

More Government with the People: The Crisis of Representative Democracy and Options for Reform in Germany

By *Hermann Pünder**

Abstract

Throughout the world, there is debate about how democratic systems should adapt to the demands of their increasingly emancipated citizenries. More than ever, people desire to take part in the creation of their life circumstances. The demand for participation is paired with a growing discontent with the political elites. This article looks at the challenges in the context of Germany's system of government, discussing the leading debates of democratic reform in the EU's largest member state with some incidental remarks on other countries. Specifically, the study analyzes two core components of representative democracy—the electoral process and the parliamentary decision-making procedure—and shows how they should be reformed to ensure political stability in the long run. As a measure for the analysis, the author develops a system of four preconditions, on which successful democratic government depends: Responsiveness and political leadership on the side of the elected representatives; preparedness for participation and acceptance on the part of the represented. The article shows that optimizing democracy on the basis of these pillars is not just advisable as a matter of political prudence. In fact, Germany's constitution, the Basic Law, contains a normative expectation towards the political elites that they continuously improve democracy and ensure its appropriate functioning.

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A. Crisis of Democracy: Risks and Opportunities

Democratia est semper reformanda; democracy requires continuous reform. In Germany, as in other states with established democratic structures, many scholars are currently discussing the crisis representative democracy faces.¹ Colin Crouch says that we live in a “post-democratic” era with democratic institutions only formally intact.² Scholars throughout the world have voiced similar criticisms, ranging from Pippa Norris, who mourns “democratic deficits” in our societies,³ to Benjamin Barber’s advocacy for a “strong democracy”⁴ and to Chantal Mouffe demanding the “return of the political.”⁵ There is no cause to dramatize, though. Democracy as a form of government continues to enjoy widespread acceptance. In Germany, the approval rates almost reach ninety percent. But over half of those questioned in surveys express dissatisfaction with how our democracy works in practice.⁶ Trust in the political process has declined to a shocking degree. Only fifteen percent are persuaded that their representatives seek to serve the interests of the people. This figure compares to forty-two percent as recently as two decades ago.⁷ Equally depressing empirical findings about “disaffected democracies” are seen in other countries.⁸ For all those who believe in democracy, the increasing public distrust—also manifested in reduced participation in elections⁹ and shrinking membership in political

¹ “Repräsentative Demokratie in der Krise” was the topic of the 2012 meeting of the *Vereinigung der Deutschen Staatsrechtler*, the association of public law professors from Germany, Austria, and Switzerland. The following article is based on the author’s contribution to the discussion. See *Wahlrecht und Parlamentsrecht als Gelingensbedingungen repräsentativer Demokratie, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 72 VVDStRL 191–267 (2012).

² COLIN CROUCH, *POST-DEMOCRACY* (2004).

³ PIPPA NORRIS, *DEMOCRATIC DEFICIT* (2011).

⁴ BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984).

⁵ CHANTAL MOUFFE, *ON THE POLITICAL* (2005).

⁶ Cf. Infratest dimap, *ARD Deutschlandtrend*, July 2010, 15 f; *SOZIALWISSENSCHAFTLICHES FORSCHUNGSZENTRUM BERLIN-BRANDENBURG, SOZIALREPORT 98* (2010).

⁷ Renate Köcher, *Umfrage des Allensbach-Instituts für die Frankfurter Allgemeine Zeitung*, F.A.Z. (Oct. 20, 2010). See also Oscar. W. Gabriel & Lisa Schöllhammer, *Warum die Deutschen ihren Abgeordneten nicht Mehr Vertrauen als dem Bundestag*, ZPARL 414 (2009) (comparative perspective to the US).

⁸ *DISAFFECTED DEMOCRACIES* (Susan J. Pharr & Robert D. Putnam eds., 1987). See also RUSSELL J. DALTON, *CITIZEN POLITICS* 245, 263 (4th ed. 2006); NORRIS, *supra* note 3, at 57; and (focusing on Great Britain) Vidya Ram, *Public Attitudes to Politics, Politicians and Parliament*, 59 PARL. AFF. 187 (2006); Susanna Kalitowski, *Parliament for the People?*, 62 PARL. AFF. 350 (2009); Ruth Fox, *Engagement and Participation: What the Public Want and How Our Politicians Need to Respond*, 62 PARL. AFF. 673 (2009); and (examining Norway) Margit van Wessel, *Political Disaffection: What We Can Learn from Asking the People*, 63 PARL. AFF. 504 (2010).

⁹ See Malcolm Shaw, *Overview: Parliamentary Democracy Today*, 57 PARL. AFF. 708 (2004) (comparative perspective). See also (focusing on Britain) Paul Whiteley et al., *Turnout*, 54 PARL. AFF. 775 (2001); Shelagh Diplock,

parties¹⁰—cannot be a matter of indifference. Ultimately, *Politikverdrossenheit* (disenchantment with politics) might even prompt citizens to question the democratic principles themselves. David Easton warns against a “spillover effect,” which threatens public acceptance of decisions seen to conflict with personal interests and values.¹¹ Indeed, in Germany as elsewhere, “angry citizens” have shown that democracy can never work effectively without an underlying belief in its legitimacy.¹² *Wutbürger* violently demonstrating against Stuttgart’s new central railway station (“*Stuttgart 21*”) have been a *menetekel* in my country, a bewildering “writing on the wall.”

Against this background, the criticism of the current state of our democracy should be used as an opportunity and a source of energy. Above all, the representative elements of the democratic system need to be improved. This is not to deny that direct democracy is part of what Benjamin Barber has termed a “strong democracy.” Nearly seventy percent of the German population believes that important issues should be determined through referenda.¹³ No political system, however, can function without representatives.¹⁴ Representation in parliaments is not merely the second best solution. Rather, it is the form of government that best serves a modern society with its increasing pluralism and decreasing homogeneity.¹⁵ This article will analyze the German discussion on how to improve representative democracy on the basis of our “Basic Law,” the *Grundgesetz* (GG),

Non-Voters, Political Disconnection and Parliamentary Democracy, 55 PARL. AFF. 715 (2002); and Peter Kellner, *Britain’s Culture of Detachment*, 57 PARL. AFF. 830 (2004) (giving other reasons for non-voting).

¹⁰ See Oscar W. Gabriel & Katja Neller, *Bürger und Politik in Deutschland*, in DEUTSCHLAND, ÖSTERREICH UND DIE SCHWEIZ IM NEUEN EUROPA 57, 93 (Oscar W. Gabriel & Fritz Plasser eds., 2010); NORRIS, *supra* note 3, at 57 (giving an international perspective); and (pertaining especially to Great Britain) Phil Parvin & Declan McHugh, *Defending Representative Democracy*, 58 PARL. AFF. 632 (2005); Ben Rogers, *From Membership to Management? The Future of Political Parties as Democratic Organisations*, 58 PARL. AFF. 600 (2005); Andrew Russell, *Political Parties as Vehicles of Political Engagement*, 58 PARL. AFF. 555 (2005).

¹¹ David Easton, *A Re-Assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435, 444 (1975).

¹² See Gerhard Leibholz, *Die Reform des Wahlrechts*, 7 VVDStRL 159, 160 (1932) (pertaining to the belief in legitimacy, “*Glaube des Volkes an den Legitimitätsanspruch der repräsentativen Instanzen*”); DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 278 (1965); NIKLAS LUHMANN, *LEGITIMATION DURCH VERFAHREN* 27 (2d ed. 1989).

¹³ See Oscar W. Gabriel & Norbert Kersting, *Partizipation auf kommunaler Ebene*, in PARTIZIPATION IM WANDEL 109 (Bertelsmann Stiftung & Staatsministerium Baden-Württemberg eds., 2014); KÖCHER, *supra* note 7; Sozialwissenschaftliches Forschungszentrum, *supra* note 6, at 102.

¹⁴ See ROBERT A. DAHL, *ON DEMOCRACY* 93 (1998) (acknowledging that the necessity of elites in complex societies has to be accepted even by those who ask for more participation in a “polyarchy”).

¹⁵ Cf. HERMANN HELLER, *Politische Demokratie und soziale Homogenität*, in GRUNDPROBLEME DER DEMOKRATIE 6 (Ulrich Matz ed., 1973) (originally 1928) (discussing the necessity of “social homogeneity” during the Weimar Republic). See also CARL SCHMITT, *DIE GEISTESGESCHICHTLICHE LAGE DES HEUTIGEN PARLAMENTARISMUS* 14 (2d ed. 1926) (“*Zur Demokratie gehört also notwendig erstens Homogenität und zweitens—nötigenfalls—die Ausscheidung oder Vernichtung des Heterogenen.*”).

with some incidental remarks to other countries. The debate may provide food for thought outside Germany about how to cope there with the democratic crisis.

B. Fundamental Pre-Requirements for Representative Democracy

Before considering specific measures of reform, it is necessary to highlight some fundamentals. What are the conditions for a successful representative democracy? Traditionally, constitutional lawyers in Germany consider it sufficient that the exercise of public authority can be traced back to the electorate along a *Legitimationskette* (a chain of legitimacy).¹⁶ But this conventional legal perspective, which sees citizens merely as voters, is too narrow. Successful democratic government depends on the complex interplay of more elaborate conditions. These conditions can be summarized as “responsiveness” and “political leadership” on the part of elected representatives, and “participation” and “acceptance” on the part of the represented.

I. Responsiveness and Political Leadership by the Representatives

Political scientists—mainly influenced by American scholars—generally agree that elected representatives ought to be responsive to the wishes of the citizens.¹⁷ From the legal perspective, however, responsiveness as a requirement is far from taken for granted. A superficial reading of the Basic Law—as of other constitutions—could lead one to think that elections are sufficient. Parliamentary delegates are constitutionally granted a free mandate; they are “responsible only to their own conscience.”¹⁸ Still, representative democracy is far more than a matter of such formalities. True government by the people requires some substantive guidance for those forming the public will. Attempts to provide such guidance by binding elected representatives to the *Gemeinwohl* will hardly prove

¹⁶ See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 1978, 47 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 253 (275); 52 BVerfGE 95 (130); 68 BVerfGE 1 (88); 77 BVerfGE 1 (40); 83 BVerfGE 60 (72); 89 BVerfGE 155 (182); 93 BVerfGE 37 (66); Ernst-Wolfgang Böckenförde, *Demokratie und Repräsentation*, in STAAT, VERFASSUNG, DEMOKRATIE 379, 389 (1991); Eberhard Schmidt-Aßmann, *Verwaltungslegitimation als Rechtsbegriff*, AÖR 116, 239–355 (1991).

