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The Political Consequences of Electoral Laws: The German System at Fifty

GIOVANNI CAPOCCIA

The electoral system has often been considered an important determinant of the political stability that the Federal Republic of Germany has enjoyed in the half-century of its existence, so that it has been often indicated as a 'model' for electoral reforms in other democracies. The analysis of the political impact of the German electoral system after 1949 shows that such impact was different in the different phases of evolution of the party system. In the 1950s, the German party system was characterised by a higher level of fractionalisation, which the electoral system contributed progressively to reduce. That phase was followed by 30 years of concentration and defractionalisation of the vote. In the last decade, the post-reunification party system presents again higher electoral fractionalisation, which the electoral system has partially reduced in the vote-seats translation. In the current political contingency it is doubtful, however, that the electoral system by itself can contain fragmentation on a durable basis.

In recent years, the electoral system of the Federal Republic of Germany (FRG) has been the model of reference for electoral reforms in New Zealand and Venezuela, and the proposal to reform the electoral legislation after the German example has emerged in the political debate in several other countries (for example, Italy, The Netherlands, South Africa, Portugal and the UK). Often, the advocates of the German system praise it for its alleged capability of achieving a good balance between a defragmenting impact, with positive consequences in terms of political stability, and respect for political minorities. This article sets out to answer the question of what have been the political consequences of the electoral system on the process of representation (and in particular on the party system) in the history of the FRG.

Answering this question is not only capable of giving useful information for 'comparative institutional engineering', but is also relevant to a correct analysis of the current phase of the German political system itself. National

reunification in 1990 has brought about higher levels of electoral and parliamentary fragmentation, as well as an increased territorial differentiation of voting behaviour. Similar phenomena already occurred in the electoral history of the FRG, notably in the first decade of its existence. The analysis of the political impact of the electoral system in that phase and the following years, as well as the conditions in which such impact was exerted, help us to a large extent to understand the potentialities and limits of electoral engineering in today's Germany.

After a synthetic description of the electoral mechanism and its reforms after 1949, the effects of the electoral legislation are analysed in the successive phases of evolution of the German party system. A subsequent section broadens the picture to include the general political conditions in which such effects took place. In the conclusion, some general reflections are made on the role of the electoral system in the future development of the German party system.

THE GERMAN ELECTORAL SYSTEM AND ITS EVOLUTION

The German elector has two votes: casting the *Erststimme* (first vote) in a single-member district (SMD), where the candidate who obtains a plurality is elected. The national territory is divided into as many SMDs as half of the seats of the Federal Assembly (Bundestag). The *Zweitstimme* (second vote) is cast for one of the lists that the parties present in every region (*Land*). The quota of seats that a party is entitled to is calculated entirely on the basis of its *Zweitstimmen*. More specifically, the votes cast for all regional lists of a certain party are summed at the national level, and – provided the party has passed the electoral thresholds built into the system – it obtains a corresponding proportional quota of the 656 Bundestag seats. Thus, the allocation of parliamentary seats to parties takes place in a single national district of 656. The formula used for this division is the 'Hare-Niemeyer', a different way of calculating the Largest Remainders-Hare. From the distribution of seats are excluded all those parties that do not obtain at least five per cent of the national amount of valid *Zweitstimmen*, or alternatively do not elect candidates in at least three SMDs (the so-called 'alternative threshold' – *Alternativklausel*). After this stage of counting, the party composition of the Bundestag is almost completely determined: in the subsequent steps of electoral counting the seat quota allotted to each party can only be modified by the eventual addition of 'surplus seats' (*Überhangmandate*).

The rest of the electoral procedure is mainly aimed at determining the *personal* composition of the Bundestag. First, each party's quota of seats is distributed – again on the basis of the Hare-Niemeyer formula – among its

regional lists (*Landesliste*). In each *Land*, from the quota of a party's regional list, the number of seats is subtracted that the party has obtained in the SMDs of that *Land*. The remaining seats to which the party is entitled in the *Land* are filled by candidates from its regional list, starting from the top of the list.¹ It can happen that in a certain *Land* a party wins a number of seats in SMDs that is higher than its regional quota. In this eventuality, the party keeps the *Überhangmandate*. The consequence of this provision is that the size of the Bundestag can vary.

The German electoral system has undergone incremental reforms over the decades, which modified many of its particular characteristics while leaving its basic structure virtually untouched (see Table 1). The 1949 law did not include the double vote system: the electors had a single vote (fused vote), which they cast in a SMD. The *Länder* – which then numbered 11 – constituted the higher tier of districts: that is, on the basis of the so-called *Landesproporz* principle, a fixed number of MPs were elected in each *Land*, corresponding to its quota of population; approximately 60 per cent of them were to be elected in SMDs. The vote counting and the seat allocation in the Federal Assembly took place entirely at the regional level: in each *Land*, first the votes obtained by each party were counted, in order to determine – on the basis of the d'Hondt formula – the quota of seats to which that party was entitled from those to be allocated in that *Land*. The seats allocated to each party were then filled by the candidates that had won the first-past-the-post competitions in the SMDs. The remaining seats were allocated to an 'additional members' list (called *Landesergänzungsvorschläge*), which the parties presented in each *Land*. In order to participate in the seat allocation in a *Land*, a party had to obtain at least five per cent of the votes, or alternatively win one seat in a SMD, of that *Land*.

In 1953 a new electoral law introduced the system of double vote and raised the electoral threshold to five per cent of the national (second) votes.² This law also modified the ratio between the seats to be assigned in SMDs and to party lists, from 60/40 per cent to 50/50 per cent; this led to an increase in the size of the Bundestag from 400 to 484 seats.³ In 1956 the single national district was introduced as higher tier of districts (*Bundesproporz*), and the alternative threshold was raised from one to three victories in SMDs. The Hare-Niemeyer formula replaced the D'Hondt system in 1985. In 1990, following national reunification, a temporary electoral reform was approved after a heated political debate and several interventions by the Federal Constitutional Court.⁴ The general purpose of the reform was to compensate for the competitive disadvantage that the parties that were present only in the regions of the former GDR faced in competing nationally, especially in crossing the five per cent threshold. To this end, the territory of application of the threshold was divided into two 'sub-territories' corresponding

TABLE 1
THE EVOLUTION OF THE ELECTORAL SYSTEM FOR THE ELECTION OF THE BUNDESTAG

Years of reform	Districts		Thresholds of exclusion				Proportional formulae					
	Higher tier	Disticting in competence of	Assembly size (w/out surplus seats) ^a	Second votes	First votes	Exemption of nat. inorties	Between Länder	Within Länder	Majority formula	Type of list	Possibility of surplus seats	Percentage of MPs elected in SMDs
1949	Länder (11)	Länder	400	5% reg.	1 seat in a SMD	no	A fixed nr. of seats is allocated to each Land	d'Hondt	plurality system	Rigid	yes	60%
1953	Länder (9) ^b	Federation	484	5% nat.	1 seat in a SMD	yes	A fixed nr. of seats is allocated to each Land	d'Hondt	plurality system	Rigid	yes	50%
1956	Single national district	Federation (Wahlkreis-komm.)	484	5% nat.	3 seats in a SMDs	yes	d'Hondt	d'Hondt	plurality system	Rigid	yes	50%
1985	Single national district	Federation (Wahlkreis-komm.)	496 ^c	5% nat.	3 seats in a SMDs	yes	Hare/Niemeyer	Hare/Niemeyer	plurality system	Rigid	yes	50%
1990	Single national district	Federation (Wahlkreis-komm.)	656	5% divided in 2 areas	3 seats in SMDs	yes	Hare/Niemeyer	Hare/Niemeyer	plurality system	Rigid	yes	50%

TABLE 1 (cont.)

Years of reform	Districts		Thresholds of exclusion				Proportional formulae					
	Higher tier	Districting in competence of	Assembly size (w/out surplus seats) ^a	Second votes	First votes	Exemption of nat. inorties	Between Länder	Within Länder	Majority formula	Type of list	Possibility of surplus seats	Percentage of MPs elected in SMDs
1994	Single national district	Federation (Wahlkreis-komm.)	656	5% nat.	3 seats in SMDs	yes	Hare/Niemeyer	Hare/Niemeyer	plurality system	Rigid	yes	50%
1996 ^d	Single national district	Federation (Wahlkreis-komm.)	598	5% nat.	3 seats in SMDs	yes	Hare/Niemeyer	Hare/Niemeyer	plurality system	Rigid	yes	50%

Notes:

a Excluding the representatives of Berlin-West: eight in 1949 (for Groß-Berlin), 22 from 1953 to 1987. After reunification Berlin was transformed in a *Land* and incorporated in the electoral procedure.

b In 1951 the *Länder* were reduced to nine, after the unification of the Baden, the Württemberg-Baden, and the Württemberg-Hohenzollern in the Baden-Württemberg.

c In 1956 the reincorporation of the Saarland in the national territory led to the increase of the size of the Bundestag by ten seats. In 1964 a total redesign of the SMDs added one district to the total, thereby increasing the total number of MPs by two.

d The reduction of the number of Bundestag seats to 598, and consequently of the number of SMDs to 299, decided with the 'Thirteenth amending law of the federal electoral law' of 15 November 1996 (B. G. B1, 1996, I, 1712ff.), will come into force for the election of the 15th Bundestag, scheduled for autumn 2002 (on this matter, see also BVerfGE 95, 335/365–367).

respectively to the old FRG and the old GDR: a party had to obtain five per cent of the votes in *only one* of the two territories in order to be able to have all its second votes (obtained in *both* territories) counted in the allocation of seats. This reform was abrogated in 1994.

