Limits of Electoral Equality and Political Representation

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Constitutional limits to the discretion of the legislature in forming the electoral system – Political equality – Equal suffrage – Equal opportunities for political parties – Free expression of popular will – Functionality of the parliament – Concrete normative standards for assessing the constitutionality of an electoral system – Conception of parliamentary democracy emphasising representation of political minorities and protection from 'tyranny of the majority'

Introduction

In a recent editorial of this review, the editors draw our attention to the issue of political representation, stressing the need for constitutional scholarship to 'brush up the fundamentals underlying representative democracy, on the basis of topical issues.'[1] One of such issues is said to be electoral systems, a subject 'full of great questions', calling constitutional scholarship to co-operate with political science, in order to provide some guidance thereof.

Indeed, electoral systems play an important role in the political *and* the constitutional life of democratic societies. Pointing to different methods for the allocation of parliamentary seats in accordance with popular vote and (in presidential systems) to different methods for the election of the executive, electoral systems affect not only the political system (the number and the magnitude of political parties, their political program and their political strategy, the electoral behaviour and the political aspirations of the population, etc.) but also the character, the dynamics and the relations of the major constitutional institutions. The significance of the electoral system for the constitutional reality of a country is often underestimated by constitutional law scholars, who seem to focus more on

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[1] 'Editorial: Thinking about Elections and about Democratic Representation', 7 *EuConst* (2011) p. 1 at p. 1.

European Constitutional Law Review, 8: 9–32, 2012
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doi:10.1017/S1574019612000028

https://doi.org/10.1017/S1574019612000028 Published online by Cambridge University Press

the abstract dilemma between presidential and parliamentary systems and less on the particular ways in which each system may be activated in practice. However, it is not by chance that the choice of the electoral system is included in the main topics of the constitution-making agenda in countries that undergo major constitutional transformations. Empirical research in such countries shows that the effect of the electoral system upon the modus operandi of democratic institutions as a whole can be more serious than the impact of other elements of the constitution, such as the powers of the President of the Republic.[2] In any case, the choice of an electoral system is not just a matter of ordinary political antagonism. It is a matter of constitutional importance for the formation and for the development of modern democratic institutions.

This has been realised at least since the second half of 19th century,[3] when the vindication of universal suffrage was coupled by the first attempts to replace plurality vote systems (prevailing during the 19th century, among else in France and in USA) with proportional representation (first adopted in Belgium in 1898 and then, after World War I, in other European countries). For the adherents of proportionality, the democratic principle requires that all opinions and interests in a given society should be reflected in the composition of political institutions, in order to be able to affect the content of laws and of public policies.[4] However, as the traumatic experience of Weimar Republic showed, proportional representation sometimes leads to governmental instability, since it encourages the formation of many independent parties,[5] which may be unwilling to build coalitions. Due to their ideological rigidity, which is enforced by confidence that they will anyway be represented in parliament, smaller parties do not need to compromise so as to enter into a political alliance, providing support for a relatively stable government. This is often stressed by proponents of plurality vote systems. For the latter,

> democracy does not consist of assembling a parliament which is a small-sized model of the distribution of a nation's different spiritual families in all their diver-

[2] *See* J.T. Ishiyama and M. Velten, 'Presidential Power and Democratic Development in Post-Communist Politics', 31 *Communist and Post-Communist Studies* (1998) p. 217; S.I. Lindberg, 'Consequences of Electoral Systems in Africa: A Preliminary Inquiry', 24 *Electoral Studies* (2005) p. 41.

[3] *See* the various essays in S. Noiret (ed.), *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries* (Nomos Verlagsgesellschaft 1990).

[4] *See* D. Nohlen, 'Two Incompatible Principles of Representation', in A. Lijphart and B. Grofman (eds.), *Choosing an Electoral System: Issues and Alternatives* (Praeger 1984) p. 83 at p. 87; B. Owen, 'Aux origines de l'idée proportionnaliste', 32 *Pouvoirs* (1985) p. 15. For a comprehensive account of the ideological origins of proportionality, *see* P. Rosanvallon, *Le peuple introuvable: Histoire de la représentation démocratique en France* (Gallimard 1998) p. 198, 201-216.

[5] *Cf.* M. Duverger, *Political Parties* (Taylor & Francis 1963) p. 245-254; M. Duverger, 'Duverger's Law: Forty Years Later', in B. Grofman and A. Lijphart (eds.), *Electoral Laws and Their Political Consequences* (Agathon Press 1986) p. 69-84, at p. 69.

https://doi.org/10.1017/S1574019612000028 Published online by Cambridge University Press

> sity and nuances. Voters should not choose their doubles who must resemble them as closely as possible. They should choose governments with the capacity to make decisions.[6]

Of course, the assertion that proportional representation systems do not favour the formation of alliance governments and that the latter, if formed, are unstable ones is based only on empirical probability and not on logical necessity.[7] The same holds as to the supposition that political minorities cannot find their place in plurality-based electoral systems.[8] A lot depends upon the specific variation of the pattern that is adopted,[9] so that in practice greater proportionality may be achieved in certain plurality vote systems than in proportionality systems.[10] In general, the performance of each electoral system is affected by so many factors (ranging from the magnitude of the electoral constituencies to the structural features of the political system, and from the political culture of a country to ethnic, social, religious etc. cleavages)[11] that the dilemma between plurality and proportionality loses a part of its original significance.[12]

What interests us in the present context is that political scientists, when debating on the implications of each electoral system, often underestimate the legal-constitutional dimension of the issues at hand.[13] However, electoral laws must be compatible with constitutional provisions, even if in practice the specification of the electoral system may be guided by strategic political calculations[14] rather than by axiological standards,[15] and even less by legal-constitutional considerations.

[6] M. Duverger, 'Which Is the Best Electoral System?', in Lijphart and Grofman (eds.), *supra* n. 4, p. 32. For similar arguments *see* F.A. Hermens, 'Representation and Proportional Representation', in Lijphart and Grofman (eds.), *supra* n. 4, p. 15.

[7] *See* G. Sartori, 'The Influence of Electoral Systems: Faulty Laws or Faulty Methods?', in Grofman and Lijphart (eds.), *supra* n. 5, p. 43.

[8] *See* W.H. Riker, 'Electoral Systems and Constitutional Restraints', in Lijphart and Grofman (eds.), *supra* n. 4, p. 103 at p. 104-105.

[9] For a comprehensive classification *see* P. Norris, *Electoral Engineering: Voting Rules and Political Behaviour* (Cambridge University Press 2004) p. 39-65.

[10] *See* the indexes in R. Rose, 'Electoral Systems: A Question of Degree or of Principle', in Lijphart and Grofman (eds.), *supra* n. 4, p. 73 at p. 75; P. J. Taylor, 'The Case for Proportional Tenure: A Defense of the British Electoral System', in Lijphart and Grofman (eds.), *supra* n. 4, p. 53 at p. 56; D. Nohlen, *Wahlrecht und Parteiensystem* (Leske und Budrich 1986) p. 220-225.

[11] *See* Norris, *supra* n. 9.

[12] *See* Sartori, *supra* n. 7, p. 53; A. Lijphart and B. Grofman, 'Choosing an Electoral System', in Lijphart and Grofman (eds.), *supra* n. 4, p. 3.

[13] *See*, however, Nohlen, *supra* n. 4, p. 87-88; Riker, *supra* n. 8, p. 107-109.

