Anonymisation updated on: 13 September 2013

State Constitutional Court of Schleswig-Holstein

- LVerfG 9/12 -

Pronounced on 13 September 2013
Thomsen, Judicial Officer and Clerk of the Court

In the Name of the People

In the proceedings
concerning the complaints requesting review of an election

1. {formerly LVerfG 9/12)

1.1 ...

1.2 ...

1.3 ...

1.4 ...

Attorney for 1.1 to 1.4: Dr. Graf Kerssenbrock, attorney-at-law
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24103 Kiel

2. {formerly LVerfG 10/12)

...

Attorney: Sommert, attorney-at-law
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3.1 ...

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3.3 ...

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4. (formerly LVerfG 12/12)

...

against the resolution of the Parliament of Schleswig-Holstein adopted on 26 September 2012 (Schleswig-Holstein Parliament printed paper 18/163, plenary minutes 18/7, page 427, 429)

the Schleswig-Holstein State Constitutional Court with the involvement of

President Flor
Vice-President Schmalz
Justice Brock
Justice Brüning
Justice Hillmann
Justice Thomsen
Justice Welti

pursuant to the oral hearing of 19 June 2013 in its

Judgment

ruled as follows:

The complaints requesting review of an election are dismissed.

A.

1 The subject of the proceedings are the complaints of a number of eligible voters against the resolution adopted by the Parliament of Schleswig-Holstein on 26 September 2012 concerning the validity and result of the elections held on 6 May 2012 (Schleswig-Holstein Parliament printed paper 18/163, plenary minutes 18/7, page 427,429).

I.

2 1. The relevant regulations of the Constitution of Schleswig-Holstein *(Landesverfassung* - LV) at the time of the elections to the Parliament of Schleswig-Holstein read as follows[1]:

3 **Article 3**

Elections and voting

(1) Elections to the representations cf the people in the federal state, in municipalities and municipal associations and voting are general, immediate, free, equal and secret.

(2) [...]

(3) Scrutiny cf elections and voting is the task cf the representations cf the people in each case for their respective constituency. Their decisions are subject to judicial review.

(4) [... l

4 **Article 10**

Function and composition of the Parliament of Schleswig-Holstein

(1) The Parliament cf Schleswig-Holstein is the supreme political decision-making body elected by the people. The Parliament of Schleswig-Holstein elects the

[1] Translator's note: Free translation since there is no official English translation of the Constitution of Schleswig-Holstein available.

Minister-President. It exercises legislative power and controls the executive power. It deals with public affairs.

(2) Members of the Parliament of Schleswig-Holstein are elected according to a procedure which combines candidate-centred elections with the principles of proportional representation. The details are governed by a law which must provide for equalising rnandates in the event of overhang mandates arising.

5 **Article 5**

National minorities and ethnic groups

(1) Declaring membership of a national minority is a free choice; such does not exempt anyone from the general obligations incumbent upon citizens.

(2) The *Land,* the municipalities and municipal associations protect the cultural autonomy and political participation of national minorities and ethnic groups. The national Danish minority and the Frisian ethnic group are entitled to protection and support.

6 **2. Section 3 of the Electoral Act for the Parliament of Schleswig-Holstein (Schleswig-Holstein Electoral Act - *Landeswahlgesetz* - WahlG -) in the version promulgated on 7 October 1991 (Law and Ordinance Gazette of Schleswig-Holstein (GVOBl. Schl.-H.) page 442, corrected page 637), most recently amended by the Act of 30 March 2010 (GVOBl. Schl.-H. page 392) specifies the following:**

Section 3

Election of the members of parliament from the *Land* lists

(1) Any party for which a Landlist has been drawn up and approved can take part in the equalisation mechanism provided a member of parliament has been elected for it in at least one constituency or provided it has won a total of live per cent of the valid second votes cast in the *Land.* These restrictions do not apply to parties of the Danish minority.

(2)-(7) [...]

7 3. Already the Statutes for the *Land* Schleswig-Holstein dated 13 December 1949 (GVOBI. Schl.-H. 1950 page 3) contained the rule that still applies in the same form in what is now Article 5 (1) of the Constitution of Schleswig-Holstein. The Act amending the Statutes for the *Land* Schleswig-Holstein dated 13 June 1990 (GVOBI. Schl.-H. page 391) incorporated Article 5 (2) of the Constitution of Schleswig-Holstein as part of the constitutional reform following the recommendation of the "Constitutional and Parliamentary Reform" special committee.

8 The regulations concerning the Danish minority in Article 5 of the Constitution of Schleswig-Holstein and in Section 3 (1) LWahlG have their origin in the Kiel Declaration of 26 September 1949 (GVOBI. Schl.-H. page 183) issued by the Schleswig-Holstein *Land* Government with the approval of the Parliament of Schleswig-Holstein, and in the Bonn-Copenhagen Declarations of 29 March 1955 (Federal Law Gazette No. 63 of 31 March 1955, page 4). The latter were the result of consultations of the Danish government and the German Federal Government and consisted of a Declaration of the Federal Government by agreement with the Schleswig-Holstein *Land* Government and a Declaration of the Federal Government by agreement with the Danish government. The German *Bundestag,* the Parliament of Schleswig-Holstein and the Danish *Folketing* consented to these Declarations

> (cf. in detail in this regard: published by Jäckel, Die Schleswig-Frage seit 1945, Frankfurt am Main, Berlin 1959, page 71 et seqq.).

9 Both the Kiel Declaration and the Bonn-Copenhagen Declarations were issued with the goal,

> of promoting the peaceful coexistence of the population on both sides of the German-Danish border and consequently also generally encouraging the development of friendly relations between the Federal Republic of Germany and the Kingdom of Denmark.

They reaffirm that the members of the Danish minority like all citizens enjoy the rights guaranteed under the Basic Law *(Grundgesetz* - GG) of the Federal Republic of Germany of 23 May 1949. Even as early as the Kiel Declaration it had been established among other things !hat identifying with Danish national

traditions and Danish culture is a free choice and must not ex officio be challenged or verified (loc. cit., page 184, II. No. 1). This principle was integrated into the Bonn-Copenhagen Declarations (loc. cit., page 5).

10 In Section 3 (1) LWahlG of 27 February 1950 (GVOBl. Schl.-H. page 77) the legislator for the first time adopted into electoral law the basic mandate clause, the 5% threshold and a special rule for parties of national minorities. The latter confined itself to saying that in the case of parties of national minorities the approval of nominations in all constituencies was not a precondition for participation in the equalisation mechanism.

11 By the Schleswig-Holstein Electoral Act of 22 October 1951 (GVOBl. Schl.-H. page 180) the regulation concerning parties of national minorities was repealed and the threshold was raised to 7.5%. This 7.5% threshold was declared by the Federal Constitutional Court in its capacity as the State Constitutional Court for Schleswig-Holstein (see Article 99 Basic Law) to be unconstitutional

> (see Federal Constitutional Court, judgment dated 5 April 1952 - 2 BvH 1/52 -, Federal Constitutional Court decisions *(Bundesverfassungsgerichtsentscheidungen* - BVerfGE) volume 1, page 208 et seqq.).

The 5% threshold still valid today was then enshrined in Section 3 (1) LWahlG of 5 November 1952 (GVOBl. Schl.-H. page 175).

12 Following the Bonn-Copenhagen Declarations, in the Act amending the Schleswig-Holstein Electoral Act of 31 May 1955 (GVOBl. Schl.-H. page 124) the parties of the Danish minority were excepted from the 5% threshold by the insertion of Section 3 (1) Sentence 2 LWahlG which has applied up to now.

13 As a result of the change in the electoral law in 1997 (cf. Act amending the LWahlG of 27 October 1997, GVOBl. Schl.-H. page 462) the second vote was introduced in the case of elections to the Parliament of Schleswig-Holstein.

Section 3 (1) LWahlG remained largely unchanged; the only change was that the word "votes" was replaced by "second votes".

14 4. After the final result of the elections to the Parliament of Schleswig-Holstein of 6 May 2012 (announcement of the *Land* Returning Officer of 18 May 2012, *Amtsblatt für Schleswig-Holstein* (ABl) No. 23 page 499) the valid second votes were attributed as follows:

Christlich Demokratische Union (CDU)	30.8%
Sozialdemokratische Partei Deutschlands (SPD)	30.4%
Freie Demokratische Partei Deutschlands (FDP)	8.2%
Bündnis 901Die Grünen (THE GREENS)	13.2%
Die Linke (THE LEFT)	2.3%
Südschleswigscher Wählerverband (SSW)	4.6%
Piratenpartei (PIRATES)	8.2%
Freie Wähler (Free Voters)	0.6%
Nationaldemokratische Partei Deutschlands (NPD)	0.7%
Familien-Partei (FAMILY PARTY)	1.0%
Maritime Union Deutschland (MUD)	0.1%.

15 The CDU, SPD, FDP, THE GREENS, the SSW and the PIRATES participated in the distribution of the seats from the *Land* lists under Section 3 (1) LWahlG.

