

CLAUDIA WINKLER

THE ELECTORAL SYSTEMS IN
GERMANY AND IN NEW ZEALAND

COMPARATIVE CONSTITUTIONAL LAW

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ABSTRACT

1 INTRODUCTION

A country's electoral system can have a significant influence on voting behaviour and on the existence and structure of political parties. It should take into account that country's history and current circumstances, so that it can be conducive to a satisfactory balance between all differences in a nation's society. The purpose of this paper is to analyse the existing voting systems in Germany and in New Zealand, highlighting the merits and demerits of them. The main focus is given to the mathematical formulas to calculate the number of seats that belong to a certain political party according to its party votes, the possibility of overhanging seats occurring, and the different possibilities for the solution of this problem. The consequences of the introduction of New Zealand's current electoral system are taken into consideration. This analysis concludes that the Mixed System of (Simple) Majority Vote and Proportional Representation (MMP) electoral system guarantees a Parliament that reflects the diversities of a society besides giving voters the possibility of influencing its personal composition. It is found that the mathematical formula Sainte Laguë is preferable, that overhanging seats occurring should, as at present, be tolerated without any measures of compensation, that only directly elected candidates should reoccupy vacated overhanging seats, that voters should be given a second choice concerning their party votes, and that the electoral system MMP in New Zealand can result in political circumstances as stable as FPP. It is recommended that Germany adopts the mathematical formula Sainte Laguë.

Word Length

The text of this paper (excluding table of contents, abstract, tables, footnotes and bibliography) comprises approximately 14,710 words.

B The Proportional Voting System

The proportional voting system is based on the principle "one man one vote". Each vote should have the same weight in the election's result. This voting system focuses on a proportional representation - the political parties obtain a certain number of seats that corresponds to the percentage of votes they have obtained in the elections.

The aim of this electoral system is to truly represent the whole society in Parliament. The most serious problem related to this system consists of the possible difficulty of reaching a majority in Parliament.

I INTRODUCTION

All voting systems have to find a solution for the conflict between proportional representation - Parliament should represent the whole population's will - and efficiency - majorities are needed for effective work in Parliament and to secure stability.

In general, there are two major groups of voting systems: the proportional representation voting system and the majority voting system. In theory, the possible variations of these systems are numerous.

A The Majority Voting System

"The winner takes it all..." The majority voting system focuses more on efficiency than on a proportional representation. There are as many voting districts as seats. The majority voting system is conducive to majorities in Parliament and to a two-party-system. It is almost impossible for new political parties to establish themselves. Another disadvantage of this system is that the votes of the electors do not have the same weight: all votes for losing candidates are lost. A voting result is not representative of a population's voting behaviour. It could happen that the political party with the majority in Parliament did not earn the majority of all votes in a country.

B The Proportional Voting System

The proportional voting system is based on the principle "one man one vote". Each vote should have the same weight in the election's result. This voting system focuses on a proportional representation - the political parties obtain a certain number of seats that corresponds to the percentage of votes they have obtained in the elections.

The aim of this electoral system is to truly represent the whole society in Parliament. The most serious problem related to this system consists of the possible difficulty of reaching a majority in Parliament.

In the twentieth century, there has been a trend for electoral systems to shift from the majority voting system to the proportional voting system.¹

II MIXED SYSTEM OF (SIMPLE) MAJORITY VOTE AND PROPORTIONAL REPRESENTATION (MMP)

A Introduction

The Mixed System of (Simple) Majority Vote and Proportional Representation (MMP) currently applies in Bolivia, Germany, Hungary, Italy, Mexico, New Zealand and Venezuela.² After the second world war, Germany adopted its current voting system; it is ruled by the Bundeswahlgesetz (BWahlG). In New Zealand, MMP came into force in 1994; it is ruled by the Electoral Act 1993. It is based on the German voting system.

This voting system consists of a combination of elements of the proportional voting system and the majority voting system. Each elector has two votes: one for a political party and another for a certain candidate in an electoral district. Referring to the latter, the candidate who obtains the highest number of votes in an electoral district becomes a Member of Parliament pursuant to § 5 BWahlG and section 179 (2) of the Electoral Act 1993. Thus, this vote can be classified as belonging to the majority voting system. It gives citizens the possibility to influence the personal composition of their Parliament.

The vote for a political party generally decides the question as to which party enters Parliament and, in the case where it does, the number of seats in Parliament that belong to the party. The voting system that applies to the party vote is the proportional voting system. The electors do not have any influence on the candidates who are put forward on the list, as the political parties decide upon the ranking order of their candidates on the lists themselves.

¹ Keith Jackson and Alan McRobie *New Zealand Adopts Proportional Representation* (Ashgate, Christchurch, 1998) 2.

² International Institute for Democracy and Electoral Assistance IDEA <<http://www.idea.int/esd/data/type.cfm?electoralSystem=MMP>> (last accessed 24 September 2003).

Once both votes are given, the question of their influence on the political and personal composition of Parliament arises. Pursuant to § 6 IV BWahlG and section 192 (2) of the Electoral Act 1993, the number of candidates elected by the electorate vote is subtracted from the number of seats gained by a political party from its party votes.

An example will make this clearer: If 10 candidates were directly elected in their electoral districts by the electorate vote and the result of the party vote of that political party is the number of 40 seats in Parliament, then the 10 directly elected candidates will enter Parliament in addition to 30 candidates from that parties list.

Additionally, Germany due to its federalism has opted for a two-staged distribution of seats obtained by the party vote. After the total number of seats for a certain political party at a national level is calculated, these seats are distributed among the different lists of the *Bundesländer* of that party according to § 7 BWahlG.

B Possible Alternatives to MMP

Some critics³ of MMP argue that the electorate vote should be abrogated. They reason that the electorate vote is inappropriate to ensure that electors influence the personal composition of Parliament.⁴ Electors would only be capable of substituting a list candidate by a direct candidate of the same political party. Also, it would not be reasonable that non-voters of political parties could influence their personal composition in Parliament.⁵ In their opinion, a real influence on the personal composition of Parliament is given by the Single Transferable Vote (STV)⁶ system as a real combination of the proportional and the majority voting system.⁷

1 Single Transferable Vote (STV)

³ Martin Fehndrich for example. *Verbesserungen für das Bundeswahlgesetz* <<http://www.wahlrecht.de/ueberhang/besseres.htm>> (last accessed 19 September 2003).

⁴ *Verbesserungen für das Bundeswahlgesetz*, above.

⁵ *Verbesserungen für das Bundeswahlgesetz*, above.

⁶ For a detailed description of this method see Wikipedia <http://www.wikipedia.org/wiki/Single_Transferable_Vote> (last accessed 19 September 2003) or Wellington City Council <<http://www.wcc.govt.nz/council/elections/stv-voting/>> (last accessed 19 September 2003).

⁷ *Verbesserungen für das Bundeswahlgesetz*, above.

Thus, it has to be asked whether the STV voting system is preferable in comparison to MMP. STV also was the subject of a closer scrutiny by the Royal Commission on the Electoral System in New Zealand.⁸ It is based on proportional representation, but electors vote for individual candidates in order of their preferences instead of voting for a party list.⁹ The model analysed by the Royal Commission additionally provides a "party box" above the list of candidates of each registered party, so that voters have the option of either marking one party box or of numbering the candidates of the same or different parties in order of their preferences.¹⁰ In contrast to MMP, STV aims to minimize the political parties' influence in the elections.¹¹ The voters' first preferences are considered first, whereupon the candidates who reach a certain "quota" are elected. If a candidate achieves more votes than required, a proportion of each of "his" votes is transferred to the candidate of the second choice and so on.¹² The electors are not required to indicate more than one preference, but marking more preferences would naturally be to the voter's advantage.¹³ This system principally presents the advantages that it is proportional, that the electors can choose representatives that have a strong tie to their interests, and that tactical thoughts when voting are avoided as most votes do not get "wasted".¹⁴

On the other hand, there are also disadvantages related to it. First, the counting of votes is more complicated and time-consuming than with other electoral systems. Also, there could be an excessive demand on the voters given the case that they are not familiar with the candidates. This problem would not be given with the proposed "party box", where voters could just tick a certain political party indicating acceptance of that party's candidates in that order. But STV could also cause illogical results. An example is the composition of Malta's Parliament in 1981. Here, the Nationalists obtained 50.9 per cent of first-preference votes and gained 31 seats, whereas the Labour Party gained 34 seats with only 49.1 per cent of first-preference votes. This

⁸ Royal Commission on the Electoral System "Towards a Better Democracy" [1986-87] IX AJHR H.3 38.

⁹ The Single Transferable Vote (STV) <<http://www.ark.ac.uk/elections/gstv.htm>> (last accessed 19 September 2003).

¹⁰ Royal Commission on the Electoral System, above, 44, 45.

¹¹ Vernon Bogdanor *What is Proportional Representation?* (Martin Robertson, Oxford, 1984) 77.

¹² Wellington City Council <<http://www.wcc.govt.nz/council/elections/stv-voting/>> (last accessed 19 September 2003).

¹³ Bogdanor, above, 81.

¹⁴ STV <<http://www.wahlrecht.de/lexikon/stv.html>> (last accessed 19 September 2003).

circumstance was given because the Nationalists had more "wasted" votes compared to the Labour Party.¹⁵ But one of the most important disadvantages is that this voting system is not practicable with a higher number of candidates.¹⁶ As this would be very likely in Germany, STV is not suitable there. Regarding New Zealand, this system might theoretically be equal to MMP in merits and demerits. But the Royal Commission concluded in its analysis that MMP is clearly superior for New Zealand.¹⁷ In their opinion, issues like a more effective Parliament, an effective representation of minorities such as Maori, and merits in terms of voter participation and legitimacy are more likely under MMP.¹⁸

Referring to MMP, the critics' argument that voters under this system cannot influence the personal composition of Parliament is not convincing. In Germany, half of the Members of Parliament are directly elected. New Zealand presents an even higher number with 57.5 per cent of directly elected candidates in the 47th Parliament.¹⁹

Here, the voters have the possibility to elect the candidate they think would best represent their interests. Also, it was criticised that non-voters of a party could influence their personal composition. This argument is quite contradictory considering that the same author expressed that voters could not adequately influence the personal composition of Parliament. Besides, it is an advantage of MMP that the electors can choose a candidate whose party they might not prefer. This vote does not affect their preferred parties chances. Thereby it can be guaranteed that voters really choose between the direct candidates.

2 Supplementary Member (SM)

¹⁵ Bogdanor, above, 97.

¹⁶ STV <<http://www.wahlrecht.de/lexikon/stv.html>> (last accessed 19 September 2003).

¹⁷ Royal Commission on the Electoral System "Towards a Better Democracy" [1986-87] IX AJHR H.3 63.

¹⁸ Royal Commission on the Electoral System, above, 63.

¹⁹ New Zealand's electoral system <http://www.elections.org.nz/elections/esyst/govt_elect.html> (last accessed 19 September 2003).

The Royal Commission on the Electoral System also dealt with the Supplementary Member (SM) voting system.²⁰ This system appears similar to the MMP voting system. The electors also have two votes, one for a local MP and another for a party. The difference to MMP is that the allocation of the list seats is independent from the number of seats belonging to a certain party according to the electorate vote.²¹ Under SM only list seats are allocated proportionally.²² This means that the larger parties obtain more seats overall than they would merely through the party vote. Therefore they have an advantage over the smaller parties.²³ The conclusion of the Royal Commission in terms of SM was that it is “a palliative rather than a true prescription for improvement.” SM does not overcome the main deficiencies of plurality.²⁴

3 First-Past-the-Post (FPP)

Prior to the MMP voting system, the First-Past-the-Post (FPP) voting system applied in New Zealand. An interesting question to consider is whether MMP represents a better choice than the anterior voting system.

In the First-Past-the-Post (FPP) voting system the candidate(s) with the highest number(s) of votes become(s) a Member of Parliament. The electors have as many votes as there are seats for their electoral district.²⁵ There are some aspects that could strongly speak in favour of this voting system: it is very easy to understand and it clearly shows the success of the single candidates of a political party.²⁶ Also, forming a new government after an election does not require a relatively long period of time as under MMP.²⁷ But there are also important disadvantages related to this voting system. Political parties may concentrate their electoral campaign and efforts on areas

²⁰ Royal Commission on the Electoral System, above, 38.

²¹ Green <<http://www.greens.org.nz/searchdocs/PR3577.html>> (last accessed 25 September 2003).

²² Elections <<http://www.elections.org.nz/elections/pandr/eglossary.html>> (last accessed 25 September 2003).

²³ Green, above.