[14] For a survey of different strategies *see* A. Schedler, 'The Nested Game of Democratization by Elections', 23 *International Political Science Review* (2002) p. 103.

[15] As the ones that are listed by P. Norris, 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems', 18 *International Political Science Review* (1997) p. 297 at p. 304-306.

https://doi.org/10.1017/S1574019612000028 Published online by Cambridge University Press

This requirement holds even in countries whose constitution does not include specific guidelines as to the electoral system. For one thing, all democratic constitutions contain, either *expressis verbis* or implicitly, a set of legally binding principles that are relevant to political representation, and which should serve as guidelines for the formulation of the electoral system by the legislature. Such principles are the ones that will be presented in this article: equality of vote, equal opportunities to political parties, free expression of popular will, and functionality of the parliament.

To be sure, we do not wish to argue that, applying these principles to the concrete political circumstances of a country, the legislature may be led to 'constitutionally perfect' electoral laws. Different electoral systems reflect divergent conceptions of what political representation is and/or should be. Different conceptions of political representation, in their turn, correspond with highly antagonistic ideologies,[16] social interests and political objectives,[17] which cannot easily be compromised even in view of a task as significant as the determination of the rules of the 'political game'. One should not forget that the 'rules of the political game' themselves, as incorporated in the electoral system, can be an area of political disagreement as legitimate as all others.

In any case, the formation and the evolution of the electoral system is a core political issue; one which usually reinforces rather than alleviates political polarisation. The political nature of electoral law provides an explanation why some scholars in the United States have sought the independence of the relevant field from classical constitutional law doctrine.[18] In this context, it was stressed that election law scholars 'tend to focus on groups and aggregation, rather than individuals and rights, which are the conventional topic of inquiry for most constitutional law scholars.'[19] In the same context it was noted that, unlike constitutional law scholars, their election law counterparts are more sensible towards issues of 'democracy reinforcement' and 'political empowerment of minorities' in ways other than 'judicially enforceable rights'.

We tend to agree with these remarks, at least in what has to do with the sensibilities which constitutional scholars should develop when dealing with election

[16] *See* Y. Mény and M. Sadoun, 'Conception de la représentation et représentation proportionnelle', 32 *Pouvoirs* (1985) p. 5; Rosanvallon, *supra* n. 4, p. 11-29 and *passim*.

[17] *See* J.-M. Cotteret and C. Emeri, *Les systems electoraux* (Presses Universitaires de France 1988) p. 83-125.

[18] *See*, e.g., R. Pildes, 'Foreword: The Constitutionalization of Democratic Politics', 118 *Harvard Law Review* (2004) p. 28; S. Issacharoff, 'Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence', 90 *Michigan Law Review* (1992) p. 1833; H.K. Gerken, 'Election Law Exceptionalism? A Bird's Eye View of the Symposium', 82 *Boston University Law Review* (2002) p. 737.

[19] H.K. Gerken, 'Keynote Address: What Election Law Has to Say to Constitutional Law', available at <http://ssrn.com/abstract=1619882>, visited 11 May 2011, p. 3.

https://doi.org/10.1017/S1574019612000028 Published online by Cambridge University Press

laws and electoral systems. We might add another aspect of the aforementioned discrepancy between the much needed constitutional theory of electoral systems and the rights-based approach which characterises much of modern constitutional jurisprudence both in the United States and in Europe. In our view, the formulation of the electoral system cannot and should not be equated with the derivation of a single answer to a specific legal-interpretative problem that is destined to be dealt with by a judge. Due to the complexity of their practical details, electoral systems cannot become 'objective' in the same sense as the one in which a judicial answer to a legal problem could under circumstances be.[20] Besides, the fundamental principle of separation of powers dictates that responsibility for the formulation of the electoral system originally belongs to the legislature. The latter is a political body that operates as a space of conflicting interests and of *dissensus*, and not (only) as a forum of rational argumentation, which could lead to 'objectivity' and/or 'perfection' of the electoral system.

On the other hand, electoral law scholars should not forget that in designing the electoral system, as in exercising all its other competences, the legislature has to respect the constitution, its rules and procedures as well as its fundamental principles. From this point of view, the principles to which we shall immediately refer serve not only as open political guidelines but also as legal restraints, which limit the discretion of the legislative power. The question of who shall be competent to identify and review any legislative deviations from these principles is a logically distinct one, and it will not occupy us in the present essay.[21] Our purpose is to specify the list of constitutional principles that guide and restrain the legislative determination of the electoral system. Doing this, we shall attempt to combine the 'election law sensibilities' which we mentioned above (taking into account the

[20] For the problem of objectivity in law *see* N. Stavropoulos, *Objectivity in Law* (Clarendon Press 1996). As well-known, the most famous adherent of the 'objectivity thesis' is R. Dworkin, *A Matter of Principle* (Harvard University Press 1985) p. 119-204.

[21] This does not mean that our answer to the first question (which are the constitutional restraints upon the legislative choice of an electoral system?) may not be influenced by our answer to the second question (which state organ must be competent to identify a violation of the constitution with regard to the choice of the electoral system?) Though logically distinct, the two issues can be dealt with as normatively interrelated. Indeed, suspicion against a judge-based model of constitutionalism (*see*, e.g., J. Waldron, *Law and Disagreement* (Oxford University Press 1999); R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007)) seems to entail minimalism as regards the specification of the constitutional principles which shall guide and limit the choice of the electoral system. However, such suspicion could also lead to the opposite direction, if we finally decide to assign the task of constitutional review of the electoral system to the legislative body itself and not to a court. Such an option would actually favour a maximalist reading of the relevant constitutional principles. In what follows we shall concentrate on the issue of the constitutional restraints, bearing in mind that our opinion could be nuanced, depending on whether the relevant authority will be assigned to the courts or to the legislature itself.

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political nature of electoral law, avoiding a strict rights-based approach and promoting concern for democracy and for the political empowerment of minorities) with the more classical interest of constitutional jurisprudence to formulate clearly identifiable limits and standards, in order to 'check and balance' the discretionary power of the political bodies which are responsible for the formulation of the electoral system.

Political equality and equal suffrage

The normative underpinnings of equal suffrage: democracy and political equality

In all democratic constitutions, institutions of political representation work as means for the legitimate and legal exercise of popular sovereignty.[22] This is so notwithstanding the fact that representative institutions were originally contrasted with popular sovereignty[23] and, more generally, with democracy.[24] Besides, popular sovereignty and democracy may sometimes take the form of constituent (i.e., constitution-making) power, which by definition does not abide by the established rules and procedures of the legal system.[25] However, even in this form, and if it is to give birth to a normatively binding constitution, popular sovereignty must be conceived and exercised as premised on certain fundamental principles, among them political equality.[26]

The intimate connection of popular sovereignty with political equality can be verified by our everyday intuitions about the qualities of a liberal-democratic political system. If popular sovereignty was compatible with political inequality, then even dictatorial regimes would be able to claim that they are based on the former, albeit in a fashion that renders the small group of persons who monopolize power 'more equal' than all other citizens. Therefore, an essential condition of popular sovereignty and of democracy is equality of all citizens in their collective autonomy; that is, in their capacity to participate in the formation of state will through self-legislative and self-government processes of any kind.

[22] *See* J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) p. 168-171.

[23] *See* J.-J. Rousseau, *On the Social Contract* (Dover Publications 2003) p. 15.

[24] *See* B. Manin, *The Principles of Representative Democracy* (Cambridge University Press 1997) p. 1-7.