16 The 69 seats to be allocated pursuant to Section 3 (3) LWahlG based on the result of the second votes were allocated as follows:

CDU	22 seats
SPD	22 seats
FDP	6 seats
THE GREENS	10 seats
SSW	3 seats
PIRATES	6 seats

17 All of the seats won by the CDU and 13 of those won by the SPD were held as direct mandates and counted under Section 3 (4) LWahlG towards the proportional share of seats. There were no additional seats (Section 3 (5) Sentence 1 LWahlG) which arise and remain if the number of the candidates elected in the constituencies for a party is larger than its proportionale share of seats.

18 The *Land* Returning Officer received 35 appeals against the announced result of the elections to the Parliament of Schleswig-Holstein of 6 May 2012, most of which (with different reasons) considered !hat the participation of the South Schleswig Vaters' Committee (SSW) in the distribution of seats was illegal. After making a preliminary examination of the matter the *Land* Returning Officer passed the appeals for preparation of the election scrutiny by the Parliament of Schleswig-Holstein to its Committee on Interna! and Legal Affairs as the Election Scrutiny Board. The *Land* Returning Officer shared neither the doubts asserted in the appeals as to the fact !hat the SSW is a party of the Danish minority, nor the doubts about the constitutionality of Section 3 (1) LWahlG. In addition, she pointed out !hat only the State Constitutional Court can conduct a constitutional law review of the Schleswig-Holstein Electoral Act (preliminary scrutiny report dated 13 July 2012, Parliament of Schleswig-Holstein printed document 18/45).

19 On 5 September 2012 the Election Scrutiny Board recommended to the Parliament of Schleswig-Holstein !hat the appeals be dismissed and recommended !hat the result of the elections to the Parliament of Schleswig-Holstein held on 6 May 2012 which was determined by the *Land* Electoral Committee and announced by the *Land* Returning Officer be confirmed (Schleswig-Holstein Parliament printed paper 18/163). On 26 September 2012, the Parliament of Schleswig-Holstein with the votes of CDU, SPD, the Greens, FDP, SSW and two votes of the PIRATES parliamentary group decided to accept this recommendation (plenary minutes 18/7, page 427, 429). The

President of the Parliament of Schleswig-Holstein informed each of the appealing parties of this in a notification dated 27 September 2012.

II.

20 The female Complainant and the Complainants who were eligible to vote filed timely administrative appeals against the Parliament of Schleswig-Holstein's resolution dated 26 September 2012 which the Court in its decision dated 8 March 2013 under reference number LVerfG 9/12 has combined for a joint decision. They seek annulment of the Parliament of Schleswig-Holstein's resolution with the aim of repeating the Parliament of Schleswig-Holstein elections; the female Complainant is calling primarily for a change in the resolution and a redeterminalion of the election result in which only those parties which have achieved at least 5% ofthe second votes are taken into account.

21 The female Complainant and the Complainants are of the view !hat it is already doubtful whether there is a Danish minority at all in Schleswig-Holstein, because in their view members of the Danish minority are not recognisable and assimilalion has taken place, and/or the number of members is not proven. In addilion, they assert !hat the SSW is in any case no langer a party of the Danish minority and so the exemption from the 5% threshold under Section 3 (1) LWahlG does not apply to it. Whether the vast majority of members of the SSW belang to the Danish minority, in their view, is not known, especially since even the chairman of the SSW in the Parliament of Schleswig-Holstein is a Frisian. A special commitment to Danish concerns is allegedly no langer recognisable, the SSW instead covers all political fields, in their view, and is not differentiated from other parties. This is allegedly shown by participation in government which was desired and was achieved. The high proportion of second votes which the SSW has achieved outside its original area of activity allegedly proves that the SSW is no langer a party of the Danish minority.

22 In addition, the Complainants consider that Section 3 (1) Sentence 2 LWahlG is unconstitutional. The principle of electoral equality in its form of equality of the success ratios *(Erfolgswerlgleichheit)* as weil as the principle of equal opportunity of the parties would be infringed by exempting parties of the Danish minority from the 5% threshold; since the introduction of the two-vote electoral law these parties are allegedly given too much preference. There is allegedly no compelling ground which can justify a differentiation. Neither, in their view, could such a ground be derived from the Constitution of Schleswig-Holstein or from the Bonn-Copenhagen Declarations. Some of the Complainants also are of the opinion that Section 3 (1) Sentence 2 LWahlG also contravenes Article 3 (3) Basic Law, according to which no person shall be favoured or disfavoured because of parentage or language.

III.

23 1. The Parliament of Schleswig-Holstein and the *Land* Government have given their opinion. They both agree that the complaints requesting review of the elections are without merit. They are of the view that the SSW at present continues to be a party of the Danish minority. The SSW is, in their view, committed in diverse ways to goals and interests of the Danish minority, which can be seen from its constitution and its agenda. The fact that the SSW covers all political fields is no argument against classifying it as a minority party. It has always taken a position in all areas of *Land* politics. The fact that it can now also be elected outside its area of activity of Southern Schleswig and Heligoland, as specified in its constitution, does not adversely impact the continuing and unaltered roots which it has in the Danish minority.

24 In the opinion of the Parliament of Schleswig-Holstein and the *Land* Government, both the 5% threshold itself and the exemption of the parties of the Danish minority from the 5% threshold are constitutional. Both refer to the

established case-law of the Federal Constitutional Court which the State Constitutional Court has adopted as its own. Accordingly, "compelling" or "sufficient" grounds might justify a deviation from the equal treatment of electoral votes.

25 The Parliament of Schleswig-Holstein points out in this regard !hat the 5% threshold is justified in order to ensure and strengthen the functionality of the constitulional order. In its view it is sufficient in this respect if without the threshold the integrative effect of the election is jeopardised and the functioning of the Parliament of Schleswig-Holstein is likely to be disrupted due to the splintering of the range of parties. It considers that this is the case now just as when the 5% threshold was inlroduced. A threshold is, in its view, likely to prevent severe political crises or at least to mitigate their consequences. This concerns both the formation of a government as weil as legislation and adoption of the budget. This assessment is, in its view, confirmed by international comparison with countries with a lower or no threshold: forming a government there is allegedly often a difficult and laborious process.

26 The *Land* Government similarly considers the 5% threshold in Section 3 (1) Sentence 1 LWahlG to be constitutional. It is of the view !hat the legislator is not denied the possibility of regarding the functionality of parliament as a compelling reason for thresholds against parliamentary splinter parties. In this respect it considers !hat the concern is the ability of parliament to fulfil its legislative and government-forming duties. The decisions of the Federal Constitutional Court concerning municipal and European elections cannot, in its view, be transposed to the Parliament of Schleswig-Holstein elections because the Parliament of Schleswig-Holstein elects the Minister-President who depends on the continuing confidence of a majority of the members of parliament. Given the actual political circumstances in Schleswig-Holstein, there was the threat of a splintering of parliament and thereby an impairment of funclionality, which it says is documenled by the election results from the Parliament of Schleswig-Holstein elections of 2009 and 2012.

27 The Parliament of Schleswig-Holstein and the *Land* Government deem that the exemption of the parties of the Danish minority from the 5% threshold in Section 3 (1) Sentence 2 LWahlG is constitutional. The Parliament of Schleswig-Holstein asserts in this regard that the legitimate goal under constitutional law is the political integration of the Danish minority, which under Article 5 (2) Sentence 2 of the Constitution of Schleswig-Holstein is entitled to protection and support. It says that, since, under Article 5 (2) Sentence 1 of the Constitution of Schleswig-Holstein, political participation of national minorities and ethnic groups is subject to the protection of the *Land,* the *Land* is at least entitled if not obligated to make it easier for parties of the Danish minority to be elected to the Parliament of Schleswig-Holstein as a means of political participation.

28 The Parliament of Schleswig-Holstein is of the opinion that Section 3 (1) Sentence 2 LWahlG does not advantage the Danish minority but evens out or equalises the disadvantage that this portion of the electorate is not !arge enough to overcome the 5% threshold with any certainty. The concern for good relations between Germany and Schleswig-Holstein and the neighbouring state of Denmark, it says, prompted the legislator to exclude the parties of the Danish minority from the threshold. The legislator also wanted by including the Danish minority in the political decision-making to eliminate tensions which have arisen due to the special position in the border region and might arise again at any time, according to Parliament. The legislator thereby fulfilled a significant part of its constitutional law obligation under Article 5 (2) Sentence 2 of the Constitution of Schleswig-Holstein. In its view, integrating the Danish minority into *Land* politics in the sense of a good neighbourly, trusting relationship of the ethnic groups with each other and undisturbed relations with Denmark benefits all residents of Schleswig-Holstein.

29 Nor, in the view of the Parliament of Schleswig-Holstein, are parties of the Danish minority excessively advantaged by the fact that they are included in the *Land-wide* equalisation mechanism. This, it says, is rather a consequence of the

Schleswig-Holstein two-vote electoral law which applies uniformly and without limitation throughout the federal state.

30 The *Land* Government emphasises that the *Land* legislator under the principles of a democratic state governed by the rule of law according to Article 28 (1) Sentence 1 and 2 of the Basic Law has autonomous latitude in configuring the electoral system so that it may design the ancillary requirement of equality of success ratios *(Erfolgswerlgleichheit)* in a limited way. Here a compelling ground for the special electoral law provision for parties of the Danish minority is evident, it says, first from Article 5 (2) Sentence 1 and 2 of the Constitution of Schleswig-Holstein, but also directly from federal law considerations. Nor does Section 3 (1) Sentence 2 LWahlG contravene Article 3 (3) Basic Law, which does not apply in electoral law. Regardless of this, the ban against disfavouring a person because of its parentage, it says, would not be relevant either based on the facts because belonging to a minority does not stem from the family history of the person but solely from the free choice to identify with the minority.

