

Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014 European Parliament Elections

Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14

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Some commentators – half tongue-in-cheek but half seriously – have said that if one wants to predict the outcome of a Czech Constitutional Court case, checking what the German Federal Constitutional Court had to say in a similar issue is the way to go. Indeed, the Czech Constitutional Court's case law has undoubtedly been influenced by the jurisprudence of its German counterpart, which can be illustrated either by comparing individual (similar) cases or simply by looking at the number of cases where the Czech Court approvingly cited a German Court case or even used it as a crucial part of its reasoning.¹

Recently, however, an exception to this 'rule' has emerged: the EU law. Although the Czech Constitutional Court has adopted a form of *Solange* doctrine,² many of its European law decisions show that the respective constitutional courts' understanding of the relationship between the member states and the EU differ. Even though in one exceptional case the Czech

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¹ See L. Vyhnánek, 'Judikatura v ústavním právu', in M. Bobek and Z. Kühn (eds.), *Judikatura a právní argumentace Case Law and Legal Reasoning* (Auditorium 2012), p. 348.

² Cf. mainly Czech Constitutional Court 8 March 2006, Pl. ÚS 50/04.

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Constitutional Court adopted an almost hostile position towards the competences of the European Court of Justice,³ the ‘mainline’ of its case law seems to be more euro-friendly than recent German decisions.⁴

Recent decisions concerning the threshold in European Parliament elections can be understood as yet another example of this divergence. After two deliberations over the constitutionality of the thresholds in front of the German Court, the Czech Court joined this interesting debate, which touched upon the constitutional nature of the whole European Union. While the German Court struck down both the 5% threshold in 2011 and then the 3% threshold in 2014,⁵ the Czech Court found the 5% threshold to be in accordance with the constitution.⁶

This article first provides readers with the factual and procedural background to the case and a concise overview of the law concerning election to the European Parliament. Second, we summarise and analyse the Czech ruling and compare its reasoning with that of the German Court. While the remarks concerning specific substantive arguments used by the courts are included throughout, additional, more general, comments can be found in the final section of this text. We assert that the two courts differ not only in the specific applications of constitutional concepts like equality of voting power and proportionality, but also in their wider perspectives on European integration which inform their decisions on legal thresholds. This case note therefore goes beyond a mere comparison of the judgments and portrays the variances through the wider lens of European democracy.

BACKGROUND

Factual and procedural background

The case was initiated by two candidates in the 2014 European Parliament election in the Czech Republic who did not succeed in earning a seat in Strasbourg/Brussels due to the existence of the 5% national legal threshold. They asked the Supreme Administrative Court, the Czech judicial authority on electoral affairs, to annul the election of the two candidates who were elected to the European

³Czech Constitutional Court 31 January 2012, Pl. ÚS 5/12; see also R. Zbiral ‘Czech Constitutional Court, Judgment of 31 January 2012, Pl. ÚS 5/12: A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed *Ultra Vires*’, 49 *Common Market Law Review* (2012) p. 1-18.

⁴Compare, for example, the respective decisions concerning the Lisbon Treaty: BVerfG 30 June 2009, 2 BvE 2/08; Czech Constitutional Court 26 November 2008, Pl. ÚS 19/08 and Czech Constitutional Court 3 November 2009, Pl. ÚS 29/09.

⁵BVerfG 9 November 2011, 2 BvC 4/10 and others and BVerfG 26 February 2014, 2 BvE 2/13 and others. See, in this issue, B. Michel, ‘Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice’, 12 *EuConst* (2016) p. 133.

⁶Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14.

Parliament with the fewest votes: had the 5% threshold not existed, they would have been replaced by the applicants. Together with the request for the annulment of two candidates' election, the applicants also petitioned for the annulment of two provisions of the Czech European Parliament Election Act. They challenged the provisions of the Act that introduced the threshold;⁷ they argued that these provisions hinder the free competition of political parties in a democratic society and violate the principle of voting equality as well as the right of citizens to equal access to elected functions.

For the most part, the Supreme Administrative Court accepted the arguments of the petitioners (although by the narrowest majority of four, with three judges dissenting).⁸ It confirmed that in the absence of the 5% threshold, two mandates of Members of the European Parliament (henceforth MEPs) would have been won by the petitioners. Only the parties whose total share of all valid votes cast exceeds 5% pass scrutiny. As the Czech Pirate Party received 4.78% of votes and the Green Party received 3.77%, their candidates were automatically excluded from the seat distribution. The Supreme Administrative Court pointed out that due to the artificial threshold almost 20% of all votes were forfeited, and therefore a sizeable portion of voters was not represented in the decision-making body. Therefore, it stayed the proceedings and asked the Constitutional Court to annul the statutory provisions regulating the 5% threshold.