In sum, the 'dual' framework of the system has remained unchanged over the last half-century: two-tier districting, two formulae, two thresholds of exclusion, and (from 1953) two votes. Therefore, the German system can be described as being formally constituted by two 'halves', one constituted by the 'second vote–single national district–proportional allocation of seats–five per cent threshold', and another consisting of the 'first vote–SMDs–plurality system–alternative threshold'. Although the former is politically more important, the latter's political importance is not negligible and has recently increased.

THE PARLIAMENTARY PARTY SYSTEM IN THE FRG

The (West) German party system went through four phases of evolution, in each of which the electoral system had a different political impact. A first phase of foundation/concentration was followed by two successive phases of stabilisation on a three-party and then on a four-party format, and by the current phase of relatively higher fragmentation starting with national reunification in 1990.

In the 12 years following the first federal elections of 1949, the system experienced a marked 'concentration process'. The main characteristics of this phase were a drastic reduction of the number of parties in the Bundestag, and a rapid concentration of votes on the biggest parties. This '*Konzentrationsprozess*' was over by the 1961 elections, from which the FRG emerged with a three-party system in which the CDU/CSU (Christlich Demokratische Union Deutschlands/Christlich-Soziale Union in Bayern – Christian-Democratic Union of Germany/Christian-Social Union in Bavaria), the SPD (Sozialdemokratische Partei Deutschlands – Social Democratic Party of Germany) and the smaller FDP (Freie Demokratische Partei – Liberal Democratic Party) obtained together the quasi-totality of the votes. This three-party equilibrium lasted approximately 20 years, during which the three parties gave rise to alternative and interchanging government coalitions.

The social-liberal coalition which in 1969 replaced the Grand Coalition between the CDU and the SPD – which had governed for the three previous years – was brought to an end by the decision of the FDP to form a new coalition with the CDU/CSU. A constructive vote of no-confidence in 1982 paved the way to the first Kohl cabinet, and the parties composing the new majority were successful in the 1983 elections. These changes marked the

beginning of a new phase of the party system, due to the emergence and national consolidation of the Greens (Grünen), the first new party to enter the Federal Assembly since 1953. Thanks on the one hand to the consolidation of the CDU/CSU-FDP coalition at the federal level, and on the other hand to the emergence of 'Green-Red' coalitions between the SPD and the Greens in some *Länder*, a structure of competition consisting of two quite clearly defined right and left 'camps', each consisting of a larger and a smaller partner, started to emerge.

National reunification in 1990 opened a fourth phase in the evolution of the German party system, characterised by the emergence in the national arena of a new party, the PDS (Partei des Demokratischen Sozialismus – Party of Democratic Socialism), as well as by still higher levels of electoral fragmentation. The PDS, successor of the hegemonic Communist Party of the old GDR, managed to keep part of its organisational resources and to reconstruct its political appeal. After a crisis in 1991–92, the party consolidated its political presence in the eastern regions and increased its share of Bundestag seats in the 1994 and 1998 elections. The emergence of an important new actor in the parliamentary party system seems to be accompanied by a greater fluidity of the electoral party system, as shown among other things by the large increase in the number of lists competing in federal elections.

THE POLITICAL CONSEQUENCES OF THE GERMAN ELECTORAL SYSTEM

The Proportional Election and the Five Per Cent Threshold

The single national district is a very 'photographic' element of the system.⁵ The Hare-Niemeyer is one of the less distortive PR formulae, or even the least distortive, depending on how the proportionality of a formula is calculated.⁶ Thus, the manipulative impact of this 'half' of the system, if any, is to be found in the five per cent threshold.

Dating from Duverger's seminal studies, two effects of electoral systems on party systems have been distinguished: the mechanical and the psychological effect.⁷ The mechanical effect of electoral systems is composed by two distinct phenomena: the distortive and the reductive effects. The distortive effect is the induced disproportion between the seat and the vote quotas of each party. The reductive effect consists in the reduction of the number of parties that obtain seats in respect of those that participate into the electoral competition: all parties that do not cross a certain threshold of votes are excluded from parliamentary representation. The psychological effect consists in the pressure exercised on electors not

to 'waste' their votes, but to cast them for parties for which the votes would 'count' in determining the victory of candidates, or in contributing to the quota of seats. This electoral behaviour, called in the literature 'strategic' or 'sophisticated' voting, aims to prevent the (reduce the chances of) success of those parties or candidates which are less preferred by the elector.⁸

The Distortive Effect

Table 2 reports measures of the overall disproportionality of the German electoral system. The distortion index D measures the overall disproportionality of the results of a given election.⁹ After the introduction of the five per cent threshold at the national level in 1953, the index displays relatively high values in the elections until 1961, then falls to very low values between 1972 and 1983, and rises again in the most recent elections. These values show that the process of concentration of the German party system that took place between 1953 and 1961 did not only occur at the parliamentary level (where the parties represented in parliament decreased to three) but also in the electorate. Moreover, the index shows that the long 'three-party phase' of the years 1961–80 was not 'manufactured' by the electoral system (with the exception of the 1969 elections), rather it was based on the concentration of the preferences of the electorate on the three main parties.

The distortive effect of the five per cent threshold can also be captured by the indices of electoral and parliamentary fractionalisation reported in Table 2.¹⁰ The difference between the two values in each election measures the distortive – that is, defractionalising – effect of the electoral system. Figure 1, showing the values of the parliamentary and electoral fractionalisation over time, displays a U-shaped pattern, with a noticeable defractionalising effect in the first few and last few federal elections. The electoral bases of the concentration process are observable in particular after 1953, shown by the rather modest difference between (F_{et} and F_{parl}). Between 1972 and 1987 the outcome of the system was of almost perfect proportionality between votes and seats. Finally, the figure shows that after national reunification the five per cent threshold has again had a 'filter' effect, turning a higher electoral fragmentation into a relatively less fragmented parliamentary system.

More specifically, the series of ($F_{et} - F_{parl}$) shows that in the first post-reunification elections of 1990 the defractionalising effect of the electoral system reached its peak, being even stronger than in the 1950s and determining, among other things, the highest level ever of over-representation of the two bigger parties. This result was mainly due to the negative result of the 'western' Greens in those elections, which failed to pass the five per cent threshold by 100,000 votes.¹¹ Obviously, the application of the five per cent threshold on a single territory would have

TABLE 2
DISTORTIVE EFFECT

Election Year	No of parties in Bundestag ^b	Distortion index <i>D</i>	<i>F</i> electoral ^a	<i>F</i> parliamentary	Difference $F_{el}-F_{parl}$	% non-represented Votes ^c
1949	10	15.5	0.795	0.751	0.044	1.1%
1953	6	8.1	0.698	0.641	0.057	6.7%
1957	4	6.9	0.637	0.581	0.056	7.0%
1961	3	5.7	0.645	0.602	0.043	5.7%
1965	3	3.6	0.609	0.581	0.028	3.6%
1969	3	5.4	0.600	0.554	0.046	5.2%
1972	3	1.2	0.582	0.572	0.010	1.0%
1976	3	1.0	0.576	0.567	0.009	0.8%
1980	3	2.1	0.606	0.589	0.017	1.9%
1983	4	1.2	0.608	0.602	0.006	0.4%
1987	4	1.4	0.651	0.643	0.008	1.5%
1990	5	8.1	0.681	0.622	0.059	8.0%
1994	5	3.5	0.683	0.656	0.027	3.5%
1998	5	5.6	0.698	0.659	0.039	5.9%

Notes:

a The party quotas used to calculate the index are rounded to the first decimal. The quotas of all parties that obtained at least 0.05% of the votes have been considered.

b At the beginning of the legislative period. The figure for 1949 does not include three partyless 'independents'.

c Quotas of votes that were *actually* not transformed into seats. The values account for the effect of the alternative threshold and the 1990 reforms. In absence of those factors, the values for the elections of 1953, 1957, 1990, and 1994 would be respectively 10.8%, 10.4%, 11.5%, and 7.8%.

Sources: Data from the official publications *Bevölkerung und Erwerbstätigkeit 1994. Wahl zum 13. deutschen Bundestag*, Hefte 1-5, Stuttgart: Metzler-Poeschel, 1994, and *Bevölkerung und Erwerbstätigkeit 1998. Wahl zum 14. deutschen Bundestag* Hefte 1-5, Stuttgart: Metzler-Poeschel, 1998. Calculations by the author.

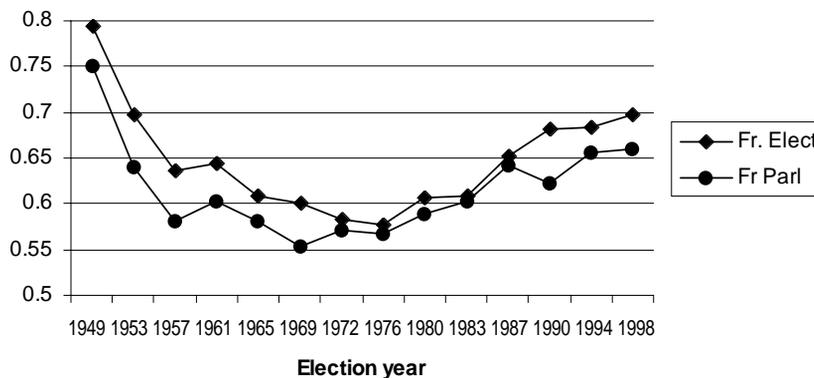
produced even higher levels of disproportionality. In 1994, however, when the old system was restored, disproportionality was lower than it would have been, had the PDS not brought its 4.4 per cent of second votes in parliament via the alternative threshold.

