written this analysis I was glad to find a similar point being made by a German scholar : Schönberger, above n 52 at 84f.

[88] Haug, above n 9 at 476f.

Lisbon Treaty the gap between the scope of the legislative powers of the European Parliament and those of a "normal" national legislature has greatly narrowed. It is first of all necessary to remember that much legislating in the "normal" national polity of the Western European type is conducted by the executive by means such as delegated legislation, and the legislature may have some control over that as a matter of law but usually less in practice. We must not again compare a European reality to an idealised picture of national legislatures.

The European treaties do not list in one place the matters on which the European Parliament's consent is required; they are scattered throughout the Treaty on the Functioning of the European Union.[89] While it is certainly true that there are a few important areas, such as the common market and competition law (Title VII of the Treaty on the Functioning of the European Union), in relation to which Parliament's consent is not required, although it must still be consulted, the ordinary legislative procedure – as it is now named; previously it was "co-decision" – was greatly extended by Lisbon to forty-four additional fields, including such important questions as freedom, security and justice, the Euro, culture and agriculture, and is now decidedly the rule rather than the exception. As a leading commentary states, 'This extension will mean that both the European Parliament and the Council, in order to be efficient, will have to agree to adopt more Acts during the first reading'[90] rather than in later stages involving negotiation and compromise – and clearly a fragmented Parliament would have much greater difficulty in doing that.

On the question of the Parliament's confidence in the Commission, too, the Court is guilty of selectively emphasising the facts that most clearly support its argument rather than giving a rounded picture. A reader of its decisions of 2011 and 2014 whose attention wanders for a moment might miss the Court's fleeting mention of the fact that the Parliament does have the power to dismiss the Commission, although under Article 234 of the Treaty on the Functioning of the European Union it must do so by a two-thirds majority of votes cast (which must represent a majority of all its members).[91] The basis for this is the declaration in Article 17 (8) of the Treaty on European Union that 'The Commission, as a body, shall be responsible to the European Parliament'.

[89] Consolidated version of this Treaty (and the Treaty on European Union) in the Official Journal of the European Union, 26 October 2012, C326.
[90] Jean-Claude Piris, *The Lisbon Treaty : A Legal and Political Analysis* (2010), 119.
[91] This is mentioned briefly in BVerfGE 129, 300, 336.

It is certainly true that the hurdle of a two-thirds majority is a high one, but then there is a precedent from 1999 – more recently than any similar precedent in the United Kingdom or Germany, but before Lisbon, as this power pre-dates that agreement – in which the Commission resigned when it became apparent that such a no-confidence motion was likely to be passed.[92] It remains possible that a Commission might consider its useful life over if a no-confidence motion passed by an ordinary, although not a two-thirds majority. Indeed, it is more rather than less likely that such motions will be passed than in national parliaments because of the absence of strict party discipline, the looser relationship between reliably voting for one's party and retaining one's seat in Parliament, the greater degree of consensus that can be observed in the workings of the European Parliament and the fact that the Commission is still not quite fully the child of the majority in the Parliament.

And, finally, as far as the budget is concerned, the complicated procedure in Article 314 of the Treaty on the Functioning of the European Union amounts to a requirement of the agreement of the Parliament, or its representatives in a Conciliation Committee formed by an equal number of its representatives and those of the Council, to the Commission's proposals. The previous arrangement under which the Parliament had the last word on non-essential expenditure only has been abolished.[93] The Court, in its 2011 decision, referred to the fact that the budget can be approved even if Parliament does not agree to it;[94] this is true, but to prevent that from occurring under Article 314 (7) (a) Parliament need only make a decision to object; it is not as if its objection can peremptorily be overridden.

In short, the Court has adopted a decidedly one-sided account of the Parliament's legal powers in order to come to the conclusion it favours. It is certainly true that much of the activity that will occur in the Parliament will be the result of the Commission's suggestions, but could it not also be said of any national parliament that most of what it does originates within the executive?