The Constitutional Court needed almost a year to issue the ruling, as the Supreme Administrative Court stayed the proceedings in June 2014 and the Constitutional Court decided in May 2015. The judge rapporteurs switched during the proceedings after the initial draft did not gain sufficient support. The final ruling was drafted under the rapporteur-ship of Judge Jiří Zemánek, an academic with a background in EU Law. The ruling was not adopted unanimously; the majority consisted of nine judges, while three attached a joint dissenting opinion.⁹

⁷ Art. 47.2 Zákon č. 62/2003 Sb. o volbách do Evropského parlamentu a o změně některých zákonů [*European Parliament Election Act*].

⁸ Supreme Administrative Court 24 June 2014, Vol 16/2014-69.

⁹ The Constitutional Court consists of 15 judges, but three judges were unable to take part in the decision-making process for procedural reasons. The dissenting judges sharply disagreed with the opinion of the majority and curiously all of them 'upgraded' to the Constitutional Court from the Supreme Administrative Court. The three dissenters found the conclusions of the German Constitutional Court more persuasive than those of the Czech majority on some accounts, especially in their emphasis on proportionality and equal voting power. They remained unconvinced that the majority of the Court or the legislature put forward strong and legitimate reasons that could justify a limitation of an important constitutional principle. Moreover, the dissenting opinion correctly identified some partial setbacks in the argumentation of the majority. Unfortunately, both the majority and the dissenting trio did not elaborate in detail on the main practical puzzle of the

Election to the European Parliament

Elections to the European Parliament have, since their inception in 1979, been characterised as ‘second-order elections’ which are of less importance than national parliamentary contests. In second-order elections voters typically turn away from government parties (especially from large parties). Big parties tend to lose votes compared to previous national elections, and smaller parties, particularly anti-EU parties, gain votes. This is especially pronounced in the middle of parliamentary cycles. Moreover, turnout is lower than in the most important elections. National parties control candidate selection and carry out election campaigns to the European Parliament which are based predominantly on national political issues. All of this hampers the legitimisation of the European parliamentarians, because seats at the European Parliament are not won in contests on European issues, but rather serve as punishment for incumbent national governments.¹⁰

Regulation of elections to the European Parliament at the European level has remained laconic since the first direct election in 1979. The fundamentals are to be found in the primary law¹¹ which are then elaborated on in the brief Act concerning the election of representatives to the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, amended by Council decision No. 2002/772/EC, Euratom (henceforth: the Direct Elections Act) of June and September 2002. The aspects not covered are explicitly left to the discretion of member states (e.g. issues of electoral system and thresholds, constituency boundaries, entitlement to vote, right to stand for election etc.). The Direct Elections Act specifies that MEPs shall be elected on the basis of proportional representation. Member states can set a minimum threshold for the allocation of seats, provided that it does not exceed 5% of the votes cast.¹²

Concerning maximum legal thresholds, in its resolution from November 2012, the European Parliament called on member states to establish appropriate and

case – relationship (let alone causal mechanism) between the legal threshold, fragmentation in the European Parliament and its hampered functioning.

¹⁰ S. Hix and M. Marsh, ‘Punishment or Protest? Understanding European Parliament Elections’, 69 *The Journal of Politics* (2007) p. 495-510; D. Judge and D. Earnshaw, *The European Parliament*, 2nd edn. (Palgrave 2008) p. 74-81.

¹¹ Art. 14(3) TEU states that ‘[t]he members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot’. Art. 20(2)(b) TFEU adds that EU citizens living in another EU member state have the right to vote and to stand as candidates in elections to the European Parliament under the same conditions as nationals (repeated also in Art. 39 EU Charter; further details provided in Art. 22(2) TEU and Directive 93/109/EC and its amending Directive 2013/1/EU, which lay down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a member state of which they are not nationals).