The parties that have obtained seats have been more often over-represented than under-represented, especially after 1953.¹² The two main parties have always been over-represented, and no case of under-representation can be observed after the adoption of the Hare-Niemeyer formula in 1985. A general measure of over-representation is determined by the size of the quota of votes that are not transformed into seats thanks to the reductive effect of the thresholds (see Table 2): the seats corresponding to those votes are in fact 'redistributed' among the parties that participate in the distribution. With the reforms of the thresholds of exclusion in 1953 (especially) and 1957, the quota of votes excluded from representation increased, and would have been even higher in those elections if some small parties had not entered the Bundestag through the 'backdoor' of the alternative threshold. Thereafter, the quota of votes excluded from representation at the federal level decreased steadily with the only exception of the 1969 elections, to increase substantially again only after 1990.¹³

The Reductive Effect

A general measure of the reductive effect of an electoral system is the difference between the number of parties competing into elections and the number of parties that obtain parliamentary seats. From the figures reported in Table 3, two characteristics of the German case are immediately evident:

FIGURE 1
ELECTORAL AND PARLIAMENTARY FRACTIONALISATION



first, the number of the parties represented in the Bundestag decreased rapidly between 1949 and 1961, from ten to three, and then rose to four after 1983 and to five after 1990. Second, a high number of lists have constantly been excluded from representation. This is, however, a characteristic of virtually all electoral systems. What is of interest here is to evaluate the *specific* reductive effect of the five per cent threshold, distinguishing it, on the one hand, from the reductive effect of the 'natural' thresholds of the system, and, on the other, from the moderating effect on the five per cent hurdle typical of the alternative threshold. For the 1990 elections the effect of a further characteristic of the system should be considered: the division of the territory in the application of the five per cent threshold.

The data show that in almost every election the two legal thresholds have excluded from representation only a relatively small fraction of the total of the competing lists, most of which have been instead excluded by the 'natural' thresholds of exclusion and representation built into the system. The natural threshold of representation is the minimal quota of votes that can be sufficient for a party to obtain parliamentary representation in the most favourable conditions. Such conditions are given, in a single national district system, by the number of competing lists and the distribution of votes among them. The natural threshold of exclusion is instead the quota of votes that – in the least favourable conditions – might not be enough for a party to gain representation. Without going into mathematical details, it is evident that the enormous district magnitude of the German system renders its natural thresholds extremely low.¹⁴ This means that many of the excluded lists represented microscopic groups of virtually no political weight, often ephemeral, which most probably would have been excluded from representation under any electoral system.¹⁵

Another aspect of the functioning of the German electoral system on which Table 3 gives important information is the effect of the alternative threshold in moderating the reductive impact of the five per cent hurdle. The data show that, had there been no alternative threshold in the system, in 1953 only four lists (instead of six) would have obtained seats, which means that the reductive effect of the transformation of the five per cent threshold from regional to national for those elections would have been much stronger in absence of an alternative threshold (then of one seat in a SMD). Similarly, in 1957 a further party (the Deutsche Partei, DP) would also have been excluded from the seat distribution, and the parties represented in the Bundestag would have been three; and in 1994 the PDS would have had the same destiny, bringing back to four (as prior to 1990) the number of the represented parties. The abrogation of the temporary reforms introduced in 1990 in order to attenuate the reductive effect of the system would have therefore made one more 'victim', had there not been an alternative

TABLE 3
REDUCTIVE EFFECT OF THE NATURAL AND LEGAL THRESHOLDS

Electron Year	Competing party lists	Party lists represented in the Bundestag	Party lists excluded from the Bundestag	Party lists that would have obtained seats in absence of legal thresholds	Party lists excluded by the natural threshold	Party lists excluded by the legal thresholds and alternative)	No of parties obtaining seats only through the alternative threshold
1949	13	10	3	***	***	***	0
1953	12	6	6	***	***	***	2
1957	12	4	8	7	5	3	1
1961	8	3	5	6	2	3	0
1965	10	3	7	5	5	2	0
1969	11	3	8	5	6	2	0
1972	7	3	4	5	2	2	0
1976	15	3	12	5	10	2	0
1980	11	3	8	4	7	1	0
1983	12	4	8	5	7	1	0
1987	15	4	11	6	9	2	0
1990	23	5	18	11	12	6	2 ^a
1994	21	5	16	9	12	4	1
1998	32	5	27	13	19	8	0

Notes: for the 1949 and 1953 elections the natural thresholds cannot be calculated in absence of disaggregated data.
a In 1990: through the division of the territory of application of the threshold.

threshold. (Such temporary reform allowed the entry in the Bundestag elected in 1990 of two lists – the PDS itself and the Grünen/Bündnis '90 – that would not have succeeded otherwise).

To sum up, although the natural thresholds have been sufficient to exclude many small groups from representation, the five per cent threshold has certainly had – especially since 1953 – a reductive effect on the party system. Such effect was moderated in three elections (1953, 1957 and 1994) by the influence of the alternative threshold, and in one (1990) by the division of the territory of application of the five per cent threshold itself. The consequences of the reductive effect on the general political equilibria, however, must be evaluated on a case by case basis, and this is done in a later section. But first the psychological effect of the five per cent threshold should be analysed.

The Psychological Effect

Even though generally the pressure to vote strategically is considered to be a characteristic of majoritarian electoral systems, it can also be exerted by PR systems that include a legal threshold of exclusion. Under such systems, if electors expect that their preferred party will not pass the threshold, they might choose to cast their vote 'strategically' for the preferred party among those that have chances to pass the threshold.¹⁶ In Germany, such an effect would discourage electors from voting for parties that are expected to obtain less than five per cent of the national vote, thus reducing parliamentary fractionalisation at least below that threshold. However, it is difficult to distinguish this defragmenting effect from the independent process of structuration of the party system, which also reduced fragmentation by progressively closing the political market through the development of the nationwide territorial organisations of the established parties and the creation of legal and factual barriers to entry for new potential competitors. These two phenomena have in fact reinforced each other to a large extent. With this proviso in mind, however, it is possible to make some general observations on the psychological effect of the five per cent threshold in the different phases of evolution of the German party system.

The occurrence of strategic voting seems likelier the longer a threshold remains in force, so that the electorate can develop stable expectations about the working of the system, and adjust its choices accordingly. Thus, in the German case, it would be implausible to hypothesise a strong psychological effect of the threshold during the initial foundation and concentration phases, between 1949 and 1961. In those years, the electoral system had been in place for too short a time, and, although a reduction of *electoral* fractionalisation can be observed, the mechanical – in particular reductive – effect of the threshold was certainly predominating. Probably, however, the exclusion from the representational arena of many small groups and the

rapid reduction in the number of relevant parties rendered increasingly clear to many electors the reductive impact of the threshold, and therefore the negative consequences of dispersing their vote on small parties. This effect of the system was certainly reinforced by (and again difficult to distinguish from) a narrowing of the political supply. In fact, the exclusion of small parties from representation often precluded their outright disappearance, which restricted the choices available to the electorate: in 1965 none of the parties that had obtained no seats in the four previous elections competed at the federal level with independent lists. Moreover, the 'conditioned' survival of small but historically important groups such as the DP and the Zentrum, whose presence in the Bundestag in 1957 and 1953 respectively was due exclusively to the alternative threshold and to the support of larger parties in electoral alliances (see below), probably rendered the reductive potential of the threshold even more evident. In sum, it is plausible to suggest that the strong mechanical effect of the five per cent threshold on the party system during the first decade of its existence influenced the learning process of the electorate, and had consequences during the successive phase, in which the system stabilised on a three-party equilibrium.

During the three-party period of the German party system (1961–80), the extremely low number of 'wasted votes' points in fact to strategic behaviour by the electorate, who concentrated their second votes almost exclusively on the CDU/CSU, the SPD and the FDP: all these parties were considered capable of obtaining more than five per cent of the national vote. All three had constantly been represented in the Bundestag, and even the small FDP, in fact, had always been quite comfortably above the threshold. In that period, an overwhelming quota of second votes (in some cases equalling or even more than 99 per cent) was cast for these three parties, despite several other lists (often more than ten) also competing in the federal elections.

This picture, where all evidence points to the existence of a psychological effect of the five per cent threshold, presents the puzzle of the 1969 elections and the relative successes of a new party, the NPD (Nationaldemokratische Partei Deutschlands – National-Democratic Party of Germany), which obtained 4.3 per cent of the vote. At first sight, this seems to contradict the existence of a relevant psychological effect of the five per cent threshold in this phase: the threshold did not deter voters from 'dispersing' votes on a new party, which did not manage to obtain any seats.