[25] *See* E.-J. Sieyès, *Political Writings, Including the Debate between Sieyès and Tom Paine in 1791* (Hackett Publishing 2003) p. 34, 135-140. For constituent power *see*, among else, A. Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', 12 *Constellations* (2005) p. 223; O. Beaud, *La puissance de l'État* (Presses Universitaires de France 1994) p. 199-306, 441-453.

[26] *See* K. Chryssogonos and C. Stratilatis, 'Constituent Power and the Constitution-Making Process in the Era of Internationalization', in I. Filibi et al. (eds.), *Democracy (With)Out Nations: Old and New Foundations for Political Communities in Changing World Order* (University of the Basque Country Press 2012, forthcoming).

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It should be noted, however, that political equality in the sense described above presupposes the existence of one collective entity acting as 'demos', that is, as the subject of popular sovereignty within a singular state. If there is not one, but several 'demoi' being represented together in a parliament, functioning within the institutional framework of an association of several states, then it could be not only permissible but even imperative to foresee different ratios of potential voters per parliamentary seat for each of them. Such is the case of the European Union, where smaller member states are accorded a relatively higher number of seats in the European Parliament and bigger member states a lower number of seats, in comparison to the pan–european medium, pursuant Article 14 paragraph 2 TEU. A uniform ratio of potential voters per seat for all member states would not do justice to the fact that the peoples of Europe have distinct collective identities and public spaces. Therefore, if a small member state, like Malta or Luxembourg, were to be represented by one deputy, the existing political and social pluralism within that state would be ignored.[27] Furthermore, a cartel of big member states could then dominate European politics in a way intolerable for almost every other. All this leads to the conclusion that political equality in the elections for the European Parliament cannot acquire the same meaning as in the elections for a national parliament, as long as the European collective identity and public space have no clear prevalence over the national identities and public spaces.

Equality of vote effect

One of the main guarantees of the democratic autonomy of citizens is the principle of universal and equal suffrage, as enshrined in most democratic constitutions and in many international law documents, among else in the Universal Declaration of Human Rights (Article 21.3) and in the International Covenant on Civil and Political Rights (Article 25b). This principle does not only require that all citizens, whatever their race, religion, economic status, political or other affiliations, etc., must be assigned equal voting power and, hence, that their vote must count once (arithmetical equality).[28] It also entails that, at least in principle, votes must have equal effect upon the allocation of seats in representative bodies (equality of effect).

[27] *Cf.* 123 BVerfGE 267, 371-377 (2009), where the German Constitutional Court concludes that it is not the European people that is represented in the European Parliament, but the peoples of Europe organised in their states.

[28] Hence, the principle of equal suffrage precludes any kind of privileged or 'plural' vote, to the effect that one citizen may be allowed to cast more than one vote on account of his/her fortune, educational background, administrative position or else. In 1979 the French *Conseil Constitutionnel* faced the case of plural vote provided for employers which employ a significant number of employees. The *Conseil* rejected this provision on the basis of equality of vote. *See* Decision No. 78-101 DC, 17 January 1979, and from French constitutional scholarship, P. Ardant and B. Mathieu, *Institutions politiques et droit constitutionnel* (L.G.D.J. 2010) p. 202; J. Gicquel and J.-É. Gicquel, *Droit constitutionnel et institutions politiques* (Montchrestien 2010) p. 533.

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Otherwise, the road would remain open to a quasi-representative regime, which would substantially violate the principle of political equality.

This aspect of equal suffrage, which is obviously favourable to proportional representation systems, has been recognised since long by the *Bundesverfassungsgericht.*[29] On its part, the American Supreme Court, as early as in 1964, stated that '[f]ull and effective participation by all citizens in state government requires (...) that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.'[30]

However, in practice the demand for equality of vote effect (or for an 'equally effective voice', in the terminology of the American Supreme Court) can hardly be fulfilled completely. Full equality of vote effect could be achieved only if a system of pure proportionality was adopted, abandoning the division of the country into separate electoral constituencies, in order to be able to allocate parliamentary seats in complete accordance with the preferences of the citizens of the country as a whole.[31] Since such an option would practically eliminate the authority of the legislature to decide upon the modes of political representation, one should accept that some form of dividing the country into electoral districts is not only empirically usual but also normatively acceptable. The discussion then moves to the problem of identifying the criteria that might determine the drawing of the electoral map.

This is the problem that has mostly occupied the American jurisprudence on electoral laws and the electoral system.[32] Facing the same problem, the French *Conseil Constitutionnel* appealed to equality of vote, and ruled that the delimitation of electoral districts should depend only on demographic criteria, allowing only minor exceptions, which must serve the public interest.[33] The constitutional law

[29] *See* 1 BVerfGE 208, 244 f. (1952), 6 BVerfGE 104, 111 (1957), 7 BVerfGE 63, 70 (1957), 11 BVerfGE 351, 362 (1960), 13 BVerfGE 243, 246 (1961), 16 BVerfGE 130, 139 (1963), 24 BVerfGE 300, 340 (1968), 43 BVerfGE 81, 100 (1976), 47 BVerfGE 253, 277 (1978), 95 BVerfGE 335, 353-354 (1997). From German constitutional scholarship, *see* H.-P. Schneider, 'Article 38', in R. Wassermann (ed.), *Kommentar zum Grundgesetz für Bundesrepublik Deutschland, Band 2* (Luchterhand 1984) p. 297; K. Stern, *Das Staatrecht der Bundesrepublik Deutschland I* (C.H. Beck 1984) p. 205-306.

[30] *Reynolds* v. *Sims*, 377 U.S. 533, at p. 565 (1964).

[31] *See* H. Kelsen, *General Theory of Law & State* (Transaction Publishers 2005) p. 297.

[32] *See*, among else, C.A. Auerbach, 'The Reapportionment Cases: One Person, One Vote-One Vote, One Value', *The Supreme Court Review* (1964) p. 1; S. Issacharoff, 'Gerrymandering and Political Cartels', 116 *Harvard Law Review* (2002) p. 593.

[33] *See* Conseil Constitutionnel 86-208 DC, 2 July 1986; 86-218 DC, 18 November 1986; 2008-573 DC, 8 January 2009; 2010-602 DC, 18 February 2010. From French constitutional scholarship, *see* Ardant and Mathieu, *supra* n. 28, p. 203; G. Burdeau et al., *Droit constitutionnel* (L.G.D.J. 1995) p. 466, 484-486.

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of 23 July 2008 provided the intervention of an independent authority, which shall formulate its proposals with regard to equity in delimiting the electoral districts.

In our view, equal suffrage should not be understood so as to make pure proportionality the only electoral system that is constitutionally permissible. Such an option would render the choice of the authors of the constitution, to make or not a direct reference to the electoral system, irrelevant. Besides, the principle of political equality, which clearly favours but does not dictate proportional representation, should be weighed against and compromised with the other constitutional principles that are relevant to the designation of the electoral system, and to which we shall refer later on. The specific form of the electoral system results from a balancing process, which includes many principles, not just the principle of equal suffrage, and many considerations relevant to the political, social, cultural etc. circumstances of each country, not just the need to reflect and to comprehend all opinions and interests that are present in the population at a given time.

