

CAN ELECTORAL INEQUALITIES  
BE LEGALLY JUSTIFIED?  
ANALYSIS OF BELGIAN, BRITISH AND GERMAN LAW  
THROUGH THE  
EUROPEAN COURT OF HUMAN RIGHTS CASE LAW\*

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“By equality of suffrage, is meant equality of effect and value,  
as between the suffrage of one man and the suffrage of another.”  
Jeremy BENTHAM<sup>1</sup>

THE election is an instrument which enables a community to choose one or several persons whom it entrusts with a political mandate.

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<sup>1</sup> J. BENTHAM, Radical Reform Bill, [1819], in: J. BOWRING (dir.), *The work of Jeremy Bentham*, vol. 3, Edinburgh, William Tait, 1843, Preliminary explanations.

When used at the scale of a democratic state, the election aims at reducing millions of different personal wills into a unique decision<sup>2</sup>.

This reduction is one of the main aims of the election: a workable number of representatives can be selected while taking into account the wills of the governed people. Even if, theoretically, democracy does not necessarily imply the organisation of elections - on the contrary, the pure ideal of democracy requires the direct exercise of political power by the people -, there is no contemporary democratic state without elected political bodies<sup>3</sup>. In the current circumstances it would therefore be fair to assert, "elections are a necessary precondition for democracy"<sup>4</sup>.

Whilst a key instrument of every democratic state, the election is also the cause of difficulties. Significantly, the extent of each voter's influence can be mitigated by the presence of other voters with differing views. This means that, for every election, there is a share of influence, and this in turn could be more or less equal. The manner in which electoral influence is distributed between the governed people depends mainly on the content of election law.

Through a comparative legal research, based on Belgian, British and German law as well as on a comprehensive definition of election law, it has been possible to evaluate the trends of this distribution of power. As it will be shown in this contribution, it appears that some legal rules tend to distribute the faculty to influence the composition of the elected assemblies equally among the governed people, while others tend to distribute it unequally. The primary goal of the study is therefore to examine if the identified inequali-

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<sup>2</sup> See G. SARTORI, *Théorie de la démocratie*, Paris, Armand Colin, 1973, 13.

<sup>3</sup> Several scholars think that the establishment of a direct democracy is simply impossible (see G. SARTORI, *op. cit.*, 22, 57, 203; A. LIJPHART, *Electoral systems and party systems*, Oxford, Oxford University Press, 1994 [reprinted: 2000], 1; D. NOHLEN, *Wahlrecht und Parteiensystem*, 6<sup>th</sup> edition, Leverkusen, Budrich, 2009, 28; T. SHAW, Max Weber on Democracy: can the people have political power in modern states?, *Constellations*, 2008, 33-45).

<sup>4</sup> C. MORRIS, *Parliamentary elections, representation and the law*, Oxford and Portland, Hart, 2012, 1.

ties are legally justified or are undemocratic tools that merely help existing rulers stay in power. This analysis is based on a thorough examination of the case law of the highest Belgian, British and German courts and of the European Court of Human Rights.

This article aims at presenting some of the results of this study. It is divided into five sections: in the first, we will describe in detail the framework of the analysis (*I*); in the second, we will discuss the key concepts of the work, *i.e.* the notions of equality and of distribution of electoral influence (*II*); the following two sections will deal with rules that tend towards equal and unequal distribution of electoral influence (*III* and *IV* respectively); and finally, the question of whether electoral inequalities can be legally justified will be addressed (*V*).

#### I. FRAMEWORK OF THE COMPARATIVE LEGAL STUDY

The research presented in this article concerns election law and the equality principle in three European legal systems, *i.e.* the Federal Republic of Germany, the Kingdom of Belgium and the United Kingdom.

The choice of these particular countries is motivated firstly by their common features. All three are members of the Council of Europe and in this role have ratified the First Protocol to the European Convention on Human Rights, of which Article 3 is important in the field of election law<sup>5</sup>. Another common characteristic is that they all have parliamentary systems, with the formation of the government depending on the composition of one of the Houses of the parliament: the *Bundestag* in Germany, the House of Representatives (*Chambre des représentants*) in Belgium and the House of Commons in the United Kingdom. The law which rules the elections of these assemblies constitutes the principal material of the research<sup>6</sup>.

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<sup>5</sup> See below in this section.

<sup>6</sup> These rules can be found in several legal documents: see below, section I.

Secondly, the choice of countries is also motivated by the fact that these legal and political systems are different on some important points relating to elections, which builds a basis for comparisons in the studied field. For example, UK law organises the 'first-past-the-post' system in small constituencies, whilst German and Belgian law have opted for differing types of proportional systems.

The study summarised here uses a comprehensive definition of election law in order to try to tackle the electoral process as a whole<sup>7</sup>. This approach differs from other analyses in the literature<sup>8</sup>.

From the perspective of substantive law, three categories of electoral legal rules have been distinguished. The first group includes rules determining who can take part (actively or passively) in the electoral process. The legal conditions to be fulfilled by anyone who wishes to belong to the electorate or to become eligible as

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<sup>7</sup> The original work also has a historical perspective that cannot be fully reflected in this short article. Not only is there an analysis of current election law, but also its evolution from the 19<sup>th</sup> century until the present. The beginning of the 1830's saw huge political changes in Belgium and the United Kingdom; the Belgian Constitution came into force in 1831 and the First Reform Act was adopted in the following year. This Act is therefore used as a time-reference for the delimitation of the study framework. In the case of Germany, the Federal Republic was built more recently (1948) than the other studied states. However, elections had already been organised for a long period before the adoption of the Basic Law (*Grundgesetz*); accordingly, the political ancestors of the *Bundesrepublik* - the Kingdom of Prussia (*Königreich Preußen*), the German Empire (*Deutsches Reich*), the Weimar Republic (*Weimarer Republik*) and the Third Reich (*Drittes Reich*) - have been taken into consideration.

<sup>8</sup> Some other interesting studies do not cover such a large definition and focus on more specific aspects (see not. H.-C. JÜLICH, *Chancengleichheit der Parteien. Zur Grenze staatlichen Handelns gegenüber den politischen Parteien nach dem Grundgesetz*, Berlin, Duncker & Humblot, 1967; W. BAUSBACK, *Verfassungsrechtliche Grenzen des Wahlrechts zum Deutschen Bundestag*, Frankfurt, Peter Lang, 1998; A. KISSLINGER, *Das Recht auf politische Chancengleichheit*, [PhD dissertation, University of Jena, 1998], Baden-Baden, Nomos, 1998; M. WILD, *Die Gleichheit der Wahl. Dogmengeschichtliche und systematische Darstellung*, Berlin, Duncker and Humblot, 2003).

member of an assembly are relevant in this respect. The laws regulating the selection and presentation of candidates have been classified in the same category. The second group of electoral legislation covers the formation and expression of opinion by the participants. The period preceding the vote, which includes issues such as media access during the campaign and the (public and private) funding of political parties is the focus of attention here. Procedures which help guarantee the free and sincere expression of opinion, such as the secret ballot, are of great importance as well. The third and final group of rules constituting the definition of election law includes those which transform the opinions expressed by votes into the distribution of parliamentary seats among parties and candidates. In this group we find the laws stating electoral formula, determining other modalities such as electoral thresholds, and managing the delicate question of the geographical distribution of seats (including the adaptation of constituency boundaries). In other words, the election law gives answers to three very large questions: Who can participate in the electoral process? How is the development and expression of political opinions regulated? How are these opinions transformed into the distribution of parliamentary seats?

The definition of election law on which the analysis is based is also extensive from the perspective of procedural law. The study notes that the relevant rules can be issued by state authorities in several legal forms. Most are contained in legislative instruments and are partly codified in Belgium and Germany<sup>9</sup>. Executive power has a limited role in this field but can nonetheless complete the rules on several points. In both Belgium and Germany, some important electoral questions are directly ruled by the relevant formal constitutions<sup>10</sup>; there is no equivalent in British law for the United

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<sup>9</sup> This is notably the case for the Federal Election Act (*Bundeswahlgesetz*) in Germany and the Election Code (*Code électorale*) in Belgium. The relevant UK law is scattered in many documents among which the most important is the Representation of the People Act 1983 (1983 c. 2).

<sup>10</sup> See in particular Art. 38 and 39 of the German Basic Law as well as Art. 61 to 65 of the Belgian Constitution.

Kingdom has no formal constitution<sup>11</sup>. However, state election law is also complemented by non-state legal orders, namely the political parties. Through their internal constitutions or rule books, they influence the electoral process on some decisive aspects, especially on the selection of candidates. Political parties have been rightly regarded as “the flesh and blood which give life to the skeleton of the State”<sup>12</sup>. By taking into consideration the relevant election rules adopted by the main German, Belgian and British parties, the study aims at offering a more complete analysis and a legal examination of the whole electoral process. To this aim, previous and current constitutions as well as rule books of the main German, Belgian and British political parties have been collected, with the help of specialised university libraries and the parties’ archive centres in the three relevant countries<sup>13</sup>.

One of the main goals of the study was to discover legal justifications to explain the electoral inequalities subsisting in Belgium, Germany and the United Kingdom, and to then evaluate their compatibility with the standards of democracy. In this respect, some forms of justification have been identified in the case law of the highest national courts, such as the German Federal Constitutional Court (*Bundesverfassungsgericht*), the Belgian Constitutional Court (*Cour constitutionnelle*) and the Supreme Court for the United Kingdom. While important aspects of the relevant decisions of these national courts will be dealt with here, this article emphasises the standards set by the European Court of Human Rights, as they have a legal value not only for the studied countries but beyond them as

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<sup>11</sup> See V. BOGDANOR, *The new British Constitution*, Oxford, Hart, 2009, 8.

<sup>12</sup> D. BEATTY, Political Parties and Constitutional Institutions, in: T. FLEINER (ed.), *Five decades of Constitutionalism - Reality and Perspectives*, Basel, Geneva and Munich, Helbing & Lichtenhahn, 1999, 294. Similar comparisons have been suggested by many authors, including Walter Bagehot who wrote that political parties are “the vital principle of representative government” (W. BAGEHOT, *The English Constitution*, [1867], Oxford, Oxford University Press, 2009, 107).