The exception is more apparent than real, however: the NPD was in all likelihood considered able to cross the five per cent threshold. Between the federal elections of 1965 and those of 1969 the party took part in regional elections in eight of the ten *Länder*, obtained seats in seven of them, and reached a peak of almost 10 per cent of the vote in Baden-Württemberg. The

results of the regional elections in the years immediately preceding the federal vote certainly exert an important influence on the expectations of the electorate on the future chances of a small party, for several reasons. First of all, the political importance of the *Länder* gives a political rather than merely administrative value to those elections. A party, and especially a new party, obtaining seats in several *Landtage* normally also achieves a good deal of visibility on the national media and in the public debate. Secondly, but not less importantly, all electoral laws for the elections of the *Landtage* include a five per cent threshold. In a situation in which a new party manages to obtain representation in several *Länder*, thereby breaking out from a merely regional dimension, it is reasonable to assume that many of its potential electors would consider it able to cross the same hurdle in the national elections: the 'wasted vote' argument would no longer apply.

The NPD thus obtained in total 46 regional MPs, and 22 of them took part in the March 1969 election for the Federal President in the *Bundesversammlung*. This gave a further boost to the visibility of the party in the national political arena only about five months before the federal elections.¹⁷ In this situation, the NPD was expected by not only its actual and potential electors, but also by broad sectors of public opinion, to be capable of obtaining more than five per cent of the national vote. It would not be completely convincing, therefore, to consider the 4.3 per cent obtained by the NPD in 1969 as an example of 'wasted votes'.

The presence of a psychological effect of the five per cent threshold can be observed during the 1980s too. Similar to what has been observed in the case of the NPD, the emergence and successive stabilisation of the Greens does not seem to be enough *per se* to contradict its existence. The results of the Greens in regional elections reflected a similar pattern to that observed in the case of the NPD: between the federal elections of 1980 and those of 1983 five regional elections were held, and in four of them the Greens passed the five per cent threshold.¹⁸ Paradoxically, their result in the only *Land* in which they failed this objective, Bavaria, where they obtained 4.6 per cent, testified to their nationwide consolidation: Bavaria is in fact a stronghold of the CSU (which has obtained the absolute majority in the *Landtag* since 1962, and the absolute majority of votes since 1970), and left-wing parties normally score much below their national average. Thus, it is reasonable to assume that, after their regional successes, the Greens were widely considered also capable of overcoming the five per cent threshold in the federal elections of 1983. The political difficulties of the SPD and the FDP, two parties from which the Greens have certainly attracted electors, made their task easier, but the nationwide visibility achieved by the Greens was in itself enough at least not to discourage their potential electors. To sum up, although it is difficult to estimate exactly the

extent of the psychological effect of the five per cent threshold, the effect in question was probably present from the 1960s.

The First-Past-the-Post Election

The 'majoritarian half' of the German electoral system has a far less significant impact on the party system than the five per cent threshold.¹⁹ However, some elements of the majoritarian half of the system can have a substantial political impact on the distribution of seats in parliament in two cases.²⁰ First, when the split-ballot phenomenon, or the drawing of the SMDs, give rise to surplus seats; second, when a party enters the Bundestag via the alternative threshold. Both phenomena are very topical. On the one hand, in the federal elections of 1990 there were six surplus seats (a record until then), while in the 1994 and 1998 elections the number soared to 16 and 13 respectively. Their occurrence substantially reinforced the tight majorities supporting Kohl in 1994 and Schröder in 1998.²¹ On the other hand, the alternative threshold gave Bundestag seats to the PDS in 1994, thereby contributing to its stabilisation in the national arena, which in turn undoubtedly facilitated its success in the 1998 elections.

The presence of two tiers of districts and of two distinct stages in the vote counting and seat allocation procedure – between *Länder* and within *Länder* – in all successive federal electoral laws has made the emergence of surplus seats a constant possibility in the history of the FRG. Surplus seats increased over the first four federal elections, then disappeared during the 1960s and 1970s, re-emerged during the 1980s, and boomed in the last decade (see Table 4). Before 1990, surplus seats mainly occurred in small *Länder*, while after reunification, 32 out of 35 surplus seats instead occurred in the 'new *Länder*' of the former GDR. Finally, with a single exception (a surplus seat for the DP in 1953, due to an electoral agreement with the CDU), the two bigger parties have monopolised all surplus seats.

Split ballots and the drawing of SMDs are only two among the many factors that can determine the emergence of surplus seats. Such factors are:

1. the malapportionment 'between *Länder*', for which some *Länder* contain a quota of the total SMDs which is higher than their quota of population;²²
2. the malapportionment 'within *Länder*' (between SMDs), and the concurrent necessary condition that SMDs that contain population quotas lower than the average are concentrated in one or few *Länder*. This leads back to point 1;²³
3. the presence in a given *Land* of minors, which is above the national average: even with a perfectly fair districting, this phenomenon would give rise to a functional equivalent of malapportionment. In fact, according to

TABLE 4
SURPLUS SEATS BY PARTY AND LAND 1949–98

Election year	Surplus seats (total)	Party	Regional lists
1949	2	SPD (1) CDU (1)	Bremen Baden-Württemberg
1953	3	CDU (2) DP (1)	Schleswig-Holstein Hamburg
1957	3	CDU (3)	Schleswig-Holstein
1961	5	CDU (5)	Schleswig-Holstein (4) Saarland (1)
1980	1	SPD (1)	Schleswig-Holstein
1983	2	SPD (2)	Bremen (1) Hamburg (1)
1987	1	CDU (1)	Baden-Württemberg
1990	6	CDU (6)	Mecklenburg-Vorpommern (2) Sachsen-Anhalt (3) Thüringen (1)
1994	16	CDU (12) SPD (4)	Baden-Württemberg (2) Mecklenburg-Vorpommern (2) Sachsen-Anhalt (2) Sachsen (3) Thüringen (3) Bremen (1) Brandenburg (3)
1998	13	SPD (13)	Hamburg (1) Mecklenburg-Vorpommern (2) Brandenburg (3) Sachsen-Anhalt (4) Thüringen (3)

the German legislation, SMDs must contain uniform quotas of *population*, and no distinction is made between electors and those not eligible;

4. abstention, or invalid second votes, in a given *Land*, which are above the national average. The stronger these phenomena in a *Land*, the fewer the second votes obtained by the parties in that *Land* entitle their lists to a number of seats which is sufficient to cover the eventual victories of their candidates in the SMDs of that *Land*;
5. a high number of parties that pass the thresholds and participate in the distribution of seats in the national counting. The probability of surplus

seats increases if this phenomenon is concentrated in some *Länder* – for example, if a party that does not compete in all *Länder*, or is substantially stronger in some regions than in others, crosses the thresholds. The consequence is that, in the *Länder* where this happens, only few second votes do not translate into seats. Thus, in those *Länder* the regional lists of larger parties will be less, or not at all, overrepresented. The less a regional list of a large party is overrepresented in the allocation of seats to a certain *Land*, the higher the probability of surplus seats becomes, if the large party in question (as is often the case) wins seats in many SMDs of that *Land*;

6. a strong *Stimmensplitting* in one or few *Länder*. If the candidates of a given party in the SMDs obtain (many) more first votes than the regional list of the same party obtains second votes, surplus seats will emerge.

Determining exactly the relative weight of each of these factors in the emergence of surplus seats would exceed the limits of this article. The picture is further complicated by the fact that these causes may concur to produce the same effect, but can also cancel each other out to various extents. In the 1994 elections, for example, the high electoral turnout in Saarland most likely avoided the emergence of a further *Überhangmandat*, while the SMDs in Baden-Württemberg, where two surplus seats (probably caused by the high number of split ballots) were allocated to the CDU, were already larger than the national average. A fairer districting according to the population of the *Land* would in all likelihood have caused the emergence of a further surplus seat (see BVerfGE, 95, 335/346).

Of the six factors listed above, only those relative to the malapportionment of the population among SMDs and among *Länder* can be directly influenced by the legislator, within the framework of the existing system. And the legislator has recently intervened: after the emergence of 16 *Überhangmandate* in 1994, following the rulings of the Federal Constitutional Court, the maximum deviation of the population of a given SMD from the national average that could be tolerated, has been reduced from 33.1/3 to 25 per cent. That is, if the population of an SMD exceeds the average amount of population in the SMDs by 25 per cent, the boundaries of the SMD in question *must* be redrawn. The same law also reduced (from 25 to 15 per cent) the level of deviation from the average that should not be exceeded *whenever possible*.²⁴ The territorial disequilibrium of SMDs *between Länder*, however, is probably the main single cause of surplus seats: according to an official simulation, this factor was alone at the basis of more than one-third (six out of 16) of the *Überhangmandate* that resulted in the 1994 elections (BVerfGE 95, 335/345).

At this stage, a few general remarks are in order: first, that the level of territorial distortion present in the system is much lower than that of some genuinely majoritarian electoral systems, such as the British or the French ones in some phases. Secondly, historically there has been a clear tendency of the German legislator to reduce – often under the stimulus of interventions by the Federal Constitutional Court – the causes of surplus seats, while keeping the basic features of the electoral system. The boundaries of all SMDs were redrawn in 1964 and frequently subjected to partial revisions in the later years. Moreover, the reduction of the possibility of occurrence of surplus seats was one of the reasons behind the introduction in 1985 of the more proportional Hare-Niemeyer in lieu of the more distortive d'Hondt formula, in *all* phases of electoral counting. In fact, the utilisation of the d'Hondt formula in particular for the distribution of the seats among the regional lists of each party increased the likelihood of surplus seats, as was remarked by the Federal Constitutional Court as well as in the constitutional debate during the 1960s.²⁵ The Court, which has always upheld the constitutional legitimacy of surplus seats, has in fact stated that they are not 'unlimitedly admissible'. In the same respect, it must also be noted that, among the various criteria listed in the law that the legislator must consider in drawing the boundaries of SMDs, the ones relative to the (rough) equality of the quotas of population, and to the allocation to each *Land* of a quota of SMDs on the basis of its quota of the total population, seem to have been privileged in the most recent partial redistricting operations, in respect to the other criteria listed in the law (in respect of the sub-regional administrative boundaries, historical and geographical coherence – see BwahlG art. 3). In fact, the most recent instances of redrawing of SMDs have been done in an increasingly 'refined' way, following the boundaries of the smallest administrative units rather than those of larger ones (see for example the partial revisions in B.G.Bl. 1997, I, 1691 ff. and 2772 ff.).