31 2. The *Land* Returning Officer in her opinion (as before in the preliminary scrutiny procedure) is of the view that there is no reason to challenge SSW's recognition as a party of the Danish minority. She is of the opinion that neither the rule concerning the 5% threshold nor the exception from such threshold for parties of the Danish minority is unconstitutional.

32 3. The complaint requesting review of an election is without merit also in the view of the SSW parliamentary group in the Parliament of Schleswig-Holstein. The SSW claims that it continues to be a party of the Danish minority as the representation of the Danish minority and the national Frisians and that it fulfils the factual preconditions for the exemption from the threshold. In particular, neither the fact that it addresses general topics nor its participation in government would result in its losing its status as a party of the Danish minority. This already follows, it says, from the range of responsibilities of a party as

defined by statute and the scope of the mandate of members of parliament. It argues based on its agendas and activities in the Parliament of Schleswig-Holstein since the 1st legislative period that it has always taken a position in all political areas. In addition, in the view of the Parliament, its interrelationship with the institutions of the Danish minority is evident.

33 In the view of the SSW parliamentary group in the Parliament of Schleswig-Holstein, Section 3 (1) Sentence 2 LWahlG also holds up to scrutiny under constitutional law. The exemption from the 5% threshold, it says, does not encroach on the equality of the success ratios *(Erfolgswertgleichheit)* and equal opportunity of the parties but is justified in order to even out a disadvantage. It refers in this regard to mathematical calculations. The SSW, in its view, is not a splinter party. Legitimate grounds for its exemption from the 5% threshold are Article 5 (2) of the Constitution of Schleswig-Holstein, the integrative function of the elections and the commitment of the Federal Republic of Germany and Schleswig-Holstein to the Bonn-Copenhagen Declarations. It says that equally suitable less radical measures to achieve the desired goals do not exist. The grounds for the exemption from the 5% threshold are in its view more important than the relatively minor encroachment on electoral equality.

34 4. The **FDP** parliamentary group in the Parliament of Schleswig-Holstein is of the view that a mandate in favour of the SSW may be awarded only with one seat. In this regard it refers to an expert opinion commissioned by it (Becker, *Die wahlrechtliche Privilegierung von Parteien der dänischen Minderheit in Schleswig-Holstein <§ 3 Abs. 1 Satz 2 LWahlG> Gesetzliche Voraussetzungen und verfassungsrechtliche Rechtfertigung* (Electoral law preference of parties of the Danish minority in Schleswig-Holstein <Section 3 (1) Sentence 2 LWahlG>, Statutory preconditions and justification under constitutional law), Dänischenhagen 2013). Article 1O (2) Sentence 2 of the Constitution of Schleswig-Holstein, even more urgently than the Basic Law, it says, guarantees the fundamental concept of electoral equality. The rule in Section 3 (1) Sentence 2 LWahlG is, it says, a reverse exception from a restriction of the electoral

equality principle (the 5% threshold) and must be assessed in connection therewith. The rule would give parties of the Danish minority an advantage over other parties. This kind of unequal treatment, it says, cannot generally be justified by the integrative function of the election. The integration of national minorities is, in its view, indeed a legitimate goal of the Schleswig-Holstein electoral legislation, but is not required under Article 5 (2) of the Constitution of Schleswig-Holstein. It says that the rule in Section 3 (1) Sentence 2 LWahlG is likely to achieve the legitimate goal, but not necessary. A regionalised rule restricted to Southern Schleswig would be a less radical way to achieve this. Similarly, it would be possible, if a party of the Danish minority feil below the 5% threshold, to have it participate only with the first person on the Landlist in the equalisation mechanism. The Danish minority is significant, according to the parliamentary group, not due to its number of votes but due to its social reference persons. Their integration, it says, will not be further strengthened by the fact that they are represented by several members of parliament.

35 5. In the view of the Pirates parliamentary group in the Parliament of Schleswig-Holstein, the 5% threshold can no langer be justified because it is still possible to form government coalitions even without the 5% threshold. This was proven, it says, by the circumstances in other European states in which the threshold does not apply. The special rule for the SSW would also be eliminated then without impeding representation of the Danish minority in the Parliament of Schleswig-Holstein.

B.

36 The complaint against the decision of the Parliament of Schleswig-Holstein dated 26 September 2012 concerning the validity and the result of the Parliament of Schleswig-Holstein elections of 6 May 2012 was referred to the State Constitutional Court pursuant to Article 3 (3) Sentence 2 and Article 44 (2) No. 5 of the Constitution of Schleswig-Holstein, Section 3 No. 5 of the Act

concerning the Schleswig-Holstein State Constitutional Court *(Gesetz über das Schleswig-Holsteinische Landesverfassungsgericht* - LVerfGG). Accordingly the scrutiny of elections deals with the legality of the decision by the Parliament of Schleswig-Holstein concluding the scrutiny of elections and the assumption by it that the election was valid (see also Article 3 (3) Sentence 2 and Article 44 (2) No. 5 of the Constitution of Schleswig-Holstein, Section 50 (1) LVerfGG, Section 43 (2) LWahlG). Vaters whose appeals the Parliament of Schleswig-Holstein has dismissed are authorised to file the complaint (Section 49 (1) No. 2 LVerfGG).

C.

37 The admissible election scrutiny complaints are unfounded. The decision of the Parliament of Schleswig-Holstein of 26 September 2012 is lawful. The SSW rightly participated in the equalisation mechanism with 4.6% of the valid second votes and has three members of parliament representing it in the Parliament of Schleswig-Holstein. The result of the Parliament of Schleswig-Holstein elections that was determined cannot be argued with. The objection as to the erroneous applicalion of Section 3 (1) Sentence 2 LWahlG to the SSW (1.) and that of the unconstitutionality of Section 3 LWahlG (II.) both fail.

1.

38 Application of the simple electoral law shows no electoral errors. In the process the State Constitutional Court must interpret the relevant laws itself and use them as the standard for electoral scrutiny

> Uudgment dated 30 August 2010 - LVerfG 1/10 -, marginal note 46, State Constitutional Court decisions (LVerfGE) volume 21, page 434 et seqq. = *Schleswig-Holsteinische Anzeigen* (SchlHA) 2010, page 276 et seqq. = *Zeitschrift für Öffentliches Recht in Norddeutschland* (NordÖR) 2010, page 401 et seqq. = *JuristenZeitung* (JZ) 2011, page 254 et seqq., Juris, marginal note 50; see also

Federal Constitutional Court, decision dated 26 February 1998 - 2 BvC 28/96 -, BVerfGE volume 97, page 317 et seqq., Juris, marginal note 15 and judgment dated 3 July 2008 - 2 BvC 1/07 inter alia -, BVerfGE volume 79, page 169 et seqq., Juris, marginal note 90; Schreiber, *Bundeswahlgesetz,* 8th edition 2009, Section 49 marginal note 34 with further references).

39 For the elections to the 18th Parliament of Schleswig-Holstein, Section 3 (1) Sentence 2 LWahlG was correctly applied to the SSW.

40 According to Section 3 (1) Sentence 2 LWahlG, the restrictions provided in Sentence 1 of the regulation concerning the participation in the equalisation mechanism (for a party, either a member of parliament must have been elected in at least one constituency or it must have achieved a total of five per cent of the valid second votes cast in the *Land)* do not apply to parties of the Danish minority. It is a party of the Danish minority if this is a party as defined in Section 2 (1) Sentence 1 Political Parties Act *(Parteiengesetz* - PartG) (1.), there is still a Danish minority (2.), and the party has emerged from the Danish minority and continues to be backed and shaped by it (3). The SSW is accordingly a party of the Danish minority.

41 1. The SSW is a party as defined in Section 2 (1) Sentence 1 PartG. Parties are associations of citizens who set out to influence either permanently or for a lengthy period of time the formation of political opinions at national level or at the level of the federal states state level and to participate in the representation of the people in the German Bundestag or federal state parliaments provided that they offer sufficient guarantee of the sincerity of their aims in the general character of their circumstances and attendant conditions, particularly with regard to the size and strength of their organisation, the number of registered members and their public image.

42 These preconditions are met by the SSW, which since it was formed in 1948 has regularly taken part in elections to the Parliament of Schleswig-Holstein

(cf. Kühl, *Dänische Minderheitenpolitik in Deutschland, Südschleswigscher Wählerverband* <SSW>, in: Kühl/ Bohn, *Ein europäisches Modell?* Bielefeld 2005, page 142, 147 et seqq.).