²⁴ Royal Commission on the Electoral System “Towards a Better Democracy” [1986-87] IX AJHR H.3 63.

²⁵ Wellington City Council <<http://www.wcc.govt.nz/council/elections/stv-voting/>> (last accessed 19 September 2003).

²⁶ Environment Canterbury <<http://www.ecan.govt.nz/about-us/stv.html>> (last accessed 23 June 2003).

²⁷ Hon Sir John Wallace “Reflections on Constitutional and other issues concerning our electoral system: the past and the future” in David Carter and Matthew Palmer (ed) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 297, 303.

that demonstrate a better winning chance. This could lead to very unequal chances to enter Parliament. Political parties, which are widespread over a bigger region, would be disadvantaged in comparison to those that are successful in a particular smaller area. Therefore the FPP system contributes to the regionalism of an election.²⁸ Furthermore, the possibility is given that some voters did not vote for any of the elected candidates. From 1954, all Governments in New Zealand were elected "with the support of fewer than half the voters."²⁹ Also, minorities would normally be underrepresented among the candidates for an election.³⁰ Thus, the result of an election would often not reflect the range of the increasingly diverse opinions that exist across the whole electorate.³¹ This problem exists with any possible voting method, but the threshold of five per cent (MMP) mitigates it to a minimum in order to guarantee a functioning Parliament. MMP presents the desirable characteristic of an almost proportional result, while voters can also influence the personal composition of Parliament.

Thus, MMP presents the advantage of a proportional Parliament in addition to the possibility of the electors influencing the personal composition of Parliament. Out of the STV, the SM and the FPP voting systems, none is necessarily preferable to MMP.

C Mathematical Formulas

Once an election was held and all the given votes were count, there are different methods of calculating the number of seats in Parliament belonging to the political parties according to the number of votes they obtained. In Germany the formula of Hare/Niemeyer has replaced the formula d'Hondt; the Sainte-Laguë formula applies in New Zealand.

1 Hare/Niemeyer

²⁸ Law Commission of Canada <http://www.lcc.gc.ca/en/themes/gr/er/er_background.asp> (last accessed 23 June 2003).

²⁹ Royal Commission on the Electoral System "Towards a Better Democracy" [1986-87] IX AJHR H.3 14.

³⁰ Law Commission of Canada, above.

³¹ Environment Canterbury <<http://www.ecan.govt.nz/about-us/stv.html>> (last accessed 23 June 2003).

The Hare/Niemeyer formula is also known as, among others, the Hamilton procedure, the largest remainder or Vinton's method of 1850.³² It is a procedure developed by the American politicians Alexander Hamilton (1755 – 1804) and Samuel Vinton (1792 – 1862), the English lawyer Thomas Hare (1806 – 1891) and the German mathematician Horst Niemeyer (*1928).³³ It has already applied for the occupation of the committees in the German Reichstag.³⁴

This formula consists of two steps pursuant to § 6 II BWahlG. In the first step the sum of all votes for a political party are multiplied by the total number of seats in Parliament and divided by the sum of all valid votes for political parties that passed the threshold of five per cent. The resulting whole number is the number of seats in Parliament for that party.

The following example will make this clearer: if the number resulting from the calculation described above is 7.5 for party A; 12.1 for party B and 9.8 for party C then 7 seats will be given to party A, 12 to party B and 9 to party C in the first step. The second step aims to distribute seats that were left after the first step was taken. These seats are given to the parties with the highest numbers after the decimal point.³⁵ In the example given above party C would first receive another seat; the second one would belong to party A.

(a) Merits

One argument speaking in favour of this formula is that it uses a proportional calculation in the first step. Therefore its application is transparent and appears plausible.³⁶ Also, political parties are not exposed to any advantages or disadvantages depending on their largeness when Hare/Niemeyer is used.³⁷

(b) Demerits

³² Hare/Niemeyer <<http://www.wahlrecht.de/verfahren/hare-niemeyer.html>> (last accessed 29 June 2003).

³³ Hare/Niemeyer <<http://www.wahlrecht.de/verfahren/hare-niemeyer.html>> (last accessed 29 June 2003).

³⁴ Deutscher Bundestag <http://www.bundestag.de/gremien/1431/azur/azur_2.html> (last accessed 14 July 2003).

³⁵ Hare/Niemeyer, above.

³⁶ Deutscher Bundestag, above.

³⁷ Hare/Niemeyer, above.

The application of the Hare/Niemeyer formula implicates several important disadvantages.

(i) "Illogical jumps" (Alabama paradox)

One of these disadvantages is the possibility of the so-called "illogical jumps". This problem is also known as the Alabama paradox.³⁸ It consists of the following: The circumstance that a certain committee is enlarged from for example sixteen to seventeen seats could have the surprising consequence that a seat, which was already assigned to a certain political party (in a committee of sixteen seats), is being lost again for that party with an enlargement of the committee (to seventeen seats).³⁹

The following example will make this clearer: If a committee has 16 seats that need to be distributed according to the voting result to the different political parties and the total amount of valid votes is 356, from which party A obtained 203 votes, party B 119 and party C 34, party A would obtain 9 seats, party B 5 seats and party C 2 seats according to this formula.

Now, if the committee is enlarged by one seat and the total number of seats to be distributed is 17, the allocation of seats with the same distribution of votes among the political parties would be the following: 10 seats for party A, 6 seats for party B and only 1 seat for party C.⁴⁰ This absurd result is obtained by the following calculation according to Hare/Niemeyer:

Total amount of valid votes: 356. Party A: 203 votes; party B: 119 votes; party C: 34 votes.

Seats to be distributed: 16 seats.

A: $\frac{203 \times 16}{356} = 9.12\dots$ B: $\frac{119 \times 16}{356} = 5.34\dots$ C: $\frac{34 \times 16}{356} = 1.52\dots$

A: $\frac{203 \times 17}{356} = 9.81\dots$ B: $\frac{119 \times 17}{356} = 5.81\dots$ C: $\frac{34 \times 17}{356} = 1.71\dots$

A: $\frac{203 \times 16}{356} = 9.12\dots$ B: $\frac{119 \times 16}{356} = 5.34\dots$ C: $\frac{34 \times 16}{356} = 1.52\dots$

³⁸ Alabama-Paradoxon <<http://www.wahlrecht.de/verfahren/paradoxien/alabama.html>> (last accessed 15 July 2003).

³⁹ Deutscher Bundestag <http://www.bundestag.de/gremien/1431/azur/azur_2.html> (last accessed 14 July 2003).

⁴⁰ Deutscher Bundestag, above.

First step:

Party A: 9 seats Party B: 5 seats Party C: 1 seat

15 seats were distributed in the first step, so that there is one more seat to be distributed in the second step. It belongs to party C because it obtained the highest number after the decimal point. Therefore the result is the following:

Party A: 9 seats Party B: 5 seats Party C: 2 seats

When the committee is enlarged by one seat (17 seats):

Total amount of valid votes: 356. Party A: 203 votes; party B: 119 votes; party C: 34 votes.

Seats to be distributed: 17 seats.

A: $\frac{203 \times 17}{356} = 9.66\dots$ B: $\frac{119 \times 17}{356} = 5.68\dots$ C: $\frac{34 \times 17}{356} = 1.62\dots$

356

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First step:

Party A: 9 seats Party B: 5 seats Party C: 1 seat

15 seats were distributed in the first step, so that there are two more seats to be distributed in the second step. Party A and party B each obtain one more seat because they obtained the highest numbers after the decimal point. Therefore the result is the following:

Party A: 10 seats Party B: 6 seats Party C: 1 seat

The allocation of seats in a committee with 18 seats would be the following:

Total amount of valid votes: 356. Party A: 203 votes; party B: 119 votes; party C: 34 votes.

Seats to be distributed: 18 seats.

A: $\frac{203 \times 18}{356} = 10.26\dots$ B: $\frac{119 \times 18}{356} = 6.01\dots$ C: $\frac{34 \times 18}{356} = 1.71\dots$

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⁴² Deutscher Bundestag <http://www.bundestag.de/german/143/omr/a_2.html> (last accessed 14 July 2003).

⁴³ "Overlapping seats" not included.

⁴⁴ Alabama-Paradoxon <<http://www.walbrich.de/verfahren/paradoxien/alabama.html>> (last accessed 13 July 2003).

⁴⁵ Alabama-Paradoxon, above.

⁴⁶ Parteiwuchs-Paradoxon <<http://www.walbrich.de/verfahren/paradoxien/parteiwuchs.html>> (last accessed 16 July 2003).

⁴⁷ Parteiwuchs-Paradoxon, above.

the German Federal Constitutional Court could declare a political party as

First step:

Party A: 10 seats Party B: 6 seats Party C: 1 seat

17 seats were distributed in the first step, so that there is one more seat to be distributed in the second step. It belongs to party C because it obtained the highest number after the decimal point. Therefore the result is the following:

Party A: 10 seats Party B: 6 seats Party C: 2 seats

As the possibility of an "illogical jump" is related to the Hare/Niemeyer method, it is advisable to calculate the allocation of seats for committees that have one seat less than the one which is meant to be distributed. This way it could be determined whether an "illogical jump" arises.⁴¹

The "illogical jumps" not only exist in theory. In the German federal elections in 1998 the Socialists (PDS) obtained 36 of the then 656 seats in the Bundestag.⁴² Assuming that the German Parliament had 657 seats, the PDS would have had obtained only 35 seats.⁴³ This phenomenon occurred also in the United States of America during the end of the 19th century in the elections for the House of Representatives. The first "affected" state was Alabama, which is why this problem is also called the Alabama paradox. The consequences taken were that the formula Hare/Niemeyer was replaced by the Sainte Laguë formula.⁴⁴

(ii) New state paradox (Parteizuwachs-Paradoxon)

Unfortunately, the "illogical jumps" are not the only problem related to the formula of Hare/Niemeyer. This formula could also lead to the fact that a certain political party loses a seat when the total number of political parties is reduced.⁴⁵ This phenomenon is known as the *Parteizuwachs-Paradoxon* or the *new state paradox*.⁴⁶

One of the reasons why the total number of political parties could be reduced is that

⁴¹ Deutscher Bundestag <http://www.bundestag.de/gremien/1431/azur/azur_2.html> (last accessed 14 July 2003).

⁴² "Overhanging seats" not included.

⁴³ Alabama-Paradoxon <<http://www.wahlrecht.de/verfahren/paradoxien/alabama.html>> (last accessed 15 July 2003).

⁴⁴ Alabama-Paradoxon, above.

⁴⁵ Parteizuwachs-Paradoxon <<http://www.wahlrecht.de/verfahren/paradoxien/partewizuwachs.html>> (last accessed 16 July 2003).

⁴⁶ Parteizuwachs-Paradoxon, above.

the German Federal Constitutional Court could declare a political party as unconstitutional.

Furthermore, the formula Hare/Niemeyer presents the so-called *Wahlerruwachs*-
 To make this phenomenon clearer an example will be given:

Given that there are 21 seats in a committee to be distributed and the total amount of valid votes is 1000, from which party A and party B both obtained 440, party C 70 and party D 50 votes, the result of the calculation according to Hare/Niemeyer would be the following:

A: 9.24... B: 9.24... C: 1.47... D: 1.05...

Thus, in the first step 9 seats will be given to party A and B each and 1 seat to party C and D each. The number of seats distributed in the first step is 20. Therefore there is one remaining seat in the second step, which will be given to party C because of its highest number after the decimal point. The final result would be A: 9 seats, B: 9 seats, C: 2 seats and D: 1 seat.

(Christian Democrat Union)

Assuming that the German Federal Constitutional Court would declare party D as unconstitutional, the calculation would result in the following numbers:

A: 9.72... B: 9.72... C: 1.54... D: -

This means that 9 seats belong to party A and B each and 1 belongs to party C in the first step. Therefore there are 2 more seats to be distributed in the second step. These will be given to parties A and B because of their highest numbers after the decimal point. Thus, the final result would be A: 10 seats, B: 10 seats and C: 1 seat.⁴⁷

As can be observed, party C obtained only one seat instead of two when the votes for party D were not taken into consideration. Party C is therefore obtaining more seats when party D is included in the calculation despite the fact that the seats are distributed between more political parties.⁴⁸ Such a result is not desirable and absolutely inequitable.

Therefore, the following numbers of seats in Parliament were allocated to the different parties:

⁴⁷ *Parteizuwachs-Paradoxon* <<http://www.wahlrecht.de/verfahren/paradoxien/partezuwauchs.html>> (last accessed 16 July 2003).

⁴⁸ *Parteizuwachs-Paradoxon*, above.