In the current political circumstances, however, the relative importance of the *political* determinants of surplus seats seems to be larger than that of the legal determinants, as also the Federal Constitutional Court has recently acknowledged (see the dissenting opinion of four judges in BVerfGE 95, 335 ff.). In 1998, the Bundestag decided not to fill vacant seats that would arise due to resignations, or death, or so on, of MPs elected in *Länder* in which surplus seats were assigned to their party.²⁶

Possibly simplifying matters somewhat, it can be maintained that the unusual increase of *Überhangmandate* in the last three federal elections is a consequence of the post-reunification phase, which is characterised by relatively higher party fractionalisation (both electoral and parliamentary), a more marked territorial differentiation of voting behaviour between

eastern and western regions, in terms of party choice, abstention and *Stimmensplitting*. This has triggered the causal mechanisms for the emergence of surplus seats listed above under points (4), (5) and (6). In particular, a lower turnout is observable in the regions of the ex-GDR, where moreover the PDS, virtually absent in the west, obtains two-digit results; at the same time, a stronger resort to split ballots can be observed in some western *Länder* (BverfGE 95, 335 ff.).

The 'majoritarian half' of the German electoral system can also have a significant impact on the party system if one or more parties enters the Bundestag *only* via the alternative threshold, as has happened in several occasions. In the 1949 elections, only a few 'independent' candidates without party affiliation entered the Bundestag this way. The alternative threshold was instead decisive in the 1953 and 1957 elections, allowing representation to several small parties. The introduction of the national five per cent threshold in 1953 made more difficult for regionally based groups such as the DP, the BP (Bayernpartei – Bavarian Party), the Zentrum and the DRP, to obtain seats. In that situation, electoral alliances were formed between the CDU/CSU and some smaller parties, on the basis of which the larger partner did not make its own candidates stand in at least one SMD, and invited its electors to cast their first votes for the candidate of the smaller group, in order to ensure the latter's entry into the Federal Assembly. It must be remembered here that breaking through the alternative threshold allows a party to have *all* its second votes counted in the seat allocation procedure. Of the 34 electoral alliances formed by the CDU/CSU with four smaller parties in the 1953 elections (the FDP, the DP, the Zentrum and the BP), 28 were successful in electing the alliance's candidate.²⁷

The presence of the alternative threshold allowed two parties, the DP and the Zentrum, to obtain seats without reaching the quota of five per cent of the national vote. While the DP certainly benefited from the above-mentioned electoral alliances with the CDU (eight of its ten successful candidates in SMDs were supported by the alliance), it did not owe its representation *per se* to those alliances: in fact, it managed to win two seats in SMDs with its own forces in its Lower Saxony strongholds. The Zentrum, instead, owed its full share of seats to its alliance with the CDU in one SMD, where the victory of the Zentrum candidate allowed the party to have its whole 0.8 per cent of second votes counted in the process of seat allocation, thereby earning the party two more seats.²⁸ In sum, in 1953 six parties were represented in the Bundestag, of which only four (CDU/CSU, SPD, FDP, GB/BHE) obtained more than five per cent of the national vote. Two (DP and Zentrum) entered the Federal Assembly only thanks to the existence – and in the case of the Zentrum, the strategic utilisation via electoral alliance – of the alternative threshold. Six other

parties – of which four had been represented in 1949 – were instead excluded.²⁹

The 1956 electoral reform raised the alternative threshold to three victories in SMDs, which made the task of the small and regional parties even more arduous than in 1953. The smallest ones, such as the Bayernpartei (BP), the Deutsche Reichspartei (DRP), and the Zentrum were deprived of any realistic chance of success, and the DP was made completely dependent for its existence in national politics on electoral alliances with larger partners, mainly the CDU. Thanks to those alliances, in 1957 the DP obtained five of its six seats.³⁰ Since the party only received 3.4 per cent of the national vote, it entered the Bundestag both thanks to the existence of the alternative threshold and to the support of the CDU. Also the SPD supported with electoral alliances in four Bavarian SMDs the small Föderalistische Union (FU), formed by splinters of the BP and the Zentrum, but with no success.

After 1957, the alternative threshold remained 'sleeping' for a long time, to become decisive again in 1994 in determining the entry to parliament of the PDS. The PDS had obtained seats in the 1990 elections only thanks to the temporary electoral reforms enacted at that time: its national share of votes was in fact a mere 2.4 per cent. Although the party enjoyed remarkable support in the Eastern regions (11.1 per cent in 1990), and continued to grow thereafter, the return to the pre-unification electoral system rendered its chances of obtaining seats in 1994 very dim. But although the party's national share of votes in those elections was again lower than five per cent (4.4), it managed to elect its candidates in four SMDs, thereby crossing the alternative threshold and obtaining 30 seats.

This event 'revitalised' the alternative threshold, which had been considered as 'anachronistic' in the previous years,³¹ since the regional parties, which were to benefit from it, had long disappeared. In the current conjuncture the alternative threshold, far from being obsolete, renders the German system more sensitive to the changes occurring in the political society than the sole existence of the five per cent threshold would allow it to be. In 1994 it allowed, rather unexpectedly, an important political group representing between 15 per cent and 25 per cent of the electorate of regions where the economic and social problems are most acute, to achieve voice at the federal level. The non-transitory nature of the PDS was confirmed in the 1998 elections, when the party, still present almost exclusively in the former GDR, actually increased its electoral following and managed to enter the Bundestag 'by the main door', that is, obtaining more than five per cent of the national vote.

In conclusion, the majoritarian 'half' of the German system has had historically two opposite effects on the party system: the alternative threshold, when activated, has contributed to make the distribution of seats more proportional to the distribution of votes. The surplus seats, in

particular in the unprecedented numbers they have emerged recently, have instead rendered the outcomes of the system more majoritarian, enhancing the degree of overrepresentation of larger parties.

ELECTORAL LAWS IN CONTEXT: ELECTORAL AND PARTY SYSTEM IN THE FRG SINCE 1949

The analysis has shown that the German electoral system, in particular the five per cent threshold, has had an important impact on the evolution of the national party system, reducing its overall fragmentation. The impact of the electoral rules should however be analysed in the context of the dynamics endogenous to the party system itself, in order to achieve a better understanding of the conditions in which the electoral rules could have relevant political consequences.

The political effects of the five per cent threshold in the successive phases of the evolution of the German party system are summarised in Table 5. In the foundation (1949) and concentration (1953–61) phases of the party system, the mechanical effect was important. The distortive effect had as main outcomes the general over-representation of the CDU/CSU (almost four per cent on average in the four elections of those years) and – more modestly – of the SPD (2.4 per cent average), as well as the under-representation of the KPD in the 1949 elections (minus two per cent). The reductive effect was stronger: the introduction of the national threshold excluded many parties from representation in 1953, in particular those with a regionally concentrated constituency. Some, such as the DRP, the BP, or some small groups founded after 1949, disappeared; others, such as the DP and the Zentrum, were forced to give up their political independence and enter electoral alliances; the KPD was excluded from the Bundestag, a circumstance that certainly facilitated its ban in 1956. Finally, the nationwide five per cent threshold accelerated the disappearance of the refugee party GB/BHE (Gesamtdeutscher Block/Bund der Heimatvertriebenen und Entrechteten – All-German Block/League of Refugees and of those Deprived of their Rights), by excluding it from the Bundestag in 1957, when the party only obtained 4.6 per cent.