43 2. There also continues to be a Danish minority in Schleswig-Holstein. Its existence is acknowledged by Article 5 (2) Sentence 2 of the Constitution of Schleswig-Holstein which was not adopted until the constitutional reform through the Act amending the *Land* Statutes for Schleswig-Holstein *(Gesetz zur Änderung der Landessatzung für Schleswig-Holstein)* of 13 June 1990 (GVOBl. Schl.-H. page 391). The *Land* constitutional legislator has currently confirmed this provision by extending the entitlement to protection and support in Article 5 (2) Sentence 2 of the Constitution of Schleswig-Holstein by the Act amending the Constitution of Schleswig-Holstein *(Gesetz zur Änderung der Landesvelfassung Schleswig-Holstein)* of 28 December 2012 (GVOBl. Schl.-H. 2013 page 8) to "the minority of the German Sinti and Roma" but leaving the regulation concerning the Danish minority and the Frisian ethnic group unchanged. The Federal Republic of Germany in its consent to the Framework Convention for the Protection of National Minorities of 1 February 1995 (Federal Law Gazette (BGBl.) 1997 II page 1406) also assumed that a Danish minority exists in Schleswig-Holstein. The German Federal Government when it signed the Framework Convention on 11 May 1995 expressly declared that national minorities in the Federal Republic of Germany include Danes of German nationality (BGBl. 1997 II page 1418). Finally, the minority reports of the *Land* Government provide detailed evidence of the continued existence and activity of the Danish minority

(last version: *Bericht der Landesregierung zur Minderheiten- und Volksgruppenpolitik in der 17. Legislaturperiode* (Report of the *Land* Government concerning minority and ethnic group policy in the 1?[1h] legislative period) (2009 - 2012) - Minority Report 2011, Schleswig-Holstein Parliament printed paper 17/2025, page 37 et seqq.).

44 Furthermore, the Danish minority is also noticeable for instance through its schools, the Danish cultural association *Sydslesvigsk Forening* (SSF) with its

institutions and events and through the Danish language newspaper *Flensborg Avis* in northern Schleswig-Holstein (Southern Schleswig).

45 3. A party is a party of the Danish minority if it emerged from the minority and it is currently staffed by the minority and its program is shaped by it

> (as confirmed by Schleswig Higher Administrative Court, decision dated 25 September 2002 - 2 K 2/01 -, SchlHA 2003, page 19 et seqq. = *Rechtsprechungs-Report* of the *Neue Zeitschrift für Verwaltungsrecht* (NVwZ-RR) 2003, page 161 et seqq. = NordÖR 2003, 61 et seqq. = JZ 2003, 519 et seqq., Juris, marginal note 36; Kühn, *Privilegierung nationaler Minderheiten im Wahlrecht der Bundesrepublik Deutschland und Schleswig-Holsteins* [Favouring of national minorities in the electoral law of the Federal Republic of Germany and Schleswig-Holstein], Frankfurt am Main 1991, page 4; Becker, *Die wahlrechtliche Privilegierung von Parteien der dänischen Minderheit in Schleswig-Holstein* [Favouring of parties of the Danish minority in Schleswig-Holstein under electoral law], <Section 3 (1) Sentence 2 LWahlG SH>, Statutory preconditions and constitutional law justification, Dänischenhagen 2013, page 13).

These preconditions apply to the SSW at the time of the 2012 elections to the Parliament of Schleswig-Holstein. The objections filed against it are without foundation.

46 The specified characteristics follow from the very wording of the Act, which says that the restrictions in Section 3 (1) Sentence 1 LWahlG do not apply to parties "of the" Danish minority. Since the legislator has not excluded parties "for" the Danish minority from the threshold, it cannot be taken from the wording that the parties covered by Section 3 (1) Sentence 2 LWahlG must be geared in terms of personnel, topics and agendas exclusively to the Danish minority or could only be elected by their members. Both electability and election by all electors, i.e. including non-members of the minority, and the handling of all political topics are also a necessary part of being a party, as is mandated under national law by Article 21 Basic Law and Section 2 (1) Sentence 1 PartG; they are an expression of the integrative function that parties are accorded in the democratic structure. Unless it were shaped by the Danish minority in terms of its personnel and agenda, however, it would not be classed as a party because otherwise

there would be no relationship, as stipulated in the law, with the minority. In this respect the party must have emerged from the minority and must also still be backed and shaped by it currently.

47 a) The SSW as a party emerged from the Danish minority. It was formed in 1948 as a party of the Danish minority in Southern Schleswig and the national Frisians in North Frisia as the South Schleswig Vaters' Committee. Previously the British occupying power had already temporarily accorded the Danish minority national minority status and its cultural organisation, the SSF, political party status for the 1947 elections to the Parliament of Schleswig-Holstein. After the Parliament of Schleswig-Holstein elections recognition of this status was again withdrawn from the SSF because it was committed to annexing the northern part of Schleswig-Holstein to Denmark and/or treating it as independent territory. The SSW was subsequently created to represent the interests of the minority politically, in addition to the SSF which was henceforth exclusively active in the cultural area

(see Kühl, loc. cit., page 142 et seqq.; Kühn, loc. cit., page 43 et seq. with further references).

48 aa) The close interrelationship of the SSW with the Danish minority is also reflected in the historical development of Section 3 LWahlG:

49 The first version of Section 3 LWahlG dated 31 January 1947 (ABl page 95) contained no special regulation for national minorities. In the election to the Parliament of Schleswig-Holstein in 1947 the SSF won 9.27% of the total valid votes cast in the *Land.* It was represented in the Parliament of Schleswig-Holstein with two constituency candidates (constituencies of Flensburg I City and Flensburg II Glücksburg) and four further seats which it received via the Landlist

(see announcement of the *Land* Returning Officer of the final result of the elections to the Parliament of Schleswig-Holstein on 20 April and 18 May 1947 dated 8 August 1947, ABl page 399).

50 The SSW that was then formed, which had put forward candidates only in Southern Schleswig, achieved 5.5% of the votes in the 1950 Parliament of Schleswig-Holstein elections; it entered the Parliament of Schleswig-Holstein with two direct candidates and another two candidates elected from the Landlist

> (see announcement of the *Land* Returning Officer of the final result of the elections to the Parliament of Schleswig-Holstein on 9 July 1950 dated 17 July 1950, ABl page 328).

51 The Schleswig-Holstein Electoral Act of 27 February 1950 (GVOBl. Schl.-H. page 77) contained for the first time a 5% threshold and a special rule for parties of national minorities, according to which in the case of parties of national minorities admission of election nominations in all constituencies was not a precondition for participation in the equalisation mechanism. The regulation referred, both according to the understanding of the legislator

> (see Parliament of Schleswig-Holstein minutes dated 21 December 1949, page 33 et seqq. and 27 February 1950, page 48; see in this regard also Kühn, loc. cit., page 67 et seqq. with further references)

and according to the case-law of the Higher Administrative Court which had jurisdiction at the time,

> (see Lüneburg Higher Administrative Court, judgment dated 19 June 1950 - II OVG A 243/50 -, decisions of the higher administrative courts for the *Land* North Rhine-Westphalia in Münster as weil as for the *Land* Lower Saxony and the *Land* Schleswig-Holstein in Lüneburg (OVGE MüLü.) volume 2, page 157, 173)

to the SSW.

52 The 7.5% threshold introduced by the Schleswig-Holstein Electoral Act of 22 October 1951 (GVOBl. Schl.-H. page 180) was declared unconstitutional by the Federal Constitutional Court in its judgment dated 5 April 1952 (- 2 BvH 1/52 -, BVerfGE 1, 208 et seqq.) because it contravened the principle of electoral equality. The Parliament of Schleswig-Holstein subsequently amended the

Electoral Ac! and enshrined the 5% threshold in Section 3 (1) LWahlG instead of the 7.5% threshold (LWahlG of 5 November 1952, GVOBI. Schl.-H. page 175).

53 After the SSW in the election to the German Bundestag on 6 September 1953 only received 3.3% of the second votes cast in Schleswig-Holstein (for the 1949 Bundestag election the percentage was 5.4% and for the 1950 Parliament of Schleswig-Holstein election 5.5%), it once more appealed to the Federal Constitutional Court because it considered the 5% threshold in the Schleswig-Holstein Electoral Act to be unconstitutional without a special rule for parties of a national minority. The Federal Constitutional Court in its judgment of 11 August 1954 (- 2 BvK 2/54 -, BVerfGE 4, 31 et seqq.) left the regulation as it was without objection.

54 Following the Bonn-Copenhagen Declarations the version of Section 3 (1) Sentence 2 LWahlG, which still applies today, was introduced by the Act of 31 May 1955 (GVOBI. Schl.-H. page 124). This regulation was specifically tailored tothe SSW

> (see motion of the SSW parliamentary group of 9 April 1954, Schleswig-Holstein Parliament printed paper 2/573, plenary minutes 82nd session of27 April 1954, page 1531 et seqq.).

55 bb) The fact !hat the SSW since it commenced its activity has been understood to also represent the Frisians makes no difference. It stemmed from the historically interlinked movements of the national Frisians and the Danish minority. This was known to the legislator when Section 3 (1) Sentence 2 LWahlG was created and in its view it was not an impediment to regarding the SSW as a party of the Danish minority

> (see also Schleswig Higher Administrative Court, decision dated 25 September 2002 - 2 K 2/01 -, SchlHA 2003, 19 et seqq. = NVwZ-RR 2003, 161 et seqq. = NordÖR 2003, 61 et seqq. = JZ 2003, page 519 et seqq., Juris, marginal note 44 with further explanations in this regard).

56 b) The SSW is also at present staffed by the Danish minority and its agendas are shaped by it.