<sup>13</sup> It is possible to access some elements of this collection through the following Internet link: <http://hdl.handle.net/2268/171092>.

well. In particular, all decisions and judgments of the Strasbourg Commission and Court related to Article 3 of the First Protocol to the ECHR (*right to free elections*)<sup>14</sup> have been meticulously examined in order to identify legal justifications for electoral inequalities and to sketch the limits of admissible inequalities in the election field<sup>15</sup>. The results of this analysis thus form one of the main points of interest of this paper.

## II. ELECTION LAW AND EQUALITY: THE DISTRIBUTION OF INFLUENCE

Even if the definition of democracy is disputed and dependent on cultural and historical factors<sup>16</sup>, it is largely admitted that in such regimes political power should as far as possible be equally shared among the governed people. According to Hans Kelsen, “[t]he essence of the political phenomenon designated by the term [‘democracy’] was the participation of the governed in the government”<sup>17</sup>. This fundamental idea was included in the preamble of the draft Treaty establishing a Constitution for Europe through a quotation of the Athenian politician and historian Thucydides: “Our Constitution

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<sup>14</sup> According to this article: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.

<sup>15</sup> Moreover, some decisions based on Articles 10 [freedom of speech] or 11 [freedom of association] of the ECHR have also been taken into account. For example, this is the case for decisions regarding the access to the media during election campaigns (Art. 10) and the internal organisation of political parties (Art. 11).

<sup>16</sup> See G. BURDEAU, *Démocratie*, *Encyclopaedia universalis*, Paris, Encyclopaedia universalis, 1996, vol. 7, 151-156, especially 151; J. VAN NIEUWENHOVE, *Parlement en democratie*, in: M. ADAMS / P. POPELIER (ed.), *Recht en democratie. De democratische verbeelding in het recht*, Antvers, Intersentia, 2004, 149-178, especially 150.

<sup>17</sup> H. KELSEN, *Foundations of democracy*, *Ethics*, 1955, 1-101, especially 2.

(...) is called a democracy because power is in the hands not of a minority but of the greatest number"<sup>18</sup>.

Election law has a decisive influence on the way this power is distributed in practice<sup>19</sup>. As suggested in the title of this article, the study analyses election law through the prism of the principle of equality. The idea of equality is a fundamental concept in contemporary democracies<sup>20</sup>. On this issue, John Stuart Mill wrote that "[t]he pure idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented"<sup>21</sup>. But achieving true equality is a challenge, because it is only reached when everyone in a community finds himself on exactly the same level. According to Ronald Dworkin, a system only offers equality in the repartition of resources when it "distributes or

<sup>18</sup> *History of the Peloponnesian War*, 5<sup>th</sup> century B.C., vol. 2, chap. 37.

<sup>19</sup> It does not aim at organising the distribution of all state power - which is the role of constitutional law - but of an important part of that power: it regulates the selection of the representatives who are responsible for debating public affairs and adopting the law. On this topic, see G. JELLINEK, *L'Etat moderne et son droit*, Paris, Giard et Brière, 1913, 2<sup>nd</sup> part, 257; K. POPPER, *Zur Theorie der Demokratie*, *Der Spiegel*, 1987, n° 32, 54-55, here 54.

<sup>20</sup> Since the 18<sup>th</sup> century, several authors have dealt with this concept. Among them: MONTESQUIEU, *De l'Esprit des Lois*, 1748, 1<sup>st</sup> part, book 5, chap. 3; A. DE TOCQUEVILLE, *De la démocratie en Amérique*, 1835 and 1840, [new edition, Paris, Flammarion, 2008], 11; H. Kelsen, *La démocratie. Sa nature - Sa valeur*, Paris, Sirey, 1932, 2; G. BURDEAU, *Traité de science politique. Tome V: Les régimes politiques*, 3<sup>rd</sup> edition, Paris, L.G.D.J., 1985, 514; R. DAHL, *Democracy and its critics*, New Haven and London, Yale University Press, 1989, 86; PH. GÉRARD, *Droit et démocratie. Réflexions sur la légitimité du droit dans la société démocratique*, Brussels, Publications des Facultés universitaires de Saint-Louis Bruxelles, 1995, 112; J. ROWBOTTOM, *Democracy distorted. Wealth, Influence and Democratic Politics*, Cambridge, Cambridge University Press, 2010, 1; E.-W. BÖCKENFÖRDE, *Demokratie als Verfassungsprinzip*, in: J. ISENSEE / P. KIRCHHOF (ed.), *Handbuch des Staatsrecht*, 3<sup>rd</sup> edition, Munich, Beck, 2004, 429-495, here 457.

<sup>21</sup> J. S. MILL, *Considerations on representative government*, 1861, chapter 7.



transfers so that no further transfer would leave their shares of the total resources more equal"<sup>22</sup>. Applied in the context of elections, this pure conception of equality would imply that every single member of the governed people would have the exact same influence on the election results as every other. If such a conception of equality had been used as a reference for the research, it would have led to conclude that almost every election rule has the potential to introduce inequality into electoral influence, because it deviates at least slightly from this ideal. A different approach has therefore been favoured: instead of using the absolute criteria of 'pure' equality, the study is based on tendencies. It appears that some legal rules tend to distribute the faculty to influence the composition of elected assemblies equally, while others tend to distribute it unequally.

To evaluate the distribution of electoral influence in Belgium, Germany and the United Kingdom, it was first necessary to consider who *should* be allowed to participate in a democratic electoral process. In other words, it was required to define the boundaries of the community to which political influence should be legally granted<sup>23</sup>. From a quantitative point of view, equality in the democratic process would be reached if each person submitted to the rules of a legal system would be allowed to choose the representatives who are responsible for dispensing the relevant law (all-subjected

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<sup>22</sup> R. DWORKIN, What is equality? Part I: equality of welfare, *Philosophy & Public Affairs*, 1981, 185-246, especially 186.

<sup>23</sup> The problem of the theoretical limits of the electorate in democratic systems is an important question of political philosophy. This topic has been discussed by F. WHELAN, Prologue: Democratic theory and the boundary problem, in: J. PENNOCK / J. CHAPMAN (ed.), *Liberal democracy*, New York and London, New York University Press, 1983, 13-47; G. BURDEAU, *Traité de science politique. Tome V: Les régimes politiques*, 3<sup>rd</sup> edition, Paris, L.G.D.J., 1985, 120-121; R. DAHL, *Democracy and its critics*, New Haven, Yale UP, 1989, 193; R. GOODIN, Enfranchising all affected interests, and its alternatives, *Philosophy and Public Affairs*, 2007, 40-68, especially 40; H. BRIGHOUSE / M. FLEURBAEY, Democracy and proportionality, *The Journal of Political Philosophy*, 2008, 1-19, especially 3. See also references in the next footnote.

principle)<sup>24</sup>. These people constitute the *demos*<sup>25</sup>. After examining German, Belgian and British law, it has been possible to conclude that the persons submitted to the legislations passed by a national assembly are mainly those with lasting residence within the national territory<sup>26</sup>.

The power distributed among them is what we called the *electoral influence*, *i.e.* the ability to influence the composition of the assembly through the electoral process<sup>27</sup>. Some of the *demos* members have no influence at all because they can neither elect nor be elected<sup>28</sup>. Although other members (in contemporary democracy, the majority of the *demos*) are allowed to participate, it is still useful to observe how the influence is shared between them. This

<sup>24</sup> See C. LÓPEZ-GUERRA, Should expatriates vote?, *Journal of Political Philosophy*, 2005, 216-234, here 220; L. BECKMAN, *The frontiers of democracy. The right to vote and its limits*, Houndmills Basingstoke, Palgrave Macmillan, 2009, 50-52; S. NÄSSTRÖM, The challenge of the all-affected principle, *Political Studies*, 2011, 116-134, here 118-122.

<sup>25</sup> This word is often used in the literature mentioned in the previous footnotes.

<sup>26</sup> The word "mainly" is operative here. There are indeed, in the studied countries, legal rules which have an extraterritorial effect and cover people who live abroad; but the total analysis - which is impossible to reproduce in this short article - shows that national legal rules (for example in civil, criminal or tax law) mainly cover people living *within* the national territory.

<sup>27</sup> The concept of electoral influence is not equivalent to the notion of 'voting power' which is used in the literature, notably by mathematicians and political scientists (see L. PENROSE, The elementary statistics of majority voting, *Journal of the Royal Statistical Society*, 1946, 53-57; L. SHAPLEY / M. SHUBIK, A method for evaluating the distribution of power in a committee system, *American Political Science Review*, 1954, 787-792; J. BANZHAF, Weighted voting doesn't work: a mathematical analysis, *Rutgers Law Review*, 1965, 317-343; D. RAE, Decision rules and individual values in constitutional choice, *American Political Science Review*, 1969, 40-56; J. COLEMAN, Control of collectivities and the power of a collectivity to act, *in*: B. LIEBERMANN (ed.), *Social Choice*, New York, Gordon & Breach, 1971, 269-300).

<sup>28</sup> See below, *III*.

means that the distribution of electoral influence can be evaluated from both quantitative and qualitative angles.

Having these general reflections in mind, it is now required to explore the actual distribution of electoral influence in the three chosen legal orders, considering first election law with a tendency to equal distribution (*III*), and then law with a tendency to unequal distribution (*IV*).

### III. RULES WITH A TENDENCY TO EQUAL DISTRIBUTION

This part of the article considers the rules which overall favour a high level of equality (if not necessarily the highest - it is a question of tendency<sup>29</sup>) among the governed people. Having considered the evolution of election law from the 1830's until the present, it appears that a high level of equality is reached in Germany, in Belgium and in the United Kingdom. This can be observed in several aspects, the most significant of which are briefly presented here, using a structure based on the three categories of election rules identified above<sup>30</sup>.

#### *a. Participation*

Regarding the question of participation, the large majority of the *demos* can now vote and stand as a candidate for general elections. This has become a reality thanks to the development of universal suffrage. Presently, the attribution of the franchise is no longer based on gender or socio-economic criteria, as had been the case until World War I and in some aspects until the middle of the 20<sup>th</sup> century. The main exceptions concern people who have not reached the requisite age (18 years old<sup>31</sup>) and foreigners. Nationality is a

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<sup>29</sup> See above, *II*.

<sup>30</sup> See above, *I*.