A similar reasoning is employed by the European Court of Human Rights, which nonetheless moves a step further. Not only it denies that proportionality can be the only appropriate electoral system for the purposes of democratic representation; it also denies that equality of vote effect is a necessary condition of equal suffrage.[34]

The explanation for this latter opinion of the Strasbourg Court might be quite simple. In contrast with the phrasing of the International Covenant on Civil and Political Rights, which includes the aspect of equality ('Every citizen shall have the right and the opportunity ... to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage...'), the relevant clause of the European Convention on Human Rights (Article 3 of the First Protocol) does not go further than prescribing the holding of 'free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' Any reference to equality

[34] *See* ECtHR 2 March 1987, Case No. 9267/81, *Mathieu-Mohin and Clerfayt* v. *Belgium*, at para. 54: 'In these circumstances the phrase "conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" implies essentially … the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election. It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory.' *See also* ECtHR 8 July 2008, Case No. 10226/03, *Yumak and Sadak* v. *Turkey*, at para. 112: 'it should not be forgotten that electoral systems seek to fulfill objectives which are sometimes scarcely compatible with each other: on the one hand to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. Art. 3 of Protocol No. 1 does not imply that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory.'

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of vote is here omitted, and this might explain, at least in part, the hesitant interpretation of equal suffrage by the Strasbourg Court. Let us also be reminded that, checking the compatibility of member-states' policies with the European Convention on Human Rights, the Strasbourg Court typically assigns to them a 'margin of appreciation', which is wider than usual in the case of the electoral system.[35] For these reasons, the relevant judgments of the Strasbourg Court should not be taken as an argument against the plausibility of an interpretation of the principle of equal suffrage to the effect that it includes equality of vote effect.

The crucial question is how one could specify equality of vote effect into certain normative standards, which might be helpful in guiding and in limiting the choices of the legislature as regards the electoral system. In our view, this could be done if we consider equality of vote effect with reference to the democratic principle, as the latter is applied to specific empirical cases which are related to possible outcomes of the electoral system.

First of all, vote equality can be viewed as precluding all variations of plurality systems that leave room for a significant detraction of the parliamentary power of the opposition, although the latter may have gained a big number of votes, one which far exceeds the percentage of its parliamentary representation. The critical limit here is set by the requirement, inherent in the democratic principle, that 'minorities should be adequately represented.'[36] This requirement is an aspect of the overall democratic 'concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.'[37] In practical terms, adequate representation is closely related with the efficient exercise of the inspecting and controlling capabilities of minority parties in Parliament. If minority votes are to count at least once, and if they can have any effect at all, then they must be translated into an adequate number of parlia-

[35] To this effect, the ECtHR employs a theory of 'implied limitations'. *See*, e.g., ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka* v. *Latvia*, at para. 103: 'The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Nonetheless, these rights are not absolute. There is room for "implied limitations", and Contracting States must be given a margin of appreciation in this sphere. The Court reaffirms that the margin in this area is wide.'

[36] J.S. Mill, 'Considerations in Representative Government', in J.S. Mill, *On Liberty and Other Essays* (Oxford University Press 1991) p. 203 at p. 307. Let us note that Mill was one of the most fervent supporters of proportional representation (*see ibid.*, at p. 302 et seq., endorsing the proposals of Thomas Hare, who gave his name to one of the most popular variations of proportional representation systems). This interest of Mill is relevant to the anti-majoritarian trends of his political philosophy (see below in this essay). In our days, adequate representation of minorities is a basic concern of United States' electoral legislation and jurisprudence. *See*, among else, *Beer* v. *United States*, 425 U.S. 130 (1976), *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), *Voinovich* v *Quilter*, 507 U.S. 146 (1993), *Shaw* v *Reno*, 509 U.S. 630 (1993), *Miller* v. *Johnson*, 515 U.S. 900 (1995).

[37] ECtHR 6 October 2005, Case No. 74025/01, *Hirst* v. *The United Kingdom*, at para. 62; *Yumak and Sadak* v. *Turkey*, *supra* n. 34, at para. 109 (iv).

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mentary seats, so as to let minority voices be expressed and heard, having the opportunity to become majority voices.[38]

It could be plausibly argued that the normative requirement of adequate representation of political minorities was violated in the case of *Yumak and Sadak* v. *Turkey*, where the Strasbourg Court was confronted with an electoral system that deprived the 45% of the electorate of any parliamentary representation.[39] Although the Court defined its competences as including the determination of whether the demand for adequate representation of minorities has been satisfied,[40] it failed to find a violation of Article 3 of the First Protocol.[41] As we noticed above, the judgment of the Strasbourg Court could be different, if the relevant clauses of the European Convention on Human Rights included the aspect of political equality and equality of vote.

On the other hand, the principle of equal suffrage does not preclude in advance all kinds of plurality vote systems[42] (provided, of course, that the constitution itself does not require the adoption of proportionality). Surely, plurality systems seem to finally cancel the effect of votes that are cast in favour of the non-elected candidates in the relevant electoral constituency. However, the effect of the same vote is preserved if one considers it from another point of view. Apart from (and even more importantly than) electing certain candidates, votes contribute to the electoral power of political parties in the country as a whole. The 'voice' of the electors materialises not only through the qualities of their representatives, but also (and even more importantly) through the program and the action of the political parties, which are still an integral element of the democratic process.

If the aforementioned perspective is adopted, then it follows that plurality systems are not *a priori* precluded. Even a system of one-ballot plurality elections in small single-member constituencies could be permissible, on condition that the electoral power of the parties is not uniformly distributed throughout the electoral districts (this would practically result in the elimination of parliamentary opposition, especially in the absence of mechanisms for effective compensation of

[38] *See* 123 BVerfGE 267, 342-343 (2009): '[A]ll systems of representative democracy have this in common: a will of the majority that has come about freely and taking due account of equality is formed, either in the constituency or in the assembly which has come into being proportionally, by the act of voting. The decision on political direction which is taken by the majority of voters is to be reflected in Parliament and in the government; the losing part remains visible as a political alternative and active in the sphere of free opinion-forming as well as in formal decision-making procedures, as an opposition that will, in subsequent elections, have an opportunity to become the majority.'

[39] *See* ECtHR *Yumak and Sadak* v. *Turkey*, *supra* n. 34, at paras. 19 and 50.

[40] 'With regard to electoral systems, the Court's task is to determine whether the effect of the rules governing parliamentary elections is to exclude some persons or groups of persons from participating in the political life of the country…' (*ibid*. at para. 121)

[41] *See*, however, the strong dissenting opinion of Judges Tulkens, Vajić, Jaeger and Šikuta.

[42] *See*, however, H. Meyer, *Wahlsystem und Verfassungsordnung* (Alfred Metzner 1973) p. 221.

https://doi.org/10.1017/S1574019612000028 Published online by Cambridge University Press

the losses at national level). Instead, the same system would not be permissible under conditions of strong bipolarisation (something that would practically result in the elimination of smaller parties), especially if the electoral power of the parties is not differentiated throughout the country.

Furthermore, vote equality is not compatible with electoral systems that are intentionally designed so as to give parliamentary majority to a party other than the one that gains the majority of votes. As we argued before, vote equality is a manifestation of political equality, and the latter is a necessary condition of popular sovereignty. If the democratic principle is to have any meaning at all, then the main factor that determines the composition of the Parliament and, in parliamentary systems, the Government, must be the people through their vote, not the legislature through the choice of some electoral system that is designed so as to permit and even favour the aforementioned paradoxical situation.