¹² Arts. 2 and 3 Direct Elections Act.

proportionate minimum thresholds in their electoral law in order to safeguard the functionality of Parliament, especially in the light of the changes introduced by the Treaty of Lisbon and the changing relationship between the Parliament and the Commission.¹³ The Parliament continues to push for electoral law reform and calls for greater harmonisation of national laws governing European elections, including the introduction of obligatory national/regional thresholds to purportedly avoid further fragmentation of the Parliament.¹⁴

The degree of squeeze on the representation of small parties counts among the most important aspects of an electoral system. If a political system sets too high a barrier for new parties to enter parliament, it can lead to its staleness and also affect the perception of fairness, and hence legitimacy, of the regime. On the other hand, the more disproportional a system is, the less fragmented the party system.¹⁵ A legal threshold serves a step function, a sudden cut-off. The effective threshold (T) closely relates to the district magnitude (M) which denotes the number of seats in a district.¹⁶ The majority of countries use only a single district in the European Parliament elections, therefore the formula for computation of the effective threshold is quite widely applicable: $T = 75\% / (M + 1)$.¹⁷ This is the case in the Czech Republic, where candidates battle for 21 seats and where the effective threshold stands at approximately 3.4% ($75\% / (21 + 1)$), which is significantly lower than the legal threshold of 5%.

Exactly half of the 28 EU member states apply a legal threshold in the European Parliament election. Most of them have set the threshold at 5%, three states at 4%, Greece at 3% and Cyprus at 1.8%. It follows that the 5% legal threshold looks like an ordinary instrument to prevent overcrowding of political parties in representative bodies. In some cases, however, the introduction of the

¹³ Art. 4 European Parliament resolution of 22 November 2012 on the elections to the European Parliament in 2014 (2012/2829(RSP)).

¹⁴ Item 1: Measures for a reform of the European Electoral Act, Working Document on the Reform of the Electoral Law of the European Union, European Parliament, Committee on Constitutional Affairs, 30 April 2015. See also the recent Art. 7 European Parliament resolution of 11 November 2015 on the reform of electoral law of the European Union (2015/2035(INL)).

¹⁵ C. Anckar, 'Determinants of Disproportionality and Wasted Votes', 16 *Electoral Studies* (1997) p. 501 at p. 502.

¹⁶ To illustrate the problem, imagine a single district in which three seats are distributed. The effective threshold to earn a seat will significantly exceed a legal threshold of e.g. 5 or even 10%. Comparing the magnitude of the effective threshold with the legal threshold therefore tells us whether the legal threshold has any effect at all.

¹⁷ See R. Taagepera, 'Effective Magnitude and Effective Threshold', 17 *Electoral Studies* (1998) p. 393-404; R. Taagepera, 'Nationwide threshold of representation', 21 *Electoral Studies* (2002) p. 383-401. It follows from the formula that a 5% legal threshold becomes relevant only when more than 14 seats are available in a single constituency and a 3% legal threshold in single constituencies with more than 24 seats.

legal threshold is only cosmetic, as the effective thresholds automatically prevent small parties from succeeding in the election. Furthermore, some states (Belgium, France, Ireland, Italy, Poland and the United Kingdom) subdivide their electoral areas, which further heightens the effective threshold.

All in all, the European Parliament is not doing too badly in terms of the Gini coefficient, used for measuring inequality. Gini stood at 0.27 for the 2009 European Parliament election seat allocation, which is less than in the case of the German *Bundesrat* (0.35). On the other hand, the *Bundestag* comes in with a very proportionate Gini of only about 0.04.¹⁸ However, Germany, with its very high emphasis on voting power equality, is quite an exception.

Constitutional framework

In deciding the case, the Czech Constitutional Court (and accordingly the referring Supreme Administrative Court) had to take into account the existing case law concerning the constitutionality of legal thresholds. Legal thresholds have been employed both in the election to the lower chamber of the Parliament and in municipal elections and both of them have been challenged before the Constitutional Court in the past.¹⁹

Even though the thresholds withstood the test of constitutionality each time, the Constitutional Court's decisions have set the framework for any further similar case. First of all, the Constitutional Court made it clear that the threshold should be considered a limitation (or deformation) of the principle of voting equality²⁰ and as such must be justified by compelling reasons. This principle has two related but separate dimensions. First of all, it may mean that every voter has the same number of votes (equal voting rights). A second and more complex dimension is related to the notion that every vote cast should have the same weight in relation to the number of the gained mandates (equal voting power, referred to as *Erfolgswertgleichheit* in the German Constitutional Court's case law). Whereas the first dimension of this principle should be – according to the Constitutional Court – strictly observed, some concessions must be always made as regards the second. In other words, the equal voting power principle is merely approximate; many of its limitations stem from the very logic of election systems used in

¹⁸R. Rose et al., 'Evaluating competing criteria for allocating parliamentary seats', *63 Mathematical Social Sciences* (2011) p. 85-89.