(iii) Population paradox (Wählerzuwachs-Paradoxon)

Furthermore, the formula Hare/Niemeyer presents the so-called *Wählerzuwachs-Paradoxon* or *population paradox*.⁴⁹ This is another not convincing aspect of this method. This problem occurs when it is assumed that a certain political party earns more or less votes than it really did in the elections. This variation would have the consequence for *other* political parties that they could win or lose seats in Parliament.⁵⁰

The election for the *Bundestag* (German Parliament) in 1998 will be used as an example to assure that this idea is understood. The result of this election was as follows:⁵¹

Total amount of votes	Calculation result
CDU: 14004908 (Christian Democrat Union)	197.96...
CSU: 3324480 (Christian Social Union)	46.99...
FDP: 3080955 (Liberal Democrat Party)	43.550...
SPD: 20181269 (Social Democrat Party)	285.26...
B90 / Grüne: 3301624 (Green Party)	46.66...
PDS: 2515454 (Socialist Party)	35.556...
Total: 46408690	
Number of seats in Parliament by 1998:	656

Therefore, the following numbers of seats in Parliament were allocated to the different parties:

⁴⁹ Population-Paradoxon <<http://www.wahlrecht.de/verfahren/paradoxien/population.html>> (last accessed 16 July 2003).

⁵⁰ Population-Paradoxon, above.

⁵¹ Population-Paradoxon, above.

First step	Second step	Result
CDU: 197	+ 1	198
CSU: 46	+ 1	47
FDP: 43	-	43
SPD: 285	-	285
B90 / Grüne: 46	+ 1	47
PDS: 35	+ 1	36
Total: 652		656

Assuming that the party CDU had obtained 38,000 less votes than it did in the election, the result looks different:

Total amount of votes	Calculation result
CDU: 13966908	197.5879...
CSU: 3324480	47.03...
FDP: 3080955	43.58586...
SPD: 20181269	285.50...
B90 / Grüne: 3301624	46.70...
PDS: 2515454	35.58579...
Total: 46370690	

Thus, the following numbers of seats in Parliament would have been allocated to the different parties:

First step	Second step	Result
CDU: 197	+ 1	198
CSU: 47	-	47
FDP: 43	+ 1	44
SPD: 285	-	285
B90 / Grüne: 46	+ 1	47
PDS: 35	-	35
Total: 653		656

It can be observed that in the first example with the real results the party PDS obtained 36 seats and the party FDP obtained 43 of them. Presuming that the party

CDU had obtained 38,000 less votes than it really did, the party FDP would have earned one more seat (44 seats) and the party PDS one seat less (35 seats).

(iv) Negative weight of votes (negatives Stimmgewicht)

The population paradox should not be confused with the problem called *negatives Stimmgewicht* or the *negative weight of votes*, where more votes for a political party could have the absolutely absurd consequence that *this* party loses seats in Parliament.⁵² Whatever should be required from a mathematical formula, all should naturally guarantee that a vote for a certain political party does not lead to a loss of seats for that party. On the other hand, it should also be guaranteed that a party does not obtain more seats for obtaining less votes in an election. There are several cases of the *negative weight of votes* using the formula Hare/Niemeyer.

(aa) Sperrklauselparadoxon

One of these cases is the so-called *Sperrklauselparadoxon*.⁵³ It occurs when (party) votes are added to the ones a political party obtained, so that this party obtains a higher amount of votes and when this has the consequence that another political party fails to pass the threshold of five per cent of all valid votes. Then the party, which obtained more votes, surprisingly loses seats in Parliament.⁵⁴ This can be observed at the following example:

The total number of seats to be distributed is 21. If the total amount of valid votes is 10,000, from which party A obtained 500 party B 700 party C 4400 and party D 4400, the numbers obtained using the Hare/Niemeyer formula are A: 1.05

⁵²Population-Paradoxon, above.

⁵³Negatives Stimmgewicht <<http://www.wahlrecht.de/systemfehler/index.html>> (last accessed 16 July 2003).

⁵⁴Sperrklausel-Paradoxon <<http://www.wahlrecht.de/systemfehler/sperrklausel.htm>> (last accessed 29 June 2003).

B: 1.47

C: 9.24

D: 9.24.

Thus, party A would receive 1 seat, party B 2 seats and the parties C and D 9 seats each.

Now, if the total amount of votes raises to 10,001 and the additional vote is given to party B, party A would not pass the threshold of five per cent of the total amount of valid votes. The numbers obtained by using the formula Hare-Niemeyer would be the following:

party A: - (under five per cent)

party B: 1.54

party C: 9.72 and

party D: 9.72.

Therefore, party B would obtain 1 and parties C and D 9 seats each in the first step. In the second step, the two remaining seats will be given to parties C and D (as these have the highest numbers after the decimal point). The final distribution of seats will thus be: no seats for party A, 1 seat for party B and 10 seats for parties C and D each. It can be seen that party B loses a seat in this example when it wins an additional vote.⁵⁵

(bb) Direktmandats-Paradoxon

Another case of the *negative weight of votes* is known as the *Direktmandats-Paradoxon*.⁵⁶

This problem can occur with the loss of an electoral district for a certain political party. This lost electoral district could have the consequence of an additional seat in Parliament for the affected party. Again, an example should clarify this idea:

The German Parliament has 598 seats. If it is imagined that the electoral district XY was won by party C and the total amount of votes was 598,000, from which party A

⁵⁵ Sperrklausel-Paradoxon (<http://www.wahlrecht.de/systemfehler/sperrklausel.htm>) (last accessed 29 June 2003).

⁵⁶ Sperrklausel-Paradoxon, above.

obtained 288,700, party B 270,700, party C 38,600 and the independent candidate D 0 votes, then the numbers obtained by Hare/Niemeyer would have been the following:

party A: 288.7

party B: 270.7

party C: 38.6.

Thus, party A would have obtained 289 seats according to this formula, party B 271, party C 38 and independent candidate D 0.

If we now change the situation by giving the electoral district XY to the independent candidate D, the numbers obtained would be:

party A: 288.21

party B: 270.14

party C: 38.53.

The seats in Parliament would be distributed as follows: party A 288 seats, party B 270 seats, party C 39 seats and independent candidate D 1 seat.

Thus, party C obtains one more seat in Parliament (39 instead of 38) when it does not win the electoral district XY. Winning an electoral district could thus have the absurd consequence for a party that it loses seats in Parliament.⁵⁷

(cc) Statewide overhanging seats

Another problem in this group is the one related to the *interne Überhangmandate (statewide overhanging seats)*.⁵⁸ This problem is specifically related to Germany as a federal state with a special provision ruling the sub-distribution of seats of the different political parties in the federal Parliament between the different *Länder* (states). §§ 7 III, 6 II BWahlG rule how the seats a certain political party obtained nationwide must be distributed among the different lists of the *Länder*.

If it is assumed that the list of one *Land* obtains more votes, it could happen that the total number of seats belonging to that party in Parliament decreases.⁵⁹

⁵⁷ Sperrklausel-Paradoxon <<http://www.wahlrecht.de/systemfehler/sperrklausel.htm>> (last accessed 29 June 2003).

⁵⁸ Systemfehler wegen mangelnder Konsistenz <<http://www.wahlrecht.de/systemfehler/konsistenz.htm>> (last accessed 21 August 2003).

⁵⁹ Systemfehler wegen mangelnder Konsistenz, above. (last accessed 21 August 2003).

The following example provides the real numbers obtained by the Social Democrats during the German federal elections in 1994. The numbers put in parentheses represent the assumption that the Social Democrats obtained 75,000 (party) votes more in the *Land* Nordrhein-Westfalen.

List of the Party <i>Land</i>	votes	Num- bers obtained	Seats accor- ding to Hare/ Niemeyer	Candidates elected in electoral district	Overhan- ging seats	Total number of seats
Schleswig- Hol.	670,791	9.706	10	2	0	10
Hamburg	389,857	5.641	6	6	0	6
Niedersachsen	1,938,321	28.045	28	14	0	28
Bremen	179,311	2.594 (2.583)	2 (3)	3	1 (0)	3
Nordrhein- Westfalen	4,534,820 (4,609,820)	65.613 (66.408)	66	40	0	66
Hessen	1,296,788	18.763	19	8	0	19
Rheinl.-Pfalz	955,383	13.823	14	4	0	14
Baden-Württ.	1,742,592	25.213	25	0	0	25
Bayern	1,983,979	28.706 (28.580)	29 (28)	1	0	29 (28)
Saarland	329,287	4.764	5	5	0	5
Berlin	663,081	9.594	9	3	0	9
Mecklenburg- Vor-pommern	283,029	4.095	4	2	0	4
Brandenburg	617,362	8.932	9	12	3	12
Sachsen-Anh.	502,193	7.266	7	3	0	7
Thüringen	431,940	6.250	6	0	0	6
Sachsen	621,620	8.994	9	0	0	9
Total	17,140,354 (17,215,354)	248.000	248	103	4 (3)	252 (251)

Source: Systemfehler wegen mangelnder Konsistenz

<<http://www.wahlrecht.de/systemfehler/konsistenz.htm>> (last accessed 21 August 2003).

Distribution of seats among the different political parties

As can be observed, the problem of the statewide overhanging seats affects the number of seats given to the same party in another *Bundesland*.⁶⁰ The Social Democrats would have lost one seat in the federal Parliament if they had won 75,000 votes in Nordrhein-Westfalen.

(dd) Unterverteilungsparadoxon

Another error related to the Hare/Niemeyer method and part of the *negative weight of votes* is the so-called *Unterverteilungsparadoxon*.⁶¹ It is also specifically related to Germany as a federal state with the provisions of §§ 7 III, 6 II BWahlG.

The achievement of more votes for a certain political party in a certain *Land* could have the consequence for that *Land* that it loses seats in the federal Parliament due to the sub-distribution of seats.

The following example provides the real numbers obtained in the German federal elections in 1994. The numbers in parentheses represent the numbers that would have been obtained when the Christian Democrats had obtained one more vote in the *Land* Bremen. This additional vote would have had the consequence that the linked lists of the *Länder* of the Christian Democrats obtain one additional seat at the expense of the linked lists of the Social Democrats. Due to the different sub-distribution and the different situation concerning overhanging seats, the result of this additional vote is contrary to what it should be: only the *Land* that obtained more votes in the assumption of an additional vote loses seats in Parliament. Besides this there would not have been any other changes to the composition of Parliament.

*Looking at the sub-distribution between the different lists of the Christian Democrats, the composition of Parliament, but only to the number of overhanging seats.*⁶²

⁶⁰ Systemfehler wegen mangelnder Konsistenz, above.

⁶¹ Unterverteilungsparadoxon <<http://www.wahlrecht.de/systemfehler/unterverteilung.html>> (last accessed 29 September 2003).

Distribution of seats among the different political parties:

Political party	Party votes	Number obtained	Seats overhanging seats	without Overhanging seats	Total
SPD	17,127,933	247.520096 (247.520091)	248 (247)	4 (5)	252
CDU	16,089,960	232.52008 (+1) (232.52010)	232 (233)	12 (10)	244 (243)
CSU	3,427,196	49.527	50	-	50
FDP	3,258,407	47.088	47	-	47
Bündnis90/Grüne	3,424,315	49.485	49	-	49
PDS	2,066,176	29.858	30	-	30
Total	45,393,987 (45,393,988)	656	656	16 (15)	672 (671)

Source: Unterverteilungsparadoxon <<http://www.wahlrecht.de/systemfehler/unterverteilung.html>> (last accessed 29 September 2003).

Looking at the sub-distribution between the different lists of the Christian Democrats it can be observed that if an additional vote is assumed in Bremen this has the effect that the *Länder* Baden-Württemberg and Sachsen-Anhalt would obtain more list seats. As these *Länder* obtained overhanging seats the only effect of the additional list seats is that the number of overhanging seats is reduced.⁶² The final result of the assumed better result would be that the Christian Democrats lose one seat in Parliament (*Land* Bremen).⁶³ There would not be any changes concerning the number of seats that belong to the Social Democrats. In the example given in parentheses, the Social Democrats lose one list seat. In the sub-distribution this leads to the fact that the *Land* Hamburg would only obtain five list seats. As Hamburg achieved six electoral districts there would not be any changes to the composition of Parliament, but only to the number of overhanging seats.⁶⁴

⁶² Unterverteilungsparadoxon, above.

⁶³ Unterverteilungsparadoxon, above.

⁶⁴ Unterverteilungsparadoxon, above.