The difficulty that arises here is connected with the meaning of the term 'intentionally designed'. The relevance of 'intention' as the 'subjective' part of our standard is very high, for what should be precluded is the determinate reversal of the electoral results in favour of a political minority that manipulates the electoral system so as to become majority in Parliament (let us notice that a transformation of an electoral majority into a parliamentary minority happened rather accidentally in Great Britain at the elections of 1951 and rather intentionally in Greece at the elections of 1956). During the 1980s the American Supreme Court took resort to a similar standard, in order to specify the conditions under which 'gerrymandering' practices should be considered unconstitutional. The standard was phrased as follows: 'intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.'[43] In 2004 the Supreme Court overruled its earlier decision, on the grounds that the aforementioned standard is unworkable for the purposes of judicial review of the electoral system.[44] However, the judgment of the Court might be different in this respect, if the substantial issue at hand was concerned with manipulation of the electoral outcome through a mechanism simpler than the complex strategies of 'gerrymandering'. Such a mechanism could be, for example, the arbitrary division of the country into two or more categories of districts, which would be represented through different allocation mechanisms (such an electoral system was used in Greece at the elections of 1956). In such an electoral system, the minority can gain more seats, if the majority's power is located in constituencies wherein a proportional system is applied and if the minority gains slightly more votes in constituencies that are represented through a plurality system. In this case, it would be easier to identify an intentional abuse of the electoral system on part of the legislature. The plaintiff

[43] *See Davis* v. *Bandemer*, 478 U.S. 109, 127 (1986).

[44] See *Vieth et al.* v. *Jubelirer, President of the Pennsylvania Senate et al.*, 541 U.S. 267 (2004).

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would just have to co-relate intention with the division of the country into two distinct categories of districts, and not with the designation of each and every electoral district.

Another case to which one could legitimately trace a violation of the principle of equal suffrage is the one of proportional systems that permit counting the same vote twice or even three times in multiple stages of allocation. Such electoral systems have been used in Greece in almost all elections between 1958 and 2000. Bearing the name of 'enforced proportionality', these systems were multiplying the electoral force of the parties by counting the sum of their votes twice or even three times, in order to distribute the seats that remained empty after the first stage of allocation. In this case, the electoral system violated the principle of equal suffrage not only in its 'vote-effect' dimension, but also in its original arithmetical meaning.

What should be kept from this part is that abstract principles, such as equality of vote, *can* be translated into more specific normative standards, which, as a whole, have to do with fairness *in* democratic representation.

Offering equal opportunities to political parties

The principle of equal opportunities and the political system

As we argued in the previous section, political equality refers not only to citizens as individuals but also to citizens in their political collectivities; hence, to political parties, through which any individual may effectively participate in the political life of a democratic regime, increasing her/his ability to influence the will of state organs. Therefore, an important element of democratic representation is the free antagonism of political parties under conditions of equal opportunities.

The principle of equal opportunities of political parties has been recognised since long by the *Bundesverfassungsgericht*[45] and, more recently, by the *Conseil Constitutionnel.*[46] The Strasbourg Court, on its part, alludes to such a principle,

[45] *See* 1 BVerfGE 208, 242, 248f. (1952), 6 BVerfGE 273, 280 (1957), 7 BVerfGE 99, 107 (1957), 8 BVerfGE 51, 67 (1957), 13 BVerfGE 204, 205 (1961), 14 BVerfGE 121, 133f. (1962), 20 BVerfGE 56, 116 f. (1966), 21 BVerfGE 196, 199 f. (1967), 24 BVerfG 300, 340 f. (1968), 34 BVerfGE 160, 163 (1972), 44 BVerfGE 125, 146 (1977), 47 BVerfGE 198, 224 f. (1978), 52 BVerfGE, 63, 88 f. (1979), 69 BVerfGE 257, 268 (1985), 73 BVerfGE 1, 16 f. (1986), 120 BVerfGE 82, 104 f. (2007). From German constitutional scholarship, *see* K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (C.F. Müller 1991) p. 73-74; D. Grimm, 'Politische Parteien', in E. Benda et al., *Handbuch des Verfassungsrechts* (Walter de Gruyter 1983) p. 343-348.

[46] *See* Decision *Larrouturou 1*, 23 August 2000, at para. 5; Decision *Génération Écologie*, 7 April 2005, at para. 4. *Cf.* 88-242 DC, 10 March 1988, at paras. 25-26.

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when it states that one among its tasks is to determine 'whether the [electoral] system tends to favour one political party or candidate by giving them an electoral advantage at the expense of others.'[47] In general, the democratic quality of a political system can be measured according to its capacity to offer to all political parties an equal opportunity to gain the majority of parliamentary seats. In our days, the principle of equal opportunities for political parties proves to be critical in what concerns financial aids to parties by the state and allocation of tv time.

This principle is highly relevant with certain features of the political system which must be determined on the basis of free action of the political actors and not as an intended effect of the electoral system. First of all, the principle of equal opportunities precludes all electoral systems that contain discriminatory clauses in favour of solid political parties against political coalitions which are formed in view of a particular electoral contest. It also precludes electoral systems that favour the perpetuation of a bipolar political system, giving absolute parliamentary majority to one of the two major parties *under any political and social circumstances*, even ones in which the accumulated votes of both parties do not exceed fifty per cent of the voters. Such electoral systems remove the chance to see smaller parties participating in the Government, assuming a regulatory role in the political system. This is especially important for parties that cannot become majoritarian political currents, on account of their ideological commitments or due to other factors, containing their share of popular vote within certain, historically defined, limits.

Surely, under conditions of free political competition, each party has *a priori* an equal opportunity to increase its appeal on future voters. From this point of view, the electoral system should not assume a *quasi* ecological function, saving marginal political entities from becoming extinct. Since the electoral system should not play the role of the saviour, it should not preserve a bipolar political system after it has exceeded its historical limits.

The distinction between the catalytic and the protective function of electoral systems

It would be helpful to consider equal opportunities of parties in the political system by making a rather thin distinction, that between the *catalytic* and the *protective* function of electoral systems. The latter function emerges whenever the electoral system distorts proportional representation to such an extent as to manifestly protect the hegemony of certain political powers, removing the opportunity of all others to participate actively in the management of political affairs. On the contrary, one may speak of a (constitutionally acceptable) catalytic function whenever the electoral system, under specific circumstances, prompts all political parties to reconsider their political and ideological commitments, so as

[47] ECtHR, *Yumak and Sadak* v. *Turkey*, *supra* n. 34, at para. 121.

https://doi.org/10.1017/S1574019612000028 Published online by Cambridge University Press

to make possible new political alliances and even the transformation of the political system and of society at large.

The critical distinction between unacceptable protection and permitted catalysis is endangered by plurality electoral systems that do not allow sufficient representation of political minorities. It is also endangered by 'enforced proportionality' systems, which ultimately distort proportionality through the multiplication of the electoral force of the parties in different allocations (as was the case of almost all electoral systems in Greece until 2004) or through some other mechanism.

Moreover, the issue of protection/catalysis arises in view of the limiting clauses that is often met in (proportional or even plurality) systems which set a numerical threshold in order to allow the participation of parties in the second or even in the first allocation of seats. This threshold varies from country to country (e.g., 3% in Greece, 5% in Germany, 10% in Turkey), and it should not be viewed as *prima facie* unconstitutional.[48] The crucial question here is whether the threshold is so high as to become a protection of a given political oligopoly, to the detriment of new political actors with a significant contribution to the 'market of ideas', which could assume a positive regulatory role. On the other hand, one may speak of a catalytic function if the threshold's primary effect is to discourage the partition of the parliament into a big number of parties, which will stay faithful to their political self-sufficiency, and which will not really contribute to the enlargement of the public space.