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[92] Alan Dashwood *et al.*, *Wyatt and Dashwood's European Union Law* (2011), 60; Richard Corbett, "The Evolving Roles of the European Parliament and of National Parliaments" in Andrea Biondi/Piet Eeckhout/Stefanie Ripley (eds.), *E.U. Law after Lisbon* (2012), 250f.

[93] Piris, above n 90 at 120.

[94] See above, n 48.

4. Conclusion

In conclusion, one further point made by the dissenting Justices di Fabio and Mellinghoff in the 2011 decision[95] should be mentioned : it may be that changes in technology have made overcoming an electoral hurdle easier than it once was. It is unfortunate that, if there is any empirical research to support that claim, it was not mentioned by the dissenters, but it is certainly plausible to hypothesise that life is easier for a start-up than it once was because of the greater ease of communication that has developed over the last twenty years or so. In Germany, the Pirate Party is at least one recent example of such a start-up quickly garnering enough support, partly through its adeptness with technology, to win parliamentary seats in some States despite five-percent hurdles (although it almost as quickly lost much of its support again, for reasons that have nothing to do with the issue under discussion here).[96] On the other hand, the number of opinions and the volume of information now available make it difficult for people to have their voices heard above the din, so it is by no means inevitable that matters have developed precisely as the two dissenters suggest.

Assessing the majority's decision is difficult because much of the reasoning that it employs is, as we have seen, one-sided and thus fragile. As this article has attempted to demonstrate, the Court's reasoning, particularly in its decision of 2011, sends the wrong message and may well be misunderstood as a decision that European elections are of lesser value. It is also based on a one-sided picture of the Parliament's role. The preferable line is that essayed in 2014, namely that any dysfunction in the European Parliament absent a hurdle can be corrected from outside that body, in the national legislatures, and thus will not be self-perpetuating. On that basis, the decision deserves qualified and provisional endorsement at least on the basis of the present functioning of the European Parliament. The decision has enhanced inclusiveness and diversity in representation and, as we have seen, there has been little to no reduction in the workability of the European Parliament, with five of the seven extra voices added to it joining the existing system of groupings.

[95] BVerfGE 129, 300, 350f.

[96] Geerlings/Hamacher, above n 70 at 676. It was also one of the parties that received one seat in Germany's European Parliament elections held without the hurdle in 2014.

If the German legislature were really concerned solely with the functioning of the European Parliament it would investigate whether it is technically and legally possible for it to provide that a party cannot receive German seats if it does not belong to a grouping in the European Parliament that obtains at least a minimum percentage of the vote across Europe, or perhaps a minimum number of seats in other countries. Given that a German party might obtain more than 5% in Germany but refuse to join a grouping, or conversely obtain less than 3% or 5% but already be a member of a grouping,[97] a three-percent or five-percent hurdle in Germany alone does not direct itself clearly to its target of reducing fragmentation in the European Parliament (that is, unless there is an ulterior motive related to the shape of the domestic party landscape).

Although the national and State hurdles seem too well-entrenched to be the subject of any constitutional doubt,[98] it may well be that the Court will be faced with these issues again in a few years. If it turns out that the European Parliament does continue to strengthen its position markedly in relation to the other institutions, the Court's one-sided picture of its operation will be out of line not merely with the wording, but with the practice. Will the Court, in such a case, be willing to admit that it got it wrong in 2011 and 2014 by looking at the past and present rather than the foreseeable future role of the European Parliament, and then ponder anew whether the law should now allow for a hurdle in the European elections – just as it has told the legislature that it must adjust its electoral law as electoral realities change?[99] If it turns out that a high percentage of votes again is wasted owing to the hurdle at the next *Bundestag* elections due in the second half of 2017, will this lead to a challenge and a re-think of the hurdles at national level? Finally, what impact will – and should – Brexit and the rise of populist parties currently being observed in many European countries have on the shape of the European Parliament and the question of a hurdle?

[97] Arndt in Karpenstein/Mayer (eds.), above n 26 at 450f.
[98] Although not everyone agrees : see above, n 9.
[99] See above, fn 9.