¹⁷ Cf. J. Renold Pennock, *Responsiveness, Responsibility, and Majority Rule*, 46 AM. POL. SCI. REV. 790 (1952); Heinz Eulau et al., *The Role of the Representative*, 53 AM. POL. SCI. REV. 742, 746 (1959); HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* 209 (1967); ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971); Heinz Eulau & Paul D. Karpis, *The Puzzle of Representation: Specifying Components of Responsiveness*, in *THE POLITICS OF REPRESENTATION* 55, 62 (Heinz Eulau & John C. Wahlke eds., 1978) (distinguishing between “policy responsiveness,” “service responsiveness,” “allocation responsiveness,” and “symbolic responsiveness”); Larry Diamond & Leonardo Morlino, *The Quality of Democracy*, 15 J. DEMOCRACY 20, 27 (2004). Meanwhile, even the German *Bundesverfassungsgericht* refers to the term. See, e.g., BVerfGE 131, 152 (205). For an empirical study with respect to the German *Bundestag*, relativating the accusation of not being responsive enough, see Frank Brettschneider, *Abgehoben oder bürgernah? Die Responsivität des Deutschen Bundestages*, in *DER DEUTSCHE BUNDESTAG IM WANDEL* 258, 264 (Heinrich Oberreuter et al. eds., 2001).

¹⁸ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, art. 38(1)(2).

sufficient, since the “common good”—in modern words, “output-legitimation”¹⁹—is always subject to dispute in individual cases. Before we can say that “all state authority is derived from the people,” the wishes of those represented must be reflected more closely in political decisions and the processes leading up to them.²⁰

We must also see as indispensable what political science refers to as political leadership.²¹ Even promoters of an “active society,” like Amitai Etzioni,²² have to admit that absolute responsiveness is not possible. The range of preferences is too contradictory, the problems are too complex, and the need for decisions—often intensified by time pressure—is too great. In addition, there is the necessity to take account of unarticulated interests for sound solutions to societal problems. Ultimately, elected politicians must personally make decisions as “trustees,” not only on behalf of their respective supporters and electorate, but rather of the “entire people,”²³ regardless of whether the decisions correspond to the concerns of the electorate or not.²⁴ Democracy is more than mere “demoscopy,” or democratic opinion polling. Edmund Burke long ago scathingly warned against mere “populism.” “Your representative,” he said, “owes you not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”²⁵

How should political representatives resolve the challenging tension between responsiveness and political leadership? The traditional—rather paternalistic—German response is that they should strive for the well-being of the people as opposed to the people’s will.²⁶ The idea is, in the words of Ernst Fraenkel, that the “hypothetical will of the people” (*hypothetischer Volkswille*) in cases of doubt should prevail over the “empirical

¹⁹ See FRITZ W. SCHARPF, *DEMOKRATIETHEORIE ZWISCHEN UTOPIE UND ANPASSUNG* 21 (2d ed. 1975).

²⁰ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 20(II).

²¹ Compare JAMES M. BURNS, *LEADERSHIP* (1978), with JOSEPH S. NYE, JR., *THE POWERS TO LEAD* (2008), Mark T. Fliegau, Andreas Kießling, & Leonard Novy, *Leader and Follower*, ZPOL 399 (2008), and POLITICAL LEADERSHIP, (Annette Zimmer & Regina Jankowitsch eds., 2008); NANNERL O. KEOHANE, *THINKING ABOUT LEADERSHIP* 155 (2010), and BARBARA KELLERMAN, *BAD LEADERSHIP: WHAT IT IS, HOW IT HAPPENS, WHY IT MATTERS* (2008).

²² AMITAI ETZIONI, *THE ACTIVE SOCIETY: A THEORY OF SOCIETAL AND POLITICAL PROCESSES* (1968).

²³ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 38(I)(1).

²⁴ EULAU ET AL., *supra* note 17 at 746 (regarding the different “styles of representation”).

²⁵ Edmund Burke, *Speech to the Electors of Bristol, 3rd November 1774*, in *SELECT WORKS OF EDMUND BURKE* (1999); see generally David Beetham, *Political Participation, Mass Protest and Representative Democracy*, 56 *PARL. AFF.* 597 (2003) (giving background).

²⁶ See MARTIN GREIFFENHAGEN & SYLVIA GREIFFENHAGEN, *EIN SCHWIERIGES VATERLAND—ZUR POLITISCHEN KULTUR IN DEUTSCHLAND* 73 (1993).

will" (*empirischer Volkswille*).²⁷ From the standpoint of the public, however, the relationship between rule and exception is precisely the other way round. Reasoned justification is required if parliamentary delegates depart from express public wishes. As the American political scholar Hanna F. Pitkin puts it: "The representative system must . . . be responsive to public opinion, except insofar as non-responsiveness can be justified in terms of the public interest."²⁸ This idea can also be found as a fundamental value within the German constitution. If all state authority is to be "derived from the people,"²⁹ the guiding principle must be: As much responsiveness as possible, as much political leadership as necessary. Departures from public demands have to be justified through argument.³⁰

II. Participation and—Albeit Critical—Acceptance by the Represented

The success of democracy is not solely the responsibility of the elected representatives. The represented public must also make its contribution. What is needed is—following the concept of Gabriel Almond and Sidney Verba—a "civic culture," a *Bürgerkultur*, characterized by a propensity of the citizens towards political participation on the one hand and an—albeit critical—degree of acceptance on the other hand.³¹

Participation is more than a matter of merely taking part in elections. Contrary to what constitutional law implies on its surface, elections are only a necessary but not a sufficient condition for democracy. Joseph Schumpeter stated once that as soon as the citizens have elected someone, they have to concede that political activity is the delegate's responsibility rather than their own.³² This view can, of course, not satisfy contemporary needs. It brings to mind Jean-Jacques Rousseau's famous sentence that "[t]he people of England regards itself as free; but it is grossly mistaken; it is free only during the election of

²⁷ Ernst Fraenkel, *Die Repräsentative und die Plebiszitäre Komponente im Demokratischen Verfassungsstaat*, in DEUTSCHLAND UND DIE WESTLICHEN DEMOKRATIEN 165 (Ernst Fraenkel ed., 2011) (originally 1958).

²⁸ PITKIN, *supra* note 17, at 224. See also DAHL, *supra* note 14, at 69 (arguing against a paternalistic "guardianship" in respect to the "common good").

²⁹ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 20(II).

³⁰ See PITKIN, *supra* note 17, at 209 ("The representative must act in such a way that there is no conflict, or if it occurs an explanation is called for. He must not be found persistently at odds with the wishes of the represented without good reason in terms of their interest, without a good explanation of why their wishes are not in accord with their interests.").

³¹ GABRIEL A. ALMOND & SYDNEY VERBA, THE CIVIC CULTURE 29 (1965) (giving the international comparative perspective, as well as explaining the mixture from "participant culture" and "parochial culture"). See also Russell J. Dalton & Hans-Dieter Klingemann, *Citizens and Political Behavior*, in OXFORD HANDBOOK OF POLITICAL BEHAVIOR 6 (Russell J. Dalton & Hans-Dieter Klingemann eds., 2007).

³² See JOSEPH A. SCHUMPETER, KAPITALISMUS, SOZIALISMUS, UND DEMOKRATIE 468 (8th ed. 2005) (originally 1942).

members of parliament. As soon as they are elected; slavery overtakes it.”³³ To ensure that “all state authority is derived from the people,”³⁴ the citizens must also be able to exert influence on the parliamentary decision-making processes. This can be a matter of acting individually, in concert with other citizens, or by means of intermediary institutions.³⁵ In the first place, it is the task of political parties to respond to interests in society, to aggregate interests in practicable alternatives, and to bring them forward in the parliamentary decision-making process.³⁶ Parties have no monopoly in this, but rather merely “participate in the formation of the political will of the people.”³⁷ From the viewpoint of constitutional law, the citizen’s influence on parliamentary policy-making is guaranteed by fundamental rights of communication (*Kommunikationsgrundrechte*) like free speech, the right to assembly, and so on, which provide for an unrestricted debate within society. By noting that these guarantees are “fundamental for a free democratic state order” (“für die freiheitlich-demokratische Staatsordnung schlechthin konstituierend”), the German Federal Constitutional Court has repeatedly clarified that the political role of the public reaches far beyond the casting of votes.³⁸

Participation requires sufficient information about—and interest in—the issues at hand.³⁹ Casting one’s ballot—while being rather easy to accomplish—has hardly any specific influence.⁴⁰ Activity in political parties and interest groups is more effective, but at a higher

³³ JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE*, (1762) at Livre 3, Chapitre XV (“*Des députés ou représentants*” “*Le peuple anglais pense être libre; il se trompe fort, il ne l'est que durant l'élection des membres du parlement; sitôt qu'ils sont élus, il est esclave, il n'est rien. Dans les courts moments de sa liberté, l'usage qu'il en fait mérite bien qu'il la perde.*”).

³⁴ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 20(II).

³⁵ See Ernst Fraenkel, *Möglichkeiten und Grenzen Politischer Mitarbeit der Bürger in einer modernen Parlamentarischen Demokratie*, in *DEUTSCHLAND UND DIE WESTLICHEN DEMOKRATIEN* 283 (Ernst Frankel ed., 2011). See also (for an international perspective) PAUL SNIDERMAN, *A QUESTION OF LOYALTY* 47 (1981); Dalton & Klingemann *supra* note 31; JOHN KEANE, *THE LIFE AND DEATH OF DEMOCRACY* 585 (2009); JAMES S. FISHKIN, *WHEN PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* 45 (2009).