In this respect, the Strasbourg Court rightly connects its relevant judgments with the question of whether the threshold promotes 'the emergence of sufficiently representative currents of thought within the country,'[49] taking also into account the need to avoid the transformation of political representation into representation on a regional basis,[50] something that would transform unitary states into federal ones. However, it is highly dubitable whether a national threshold as high as 10% (that was the case in *Yumak and Sadak* v. *Turkey*) serves such objectives. It is more reasonable to accept that compatibility with such standards does not require a threshold higher than 3%, as the Parliamentary Assembly of the Council of Europe has recently held.[51]

[48] *See* 1 BVerfG 208, 239f. (1952), 4 BVerfG 31, 39f. (1954), 51 BVerfG 222, 233f. (1979).

[49] *Yumak and Sadak* v. *Turkey*, *supra* n. 34, at para. 125.

[50] *See ibid.*, at para. 124.

[51] *See* Council of Europe, Resolution 1547 (2007), *State of human rights and democracy in Europe*, at para. 58: 'In well-established democracies, there should be no thresholds higher than 3% during the parliamentary elections. It should thus be possible to express a maximum number of opinions. Excluding numerous groups of people from the right to be represented is detrimental to a democratic system. In well-established democracies, a balance has to be found between fair representation of views in the community and effectiveness in parliament and government.' *See also* Recommendation 1791 (2007), *State of Human Rights and Democracy in Europe*, at para. 17.10.

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Free expression of popular will

As we argued in the introductory section of our essay, electoral systems play a crucial role in the political life of a democratic society. This is so even if it is not so easy to derive a law-like, causal connection between electoral laws and the political system.[52] Be that as it may, it is certain that electoral laws affect the concretisation of popular will, having an impact not only upon the political system but also upon the individual voter's choice.

On the other hand, the democratic principle entails that citizens should be able to form and to express freely their political preferences. Being an important guarantee of popular sovereignty, the principle of free expression of popular will is included in all democratic constitutions, either *expressis verbis*[53] or implicitly. With regard to this aspect of the right to vote, the Strasbourg Court holds that 'the words "free expression of the opinion of the people" mean that elections cannot be conducted under any form of pressure in the choice of one or more candidates, and that in this choice the elector must not be unduly induced to vote for one party or another.'[54]

Free expression and the 'wasted vote'

As regards the connection of this principle with the electoral system, it should first of all be admitted that it cannot be easily specified, especially when all other aspects of a nation's democratic life (e.g., when there is an open public sphere, wherein each political actor can express her opinions, and wherein citizens are fully and objectively informed) ensure that citizens can freely make their choices.

However, such a connection could be traced if one considers things from the perspective of an electoral system that does not leave room for parliamentary representation of small but significant parties.[55] Such electoral systems invest a lot on the logics of 'wasted vote', that is, on a kind of electoral blackmail that forces citizens into changing their original preference for smaller parties, which do not seem to have a chance to gain parliamentary majority or even parliamentary seats.

[52] *Cf.* Duverger, *supra* n. 5; *cf.* Sartori, *supra* n. 7; William Riker, *Duverger's Law Revisited*, in Grofman and Lijphart (eds.), *supra* n. 5, p. 19; Nohlen, *supra* n. 10, p. 201 et seq.

[53] As is the case of Art. 52 of the Greek Constitution, which requires that 'the free and unfalsified expression of popular will, as an expression of popular sovereignty, shall be guaranteed by all State officials.' This constitutional clause is connected with traumatic incidents of Greek political history after World War II, when most elections were held under conditions of sheer violence against the voters of specific parties.

[54] *Yumak and Sadak* v. *Turkey*, *supra* n. 34, at para. 128.

[55] Such a perspective is adopted by the ECtHR, when holding that free choice 'means that the different political parties must be ensured a reasonable opportunity to present their candidates at elections' (*ibid.*).

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In the same category one could enlist electoral systems that privilege the bigger party of the opposition to the detriment of the smaller ones, as was the case in British elections of 1983, when a small difference between the votes of the Labour Party and of Liberals/Social Democrats (27.6% to 25.4%) was translated into a vast difference in their parliamentary representation (32.2% to 3.5%).

The crucial problem here is not the 'wasted vote' itself,[56] but the possibility that the electoral system perpetuates the logics of the 'wasted vote' *always to the detriment of the same parties*, even when the latter's appeal onto the electorate has significantly increased (though not to an extent as high as to override the barriers of the electoral system). We may track here another normative standard for the evaluation of electoral systems. This standard combines the subjective perspective of the individual voter and of her/his various motives with the objective perspective of a democratic polity and of its political-institutional premises, which are here related with the admissible effects of electoral laws upon the political system. These laws can be considered as compatible with the principle of free expression of popular will only on condition that they leave enough space for considerations other than the ones which are relevant to the prospect of seeing our political preferences being 'justified' by the electoral results.

Free expression, democratic deliberation, and transparency of the political process

In any case, the political system must work so as to let smaller political parties influence the public policies that are promoted through the parliament, even if this influence is only marginal. Besides, in order to take advantage of the contribution of all political powers, the political system must contain the logics of 'electoral combats' between parties that look more like armies than like means of political participation,[57] and must promote conditions of 'deliberative democracy',[58] more favourable to ideological nuances and to programmatic convergences.[59] Such conditions have to do with another aspect of free expression of popular will. In order to be fulfilled, this constitutional principle requires that political parties be

[56] *Cf. Yumak and Sadak* v. *Turkey*, *supra* n. 34, at para. 112; *Mathieu-Mohin and Clerfayt* v. *Belgium*, *supra* n. 34, at para. 54.

[57] For this tendency *see* R. Michels, *A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Transaction Publishers 1999) p. 78-80.

[58] *See* J. Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (The MIT Press 1996); A. Gutmann and D. Thompson, *Democracy and Disagreement* (The Belknap Press of Harvard University Press 1996); J. Bohman and W. Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (The MIT Press 1997); J. Elster (ed.), *Deliberative Democracy* (Cambridge University Press 1998); J. Rawls, *Political Liberalism* (Columbia University Press 2005) p. 212-254, 435-490; Habermas, *supra* n. 22, ch. 7-8.

[59] This is wanted not only by proponents of proportionality but also by adherents of majoritarian electoral systems. *See* Hermens, *supra* n. 6, p. 16, 20, 23, 29; Duverger, *supra* n. 6, p. 32-33, 35.

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able to specify a concrete political program, in such a manner that citizens will know exactly what they are going to vote for and, hence, will be able to make an informed choice.[60]

We may track here a serious disadvantage of highly proportional electoral systems. Even if political parties play an important role in modern democracies, one should accept that citizens choose and have the right to choose not only parties but also political leaders. According to Duverger, such a choice cannot easily take place under conditions of pure proportionality, because the latter usually leads to a fractured parliament.[61] Under such conditions there exist a lot of possibilities as to the parties that are going to cooperate in order to form a government, and as to the leaders of this government. Not being able to predict which political combination will emerge after the elections, citizens are deprived the right to choose their governors and their leaders.