This reductive effect, however, must be seen against the background of the strategies of the two bigger parties aiming to hegemonise the respective political camps in those years. On the left side of the political spectrum, electoral support for the SPD grew constantly (with the exception of the 1953 elections), and the party – thanks also to the strong personality of its leader Kurt Schumacher – progressively succeeded in monopolising the opposition to the ‘bourgeois block’ led by Chancellor Adenauer. In this process the SPD was possibly helped by the outlawing of the KPD in 1956, which had, however, already been rendered ineffectual by the electoral reform. The

TABLE 5
POLITICAL CONSEQUENCES OF THE 5% THRESHOLD IN THE VARIOUS PHASES
OF THE GERMAN PARTY SYSTEM

Phases of development of the party system	Distortive effect	Reductive effect	Psychological effect
1949 – Regional thr. (foundation)	Strong	Weak	Absent
1953–61 (concentration)	Medium	Strong	Absent
1965–80 (three-partyism)	Weak (with the exception of 1969)	Weak (with the exception of 1969)	Present
1983–87 (four-partyism)	Weak	Weak	Present
1990–current (post-reunification)	Medium	Medium/Strong	Different between East and West

historical turn of the Bad Godesberg Congress in 1959, in which the SPD transformed itself from a party of the working class in a *Volkspartei*, also came in this phase: the explicit recognition of the role of the churches and of the necessity of national defence, approved in the Congress, broadened the party's appeal beyond the working class. In the 1961 federal elections, thanks to the new support coming from the middle classes and the Catholic workers, the party increased its share of votes by almost five per cent.³²

In the opposite political camp the CDU/CSU succeeded in rapidly gaining a position of absolute predominance, despite the high number of political parties operating in that end of the political space. In fact, in the early 1950s, it would have been reasonable to foresee a future of fragmentation and polarisation for the political centre and right. Besides the many moderate and conservative parties that had gained representation in 1949 (CDU/CSU, FDP, DP, Zentrum, DKP/DRP, and also, with some peculiarities, BP and WAV (Wirtschaftliche Aufbauvereinigung – Association for Economic Reconstruction), new groups had also emerged, and had obtained important regional successes, such as the BHE, admitted to electoral competition only in 1950,³³ which obtained 23.5 per cent of the votes in the regional elections in Schleswig-Holstein in the same year, and the neo-Nazi SRP (Sozialistische Reichspartei – Socialist Party of the Reich, then outlawed in 1952), which in the same years obtained 11 per cent of the vote in Lower Saxony and 7.7 per cent in Bremen.

In this situation, the electoral thresholds and their reforms certainly helped the CDU/CSU to hegemonise the centre-right vote. At the same time, at least

two other factors contributed independently to the same result: the structural changes occurred in German society after the war, and the strategies of the CDU leadership towards the smaller parties of the centre right. On the one hand, it is impossible to understand the disappearance of the regionally based parties (as most of the competitors of the CDU/CSU for the centre-right vote were) without taking into account the social and political conditions of Germany after World War II: there had been enormous movements of population, mainly for the resettlement of refugees from the eastern regions, while the centre-periphery cleavage had lost much of its force in a country in which no proper 'centre' longer existed and a fully fledged federal system was being created. In a similar fashion, the exclusion from the Bundestag of the GB/BHE in 1957 cannot *per se* account for the rapid disappearance of the party: the threshold alone would in all likelihood not have had the same effect if the refugees had not been integrated in the national community and economy in a relatively rapid way by the policies of the Adenauer governments (some of which included GB/BHE ministers), thanks also to the good economic conditions of those years. The substantial attainment of the goals for which the GB/BHE had been created and had received electoral support worked against its very existence.

On the other hand, the CDU/CSU leadership displayed a shrewd ability in exploiting the manipulative potentialities of the electoral system (and the electoral reforms) to its advantage. Politically, the CDU/CSU succeeded in posing itself as a reference point for the grievances of the electorate of the smaller moderate and conservative parties, and at the same time in forming alliances, from a position of strength, with those parties, as described in the previous section. In so doing, the CDU/CSU displayed internal cohesion, all the more noticeable in an internally diversified party, as it was, never yielding to centrifugal temptations which could have been exploited by the smaller parties to their own advantage. Acting from the position of senior governing party, the CDU/CSU tactically exploited electoral alliances with the aim of rendering acceptable to some of the smaller parties electoral reforms that would weaken the latter's position, until they were completely dependent on the support of the CDU/CSU itself to obtain seats. This two-track strategy of electoral reforms and electoral alliances allowed the CDU/CSU to absorb both the electorates and (part of) the elites of the smaller moderate groups.

In the subsequent three-party (1961–80) and four-party (1983–87) phases of the system, the five per cent threshold had a weak mechanical effect: the threshold only excluded one or two lists from the Bundestag in each election, and – with the exception of the 1969 elections – the access of these lists to parliamentary representation would not have influenced the coalition dynamics. In these phases, there is instead indirect but convincing evidence of a psychological effect of the five per cent threshold, which, on

the one hand, led to a concentration of the votes on the three main parties, and on the other, probably contributed to discourage the emergence of new parties. As pointed out earlier, the two apparent exceptions to this rule, the NPD in 1969 and the Grünen in the early 1980s, if closely analysed, do not contradict this interpretation.

Vote concentration and lack of new parties are as much the result of the psychological effect of the threshold as they are of two endogenous dynamics of the party system in those years: the enhanced capability of the established parties to 'close' the political market, and their alternation in government, which activated a bipolar mechanics. To be sure, the Grand Coalition years 1966–69 constituted an exception to both tendencies: during those years, both the CDU/CSU and the SPD left substantial political space on their extremes, where respectively the extreme right-wing NPD and the extreme left-wing groups constituting the so-called 'extra-parliamentary opposition' (Außenparlamentarische Opposition – APO; in later years partially absorbed by the Greens), found political opportunities emerging. During the same period, however, internal changes in the FDP freed the party from the moderate bloc, so that in 1969 an FDP–SPD alliance could be formed and fully fledged alternation realised. The 'three-partyism with bi-polar mechanics' of the German party system of the 1960s and 1970s³⁴ was also favoured by the personalisation of the national electoral campaigns. This phenomenon, by now a stable characteristic of federal elections in Germany, began to emerge in those years, mainly thanks to the strategy of the SPD to oppose incumbent CDU chancellors with the young and popular mayor of West Berlin, Willy Brandt, as '*Kanzlerkandidat*'. This reinforced the image of the SPD as the real 'alternation party', according to an adversary politics scheme similar to that of Anglo-Saxon democracies.

In the current 'post-reunification' phase, the German party system presents symptoms of relative instability, in particular a higher level of electoral fractionalisation. Therefore, the five per cent threshold again has a strong mechanical effect. To begin with, despite the increase of the parties in the Bundestag from four to five, a stronger reductive effect of the five per cent threshold can be observed: in the last three federal elections a much higher number of lists competed than in the previous years, and, although most of them did not even break through the natural thresholds of the system, the legal thresholds excluded a much higher number of competitors from the allocation of seats than in the past (see Table 3). Secondly, thanks to the over-representation of the parties that obtained seats, the governing majorities were 'manufactured': in 1994, the votes of the CDU/CSU and the FDP, which would govern together for the following four years, totalled 48.4 per cent; in 1998, the parliamentary majority of the Greens and the

SPD was also based on a plurality of votes (47.6 per cent). This had only happened twice in the history of the FRG: in 1949, when the party system was still in a nascent phase, and in the rather exceptional elections of 1969.

This manipulative effect of the five per cent threshold must again be placed against the background of political reality in order to be understood correctly. The higher levels of electoral fragmentation are a consequence of national reunification and the 'entry' of the ex-GDR into the old FRG. Such effects would have been much stronger, however – and certainly impossible for the five per cent threshold to contain – had the western parties not rapidly 'colonised' the new eastern *Länder*. In fact, with the exceptions of the PDS and (partially) the Greens, all other parties, and in particular the CDU, the SPD, and the FDP, absorbed the organisations of their eastern partners even before reunification. Also thanks to a massive campaign effort, the established western parties quickly managed to close the political market of the ex-GDR: in the elections of December 1990 together they obtained about 80 per cent of the votes cast in the new *Länder*. Since 1990, the PDS has regained an important share of the electorate in the new *Länder*, but could only partially reverse the post-reunification situation.

Lastly, any evaluation of the psychological effect of the five per cent threshold in the present political conjuncture must take the lead from the consideration that, while in the western regions little has changed from previous years in this respect, in the eastern regions the situation is different. There, on the one hand, the electorate has had less time to internalise the functioning of the electoral system; on the other hand, and more importantly, the party panorama of the new *Länder* is substantially different from that of the western regions. The PDS collects almost all its votes in the regions of the ex-GDR, while FDP and Greens, well beyond five per cent in the west, are much weaker in the east. It is too early to forecast how this situation will evolve in the near future, and which party will be favoured or disadvantaged by the psychological effect of the five per cent threshold.

CONCLUSIONS

In the last decade, largely as a consequence of national reunification, the German party system presents a higher level of electoral and parliamentary fractionalisation as well as a much stronger territorial differentiation of the vote, which stand in stark contrast with the relative stability and concentration of the previous three decades. In this situation, the electoral system has regained political importance, on the one hand for its actual and potential manipulative effects, and on the other for the revitalisation of some of its features that had been irrelevant during the previous decades, such as the alternative threshold or the surplus seats.

Fragmentation and territorial differentiation of the vote have already taken place in the electoral history of the FRG, and the manipulative capabilities of the electoral law made an important contribution in overcoming fragmentation and eliminating regional groups, but independent political processes contributed to the same outcome, probably in a decisive way. Of particular importance was a combination of electoral reforms aiming to increase the distortion of the system, and a series of tactical electoral alliances. The weakness of the centre–periphery and other cleavages in the post-war West Germany also made the process of elimination of small parties easier, and the outlawing of extremist groups in the 1950s also possibly made a contribution, at least in terms of deterrence.