³⁶ Cf., e.g., 2 BVERFGE 1 (11 ff.); 20 BVERFGE 56 (101); 44 BVERFGE 125 (145 f.); 52 BVERFGE 63 (82); 60 BVERFGE 53 (61 f., 66 f.); 73 BVERFGE 40 (85); 85 BVERFGE 264 (284); 91 BVERFGE 262 (268 f.). See also Rogers, *supra* note 10, at 604 (focusing on Great Britain).

³⁷ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 21(I)(1).

³⁸ See, e.g., 7 BVerfGE 198 (208); 20 BVerfGE 56 (97 f.); 20 BVerfGE 162 (174); 27 BVerfGE 71 (81); 62 BVerfGE 230 (247); 69 BVerfGE 315 (345); 71 BVerfGE 206 (219 f.); 76 BVerfGE 196 (208).

³⁹ See SCHUMPETER *supra* note 32, at 416 (“*So fällt der typische Bürger auf eine tiefere Stufe der gedanklichen Leistung, sobald er das politische Gebiet betritt. Er argumentiert und analysiert auf eine Art und Weise, die er innerhalb der Sphäre seiner wirklichen Interessen bereitwillig als infantil anerkennen würde. Er wird wieder zum Primitiven.*”).

⁴⁰ See LUHMANN, *supra* note 12, at 166 (stating that not participating at elections may be rational against this background).

cost to the activist. It requires a greater degree of commitment, conflicting with other interests. From all sides of the political spectrum, complaints about the decline of traditional political engagement in political parties can be heard, but according to empirical studies, around two-thirds of German citizens would be willing to play an active role in society.⁴¹ The social capital, to use Robert D. Putnam's term,⁴² is still remarkable in Germany. The fact that this willingness to be engaged hardly ever involves contributing to the representative democratic processes should be understood as a wake-up call, requiring parliamentarians to strengthen their efforts to include the people in their decision-making.

If representatives make decisions, which in the context of their task of political leadership depart from citizen preferences, then the propensity of the people towards acceptance becomes critical. Rather than blind obedience, a functioning democracy requires healthy skepticism on the part of the public. Citizens are the "principals." They need to control their "agents." The people must effectively be able to express dissent.⁴³ This is, in the words of Niklas Luhmann, necessary to secure the "general recognition" that is independent of the "gratification derived from an individual decision,"⁴⁴ and this depends above all on the perceived legitimacy of the underlying procedures. "Legitimation by procedure" (*Legitimation durch Verfahren*) is decisive.⁴⁵ Legitimacy is primarily a matter of selecting political representatives. The electoral process must be so structured that voters exert a significant and evenly distributed potential for influence on the composition of parliament. Beyond this, however, the form of parliamentary decision-making process is important. The democratic process of deliberation⁴⁶ may not be restricted to politicians,

⁴¹ See SOZIALWISSENSCHAFTLICHES FORSCHUNGSZENTRUM, *supra* note 6, at 104.

⁴² ROBERT D. PUTNAM, *BOWLING ALONE: THE COLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (complaining about the loss of "social capital" in the U.S.).

⁴³ SNIDERMAN, *supra* note 35, at 13 (giving an international perspective to a "balanced judgment"); KEANE *supra* note 35, at 85 ("monitory democracy"); Ralf Dahrendorf, *Fundamentale und Liberale Demokratie*, in *FÜR EINE ERNEUERUNG DER DEMOKRATIE IN DER BUNDESREPUBLIK DEUTSCHLAND* 31 (Ralf Dahrendorf ed., 1968) (describing the importance of "latent publicity"—*latente Öffentlichkeit*).

⁴⁴ LUHMANN, *supra* note 12, at 30 ("*Generelle Anerkennung, die unabhängig ist vom Befriedigungswert der einzelnen Entscheidung*"). See also EASTON, *supra* note 12, at 272–78 (explaining the necessity of "diffuse support" in contrast to the "specific support").

⁴⁵ See Hermann Pünder, *Administrative Procedure: Mere Facilitator of Material Law Versus Cooperative Realization of Common Welfare*, in *DEBATES IN GERMAN PUB. L.* 239, 247 (Hermann Pünder & Christian Waldhoff eds., 2014); Hermann Pünder, *Democratic Legitimation of Delegated Legislation—A Comparative View on the American, British and German Law*, 58 *INT'L. & COMP. L.Q.* 353, 369 (2009).

⁴⁶ See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *PHILOSOPHY, POLITICS, DEMOCRACY* 16, 21 (Joshua Cohen ed., 2009); James S. Fishkin, *Democracy and Deliberation* (1991); Jürgen Habermas, *Faktizität und Geltung* 349, 367 (1992); Anthony Giddens, *Beyond Left and Right: The Future of Radical Politics* (1994); cf. John S. Dryzek, *Deliberative Democracy and Beyond* (2000). Critically with John Parkinson, *Legitimacy Problems in Deliberative Democracy*, 51 *POL. STUD.* 180 (2003).

but rather should involve the public equally and to the greatest possible extent in the free and transparent opinion-forming process.⁴⁷ The German Federal Constitutional Court once ruled that the constitution pictures the relationship between the citizens and the executive branch of government as one of dialogue.⁴⁸ Why should the same not apply to the polity's relationship with its parliament?

Furthermore, citizens will more likely accept controversial decisions when parliament ensures transparency. Parliament has to show that it functions in the sense of responsiveness. It has to make clear that what citizens think—and possibly has been communicated to the representatives—has been weighed in a fair way and that the parliamentary majority cannot be exercised free from controls.⁴⁹ Ultimately, parliamentary decisions must be reasoned and explained to the citizen. It is not enough to rely merely on pointing out that the “chain of legitimation” proceeds from elections. It is also insufficient if parliamentarians only refer to the fact that there are no alternatives. And that “hard power”—the sheer exercise of the coercive resources of the state authority—can only be the last resort should be a matter of course in democratic societies.⁵⁰ “Transformational leadership” is necessary.⁵¹

III. Improvement of Democracy as a Constitutional Requirement

Including perspectives of political science in the debate about constitutional law traditionally faces reservation in German legal scholarship.⁵² The aforementioned requirements for the success of representative democracy, however, are not only a matter of political prudence. Constitutions provide norms only in the form of indispensable rules

⁴⁷ Cf. 44 BVERFG 125 (139); 89 BVERFG 155 (185); 97 BVERFG 350 (369); Vivien A. Schmidt, *Democracy in Europe*, PERSP. ON POL. 761, 768 (2005) (giving a European perspective on “government with the people”).

⁴⁸ 45 BVERFG 297 (335) (“Die Notwendigkeit eines Gesprächs zwischen Verwaltung und Bürger entspricht dem grundgesetzlichen Verständnis der Stellung des Bürgers im Staat.”). See also Hermann Pünder, *German Administrative Procedure in a Comparative Perspective: Observations on the Path to a Transnational ius commune proceduralis in Administrative Law*, 11 INT’L J. CONS’T L. 940 (2013); Hermann Pünder, *Administrative Procedure—Mere Facilitator of Material Law versus Cooperative Realization of Common Welfare*, in DEBATES IN GERMAN PUB. L. 239 (Hermann Pünder & Christian Waldhoff eds., 2014); Hermann Pünder, *Verwaltungsverfahren*, in ALLGEMEINES VERWALTUNGSRECHT § 13, note 12 (Dirk Ehlers & Hermann Pünder eds., 15th ed. 2015) (describing the importance of procedure).

⁴⁹ Cf. 40 BVERFG 237 (249); 40 BVERFG 296 (327); 70 BVERFG 324 (355, 358); 84 BVERFG 304 (329); 89 BVERFG 155 (185); 97 BVERFG 350 (369); 103 BVERFG 44 (63); 130 BVERFG 318 (344); 131 BVERFG 152 (204 ff.).

⁵⁰ NYE, *supra* note 21 (differentiating between “hard,” “soft,” and a mixture from both —“smart power”).

⁵¹ See BURNS, *supra* note 21.

⁵² See, e.g., SEBASTIAN UNGER, DAS VERFASSUNGSPRINZIP DER DEMOKRATIE 86, 247 (2008).

for the democratic order.⁵³ It is the constitutional task of the parliament and individually-elected representatives to reach over and above these minimum constitutional standards, in such a way that public decisions enjoy the highest possible level of legitimation (*Legitimationsniveau*).⁵⁴

Over the last few decades, we have witnessed an obvious shift of values—a *Wertewandel*—among the population.⁵⁵ Past generations showed a significantly stronger tendency to dutifully accept unpopular decisions. In today's society, citizens are less trusting. People desire more than ever to take part in the creation of their life circumstances. Against this background, it is important to enhance the influence of the citizen, not only on the composition of the representative political bodies, but also on parliamentary decision-making, to improve the transparency of political procedures. This would simultaneously strengthen the responsiveness of the elected representatives and ultimately contribute to the public being more ready to accept political leadership that conflicts with their own perceptions. This article will subsequently illustrate recommendations for concrete steps with a view on the federal level in Germany.

C. Reforming the Electoral Process

What can electoral law contribute to the success of representative democracy? For a long time, this question was hardly raised in Germany. Germans opted for the proportional representation in the *Bundestag*, the Federal Parliament. There are, however, some modifications. On the one hand, half of the parliamentary seats are awarded by majority vote in electoral districts. On the other hand, every party needs to pass a threshold of five percent of the overall votes in order to be awarded any seats at all. For decades, there was broad satisfaction with this electoral system; it was even admired and praised abroad⁵⁶

⁵³ See KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS* (20th ed. 1999) (stressing the notion of norms only as indispensable rules).

⁵⁴ Questions of the appropriate "*Legitimationsniveau*" are discussed in Germany so far only in respect to the democratic legitimation of the administration but not in respect to the legislature. See, e.g., 83 BVERFGE 60 (72); 93 BVERFGE 37 (66 f.); 107 BVERFGE 59 (87); Ernst-Wolfgang Böckenförde, *Demokratie als Verfassungsprinzip*, in *HANDBUCH DES STAATSRECHTS* § 24, notes 16, 22 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2004)

⁵⁵ Compare RONALD INGLEHART, *THE SILENT REVOLUTION* (1977), GERD HEPP, *WERTEWANDEL: POLITIKWISSENSCHAFTLICHE GRUNDFRAGEN* (1994), Gabriel & Neller, *supra* note 10, at 79, 126, with DALTON, *supra* note 8, at 81 (giving an international perspective).