Sub-distribution to the CDU-lists of the *Länder*

<i>Bundesland</i>	Party votes	Number obtained	Seats	Direct seats	Overhan- ging seats	Total
Schl.-Holst.	702,367	10.127	10	9		10
Hamburg	343,398	4.951	5	1		5
Nieder- sachsen	1,957,664	28.227	28	17		28
Bremen	105,063	1.5149	2	0		2
	(105,064)	(1.5214)	(1)			(1)
Nordrhein- Westf.	3,997,317	57.637	58	31		58
Hessen	1,417,692	20.441	20	14		20
Rheinl.Pfalz	1,061,643	15.307	15	12		15
Baden-W.	2,458,917	35.455	35	37	2	37
		(35.607)	(36)		(1)	
Saarland	250,978	3.618	4	0		4
Berlin	612,217	8.827	9	6		9
Mecklenb.V.	378,274	5.454	5	7	2	7
Brandenburg	385,383	5.556	6	0		6
Sachsen- Anh.	589,294	8.497	8	10	2	10
		(8.533)	(9)		(1)	
Thüringen	600,440	8.657	9	12	3	12
Sachsen	1,229,313	17.725	18	21	3	21
Total:	16,089,960	232	232		12	244
	(16,089,961)				(10)	(243)

Source: Unterverteilungsparadoxon <<http://www.wahlrecht.de/systemfehler/unterverteilung.html>>
(last accessed 29 September 2003).

The German Federal Constitutional Court dealt with a constitutional complaint against the Hare/Niemeyer formula in 1968.⁴⁵ The appellant argued that the utilisation of the Hare/Niemeyer formula lead to a violation of the principle of the equality of votes guaranteed by art. 38 I 1 of the German Constitution. This principle requires not

⁴⁵ BVerfGE 39, 109ff available at <<http://www.scfis.unibe.ch/law/25/bv/6779169.html>> (last accessed 30 September 2003) 1.

Sub-distribution to the SPD-lists of the *Länder*

<i>Bundesland</i>	Party votes	Number obtained	Seats	Direct seats	Overhan- ging seats	Total
Schl.-Holst.	670,791	9.712	10	2		10
Hamburg	386,857	5.6014	6	6		6
		(5.5788)	(5)	(6)	(1)	
Niedersachs.	1,938,321	28.065	28	14		28
Bremen	179,311	2.596	2	3	1	3
NRW	4,548,820	65.864	66	40		66
Hessen	1,296,788	18.776	19	8		19
Rheinl.Pfalz	955,383	13.833	14	4		14
Baden-W.	1,742,592	25.231	25	-		25
Bayern	1,983,979	28.726	29	1		29
Saarland	329,287	4.767	5	5		5
Berlin	663,081	9.600	9	3		9
Mecklenb.V or.	283,029	4.098	4	2		4
Brandenburg	617,362	8.939	9	12	3	12
Sachsen- Anh.	478,772	6.932	7	3		7
Thüringen	431,940	6.254	6	-		6
Sachsen	621,620	9.000	9	-		9
Total	17,127,933	248	248		4	252
			(247)		(5)	

Source: Unterverteilungsparadoxon <<http://www.wahlrecht.de/systemfehler/unterverteilung.html>> (last accessed 29 September 2003).

(c) Judgement of the German Federal Constitutional Court

The German Federal Constitutional Court dealt with a constitutional complaint against the Hare/Niemeyer formula in 1988.⁶⁵ The appellant argued that the utilisation of the Hare/Niemeyer formula lead to a violation of the principle of the equality of votes guaranteed by art. 38 I 1 of the German Constitution. This principle requires not

⁶⁵ BVerfGE 79, 169ff available at <<http://www.oefre.unibe.ch/law/dfr/bv079169.html>> (last accessed 30 September 2003) 1.

only the equality of all electors, but also an equal outcome for each vote. The appellant stated that the formula d'Hondt⁶⁶ would result in mathematically more satisfactory results than the Hare/Niemeyer formula and that therefore only the former should be applied.

The Court observed that, neither with the Hare/Niemeyer formula nor the method according to d'Hondt could an exact equality be reached. It said it is inevitable with both formulas that a mathematically perfect result cannot be obtained.⁶⁷ Thus, as none of these methods is unproblematic, it would be the freedom of the legislature to choose the method it considered the most convenient.⁶⁸

2 D'Hondt

Another possibility of calculating the seats belonging to a political party is the method according to d'Hondt. It has been used for the federal elections in Germany until 1983 when it was replaced by the Hare/Niemeyer formula. It still applies in the elections of several *Länder*. This procedure is also known as the "Jefferson's method" and the "Hagenbach-Bischoff procedure."⁶⁹ It was developed by the American president Thomas Jefferson (1743 – 1826), the Belgium lawyer Victor d'Hondt (1841 – 1901) and the Swiss physician Eduard Hagenbach-Bischoff (1833- 1910).⁷⁰

This method consists of three different but mathematically equivalent procedures. As the d'Hondt method does neither apply in the federal elections in Germany nor in New Zealand, this paper confines itself to describe only the probably most common of these three methods.

This is the simple procedure of the "highest numbers".⁷¹ The votes a political party obtained are divided by the numbers 1,2,3.... The seats in Parliament are then distributed according to the highest numbers obtained by that calculation.⁷² This means that if it is imagined that a Parliament has 120 seats as in New Zealand, then

⁶⁶ For details about the d'Hondt formula see d'Hondt <<http://www.wahlrecht.de/verfahren/dhondt.html>> (last accessed 29 June 2003).

⁶⁷ BVerfGE 79, 169ff, above, 2.

⁶⁸ BVerfGE 79, 169ff, above, 2.

⁶⁹ d'Hondt, above.

⁷⁰ d'Hondt, above.

⁷¹ d'Hondt, above.

⁷² d'Hondt, above.

the 120 highest numbers obtained from that calculation would lead to a seat in Parliament.

- Merits and demerits

A considerable advantage of this method is that it consists of an easy algorithm.⁷³ Also, it does not present the difficulties related to the Hare/Niemeyer formula described above.

But this method also presents its difficulties: it is not absolutely proportional as it tends to privilege larger political parties.⁷⁴ The reason for this is that this formula privileges the party that obtains the last seat – and it is not unlikely that this is a larger party.⁷⁵ The Liberal Democrat Party FDP for example only obtained 3.4 per cent of the seats having a share of 5.2 per cent of the votes in Bavaria (Bayern) in 1990.⁷⁶ Another disadvantage is that it can happen that two parties obtain exactly the same number using this method where this number would be decisive for the distribution of the last seat.⁷⁷ Therefore the question of which party obtains the seat would have to be decided by drawing lots or comparable methods that cannot be considered as satisfactory.

3 Sainte Laguë

The Sainte Laguë mathematical formula applies in New Zealand. This formula is also known as the *Sainte Laguë / Schepers* procedure, the *Webster's method* or the *method of odd numbers*.⁷⁸ This formula was developed by the American politician Daniel Webster (1782-1852), the French mathematician Jean-Andre' Sainte Laguë (1882-1950) and the German employee of the *Bundestag* Hans Schepers (*1928).⁷⁹

According to this formula and pursuant to section 191 (5) of the Electoral Act 1993, the sum of the votes for a political party is divided by odd numbers beginning with 1,

⁷³ Deutscher Bundestag <http://www.bundestag.de/gremien/1431/azur/azur_3.html> (last accessed 29 June 2003).

⁷⁴ Deutscher Bundestag, above.

⁷⁵ Formeln zur Stimmenverwertung in Verhältniswahlsystemen <<http://www.fortunecity.de/parkalleen/lindenallee/102/leseprob.htm>> (last accessed 8 May 2003).

⁷⁶ d'Hondt <<http://www.wahlrecht.de/verfahren/dhondt.html>> (last accessed 29 June 2003).

⁷⁷ Deutscher Bundestag, above.

⁷⁸ Sainte Laguë <<http://www.wahlrecht.de/verfahren/stlague.html>> (last accessed 8 May 2003).

⁷⁹ Sainte Laguë, above.

3, 5, 7, 9 11, 13... The 120 highest results determine both the number of seats in Parliament for each party and the order in which they are allocated, section 191 (7) of the Electoral Act 1993. Given the case that independent candidates win seats these would, pursuant to section 191 (7) of the Electoral Act 1993, be subtracted from the total number of seats to be distributed among the parties.⁸⁰

- Merits and demerits

The formula Sainte Laguë has the advantage that it also consists of a simple algorithm⁸¹ and it does not privilege any political parties dependent on their size. The results obtained by this formula are always proportional.⁸² The reason for this is that Sainte Laguë uses only odd numbers instead of all natural numbers as the d'Hondt formula. The requirements for achieving seats decreases therefore and this leads to equivalent chances for political parties independently from their sizes.⁸³

This formula also has the unsatisfactory characteristic of the possibility of obtaining identical numbers after a calculation that is decisive for the distribution of the last seat.⁸⁴ This possibility is shown in the following example: A certain committee has 5 seats. 200 electors took part in the election, from which party A obtained 100 votes, party B 60 and party C 40. The numbers obtained dividing these results by the number 1 are A: 100, B: 60 and C: 40. Dividing by the number 3 results in A: 33.333, B: 20 and C: 13.333 and by the number 5 results in A: 20, B: 12 and C: 8. Thus, the four highest numbers are 100 (A), 60 (B), 40 (C) and 33.333 (A). The parties A and B both obtained the fifth highest number 20. This number is decisive for the distribution of the last seat.

Section 191 (9) of the Electoral Act 1993 states that when such an unlikely circumstance happens, it has to be determined by lot by the Chief Electoral Officer which of those numbers is going to be selected.

⁸⁰ Sainte Laguë explained <http://www.elections.org.nz/elections/pandr/sainte_lague.html> (last accessed 21 May 2003).

⁸¹ Deutscher Bundestag <http://www.bundestag.de/gremien/1431/azur/azur_3.html> (last accessed 29 June 2003).

⁸² Sainte Laguë <<http://www.wahlrecht.de/verfahren/stlague.html>> (last accessed 8 May 2003).

⁸³ Deutscher Bundestag, above.

⁸⁴ Deutscher Bundestag, above.

Despite this, the Sainte Laguë formula is exposed to unsatisfactory results in a lesser extent than other formulas. Particularly, the Sainte Laguë formula does neither present all the difficulties of the Hare/Niemeyer method demonstrated above nor does it discriminate smaller parties as the d'Hondt formula.

4 General problems that can occur with all formulas

Independent of which formula is utilised, some problems belonging to the group of the *negative weight of votes* can always occur. The most important ones are the following:

(a) Overhanging seats

A problem that regularly occurs in Germany and could also occur in New Zealand is that the loss of party votes can lead to overhanging seats, so that a party obtains more seats than it is entitled to because of the party votes it obtained.⁸⁵

(b) Seats of compensation for overhanging seats

Electoral systems can provide provisions for seats of compensation. Seats of compensation are additional seats other political parties obtain in compensation for overhanging seats. It is arguable that these seats of compensation represent a risk concerning the *negative weight of votes* as they basically penalise parties that won more seats by the electorate than by the party vote and therefore obtained overhanging seats.⁸⁶

5 Conclusion

Numerous mathematicians have been working on this question for centuries and it has been mathematically demonstrated in 1978 that it is impossible to develop an

⁸⁵ Überhangmandat und negatives Stimmgewicht <<http://www.wahlrecht.de/ueberhang/ueberhangmandat.html>> (last accessed 28 August 2003). For an explanation of the phenomenon of overhanging seats see II D 1.

⁸⁶ Ausgleichsmandate <<http://www.wahlrecht.de/lexikon/ausgleichsmandate.html>> (last accessed 25 August 2003).

errorless method to calculate the number of seats belonging to a certain party.⁸⁷ Thus, this paper cannot propose a better solution than the one developed by Sainte Laguë and Schepers. The Sainte Laguë formula is the preferred method as it presents the lowest possibility of absurd results. Germany should follow the example given by New Zealand and introduce the Sainte Laguë method. Numerous problems could be avoided with this formula. Some German politicians and mathematicians have recognised this by now and the German Chief Electoral Officer concluded after his survey in 1999 that the Sainte Laguë formula is preferable.⁸⁸ In consequence a committee of the *Bundestag* is dealing with the question whether Sainte Laguë should be introduced in Germany.

D Principal Disadvantages of our Voting System

1 Overhanging seats

It could be said that the MMP voting system is a fully proportional voting system because the party vote determines the overall total of seats each party receives.⁸⁹ But there is a problem related to this: the overhanging seats. These occur when a party is entitled to less seats according to the party vote than it is by the electorate vote. The seats won in the electoral districts remain with that party pursuant to §§ 6 V, 7 III 2 BWahlG and section 192 (5) of the Electoral Act 1993. They enlarge the number of seats in Parliament and change its proportional composition.