<sup>31</sup> For Germany, see § 12 (1) of the *Bundeswahlgesetz*; for Belgium, see Art. 61 (1) of the Constitution and Art. 1, § 1, 2°, of the *Code électoral*; for the United Kingdom, see section 1 (1) (d) of the Representation of the People Act 1983. In Germany, there is an interesting debate about the

condition for entering the electorate in the three studied states. German Basic Law does not expressly exclude foreigners, but the Federal Constitutional Court ruled that inclusion in the 'political people' of the Federal Republic (*Staatsvolk der Bundesrepublik*) follows from nationality (*Staatsangehörigkeit*)<sup>32</sup>. Moreover, this is the principle adopted by German legislation in the *Bundeswahlgesetz*<sup>33</sup>. In Belgium, the exclusion of foreigners from the electorate legally rests on several texts of the Constitution<sup>34</sup> and is confirmed in the Election Code<sup>35</sup>. In this regard, UK law is more inclusive: not only British citizens can take part in the vote, but also Commonwealth citizens and citizens of the Republic of Ireland<sup>36</sup> who live in the United Kingdom.

The other causes of exclusion are based on more individual considerations (due to mental incapacity or criminal conviction) and tend to be exceptional in contemporary democracies. The general exclusion of convicted prisoners remains however a topic of political discussion in the United Kingdom: the Representation of the People Act 1983 states that during the time a convicted person is detained in a penal institution in pursuance of his sentence, he is le-

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extension of the right to vote to children (*Familienwahlrecht*). Children would be included in the electorate but their right would be exercised by their parents or legal representatives until their majority. In theory, this would offer a better correspondence between the *demos* and the electorate thanks to the extension of the last. But in practice, it would establish a form of plural vote that seems to be incompatible with modern standards of democracy. On this question, see K. LÖW, *Das Selbstverständnis des Grundgesetzes und wirklich allgemeine Wahlen*, *Politische Studien*, 1974, 19; K. NOPPER, *Minderjährigenwahlrecht - Hirngespinnst oder verfassungsrechtliches Gebot in einer grundlegend gewandelten Gessellschaft?*, PhD dissertation, Tübingen, 1999; H. QUINTERN, *Das Familienwahlrecht. Ein Beitrag zur verfassungsrechtlichen Diskussion*, [PhD dissertation, Cologne, 2009], Berlin, Lit, 2010.

<sup>32</sup> BVerfG, 31 October 1990, *BVerfGE*, 83, 37 (51).

<sup>33</sup> § 12, al. 1.

<sup>34</sup> Art. 8, al. 2; Art. 33, al. 1 and Art. 61.

<sup>35</sup> Art. 1, § 1, 1°.

<sup>36</sup> Section 1 (1) (c) of the Representation of the People Act 1983.

gally incapable of voting in any parliamentary (or local) government election<sup>37</sup>. This exclusion from the electorate holds for all prisoners, regardless of the seriousness of their offence or length of their sentence. It is an automatic consequence of imprisonment which requires no judicial oversight. Despite the pressure of the ECtHR case law, that considers such automatic exclusions as incompatible with Art. 3 of the First Protocol to the Convention<sup>38</sup>, the UK parliament still maintains this rule.

Regarding the composition of the electorate, it is worth mentioning the situation for expatriates. Since the end of the 20<sup>th</sup> century, some expatriates can take part in the vote despite living overseas. German and British law restrict this right to a certain period of time after emigration<sup>39</sup>, while the Belgian Election Code offers it indefinitely<sup>40</sup>. This relatively new trend in election law does not represent democratic progress: it grants the same electoral influence to residents subject to national law as to expatriates who are largely beyond this law and do not belong to the *demos*.

### *b. Opinion*

The tendency towards equality is also supported by the ability of electors to express their political opinions *freely* and *sincerely*, owing to fundamental principles guaranteed by the law and enforced in practice.

This is assisted firstly by the relatively high frequency of elections: at any one time, an election can be expected within the next few years (the period between two national assembly elections being limited to four years in Germany<sup>41</sup> and five years in Belgium<sup>42</sup>

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<sup>37</sup> Section 3 (1) of the Representation of the People Act 1983.

<sup>38</sup> See below, section *V. a*.

<sup>39</sup> See § 12 (2) of the *Bundeswahlgesetz* and section 1 (3) (c) of the Representation of the People Act 1983.

<sup>40</sup> Art. 1, § 1, 3°, of the *Code électoral*.

<sup>41</sup> When there is no dissolution of the *Bundestag*, the election must be held between 46 and 49 months after the previous one (Art. 49 of the Basic Law).

and the United Kingdom<sup>43</sup>). Authorities cannot deprive the people of the opportunity to vote<sup>44</sup>. They can, however, organise snap elections, which makes it harder to predict the next election date. In many parliamentary regimes, the executive or head of state traditionally has the prerogative to dissolve parliament and to hold an election before the end of a term. Such an instrument can offer a decisive advantage to the incumbent government parties, which are able in these circumstances to choose a convenient date and to secretly prepare their campaign; in this regard, the snap election in the UK has been compared to “a race in which the Prime Minister is allowed to approach it with his running shoes in one hand and his starting pistol in the other”<sup>45</sup>. In the three countries examined here, this prerogative is no longer a discretionary power<sup>46</sup>: it can only be exercised when some strict conditions are fulfilled<sup>47</sup>. Despite the existence of these limitations, it appears that governments are often able to find ways to dissolve the parliament when they really wish to. In Belgium, the political authorities activate the constitutional revision process - which requires the dissolution of the federal parliament and was originally designed as an exceptional procedure - every time they intend to organise elections<sup>48</sup>. In Germany, the

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<sup>42</sup> Art. 65 of the Constitution.

<sup>43</sup> Section 1 of the Fixed-term Parliaments Act 2011 (2011 c. 14).

<sup>44</sup> In the studied countries, exceptional measures have been adopted in the context of both World Wars to extend the period between two elections. These special allowances cannot, however, be analysed in this short contribution.

<sup>45</sup> Lord Holme, in *Hansard*, HL, vol. 529, col. 245, 22 May 1991.

<sup>46</sup> Regarding the previous system, see not. E. FORSEY, *The royal power of dissolution of Parliament in the British Commonwealth*, Toronto, Oxford University Press, 1943; R. BLACKBURN, The prerogative power of dissolution of Parliament: law, practice and reform, *Public Law*, 2009, 766-789.

<sup>47</sup> See Art. 63 (4) and 68 of the German Basic Law; Art. 46 and 195 of the Belgian Constitution and the Fixed-term Parliaments Act 2011 for the United Kingdom.

<sup>48</sup> Since 1954, every federal election - with the exception of the 1985 election - has been preceded by the publication of a declaration of consti-

chancellor proposed a motion of confidence to the *Bundestag* on three occasions (1972, 1982 and 2005) with the hope of obtaining its rejection and, as a result, gaining the right to ask the federal President to dissolve the assembly<sup>49</sup>. This adds nuance to the otherwise pro-equality trend observed in this field.

Another important evolution regarding the sincerity of the vote is the development of the secret ballot. This is the most robust institution for limiting the ability of wealthy and powerful electors to put others under economic or social pressure in order to influence their votes. Public vote procedures were common in the studied countries until the end of the 19<sup>th</sup> century. In the United Kingdom, the process was known under the expression “*viva voce*” and based on rules established in the 15<sup>th</sup> century: the electors met together and were invited to express their vote through a show of hands. If no clear trend was established, the electors were then called one by one and invited to publicly speak out the name of their favoured candidate<sup>50</sup>. This pernicious system was abolished by the Ballot Act 1872<sup>51</sup>, which notably introduced pre-printed ballots and polling booths. In Germany, the public nature of the vote introduced what has been described as a situation of “*Wahlterror*”<sup>52</sup>. It was not until the start

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tutional revision (the first act of the revision process according to Art. 195 of the Constitution) which automatically triggers the dissolution of the federal assemblies.

<sup>49</sup> This is often considered as a misuse of Art. 68 of the Basic Law. M. Morlok wrote that these motions were “*unechte und auflösungsgerichtete Vertrauensfrage*”, i.e. “artificial and dissolution-oriented motions of confidence” (M. MORLOK, *Staatsorganisationsrecht*, Baden-Baden, Nomos, 2013, 329). According to V. Bogdanor, chancellors have manipulated the institutions (V. BOGDANOR, *The coalition and the constitution*, Oxford and Portland, Hart, 2011, 117).

<sup>50</sup> H. BUCHSTEIN, *Öffentliche und geheime Stimmabgabe. Ein wahlrechtshistorische und ideengeschichtliche Studie*, Baden-Baden, Nomos, 2000, 166.

<sup>51</sup> 35 & 36, Victoria c. 33.

<sup>52</sup> In English: “election terror”. T. KÜHNE, *Entwicklungstendenzen der preußischen Wahlkultur im Kaiserreich*, in: G. RITTER (dir.), *Wahlen und*

of the 20<sup>th</sup> century that the secret ballot was efficiently established in Germany<sup>53</sup>. Whilst far from perfect, the Belgian system was better on this subject in the 19<sup>th</sup> century, for election law had imposed the secret vote since 1831<sup>54</sup>; the lack of concrete guarantees, however, permitted some abuses<sup>55</sup>. Presently, the secret nature of the vote is almost unanimously recognised as one of the main principles of democratic elections<sup>56</sup> and is established as such by national<sup>57</sup> and international law<sup>58</sup>. Its efficiency could, however, be impaired by modern electoral practices such as postal voting, which permits people to fill in their ballot outside the polling booth, where they could be exposed to external influences. This cannot be considered as a minor detail since a quarter of the German electorate

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*Wahlkämpfe in Deutschland. Von den Anfängen im 19. Jahrhundert bis zur Bundesrepublik*, Dusseldorf, Droste, 1997, 131-167, here 147-148.

<sup>53</sup> M. ANDERSON, *Practicing democracy: elections and political culture in imperial Germany*, Princeton, Princeton University Press, 2000, 55.

<sup>54</sup> Art. 25 of the *loi électorale du 3 mars 1831 pour la formation de la Chambre des représentants et du Sénat (Bulletin officiel, 1831, n° 19)*.