⁵⁶ Hans-Dieter Klingemann & Bernhard Wessels, *The Political Consequences of Germany's Mixed-Member-System*, in *MIXED-MEMBER ELECTORAL SYSTEMS: THE BEST OF BOTH WORLDS?* 279 (Matthew S. Shugart & Martin P. Wattenberg eds., 2001). See also CHOOSING AN ELECTORAL SYSTEM (Arend Lijphart & Bernard Grofman eds., 1984); Shaw, *supra* note 9, at 708; G. Bingham Powell, *Election Laws and Representative Governments*, *BRIT. J. POL. SCI.* 291 (2006) (giving an overview to the international debate).

and was the role model, for example, for the election law in Scotland, Wales, and New Zealand.⁵⁷ In the meantime, critical voices may be heard in Germany.

I. Introduction of a Majority Voting System?

Today, there are calls for a complete conversion to majority voting,⁵⁸ similar to the system in place in Great Britain.⁵⁹ The fact that majority voting—at least generally—enables effective political leadership through stable governments⁶⁰ is an increasingly strong argument in Germany in the face of its increasingly fragmented spectrum of political parties. In addition, the unfortunate circumstance could be recognized that, despite previous coalition statements, with proportional voting, the electorate can never be sure which government they are voting for. The fact that small parties frequently have disproportionate leverage is particularly annoying to many in Germany. It may be expected that elected representatives under a majority voting system direct their “focus of representation”⁶¹ less toward their party and more towards the citizens, since the voters have a greater influence on their entry into parliament.⁶²

Naturally, an argument against the majority voting system is the fact that this system—as also increasingly criticized in Great Britain⁶³—disadvantages those citizens who wish to

⁵⁷ See Jack Vowles, *Introducing Proportional Representation: The New Zealand Experience*, 53 *PARL. AFF.* 680 (2000); Thomas Carl Lundberg, *Second-Class Representatives? Mixed-Member Proportional Representation in Britain*, 59 *PARL. AFF.* 60 (2006).

⁵⁸ See ECKHARD JESSE, WAHLRECHT ZWISCHEN KONTINUITÄT UND REFORM 91, 144, 169 (1985) (giving details of the debate). See also DER PARLAMENTARISCHE RAT: AKTEN UND PROTOKOLLE, (*Deutscher Bundestag & Bundesarchiv* eds., 1994) (discussion around drafting the *Grundgesetz*).

⁵⁹ Compare for the old debate JOHN S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1868) (promoting the proportional system), with WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (1867) (promoting the majority system).

⁶⁰ Compare MAURICE DUVERGER, *LES PARTIS POLITIQUES* (1951), with Susanna Kalitowski, *Hung-up over Nothing? The Impact of a Hung Parliament on British Politics*, 61 *PARL. AFF.* 396 (2008).

⁶¹ Compare Eulau et al., *supra* note 17 (explaining the different “foci of orientation for the representative”), with Thomas D. Lancaster & W. David Patterson, *Comparative Pork Barrel Politics: Perceptions from the West German Bundestag*, 22 *COMP. POL. STUD.* 458 (1990).

⁶² Cf. 95 *BVERFGE* 335 (352). See also for an international comparative perspective Paul Mitchell, *Voters and Their Representatives*, 37 *EUR. J. POL. RES.* 335, 340 (2000) (referring to the *Principal-Agent* theory); Kathleen Bawn & Michael F. Thies, *A Comparative Theory of Electoral Incentives*, *J. THEORETICAL POL.* 5 (2003); Lundberg, *supra* note 57 (discussing the situation in Great Britain).

⁶³ See D. Butler, *Electoral Reform*, 54 *PARL. AFF.* 734 (2004); POWER COMMISSION, *POWER TO THE PEOPLE: AN INDEPENDENT INQUIRY INTO BRITAIN'S DEMOCRACY* (2006); but see Charles Pattie & Ron Johnston, *Power to the People Through “Real Power and True Elections?”*, 60 *PARL. AFF.* 253, 268 (2007) (critical to the proposals); Lundberg, *supra* note 57, at 76 (reacting positively to the personalized proportional system in Wales and Scotland). See also Patrick Dunleavy & Helen Margetts, *The Impact of UK Electoral Systems*, 58 *PARL. AFF.* 854 (2005); Karen E. Cox & Leonard J.

vote for smaller parties. Some think that this amounts in effect to a de facto minimum requirement for entry into parliament of twenty or even forty percent in Germany.⁶⁴ This is the decisive objection from a constitutional viewpoint.⁶⁵ Parliament should reflect the full range of political currents, even if this renders political leadership more difficult.⁶⁶ In any case, the change of system could hardly be achieved in Germany politically even through a grand coalition (*Große Koalition*) of the major parties. The traditional mass parties—the *Christlich Demokratische Union* (CDU) and the *Sozialdemokratische Partei Deutschlands* (SPD)—are increasingly less attractive to the voters.⁶⁷ Suspicion would be inescapable, as citizens would speculate that they sought to make themselves winners instead of losers.

II. Reform of the Present Electoral System

1. Supplementing the Five Percent Minimum Requirement by a Supplementary Vote

This is not to say that there is no room for improvement. There are increasing demands for the abolition, or at least reduction, of the five percent minimum requirement clause, to increase public participation and parliamentary responsiveness.⁶⁸ Courts have declared this restriction to be unconstitutional for municipal elections.⁶⁹ For the election of the EU Parliament, the Federal Constitutional Court recently decided that even a three percent limitation clause was void.⁷⁰ For the elections of the *Bundestag* and the parliaments on the State (*Länder*) level, however, the need for majorities, which are capable of providing effective and efficient political leadership, still justifies the restriction of “equal weighting” of votes.⁷¹ Examples of new groups establishing themselves in parliament are shown by the

Schoppa, *Interaction Effects in Mixed-Member Electoral Systems—Theory and Evidence From Germany, Japan, and Italy*, 35 COMP. POL. STUD. 1027, 1030 (2002) (giving the international perspective).

⁶⁴ Günter Dürig, ZUR NEUGESTALTUNG DES BUNDESTAGSWAHLRECHTS 58 (Bundesministerium des Inneren ed., 1968); Rainer Bakker, *Verfassungswidrigkeit des Mehrheitswahlrechts*, ZRP 457, 459 (1994).

⁶⁵ Cf. 1 BVERFGE 208 (246 f., 248–58); 6 BVERFGE 84 (90); B34 VERFGE 81 (100); 95 BVERFGE 335 (349, 352 ff., 370); 121 BVERFGE 266 (295 f., 297); 131 BVERFGE 316 (336 ff.) (showing electoral rule of equality). See also 129 BVERFGE 300 (349 f.) (Di Fabio, U., Mellinghoff, R., dissenting).

⁶⁶ See AREND LJPHART, PATTERNS OF DEMOCRACY 258, 275 (1999).

⁶⁷ Oskar Niedermayer, *Die Erosion der Volksparteien*, ZfP 264 (2010).

⁶⁸ See, e.g., Michael Antoni, *Die Legende von Weimar*, DUR 402 (1979); ERNST BECHT, DIE 5%-KLAUSEL IM WAHLRECHT 94 (1990).

⁶⁹ See, e.g., 120 BVERFGE 82 (113 ff.).

⁷⁰ 135 BVERFGE 259. See also 129 BVERFGE 300 (discussing the five percent limitation clause in federal elections, with a dissenting opinion of the justices R. Mellinghoff and U. Di Fabio).

⁷¹ See 1 BVERFGE 208 (256 ff.); 4 BVERFGE 142 (143); 5 BVERFGE 77 (83); 6 BVERFGE 84; 82 BVERFGE 322 (338); 95 BVERFGE 335 (366); 95 BVERFGE 408 (419); 120 BVERFGE 82 (109 ff.).

development of the ecologist party *Die Grünen*, the leftist party *Die Linke*, and recently, but only on the *Länder* (State) level, the *Piratenpartei*.

Obviously, if the party chosen gains less than five percent of the total votes cast, citizens may think they have wasted their vote. This frustration can be counteracted, however. Citizen should be given a *Nebenstimme* (a supplementary vote) that is counted if the main vote is unsuccessful because of the five percent restriction.⁷² The electorate could then initially vote for the party that most closely reflects their interests, without the worry that they may squander their potential to exert influence. This reform would improve the electoral chances of the smaller parties and thereby broaden the range of interest represented in the German parliament. Transferable votes are already common in many countries with majority voting systems.⁷³

2. Personalizing the Party Lists, Official Announcement of “Protest Votes,” and Preliminary Elections

That the German electorate has too narrow a choice in elections is another serious complaint. Some discussion exists concerning a “pretend participation” and a “cosmetic effect” of the franchises.⁷⁴ Some even compare the situation to the “quasi elections in the German Democratic Republic.”⁷⁵ In fact, there are always candidates entering parliament by means of the party lists who have stood for election in a constituency but were not directly elected by the citizens.⁷⁶ While this possibility should not be seen as a violation of the constitutional guarantee of “direct” elections as required by Article 38(I) GG,⁷⁷ the severe restrictive effects of the rigid party lists on voter influence must be taken seriously. At the same time, it has to be noted, though, that the fact that the parties create lists for

⁷² See, e.g., JESSE, *supra* note 58, at 258.

⁷³ Australia, Malta, the Republic of Ireland and Iceland as well as on the local level in New Zealand and Scotland. In Great Britain the introduction of a supplementary vote failed via referendum. Critically Ken Ritchie & Alessandro Gardini *Putting Paradoxes into Perspective—In Defense of the Alternative Vote*, in *ELECTORAL SYSTEMS: PARADOXES, ASSUMPTIONS, AND PROCEDURES* 275 (Dan Felsenthal & Moshé Machover eds., 2012)..

⁷⁴ See, e.g., Hans-Herbert von Arnim, *Wahlgesetze: Entscheidungen des Parlaments in eigener Sache*, JZ 813, 818 (2009).