(a) Germany

Germany, being a federal state, has the provisions of §§ 7 III, 6 II BWahlG ruling the sub-distribution of seats belonging to a certain political party among the *Bundesländer*. This is the reason why in theory, there are two possible categories of overhanging seats. Due to their two-staged distribution of seats, a difference has to be made between the nationwide and the statewide overhanging seats. Nationwide overhanging seats could only occur when a certain political party wins more seats by

⁸⁷ Formeln zur Stimmenverwertung in Verhältniswahlsystemen
<<http://www.fortunecity.de/parkalleen/lindenallee/102/leseprob.htm>> (last accessed 8 May 2003).

⁸⁸ Sainte Laguë <<http://www.wahlrecht.de/verfahren/stlague.html>> (last accessed 8 May 2003).

⁸⁹ Keith Jackson and Alan McRobie *New Zealand Adopts Proportional Representation* (Ashgate, Christchurch, 1998) 2.

the electorate vote than by party vote in the whole country. These nationwide overhanging seats did not occur in any federal election yet and cannot be considered as probable.⁹⁰ Statewide overhanging seats arise in the *Bundesländer* and are a consequence of the German system of splitting up the list of one party into the different lists of the *Länder*.⁹¹ These statewide overhanging seats occur frequently. In order to show how important statewide overhanging seats became in Germany, their number in the federal elections is shown below:

Year	Land	Amount of overhanging seats	Party
1949	Bremen	1	SPD
	Baden	1	CDU
1953	Schleswig-Holstein	2	CDU
	Hamburg	1	DP
1957	Schleswig-Holstein	3	CDU
1961	Schleswig-Holstein	4	CDU
	Saarland	1	CDU
1980	Schleswig-Holstein	1	SPD
1983	Hamburg	1	SPD
	Bremen	1	SPD
1987	Baden-Württemberg	1	CDU
	Mecklenburg-Vorpommern	2	CDU
1990	Sachsen-Anhalt	3	CDU
	Thüringen	1	CDU
	Baden-Württemberg	2	CDU
	Mecklenburg-Vorpommern	2	CDU
	Sachsen-Anhalt	2	CDU
1994	Thüringen	3	CDU
	Sachsen	3	CDU
	Bremen	1	SPD
	Brandenburg	3	SPD
1998	Hamburg	1	SPD

⁹⁰ Interne und externe Überhangmandate <<http://www.wahlrecht.de/ueberhang/internextern.htm>> (last accessed 25 August 2003).

⁹¹ Interne und externe Überhangmandate, above.

	Mecklenburg-Vorpommern	2	SPD
	Brandenburg	3	SPD
	Sachsen-Anhalt	4	SPD
	Thüringen	3	SPD
	Hamburg	1	SPD
2002	Sachsen-Anhalt	2	SPD
	Thüringen	1	SPD
	Sachsen	1	CDU

Source: Geschichte der Überhangmandate

<<http://www.wahlrecht.de/ueberhang/ueberhist.html>>

(last accessed 26 August 2003).

As can be observed, the political parties that benefited from overhanging seats are the Christian Democrats (CDU) with a total of 31 overhanging seats in the period from 1949 to 2002, the Social Democrats (SPD) with a total of 25 and the German Party (DP) with one overhanging seat in the same period of time. Generally speaking, the number of overhanging seats is increasing as can be seen in the following graphic:

Year	Total amount of overhanging seats
1949	2
1953	3
1957	3
1961	5
1980	1
1983	2
1987	1
1990	6
1994	16
1998	13
2002	5

For several decades, overhanging seats were quite irrelevant as the composition of Parliament was not changed decisively. But the sixteen overhanging seats that

occurred in 1994 led to the fact that the then Christian – Liberal coalition in the *Bundestag* could stabilize its narrow majority with them. Without the overhanging seats and the passover of one Member of Parliament from the Green party to the Christian Democrats, the coalition had just exactly the number of seats for an absolute majority. If then only one member of the coalition had missed the election, the re-election of the former German chancellor Helmut Kohl would have been impossible.⁹² Overhanging seats were then considered as the "harassers of the proportionality" in Parliament.⁹³ This was the reason why the German public became aware of the problem related to overhanging seats and a debate started about their constitutionality.

An analysis made after the federal elections in 1994 concluded that there were several reasons for the emergence of the sixteen overhanging seats. The direct reasons logically are that parties won numerous electoral districts and only sparse party votes. This can happen by the splitting of votes, where the electors give different parties support through their party and electorate vote. But there are other reasons that influence in an indirect way. One of these is the low participation in the elections particularly in the five new *Bundesländer*.⁹⁴ Low participation is conducive to overhanging seats as it reduces the amount of party votes for the lists of the affected *Land*. It was also referred to the erroneous allocation of electoral districts among the *Bundesländer*, as these were often unequal.⁹⁵ If the 328 electoral districts had been similar in their dimensions there would have been an equal distribution of electoral districts among the *Bundesländer* and the possibility of obtaining overhanging seats would be lower.⁹⁶

German political parties and a reform commission of the *Bundestag* have since worked on a better allocation of electoral districts and set up a new allocation that was introduced for the federal elections in 2002. Since then, pursuant to § 1 BWahlG Germany has only 299 electoral districts instead of 328 and 598 Members of Parliament instead of 656 (without the overhanging seats).

⁹² *Berliner Morgenpost* 11 April 1997

<<http://www.wahlrecht.de/ueberhang/chronic/berlinermorgenpost-story05.html>> (last accessed 27 August 2003).

⁹³ Deutscher Bundestag <<http://www.bundestag.de/info/wahlen/wahlverfahren/wahlen4.html>> (last accessed 27 August 2003).

⁹⁴ Deutscher Bundestag, above.

⁹⁵ Der aktuelle Begriff Überhangmandate <http://www.bundestag.de/aktuell/begriff/2003/04_2003.pdf> (last accessed 27 August 2003).

⁹⁶ Deutscher Bundestag, above.

(b) New Zealand

New Zealand has not yet experienced the phenomenon of overhanging seats. This can be partially explained by its different electoral organisation. Statewide overhanging seats cannot occur in New Zealand as it is not a federal state and therefore has not divided its party lists as Germany has. The possibility of the occurrence of nationwide overhanging seats is improbable, but cannot be eliminated. Nevertheless, the number of overhanging seats that occurred in Germany would not be reached in New Zealand. But the extent of the changes to the proportional composition of Parliament could become as problematic as it has in Germany...

(c) Possibilities of handling overhanging seats

When the possibility of overhanging seats is given, it should be dealt with the different possibilities of handling them.

One possibility consists of subtracting the number of overhanging seats that political parties obtained from the number of seats that correspond to other parties. The aim of this method is to keep the total number of seats in Parliament constant. This method is used, among others, in the Scottish Parliament.⁹⁷ It has the advantage that the numbers of seats in Parliament remain the same notwithstanding the existence of overhanging seats; but it intensifies the problem of an unproportional Parliament. This method would logically be the most convenient for parties that obtained overhanging seats.

Another possibility of handling overhanging seats is admitting them in addition to the regular number of seats in Parliament. Therefore Parliament would be enlarged. This model applies both in Germany and in New Zealand pursuant to §§ 6 V, 7 III 2 BWahlG and section 192 (5) of the Electoral Act 1993. Its problem is an unproportional Parliament.

Furthermore, it might be reasonable to create seats of compensation for those parties that did not obtain overhanging seats. An example for this solution is provided by the

⁹⁷ Schottisches Parlament <<http://www.wahlrecht.de/ausland/schottland.htm>> (last accessed 29 August 2003).

Land Nordrhein-Westfalen.⁹⁸ The advantage of this possibility is the proportionality of (the enlarged) Parliament notwithstanding the overhanging seats.

Finally, the overhanging seats could also just not be allocated, meaning that their existence would not be permitted. This method was temporarily used in the *Land* Bavaria,⁹⁹ but it is the most problematic way of handling this phenomenon. It would mean that some directly elected candidates would not be able to enter Parliament. This would be a very serious violation of the principle of democracy. In addition, there would also not be a satisfactory method of deciding which directly elected candidates could access Parliament and which not. This method would be the most inconvenient solution for those parties that obtained overhanging seats.

A combination of the methods described above is also possible.

Before considering these possibilities in depth, the two judgements of the German Federal Constitutional Court about the constitutionality of overhanging seats will be discussed.

(d) Judgements of the German Federal Constitutional Court

The German Federal Constitutional Court delivered two judgements concerning the question about the constitutionality of overhanging seats. The art. 38 of the German Constitution is of special importance concerning these judgements. Its wording is the following:

“ Article 38 (Elections)

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

(2) Anyone who has attained the age of eighteen years shall be entitled to vote; anyone who has attained full legal age shall be eligible for election.

(3) Details shall be regulated by a federal law.”

⁹⁸ Umgang mit Überhangmandaten <<http://www.wahlrecht.de/ueberhang/umgang.html>> (last accessed 26 August 2003).

⁹⁹ Umgang mit Überhangmandaten, above.

The Court has also considered ways to deal with the occurrence of overhanging seats.

(i) Judgement of 1988

The first complaint was lodged against the ruling of § 6 V BWahlG in 1988.¹⁰⁰ This provision states that overhanging seats are permitted. Seats of compensation for other parties are not provided. The appellant argued that this provision represents a violation of the principle of the equality of votes guaranteed by art. 38 I 1 of the German Constitution. According to the judiciary of the German Federal Constitutional Court this principle requires not only the equality in counting votes (one person – one vote), but also that the outcome for each vote is equal.¹⁰¹ The appellant argued that this principle requires mathematical correctness that would only be reached by conferring as many seats of compensation as overhanging seats occurred.¹⁰²

The Court observed that the divergence from the principle of the same outcome for each vote caused by the occurrence of overhanging seats is necessarily related to the electoral system.

Unequal sized electoral districts represent a problem for vote equality. However, the exact same outcome for each vote is not achievable independently from the methods used.¹⁰³ The average number of votes each party needed to obtain one seat in Parliament in 1987 (the occurred overhanging seat was not considered) was mentioned. These were:

- 74,435 for the Green Party,
- 74,802 for the Free Democrat Party
- 75,407 for the Social Democrat Party
- 75,409 for the Christian Democrat Union and
- 75,833 for the Christian Social Union.¹⁰⁴

¹⁰⁰ BVerfGE 79, 169ff available at <<http://www.oefre.unibe.ch/law/dfr/bv079169.html>> (last accessed 30 September 2003).

¹⁰¹ BVerfGE 79, 169ff, above.

¹⁰² BVerfGE 79, 169ff, above.

¹⁰³ BVerfGE 79, 169ff available at <<http://www.oefre.unibe.ch/law/dfr/bv079169.html>> (last accessed 30 September 2003).

¹⁰⁴ BVerfGE 79, 169ff, above.

If the one overhanging seat that occurred in 1987 is considered, the Christian Democrat Union had to have 74,976 votes for each seat. This number is still higher than the number required by the Green and the Free Democrats. Referring to their argument that an absolute mathematical correctness is not achievable with any method, it was concluded that a seat of compensation was not necessary. Thus, it was observed unanimously that the provision of § 6 V BWahlG is constitutional.¹⁰⁵

(ii) Judgement of 1995

Things had changed by the time the Constitutional Court was confronted with another constitutional complaint against the provision of § 6 V BWahlG¹⁰⁶ in 1995. The federal elections in 1994 brought sixteen overhanging seats.¹⁰⁷

The petitioner was the (Social Democrat) government of the *Land* Niedersachsen under the later German federal chancellor Gerhard Schröder. The *Land* submitted that the occurrence of overhanging seats is not in accordance with the principle of equality of votes required by art. 38 I 1 of the German Constitution as long as seats of compensation are not provided.¹⁰⁸ It argued that the provision in question is a violation of the principle of democracy. This could be demonstrated with the federal elections in 1994, when the occurred overhanging seats had the consequence of an unequal outcome for each vote. At a federal level, the Christian Democrat Union obtained 830,000 less votes than normally necessary for the number of seats that belonged to that party. The same occurred with the Social Democrats, who obtained 277,000 less votes.¹⁰⁹ It was also submitted that there were no justifying aspects for this inequality. The aim of MMP, which is a strong personal tie to a certain electoral district of half of the Members of the *Bundestag*, could also be reached by conferring seats of compensation to other parties or by other measures of compensation.¹¹⁰ These other possible measures of compensation could consist in a subtraction of list seats of the party affected by overhanging seats in the other *Länder*. The fact that some

¹⁰⁵ BVerfGE 79, 169ff, above.