<sup>55</sup> J. STENGERS, L'établissement de la représentation proportionnelle en Belgique, in: P. DELWIT / J.-M. DE WAELE (dir.), *Le mode de scrutin fait-il l'élection?*, Brussels, éditions de l'Université de Bruxelles, 2000, 129-144, here 133; R. VAN EENO, De evolutie van de kieswetgeving in België van 1830 tot 1919, *Tijdschrift voor Geschiedenis*, 1979, 333-352, here 337; J. GILISSEN, *Le système représentatif en Belgique depuis 1790*, Brussels, La renaissance du livre, 1958, 110.

<sup>56</sup> In fairness, some contemporary authors do contest (at least theoretically) the relevance of the secret vote as a democratic principle: G. BRENNAN / P. PETTIT, Unveiling the vote, *British Journal of Political Science*, 1990, 311-333; J.-P. SARTRE, Elections, piège à cons, *Les temps modernes*, 1973, 1099-1108, here 1100; H. KRÜGER, *Allgemeine Staatslehre*, Kohlhammer, Stuttgart, 1966, 251.

<sup>57</sup> Art. 62 (3) of the Belgian Constitution; Art. 38 (1) of the German Basic Law; section 18 and following of the Annex 1 of the Representation of the People Act 1983.

<sup>58</sup> See, for example, Art. 3 of the First Protocol to the ECHR.



used this method in 2013<sup>59</sup>, as did a fifth of British electors two years later<sup>60</sup>.

*c. Transformation*

The tendency to equal distribution is also apparent in the geographical redistribution of seats and the revision of constituency boundaries. Election systems with uninominal constituencies encounter unique issues in this matter: because the number of seats per constituency cannot be adapted in such cases, the only solution is the modification of constituency boundaries, which always leads to political difficulties. For a large part of the 19<sup>th</sup> century, the demographic differences among the constituencies were paramount in Germany<sup>61</sup> and the United Kingdom<sup>62</sup> as were inequalities between electors depending on their place of residence. In those countries, the legal situation has changed considerably in favour of more equality: the constituencies are now frequently reapportioned and the number of inhabitants or electors tends to be more or less the

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<sup>59</sup> See the Website of the *Bundeswahlleiter*: <http://www.bundeswahlleiter.de/de/glossar/texte/Briefwahl.html> (last consulted on 24 December 2015).

<sup>60</sup> C. RALLINGS / M. THRASHER, *The 2015 general election: aspects of participation and administration*, Plymouth, Elections Centre (Plymouth University), 2015, 2.

<sup>61</sup> E. SCHANBACHER, *Parlamentarische Wahlen und Wahlsystem in der Weimarer Republik. Wahlgesetzgebung und Wahlreform im Reich und in den Ländern*, Düsseldorf, Droste, 1982; W. RIDDER, *Die Einteilung der Parlamentswahlkreise und ihre Bedeutung für das Wahlrecht in rechtsvergleichender Sicht (Deutschland, Großbritannien, USA)*, Göttingen, Institut für Völkerrecht der Universität Göttingen, 1976; H. VON GERLACH, *Die Geschichte des preußischen Wahlrechts*, Berlin, die Hilfe, 1908, 24 and ff.

<sup>62</sup> On this topic, see S. LANG, *Parliamentary Reform 1785-1928*, London, Routledge, 1999; M. CHADWICK, The role of redistribution in the making of the Third Reform Act, *The Historical Journal*, 1976, 665-683; E. PORRITT, Barriers against democracy in the British electoral system, *Political Science Quarterly*, March 1911, 1-31.

same in each, even if differences are still legally admitted<sup>63</sup>. The intervention of independent commissions which have to implement the legal rules impartially helps in the battle against gerrymandering and constitutes another factor promoting equality<sup>64</sup>. The Belgian election system has used plurinominal constituencies since 1831 and has thus known fewer difficulties on this topic when compared to Germany and the United Kingdom<sup>65</sup>: when the demography evolves, rather than modifying constituency boundaries, one can simply adapt the number of seats allocated to each. Such a system is based on a mathematical formula and can work automatically<sup>66</sup>, which helps avoid political controversy.

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<sup>63</sup> In the United Kingdom, the electorate of any constituency shall be between 95 and 105% of the national average (section 2 of the schedule 2 of the Parliamentary Constituencies Act 1986, as modified by the Parliamentary Voting System and Constituencies Act 2011). The margin of appreciation is broader in Germany, where uninominal constituencies are used to elect half of the members of the *Bundestag*: the number of German inhabitants living in every constituency have to remain between 85 and 115% of the national average. However, greater differences (between 75 and 125% of the national average) can be admitted if there is special justification (§ 3, (1), (3), of the *Bundeswahlgesetz*).

<sup>64</sup> In the United Kingdom, four Boundary Commissions are responsible for recommending new boundaries of constituencies for Westminster Parliament and other assemblies (regarding these commissions, see D. ROSSITER / R. JOHNSTON / C. PATTIE, *The Boundary Commissions. Redrawing the UK's map of Parliamentary constituencies*, Manchester and New York, Manchester University Press, 2009). In Germany, this function is exercised by the Permanent Constituencies Commission (*die ständige Wahlkreiskommission*).

<sup>65</sup> In the original study we showed that even in this context there were some political tensions and legal controversies regarding the process and timing of changes to the geographical share of the seats.

<sup>66</sup> Art. 63 of the Constitution.

#### IV. RULES WITH A TENDENCY TO UNEQUAL DISTRIBUTION

Despite the developments described in the previous section, other rules that tend to distribute the electoral influence unequally have been found. These trends can also be observed in each of the three categories of the definition of election law suggested above, *i.e.* participation, opinion and transformation.

##### *a. Participation*

Whereas universal suffrage means the right to participate is widely shared on election day, within the limits already mentioned, this is not the case for the earlier, more discreet, but nevertheless fundamental process of candidate selection. In the countries under consideration (and in most contemporary democracies), the only candidates with a serious chance of being elected are those who have been selected by the established parties and fielded in a constituency with enough voter support<sup>67</sup>. Theoretically, people can contest the election as an individual candidate or create a new party to compete with the traditional ones, but in practice this is very often futile. In other words: “[s]ome entry barriers (...) make it almost impossible to form another party, not to mention the tremendous cost of such a venture. In these cases, the real ability of the individual to participate and influence the party is within the party (...)”<sup>68</sup>. An author who studied selection processes in the UK in depth found that “candidate selection plays a vital role in the British system of government”<sup>69</sup>; this is without doubt extendable to other democra-

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<sup>67</sup> This has been observed in the political science literature since the beginning of the 20<sup>th</sup> century: R. MICHELS, *Political Parties*, London, Jarolds & Sons, 1915, 183-184; E. SCHATTSCHEIDER, *Party Government*, New York, Holt, Rinehart & Winston, 1942, 64 and 100.

<sup>68</sup> Y. MERSEL, The dissolution of political parties: the problem of internal democracy, *International Journal of Constitutional Law*, 2006, 84-113, here 104.

<sup>69</sup> A. RANNEY, *Pathways to Parliament. Candidate selection in Britain*, Madison and Milwaukee, University of Wisconsin Press, 1965, 4.

cies including Belgium and Germany. However, it appears that selection power is concentrated, in the case of most parties, in a relatively small number of hands. This conclusion follows from an analysis of the relevant state law and a large number of party rule books.

Belgian and British state law contain very few obligations regarding candidate selection<sup>70</sup>, meaning parties are largely free to organise their selection process in these countries: even systems concentrating the power to choose candidates into the hands of the single national leader of the party are legally permitted. In Germany, however, the Basic Law states that the internal organisation of the parties “must conform to democratic principles”<sup>71</sup>. This obligation applies notably to the candidate selection process, as expressly confirmed in the *Bundeswahlgesetz*, which contains several texts directly related to this question<sup>72</sup>. Among the relevant legal rules, it is specified that a party’s candidates must be selected by one of the three following organs of the party: an assembly of all the party members living in the constituency (*Mitgliederversammlung*), an assembly of the delegates of these members specifically elected to select the candidates (*besondere Vertreterversammlung*) or a common assembly of the delegates of these members (*allgemeine Vertreterversammlung*)<sup>73</sup>.

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<sup>70</sup> Among the few existing limits, the Belgian law foresees that every list of candidates must include as many men as women and that the first two candidates on the top of the list must be of different genders (Art. 117*bis* of the *Code électoral*). In the United Kingdom there is no obligation under state law for gender parity, but the *Sex Discrimination (Election Candidates) Amendment Act 2002* (2002 c. 2) allows parties to take internal measures to promote these candidacies and foster the election of women as members of Parliament. The Act of 2002 has been adopted in reaction to previous case law which considered some party practices favouring women candidates as illegal (*Jepson and Dyas-Elliott v. The Labour Party and others*, 1996 IRLR 116).

<sup>71</sup> Art. 21, (1), of the German Basic Law.

<sup>72</sup> See especially §§ 21 and 27 of the *Bundeswahlgesetz*.

<sup>73</sup> See §§ 21, (1), and 27, (5), of the *Bundeswahlgesetz*. On this topic see I. HONG, *Verfassungsprobleme der innerparteilichen Kandidatenaufstel-*

An analysis of the relevant state law only provides a starting point for the study of this question, for access to the legislative bodies also depends significantly on parties' internal rules for candidate selection: "[t]he party rules and procedures determine the process which all aspirants have to go through to become official nominees"<sup>74</sup>. It was thus necessary to explore what is sometimes described as the 'secret garden of politics'<sup>75</sup>, using a method inspired by the work of political scientists Reuven Hazan and Gideon Rahat<sup>76</sup>. Despite the diversity of selection procedures applied by major British, German and Belgian parties, and even counting the more inclusive selection processes<sup>77</sup>, the general trend is that the decisive power belongs to small groups of party committee members. This conclusion applies to Germany as well, despite the specificities of its state law, for at least two reasons: firstly, the main parties often choose to give the selection power to delegate assemblies rather than to member assemblies<sup>78</sup>; secondly, although these assemblies have the remit of selecting candidates, it appears that decisive choices are in fact made in advance by leading committees, which preselect candidates and suggest their names to the relevant

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*lung für die Wahl zum Deutschen Bundestag*, Berlin, Nomos, 2004; M. WERNER, *Gesetzesrecht und Satzungsrecht bei der Kandidatenaufstellung politischer Parteien*, Osnabrück, Universitätsverlag Osnabrück, 2010; S.-C. LENSKI, *Parteiengesetz und Recht der Kandidatenaufstellung*, Baden-Baden, Nomos, 2011.