⁷⁵ Volker von Prittwitz, *Vollständig personalisierte Verhältniswahl*, APuZ 12, 16 (2003/52) (“*Quasiwahlen, wie sie in der DDR üblich waren.*”).

⁷⁶ See Suzanne Schüttemeyer & Roland Sturm, *Der Kandidat—das (fast) Unbekannte Wesen*, ZPARL 539, 548 (2005); Philip Manow, *Wiederwahlwahrscheinlichkeiten im System der personalisierten Verhältniswahl*, ZPOL 147 (2008).

⁷⁷ 3 BVERfGE 45 (50 f.); 7 BVERfGE 63 (67 ff.); 21 BVERfGE 355; 47 BVERfGE 253 (283); 122 BVERfGE 304 (314); 90 BVERfGE 97. *But see* Hans-Herbert v. Arnim, *Wählen wir unsere Abgeordneten unmittelbar?*, JZ 578 (2002) (believing in such a constitutional violation).

elections also has its advantages. On the one hand, the frequently criticized *Ochsentour*—the cumbersome yearlong party career, which candidates usually have to complete before being appointed—should not be underestimated as a preliminary qualification for the parliamentary mandate. On the other hand, parties gain the ability to ensure a balanced representation by listing candidates from underrepresented social groups.⁷⁸

A reform option would consist in opening the party lists to the voters. At the moment, in federal elections, citizens can basically only choose between party lists. It would be better if each voter had several votes that could be distributed between several candidates on the list or be cumulated on one candidate.⁷⁹ This reform would maintain the responsibility of the parties to nominate candidates, but at the same time strengthen voter influence on the composition of parliament. This would augment the responsive efforts of delegates towards the citizens, the independence of politicians from their parties, and the propensity for political leadership. Furthermore, the electorate should be able to express its dissatisfaction with the established parties, without having to deface its ballot papers, cast invalid ballot papers, opt for extremist parties, or even stay away from the polling station. This can be achieved through the official announcement of blank ballot papers—in France these are termed “*votes blancs*”—or through separate “protest votes.”⁸⁰

Parties’ nomination procedures can also improve. In Germany, party delegates regularly nominate electoral candidates, not the party members directly.⁸¹ To increase the opportunities for participation—and also to facilitate citizens freshly entering into politics—the legislature should demand direct preliminary elections of the party candidates (*Vorwahlen*).⁸² Following the example of closed primaries in the United States,⁸³

⁷⁸ Mitchell, *supra* note 62.

⁷⁹ Cf. the legislative proposal of Bündnis90/Die Grünen (BT-Drs. 11/5918) und the PDS (BT-Drs. 13/3523). The *Enquete-Kommission Verfassungsreform* BT-Drs. 7/5924, 17, favored for limited open lists. “Cumulation”, however, was rejected.

⁸⁰ Micah L. Sifry, *Give The People a Choice*, THE NATION 221 (1990); OLIVIER DURAND, LE VOTE BLANC: POUR UN SUFFRAGE VRAIMENT UNIVERSEL (1999); Diplock, *supra* note 9, at 723; Adélaïde Zulfikarpasic, *Le Vote Blanc—Abstention Civique ou Expression Politique?*, 51 REVUE FRANÇAISE DE SCIENCE POLITIQUE 247 (2001). The *Bundesverfassungsgericht* has stressed that there is no constitutional right to a protest vote (NVwZ 2012, 161).

⁸¹ Bundeswahlgesetz [BWAHLG] [Federal Election Law] §§ 21(1) & 27(5) (stating political parties can decide whether they nominate the candidates by representatives or directly by all party members).

⁸² Compare the legislative proposal of the Federal Government coalition of the *Sozialdemokratische Partei Deutschland* and *Bündnis 90/Die Grünen*, BT-Drs. 14/3764. Critically *Enquete-Kommission Verfassungsreform* BT-Drs. 7/5924, 15 ff.; James Hillson Cohen, *Political Candidate Nominations—A Comparative Study of the Law of Primaries and German Party Candidate Nominating Procedures*, 18 JÖR N.F. 491, 500 (1969); to the discussion in Great Britain, Rogers, *supra* note 10, at 607.

⁸³ EBERHARD KÖLSCH, VORWAHLEN—ZUR KANDIDATENAUFSTELLUNG IN DEN USA (1972); Fritz Plasser, *Vorwahlen und Vorwahlpraxis in den Vereinigten Staaten, in VORWAHLEN UND KANDIDATENNOMINIERUNG IM INTERNATIONALEN VERGLEICH* 7, 13 (Heinrich Neisser & Fritz Plasser eds., 1992).

parties in Germany should allow as sufficient a party registration instead of a formal party membership. Such a “party membership light” would be attractive for those citizens who wish to participate in nominating candidates, but—at least initially—have no interest in the further activities of the party. Preliminary elections would enhance the public’s knowledge, particularly about the constituency candidates. Unfortunately and astonishingly, these candidates are often unfamiliar to the electorate up to now.⁸⁴ Public “duels” would counteract this. To this extent, one should not be shy of “Americanizing” politics. Entirely open primaries should, however, be avoided in Germany as these would give the opponent too great a scope for manipulation.⁸⁵

3. Extension of the Governmental Period, But No Bundling of the Election Dates

The closer elections get, the more difficult politicians find it to exercise political leadership by making unpopular decisions. For this reason, scholars debate an extension of the electoral period of the *Bundestag* from four years to five.⁸⁶ Other countries—for example, Austria—have already implemented this reform. Restricting the citizen’s opportunities to participate in this way seems acceptable if other democratic reforms are implemented in return by extending opportunities for the people to participate in parliamentary decision-making.⁸⁷ Some scholars currently also consider combining the *Länder* elections with the federal parliamentary election or coordinating state elections, for example in the middle of the federal election period.⁸⁸ This would significantly relieve the burden; however, a legal obligation to bundle all electoral dates would contradict the constitutional law principle of federal state autonomy guaranteed above all by Articles 20(I) and 28(II) GG.⁸⁹

⁸⁴ See Christian Mackenrodt, *Wie wichtig ist die Person?*, ZPARL 69 (2008).

⁸⁵ JENS BORCHERT, *DIE PROFESSIONALISIERUNG DER POLITIK* 216 (2003) (favoring open preliminaries); Andrea Römmele, *Elitenrekrutierung und die Qualität politischer Führung*, 51 ZfP 259, 266 (2004) (explaining the United States perspective).

⁸⁶ This reform was realized in Austria in respect to the *Nationalrat* in 2007 (Art. 27 Abs. 1 B-VG). In the German *Bundesländer*, the electoral period is mostly five years. Against any reform in this respect, *Enquete-Kommission Verfassungsreform* BT-Drs. 7/5924, 38 (with a dissenting opinion by H. Lemke).

⁸⁷ *Supra* Section D. II.

⁸⁸ Klaus von Beyme, *Zusammenlegung von Wahlterminen: Entlastung der Wähler—Entlastung der Politik?*, ZPARL 339 (1992); Michael Sitsen, *Anreiz für Bürger, Entlastung für Politiker? Zur Bündelung von Wahlterminen*, ZPARL 602 (2007).

⁸⁹ Against that *Enquete-Kommission Verfassungsreform* BT-Drs. 7/5924, 46.

III. Extending the Franchise

Finally, scholars in Germany debate whether the franchise should be extended to further groups of potential voters. Some call for a franchise at birth, a *Wahlrecht von Geburt an*, which—initially exercised by parents on a trustee basis—should ensure child-friendly politics.⁹⁰ This, however, would lead in effect to a multiple franchise of parents, which is legally impermissible in Germany even through a constitutional amendment, as it would constitute a departure from the equal value of votes.⁹¹ To kindle interest in democracy among the young, it makes sense to reduce the voting age to sixteen, as has happened in Austria.⁹² This would be a fruitful challenge for parliamentary candidates, parents, schools, and other institutions.⁹³ The eligibility to stand for election, however, should—as with Austria⁹⁴—be limited to those who have reached the age of majority. This is because an appreciation of the political mandate of elected representatives—in particular the challenge of weighing between responsiveness and political leadership—requires a particularly high sense of responsibility. Apart from this, foreign citizens who have lived in Germany for several years, work there, and pay taxes should receive the franchise through a facilitated path to citizenship.⁹⁵ “No taxation without representation” holds today as it did at the time of the American Revolution.⁹⁶

⁹⁰ There have been several parliamentary initiatives in this direction. See BT-Drs. 15/1544; BT-Drs. 15/4788; BT-Drs. 16/9868.

⁹¹ Franz Reimer, *Nachhaltigkeit durch Wahlrecht?*, ZPARL 322 (2004); Michael Rolfsen, *Eine Stimme für die Zukunft?*, DÖV 348 (2009). But see also BVERFG, NVwZ 69 (2002) (leaving this question open).

⁹² Nationalrats-Wahlordnung Austria [NRWO] [NATIONAL ELECTION RULES] BUNDESGESETZBLATT [BGBl] No. 471/1992 § 21(1) (introducing voting at 16). To the discussion in Great Britain, Pattie & Johnston, *supra* note 63, at 272.

⁹³ Michael C. Hermann, *Wahlkampf und Jugendliche*, ZPARL 818 (2010).

⁹⁴ See NRWO § 41(1).

⁹⁵ The *Bundesverfassungsgericht* has stated that there is a legally necessary link between the notion of “the people” in GG art. 20(2) and the German citizenship; 83 BVERFGE 37 (50); 83 BVERFGE 60 (71); 107 BVERFGE 59 (87). As far as the Court sticks to that opinion (which is not beyond doubt), the only possibility is to ease the naturalization by a dual citizenship. See also DAHL, *supra* note 14, at 76 (describing an “inclusive” citizenship).

⁹⁶ Compare Merrill Jensen, *THE FOUNDING OF A NATION—A HISTORY OF THE AMERICAN REVOLUTION* (1968) (describing that the assessment of the constitutional lawyers of that time that the American colonies were “virtually represented” in the House of Commons, was understandably rejected by the Americans), with Francine J. Lipman, *The Taxation of Undocumented Immigrants—Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. (2006), 1, 4; and Erin E. Stefonick, *The Alienability of Alien Suffrage: Taxation Without Representation in 2009*, 10 FLA. COASTAL L. REV. 691 (2009) (applying “no taxation without representation” in respect to the immigrants of our days).