In our opinion, the problem is slightly different. If parties know in advance that they are not going to win a parliamentary majority, as it usually happens under pure proportionality systems, and if, on the other hand, parties really wish to negotiate their preferred public policies in order to be able to participate in a future government, then this might prevent them from specifying their political program before elections. To this problem we should add lack of transparency, which emerges after the elections, since negotiations between parties in order to form a government usually take part in secrecy. Indeed, under such conditions free expression of popular will is seriously endangered. The problem does not (only) consist in the inability of the individual voter to choose her leaders, but (also) in the tendency of the political actors to avoid stating clearly their political objectives and their strategic considerations.

Functionality of the parliament

In any case, proportionality leaves open the prospect of a fragmented political system with many small political organisations. Besides, the latter may not reflect the range of varying political opinions and societal interests. Their existence may just correspond with particular strategies, political or even personal ones. Should this prospect be left open, to be determined by the contingencies of the 'political game'? Up to a certain extent, and in view of the openness which should characterise democratic societies and their political history, one cannot but give a positive answer. However, after a certain extent the prospect of fragmentation ceases to be a constitutionally neutral phenomenon. It then falls within a fundamental prin-

[60] *Cf. Yumak and Sadak* v. *Turkey*, *supra* n. 34, at para. 147 (arguing that high thresholds 'compel political parties to make use of stratagems which do not contribute to the transparency of the electoral process').

[61] *See* Duverger, *supra* n. 6, p. 32-34.

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ciple which may be derived from the organisational clauses of each democratic constitution, at least in parliamentary democracies: the principle of functionality of the parliament.

Parliaments are not only representative *fora* that reflect the opinions, the conflicting social interests and the diverging political ideologies of citizens. They are also state organs, which are composed through a specific legal process (the parliamentary elections, which make possible the expression of the will of another state organ, namely the electoral body). Besides, parliaments are equipped with a set of competences that are critical for the actual operation of democracy, that is, for the transformation of popular will into public policies which can effectively be adopted and implemented in practice. In all democratic regimes such competences include legislation, checking the government through parliamentary control, constituting examining committees etc. Moreover, in parliamentarian systems the vote and the support of the parliament is a necessary condition for the formation and for the stability of a government. Parliaments in such systems may also elect the head of the state. Thus, the processes whereby the parliament is composed must be designed so as to ensure that these competences will be effectively exercised and, in general, that democratic institutions will be functional in practice.[62]

This is required not only by the democratic principle but also by the fundamental principle of distinction of powers. If the parliament cannot adequately perform its legislative tasks, then the latter will be assumed by the executive branch or, even worse, they will not be performed at all. As a result, the regulation of social conflicts and the promotion of public policies will either be abandoned or will be left in the hands of the most powerful social actors. This would lead to the collapse of all branches and sectors of constitutional governance. Anyway, it would entail a violation of the distinction of powers, which is based on the tacit assumption that a polity with workable institutions coexisting with each other is possible.

We should immediately stress that concern for a functional parliament should not be reduced to concern for governmental stability. A lot of the competences which a parliament is expected to fulfil do not have to do with the stability of the government. Besides, a lot of these competences do not presuppose a one-party parliamentary majority. Effective parliamentary control requires less than simple parliamentary majority, while other functions that fall within the constitutional competences of parliaments (such as the amendment of the constitution) may require increased majorities of two thirds, three fifths or other.

[62] *Cf. Yumak and Sadak* v. *Turkey*, *supra* n. 34, at para. 140 (mentioning 'the crucial role played in a representative democracy by parliament, which is the main instrument of democratic control and political responsibility, and must reflect as faithfully as possible the desire for a truly democratic political regime').

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In any case, governmental stability belongs to the objectives that are inscribed in the principle of functionality. If a government wishes to fulfil its own constitutional duties, which in parliamentarian systems include the designation of laws and the legislative initiative, then there must be in place conditions which will make possible the adoption of its proposals by the parliament. One of these conditions is that the government should be formed as a relatively solid group of people with similar ideas and with a clear political program, which is supported by all its members and, at least in its bigger part, by the majority of the political powers in parliament. Another condition is that the government must be organised so as to be able to schedule in detail its legislative proposals before submitting them to the judgment of the parliament.[63] A third condition is that the parliament itself must be composed so as to allow the government to deploy its political program comprehensively and without serious disruptions for a certain period of time.

However, governmental stability should not be equated with one-party parliamentary majority. While the latter is an adequate condition for the fulfilment of a government's constitutional duties, it is not a necessary condition.[64] After a certain extent, insistence on one-party majorities may even cause the opposite results. The construction of a one-party parliamentary majority through the mechanisms of the electoral system may lead to forceful resistance on part of major social and political actors (e.g. trade unions and syndicates, local authorities). This may result in a situation where the government could hardly impose its political will (for this reason, it is not rare to see coalition governments emerging even when the major party could achieve parliamentary majority alone, as was the case of the coalition between socialists and communists in France after the elections of 1981). Under such conditions, one may speak of governmental incompetence rather than of governmental stability. The final arbitrator under such conditions can only be the people through new elections, not the electoral system of the past through the protection of an artificially constructed majority.

Governmental stability is a political, not a mathematical magnitude. In general, the fulfilment of the principle of functionality does not only depend upon the balance of political powers as they are represented in parliament. It also depends on the politics that are pursued through the parliamentary majority and on other

[63] John Stuart Mill notices that 'there is hardly any kind of intellectual work which so much needs to be done not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws. This is a sufficient reason, were there no other, why they can never be well made but by a committee of very few persons' (Mill, *supra* n. 36, p. 277).

[64] For the distinction between necessary and adequate conditions in social sciences, *see* G. Goertz and H. Starr (eds.), *Necessary Conditions: Theory, Methodology, and Conditions* (Rowman & Littlefield Publishers 2003).

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socio-political factors, which may prove to be catastrophic for the balance between the political system and the trends and currents of society at large.

What do all these points mean for the designation of the electoral system? Avoidance of political fragmentation, as connected with the principle of functionality, can justify some deviations from the principle of equal suffrage in its 'vote-effect' dimension, that is, the one that has to do with the effect of votes on the distribution of parliamentary seats. However, these deviations must only be minor. This is so because pursuance of governmental stability is just one among the various objectives that are inscribed in the principle of functionality. Other objectives, such as the effective exercise of parliamentary control, require more proportional forms of representation and, thus, more insistence on equality of vote-effect. In any case, governmental stability should not be equated with pursuance of one-party parliamentary majority by all means and under any circumstances.

Besides, deviations from the principle of equality must be stated clearly, that is, in a manner that does not obscure the mechanisms of the electoral system. This is demanded by the principle of free expression of popular will. As we saw in the previous section, the latter requires conditions of transparency in the political system, so as to let the voters make an informed choice, taking into account all relevant factors, including the mechanisms of the electoral system. In view of this requirement, it should be accepted that the adoption of a low but clear numerical threshold for the entrance of political parties into the parliament is more preferable than complex systems which depend on a lot of variables, leaving open the space for unexpected distortions of the parliamentary power of political parties. Of course, as we argued in a previous section, this threshold must not be so high as to violate the principle of equal opportunities.

A more specific consequence of the principle of functionality, as combined with the other constitutional principles that we presented above, is the unconstitutionality of electoral laws which provide for different electoral systems in different constituencies (e.g. plurality vote in small single-member constituencies and proportionality in big multi-member constituencies). This is so because a (functional) parliament is elected by the citizens of a country as a whole, in order to represent and to legislate for the national society as a whole. This is the reason why parliamentary elections must in principle be held simultaneously in all constituencies. For the same reason, allocation of parliamentary seats must take part uniformly, in accordance with the same electoral system throughout the constituencies of the country as a whole.