57 aa) The interrelationship of the SSW's members with the Danish minority is evident in particular from the dual membership of a large number of individuals who are involved both in the SSW and in the other organisations of the minority. They cooperate in the Southern Schleswig Joint Council for the Danish minority (Dei Sydslesvigske Samräd) and coordinate their joint approach

(see Minorities Report 2011, Schleswig-Holstein Parliament prinled paper 17/2025, page 37).

58 The organisations of the Danish minority include, in addition to the SSW and the SSF, the Danish church in Southern Schleswig *Oansk Kirke i Sydslesvig,* the Danish school association for Southern Schleswig *Dansk Skoleforening for Sydslesvig e. V.,* the Danish youth associations in Southern Schleswig *Sydslesvigs danske Ungdomsforeninger* (SdU), the Danish central library for Southern Schleswig *Oansk Centralbibliotek for Sydslesvig,* the Danish health service *Oansk Sundhedstjeneste for Sydslesvig,* the Danish college of further education *Jarup!und H0jskole* and the daily newspaper *Flensborg Avis*

(see Minorities Report 2011, loc. eil., page 153 et seq.).

59 According to information of the SSW at Landlevel, of the 3,660 members of the SSW, 78% are also members of the SSF, the Danish cultural association, and around 2% are members of the Friisk Foriining, the Frisian cultural association. Many are additionally members of Skoleforening, SdU, Dansk Kirke etc., but there are no statistics about these. All leading politicians of the SSW are members of the Danish cultural association or held positions there. The vast majority of the chairmen and leading officials of the organisations of the Danish minority are in any case members of the SSW or even active in the party's municipal politics and organisation

(see File 08 Document 01 of the opinion of the SSW concerning the proceedings).

No specific grounds for doubting this information have been submitted in the proceedings.

60 bb) The SSW's agenda is also shaped by the minority, as can be seen from its statutes, its agendas and its cooperation with the local associations in its area of activity of Southern Schleswig and Heligoland, the ancestral settlement area of the Danish minority and the Frisian ethnic group. This is not altered in any way by either the electability of the list throughout the federal state nor the exercise of a general political mandate.

61 (1) Section 2 No. 2 of the SSW statutes reads[2]:

> (...) The party, based on the Basic Law of the Federal Republic of Germany, the Constitution of Schleswig-Holstein, its statutes and the framework and action programmes, participates in political decision-making.
>
> The SSW is the political representation of the Danish minority and the national Frisians in Southern Schleswig and feels a particular obligation to them, but at the same time also intends to serve the good of all citizens in Schleswig-Holstein.
>
> The SSW is committed to a democratic form of life and society which is characterised by social justice, mutual respect and respect for our fellow man based on the Nordic model.
>
> The SSW intends to participate in fostering understanding between the peoples and in cooperation in Europe. Its politics are free and independent.

62 The understanding of the Nordic legal tradition, which is a guiding principle for the party's actions, is incorporated in the various agendas of the SSW. For

[2] Translator's note: Free translation since there is no official English translation of the SSW statutes available.

example, the Framework Agenda which has applied since 13 February 1999 says that

> (...) the basic values of the SSW (...) (are) shaped primarily by our special status as a minority party, our regional roots in North Schleswig-Holstein and our special connection with the Nordic countries.[3]

63 The election agenda for the Parliament of Schleswig-Holstein elections of 2012 contains, on the one hand, statements regarding general *Land* policy. On the other hand, there is evidence of an explicitly Danish orientation such as, for example, in school policy, university cooperation, recognition of professional qualifications, cross-border health services offered, sharing of experience with border regions and the transport infrastructure connecting the area with Denmark

(cf. 2012 SSW election agenda, page 20 et seqq.).

This also includes the demand that the support of the Danish school association *Dansk Skoleforening for Sydslesvig e. V.* be again enshrined in the *Land's* School Act at 100% of public student costs, thereby restoring equal treatment of the children at the Danish schools

(cf. 2012 SSW election agenda, page 50).

64 (2) Nor does the SSW lose its distinctive character because its activity goes beyond a specific minority policy.

65 (a) The fact that since the introduction of the two-vote electoral law by the Act amending the Schleswig-Holstein Electoral Act of 27 October 1997 (GVOBl. Schl.-H. page 462) the SSW can be elected *Land-wide* does not conflict with its status as a party of the Danish minority.

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[3] Translator's note: Free translation since there is no official English translation of the SSW Framework Agenda available.

66 The change in the electoral law cannot in and of itself influence the status of the SSW as a minority party

> (see also Federal Constitutional Court, decision dated 17 November 2004 - 2 BvI 18/02 -, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2005, page 205 et seqq. = NordÖR 2005, page 19 et seqq., Juris, marginal note 25 et seqq.).

It would otherwise be up to the majority to cancel the minority party status by means of a corresponding electoral law. The SSW had moreover expressly spoken out against the change in the electoral law

> (cf Schleswig-Holstein Parliament printed paper 14/39, plenary minutes 14/37, page 2449 - second reading of the bill amending the LWahlG, contribution of member of parliament Spoorendonk -).

67 In addition, direct candidates of the SSW for the Parliament of Schleswig-Holstein since 1997, as before, are only nominated in Southern Schleswig and in the constituency Pinneberg Nord (Heligoland) although it would have been possible for the SSW even before the change in the electoral law to nominate candidates in all constituencies

> (see Federal Constitutional Court, decision dated 17 November 2004, loc. cit., Juris, marginal note 27 with reference to the minutes 14/32 of the preparatory meeting of the Committee on Interna! and Legal Affairs of 13 August 1997, page 14 and the contributions in the plenary minutes 14/37, page 2445 et seqq.).

68 It is true that the change in the electoral law led to the SSW list being electable throughout the federal state, but its character as a party of the Danish minority in political reality was not materially changed. The SSW's higher profile which has arisen throughout the federal state because of the electability of its list is not enough for such a fundamental shift in its character as a minority party.

69 (b) Restrictions in gearing the agenda to minority-specific topics (as the Complainants considered would be appropriate) would contradict not only the

wording of Section 3 (1) Sentence 2 LWahlG but also its meaning and intent by which the specifications of the Bonn-Copenhagen Declarations are to be fulfilled (<aa>) and the Danish minority is to be integrated into the general body politic of the majority (<bb>). Restricting the electability of the SSW to members of the minority would also conflict with the specific *Land* constitutional law regulations to which the provision relates (<cc>).

70 (aa) As a result of the German-Danish talks, the Federal Foreign Office, in the formal statement to the Bonn-Copenhagen Declarations of 29 March 1955 (Bundesanzeiger No. 63 dated 31 March 1955, page 4), expressly stated under 1. No. 3:[4]

> The *Land* Government of Schleswig-Holstein has informed the Federal Government that it is ready to:
>
> a) work towards the Parliament of Schleswig-Holstein adopting an exclusionary provision from the 5% threshold in Section 3 of the Schleswig-Holstein Electoral Act in favour of the Danish minority as soon as possible; (...).

The Schleswig-Holstein legislator fulfilled this promise by inserting, by the Act amending the Schleswig-Holstein Electoral Act of 31 May 1955 (GVOBl. Schl.-H. page 124), Section 3 (1) Sentence 2 LWahlG, which up to now still applies unchanged.

71 (bb) Section 3 (1) Sentence 2 LWahlG aims, in line with the nature of the election which is specified under constitutional law as being an integrative process in political decision-making, to ensure the representation of the Danish minority as a politically significant movement in parliament.

72 Representation of recognised national minorities is always politically significant

> (see also Federal Constitutional Court, decisions dated 14 February 2005 - 2 BvI 1/05 -, SchlHA 2005, page 128 et seqq. = NVwZ 2005, page 568 et seqq. = NordÖR 2005, page 106 et seqq., Juris, marginal

[4] Translator's note: Free translation since there is no official English translation of this text available.

note 34 and dated 13 June 1956 - 1 BvR 315/53 inter alia -, BVerfGE volume 5, page 77 et seqq., Juris, marginal note 22; judgment dated 23 January 1957 - 2 BvE 2/56 -, BVerfGE volume 6, page 84 et seqq., Juris, marginal note 34).

The international community of states, and in particular Denmark, is involved in dealing with the Danish minority in Schleswig-Holstein. For after the Federal Republic of Germany, during the signing and ratification of the Framework Convention for the Protection of National Minorities, explicitly declared that inter alia Danes of German nationality were a national minority in the Federal Republic (BGB!. II of 29 July 1997 page 1418), Denmark for its part declared that the Framework Convention for the Protection of National Minorities applied to the German minority in South Jutland (Northern Schleswig) in the Kingdom of Denmark

(see Denmark's declaration of 22 September 1997 on the application of the Framework Convention for the Protection of National Minorities, publication by Kühl/ Bahn, *Ein europäisches Modell?* [A European Model?] Bielefeld 2005, page 553).

Representation of the Danish minority in the Parliament of Schleswig-Holstein prevents the minority from instead feeling allegiance to another country (Denmark) and from separatist tendencies arising as a result of exclusion. In addition, this enables the specific concerns of the national minority to be taken account of in the political decision-making process and the values represented by the minority can influence the work of parliament.