¹⁰⁶ And § 7 III BWahlG, which is related to the special German method of the sub-distribution of seats among the *Länder*.

¹⁰⁷ See above under II D 1 (a).

¹⁰⁸ BVerfGE 95, 335ff available at <<http://www.oefre.unibe.ch/law/dfr/bv095335.html>> (last accessed 30 September 2003) 1.

¹⁰⁹ BVerfGE 95, 335ff, above, 5.

¹¹⁰ BVerfGE 95, 335ff, above, 5.

Bundesländer would thus not be properly represented in Parliament was not considered as problematic as the *Bundestag* is a unitarian government body. The lower representation of some *Länder* in Parliament would also primarily be caused by overhanging seats and not by the measures of compensation. Referring to the second possibility, the seats of compensation, it was argued that the overhanging seats are what creates an unequal representation of the *Bundesländer* in the *Bundestag*, not the proposed seats of compensation.¹¹¹

The Constitutional Court asked some important institutions such as the federal government and the different political parties in the *Bundestag* for their opinion on the issue.

The federal government, represented by the Ministry of Internal Affairs, argued with the wording of art. 38 III of the German Constitution. This provision states that the concrete electoral system should be input and ruled by the legislature. There is no provision in the constitution that rules on the German electoral system. The existing electoral system would not be a "pure" proportional one. If the overhanging seats were compensated by other seats or by the proposed subtracting method, this would not be in accordance with the will of the legislature.¹¹² Also, political parties should be given an incentive to make an effort to work with candidates who have a strong tie to a certain area and who do good work in the constituencies. Such an incentive would be gone by the time a compensation for overhanging seats was provided.¹¹³ In addition, the German method of a sub-distribution of seats among the *Länder* guarantees an equal representation of these in Parliament. Methods of compensation would have had the consequence of 891 members in the *Bundestag* in 1994.¹¹⁴ This could be a serious problem in relation to the efficiency of the *Bundestag*. An alternative solution to the problem was alleged to be a partial compensation. But the problem of an unequal representation of the *Länder* in the *Bundestag* would not be resolved by this possible method.¹¹⁵ It would consist of assigning seats of compensation to the *Länder* that did not obtain any overhanging seats. The number of overhanging seats obtained would

¹¹¹ BVerfGE 95, 335ff, above, 5.

¹¹² BVerfGE 95, 335ff, above, 6.

¹¹³ BVerfGE 95, 335ff, above, 6.

¹¹⁴ BVerfGE 95, 335ff, above, 6.

¹¹⁵ BVerfGE 95, 335ff, above, 7.

not be considered, the *Länder* with only one would be treated in the same way as those with several.¹¹⁶

The German Federal Electoral Officer was also consulted. In his opinion, the occurrence of overhanging seats could not be prevented with a prohibition of splitting votes. This was confirmed by the Electoral Officers of the *Länder* Baden-Württemberg, Nordrhein-Westfalen and Schleswig-Holstein. These *Länder* had experienced overhanging seats despite the fact that the electors could not split their votes.¹¹⁷

The Court considered that the provision in question is constitutional. This decision was taken by four of the eight Judges of the Federal Constitutional Court. The reasons given by the four Judges supporting this decision of the Court were the following:

The Constitution in its art. 38 III transferred the competence of ruling the electoral system to the legislature. The legislature therefore has the competence of introducing proportional representation or a majority voting system; these methods can also be combined. It is not a duty of the Constitutional Court to examine whether the decision of the legislature is preferable or not. The principle of the equality of votes guaranteed by art. 38 I 1 of the Constitution requires an *ex ante* view and this has a different meaning for the two main electoral systems.

It is the purpose of the majority voting system that only the votes for the successful candidate lead to a seat in Parliament, whereas the votes for unsuccessful candidates do not have any influence. The principle of the equality of votes under this voting system requires that the electoral districts are similar in their extensions, so that it can be assured that the weight of the votes is comparable.¹¹⁸ However, when proportional representation applies, this principle basically requires that each elector has the same influence on the composition of Parliament.¹¹⁹

¹¹⁶ BVerfGE 95, 335ff, above, 7.

¹¹⁷ BVerfGE 95, 335ff, above, 8.

¹¹⁸ BVerfGE 95, 335ff, above, 12.

¹¹⁹ BVerfGE 95, 335ff, above, 12.

The occurrence of overhanging seats does change the proportional representation in Parliament and therefore has an influence on the outcome for each vote in an election.¹²⁰ But this is a necessary consequence of the electoral system MMP and is therefore in accordance with the principle of the equality of votes as long as the electoral districts have comparable sizes.¹²¹ Nevertheless, when considering this question, it has to be seen that the electoral districts have to be distributed among the *Bundesländer*. Additionally, it does not make sense and is against the idea of Members of Parliament having a strong tie to their electoral districts to frequently adjust these to any new circumstances.¹²² Such a personal relationship of a candidate to a certain electoral district requires a certain continuity of the existence of this constituency. It would not be in accordance with the principle of a democratic representation if the electoral districts would continuously be subject to reform. The historical borders should also be kept in mind.¹²³

The sizes of the current electoral districts are significantly unequal and variations of 33.3 per cent or more can no longer be tolerated. Nevertheless, there is no reason for declaring the distribution of electoral districts as unconstitutional as the work on their reorganisation has already started.¹²⁴

The Judges considered that even if the choice of the applicable electoral system falls within the competence of the legislature, a different weight of each vote in the outcome of an election is not permitted without limitations. The idea of having a Parliament that is half directly elected and half elected by the party vote cannot be fulfilled when the numbers of overhanging seats are constantly increasing. Nevertheless, the decision whether or not the electoral system should be changed primarily falls within the competence of the legislature according to art. 38 III of the German Constitution.¹²⁵ The legislature could be orientated by the idea of the threshold of five per cent of all valid votes, which could be helpful concerning the question of a tolerable limit for overhanging seats. Then, unconstitutionality would be given when the number of overhanging seats leads to a change of or over five per cent

¹²⁰ BVerfGE 95, 335ff, above, 15.

¹²¹ BVerfGE 95, 335ff, above, 15.

¹²² BVerfGE 95, 335ff, above, 19.

¹²³ BVerfGE 95, 335ff, above, 19.

¹²⁴ BVerfGE 95, 335ff, above, 19.

¹²⁵ BVerfGE 95, 335ff, above, 20.

of the proportional representation in Parliament.¹²⁶ Considering these thoughts and from a constitutional point of view, the legislature is not required to introduce any changes as the number of overhanging seats occurred did not reach five per cent of all seats in Parliament.¹²⁷

Additionally, the possibility of overhanging seats occurring does not mean that the electors can give their votes a double weight in advance.¹²⁸ The individual elector does not have any influence on the general voting behaviour.¹²⁹ For these reasons, it was concluded that the provision of § 6 V BWahlG is constitutional.

The four Judges who voted against these findings considered that the provision of § 6 V BWahlG is not in accordance with art. 38 I 1 of the German Constitution when it leads to a number of overhanging seats that results in an unproportional composition of Parliament. This would occur whenever the variations caused by the overhanging seats are superior to the necessary irregularities due to the mathematical formula used.¹³⁰

These four Judges gave the following reasons: an election in a democratic state is the event where the population exercises the state authority and legitimises the resulting executive body. Therefore it is essential for the democratic state to guarantee the equal treatment of all citizens in the elections. Thus, art. 38 I 1 of the German Constitution guarantees a strict equality of all electors.¹³¹ Nevertheless, the question whether an election presents an unequal handling of votes cannot be answered independently from the electoral system used. The majority voting system does naturally grant success only to the votes for the most popular candidate in order to guarantee a functioning Parliament. A strict equality of chances here is guaranteed by an equal distribution of electoral districts.¹³² Compared with this, the elections in proportional representation are not done by counting the votes for each candidate. Subsequently, a mathematical formula is used to determine the proportions in

¹²⁶ BVerfGE 95, 335ff, above, 20.

¹²⁷ BVerfGE 95, 335ff, above, 20.

¹²⁸ BVerfGE 95, 335ff, above, 17.

¹²⁹ BVerfGE 95, 335ff, above, 18.

¹³⁰ BVerfGE 95, 335ff, above, 21.

¹³¹ BVerfGE 95, 335ff, above, 21.

¹³² BVerfGE 95, 335ff, above, 22.

Parliament. Then, the principle of the strict equality of votes requires that each elector has the same influence on the outcome of the elections. Thus, it is not only required that each elector has the same chance of influencing the outcome, but each vote needs to have the same outcome in the result.¹³³ Nevertheless, this requirement is different from an ex post point of view due to the problems necessarily related to the mathematical formulas.¹³⁴

Overhanging seats do have their cause in an "overhang" of directly elected candidates in the electoral districts, but they are not "direct seats".¹³⁵ Overhanging seats only represent a number of seats that are given to a certain party beyond the proportion. As the number of electoral districts and therefore directly elected candidates was established at and is always 328,¹³⁶ list candidates fulfill the overhanging seats.¹³⁷ The distribution of these seats, which are not part of the regular number of seats, is not ruled by the majority voting system and is therefore not governed by the requirements of the principle of the equality of votes for this system. The majority of votes can only justify the existence of a seat "offered" to the electors before the election took place.¹³⁸ On the other hand, overhanging seats, being caused by the direct votes, are not governed by the rules for the proportional system either.¹³⁹

Furthermore, if the equality of votes in the outcome is applied only as long as directly elected candidates can be subtracted from the list seats belonging to a certain party, it overlooks that the majority voting system merges with the proportional system at that point. The principle of the equality of votes does not permit to guarantee the same outcome for votes only until the regularly 656 seats in Parliament are distributed.¹⁴⁰ The MMP electoral system creates the possibility of the occurrence of overhanging seats. But this possibility, from an ex ante point of view, does not guarantee an equal possibility for all electors to influence the outcome of the election. Each vote only has, ex ante, the same possibility of influencing something that from the beginning is an unequal regulation. The elector only has the same chance as

¹³³ BVerfGE 95, 335ff, above, 23.

¹³⁴ BVerfGE 95, 335ff, above, 23.

¹³⁵ BVerfGE 95, 335ff, above, 29.

¹³⁶ There were 328 electoral districts before the electoral district reform in 2002. Nowadays Germany presents only 299 electoral districts.

¹³⁷ BVerfGE 95, 335ff, above, 29.

¹³⁸ BVerfGE 95, 335ff, above, 29.

¹³⁹ BVerfGE 95, 335ff, above, 29.

¹⁴⁰ BVerfGE 95, 335ff, above, 32.

everyone else to belong to the group of electors whose votes will count double in the result. Such a provision does not guarantee an equal treatment of all electors and is therefore not in accordance with art. 38 I 1 of the German Constitution.¹⁴¹

When overhanging seats occur, the total number of seats in Parliament should still be distributed according to the proportions in the election. There are diverse methods of achieving this result. The easiest is not to consider the directly elected candidates with the fewest amount of votes. Nevertheless, it has to be admitted that this solution would have the consequence of not considering one of the aims of MMP. Each elector should have the possibility of influencing not only the proportional, but also the personal composition of Parliament. This renouncement is not necessary as there are other solutions.¹⁴²

One of these could consist of granting seats of compensation. Referring to the arguments of the opposing four Judges concerning the then absolutely irrational high number of seats in Parliament, it has to be observed that only fifteen additional seats would have been needed in 1994 to achieve a certain balance for the occurrence of overhanging seats.¹⁴³ Nevertheless, this solution finds its limits when Parliament is enlarged to an extent where the functioning of Parliament could not be guaranteed anymore.¹⁴⁴

A possible model that is, in comparison, milder is the subtraction of overhanging seats of one party in one *Bundesland* from the seats which belong to the same party in another *Bundesland*. This model can prevent the *Bundestag* having more than the regular number of seats. The disadvantage of this possible solution is that the different party lists of the *Länder* would not be represented equally in Parliament. But this disadvantage does currently already exist. Those party lists of the *Länder*, which could achieve overhanging seats, are better represented in Parliament than they would be according to the proportions after the elections.¹⁴⁵ The unequal representation of the *Länder* in the *Bundestag*, which exists currently to a certain extent due to the overhanging seats, is still better than an unequal treatment of votes related to

¹⁴¹ BVerfGE 95, 335ff, above, 26.

¹⁴² BVerfGE 95, 335ff, above, 25.

¹⁴³ BVerfGE 95, 335ff, above, 42.

¹⁴⁴ BVerfGE 95, 335ff, above, 43.