¹⁹Czech Constitutional Court 2 April 1997, Pl. ÚS 25/96 (parliamentary election) and Czech Constitutional Court 25 August 2004, IV. ÚS 54/03 (municipal elections).

²⁰This principle can be derived from multiple provisions of the Czech constitutional order. For the European Parliament case, Art. 21 paras. 3 and 4 (active and passive electoral rights) of the Czech Charter of Fundamental Rights and Freedoms (henceforth Czech Charter) are arguably the most relevant.

representative democracies²¹ and some further limitations can be introduced artificially.²²

Given this, the Court had no trouble arguing that in the case of parliamentary election, reasons that justify the limitation of the equal voting power principle can be found. It stressed that the election should not only mirror the political opinions of voters, but it must also serve as a basis for creating majorities capable of effective decision-making. In other words, the principle of representative democracy allows the incorporation of certain integration stimuli to the election mechanism which prevent an 'abundance' of political parties in the representative body and the subsequent inability to create a government which is able to perform its legislative function. Full proportionality would lead to political fragmentation and subsequent difficulties in forming stable governments. Therefore, endowing electoral mechanisms with some integration stimuli such as a 5% threshold can be justified. Already at this point some seeds of the later divergence between the Czech and the German constitutional courts have emerged. The Czech Constitutional Court held that the ability to adopt decisions effectively (*in abstracto*, without the need to prove that such a risk is actually foreseeable) is a legitimate and sufficiently specific aim and that as such it allows the legislature to adopt measures which limit the equal voting power principle. The German Constitutional Court, on the other hand, refused to do the same. It stressed that even a 3% threshold cannot be justified by a mere (empirically unfounded) concern that the decision-making process would be made more difficult by further differentiation of the representative body. On the contrary, only an existing or reliably foreseeable threat to the very functioning of the representative body can outweigh the impairment of the voting equality.²³ However, even the Czech Court emphasised that the principle of voting equality cannot be deformed beyond what is necessary to fulfil these goals and hinted that it would consider a 10% legal threshold unconstitutional.²⁴

²¹ Still, we can find some interesting applications of this principle in comparative constitutional law. In a famous line of case law, the US Supreme Court held that the 'one man, one vote' principle protects even the weight of the vote. Therefore (though in a majoritarian system), the congressional districts must contain roughly the same number of voters in order for their representation to be equal (*see for example Reynolds v Sims*, 377 U.S. 533 (1964)). This later led to a massive wave of redistricting. Even though this logic cannot be automatically transferred to a proportional system, it illustrates that the equal voting power principle can be understood quite extensively.

²² Generally, the standard of review was quite deferential; the German Constitutional Court, on the other hand, explicitly employed a strict standard of constitutional review (BVerfG 26 February 2014, 2 BvE 2/13 and others, para. 59 and BVerfG 9 November 2011, 2 BvE 4/10 and others, para. 91).

²³ *See* BVerfG 26 February 2014, 2 BvE 2/13 and others, paras. 60 and 61.

²⁴ Czech Constitutional Court 24 January 2001, Pl. ÚS 42/2000.

The challenge, therefore, for the petitioners (and afterwards for the Supreme Administrative Court) was to convince the Czech Constitutional Court that, in the case of European Parliament elections, the reasons justifying the 5% legal threshold are either too weak or absent. Accepting many of the petitioners' arguments, the Supreme Administrative Court was convinced. It stressed that the aforementioned Constitutional Court's case law should not be hastily followed in the present case, because the role of the European Parliament is different from the role of national parliaments and consequently the need for integration stimuli differs as well. The Supreme Administrative Court also pointed to the fact that integration effect can be considered only from the point of view of the whole institution, and not only from one of the individual seat clusters elected in member states.²⁵ In this regard, the Supreme Administrative Court said that the idea of a national level legal threshold contributing to the integrity of the political spectrum in the European Parliament is 'rather illusory', taking into account that out of 751 MEPs only 21 are elected in the Czech Republic. Moreover, in a democratic society, the legal threshold is not necessary to achieve the aim of integration of political representation at the EU level because this role is sufficiently fulfilled by the existence of the effective threshold.²⁶

THE CZECH CONSTITUTIONAL COURT'S DECISION

Before the Constitutional Court turned its attention to the substantive problem at hand, it had to answer one important meta-question: is the acceptability of the threshold to be decided on the grounds of EU law or on the grounds of domestic constitutional law? Although it ultimately came to the conclusion (or so it seems) that the latter answer is correct, it also touched on some interesting points concerning the effects that European law has on the national regulation of European Parliament elections.