D. Reforming the Parliamentary Decision-Making Process

Elections are a necessary, but not a sufficient, condition for democracy. For this reason, this article will subsequently consider what parliamentary law can contribute to the success of representative democracy.

I. Disclosure and Regulation of the Influence Exerted by Lobbyists

The first step is to disclose and regulate the influence of lobbyists. In Germany, people consider the silent power⁹⁷ of those representing specific interests a danger for the democratic principle of equality, a restriction on the transparency of parliamentary decision-making, and a threat to the public acceptance of controversial decisions. Without question, representing interests—whether those of the common well-being or simply of private benefit—is part of democracy just as much as free elections and independent media.⁹⁸ Fair and pluralistic competition, however, requires that the representatives of specific interests work in a transparent way and have equal opportunities of access. Here, we see—especially when compared with the U.S.⁹⁹—that there is an urgent need for reform in Germany.

⁹⁷ DIE STILLE MACHT (Thomas Leif & Rudolf Speth, eds., 2003); DIE FÜNFTE GEWALT (Thomas Leif & Rudolf Speth, eds., 2006); Karsten Ronit & Volker Schneider, *The Strange Case of Regulating Lobbying in Germany*, 51 PARL. AFF. 559 (1998) (providing a comparative perspective on the negative connotation of the word “lobbying” in Germany).

⁹⁸ See *supra* note 38 (concerning the fundamental rights of communication). Concerning the American constitutional law Andrew P. Thomas, *Easing the Pressure on Pressure Groups—Toward a Constitutional Right to Lobby*, 16 HARV. J. L. & PUB. POL’Y 149 (1993); S. A. Browne, *The Constitutionality of Lobby Reform—Implicating Associational Privacy and the Right to Petition the Government*, 4 WM. & MARY BILL RTS. J. 717 (1996); Stacie L. Fatka & Jason M. Levien, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559 (1998).

⁹⁹ See Vincent R. Johnson, *Regulating Lobbyists: Law Ethics, And Public Policy*, 16 CORNELL J. L. & PUB. POL’Y 1 (2006); Anita Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513 (2007); Angela Lynne Davis, *Genuine Reform or Just Another Meager Attempt to Regulate Lobbyists—A Critique of the Honest Leadership and Open Government Act*, 18 KAN. J.L. & PUB. POL’Y 340 (2008/09); Jarica B. Nipper, *Lobbying the Lobbyists—A Comparative Analysis of the Lobbying Regulatory and Disclosure Models of the United States and European Union*, 14 TULSA J. COMP. & INT’L. L. 339 (2007) (comparing the rules in Europe). See generally OPEN SECRETS—CENTER FOR RESPONSIVE POLITICS, available at www.opensecrets.org (providing transparency with the help of other public interest groups); Richard A. Smith, *Interest Group Influence in the U.S. Congress*, 20 LEGIS. STUD. Q. 89 (1995); Dorie Apollonio et al., *Access and Lobbying—Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13 (2009); RAJ CHARI ET AL, *REGULATING LOBBYING—A GLOBAL COMPARISON* (2010) (comparing the law in the US, Canada and in the EU and in some EU countries).

1. Register of Lobbyists and Code of Conduct

Parliament should establish a register of lobbyists and require that those involved disclose the amount and origin of their financial and other resources.¹⁰⁰ The addressees of lobbying activities have to know who is behind specific demands. Only in this way can politicians correctly estimate the importance of demands and find a balance between the requirements of responsiveness and political leadership.¹⁰¹ German constitutional law expressly states that parliamentary delegates are “responsible only to their own conscience.”¹⁰² Accordingly, they can decide freely with whom they come into contact in the exercise of their mandate. For this reason, accreditation has to be voluntary in Germany, in contrast to what many propose from a political perspective.¹⁰³ Rather than making it a legal obligation, accreditation should be supported by political incentives. Accredited lobbyists should be accorded prior rights in the exertion of influence on parliamentary decision-making. In contrast to actual practice, there should be a formal restriction of consultations only to accredited lobbyists.¹⁰⁴ Above all, accreditation should be linked to a legal claim to state opinions on proposed legislation and to the right that the competent parliamentary committee (*Parlamentsausschuss*) reacts substantively to the stated opinions.¹⁰⁵ This would be a useful tool to encourage lobbyists to register. The public discussion made possible in this way may also counterbalance the social inequalities that otherwise threaten to distort parliamentary responsiveness, especially those inequalities between capital and employee, the employed and the jobless, and the economy and the ecology.

Furthermore, the *Bundestag* should create a code of conduct that applies to all representatives of interests—irrespective of whether they are accredited or not—and at the same time is a commitment entered into by the parliamentarians. All those involved in parliamentary decision-making must undertake an obligation towards transparency, truth,

¹⁰⁰ See the legislative proposals of the *Sozialdemokratische Partei Deutschlands*, BT-Drs. 17/6442, 2, and *Bündnis 90/Die Grünen*, BT-Drs. 17/2486, 2. Incomplete and wrong information should result in the deprivation of privileges or in fines. Imprisonment sentences—like in the U.S.—seem not to be necessary.

¹⁰¹ See Scott Ainsworth, *Regulating Lobbyists and Interest Group Influence*, 55 J. POL. 41 (1993) (referencing “game theory”).

¹⁰² GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 38 (1)(2).

¹⁰³ See, e.g., the legislative proposal of the *Sozialdemokratische Partei Deutschlands*, BT-Drs. 17/6442. Like here the legislative proposal of *Bündnis 90/Die Grünen*, BT-Drs. 17/2486.

¹⁰⁴ CHARI, *supra* note 99, at 61.

¹⁰⁵ In the actual law there is no legal claim to participate in public hearings of the *Bundestag* (“*öffentlichen Anhörungssitzungen*”). See Nr. 4 of appendix 2 to the GESCHÄFTSORDNUNG DES DEUTSCHEN BUNDESTAGES [GO-BT] [RULES OF PROCEDURE OF THE GERMAN BUNDESTAG].

fairness towards competitors, and the waiver of influence gained by financial or other substantive material incentives.¹⁰⁶ Criminality is a matter for public prosecution.¹⁰⁷

2. Transparency of the External Influence and of Committee Deliberations

To secure public acceptance of controversial decisions, the external influence of interest representatives on individual decisions should be more transparent. Admittedly, documenting each and every legislative footprint is impractical.¹⁰⁸ To realize the constitutional requirement of transparency, however, parliament should lay down that all expressed external positions on legislative proposals should be centrally documented on the website of the *Bundestag*.¹⁰⁹ In addition, it should be required that legislative drafts of the ministries are published as soon as they are made available to specific interest groups involved in the decision-making process. Unfortunately—and bewilderingly—this is not always the case in Germany up to now.¹¹⁰

More transparency is also needed in the parliamentary decision-making process itself. While the German constitution requires that “sittings of the *Bundestag* shall be public,”¹¹¹ parliamentary committees generally meet behind closed doors. This gives rise to public mistrust because parliamentary decisions are de facto made in these committees.¹¹² Cases exist where a privileged area free from public disclosure is necessary for the creation of opinions. Parliamentary procedure law, however, should require that this is not the rule, but an exception requiring a reasoned justification. Admittedly, this proposal goes against the present formalistic conventional view on German constitutional law, but it is in line with the leading constitutional principle of parliamentary publicity.

¹⁰⁶ Similarly—but restricted to lobbyists—the legislative proposal of *Bündnis 90/Die Grünen*, BT-Drs. 17/2486, 5.

¹⁰⁷ See the recently reformed STRAFGESETZBUCH [STGB] [PENAL CODE] §108 (e).

¹⁰⁸ See ANDREAS KOLBE ET AL, MARKTORDNUNG FÜR LOBBYISTEN 57 (2011); Hans-Jörg Schmedes, *Mehr Transparenz wagen? Zur Diskussion um ein gesetzliches Lobbyregister*, ZPARL 543, 548 (2009). Against that Christian Lange, *Lobbyistenregister in Deutschland?*, RUP 198 (2011).

¹⁰⁹ Cf. the legislative proposal of *Bündnis 90/Die Grünen*, BT-Drs. 17/2486, 3, 5.

¹¹⁰ See GEMEINSAME GESCHÄFTSORDNUNG DER BUNDESMINISTERIEN [GGO] [JOINT RULES OF PROCEDURE OF THE FEDERAL MINISTRIES] §§ 47–48.

¹¹¹ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 42(I)(1).

¹¹² Cf. *Enquete-Kommission Verfassungsreform*, BT-Drs. 7/5924, 80; *Ad-hoc-Kommission Parlamentsreform*, BT-Drs. 10/3600, 10. To the decision-making in parliamentary committees, see *supra* Section D. III. 1.

3. Regulating Conflicts of Interests

Finally, it is necessary to combat the suspicion that certain parliamentarians serve second masters. Citizens in Germany believe that influential interest groups are represented in the *Bundestag* by parliamentary delegates while other interests can gain no parliamentary presence.¹¹³ The recently sharpened obligation to make non-parliamentary activities and incomes public leads to more transparency.¹¹⁴ To increase acceptance of parliamentary decisions, however, it is necessary to address conflicts of interest further. For reasons of constitutional law, not all remunerated non-parliamentary activities of the elected representatives can be prohibited.¹¹⁵ The *Berufsfreiheit*, the fundamental right of free profession,¹¹⁶ and the *freies Mandat*, the constitutionally guaranteed autonomy of the parliamentarians,¹¹⁷ would stand against this restriction. But these guarantees do not prohibit a ban of those additional activities that create conflicts of interest.¹¹⁸ A ban of those actions would apply to a full-time trade unionist or representatives of employers' associations. It could also be considered whether to exclude parliamentarians from participating in decisions where they are partial as they have a vested interest. This, however, is not recommended as it could lead to inadvertent shifts of political power within parliament.