<sup>74</sup> P. NORRIS, Introduction: theories of recruitment, in: P. NORRIS (dir.), *Passages to power. Legislative recruitment in advanced democracies*, Cambridge, Cambridge University Press, 1997, 1-14, here 12.

<sup>75</sup> M. GALLAGHER / M. MARSCH (ed.), *Candidate selection in comparative perspective. The secret garden of politics*, London, Sage, 1988.

<sup>76</sup> R. HAZAN / G. RAHAT, *Democracy within parties. Candidate selection methods and their political consequences*, Oxford, Oxford University Press, 2010.

<sup>77</sup> For example, in some constituencies, the British Conservative Party allows all electors (even those who are not members of the party) to take part in the final step of the selection process.

<sup>78</sup> C. FONTAINE, *Wahlssystem und Oligarchisierung in Deutschland*, PhD dissertation, Hamburg, 2001, 57; R. HAZAN / G. RAHAT, *op. cit.*, 44.

assemblies<sup>79</sup>. All this implies that eligible people who hope to access parliament have to obtain the support of leaders or committee members of one of the main political parties to gain a serious chance of election success. This conclusion itself may not be surprising - it is an application of the iron law of oligarchy identified by Robert Michels a century ago<sup>80</sup> - but it is significant to underline that this is sustained by law.

Moreover, there is another obstacle in the path towards the designation of a candidate: in each of the countries covered by the study, the would-be candidates must either obtain the support of a relatively large number of electors if they are not already represented in the parliament (in Germany<sup>81</sup> and in Belgium<sup>82</sup>) or pay a deposit which will be refunded only if they receive a certain amount of votes (in the United Kingdom<sup>83</sup>). These legal formalities tend to

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<sup>79</sup> C. FONTAINE, *op. cit.*, 136.

<sup>80</sup> "The democratic external form which characterizes the life of political parties may readily veil from superficial observers the tendency towards aristocracy, or rather towards oligarchy, which is inherent in all party organization" (R. MICHELS, *Political parties*, 1915 [reedition: Kitchener, Batoche, 2001], 13).

<sup>81</sup> In Germany, parties which already have members elected in the *Bundestag* can put up candidates in uninominal constituencies and establish lists of candidates in the *Länder* level without having to collect any signatures. Other parties can put up a candidate in a uninominal constituency if they obtain the signatures of 200 electors and can establish a list of candidates in a *Land* with the support of up to 2,000 electors - the effective number depending on the *Land*. Finally, individual candidates or groups of electors that are not officially recognised as parties can only compete in uninominal constituencies (if they collect at least 200 signatures) and cannot draw up lists at *Länder* level. See § 18, (1) and (2), § 20, (2) and (3), and § 27, (1), of the *Bundeswahlgesetz*.

<sup>82</sup> In Belgium, every list of candidates must be supported either by three members of the House of Representatives or by 200 to 500 electors, depending on the number of inhabitants in the relevant constituency (Art. 116 of the *Code électoral*).

<sup>83</sup> A person shall not be validly nominated as a candidate unless the sum of £500 is deposited. The deposit shall be forfeited if, after the counting of the votes is completed, the candidate is found not to have polled more than

keep the smaller or newer parties out of the national legislative assemblies and to disenfranchise the electors who support them; they can be analysed as a subsidy given to established parties<sup>84</sup>.

*b. Opinion*

Inequalities among candidates, parties and their electors are particularly strong in the period preceding the election day, when political opinions are still in formation for a large part of the electorate. Owing to their success in the previous election, incumbent parties are given inherent advantages. This is particularly notable in two areas: rights to funds and access to audio-visual media during the political campaign.

In Belgium and in the United Kingdom, public money is only allocated to parties which have already won at least one seat in parliament<sup>85</sup>. Moreover, the Belgian system drastically limits the possi-

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one twentieth of the total number of votes polled by all the candidates (Rules 9 (1) and 53 (4) of the schedule 1 of the Representation of the People Act 1983).

<sup>84</sup> F. MEINEL, Chancengleichheit oder Kooptation? Der Zugang kleiner Parteien zur Bundestagswahl, *Zeitschrift für Parlamentsfragen*, 2010, 67-76, here 68.

<sup>85</sup> In Belgium, the main public financing system is only open to parties which have already at least one seat in the House of Representatives (Art. 15 of the *loi du 4 juillet 1989 relative à la limitation et au contrôle des dépenses électorales engagées pour l'élection de la Chambre des représentants, ainsi qu'au financement et à la comptabilité ouverte des partis politiques*). In the United Kingdom, the public financing of the parties is less developed than in Belgium and Germany. Some money is allocated in application of a system commonly called "Short money", which is made available to the opposition parties that secured either at least two seats or one seat and more than 150,000 votes at the previous general election. It is based on a resolution of the House of Commons (*HC Deb*, 26<sup>th</sup> of May 1999, vol. 332, col. 427-429). Another public subvention - the Policy Development Grant - is made available for all parties that have won at least two seats at the House of Commons in application of the section 12 of the Political Parties, Elections and Referendums Act 2000.

bility of private donation to parties, thus increasing the relative importance of public funding to which only the established parties have access<sup>86</sup>. Financial inequality is less apparent in Germany, where any party that gains 0.5% of the national vote has a right to public money even if it does not obtain a seat in the *Bundestag*<sup>87</sup>. A peculiarity of the German financing system is that the amount of public money allocated to a party cannot exceed the amount of its own private revenue<sup>88</sup>; this prevents a party from depending solely on state finance. From a financial perspective, the main source of inequality in Germany is the absence of campaign spending limits that are important instruments in British<sup>89</sup> and Belgian<sup>90</sup> law. In these countries the expenses of the candidates individually and of the parties collectively have to comply with legal limits. In this regard, it can be affirmed that “the spending limits assist by reducing the money available to spend, thereby containing the money which needs to be raised, thereby in turn relieving the parties of the need to seek larger and larger donations from more and more people”<sup>91</sup>.

In the legal systems under scope, the law also favours the established parties in terms of access to the most influential media, especially radio and television. It is beyond doubt that “[b]roadcasting is a scarce but influential resource; access to it is a correspondingly

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<sup>86</sup> Only Belgian natural persons can make donations and these are limited to €500 a year to a particular party; if a person wishes to donate money to several parties, the total amount of his or her transfers is limited to €2,000 a year (Art. 16bis, (2), of the *loi du 4 juillet 1989* mentioned above).

<sup>87</sup> The right to receive public money is also open to parties which obtained 0.5% of the vote in the European Parliament election or 1% of the vote in any Land Parliament election (§ 18, (4), of the *Parteiengesetz*).

<sup>88</sup> § 18, (5), of the *Parteiengesetz*.

<sup>89</sup> Section 76 of the Representation of the People Act 1983 and section 72, (2), of the Political Parties, Elections and Referendums Act 2000.

<sup>90</sup> Art. 2 to 14 of the *loi du 4 juillet 1989* mentioned above.

<sup>91</sup> K. EWING, Promoting political equality: spending limits in British electoral law, *Election Law Journal*, 2003, 499-523, here 499.



valuable advantage<sup>92</sup>. In this regard, the incumbent parties are once again privileged: they receive longer and more valuable airtime and can therefore deliver their political messages to a larger audience. This access takes the form of invitations to political debates, participation in radio or television reports, and the allocation of time for election broadcasts. Other parties can obtain limited airtime if they fulfil some further conditions, the most significant of which being putting up a sufficient number of candidates. German law seems to be more generous than Belgian and British law: it states that every political party which has put up a valid list of candidates can obtain at least one fifth of the broadcasting time that is allocated to the biggest parties of the *Bundestag*<sup>93</sup>. However, German and British case law does admit the broadcasting of election debates in which only the leaders of the (respectively) two or three main political parties are invited to take part<sup>94</sup>. This is notable in the case of the famous *Kanzler-Duell*, which is watched by a significant part of the German electorate before each general election.

One of the most controversial topics regarding access to audio-visual media concerns paid-for political advertising. In all three studied countries, it is forbidden by law to pay for the broadcasting of election campaign spots<sup>95</sup>; a practice that is common in the United States and in some European countries is thus excluded.

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<sup>92</sup> A. BOYLE, Political broadcasting, fairness and administrative law, *Public Law*, 1986, 562-596, here 562.

<sup>93</sup> S.-C. LENSKI, *op. cit.*, 68. The same principle was confirmed in instructions sent to private broadcasters before the federal election of September 2013 (*Rechtliche Hinweise zu den Wahlensendezeiten für politische Parteien im bundesweit verbreiteten Privatfunk*).

<sup>94</sup> See BVerfG, 30 August 2002, *Neue Juristische Wochenschrift*, 2002, 2939-2940; *Scottish National Party Petitioner*, 2010, CSOH 56.

<sup>95</sup> For Germany, see § 7, (9), of the *Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag)* of 31 August 1991, in the version modified by the *Fünftehnter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (Fünftehnter Rundfunkänderungsstaatsvertrag*, 15-21 December 2010). For Belgium, see Art. 5, § 1, 5°, of the *loi du 4 juillet 1989* mentioned above. For the United Kingdom, see sections 319 (2) (g) and 321 (2) and (3) of the Communications Act 2003.

This measure prevents the richer candidates or parties from using a powerful instrument that the poorer ones could not afford, and therefore favours equality in the electoral process<sup>96</sup>. However, this ban is a significant limit to the freedom of expression, since candidates and parties cannot spend their money on expressing their political ideas as they wish<sup>97</sup>. A blanket interdiction could violate Article 10 of the European Convention on Human Rights, but only where parties or candidates have no alternative to reach the electorate<sup>98</sup>. In a recent case, the Court considered that UK law was compatible with the Convention, since there were enough alternative methods available for parties and candidates to communicate their political views<sup>99</sup>. This remains doubtful in the case of smaller parties, which have very few other ways to do so on a large scale.

### c. Transformation

Electoral formulas and other rules relating to the voting system can also encourage the unequal distribution of political influence<sup>100</sup>. This is more obvious in countries such as the United Kingdom,

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<sup>96</sup> See for example T. LEWIS / P. CUMPER, Balancing freedom of political expression against equality of political opportunity: the courts and the UK broadcasting ban on political advertising, *Public Law*, 2009, 89-111, here 91; I. KATSIREA, Judicial review of party broadcasts in Germany and the United Kingdom, *Journal of Media Law*, 2009, 269-287, here 277.