The Court considered the Czech European Parliament Election Act as 'implementing' EU law in the sense of Art. 51(1) of the EU Charter of Fundamental Rights (henceforth the EU Charter), therefore the EU Charter and the Czech constitutional order together form the referential criteria against which the provision of the Czech European Parliament Election Act was measured.²⁷ The EU Charter was then even used when debating justifiable restrictions on

²⁵ The argument has also been elaborated by the German Court (*see* BVerfG 26 February 2014, 2 BvE 2/13 and others, para. 80-82).

²⁶ *See supra* the discussion on the legal and effective threshold. The legal threshold in the Czech Republic stands at 5%, while the effective threshold is slightly below 4%, which led the majority on the Supreme Administrative Court to have doubts about the necessity for the legal threshold.

²⁷ Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14, para. 47.

fundamental rights which are set in the EU Charter in greater detail than in the Czech Charter.²⁸ One may wonder then why the Constitutional Court has not asked the Court of Justice a preliminary question in order to learn its perspectives on the concepts of proportional representation and equal voting rights.

In any case, the Constitutional Court decided to answer the main question for itself. That is, does the legislature sufficiently follow the (European) requirement of electoral system proportionality and (European and national) respect for fundamental rights when it introduces a legal threshold? European norms demand the proportionality of national electoral systems while clarifying that a 5% legal threshold is consistent with this requirement.²⁹ In the Czech case, the legislature fulfilled the EU requirement on the maximum legal threshold. However, according to national standards on voting equality this may not have been enough, given that the European Parliament is a different body than domestic representative bodies.

We are aware that it is slightly unequal...

As stated above, the Constitutional Court had to evaluate the constitutionality of the threshold through the prism of the principle of voting equality. The reasoning of the Constitutional Court's decision in this regard is quite long and at times slightly eclectic. Still, the knowledge of the aforementioned previous case law allows us to isolate the main line of argumentation leading to the ultimate outcome – i.e. that the 5% threshold in European Parliament elections is consistent with the constitution.

The previous case law of the Constitutional Court accepted legal thresholds in parliamentary and municipal elections. This posed some constraints for the constitutional judges. It was clear that the threshold in European Parliament elections should also be considered a limitation (or deformation) of the principle of voting equality according to the Czech Charter. On the other hand, should the Court accept that there is a need for integration stimuli comparable to the case of the Chamber of Deputies, this limitation would be justified and thus consistent with the constitution.

It follows from the logic of proportionality analysis that the threshold could – practically speaking – be declared unconstitutional only if one of the following rationales was to be accepted by the Constitutional Court. First of all, it could be argued that the role and position of the European Parliament are substantially

²⁸ Art. 52(1) EU Charter.

²⁹ Still, it remains debatable to what extent the system can be proportional e.g. in Malta with only six seats in the European Parliament, or in Ireland with a mere 11 seats, but with four electoral districts. In the context of these smaller states, many voters remain unrepresented as their votes go in vain.

different from those of a national parliament in a parliamentary democracy, that it therefore does not need artificial integration stimuli to perform its functions properly and that the nature of these differences makes the integration stimuli *unnecessary* or even illegitimate.³⁰ Another possible argument is that even though the European Parliament needs some integration stimuli, it is *not effective* to introduce such stimuli at the national level (i.e. only for a single cluster of seats), and even more impractical in smaller states where the effective and legal thresholds are quite close to each other.

However, the Court rejected both of the above-mentioned counter-arguments. It indeed utilised the basic argumentative structure contained in the previous case law and then maintained that the legal threshold can be justified even in the case of the European Parliament.

... but it can be justified.