A non-majoritarian conception of representative democracy

Our theses about the limiting effects of constitutional principles upon the formulation of an electoral system imply a specific conception of political representation in parliamentary democracies. Let us now present this conception.

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Alexis de Tocqueville and John Stuart Mill were among the first ones to cast light on the prospect of a 'tyranny of the majority'. In his famous essay *On Liberty* Mill emphasized the utility of minority voices and analysed the dangers for liberty which stem from a government that blindly follows the wishes of the majority of public opinion.[65] Besides, in his treatment on representative government Mill pointed out the relation between tyranny of majority and the class structure of modern societies, stressing the danger of seeing factional interests prevailing over 'impartial regard for the interest of all.'[66]

Alexis de Tocqueville, on his part, located the moral power of the majority principle in 'the notion that there is more intelligence and wisdom in a number of men united than in a single individual', warning nonetheless that majorities change rapidly and that this rapidity may cause instability and improvisation in the legislation as well as in the administrative practices of a democratic polity.[67] Although he thought that 'all authority originates in the will of the majority,' and that 'a social power superior to all others must always be placed somewhere,' Tocqueville claimed that 'a majority taken collectively may be regarded as a being whose opinions, and most frequently whose interests, are opposed to those of another being, which is styled a minority.'[68] But 'if it be admitted that a man, possessing absolute power, may misuse that power by wrongdoing his adversaries, why should a majority not be liable to the same reproach?'[69] For Tocqueville, there is a certain limit on the 'irresistible strength' of majorities. This limit is 'a general law' which 'bears the name of Justice', and which 'has been made and sanctioned not by this or that people, but by majority of mankind.'[70]

In both thinkers we trace the idea that democracy should not be reduced to the capacity for effective governance, and that political representation, as a means for exercising popular sovereignty, should be secured against the unmediated dominance of un-reflective political or social majorities.

A similar argument is met in the democratic theory of Hans Kelsen. The latter argued that parliamentary procedures serve as safeguards against the dominion of the 'absolute majority' of people physically assembled. Parliaments make possible 'qualified majorities' and bring forward processes of 'rational self-restraint', which is also a function of other elements of modern legal civilisation, such as human and civil rights, the generality of law, the principle of legality, etc.[71]

[65] J.S. Mill, 'On Liberty', in Mill, *supra* n. 36, p. 1.

[66] Mill, *supra* n. 36, p. 294.

[67] *See* A. de Tocqueville, *Democracy in America* (The Lawbook Exchange 2003) p. 235-239.

[68] *Ibid.*, p. 240-241.

[69] *Ibid.*, p. 240.

[70] *Ibid.*

[71] *See* H. Kelsen, 'On the Essence and Value of Democracy', in A. Jacobson and B. Schlink (eds.), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) p. 84 at p. 100-101.

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Kelsen did not underestimate the majority principle. He argued that the essence of parliamentarism lies in the institutionalisation of this principle, in accordance with all other principles of a democratic state.[72] However, Kelsen did not see in majority principle only a technical solution to the problem of effective democratic governance in modern mass societies. He also claimed that this principle works as a realistic limit on the idea of self-determination, on which the 'fiction' of representation is based.[73] This need not be conceived only as an argument against the idealistic elements in political representation and in popular sovereignty.[74] It is also an argument that orients us towards a rather pragmatist conception of representative democracy; one which is especially favourable to political minorities.

For Kelsen, 'the concept of a majority assumes by definition the existence of a *minority*, and thus *the right of the majority* presupposes the *right* of a minority to exist.'[75] Parliamentarism effects upon social reality in a way that provides guarantees for this basic right. It signifies a departure from the crude mathematical conception of majority/minority relations. It makes us realise that '*there is no absolute rule of the majority over the minority*', that 'the will of the community formed according to the so-called majority principle turns out to be not a majority *diktat* to the minority but a result of the mutual influence exercised by both groups upon another, a resultant of the clash of their political will.'[76]

This leads to an understanding that does not equate political representation with a contract through which citizens concede or entrust their powers and rights to a 'sovereign', be it a parliament, a government or some other political body.[77] Nor should one identify representation with a rather neutral process whereby the conflicting interests and the varying opinions of a given society may be depicted and be brought into a common forum. Both conceptions indicate important elements of representation as actualised in practice, but they fail to capture its normative-institutional core under conditions of modernity. Within the historical horizon of the 'process' conception, political representation must be conceived

[72] 'Parliamentarism is *formation of the governing will of the state according to the majority principle through a collegial organ elected by the people on the basis of a universal and equal right to take part in the full electoral process – that is, democratically*' (*ibid*., p. 96).

[73] *See ibid*., p. 96-97.

[74] For a well-grounded critique of Kelsen's theory of representation, *see* N. Urbinati, *Representative Democracy: Principles & Genealogy* (The University of Chicago Press 2006) p. 55-59. Urbinati rightly stresses that representation should not be reduced to a fertile legal bond between the voter and his/her representative.

[75] Kelsen, *supra* n. 71, p. 100.

[76] *Ibid*., p. 102.

[77] For this conception of representation, which stems from the political thought of Hobbes, *see* H.F. Pitkin, *The Concept of Representation* (University of California Press 1972) ch. 1.

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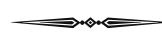
as a process of socialisation and politicisation, one based on the mutual influence of opinions and interests which originally may vary and conflict with each other.[78]

In this process, two important social relations cross and limit each other: that between citizens as self-governed equals, and that between citizens as governors and governed. The second relation incorporates all the elements of modern societies which have to do with its class structure, its elitist trends and its political bureaucracies or technocracies. However, it also makes possible the transcendence of the crude conception of the political community as an aggregation of conflicting interests that are not mediated by the presence of others and by the principles on which social coexistence must be based. The first relation, in its turn, guarantees that these principles will be respected in practice, so that no numerical majority can impose its will on a minority simply by invoking its physical presence and power. It also brings forward the deliberative qualities that a representative democracy must possess, in order to be just and workable.

Kelsen stresses the need for such qualities by making the contrast between primitive communities, in which the specification and the implementation of laws is based on customary obedience or on purely psychological processes of submission to a transcendent will, and modern societies which are formed through processes of 'conscious determination and fixation' of legal meanings and legal rules.[79] In modernity, the development towards more rational forms of social coexistence coincides with the trend towards parliamentarism and rule of law. This trend cannot be contained. 'The attempt to remove parliament entirely from the organism of the modern state can hardly succeed in the long run.'[80] For our modern societies, 'the essential issue can be only the [legal] *way in which parliament is appointed and constituted*, and the *type and degree of powers* it should have.'[81]

The aim of this essay was to provide a treatment of the first of these 'essential' issues. Our overall concern to restrict the majoritarian effects of electoral systems corresponded with the 'right of minorities' to exist in parliament and to develop their political influence and their contribution to the political life of a democratic society. Not underestimating the importance of the majority principle, we nonetheless argued that the institutionalization of this principle must abide by the premises of a wider normative constellation, which seeks for a fair balance between the principles of vote equality, of equal opportunities, of free expression of popular will, and of the functionality of the parliament.



[78] *See* Urbinati, *supra* n. 74, ch. 1 and *passim*.
[79] *See* Kelsen, *supra* n. 71, p. 99.
[80] *Ibid.*, p. 100.
[81] *Ibid.*

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