73 It is true that a party of the Danish minority exercises the intermediary function it has in political decision-making for a certain portion of the country's population (for German citizens who identify with the Danish minority)

(cf. Pieroth, *Begriff der Parlei der dänischen Minderheit und die Verfassungsmäßigkeit ihrer Privilegierung im Schleswig-Holsteinischen Landeswahlrecht* [The term "Party of the Danish minority" and the constitutionality of preferential treatment in Schleswig-Holstein's *Land* electoral law], Parliament of Schleswig-Holstein printed document 15/634, page 14).

Since, however, the political debate and the exerting of influence of a party within the meaning of Article 21 Basic Law, whose principles apply not only in Germany as a whole but also directly in the individual federal states,

> (Federal Constitutional Court, judgments dated 5 April 1952 - 2 BvH 1/52 -, BVerfGE volume 1, page 208 et seqq. Juris, marginal note 64 and dated 24 January 1984 - 2 BvH 3/83 -, BVerfGE volume 66, page 107et seqq., Juris, marginal note 23 with further references, established case-law),

are intrinsic, a party must according to Section 2 (1) Sentence 1 PartG pursue the goal of exerting influence on the political decision-making process permanently or for a fairly lengthy period at national level or at the level of the federal states and of participating in representing the entire population in the German *Bundestag* or in a *Land* parliament

> (cf. Lenski, PartG, 1st edition 2011, Section 2 marginal note 7).

74 Having its agendas shaped by the minority therefore does not mean !hat the party could be restricted to minority-specific topics. The concern for integration is only met if the party of the Danish minority is not limited to vested interests; otherwise it would be unelectable even for the minority itself because there would be no attempt made to participate in the political decision-making

> (cf. Pieroth, loc. cit., page 28 et seq.).

75 The SSW's statement !hat it wants to work for everyone in its sphere of activity and take a position on all issues of *Land* policy expresses this concept of integration. The legitimate goal of wishing to assume governmental responsibility is also supported by the Danish minority. The joint council of Danish minority organisations *Sydslesvigsk Samrad* wanled, according to the resolution of 24 January 2011, to campaign for a change in government. This can be understood as a call to the SSW by the Danish minority to participate in a change in government.

76

(cc) Finally, restrictions on electability were contrary to the principle of secret elections (Article 3 (1) of the Constitution of Schleswig-Holstein) and the freedom of identifying with the minority (Article 5 (1) half-sentence 1 of the Constitution of Schleswig-Holstein). Since both the demand for disclosure of the elected party is prohibited

> (cf. Caspar, in: Caspar/Ewer/Nolte/Waack <Editors>, *Verfassung des Landes Schleswig-Holstein* [Constitution of Schleswig-Holstein], 2006, Article 3, marginal note 71 et seqq.; Achterberg/Schulte, in: von Mangoldt/Klein/Starck, volume 2, 6th edition 2010, Article 38, marginal note 151 et seq.; Trute, in: von Münch/Kunig, *GG-Kommentar* [Commentary on the Basic Law], volume 1, 6th edition 2012, Article 38, marginal note 65 et seqq.},

and verification of the national profession of identity by means of objective criteria such as, for instance, parentage or the speaking of a foreign language is excluded,

> (cf. Section II Clause 1 of the "Kiel Declaration" of 26 September 1949, GVOBI. Schl.-H. page 183 et seq.; von Mutius, in: von Mutius/Wuttke/Hübner, *Kommentar zur Landesverfassung* [Commentary on the *Land* Constitution], 1995, Article 5, marginal note 5; Riedinger, in: Caspar/Ewer/Nolte/ Waack <Editors>, *Verfassung des Landes Schleswig-Holstein* [Constitution of Schleswig-Holstein], 2006, Article 5, marginal note 10; Köster, *Der Minderheitenschutz nach der schleswig-holsteinischen Landesverfassung* [Protection of minorities under the Schleswig-Holstein Constitution], Bredstedt 2009, page 34 et seqq.; Lemke, *Nationale Minderheiten und Volksgruppen im sch/eswig-holsteinischen und übrigen deutschen Verfassungsrecht* [National minorities and ethnic groups in Schleswig-Holstein and other German constitutional law], Kiel 1998, page 242 et seqq.),

it is not possible to determine the persons that are addressed by the party activity and that may be the electorate of an individual party.

II.

77 The 5% threshold specified in Section 3 (1) Sentence 1 LWahlG is compatible with the Constitution of Schleswig-Holstein. It does not contravene either the principle of electoral equality (Article 3 (1) and Article 1O (2) of the Constitution of Schleswig-Holstein) or the requirement of equal opportunity of the parties

(Article 3 (1) of the Constitution of Schleswig-Holstein in conjunction with Article 21 (1) Basic Law) (1.). Also the exemption of the parties of the Danish minority from the 5% threshold specified in Section 3 (1) Sentence 2 LWahlG cannot be argued with. In this regard, Article 2a of the Constitution of Schleswig-Holstein in conjunction with Article 3 (3) Sentence 1 Basic Law in the present context is not an appropriate standard (2.). Section 3 (1) Sentence 2 LWahlG does affect electoral equality when characterised as equality of the success ratios *(Erfolgswertgleichheit)* and equal opportunity of the parties. The provision is, however, justified by compelling grounds (3.).

78 1. The electoral principles in Article 3 (1) of the Constitution of Schleswig-Holstein are in line with those which, according to Article 38 (1) Sentence 1 Basic Law, apply to the elections to the German Bundestag. The *Land* is bound by them under Article 28 (1) Sentence 2 Basic Law. Therefore recourse may be had, in interpreting Art 3 (1) of the Constitution of Schleswig-Holstein, to the case-law of the Federal Constitutional Court concerning Article 38 (1) Sentence 1 Basic Law provided no crucial differences arise from the electoral systems. Provided they adhere to the principles of Article 28 Basic Law the *Laender* have autonomous latitude in designing their electoral system

> Qudgment dated 30 August 2010 - LVerfG 1110 -, marginal note 90 with further references, LVerfGE 21, 434 et seqq. = SchlHA 2010, page 276 et seqq. = NordÖR 2010, page 401 et seqq. = JZ 2011, page 254 et seqq., Juris, marginal note 95).

79 a) Electoral equality requires that all citizens of Germany are able to vote and stand as a candidate as equally as possible. The Electoral Act, according to Article 10 (2) Sentence 2 of the Constitution of Schleswig-Holstein, organises the details of the electoral system stipulated in Article 10 (2) Sentence 1 of the Constitution of Schleswig-Holstein as candidate-based proportional representation. In this system the votes of all voters, looked at before the event, must have the same value when counted and have the same chance of success

> Qudgment dated 30 August 2010, marginal note 91 et seqq., loc. cit., Juris, marginal note 96 et seqq.; Federal Constitutional Court,

judgment dated 10 April 1997 - 2 BvC 3/96 -, BVerfGE volume 95, page 408 et seqq., Juris, marginal note 41).

80 The same requirements must also be met by the electoral law with regard to the equal opportunity of the parties which is guaranteed under constitutional law in Article 3 (1) of the Constitution of Schleswig-Holstein in conjunction with Article 21 (1) Basic Law

(see Federal Constitutional Court, judgment dated 10 April 1997, loc. eil., Juris, marginal note 42).

81 Equal opportunity of the parties means for proportional representation !hat all parties are represenled in the body that is to be elected in a ratio that comes closest to the number of votes and !hat every party and group of voters are as a matter of principle granted the same chances in the distribution of the seats

(see BVerfGE, judgments dated 13 February 2008 - 2 BvK 1/07 -, BVerfGE volume 120, page 82et seqq., Juris, marginal notes 99, 103 and dated 9 November 2011 - 2 BvC 4/10 inter alia -, BVerfGE volume 129, page 300 et seqq., marginal notes 79, 82; Hamburg Constitutional Court, judgment dated 15 January 2013 - HVerfG 2/11 -, *Deutsches Verwaltungsblatt* (DVBI) 2013, page 304 et seqq. = NordÖR 2013, 156 et seqq., Juris, marginal notes 71, 72).

82 b) Section 3 (1) Sentence 1 LWahlG affects electoral equality, as characterised by *equality of the success ratios (Erfolgswertgleichheit),* since the 5% threshold results in unequal treatment of the electoral votes. While the count-value of all electoral votes remains unaffecled by the 5%, the electoral votes are treated differently with regard to their result depending on whether the vote was cast for a party which could muster more than five percent of the votes, or for a party which failed to achieve this. If a party does not get above the threshold, the votes cast for il are, according to Section 3 (1) Sentence 1 LWahlG, still not taken into account in allocating the mandates. In this regard the 5% threshold takes away the result of these votes

(see also Constitutional Court of the Saarland, judgment dated 29 September 2011 - Lv 4/11 -, NVwZ-RR 2012, page 169 et seqq., Juris, marginal note 200).

83 At the same time the right of the parties to equal opportunity is affected by the 5% threshold, for, according to Article 10 (2) Sentence 2 of the Constitution of Schleswig-Holstein in conjunction with Section 1 (1) Sentence 1 LWahlG, out of a fixed number of 69 seats (subject to the deviations arising from the Ac!) 34 are distributed after the result of the second vote proportionally to the parties who have surpassed the threshold. The parties represented in the Parliament of Schleswig-Holstein thus have more seats than corresponds to their share in the total number of votes, while the parties who fail to reach the 5% threshold do not participate in the distribution of seats

(see also Constitutional Court of the Saarland, judgment dated 29 September 2011, loc. eil., Juris, marginal note 201).