The current fractionalisation and territorial differentiation of the vote are for the most part the consequence of the strong electoral showing of the PDS, a party that has obtained between 15 and 25 per cent of the vote in the *Länder* of the ex-GDR, while almost absent in the western regions of the country. The electoral system has not been able to exclude the party from the Bundestag (actually the alternative threshold gave it the possibility of consolidating its position), and therefore the increase in the electoral fractionalisation has translated into a higher parliamentary fragmentation. The fact is, none of the mechanisms which led to the simplification of the political panorama in the 1950s seems to be available in the current political situation. Raising the legal threshold of exclusion, as was done in the 1950s, does not seem to be a viable option. For example, the Federal Constitutional Court has repeatedly stated that the five per cent hurdle constitutes a violation of the principle of ‘equality of chances’ of political parties as well as to that of proportional representation, which is only acceptable because it fulfils other constitutionally protected values such as governmental stability. A higher hurdle would hardly be acceptable, according to the Court.³⁵ Thus, such an option is not considered in the political debate, nor is – given the nature and the dimensions of the PDS – an eventual ban based on the presumed opposition of the party to the basic liberal-democratic order.³⁶ Addressing the social and economic difficulties of the eastern regions, which are at the basis of large part of the electoral support for the PDS, is obviously the best option, but its realisation would take time, and it is unlikely soon to lead by itself to the disappearance of the party from the Bundestag. True, the vote for the PDS is concentrated in a relatively small part of the country, has little chance of breaking through in the western regions, and barely overcomes the five per cent threshold (5.1 of the national vote in 1998); however, a limited electoral setback would probably not be enough to prevent the PDS from entering the Bundestag (as happened, for example, with the GB/BHE in 1957), since the party has a solid plurality in a few SMDs, which is sufficient to cross the alternative threshold.

Although it is difficult to forecast how the present situation of the German party system will evolve, it cannot be excluded that in the next few elections the consolidation of the PDS in the Federal Assembly might seriously influence the bipolar functioning of the German party system. In fact, apart from sporadic cases of external support by the PDS to SPD-led governments in two eastern regions, the other parties do not consider the PDS to be *Regierungsfähige*, that is, a possible alliance partner. Moreover, and somewhat paradoxically, the diversification of the electoral panorama between eastern and western regions might instead considerably damage the other two small parties present in the Bundestag, the FDP and the Greens. These parties, although obtaining slightly more votes than the PDS at the national level, are considerably weaker in the east of the country, and certainly unable to win any seats in SMDs. Should these parties fall below the five per cent level in the polls a scenario in which the PDS might be pivotal is not unlikely. Will we then witness a revival of the electoral alliances in SMDs between big and small parties typical of the 1950s? Such alliances would certainly be in the interest of the two bigger parties, should the parliamentary existence of their typical coalition partners be endangered – on the other hand, their acceptability by the public is now highly debatable.

Problems for the bipolar mechanics of the system might emerge even if all three small parties obtain seats, though. The capability of the German electoral system to manufacture majorities is indeed limited if compared with that of majoritarian systems, and essentially depends on the quota of votes that are excluded from representation. With the PDS being constantly excluded from coalitions, the electoral system might not be able to manufacture a majority if all three small parties (FDP, Greens and PDS) obtain seats – unless the largely unpredictable occurrence of surplus seats comes to help. In fact, as surplus seats have reinforced narrow majority coalitions in the last two elections, it cannot be excluded that they might even *manufacture* a majority in the future. It is reasonable to think that this eventuality will be kept in mind in a reform of the surplus seats mechanism, now advocated by many. However, a scenario in which resort to a Grand Coalition or to a minority government – the latter would be an entirely new option at the federal level – might prove necessary is not unlikely. And in that case, as already occurred in the 1960s, voices in favour of a sweeping electoral reform might be heard again.

NOTES

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Note on abbreviations for legislative and jurisdictional sources: the abbreviation 'B.G.Bl. 1991, I, 150–59' is to be read in the following way: *Bundesgesetzblatt* (Official Journal of Legislation), year 1991, Volume I, pages 150–59. The abbreviation 'BverfGE' means 'Decisions of the Federal Constitutional Court' ('*Entscheidungen des Bundesverfassungsgerichtes*'), and refers to the official collection of the Court's decisions. It is followed by the volume and page numbers.

1. It happens very often that candidates elected in the SMDs are also placed in the top positions of the regional list (see e.g. Dieter Nohlen, *Wahlsysteme der Welt. Daten und Analysen. Ein Handbuch* (München: Piper 1977), p.305): in those cases, their names are skipped when allocating the seats to the list.
2. The same law exempted from the threshold all parties representing national minorities. A party is considered as 'representing a national minority', according to the German laws, if the Federal Government officially recognises it as such. Such status has been accorded so far only to the party of the Danish minority, settled in the northern areas of Schleswig-Holstein, the *Südschleswigsche Wählerverband* (SSW – Electoral Association of the South-Schleswig). See Angelika Kühn, *Privilegierung nationaler Minderheiten im Wahlrecht der BRD und Schleswig-Holstein* (Frankfurt a.M./Bern/Paris: Peter Lang 1991), pp.177–80.
3. The boundaries of the 242 SMDs drawn in 1949 were not changed. The number of the seats to be allocated through party lists was therefore increased to 242 to match the number of the existing SMDs. See Table 1 for later changes in the total number of seats of the Bundestag.
4. Michael Brenner, 'Die Entwicklung des Wahlrechts und der Grundsatz der Wahlrechtsgleichheit im wiedervereinigten Deutschland', *Archiv des öffentlichen Rechts*, 116/3 (1991), pp.537–87.
5. On the impact of the district magnitude, see e.g. Rein Taagepera and Matthew Soberg Shugart, *Seats and Votes: The Effects and Determinants of Electoral Systems* (New Haven: Yale University Press 1989).
6. Arend Lijphart, 'Degrees of Proportionality of Proportional Representation Formulas', in Lijphart and Grofman (eds.), *Electoral Laws and their Political Consequences*, pp.170–79.
7. Maurice Duverger, *L'influence des systèmes électoraux sur la vie politique* (Paris: Colin 1950).
8. See e.g. Gary Cox, *Making Votes Count. Strategic Coordination in the World's Electoral Systems* (Cambridge: Cambridge University Press 1997), pp.69 ff.
9. D is given by the sum of the absolute values of the quotas of over- and under-representation of all parties competing in an election. The index's formula is: $D = \sum_{i=1}^n |V_i - S_i|$, where V_i is the percentage of votes for party i , and S_i its percentage of seats. High values of D reveal a strong distortive effect (in a given election, the quotas of seats allocated to the parties differ significantly from their quotas of votes), and vice versa.
10. This index can be calculated for both the distribution of votes (electoral fractionalisation, F_e) and seats (parliamentary fractionalisation, F_{parl}). The respective formulas are:

$$F_e = 1 - \left(\sum_{i=1}^n T_i^2 \right); \text{ and } F_{parl} = 1 - \left(\sum_{i=1}^n S_i^2 \right),$$
 where T_i and S_i are respectively the quotas of votes and seats of each party. See Douglas Rae, *The Political Consequences of Electoral Laws* (New Haven and London: Yale University Press 1967).
11. In the 1990 elections a different ecologist party competed in each sub-territory of application of the 5% threshold. The 'western' Greens, however, did not manage to pass the 5% threshold in their sub-territory, while the 'eastern' Grüne/Bündnis'90 did. It should be noted that, had they decided to compete as a unified party, *all* their second votes would have been counted for the allocation of seats, and their parliamentary group would have been much larger. The two parties merged into the Bündnis '90/Die Grünen in 1991. See Hubert Kleinert, *Aufstieg und Fall der Grünen. Analyse einer alternativen Partei* (Bonn: Dietz 1992).
12. In the 1949 elections, when the 5% threshold was applied at the level of the single regions, many parties were under-represented, among which the KPD (Kommunistische Partei Deutschlands – German Communist Party), which crossed the threshold in only six *Länder*

and, given the bias of the d'Hondt formula, it did not obtain seats in all six.

13. Contrary to what sometimes maintained (see e.g. Thomas D. Lancaster, and W. David Patterson, 'Comparative Pork Barrel Politics: Perceptions from the West German Bundestag', *Comparative Political Studies* 4 (1990), pp.458-77) surplus seats are not allotted in order 'to keep the proportionality of the system', i.e. to correct over-representation. Surplus seats are allocated to parties *independently* on their quota of second votes, and often simply redistribute over-representation among parties in an unequal way. In a context of almost constant over-representation of the parties that obtain seats, in fact, surplus seats increase the over-representation of the parties to which they are allocated. At the same time, they increase the assembly size, thereby reducing the over-representation of the parties that do *not* obtain them.

14. The mathematical expression to calculate the natural thresholds (Tr : threshold of representation; Te : threshold of exclusion) are: for the d'Hondt formula:

$$Tr = \frac{1}{m+n+1}; Te = \frac{1}{(m+1)}. \text{ For the Hare/Niemeyer formula: } Tr = \frac{1}{(mn)};$$

$$Te = \frac{1}{(m+1)} \text{ (where } m: \text{ district magnitude; } n: \text{ number of competitors). See Arend}$$

Lijphart and Robert W. Gibberd, 'Thresholds and Payoffs in List Systems of Proportional Representation', *European Journal of Political Research* 3/3 (1977), pp.219-44. The figures reported in Table 3 are calculated on the basis of the natural threshold of exclusion, which is higher. The results would not change substantially if the natural threshold of representation was considered, except for the four elections (1987, 1990, 1994 and 1998) held under the Hare/Niemeyer formula, where that threshold would not have been reached by respectively 2, 5, 1 and 1 (instead of 9, 12, 12 and 19) lists.