¹⁴⁵ BVerfGE 95, 335ff, above, 41.

overhanging seats. In addition, there is no regulation or principle in the German Constitution requiring the *Bundesländer* to be represented equally in Parliament.¹⁴⁶

Also, the inequality of votes related to the occurrence of overhanging seats is conducive to a diminution of the principle of equal opportunities for political parties. This is made very clear when the amount of votes a party required for a seat after the federal elections in 1994 is observed. The Christian Democrat Union needed 69,353 votes for each seat in Parliament if the overhanging seats are not considered, but only 65,942 votes if these are taken into consideration. The Social Democrats needed 69,114 votes, but only 68,017 if the overhanging seats are considered. The Free Democrats had to have 69,328 votes, the Christian Social Union 68,544 votes, the Green Party 69,884 and the Socialists 68,873 votes. Thus, the Christian Democrats needed 3,942 less votes than the Green Party for one seat, while the biggest necessary difference due to the problems related to the mathematical formulas was only 1,340 votes between the Christian Social Union and the Green Party.¹⁴⁷ Overhanging seats are only tolerable as long as the difference in the outcome of votes is necessarily related to proportional representation.¹⁴⁸

Referring to the proposal of the other four Judges concerning the threshold of five per cent of all valid votes, it was considered that this threshold aims to guarantee a functioning Parliament. This question is a completely different issue than the question of a tolerable difference in the outcome for each vote; the threshold is therefore unsuitable here.¹⁴⁹

The provision in question aims to provide an incentive for political parties to make an effort concerning the political work in the electoral districts in order to gain overhanging seats. This is absolutely contrary to the principle of a strict equality of votes.¹⁵⁰ In addition, the provision of § 6 V BWahlG is not suitable to do so. There is no incentive for political parties, as their chances of gaining an overhanging seat do not increase with good work in the electoral districts. The more successful a party is

¹⁴⁶ BVerfGE 95, 335ff, above, 42.

¹⁴⁷ BVerfGE 95, 335ff, above, 34.

¹⁴⁸ BVerfGE 95, 335ff, above, 36.

¹⁴⁹ BVerfGE 95, 335ff, above, 36.

¹⁵⁰ BVerfGE 95, 335ff, above, 36.

in general, the lower is its chance to gain an overhanging seat.¹⁵¹ Therefore, only parties with a lower success and fewer party votes benefit from the provision in question.¹⁵²

(e) Convincing methods for solution

When looking at the possible solutions for overhanging seats, the question whether these need to be found should be answered first. The four supporting Judges expressed that overhanging seats are necessarily related to MMP and that electors cannot give their votes a double weight in advance. As the opposing Judges observed, this only means that the electors have the same possibility of influencing something that, from the beginning, is an unequal regulation.

Consenting with the four opposing Judges, it has to be said that the threshold of five per cent exists to ensure a functioning Parliament and that the present question is a different issue. Nevertheless, the idea that a variation of the proportional composition of Parliament of fewer than five per cent is tolerable could be supported. Then, it could be argued that, as the number of overhanging seats did not reach this percentage neither in Germany nor in New Zealand (where overhanging seats have not yet occurred), the variation of the proportional representation is still insignificant. However, there have been instances where a variation of less than five per cent has had a significant political impact. One of these was the situation given in 1994, where the overhanging seats stabilized the German government under the former chancellor Helmut Kohl. This means that the premise of the supporting Judges that a variation of the proportional composition of Parliament fewer than five per cent is tolerable could be questioned. Sixteen or almost 2.5 per cent additional seats in a Parliament with a regular number of (then) 656 seats cannot be considered as a marginal variation.

In conclusion, overhanging seats are problematic. But are they really necessarily related to MMP? They occur, as it is well known, by the fact that a party obtains more seats by the electorate than by the party vote. Even if there are several reasons for this phenomenon, one of the most obvious is the possibility of splitting votes. This possibility is used by an increasing number of electors. One could expect the

¹⁵¹ BVerfGE 95, 335ff, above, 36.

¹⁵² BVerfGE 95, 335ff, above, 37.

avoidance of a significant number of overhanging seats by the prohibition of vote splitting. Even if the problem of their occurrence cannot be completely resolved by such a prohibition, their practical importance could undoubtedly be reduced. Nevertheless, when thinking about such a solution, the problems related to it have to be faced. Such a prohibition would signify a violation of the principle of the equality of votes. Those electors who vote for a smaller party like the Green or Free Democrats in Germany or the Green or United Future in New Zealand would not be able to influence the personal composition of Parliament. The reason for this obviously is that the direct candidates of these small parties are very unlikely to be elected by the majority of votes in an electoral district. Such a prohibition would mean at the very end that one of the advantages of MMP, the possibility of the electors to choose their favourite candidate besides having a Parliament that reflects the diversities in a society, would be annulled.

In Germany, at regular intervals, measures should be taken to reduce the possible number of overhanging seats by dividing the whole territory into equal electoral districts among the *Bundesländer*. Nevertheless, the possibility of the occurrence of overhanging seats cannot be avoided.

Some specific proposals for solution to the overhanging seats have been raised by the Court and these solutions are discussed here. The four opposing Judges expressed the opinion that the easiest way of handling the problem consists of simply not admitting those directly elected candidates into Parliament, who obtained the lowest result in the elections. This suggestion absolutely disregards the principle of democracy and is therefore not acceptable. All directly elected candidates must obtain a seat in Parliament. This should be considered as immanent to the electoral system MMP.

The idea of subtracting the number of overhanging seats from the list seats that belong to the same party in the other *Bundesländer* can only be applied in a country with a provision stating the sub-distribution of seats among different regions. Such a provision does not exist in New Zealand, but in Germany with § 7 BWahlG. Therefore this idea does not represent a general solution for the problem. Concerning its possible application in Germany, it has to be seen that it would be conducive to an unequal representation of the *Länder* in the *Bundestag*. Even if an equal

representation is not a written principle in the German Constitution, it is strongly desirable that the different regions are equally represented in the national Parliament. If it is argued that such an inequality is already produced by the occurrence of overhanging seats and therefore exists anyway, it has to be observed that subtracting the number of these overhanging seats from the party lists of the same party in the other *Länder* would strongly intensify this problem.

The model of the seats of compensation for other parties has the disadvantage that the then extremely large Parliaments could have a problem concerning their efficiency. As a functioning Parliament is essential for a good working democratic state, this solution cannot be considered as satisfactory.

Nevertheless, a minimum number of seats of compensation for other parties could be provided. This way, the directly elected candidates, who have the advantage of a strong tie to their electoral districts, would be able to influence the parliamentary work without privileging their political party to some extent. This model presents the disadvantage that the composition of Parliament would still not be proportional.

Conclusion

In conclusion, the possibility of the occurrence of overhanging seats cannot be avoided and the best proposal made by the Judges of the Constitutional Court to change the current situation and mitigate the problem is to confer a minimum of seats of compensation to the parties that did not obtain overhanging seats. Through this, a certain balance for overhanging seats could be created. Nevertheless, this solution presents the problem of a further enlargement of Parliament. Especially in New Zealand, there is a public resistance to such an enlargement. The Royal Commission on the Electoral System ascertained that the cost for each additional Member of Parliament amounts \$ 142,000 per year. This sum does not include additional costs as the accommodation within Parliament Buildings.¹⁵³ In order to avoid the enlargement of Parliament and the problems related to it, a New Zealand citizen¹⁵⁴ made the proposal that these seats of compensation could be conferred in a notional form. The official who controls the work of the members of the particular parties would hold their votes. In New Zealand, the whips of the political parties would be in charge of voting for the notional Members of Parliament. This proposal has the advantages that

¹⁵³ Royal Commission on the Electoral System "Towards a Better Democracy" [1986-87] IX AJHR H.3 126.

¹⁵⁴ Oral proposal by Rana Waitai.

it gives less reason for public resistance and avoids the additional costs related to any additional seats in Parliament. On the other hand, it is also quite problematic. It presents no satisfactory solutions for certain circumstances such as political parties splitting up. Besides this, the problem of an unproportional composition of Parliament cannot be resolved with just some seats of compensation. Thus, there would be no significant advantages of introducing some seats of compensation. But the conferment of more seats of compensation in order to re-establish proportionality in Parliament would lead to irrational high numbers of seats. Therefore it is reasonable to conclude that overhanging seats should be tolerated without any measures of compensation.

The idea of subtracting the number of overhanging seats from the number of seats that belong to other political parties was not even proposed in the judgements of the Constitutional Court. This method would strongly intensify the problem caused by the overhanging seats and can therefore not be seen as a solution. A Parliament would be more unproportional than it already is as a result of the overhanging seats.

- Conclusion

For the reasons given above, the occurrence of overhanging seats should be permitted without any measures of compensation.

(f) Vacancies of overhanging seats

Now, once an "overhang" has been seated in Parliament, the following question has to be answered: What happens when one of the cases enumerated in § 48 I 1 BWahlG or section 55 of the Electoral Act 1993 occur during the legislative period? This means what steps should be taken when such a Member of Parliament dies for example?

It could be possible to consider that another politician of the same political party could then occupy the affected seat or it could just remain vacant. The electoral provisions in Germany and New Zealand present differences concerning this question.

In Germany, § 48 I 1 BWahlG rules that in the case where a Member of Parliament for example dies the vacant seat is occupied by a politician of the same political party.

This provision does not refer to overhanging seats, but just "normal" seats. A distinction between list seats and directly won electoral districts is not made. Nevertheless, it has occurred during seven legislature periods (1953, 1961, 1980, 1983, 1987, 1990 and 1994) that vacant overhanging seats were occupied by list candidates of the affected party.¹⁵⁵

The idea of another candidate taking the seat in question implicates a renouncement to the idea of the vote for an electoral district. Somebody who was not elected by the majority of the electors cannot replace a directly elected candidate. This would otherwise not comply with MMP. Thus, if an election of the successor did not take place, the seat has to remain vacant.

The German Federal Constitutional Court, which had to decide about a constitutional complaint on this issue in 1998, argued similarly. The Court considered that § 48 I 1 BWahlG does not apply in these situations. Overhanging seats are "special" seats that, contrary to the previous legal practice, cannot be occupied by other candidates if these were not elected as substitutes for the directly elected candidate. A list candidate is not legitimized, as the affected party is not entitled to any more seats considering its party votes. The demanded election of a substitute could take place simultaneously in the general election or after the overhanging seat was vacated.¹⁵⁶ Due to the lack of such a provision things depend on the legislature to pass a provision ruling on this procedure. Therefore, overhanging seats cannot be considered as "secure" seats for a party for the whole legislative period.¹⁵⁷

Interestingly, the Court said in addition that things would be tolerated how they were until the following federal elections that took place a few months after this decision was taken. The Court reasoned with the electoral legal practice used since 1953 and the possible consequences that it could not estimate.¹⁵⁸ It is very likely that the latter was the heavier argument. The Court did not want to interfere in the political circumstances.

¹⁵⁵ BVerfG 2 BvC 28/96, 26 February 1998 available at <http://www.bverfg.de/entscheidungen/frames/cs19980226_2bvc002896> (last accessed 30 September 2003) 4.

¹⁵⁶ BVerfG 2 BvC 28/96, above, 4.

¹⁵⁷ BVerfG 2 BvC 28/96, above, 4.

¹⁵⁸ BVerfG 2 BvC 28/96, above, 4.

In New Zealand the Electoral Act 1993 handles the vacancies of seats in the House of Representatives in a more differentiating way than the BWahlG. Section 129 of the Electoral Act 1993 refers to the Members of Parliament representing electoral districts whereas section 134 refers to the party list seats. Section 129 anticipates what the German Federal Constitutional Court had considered five years later: a by-election takes place in order to fill the vacancy. Thus, the principle of democracy would be well observed when this provision is also applied for overhanging seats.

- Conclusion

A vacated overhanging seat can only be reoccupied by a directly elected candidate.

2 The system is quite complex

Another demerit of our voting system is that numerous electors do not understand it. In 2000, a survey conducted in New Zealand revealed that 55 per cent of the respondents thought that FPP is more proportional than MMP.¹⁵⁹ Other surveys in the week after the election day in 1996 and 1999 revealed that 23 per cent (1996) and 30 per cent (1999) of the electors did not know that the party vote is more important in deciding the number of MPs. These numbers increased thereafter.¹⁶⁰ It might not be advisable to expose the electors to two votes, which they can give to different political parties. These difficulties voters have can also be observed when looking at the use of splitting votes. In Germany, 20.1 per cent of all electors split their votes in the federal election of 1980, whereas the number increased to 25.4 per cent in 2002. If only the electors of small parties are taken into consideration, the numbers are 43.3 per cent in 1980 and 49.6 per cent in 2002.¹⁶¹ In the first MMP general election in New Zealand in 1996 37 per cent of the electors decided to split their votes;¹⁶² the number remained

¹⁵⁹ Hon Sir John Wallace "Reflections on Constitutional and other issues concerning our electoral system: the past and the future" in David Carter and Matthew Palmer (ed) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 297, 319.