84 c) Electoral equality, just like the principle of equal opportunity of the political parties, is not subject to an absolute prohibilion against differentiation. However, it follows from the formal nature of electoral equality that the legislator in configuring the electoral law still has only a small amount of leeway to make differentiations. The issue relates to exercise of the right to vote and the right to stand as a candidale in a way !hat is as equal as possible in formal terms

(Federal Constitutional Court, judgments dated 23 January 1957 - 2 BvE 2/56 -, BVerfGE volume 6, page 84 et seqq., Juris, marginal note 25 et seq., and dated 3 July 2008 - 2 BvC 1/07 inter alia -, BVerfGE volume 121, page 266 et seqq., Juris, marginal note 97, established case-law).

85 Differentiations in electoral equality always require a special, objectively legitimate, "compelling" reason in order to be justified. This term does not mean !hat the differentiation must be shown to be necessary from a constitutional standpoinl. Differentialions in electoral law can rather be justified also by

grounds which are legitimised by the constitution and are of a weight which can balance electoral equality

> Uudgment dated 30 August 2010, marginal note 142 et seqq., loc. cit., Juris, marginal note 148 et seqq.; see also: Federal Constitutional Court, judgments dated 13 February 2008, loc. cit., Juris, marginal note 108 et seq., and dated 9 November 2011, loc. cit., Juris, marginal note 87; Hamburg Constitutional Court, judgment dated 15 January 2013, loc. cit., Juris, marginal note 78).

86 Since there is a close connection between electoral equality and equal opportunity of the parties in elections, the constitutional law justification of restrictions in the equal opportunity of the parties is based on the same standards

> (Federal Constitutional Court, judgment dated 9 November 2011, loc. cit., Juris, marginal note 86 with further references).

87 Within this narrow leeway it is a fundamental duty of the legislator to balance the requirement of electoral equality with other legitimate goals under constitutional law

> Uudgment dated 30 August 2010 - LVerfG 1/10 -, marginal note 142, LVerfGE volume 21, page 434 et seqq. = SchlHA 2010, page 276 et seqq. = NordÖR 2010, page 401 et seqq. = JZ 2011, page 254 et seqq., Juris, marginal note 148).

The legislator must, in assessing whether a compelling reason with constitutional weight justifies the threshold, not be guided by abstractly construed scenarios but by political reality

> (see Federal Constitutional Court, judgments dated 13 February 2008, loc. cit., Juris, marginal note 110, and dated 9 November 2011, loc. cit., Juris, marginal note 89; Hamburg Constitutional Court, judgment dated 15 January 2013, loc. cit., Juris, marginal note 80).

The legislator must verify and assess whether it is to some degree likely that the functionality of the representative bodies will be impaired

> (see Federal Constitutional Court, judgments dated 9 November 2011, loc. cit., Juris, marginal note 92 and 13 February 2008, loc. cit., Juris,

marginal note 126; Hamburg Constitutional Court, judgment dated 15 January 2013, loc. cit., Juris, marginal note 102).

88 It is the task of a constitutional court to verify by taking all the actual circumstances into account whether the limits of the legislator's discretion have been exceeded with regard to the quorum rule

(see Federal Constitutional Court, judgment dated 11 August 1954 - 2 BvK 2/54 -, BVerfGE volume 4, page 31 et seqq., Juris, marginal note 36).

The Schleswig-Holstein State Constitutional Court therefore merely assesses if in the legislator's considerations and the underlying forecast the constitutional law limits are adhered to, but not whether the legislator has found the most appropriate solution or one that is particularly desirable from the standpoint of judicial policy

(cf. concerning the corresponding scope of assessment of the Federal Constitutional Court: judgment dated 25 July 2012 - 2 BvE 9/11 etc. -, BVerfGE volume 131, page 316 et seqq., Juris, marginal note 63, established case-law).

89 To the extent that a differentiating provision pursues a legitimate purpose, the constitutional court of a *Land* may find that there is a breach of the principle of electoral equality only if the provision for achieving the goal is not suitable or goes beyond what is required to achieve this goal

(see judgment dated 30 August 2010, marginal note 144, loc. cit., Juris, marginal note 151; Federal Constitutional Court, judgments dated 10 April 1997 - 2 BvC 3/96 -, BVerfGE volume 95, page 408et seqq., marginal note 49, and dated 25 July 2012, loc. cit., Juris, marginal note 63 with further references)

or unreasonably and adversely affects electoral equality ultimately.

90 d) According to these standards the 5% threshold does not infringe the electoral equality or equal opportunity of the parties.

91 aa) Since the threshold is not governed by the Constitution of Schleswig-Holstein but simply by statute in Section 3 (1) Sentence 1 LWahlG

(see discussion of the Schleswig-Holstein legislators in the context of the 1990 constitutional reform: Minutes of the special committee "Constitutional and Parliamentary Reform", e.g. meeting of 21 April 198912/6, page 18 et seqq. and 2 June 198912/11, page 10),

more stringent requirements are needed for it to be justified. Simply the fact that the threshold has no direct constitutional status does not, however, make it unconstitutional.

92 bb) The functionality of the Parliament of Schleswig-Holstein and the integrative function of the parties are constitutionally legitimate grounds which can balance out electoral equality.

93 (1) The ability to work and the functionality of the parliament are acknowledged in connection with the 5% threshold to be grounds for differentiating in *Land* parliament and *Bundestag* elections. This is justified by the concern that the parliament will become unable to function due to a splintering of the forces represented there and will, in particular, no longer be able in and of itself to form stable majorities and create a government capable of getting things done

Uudgment dated 30 August 2010, marginal note 151, loc. cit., Juris, marginal note 158; see also Federal Constitutional Court, judgments dated 5 April 1952 - 2 BvH 1/52 -, BVerfGE volume 1,208 et seqq., Juris, marginal note 127 et seq.; dated 11 August 1954, loc. cit., Juris, marginal note 36 et seq.; dated 23January 1957 - 2 BvE 2/56 -, BVerfGE volume 6, page 84 et seqq., Juris, marginal note 28; dated 29 September 1990 - 2 BvE 1/90 etc.-, BVerfGE volume 82, page 322 et seqq., Juris, marginal note 45; dated 10 April 1997 - 2 BvC 3/96 -, BVerfGE volume 95, page 408 et seqq., Juris, marginal note 52 et seqq., and dated 13 February 2008 - 2 BvK 1/07 -, BVerfGE volume 120, page 82 et seqq., Juris, marginal note 121; Bavarian Constitutional Court, decision dated 18 July 2006 - Vf.9-VII-04 -, Bavarian Constitutional Court decisions (VerfGHE BY) volume 59, page 125 et seqq., Juris, marginal note 24; Constitutional Court of the *Land* of Berlin, decision dated 17 March 1997 - 82/95 -, LVerfGE volume 6, page 28 et seqq., Juris, marginal note 10; Constitutional Court of the Free Hanseatic City of Bremen, judgment dated 29 August 2000 - St 4/99 -, Constitutional Court of the Free Hanseatic

City of Bremen decisions (StGHE BR) volume 6, page 253 et seqq., Juris, marginal note 55; Lower-Saxonian Constitutional Court, decision dated 15 April 2010-2/09, StGH 2/09 -, *Niedersächsische Verwaltungsblätter* (NdsVBl.) 2011, page 77 et seq., Juris, marginal note 25; Constitutional Court of the Saarland, judgment dated 22 March 2012 - Lv 3/12 -, *Zeitschrift für Landes- und Kommunalrecht Hessen, Rheinland-Pfalz, Saarland* (LKRZ) 2012, page 209 et seqq., Juris, marginal note 36 et seqq.; Schleswig-Holstein Higher Administrative Court, decision dated 25 September 2002 - 2 K 2/01 -, SchlHA 2003, page 19 et seqq. = NVwZ-RR 2003, page 161 et seqq. = NordÖR 2003, page 61 et seqq. = JZ 2003, page 519 et seqq., Juris, marginal notes 47, 50; Caspar, in: Caspar/Ewer/NolteNVaack <Editors>, *Verfassung des Landes Schleswig-Holstein, Kommentar* [Constitution of Schleswig-Holstein, Commentary], 2006, Article 3 marginal note 41).

94 This view is a tradition of conslilutional law at national level and in all the German *Laender.* In the elections to the German Bundestag and to eight of the sixteen *Land* parliaments in the Federal Republic of Germany the threshold also applies even though it is not enshrined in the constitution

(Section 6 (3) Sentence 1 of the Federal Electoral Act *(Bundeswahlgesetz* - BWahlG); Section 3 (1) Brandenburg Electoral Act; Section 5 (2) of the Act on the Election to the Hamburg City Parliament; Section 4 (1) Electoral Act of Mecklenburg-Western Pomerania; Section 33 (2) Electoral Act of North Rhine-Westphalia; Seclion 38 (1) Saarland Parliament Electoral Act; Section 6 (1) Saxony Electoral Act; Section 35 (3) Electoral Act of the *Land* Saxony-Anhalt and Section 3 (1) Schleswig-Holstein Electoral Act).