Although the Czech Constitutional Court provided a standard description of the differences of the European Parliament when compared to national parliaments in European liberal democracies,³¹ it later downplayed their significance and made it clear that it still considers the European Parliament to be (at least for the purposes of this case) comparable to its national counterparts.³²

The Court majority perceived the need for the creation of a functioning European Parliament capable of generating clear majorities as the most important element for justifying the restriction of equal voting power.³³ The Court noted that the Lisbon Treaty generally strengthened the European Parliament's position, so that it is possible to consider it a 'real' parliament. More specifically, the Court stressed that clear and effective majorities are necessary for the proper functioning of the European Parliament, particularly in the legislative process and in approving and dismissing the Commission.³⁴ Unlike the German Constitutional Court, the Czech Constitutional Court put great emphasis on the desired 'ability of the European Parliament to achieve consensual [*sic*] solutions'.³⁵

The Czech Court also rejected the argument that the national threshold cannot be compellingly justified because it had only a marginal impact

³⁰ A simplistic argument along the lines of 'a national parliament in a parliamentary system needs to form an effective majority to support a government; the European Parliament does not support a government *stricto sensu*, therefore integration stimuli are unnecessary' could serve as an example.

³¹ Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14, paras. 38-41.

³² *Ibid.*, paras. 70-75.

³³ *Ibid.*, para. 67.

³⁴ *Ibid.*, paras. 70 and 71.

³⁵ *Ibid.*, para. 70.

on the composition of the European Parliament as a whole.³⁶ The Court majority developed a highly pro-European solution when it called for a multilateral obligation *erga omnes*³⁷ leading to the solidary responsibility of all member states. The states should not view themselves as a small portion of the whole, whose internal regulation of the European Parliament election will not influence others, because if every state did the same, then the effect would not remain marginal.³⁸ The Court even stated that striking down the threshold based on the ‘marginal effect’ argument would make a member state a ‘free rider’ that shifts the responsibility for the proper functioning of the European Parliament to other member states.³⁹ This wording is obviously quite controversial since it implicitly labels 14 member states as such free-riders. Again, it stands in contrast to the German Court. While it is true that even the German judges were ready, in principle, to adopt European level justifications, there was little room for their practical application. Even though the Czech Constitutional Court accepted that the effective threshold was – in the Czech case – quite close to the legal threshold, it allegedly did not amount to a sufficient pro-integration factor. The Court explained its position by referring to the psychological effects of the legal threshold; its existence is widely known amongst voters (unlike the existence and value of the effective threshold), and therefore has a pro-integration effect on voter behavior.

The Court concluded that the legal threshold was a justifiable restriction of voting equality, free electoral competition of political parties and of the citizen’s right to equal access to elected functions, because it is a proportionate measure capable of contributing to the main objective – the effective representation of the will of citizens in the European Parliament.⁴⁰

³⁶ This point was one of those that sharply divided the Court. The dissenting judges voiced their opinion that the limitation of voting equality can hardly be justified if the legal threshold does not have a noticeable potential to contribute to the integration of the political spectrum in the European Parliament. See Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14, joint dissenting opinion, para. 4.

³⁷ As explicitly stated by the Czech Constitutional Court, *ibid.* para. 77.

³⁸ Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14, para. 77. The dissenters on the other hand stated that the concern about the situation when more countries abolish the legal threshold which supposedly has a disintegrating effect on the European Parliament is completely unfounded. In 14 countries with the legal threshold, that threshold is generally so low or the effective threshold so high that the legal threshold cannot have any effects.

³⁹ The German Constitutional Court, interestingly, did just that. Cf. in this issue, B. Michel, ‘Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice’, 12 *EuConst* (2016) p. 133, where it is labelled quite fittingly as ‘national solipsism’.

⁴⁰ *Ibid.*, para. 85.

ADDITIONAL COMMENTS

Perhaps the greatest difference between the perspectives of the German and Czech Constitutional Courts concerns the nature of European democracy. The Czech Court perceives democratic processes at both the Union and national level as mutually complementary and mutually determinant, with the European Union representative democracy, personalised by the European Parliament, playing an important role. It explicitly challenges the perspective of the German Court, which places the decisive responsibility for European integration on the national parliament while downplaying the democratic-legitimising role of the European Parliament.⁴¹

A general framework for analysing the rulings

Democracy in the European Union has been an extensively contested issue for a long time, therefore the brief sketch introduced here only provides a basic framework for understanding the two different perspectives concerning the European Parliament's place and role in the Union's political system. In its long and elaborate rulings, the German Court seems to adopt a traditional view of democracy and representation according to which the democracy presupposes the existence of a *demos* and where representation requires both the equality of voting rights and equality of the weight of each vote when translating votes to seats in a representative body.⁴² Such a perspective stands tightly in traditional categories of people, democracy, state, constitution, identity and loyalty. These categories are well established in constitutional jurisprudence and their boundaries can be determined by using a long-tested apparatus. Difficulties occur when applying these static (and statist) categories to a *sui generis* entity like the EU with new modes and multiple levels of governance and overlapping authorities. Joseph Weiler states that the basic condition of representative democracy is the ability of citizens to throw the scoundrels out at elections.⁴³ But in the EU dual executive model, the Council and the Commission share executive responsibilities for the formulation, initiation and oversight of implementation of policies, therefore one can hardly authorise or throw out a government.⁴⁴

⁴¹ Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14, para. 74.