<sup>97</sup> This argument leads a British author to affirm the following: "Generally political speech is more fully protected than commercial speech, so if broadcasters are legally free to show advertisements for goods and services, it is hard to see why they should not be able to show advertisements for political parties and pressure groups" (E. BARENDT, *Broadcasting law. A comparative study*, Oxford, Clarendon Press, 1995, 170).

<sup>98</sup> European Court of Human Rights (GC), *Animal Defenders International v. United Kingdom*, 22 April 2013.

<sup>99</sup> *Idem*.

<sup>100</sup> M. DUVERGER, *Les partis politiques*, 1<sup>st</sup> edition, Paris, Armand Colin, 1951, 236 and ff.; D. RAE, *The political consequences of electoral laws*, 2<sup>nd</sup> edition, New Haven and London, Yale University Press, 1971, 3 and ff.

where the ‘first-past-the-post’ system is applied: only the most successful candidate in each constituency is elected and the others are kept out of parliament even if they (or their party) are supported by a significant portion of the electorate<sup>101</sup>. The Liberal Democrats are chronic victims of this system<sup>102</sup>, as are other smaller parties<sup>103</sup>. In a referendum on 5 May 2011, the citizens of the United Kingdom quite decisively rejected an opportunity to replace this system with the ‘alternative vote’<sup>104</sup>, which would have brought more equality between the parties<sup>105</sup>.

Even under the proportional systems organised in Germany and in Belgium, the law tends to distribute electoral influence unequally in three ways. Firstly, some electoral formulas (like the *d’Hondt* for-

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<sup>101</sup> Regarding this system, see for example P. HAIN, *Misproportional representation*, Hants, Wildwood House, 1986; P. DUNLEAVY / H. MARGETTS, The impact of UK electoral system, *Parliamentary Affairs*, 2005, 854-870; A. BLAIS (ed.), *To keep or to change First past the post?*, Oxford, Oxford University Press, 2008; V. BOGDANOR, *The new British Constitution*, Oxford and Portland, Hart, 2009.

<sup>102</sup> This table compares the share of votes to the share of seats of this party since 1983:

|                | 1983  | 1987  | 1992  | 1997  | 2001  | 2005  | 2010  | 2015 |
|----------------|-------|-------|-------|-------|-------|-------|-------|------|
| Share of votes | 26.0% | 23.1% | 18.3% | 17.2% | 18.8% | 22.6% | 23.0% | 7.9% |
| Share of seats | 3.5%  | 4.1%  | 3.0%  | 7.0%  | 7.9%  | 9.6%  | 8.8%  | 1.2% |

Sources: C. RALLINGS / M. THRASHER, *British electoral facts*, London, Totalpolitics, 2009, 80; D. KAVANAGH / P. COWLEY, *The British general election of 2010*, Houndsmill, Palgrave Macmillan, 2010, 351.

<sup>103</sup> The Green Party, for example, secured only one of the 650 seats (*i.e.* 0.15%) in 2010 and in 2015, although they polled respectively 0.9 and 3.8% of the vote. Moreover, the United Kingdom Independence Party (UKIP) won in 2015 only one seat with 12.7% of the vote.

<sup>104</sup> This referendum has been organised in application of the Parliamentary Voting System and Constituencies Act 2011. On a turnout of 42.2%, 68% voted No and 32% voted Yes.

<sup>105</sup> D. SANDERS / H. CLARKE / M. STEWART / P. WHITELEY, Simulating the effect of the alternative vote in the 2010 UK general election, *Parliamentary Affairs*, 2011, 5-23.

mula implemented in Belgium<sup>106</sup>) favour larger parties and discriminate against smaller ones. Secondly, access to parliament is sometimes reserved for parties able to meet a legal threshold (5% calculated independently in each constituency in Belgium<sup>107</sup> or nationwide in Germany<sup>108</sup>). Thirdly, when there are few seats allocated to a constituency, as is for example the case in some Belgian constituencies<sup>109</sup>, the need for a greater share of the votes means another form of threshold is created on the path to parliamentary representation<sup>110</sup>.

In Germany, a particularity of the 'mixed member proportional system' previously gave rise to further distortions and inequalities that favoured the two biggest parties. The *Bundeswahlgesetz* stated that parties which have won more seats in uninominal constituencies than they could secure under the proportional system could nevertheless keep these 'overhang seats' (*Überhangmandate*). This implied that some parties could obtain more seats than their share of the votes would normally allow and therefore become overrepresented in the *Bundestag*. The Federal Constitutional Court allowed this situation for a long time, considering that it was a sustainable consequence of the election system chosen by the legislator<sup>111</sup>. The

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<sup>106</sup> Art. 167 of the *Code électoral*.

<sup>107</sup> Art. 165bis of the *Code électoral*.

<sup>108</sup> § 6, (3), of the *Bundeswahlgesetz*.

<sup>109</sup> There are only four seats available in the less populated constituency used for the federal general election (province of Luxembourg).

<sup>110</sup> D. RAE, *op. cit.*, 119.

<sup>111</sup> BVerfG, 3 July 1957, *BVerfGE* 7, 63, here 74 and ff.; BVerfG, 22 May 1963, *BVerfGE* 16, 130, here 139 and ff.; BVerfG, 24 November 1988, *BVerfGE* 79, 169, here 171; BVerfG, 10 April 1997, *BVerfGE* 95, 335, here 358. About this German particularity and the debates regarding its legality and opportunity, see not. H. NICOLAUS, *Demokratie, Verhältniswahl & Überhangmandate. Eine Studie zum Wahlverfassungsrecht*, Heidelberg, Manutius, 1995; H. JACOB, *Überhangmandate und Gleichheit der Wahl. Ein Beitrag zur aktuellen Wahlrechtsdiskussion*, Frankfurt am Main, Peter Lang, 1998; H. MEYER, *Die Zukunft des Bundeswahlrechts*, Baden-Baden, Nomos, 2010.

Court has however recently reviewed its conclusion<sup>112</sup> and the *Bundeswahlgesetz* has since been modified<sup>113</sup>: ‘overhang seats’ can still be allocated, but this will be compensated by giving additional seats to all parties in the *Bundestag* to ensure full proportionality<sup>114</sup>.

## V. AMBIGUOUS JUSTIFICATIONS FOR ELECTORAL INEQUALITIES

The study summarised here not only aims at observing the effects of election law in light of the principle of equality, but also tries to offer a critical legal analysis of three electoral systems, by considering whether inequalities - where they exist - can be legally justified in democratic systems. To this end, national and international case law has been studied in order to establish a list of the main legal justifications for electoral inequalities. An overview of the research results, emphasising the European Court of Human Rights’ relevant decisions and judgments, is offered below.

### *a. Implementation of Fundamental Constitutional Choices*

The first legal justification rests on fundamental constitutional choices regarding the political regime organised in each particular state. The exclusion of foreigners living in the national territory is

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<sup>112</sup> BVerfG, 3 July 2008, *BVerfGE* 121, 266; BVerfG, 25 July 2012, *BVerfGE* 131, 316.

<sup>113</sup> *Zweiundzwanzigstes Gesetz zur Änderung des Bundeswahlgesetzes*, 3 May 2013, *Bundesgesetzblatt*, 2013, I, 1082 and ff.

<sup>114</sup> See the new § 6 of the *Bundeswahlgesetz*. On this reform, see G. STROHMEIER, Kein perfektes Wahlsystem, aber ein guter Kompromiss - unter schwierigen Rahmenbedingungen, *Zeitschrift für Parlamentsfragen*, 2013, 144-161; J. BEHNKE, Das neue Wahlgesetz, sicherlich nicht das letzte, *Recht und Politik*, 2013, 1-10; N. DEHMEL / E. JESSE, Das neue Wahlgesetz zur Bundestagswahl 2013. Eine Reform der Reform der Reform ist unvermeidlich, *Zeitschrift für Parlamentsfragen*, 2013, 201-213; H. HOLSTE, Demokratie wieder flott gemacht: das neue Sitzzuteilungsverfahren im Bundeswahlgesetz sichert das gleiche Wahlrecht, *Neue Zeitschrift für Verwaltungsrecht*, 2013, 529-534, here 532.

one of the clearest examples in this field: although they are subjected to the law as much as citizens, they cannot participate in the election process, as Belgian, German and British constitutional law do not endow them with political power. This traditional approach, which favours nationality over residency, is admitted in the European Court of Human Rights case law<sup>115</sup>. However, choices regarding the boundaries of the electorate are not always approved by the Strasbourg Court: measures that automatically exclude prisoners from the right to vote are for example held as violating Art. 3 of the First Protocol to the ECHR<sup>116</sup>. This case law is the origin of political and legal controversy in the United Kingdom, as mentioned above.

The choice of voting system, especially of the electoral formula, is another major political decision that democratic states are largely free to make as they see fit. Subject to possible constitutional obligations, as in contemporary Belgium<sup>117</sup>, legislators can opt for any

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<sup>115</sup> See European Commission of Human Rights, decision *Luksch v. Italy*, 21 May 1997; European Court of Human Rights, decision *Makuc v. Slovenia*, 31 May 2007.

<sup>116</sup> ECtHR (GC), judgment *Hirst v. the United Kingdom (2)*, 6 October 2005. More recently, the Court held that member states could, however, exclude the whole of a category of prisoners, for example those who have been condemned for the more serious offences (ECtHR (GC), judgment *Scoppola v. Italy (3)*, 22 May 2012, § 102 and ff.). The Court confirmed the incompatibility with Art. 3 of the First Protocol of disenfranchisement which “affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or seriousness of their offence and their individual circumstances” (ECtHR, judgment *Brândușe v. Romania (2)*, 27 October 2015, § 45). The Court of Justice of the European Union delivered recently a similar decision (CJUE (GC), judgment *Delvigne v. Commune de Lespard-Médoc and Préfet de Gironde*, 6 October 2015). The Court also stated that an individualised decision must be made before excluding someone from the electorate on the grounds of mental incapacity (ECtHR, judgment *Alajos Kiss v. Hungary*, 20 May 2010).