Further, there should be rules governing the period following the elected mandate. The transfer of leading politicians into the service of powerful business companies and associations has repeatedly harmed the image of democracy. The "revolving door" stands as a particularly remarkable symbol of the power of lobbyists. There are legal obligations of confidentiality,¹¹⁹ but that is not enough. To reduce the impression of a reward after leaving office, some commentators wish former elected representatives to be prohibited for a two-year quarantine period from taking up any activities that are connected to a former public role.¹²⁰ Such an intervention in the basic rights of freedom to exercise a

¹¹³ Cf. also 40 BVERFGE 296 (318).

¹¹⁴ Cf. ABGEORNETENGESETZ [AbG] [DELEGATES' LAW] § 44a Abs. 4 S. 1, § 44b Nr. 1 und 2; GO-BT § 18, and §§ 1–4 of the "Verhaltensregeln für Mitglieder des Deutschen Bundestages" [RULES OF CONDUCT FOR THE DELEGATES] (appendix 1 to GO-BT). See also 135 BVERWGE 77; 118 BVERFGE 277.

¹¹⁵ See ANNE KÄßNER, NEBENTÄTIGKEITEN UND NEBENEINKÜNfte DER MITGLIEDER DES DEUTSCHEN BUNDESTAGES 155 (2010).

¹¹⁶ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 12.

¹¹⁷ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 38(I)(2).

¹¹⁸ See 118 BVERFGE 277 (333); but see 118 BVERFGE 277 (338) (W. Hassemer, U. Di Fabio, R. Mellinghoff and H. Landau, *dissenting*).

¹¹⁹ See ABGG § 44d Abs. 1.

¹²⁰ KOLBE, *supra* note 108, at 50.

profession would be unconstitutional, however. Nevertheless, a regulation would be admissible and reasonable whereby—following the American model¹²¹—former politicians would not be able to act as lobbyists within the following legislative period.

II. Strengthening the Influence of Individual Members of the Public

Second, one must consider the influence of individual citizens on parliamentary activity. Increasingly, citizens are no longer satisfied with the role of spectators after the election.¹²² There is a considerable political interest—only twenty-two percent have no or only a limited interest¹²³—which can improve the responsiveness of parliament and render controversial decisions more acceptable.

1. Petition Procedures, Ombudsman Functions, Peoples' Initiatives

The starting point in Germany is the constitutional right of petition.¹²⁴ Important reforms have already been implemented in recent years. Petitions of general interest (*von allgemeinem Interesse*) are open to the public online. In addition, provided 50,000 citizens support a submission, the *Petitionsausschuss* (the Petition Committee) must deliberate with the petitioners openly rather than behind closed doors.¹²⁵ This form of participation should be improved through a petition management system, which discloses the respective stage of the submissions being pushed forward.¹²⁶ From a political perspective, there is a serious complaint that the Petition Committee of the *Bundestag* has only a subordinate role in parliamentary activity.¹²⁷ An ombudsman could render public concerns more visible.¹²⁸ There are role models especially in Scandinavian countries. In Germany, however, the treatment of petitions is traditionally organized within the parliamentary

¹²¹ Cf. DAVIS, *supra* note 99, at 362.

¹²² Cf. SOZIALWISSENSCHAFTLICHES FORSCHUNGSZENTRUM, *supra* note 6, at 102.

¹²³ *Id.* at 100.

¹²⁴ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 17.

¹²⁵ Cf. the rules of procedure (*Verfahrensgrundsätze*) enacted by the Petition committee on the basis of § 110 Abs. 1 GOBT (Nr. 4 I 2, Nr. 2.2. IV, Nr. 8.4 IV). For details, see Annette Guckelberger, *Neue Erscheinungen des Petitionsrechts*, DÖV 85 (2008); for an evaluation in a political science perspective, see Andreas Jungherr & Pascal Jürgens, *E-Petitionen in Deutschland*, ZPARL 523 (2011).

¹²⁶ Cf. ULRICH RIEHM ET AL., *BÜRGERBETEILIGUNG DURCH E-PETITIONEN* 253, 259 (2009) (giving further reform suggestions). The British www.fixmystreet.com could serve as a role model.

¹²⁷ See Thomas Saalfeld, *Parliament and Citizens in Germany*, in *PARLIAMENTS AND CITIZENS IN WESTERN EUROPE*, 43, 51 (Philip Norton, ed., 2002).

¹²⁸ Cf. the legislative proposal of *Bündnis 90/Die Grünen*, BT-Drs. 13/3578.

system¹²⁹ and this should remain so. Ombudsman functions should be exercised not by an independent person, but by the chair of the Petition Committee. Political differences of opinion in the treatment of petitions in the committee must be disclosed in detail. So far, the committee only provides a general overview.¹³⁰

The possibilities for public influence should be strengthened by means of allowing a certain number of individuals to legally oblige parliament to deliberate on a particular concern.¹³¹ Such *Volksinitiativen* (peoples' initiatives) would serve the desire of the public for more direct democratic involvement without restricting the representation principle. Peoples' initiatives need not be a preliminary step to a *Volksentscheid* (a legally binding peoples' decision) but may be deployed as independent participatory instruments.¹³² If the parliamentarians make a decision that does not correspond with the articulated public interest, they have to face popular frustration in the next election at the latest. This is the price of political leadership.

2. Exerting Influence on Legislative Procedure

The general legislative procedure itself also contains possibilities for strengthened participation. In individual cases, the *Bundestag* already offers discussion forums on the Internet.¹³³ To strengthen the equality of possibilities for influence—and ultimately also to enhance the public acceptance of decisions made through political leadership—the individual member of the public should have an enforceable right to express opinions on legislative proposals.¹³⁴ The Swiss *Vernehmlassungsverfahren* could serve as a model.¹³⁵ As expression of opinion rather than decision is concerned, the information and participation opportunities can be limited to the Internet—to reduce the parliamentary workload and involvement—although the possibilities to use this method are not yet uniformly

¹²⁹ See GO-BT §§ 12, 57, 58. To the constitutional rule according to which the committees have to “mirror” Parliament politically, 80 BVerfGE 188 (222); 84 BVerfGE 304 (323); 96 BVerfGE 264 (283); 112 BVerfGE 118 (133).

¹³⁰ See GO-BT § 112 Abs. 1.

¹³¹ Cf. STEFAN MARSCHALL, *PARLAMENTARISMUS* 117 (2005).

¹³² See (discussing Great Britain) FOX, *supra* note 8, at 682; Peter Riddell, *In Defence of Politicians: In Spite of Themselves*, 63 *PARL. AFF.* 545, 554 (2010).

¹³³ Compare Jens Tenschler & Laura Will, *Abgeordnete Online?*, ZPARL 504 (2010) with Ross Ferguson, *Convergent Evolution: The Development of Online Engagement in Westminster and Whitehall*, 61 *PARL. AFF.* 216 (2008) (giving a perspective on Great Britain).

¹³⁴ Cf. Joachim Linck, *Unmittelbare Bürgerbeteiligung am parlamentarischen Gesetzgebungsprozess*, ZG 137, 145 (2004).

¹³⁵ Cf. Art. 147 of the Swiss *Bundesverfassung* [FEDERAL CONSTITUTION], the *Vernehmlassungsgesetz* [CONSULTATION ACT], and the *Vernehmlassungsverordnung* [RULE ON CONSULTATION], with LINCK, *supra* note 134, at 140 (also providing comparable procedures in Austria and some states of the U.S.).

distributed in the society. The parliamentarians will have to take account of the digital divide in their decision-making and also remember that the opinions expressed may be distorted by fraudulent activities such as intentional mass mailing. In addition to this, consultative referenda (*Volksbefragung*) should be considered by parliament.¹³⁶ Experiences on the local level and abroad support this proposal.¹³⁷

3. Using Empirical Research Methods

In all forms of public involvement, parliamentarians have to take into account that well-resourced and educated groups of the population use the opportunities to participate disproportionately often. In the words of Elmer Eric Schattschneider: “The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”¹³⁸ This threatens the democratic demand for equality. For the political representatives, it is difficult to correctly assess the balance of interest. There is a danger that parliamentary responsiveness will be distorted. To counteract this threat, the expertise of social sciences in empirical research should be considered by the *Bundestag*. In Germany, the experience has been far from negative on the local and regional level with a “citizen forum” (*Bürgerforum*) and “citizen statements” (*Bürgergutachten*).¹³⁹ Such measures can render parliamentary work more fertile. Some consider giving even decision-making rights—possibly in the form of a veto—to discussion groups in which randomly selected members of the public participate.¹⁴⁰ This would, however, contradict the constitutionally required chain of legitimacy. Therefore, this idea cannot be realized in Germany.

III. Role of the Representatives in Parliamentary Decision-Making

Finally, consideration should be given to the way in which parliamentarians can take account of the preferences of the public in the interest of responsiveness in the decision-

¹³⁶ But see *Enquete-Kommission Verfassungsreform* BT-Drs. 7/5924, 12.

¹³⁷ See ULRICH ROMMELFANGER, *DAS KONSULTATIVE REFERENDUM* 54, 159, 172, 283 (1987). For Austria, see *Bundesverfassungsgesetz*, art. 49b, and the *Volksbefragungsgesetz* of 1989. In Switzerland there are hardly any consultative referenda. Cf. REGINE STRÄULI, *KONSULTATIVE VOLKSABSTIMMUNGEN IN DER SCHWEIZ* (1982).

¹³⁸ ELMER E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE* 34 (1960). See also ROBERT A. DAHL, *WHO GOVERNS?* 305 (1961); Wainer Lusoli et al., *(Re)connecting Politics? Parliament, the Public and the Internet*, 59 *PARL. AFF.* 24, 39 (2006); Declan McHugh, *Wanting to be Heard But Not Wanting to Act? Addressing Political Disengagement*, 59 *PARL. AFF.* 546, (2006); Aviezer Tucker, *Pre-emptive Democracy: Oligarchic Tendencies in Deliberative Democracy*, 56 *POL. STUD.* 127 (2008); Fishkin, *supra* note 35, at 49 (“participatory distortion”).

¹³⁹ PETER C. DIENEL, *DIE PLANUNGSZELLE* (5th ed. 2002) (explaining the concept of *Planungszelle* or focus group); Claudia Landwehr & Katharina Holzinger, *Parlamentsplenum und Bürgerkonferenz—Was leisten sie auf dem Weg zu politischen Entscheidungen?*, ZPARL 889 (2009) (giving the background of deliberative democratic theory).