⁴² In addition to both rulings on legal thresholds, the ruling on the Lisbon Treaty also offers an important hint as to the Court's position (German Constitutional Court 30 June 2009, 2 BvE 2/08). In the Lisbon judgment, the German Court criticised the severely imbalanced number of votes needed to earn a seat in the European Parliament in the smallest and biggest states where the number of votes can differ by as much as twelve times. Cf. Ch. Lord and J. Pollak, 'Unequal but democratic? Equality according to Karlsruhe', 20 *JEPP* (2013) p. 190-205.

⁴³ J. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press 1999) p. 266.

⁴⁴ Judge and Earnshaw, *supra* n. 10, p. 84.

In this regard, the Czech Court seems to more readily accept that the EU does not necessarily need to be viewed through a strict democratic lens and that consequently the traditional constitutional principles (such as the equal voting power principle) might be interpreted in a more relaxed manner in order to allow some flexibility for the EU in organising its operations to better suit its specific make-up. In this, the Czech Court showed greater openness towards the Union and did not insist on the strict application of the traditional understandings of state and democracy in the case of a supranational polity. For the Czech Court, the functioning of European Parliament and considerations concerning the general functioning of democracy at the EU level was not relevant ‘merely’ as a possible legitimate aim within the framework of proportionality analysis. It also played a second (less obvious but equally significant) role – as a part of an indivisible legal and political system to which the Court owes its loyalty.

This approach seems to be in line with (and is perhaps an unconscious approval of) some modern conceptions which have appeared, and which refute the classical legitimisation of the EU either through national parliaments or the European Parliament. The most influential of these seem to be gathered around the concept of ‘demoicracy’.⁴⁵ Demoicracy denotes ‘a Union of peoples, understood both as states and as citizens, who govern together but not as one’.⁴⁶ Such a view has a greater appreciation for the flux in which identities and loyalties overlap and develop and for the related flexibility of concepts. Demoicracy does not require a single demos, but rests on a polity composed of multiple demoi in which decision-making should be based on a plurality of majorities of peoples.⁴⁷ The European Parliament represents only one legitimisation source of many within the multilevel EU. Legitimacy should not be viewed here as a zero sum game where either national parliaments or the European Parliament serve as single sources of European legitimacy.

Emphasising legal texts, side-lining practice

Both constitutional courts share a legalistic view of the European Parliament. They focus on its legal position in the Treaties, and do not fully appreciate its practical operation and position in the EU political system. This is especially true of the Czech Constitutional Court. Even the German Constitutional Court, however, despite its more careful analysis of the European Parliament’s nature and functioning, seems to overlook recent political science literature on the power and importance of the Parliament in the European polity.

⁴⁵ Weiler, *supra* n. 43, p. 346-347.

⁴⁶ K. Nicolaidis, ‘European Demoicracy and Its Crisis’, 51 *JCMS* (2013) p. 351 at p. 353.

⁴⁷ K. Nicolaidis, ‘Germany as Europe: How the Constitutional Court unwittingly embraced EU demoi-cracy’, 9 *ICON* (2011) p. 786 at p. 790.

Most of the relevant literature seems to support the notion that the European Parliament has gradually acquired many features typical of traditional national parliaments.⁴⁸ First of all, it is an essential policy-maker. In one of the preminent books on the European Parliament, Simon Hix et al. point to the fact that a large proportion of social and economic legislation is now adopted at the European level. And there the European Parliament plays a key role in policy-making because it amends and rejects laws, and influences the make-up and political direction of the Commission. Moreover, the co-decision procedure triggered a dramatic rise in interactions between the European Parliament and the Council which increasingly deliberate informally and contribute to technocratisation and depoliticisation of EU decision making.⁴⁹

Also, the role of political parties in the Parliament has been evolving dynamically for decades. Voting in the Parliament is increasingly structured around the European party position and parties have become more and more coherent over time. However, with the Eastern enlargement when many new national parties entered the Parliament, ideological heterogeneity has increased. The legal threshold has the ability to reduce the number of parties in the Parliament, therefore making deliberations within the European parties smoother. National parties still play the key role in the cohesion of European parties: members of Parliament coming from one national party delegation almost always vote together. Big European parties tend to have greater levels of voting cohesion than the smaller parties. In addition to the classical left-right political conflicts which dominate voting, a second division is present – speed and the nature of European integration.⁵⁰ Links between national parties and their MEPs are gradually becoming stronger, as national parties increasingly coordinate their policy positions with MEPs and occasionally instruct them on how to vote.⁵¹

Of course, taking these academic findings into account would not necessarily determine any specific outcome in the respective cases. If the Czech Court were to take the findings into consideration however, the persuasiveness of its reasoning would definitely increase.