<sup>117</sup> Art. 62 (2) of the Belgian Constitution imposes the proportional system for the election of the House of Representatives members.

voting system, even those which tend to keep political minorities out of parliament. The case law indisputably supports this position: “as regards, in particular, the choice of electoral system, the Court reiterates that the Contracting States enjoy a wide margin of appreciation in this sphere. In that regard, Article 3 of Protocol No. 1 goes no further than prescribing ‘free’ elections held at ‘reasonable intervals’, ‘by secret ballot’ and ‘under conditions which will ensure the free expression of the opinion of the people’. Subject to that reservation, it does not create any ‘obligation to introduce a specific system’ such as proportional representation or majority voting with one or two ballots”<sup>118</sup>. In this field, the Strasbourg Court takes into account the diversity of political traditions and historical particularities: “[t]here are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision”<sup>119</sup>.

*b. Compliance with Human Rights*

The unequal distribution of electoral influence is also partly justified by the implementation of *human rights*: perfect electoral equality would necessitate a disproportionate infringement of personal freedoms, notably the two freedoms of expression and association.

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<sup>118</sup> ECtHR (GC), judgment *Sitaropoulos and Giakoumopoulos v. Greece*, 15 March 2012, § 65. See also: ECHR, decision *X. v. the United Kingdom*, 6 October 1976; ECHR, decision *Liberal Party v. the United Kingdom*, 18 December 1980; ECHR, decision *X v. Island*, 8 December 1981; ECtHR, judgment *Mathieu-Mohin v. Belgium*, 2 March 1987, § 54 and ff.; ECtHR, decision *Federación nacionalista Canaria v. Spain*, 7 June 2001; ECtHR, judgment *Yumak and Sadak v. Turkey*, 30 January, 2007, § 61; ECtHR (GC), judgment *Yumak and Sadak v. Turkey*, 8 July 2008, § 110.

<sup>119</sup> ECtHR, judgment *Communist Party of Russia v. Russia*, 19 June 2012, § 108.

Regarding freedom of expression, one can affirm that very low spending limits prevent candidates from fully exploiting their rights. In this regard, the European Court of Human Rights has found that the setting of a limit on expenditure by unauthorised persons during the election period as low as £5 in pursuit of equality between candidates was a disproportionate restriction, incompatible with Art. 10 of the ECHR<sup>120</sup>.

Freedom of association limits the possibility of authorities influencing candidate selection: parties are indeed free associations and, despite their specific functions in political systems, are protected from excessive interference. The inequality resulting from selection processes (from which most of the electors are excluded) is thus - at least partially - justified by the freedom of association enjoyed by party members. This liberty is, however, restricted in Germany by the Basic Law: parties must respect democratic principles in their own structures and cannot deprive their members of influence during the candidate selection process (the final decisions must be made by assemblies of the members themselves or their delegates)<sup>121</sup>. The case law of the European Court of Human Rights on this specific topic is quite limited, but recognises that the freedom of political parties to organise their candidate selection processes is not absolute<sup>122</sup>.

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<sup>120</sup> ECHR, judgment *Bowman v. the United Kingdom*, 19 February 1998.

<sup>121</sup> See above, point *IV.a*.

<sup>122</sup> See ECHR, decision *Staatkundig Gereformeerde Partij v. the Netherlands*, 10 July 2012, especially §§ 66 to 79. This case concerns a party which states that women should not be allowed to stand for elected office in general representative bodies of the State on its own lists of candidates. The party complained under Articles 9, 10 and 11 of the Convention that Dutch authorities (especially the Supreme Court), in taking measures to force the party to admit women on its lists, deprived it and its individual members of their right to freedom of religion, their right to freedom of expression and their right to freedom of assembly and association. The Court found this application manifestly ill-founded.



*c. Efficiency and Stability of the Institutions*

One of the most common legal justifications for the unequal distribution of electoral influence is the drive for efficiency and stability in democratic institutions. According to John Stuart Mill, the form of a government “is negatively defective if it does not concentrate in the hands of the authorities power sufficient to fulfil the necessary offices of a government”<sup>123</sup>. In pursuit of a workable government, election law can influence the assembly composition to facilitate the formation of a parliamentary majority able to make political decisions and pass bills.

A great many electoral rules which tend to keep smaller parties out of parliament<sup>124</sup> are frequently justified in this way with constitutional court approval<sup>125</sup>. This is for example the case for rules such as legal thresholds, considered by the German Federal Constitutional Court as a reasonable means to help forming a *Bundestag*

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<sup>123</sup> J. S. MILL, *Considerations on representative government*, 1861, chapter 6.

<sup>124</sup> One can mention, among examples already described in this article, the obligation to submit hundreds of signatures of support for candidates, the limited access to audio-visual media enjoyed by smaller parties during the campaign or the public financing scheme oriented in favour of already-represented parties.

<sup>125</sup> The following decisions of the German Federal Constitutional Court are notably relevant: BVerfG, 5 April 1952, *BVerfGE* 1, 208, here 247; BVerfG, 1 August 1953, *BVerfGE* 3, 19, here 27; BVerfG, 23 January 1957, *BVerfGE* 6, 84, here 92; BVerfG, 30 May 1962, *BVerfGE* 14, 121, here 136; BVerfG, 11 October 1972, *BVerfGE* 34, 81, here 92; BVerfG, 22 May 1979, *BVerfGE* 51, 222, here 236; BVerfG, 29 September 1990, *BVerfGE* 82, 322, here 338; BVerfG, 10 April 1997, *BVerfGE* 95, 408, here 418; BVerfG, 9 November 2011, *BVerfGE* 129, 300, here 321. Regarding the Belgian Constitutional Court, see C.A., judgment n° 30/2003, 26 February 2003, B.22.6; C.A., judgment n° 73/2003, 26 May 2003, B.19.6; C.A., judgment n° 22/2004, 4 February 2004, B.3; C.A., judgment n° 96/2004, 26 May 2004, B.9.4; C.A., judgment n° 103/2004, 9 June 2004, B.8.4; C.A., judgment n° 78/2005, 27 April 2005, B.11.3; C.C., judgment n° 86/2012, 28 June 2012, B.6.3.

capable of exercising its constitutional functions<sup>126</sup>. The European Court of Human Rights considers that election law can “channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will”<sup>127</sup>.

#### *d. Struggle against Antidemocratic Movements*

A no less significant purpose that can legally justify some inequalities is the struggle against antidemocratic movements in order to perpetuate the democratic regime. This goal is commonly associated with electoral thresholds, which unfortunately keep all smaller parties out of the parliament, whatever their ideology, and do not create an obstacle to larger antidemocratic parties. More specific

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<sup>126</sup> In fact, the Court uses several expressions to refer to this idea; “*Handlungsfähigkeit*” - ability to act (BVerfG, 5 April 1952, *BVerfGE* 1, 208, here 247; BVerfG, 23 January 1957, *BVerfGE* 6, 84, here 98; BVerfG, 22 May 1979, *BVerfGE* 51, 222, here 236; BVerfG, 9 November 2011, *BVerfGE* 129, 300, here 321); “*Funktionsfähigkeit*” - ability to exercise its functions (BVerfG, 5 April 1952, *BVerfGE* 1, 208, here 248; BVerfG, 23 January 1957, *BVerfGE* 6, 84, here 92; BVerfG, 23 January 1957, *BVerfGE* 6, 104, here 115; BVerfG, 22 May 1979, *BVerfGE* 51, 222, here 236; BVerfG, 29 September 1990, *BVerfGE* 82, 322, here 338; BVerfG, 10 April 1997, *BVerfGE* 95, 408, here 418; BVerfG, 9 November 2011, *BVerfGE* 129, 300, here 321); “*Arbeitsfähigkeit*” - ability to work (BVerfG, 22 May 1979, *BVerfGE* 51, 222, here 247); and “*Entscheidungsfähigkeit*” - ability to decide (BVerfG, 29 September 1990, *BVerfGE* 82, 322, here 338; BVerfG, 10 April 1997, *BVerfGE* 95, 408, here 419).

<sup>127</sup> ECtHR (GC), judgment *Yumak and Sadak v. Turkey*, 8 July 2008, § 112. See also: ECtHR, judgment *Mathieu-Mohin v. Belgium*, 2 March 1987, § 54; ECHR, decision *Tête v. France*, 9 December 1987; ECHR, decision *Fournier v. France*, 10 March 1988; ECHR, decision *Tête v. France*, 10 March 1988; ECtHR, decision *Antonopoulos v. Greece*, 29 March 2001; ECtHR, decision *Federación Nacionalista Canaria v. Spain*, 7 June 2001; ECtHR, decision *Tsimas v. Greece*, 26 September 2002; ECtHR (GC), judgment *Refah Partisi v. Turkey*, 13 February 2003, § 99; ECtHR, decision *Bompard v. France*, 4 April 2006; ECtHR, judgment *Yumak and Sadak v. Turkey*, 30 January 2007, § 62; ECtHR, decision *Partija Jaunie Demokrati v. Latvia*, 29 November 2007.

measures intended to prevent those parties from entering the parliament are quite scarce and invite criticism because they discriminate against candidates or parties either on the grounds of the ideology expressed in their manifestos or of the content of their speeches.

In this regard, the European Court of Human Rights held that the Convention “cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State’s institutions, of the right to protect those institutions. (...) In view of the very clear link between the Convention and democracy (...), no one must be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole”<sup>128</sup>.

In Belgium, the possibility of temporarily depriving parties of their public subvention when they show clear hostility towards the rights and freedoms guaranteed by the European Convention on Human Rights<sup>129</sup> has been approved (with some reservations) by the Constitutional Court<sup>130</sup>. Other measures directed against anti-democratic parties include restricting access to audio-visual media. The Belgian Council of State allows public broadcasters to refuse to air election spots which are not themselves antidemocratic but which represent parties known as antidemocratic<sup>131</sup>. Meanwhile, in Germany and in the United Kingdom, the election spots cannot be excluded from broadcasting based on the reputation of the party; a

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<sup>128</sup> ECtHR (GC), judgment *Refah Partisi (the Welfare Party) and others v. Turkey*, 13 February 2003, §§ 96 and 99.

<sup>129</sup> Art. 15ter of the *loi du 4 juillet 1989* mentioned above.

<sup>130</sup> C.A., judgment n° 10/2001, 7 February 2001; C.C., judgment n° 195/2009, 3 December 2009.

<sup>131</sup> C.E., judgment n° 80.787, 9 June 1999, *Bastien v. RTBF*; C.E., judgment n° 171.094, 11 May 2007, *Robert v. RTBF*.

decision not to broadcast must be founded on arguments related to the content of the message in question<sup>132</sup>.