15. A brief note on the case of the SSW. The party of the Danish minority took part into the 1949 elections and obtained a seat since it passed the 5% threshold in Schleswig-Holstein, the only region in which it competed. Therefore Rose's statement that the party was represented in the 1949 Bundestag since exempted from the 5% threshold is inaccurate: the exemption of national minorities from the threshold was introduced later (see Richard Rose, 'Electoral Systems: Question of Degree or of Principle?' in Arend Lijphart and Bernard Grofman (eds.), *Choosing an Electoral System: Issues and Alternatives* (New York, Praeger 1984), pp.73-82). In 1953 the party was indeed exempted from the five per cent threshold; however, in those federal elections – as well as in those of 1957 and 1961 – it did not pass the *natural* thresholds of the system.
16. See Andre Blais and Louis Massicotte, 'Electoral Systems', in Lawrence LeDuc, Richard G. Niemi and Pippa Norris (eds.), *Comparing Democracies. Elections and Voting in Global Perspective* (London: Sage 1996), pp.49-81.
17. The *Bundesversammlung* is composed by the Bundestag members and by an equal number of representatives of the *Landtage*. The NPD representatives supported the CDU/CSU candidate, Schröder, who was defeated by the SPD candidate, Heinemann, also supported by a part of the FDP. See Peter Pulzer, *German Politics 1945-1995* (Oxford: Oxford University Press 1995).
18. In March 1982 they obtained 6.5% of the votes in Niedersachsen, almost doubling the 3.9% obtained in the previous regional elections. In June of the same year in the elections in Hamburg, two ecologist groups obtained together 8.7% of the votes; the bigger group, the Grüne Alternative Liste (7.7%), entered the regional parliament with nine representatives. New elections were called six months later, and the Greens managed again to obtain seats (eight) with 6.8% of the votes. Meanwhile, in September 1982 the party had obtained 8% in the regional elections in Hessen.
19. Duverger ('Duverger's Law: Forty Years Later', pp.69-84) maintained that the pressure on casting the first vote 'strategically' for the bigger parties could 'spill over' onto the second vote, inducing the elector to vote for the same (big) party with both votes. This hypothesis is however not sufficiently supported empirically. The related thesis that the electors are misled by the denominations of 'first' and 'second' ballot respectively for the less and more

- important vote, and that therefore the electoral system would not register correctly their preferences is not fully convincing either. Schmitt-Beck ('Denn sie wissen nicht was sie tun ... Zum Verständnis des Verfahrens der Bundestagswahl bei westdeutschen und ostdeutschen Wählern', *Zeitschrift für Parlamentsfragen* 24/3 (1993), pp.393–415) evaluated in 4.1% of the electorate in the western *Länder* and 5.3% in the eastern *Länder* (in the 1990 elections) the percentage of electors who do not understand the real value of the two votes.
20. A quite large literature exists on the phenomenon of the 'strategic voting' displayed by the German electorate in the so-called *Stimmensplitting* (split ballot) phenomenon, which however is marginal to the present analysis. See e.g. Eckart Jesse, 'Split-voting in the Federal Republic of Germany: An Analysis of the Federal Elections from 1953 to 1987', *Electoral Studies* 7/1 (1988), pp.109–24; Harald Schön, 'Split-ticket Voting in German Federal Elections, 1953–90: An Example of Sophisticated Balloting?' *Electoral Studies* 18/4 (1999), pp.473–96.
 21. Without surplus seats, the Christian Democrat-Liberal majority would have had a margin of only two seats in 1994. The margin would have been of four seats for the green-red majority currently supporting Schröder. The occurrence of surplus seats increased those margins respectively to ten and 21 seats.
 22. To clarify how malapportionment (the substantial disproportionality between the magnitude of a district and the number of electors that it contains) between regions can give rise to surplus seats, let us assume a situation of perfect 'straight ballot' in a certain *Land* where one of the big parties obtains a good share of votes, and that the *Land* in question contains a substantially higher quota of SMDs than its quota of population. If we also assume a certain level of territorial uniformity of the vote for that party within the *Land*, the party in question would be likely to win more seats in the SMDs of that region than its regional list is entitled to in the regional distribution of seats after the national counting. This scenario is far from unrealistic, since it describes *en gros* the situation of the Schleswig-Holstein in the 1961. elections, when the CDU obtained four surplus seats in that *Land*.
 23. These two forms of malapportionment – addressed respectively by points 3 and 2 of paragraph 1 of the recent reformulation of article 2 of the federal electoral law (B.G.Bl. 1996, I, p.1712) – imply each other to a large extent: malapportionment 'within regions' increase the probability of the emergence of malapportionment 'between regions'. The two are however distinct phenomena, since imbalances between the population of single SMDs can cancel out at the national level.
 24. Law of 15 November 1996, art. 1 (B.G.Bl. I, 1712). Surprisingly, Roberts disregards this legislative innovation in his discussion of causes of surplus seats. See Geoffrey Roberts, 'By Decree or Design? The Surplus Seats Problem in the German Electoral System: Causes and Remedies', *Representation* 37/3–4 (2000), pp.196–205.
 25. The d'Hondt formula tends to under-represent smaller parties more than any other PR formula. Distributing the national quota of seats of each party among its regional lists with the d'Hondt system, therefore, under-represented the regional lists of big parties in small *Länder*, which increased the probability of emergence of surplus seats, especially if the candidates of the party in question won in many SMDs of a small *Land*. It can be noticed that all *Überhangmandate* emerged in the elections between 1957 (introduction of the *Bundesproporz*) and 1983 (last election with the d'Hondt method) were assigned to big parties in small *Länder* (Schleswig-Holstein, Bremen, Hamburg, Saarland – see Table 4). In those *Länder* one of the large parties (the SPD in Bremen and Hamburg in certain periods, the CDU in the Schleswig-Holstein) often won in all SMDs.
 26. See e.g. *Süddeutsche Zeitung*, 7 May 1998, p.5, and 14 June 1999, p.4. Normally, the vacant seats would be filled by the first non-elected candidate on the party's regional list of that *Land*.
 27. In the 1953 elections three surplus seats were assigned, two to the CDU in Schleswig-Holstein, and one to the DP in Hamburg (see Table 4). The electoral alliances in SMDs – massively present in those two regions – might well have contributed to such phenomenon. The three alliances in Schleswig-Holstein allowed in fact the election of three CDU candidates (in two SMDs against SPD incumbents). In the seven Hamburg SMDs in which

- the alliance was successful (out of the eight where it participated), three CDU, two FDP and two DP candidates were elected. According to the *Landesproporz* system then in force, 17 MPs were to be elected in Hamburg in 1953, of which eight in SMDs and nine from party lists. The DP obtained 5.9% of the second votes cast in the *Land*, which would have entitled the party to one seat. Thanks to the electoral alliances, the party obtained instead two seats (in SMDs), and therefore was allocated a surplus seat. See James Pollock, 'The West German Electoral Law of 1953', *American Political Science Review* 50/1 (1955), pp.107–30.
28. In return for the support given to the Zentrum in one SMD, a CDU candidate was placed at the top of the Zentrum regional list, and he was elected.
 29. The most illustrious victim of the 1953 electoral reform was the KPD. Interestingly, the party tried to exploit the possibility of obtaining seats via the alternative threshold by moving electors in a SMD (that of Remscheid-Solingen) in order to win that seat. The 1949 electoral law allowed electors to cast their vote (by presenting a certificate that they had to be away from their own district on that day) in any SMDs of their *Land*, and the 1953 electoral law extended this possibility to all SMDs of the country. (See Derek Urwin, 'Germany: Continuity and Change in Electoral Politics', in Richard Rose (ed.), *Electoral Behavior: A Comparative Handbook* (New York: Free Press 1974), pp.109–70.) The introduction of the postal vote in 1956, which allowed the elector to vote when away from her own district, but having her vote counted in her own district, rendered the tactic used by the KPD in 1953 unviable for the future.
 30. Also its sixth seat (in district 131 – Marburg) could have been due to the electoral alliance between the DP and the Freie Volkspartei (FVP). This is more difficult to establish, however, given the small size of the latter group. See Statistik der Bundesrepublik Deutschland, *Die Wahl zum 3. Deutschen Bundestag* (Wiesbaden: Kohlhammer 1957), Heft 1, p.22.
 31. Eckhart Jesse, *Wahlrecht zwischen Kontinuität und Reform* (Düsseldorf: Droste 1985), p.256.
 32. Wolfgang Rudzio, *Das politische System der Bundesrepublik Deutschland* (Opladen: Leske & Budrich 3rd edn 1991), p.124.
 33. In 1949 the groups representing the refugees expelled from the eastern regions that Germany had lost in the war were not admitted to participate into elections (see Richard Stöss, 'Einleitung: Struktur und Entwicklung des Parteiensystems der Bundesrepublik – Eine Theorie', in Stöss (ed.), *Parteihandbuch*, vol.1, pp.17–295).
 34. Giovanni Sartori, *Parties and Party Systems* (Cambridge: Cambridge University Press 1976), pp.178–9.
 35. See e.g. Jochen A. Frowein, 'Die Rechtsprechung des Bundesverfassungsgerichts zum Wahlrecht', *Archiv des öffentlichen Rechts* (1974), pp.72–110.
 36. This is instead still considered a viable option against (much smaller) extreme right-wing parties, such as the NPD. In January and March 2001, the Federal Government and the presidents of the two chambers of parliament have deposited at the Federal Constitutional Court the request to ban the NPD as opposing the 'basic liberal democratic order' on the basis of its racist, anti-Semitic, and Nazi-like positions. See *Süddeutsche Zeitung*, 30 March 2001.