⁴⁸ But one should not jump to conclusions too quickly. Judge and Earnshaw point out that the European Parliament performs defining parliamentary functions of legitimation, linkage and decision-making, but it is disputed whether the EU's political system as such can be defined as a parliamentary model: *supra* n. 10, p. 5-24.

⁴⁹ T. Raunio, 'The European Parliament', in E. Jones et al. (eds.), *The Oxford Handbook of the European Union* (Oxford University Press 2012) p. 365 at p. 368-369.

⁵⁰ S. Hix et al., *Democratic Politics in the European Parliament* (Cambridge University Press 2007) p. 3-10, 93-102 and 136-160.

⁵¹ Raunio, *supra* n. 49, p. 371.

CONCLUSION

The judgments of the Czech and German constitutional courts on the constitutionality of legal thresholds in the European Parliament elections address many minor points (especially the Czech ruling) which could reasonably be questioned and debated. But paying undue attention to every peculiar detail, formulation and footnote would obscure our main point that the divergence between the Czech and the German constitutional courts cannot be explained in purely legalistic terms. After all, both courts adopted the same general framework of analysis: the threshold limits the principle of equal voting power and a three-step proportionality test shall be used to determine its constitutionality. The explanation of their divergence thus has to (at least partially) lie elsewhere.

Admittedly, the most obvious difference between the judgments here analysed could be described as 'legal'. The extensive and quite strict German conception of the equal voting power principle differs from the more relaxed Czech understanding. Still, it remains to be explained what caused the divergence at this level.

The reasoning of the German judgments is perhaps more helpful in this regard as it explicitly lists the reasons for the position of the Karlsruhe judges. Particularly, the German Court emphasised that any state interference with the equality of opportunities of political parties must be strictly scrutinised, because such measures can be used by the respective majority in order to disadvantage its opponents and preserve its power.

The nature of the European Parliament was another important issue. In this regard, both courts admit that the European Parliament is not fully equivalent to 'classical' state parliaments. But only the German Constitutional Court understood this as an argument that even further narrows the room for the legislature to limit the *Erfolgswertgleichheit* principle (and that consequently makes the proportionality test even stricter).

A further significant ingredient contributing to the practical strictness of the proportionality test was the German Court's reluctance to accept the legislature's desire to avert 'purely theoretical' and unsubstantiated dangers as a legitimate aim for the limitation of equal voting power.⁵²

These strict overtones of constitutional scrutiny are missing from the Czech judgment. The majority of judges in Brno did not protect the *Erfolgswertgleichheit* principle so rigorously; it was satisfied that the legal threshold is capable of contributing to the effective representation of the will of citizens in the European Parliament and to its proper functioning.

⁵² BVerfG 26 February 2014, 2 BvE 2/13 and others, paras. 50 and 60.

This may be partly attributed to the general message of the Czech Constitutional Court's previous case law that the equal voting power principle is something that inevitably will and perhaps even should be limited in proportional representation systems for the sake of their effectiveness. But this case law alone could not have been the reason for the divergence – it merely created the opportunity for the Czech Court to decide either way (whereas the German Court was arguably more constrained by its previous case law). Thus, in order to understand the divergence from the Czech point of view, one has to go beyond the text of the judgment.

While the German court viewed the problem through the traditional lens of democracy at the national level⁵³ and the protection of political rights, the Czech judges did not hesitate to adopt a 'euro-friendly' attitude that assigns greater importance to the smooth functioning of the European Parliament and tries to protect it even against barely foreseeable threats.

Consequently, even though both courts adopted the same general framework of constitutional analysis and even worked with the same concepts, they filled the framework and the concepts with different understanding and emphasis. Metaphorically speaking, the judges worked with the same text but used very different lenses to read it.



⁵³ See, in this issue, B. Michel, 'Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice', 12 *EuConst* (2016) p. 133.