¹⁶⁰ Report of the MMP Review Committee *Inquiry into the Review of MMP* (Wellington, 2001) 90 <<http://www.clerk.parliament.govt.nz/content/20/mmprevw.pdf>> (last accessed 25 September 2003).

¹⁶¹ *Wahlbeteiligung und Stimmabgabe der Männer und Frauen nach dem Alter in Wahl zum 15. Deutschen Bundestag am 22. September 2002* (Bundeswahlleiter, Wiesbaden, 2002).

¹⁶² Keith Jackson and Alan McRobie *New Zealand Adopts Proportional Representation* (Ashgate, Christchurch, 1998) 320.

almost constant in 1999 (35.2 per cent).¹⁶³ This is a surprisingly high percentage for the first elections under MMP. It can be expected that this number will increase over the years. Even if the use of splitting votes is generally increasing, there are still numerous electors of small parties who do not make use of it.

Notwithstanding this, the advantages of MMP are so convincing that this problem has to be accepted. The informal campaigns undertaken in both countries also help to mitigate this problem. Additionally, it might be helpful to look at the placing of the party vote in the ballot papers. While in Germany, pursuant to § 4 BWahlG, the party vote is the second vote and the electorate vote the first one, in New Zealand, according to section 150 (3) of the Electoral Act 1993, this situation is reversed. This is preferable as the party vote is the most important. Electors who do not understand their electoral system might consider the first vote as the most important.

3 The threshold of five per cent

Pursuant to § 6 VI 1 BWahlG and section 191 (4) (a) of the Electoral Act 1993 a political party is only elected into Parliament when its party votes cross the threshold of five per cent or when, pursuant to § 6 VI 1 BWahlG and section 191 (4) (b) of the Electoral Act 1993, it wins at least three electorates in Germany or one in New Zealand. The party vote is based on the proportional voting system, which aims to represent all electors in Parliament. This cannot be achieved if those votes for a party that did not reach five per cent of all votes do not influence its composition at all, if they are just lost. Also, it has to be considered that the threshold is even higher in practice. It could impede potential electors from voting for smaller parties, as these might not gain five per cent of all valid votes. Additionally, the foundation of any new parties is made difficult. This represents a breach of the principle of the equality of votes and is therefore problematic.

On the other hand, this threshold has its justification. Without it, the political decision-making could be made very difficult or even impossible because of the lack

¹⁶³ Hon Sir John Wallace "Reflections on Constitutional and other issues concerning our electoral system: the past and the future" in David Carter and Matthew Palmer (ed) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 297, 310.

of majorities. A proportional representation electoral system with a low or no threshold could result in having as many as 15 political parties in Parliament.¹⁶⁴ A good example for such a non-functioning Parliament occurred in the Republic of Weimar (1918 – 1933). It had experienced a double-digit number of political parties in its Parliament, and sixteen government coalitions between 1919 and 1928¹⁶⁵. The consequence was that an effective parliamentary work was made almost impossible. No majorities at all were reached in Parliament from 1929. The legislature was in cessation. In consequence, only emergency decrees were passed by the executive.¹⁶⁶ These non-desirable experiences make it clear that Parliament cannot represent a total reflection of a society, that some restrictions must apply. Thus, a threshold of five per cent could be perceived as a reasonable measure to assure the efficiency of Parliament. And even if the establishment of new political parties becomes more difficult because of the threshold, there are still enough examples to justify it.

Nevertheless, there is a question that needs to be dealt with. It is often discussed whether the threshold should be lowered to four per cent¹⁶⁷. The arguments speaking in favour of this idea are that it could ensure that minor parties gain some representation and that it would reduce the number of “wasted” votes.¹⁶⁸ On the other hand, a higher limit reduces the risk of instability. Furthermore, there might be a better model for solution of the “wasted” votes. It should be analysed whether it is necessary in order to achieve a functioning Parliament that all the votes for political parties with fewer than the established threshold of the total amount of votes get lost.

Two German citizens¹⁶⁹ have made the proposal that electors should have a “second choice” concerning their party votes on their ballot papers. It was proposed that the elector should enter the number 1 next to the name of his or her favourite political party and the number 2 besides the second favourite one.¹⁷⁰ In case the favoured party

¹⁶⁴ Jackson and McRobie, above, 320.

¹⁶⁵ Wikipedia <http://de.wikipedia.org/wiki/Weimarer_Republik> (last accessed 14 September 2003).

¹⁶⁶ Freistaat Thüringen

<<http://www.thueringen.de/de/index.asp?untent=http://www.thueringen.de/de/lzt/politik/politsys/weimare/content.html>> (last accessed 30 September 2003).

¹⁶⁷ See for example Report of the MMP Review Committee *Inquiry into the Review of MMP* (Wellington, 2001) 47 <<http://www.clerk.parliament.govt.nz/content/20/mmprevw.pdf>> (last accessed 25 September 2003) and Royal Commission on the Electoral System “Towards a Better Democracy” [1986-87] IX AJHR H.3 67.

¹⁶⁸ MMP Review Committee, above, 48.

¹⁶⁹ Dr. Björn Benken and Gerhard Kottschlag.

¹⁷⁰ Wahlreform.de <<http://www.wahlreform.de/presse.htm>> (last accessed 14 September 2003).

does not pass the threshold, the elector's second choice should automatically be counted. The authors say that this way the efficiency of Parliament could be guaranteed besides ensuring the principle of the equality of votes. Also, Parliament would really represent the society's will, as tactical thoughts when voting would not be necessary anymore.¹⁷¹

When considering this idea, the possible problems related to it have to be faced. First, the idea would not represent a solution in those cases where the elector prefers political parties that both do not pass the threshold. Therefore a longer list of the preferred parties could be considered. But the practicability and clearness of an election are also very important. It could provoke a lot of confusion if electors were confronted with ballot papers requiring them to make a list of their most preferred political parties. This problem would even arise if the proposal is followed and the electors only have to fill in two numbers for their party vote and one cross for their electorate vote. Electors already often do not understand the reason for having two votes; three would not make things better. Thus, the clearness of an election could be risked when following this proposal. Also, it has to be seen that such a procedure could be difficult to carry out in practice. The alternative vote should be counted automatically, the authors say. This has to be realised somehow, but in our modern era an accordant technology could be developed for sure.

Therefore, the remaining problem is the clearness of the elections. On the other hand, this problem could be lessened by a suitable campaign informing the electoral population about the changes. The benefits from it would be the possibility of a very strict consideration of the principle of the equality of votes and the avoidance of tactical thoughts when voting. Nevertheless, it seems more reasonable to let electors mark their ballot papers with just two numbers for their party votes instead of five or even more. It is likely that most electors would choose a larger party as their second choice when their first choice is a smaller one.

Therefore it has to be concluded that the "two-choice" proposal should be followed in order to ensure both a functioning Parliament and the compliance with the principle of the equality of votes.

¹⁷¹ Wahlreform.de, above.

E Consequences of the Introduction of MMP for New Zealand

Political circumstances are often not predictable. Whereas the German public does, despite some insignificant exceptions, not question the appliance of MMP, a wave of doubt has overcome New Zealand's society.

What are the factual changes that took place in New Zealand after the introduction of MMP? For example, it is considerable that the average vote won by a majority party decreased significantly with MMP. Whereas this average was 41.7 per cent of the total amount of votes during the FPP period, it only was 33.5 per cent after the introduction of MMP.¹⁷²

It is unlikely that major parties win the absolute majority in Parliament. Thus, the composition of Parliament with an estimated total of five or six parties gives the choice between coalition or minority governments or a minority coalition.¹⁷³ Among the population of New Zealand, the fear has raised that minority governments or minority coalitions could not present the stable conditions they were accustomed to with the FPP electoral system.¹⁷⁴ But minority governments are not necessarily unstable. They have often lasted a considerable time in many countries.¹⁷⁵

Furthermore, the examples given by the National and Labour/Alliance Governments do not justify the apprehension that MMP could lead to ineffective governments.¹⁷⁶

Coalition governments are likely to act effectively and implement their policies. These just sometimes need to be submitted to modifications in order to gain a majority in Parliament.¹⁷⁷ Also, the electors should not overestimate the requirement that potential coalition partners are viable and available. In 1998, it was predicted that the principal two potential coalition partners, Alliance and New Zealand First, were unlikely to constitute a coalition because of personal antipathies concerning the major parties their leaders had broken with.¹⁷⁸ But only four years later, the Progressive

¹⁷² Keith Jackson and Alan McRobie *New Zealand Adopts Proportional Representation* (Ashgate, Christchurch, 1998) 320.

¹⁷³ Jackson and McRobie, above, 321.

¹⁷⁴ Jackson and McRobie, above, 321.

¹⁷⁵ Jackson and McRobie, above, 323.

¹⁷⁶ Hon Sir John Wallace "Reflections on Constitutional and other issues concerning our electoral system: the past and the future" in David Carter and Matthew Palmer (ed) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 297, 307.

¹⁷⁷ Wallace, above, 297, 307.

¹⁷⁸ Jackson and McRobie, above, 322.

Coalition, which split from Alliance, entered a coalition with the Labour Party. The new electoral system can result in circumstances as stable as with FPP.¹⁷⁹

Another significant change for New Zealanders is the circumstance of the party list mechanism of MMP. The electors have no influence on the candidates put forward on the party lists. Nevertheless, the numerous merits related to the list MPs have to be regarded. The Maori representation in Parliament increased under MMP, resulting in a broadly proportional representation. This circumstance is due both to the list representation and the increased number of Maori electorates.¹⁸⁰ Also, the representation of women in Parliament has increased since the introduction of MMP. Even before the introduction of the new electoral system, New Zealand ranked eighth in an international comparison for women's representation. This number has increased markedly since then. At the last FPP election, women occupied 21.6 per cent of the seats in Parliament. Under MMP, this number increased to 29.2 per cent in 1996 and further to 30.8 per cent in 1999.¹⁸¹ Therefore, the nature and diversity of the New Zealand society is better reflected in Parliament than under any previous electoral system.¹⁸²

III CONCLUSION

The Mixed System of (Simple) Majority Vote and Proportional Representation (MMP) electoral method guarantees a proportional representation in Parliament besides giving the electors the possibility of influencing the personal composition of it. Other voting systems, such as the Single Transferable Vote (STV), Supplementary Member (SM) or First-Past-the-Post (FPP) are not preferable in comparison to MMP.

Numerous mathematicians have been working on the development of an accurate mathematical formula to calculate the number of seats that belong to the political parties according to the party vote. It was demonstrated in 1978 that an error-free formula cannot be developed. The Sainte Laguë formula, which applies in New

¹⁷⁹ Jackson and McRobie, above, 323.

¹⁸⁰ Report of the MMP Review Committee *Inquiry into the Review of MMP* (Wellington, 2001) 41 <<http://www.clerk.parliament.govt.nz/content/20/mmprevw.pdf>> (last accessed 25 September 2003).

¹⁸¹ MMP Review Committee, above, 43.

¹⁸² MMP Review Committee, above, 46.

Zealand, is the method to be preferred as it presents the lowest possibility of unsatisfactory results. This formula should substitute the Hare/Niemeyer formula in Germany.

The occurrence of overhanging seats changes the proportional composition of Parliament. Even so, measures of compensation for overhanging seats should not be taken. As currently occurs, the overhanging seats should be granted as additional to the regular seats in Parliament. If an overhanging seat is vacated during a legislative period, only a candidate who was directly elected can reoccupy it.

It is recommended that Germany allocates the party vote as the first vote in the ballot papers and the electorate vote as the second, as in New Zealand. Electors who do not understand their voting system might think that the first vote is the more important.

The current threshold of five per cent represents a deviance from the proportionality. Political parties that do not obtain five per cent or more of all valid votes are not represented in Parliament. This threshold is necessary in order to assure a functioning Parliament. Nevertheless, the votes for political parties that did not pass the threshold do not need to get "wasted". Electors should be given a second choice concerning their party votes. If the preferred political party does not pass the threshold, the voters' second choice should automatically be counted.

The MMP voting system can result in political circumstances as stable as the FPP system. It has increased the representation in Parliament of minorities such as Maori. Also, women's representation has increased since the introduction of the MMP system in New Zealand.

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