It is also important to underline a distinctive feature of German law: under the Basic Law, the Federal Constitutional Court is the only authority allowed to judge the unconstitutional nature of a party and to consequently deprive it of the legal advantages generally given to parties<sup>133</sup>. This means that as long as a party has not been named in such a decision of this Court, it must be treated exactly as the other parties, even if it is commonly known to be an antidemocratic or unconstitutional movement.

#### *e. An Ambiguous Concept of Representativeness*

Finally, the trend to unequal distribution of electoral influence in election law can be explained in relation to the concept of representativeness. The study shows that parties are expected to gain a significant portion of the people's support: not only should the parliament (as a whole) or its members (as individuals) represent the governed people, but the parties themselves are expected to be sufficiently representative of the people; meanwhile, parties which are not sufficiently representative can be kept out of the parliament, with individual candidates faring even worse<sup>134</sup>. This is evident in several aspects of national election law in Belgium, Germany and

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<sup>132</sup> Regarding Germany, see especially BVerfG, 14 February 1978, *BVerfGE* 47, 198, here 227; and also: BVerfG, 17 August 1956, *BVerfGE* 5, 85, here 140; BVerfG, 3 September 1957, *BVerfGE* 7, 99, here 107. In the United Kingdom, the election spots must not offend good taste and decency; see *R (Pro Life) v. BBC*, 2004, 1, *Law Reports (Appeal Cases)*, 185; *R (Alan Craig) v. BBC*, 2008, High Court of England and Wales (Admin.), 1369. On this topic, see not. I. KATSIREA, Judicial review of party broadcasts in Germany and the United Kingdom, *Journal of Media Law*, 2009, 269-287.

<sup>133</sup> Art. 21, (2), of the German Basic Law.

<sup>134</sup> The ECtHR "highlights the primordial role played by political parties, the only bodies which can come to power and have the capacity to influence the whole national regime" (ECtHR, judgment *Oran v. Turkey*, 15 April 2014, § 64).

the United Kingdom and is supported by the European Court of Human Rights case law.

Many measures which induce a tendency to unequal distribution of electoral influence are justified on the grounds that they reserve access to the parliament to *sufficiently representative* parties. Such a conclusion has been upheld in cases regarding various rules, such as the payment of deposits to put up candidates<sup>135</sup>, the collection of signatures to support candidacies<sup>136</sup> and the electoral thresholds<sup>137</sup>.

The position of the Strasbourg Court is especially clear on the point of public financing of political parties in the case law. It is held that states can reserve public funds for parties with a certain level of electoral support. This is notable in the judgment *Özgürlük*: “the Court considers that the public funding of political parties on the basis of a system of equitable distribution requiring a minimum level of electoral support pursues the legitimate aim of enhancing democratic pluralism while preventing the excessive and dysfunctional fragmentation of candidacies, thereby strengthening the expression of the opinion of the people in the choice of the legislature”<sup>138</sup>. It is interesting to note that, in the French version of the judgment, the Court uses the expression “*seuil de représentativité*”, which can be translated as “threshold of representativeness”, instead of the words “minimum level of electoral support”.

In February 2016, the European Court of Human Rights judged that the states in general cannot be held responsible for the disad-

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<sup>135</sup> ECHR, decision *Tête v. France*, 9 December 1987; ECHR, decision *Fournier v. France*, 10 March 1988; ECHR, decision *André v. France*, 18 October 1995; ECtHR, judgment *Soukhovetski v. Ukraine*, 28 March 2006, § 73.

<sup>136</sup> ECtHR, judgment *Ekoglasnost v. Bulgaria*, 6 November 2012, § 64.

<sup>137</sup> ECHR, decision *Magnano and Südtiroler Volkspartei v. Italie*, 15 April 1996; ECtHR, decision *Partija Jaunie Demokrāti and Partija Mūsu Zeme v. Latvia*, 29 November 2007; ECtHR (GC), judgment *Yumak and Sadak v. Turkey*, 8 July 2008, § 125.

<sup>138</sup> ECtHR, judgment *Özgürlük ve Dayanışma Partisi v. Turkey*, 10 May 2012, § 42. See also ECHR, decision *New Horizons and others v. Cyprus*, 10 September 1998.

vantages in the electoral process which result of the choice “of only representing the interests of a small part of the population”<sup>139</sup>.

The resulting challenge thus consists in determining what is a sufficiently representative (or significant) party, to which election law has developed two complementary solutions. Firstly, the representativeness of a particular party is measurable on the election day following the ballot count. This is an essential feature of a democratic election: “only the elector may judge the aptitude of a political party to access the Parliament; his decision can only be assessed on the grounds of the number of votes”<sup>140</sup>. The implementation of the electoral threshold can illustrate this idea: on the election night, only parties that have obtained at least the requisite number of votes are seen as sufficiently representative and earn the right to access parliament. The representativeness of a political party here depends directly on its electoral support. Secondly, the representativeness of a party is presumed during the period preceding the election based on several elements, the most important of which being the party score in the *previous* election. This solution is often applied during the electoral campaign: the degree of legal advantages given to a party (in media coverage or public financing) cannot be determined according to the people’s current will, for its expression through the election is yet to come. The representativeness of each party, and the extent of the advantages linked to it, are therefore calculated according to diverse elements such as the number of actual candidates and the results of previous elections. This element plays a major part, so that the most successful parties in a general election are legally favoured when they face the following one.

A general overview of the election law also allows another conclusion regarding the concept of representativeness: in each of the

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<sup>139</sup> ECtHR, Judgment *Partei die Friesen v. Germany*, 28 January 2016, § 40.

<sup>140</sup> “Allein der Wähler hat über die Parlamentswürdigkeit einer Partei zu entscheiden; seine Entscheidung ist nur stimmzahlenmäßig meßbar”. H.-C. JÜLICH, *Chancengleichheit der Parteien. Zur Grenze staatlichen Handelns gegenüber den politischen Parteien nach dem Grundgesetz*, Berlin, Duncker & Humblot, 1967, 109.

studied legal systems, the composition of parliament is the outcome of a combination of the electors' will as expressed through the vote, and of the government's will in determining how people should be represented. What the electorate wishes is, in this respect, partially presumed.

*f. Legal Justifications, or Pretexts for Keeping Power?*

It appears that the trend in favour of unequal distribution of influence that characterised a part of the election law is therefore justified by several legal grounds and more generally by the contemporary conception of democratic representativeness. However, the same rules help to secure the ruling powers - namely, the parties already represented in parliament and their supporters - which cannot be justified as such. The Deputy Leader of the Labour Party Clement Attlee recognised as much in 1933 when he said the following in the House of Commons: "I find that all parties, possibly we ourselves, tend to adopt the electoral system which suits their political position in any country for the time being. Minority groups naturally ask for the system that suits them, and majority groups probably have a dangerous tendency to squeeze out minorities"<sup>141</sup>.

Despite much progress towards a more equal political system over the last few centuries, election law still builds a fortress around the main political parties and their supporters in the electorate. Within the walls those parties fight frequently, like knights in medieval tournaments, and do not need to fear the enemies who are held behind the ramparts and moats. This relatively stable situation is only disrupted in two rather rare cases: when one of the knights dies during a tournament or when a powerful enemy breaches the fortress walls.

In practice, however, it is extremely difficult - if not impossible - to retain those electoral rules which are legally justified and to repeal those which unrightfully favour the powerful elite, because they are almost always the same. In other words, after having ana-

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<sup>141</sup> C. ATTLEE, 6 December 1933, quoted in R. BLACKBURN, *The electoral system in Britain*, London, Macmillan, 1995, 424.

lysed election law in detail, it seems impossible in most cases to seriously distinguish the legal justifications from the political pretexts.

### CONCLUSIONS

Under contemporary election law, a very large majority of the people can participate freely and frequently in the choice of representatives, and therefore influence the adoption of rules to which they are submitted. A part of the election law tends, however, to distribute the electoral influence, *i.e.* the capacity to influence the composition of parliament, unequally among them. A significant part of the rules which have this effect are legally justified, according to the case law of the most senior national and European Courts.

The composition of the national legislative assemblies depends on the electors' choices - this being a necessary condition for democracy - but is also partially determined by election law itself, and by the leaders of the main political parties, notably through their choices of candidates. While British, German and Belgian election law may organise quite different electoral schemes, they are characterised by a similar historical evolution and all contribute to the political dynamic which has been described briefly in this paper and which is analysed more deeply in the original work summarised here.

### ABSTRACTS / RÉSUMÉS

In light of the principle of equality, German, Belgian and British election law contain some legal rules that tend to distribute the faculty to influence the composition of the elected assemblies equally among the governed people, and others that tend to distribute it unequally. The inequality caused by the latter group may be to some extent legally justified by concerns for the general interest, but also provides rulers with means that help them to remain in power, which is hardly justifiable from a legal perspective. In these legal systems, parties are expected to gain a significant portion of the people's support: not only should the parliament (as a whole) and its members (as individuals) represent the governed people, but the parties themselves are expected to be sufficiently representative of the



people in order to access the legislative assemblies. Notably, this thesis draws examples from the case law of the European Court of Human Rights, from which relevant decisions are mentioned here.

Le droit électoral allemand, belge et britannique, examiné à travers le prisme du principe d'égalité, est constitué de deux catégories de normes dont la dynamique est opposée: certaines normes électorales tendent à distribuer également entre les gouvernés la faculté d'influencer la composition des assemblées élues, alors que d'autres tendent à distribuer inégalement cette faculté. L'effet inégalitaire des normes de la seconde catégorie peut être dans une certaine mesure juridiquement justifié par des objectifs d'intérêt général, mais cet effet assure aussi aux gouvernants - d'une manière difficilement justifiable en droit - des moyens de faciliter leur maintien au pouvoir. Dans ces systèmes juridiques, les partis constituent des objets de représentation: ce n'est pas seulement le parlement en tant que tel ou ses membres individuels qui doivent représenter les gouvernés, on attend aussi des partis eux-mêmes qu'ils soient suffisamment représentatifs pour accéder aux assemblées législatives. Cette thèse est notamment confortée par la jurisprudence de la Cour européenne des droits de l'homme, dont les décisions pertinentes sont évoquées ici.