¹⁴⁰ Cf. CROUCH, *supra* note 2; Fishkin, *supra* note 35, at 183 (“Putting Europe in one room”).

making process, and how they are able to implement their assessment on the need for political leadership.

1. Division of Labor Between Plenary and Committees, Parliamentary Minority Rights

Many complain that the *Bundestag*'s plenary debates generally have no effect on policy outcomes, since the opinions of the parliamentary groups are formed in advance.¹⁴¹ Division of labor between plenum and committees, however, is necessary. In a comparative perspective, there is a rule of thumb, according to which the more time a parliament spends in plenary debate, the less influential it is.¹⁴² This does not mean that what is previously discussed and decided in parliamentary committees is merely given a form of legal validity in plenum.¹⁴³ Rather, the plenary debate is intended to justify the respective political position publicly. The debates not only provide information for future elections, but they can also contribute to the acceptance of controversial decisions, because in the parliamentary debates the people sees that what they think—and possibly have submitted to parliamentarians—plays a role in parliament in the sense of responsiveness. This aspect should not be underestimated. Also, speeches of party-independent parliamentarians and of those who depart from the party line contribute to the success of representative democracy, particularly when the government is supported by a grand parliamentary coalition or if governing parties and large parts of the opposition are of the same opinion.

Contrary to the traditional image of the separation of powers, parliament in the German system—as also in Great Britain—generally fails as a “veto player”¹⁴⁴ in the legislative process, as the parliamentary majority regularly supports the government.¹⁴⁵ Therefore, the political minority above all has the task to control its government.¹⁴⁶ As many citizens

¹⁴¹ See, e.g., Hildegard Hamm-Brücher, *Die Krise des Parlamentarismus und Chancen zu ihrer Überwindung*, APuZ 3, 4 (1985/B 6). During the Weimar Republic SCHMITT, *supra* note 15, at 63 (“Sind Öffentlichkeit und Diskussion in der tatsächlichen Wirklichkeit des parlamentarischen Betriebs zu einer leeren und nichtigen Formalität geworden, so hat auch das Parlament ... seine bisherige Grundlage und seinen Sinn verloren.”).

¹⁴² Klaus von Beyme, *Parlamente*, in VERGLEICHENDE REGIERUNGSLEHRE 264, 273 (Hans-Joachim Lauth ed., 3d ed. 2010).

¹⁴³ But see Alfred Mechttersheimer, *Parlamentsreform—eine demokratische Notwendigkeit*, APuZ 50-1 1988/B 13; CARL SCHMITT, VERFASSUNGSLEHRE 319 (1928).

¹⁴⁴ Cf. GEORGE TSEBELIS, VETO PLAYERS—HOW POLITICAL INSTITUTIONS WORK (2002).

¹⁴⁵ See Philip Cowley & Mark Stuart, *Parliament: More Revolts, More Reforms*, 56 PARL. AFF. 188 (2003) (concerning British parliamentarianism).

¹⁴⁶ Cf. 49 BVERFGE 70 (86); 102 BVERFGE 224 (236); 114 BVERFGE 121 (149).

fail to understand this intra-institutional separation of powers,¹⁴⁷ an express provision should be included in the Basic Law that emphasizes the task of the opposition to control.¹⁴⁸ Parliamentary minority rights, such as the right to publicly question the government and to set up a committee of enquiry, can already be used by opposition parties to mobilize the public and exert pressure on the government.¹⁴⁹ The political “knockabout” in parliament—at times sanctimoniously criticized, even by politicians themselves¹⁵⁰—is not a symbol of degeneration but rather the expression of a fertile *Streitkultur*, a fruitful arguing culture. Democracy means a fight for the well-being of the people in an “agonistic pluralism”¹⁵¹ and parliament provides an appropriate arena for this. In this context, the trend to political entertainment—for example, in talk shows—is not to be bemoaned but praised as a sign for a vivid democracy.¹⁵²

2. Decision-Making Within the Party Factions

The widespread criticism of the power of the party factions in parliament (*Fraktionen*) carries more weight. There is talk of the parliamentary mandate becoming “depersonalized.” The complaint is that individual delegates have only a minimal potential to effectively influence the decision-making of parliament.¹⁵³ Still, it is an important task of party factions to aggregate the various ideas and concerns of the parliamentarians.¹⁵⁴ The public has elected the parliamentarians also—if not even primarily—as representatives of a particular political party in Germany. Against this background, there is no constitutional objection against *Fraktionsdisziplin*, the social pressure being exerted in the party factions. In Germany, only *Fraktionszwang*—downright faction compulsion—is prohibited.¹⁵⁵ Apart

¹⁴⁷ See Werner J. Patzelt, *Ein latenter Verfassungskonflikt? Die Deutschen und ihr parlamentarisches Regierungssystem*, PVS 725, 738 (1998).

¹⁴⁸ Cf. PASCALE CANCIK, PARLAMENTARISCHE OPPOSITION IN DEN LANDESVERFASSUNGEN (2000). *Against that Gemeinsame Verfassungskommission*, BT-Drucks. 12/6000, 89.

¹⁴⁹ Cf. 13 BVERFGE 123 (125); 57 BVERFGE 1 (5); 67 BVERFGE 100 (129); Sven T. Siefken, *Parlamentarische Frageverfahren—Symbolpolitik oder wirksames Kontrollinstrument?*, ZPARL 18 (2010).

¹⁵⁰ Critically, e.g., Kurt Biedenkopf, *Parlamentsreform—eine demokratische Notwendigkeit*, APuZ 48, 49 (1988/B 13) (assessment of a former *Ministerpräsident of Sachsen*).

¹⁵¹ Compare SCHUMPETER, *supra* note 32, at 428, with MOUFFE, *supra* note 5 (giving a modern view in favor of an “agnostic pluralism”).

¹⁵² Cf. András Körösenyi, *Political Representation in Leader Democracy*, 40 GOV'T & OPPOSITION 358, 367 (2005). *But see* CROUCH, *supra* note 2.

¹⁵³ See Hamm-Brücher, *supra* note 141, at 5. *See also* JÜRGEN HABERMAS, STRUKTURWANDEL DER ÖFFENTLICHKEIT 304 (1962); SCHMITT, *supra* note 15.

¹⁵⁴ Cf. 2 BVERFGE 143 (160); 10 BVERFGE 4 (14); 20 BVERFGE 56 (104); 43 BVERFGE 142 (147); 84 BVERFGE 304 (324); 112 BVERFGE 118 (135); 118 BVERFGE 277 (329).

¹⁵⁵ *See, e.g.*, 4 BVERFGE 10 (15).

from that, it is politically and legally correct that delegates generally appear not as struggling alone but as voluntary members of a team. The situation is different for the formation of faction policy. The elected representatives of the people are not merely organizational and technical intermediaries between their party and parliament.¹⁵⁶ Within their factions, parliamentarians are called upon to be responsive to public preferences and to express themselves according to their consciences and with courage regarding their own views on the need for political leadership. The clarification of problems should not always take place behind closed doors.¹⁵⁷ The public will not be offended by open internal debates. They only expect that compromises are upheld.

E. Final Remarks: More Government with the People

The empirical findings mentioned at the outset of this article have made it clear: The democracy of the twenty-first century cannot only be the one, which was founded in Germany after the collapse of the Third Reich in 1949. The well-known triad of Abraham Lincoln—“government of the people, by the people, and for the people”¹⁵⁸—must be extended in Germany as elsewhere towards more “government with the people.” This article has contemplated what can be done in Germany *de lege ferenda* to increase the influence of the public on the composition of parliament and parliamentary decision-making and to improve the transparency of the procedures. Euphoria is out of place here. Even if parliament and the delegates exploit all opportunities for the improvement of the level of legitimacy, public acceptance of political leadership decisions that do not reflect its own interests and values will remain precarious. Still, the more representative democracy transparently involves the public, the more hope for acceptance of their decisions without having to deploy coercive state power.

Finally, there are worrying sociological findings regarding “unequal democracy.”¹⁵⁹ The lower a person’s level of education and income is, the less likely he or she is to participate in elections.¹⁶⁰ Many of the proposed reforms are subject to the criticism that they further

¹⁵⁶ But see Gerhard Leibholz, *Der Strukturwandel der modernen Demokratie*, in *GRUNDPROBLEME DER DEMOKRATIE* 170, 197 (Ulrich Matz ed., 1973).

¹⁵⁷ See Wolfgang Jäger, *Repräsentationsdefizite des Deutschen Bundestages*, in *DER SOUVERÄN AUF DER NEBENBÜHNE* 134, 144 (Bernd Guggenberger & Andreas Meier eds., 1994).

¹⁵⁸ President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (“Government of the people, by the people, for the people, shall not perish from the earth.”).

¹⁵⁹ Cf. LARRY M. BARTELS, *UNEQUAL DEMOCRACY* 252 (2010) (“Economic Inequality and Political Representation”).

¹⁶⁰ See Dirk Jörke, *Die Versprechen der Demokratie und die Grenzen der Deliberation*, ZPOL 269 2010; DALTON, *supra* note 8, at 50 (giving an international perspective on the U.S.); Jens Alber & Ulrich Kohler, *Die Ungleichheit der Wahlbeteiligung in Europa und den USA und die politische Integrationskraft des Sozialstaats*, LEVIATHAN 510, 523 (2007) (comparing to the U.S.).

advantage already active people and further disadvantage those who belong to what sociologists term the “new underclass.”¹⁶¹ To counteract this, all individuals involved in democratic decision-making must do their utmost to get those to speak who lack not only time and knowledge but also rhetorical skills and self-confidence.¹⁶² This is, however, not a requirement of law, but rather a political pre-condition for the success of representative democracy that can only be referred to the democratic and social ethos of the elected representatives.

¹⁶¹ See, e.g., GIDDENS, *supra* note 46.

¹⁶² Geoffrey K. Roberts, *Political Education in Germany*, 55 *PARL. AFFAIRS* 556 (2002) (relatively positive to Germany).