In the other eight *Laender* the threshold is explicitly prescribed by the constitution

(Article 14 (4) Constitution of the Free State of Bavaria; Article 39 (2) Constitution of Berlin; Article 75 (3) Constitution of the Free Hanseatic City of Bremen; Article 8 (3) Lower Saxony Constitution and Article 49 (2) Constitution of the Free State of Thuringia)

or permitted

(Article 28 (3) Constitution of Baden-Württemberg; Article 75 (3) Constitution of Hesse and Article 80 (4) Conslitution for Rhineland-Palatinate).

95 The fact that it is allowed for the German Bundestag and the *Land* parliaments has so far been confirmed by the constitutional courts

(Federal Constitutional Court, judgments dated 29 September 1990 - 2 BvE 1/90 inter alia -, BVerfGE volume 82, page 322 et seqq., Juris, marginal note 46, and dated 10 April 1997 - 2 BvC 3/96 -, BVerfGE volume 95, page 408 et seqq., Juris, marginal note 53 et seqq.; Bavarian Constitutional Court, decision dated 18 July 2006 - Vf.9-VII-04 -, loc. cit., Juris, marginal note 24 et seq.; Constitutional Court of the *Land* Berlin, decision dated 17 March 1997 - 82/95 -, loc. cit., Juris, marginal note 11 et seqq.; Constitutional Court of the Free Hanseatic City of Bremen, judgment dated 29 August 2000 - St 4/99 -, loc. cit., Juris, marginal note 54 et seqq.; StGH Niedersachsen, Decision dated 15 April 2010, loc. cit., Juris, marginal note 25; Constitutional Court of the Saarland, judgments dated 22 March 2012 - Lv 3/12 -, loc. cit., Juris, marginal note 36 etseqq., and dated 18 March 2013- Lv 12/12- , printed judgment page 7 et seqq.).

96 The threshold can also continue to apply in Schleswig-Holstein since the legislator's assumption is sufficiently plausible that parliament's functionality is only guaranteed if the formation of a government, legislation and the preparation of the budget are ensured through stable majorities. Without a threshold, although it is true that there would have been a more accurate reflection of the electorate in parliament, it would be much more likely that small parties representing vested interests and only individual agendas would enter the Parliament of Schleswig-Holstein. If there were a splintering of the forces represented in parliament it would be sufficiently likely that its ability to act and function would be impaired because there would be no guarantee of stable majorities which enable continuous work to be done. As a result there could be a risk to democracy, in which the people's will and opinions are not only expressed but must also be implemented by government action.

97 To the extent that the opposing argument is made that even when very small parties are included effective government activity is possible (where necessary with constantly changing majorities), this is not true of the Parliament of Schleswig-Holstein. Particularly in the case of the formation and activity of the government, which needs the ongoing confidence of the *Land* Parliament

(Articles 35, 36 of the Constitution of Schleswig-Holstein), and in the case of the budget, it is important that in the Parliament of Schleswig-Holstein reliable majorities can be formed with a consistent agenda over the lang term. For this reason also, a five-year legislative period is stipulated (Article 13 (1) Sentence 1 of the Constitution of Schleswig-Holstein).

98 Recent case-law of the Federal Constitutional Court and of constitutional courts of federal states, according to which the thresholds in the case of municipal elections

> (see Federal Constitutional Court, judgment dated 13 February 2008 - 2 BvK 1/07 -, BVerfGE volume 120, page 82 et seqq. concerning municipal elections in Schleswig-Holstein; Constitutional Court of the Free Hanseatic City of Bremen, judgment dated 14 May 2009 - St 2/08 - concerning the threshold in Bremerhaven, NordÖR 2009, page 251 et seqq.; Thuringia Constitutional Court, judgment dated 11 April 2008 - 22/05 - concerning municipal elections in Thuringia, NVwZ-RR 2009, page 1 et seqq. and Hamburg Constitutional Court, judgment dated 15 January 2013 - HVerfG 2/11 - concerning the election to the district assemblies, NordÖR 2013, page 304 et seqq.)

and in the election of the German members to the European Parliament

> (Federal Constitutional Court, judgment dated 9 November 2011 - 2 BvC 4/10 inter alia -, BVerfGE volume 129, page 300 et seqq.)

have been declared to be unconstitutional cannot be transposed to *Land* parliament electoral law. For both in European elections and in municipal elections the interests are different from those in elections to *Land* parliaments. The representatives elected at European and municipal level have, unlike the *Land* parliament, which has to elect the Minister-President (cf. Article 26 (2) of the Constitution of Schleswig-Holstein) and is responsible for legislation (cf. Article 37 (2) of the Constitution of Schleswig-Holstein), no comparable creative and legislative function

> (see also Morlok/Kühr, *Juristische Schulung* (JuS) 2012, page 385, 391).

99 The desire to ensure that parliament can function cannot be objected to on the grounds that the legislative activity of the *Land* parliament is of lesser importance

> (see, however, Wenner, *Sperrklauseln im Wahlrecht der Bundesrepublik Deutschland* [Thresholds in the Electoral Law of the Federal Republic of Germany], Frankfurt am Main, Bern, New York 1986, page 282 et seq.).

The democratically committed and law-based government power of the *Laender* is expressly emphasised in Article 28 (1), Article 30, 51, 70, 83, 92 and 109 Basic Law. *Land* legislation, for example in budget law, municipal law, law and order, as well as school and higher education law, is necessary in order to ensure the existence of the federal state of Schleswig-Holstein and the Federal Republic of Germany.

100 The Federal Constitutional Court, in contrast, found that for the elections to the European Parliament there are no compelling grounds for encroaching on electoral equality and equal opportunity by means of thresholds because the European Parliament does not elect an EU government which would be dependent on continuing support; the legislation of the EU and the information and control rights of the European Parliament depend just as little on a constant majority in the European Parliament

> (Federal Constitutional Court, judgment dated 9 November 2011, loc. cit., Juris, marginal note 118).

101 With reference to the municipal elections in Schleswig-Holstein, the Federal Constitutional Court declared the 5% threshold to be unconstitutional because this was not necessary to maintain functionality of the municipal and district councils, for unlike state parliaments these exercised no legislative activity for which clear majorities are necessary to ensure a government that can take political action. Nor did the municipal representative bodies have a creative

function for a body similar to the government and finally their decisions were subject to legal supervision

> (Federal Constitutional Court, judgment dated 13 February 2008, loc. cit., Juris, marginal note 123).

102 There is some dispute about both decisions, firstly with regard to the important functions of the European Parliament, especially after the Treaty of Lisbon

> (cf. Federal Constitutional Court, judgment dated 9 November 2011, loc. cit., dissenting opinion, Juris, marginal note 147 et seqq.; Schönberger, JZ 2012, page 80 et seqq.; Geerlings/ Hamacher, *Die Öffentliche Verwaltung* (DÖV) 2012, page 671, 675 et seqq.)

and secondly, at municipal level regarding the risk of splintering, which might jeopardise the work of municipal representatives for the public good, for instance in connection with the enactment of budgetary bylaws, which are the basis of local politics

> (cf. Theis, *Zeitschrift Kommunaljurist* (KommJur) 2010, page 168, 169 et seqq.).

103 (2) A further legitimate purpose of the 5% threshold is to ensure that the election has the character of an integrative process in the political decision-making of the people

> (see Federal Constitutional Court, judgment dated 10 April 1997 - 2 BvC 3/96 -, BVerfGE volume 95, page 408 et seqq., Juris, marginal note 44, 53),

in order to prevent the splintering of parties and to enable functional constitutional bodies to be formed

> (cf. Schreiber, *Bundeswahlgesetz* (Federal Electoral Act), 8th edition 2009, Section 6 marginal note 35; Section 20 marginal note 8).

To this extent, this supports the integrative function of the parties, who are as a result of the threshold meant to be bound to pool and organise interests and political trends in a structured way.

104 cc) Section 3 (1) Sentence 1 LWahlG is also proportionale.

105 (1) The 5% threshold is suitable to advance the legitimate purposes pursued by it, in !hat it prevents an increased number of smaller parties !hat do not aim for stronger support from entering the *Land* parliament.

106 (2) The previous assessment of the Parliament of Schleswig-Holstein !hat the 5% threshold is also necessary in future in order to counter an expected disruption in the Parliament of Schleswig-Holstein's ability to function cannot be argued with at present. On the one hand, new parties (for instance THE LEFT party in the 1i ^{h} legislative period and the PIRATES in the 18th legislative period) have succeeded despite the 5% threshold in entering the Parliament of Schleswig-Holstein. On the other hand, the threshold has prevented other smaller parties with one or two seats from also entering the Parliament of Schleswig-Holstein and contributing to a splintering.

107 The introduction of a second list vote, in the sense of a replacement or contingent vote which would only be taken into account if the party elected with the primary vote remained below the 5% threshold

> (cf. Linck, DÖV 1984, page 884 et seqq.; Wenner, loc. cit., page 412 et seqq.),

is not an equally suitable less radical measure, for this model would mean a change in the concept of the applicable electoral system of candidate-based proportional representation by increasing the chances of success of the major parties.

108 It is instead up to the legislator's freedom of assessment whether in order to achieve the purpose a 5% threshold, a lower threshold or eise other miligating measures are considered

(see also Linck, loc. cit., page 884 and von Arnim, DÖV 2012, page 224, 225, who do not doubt the constitutionality of the 5% threshold and ascribe mitigating measures to political discretion).

109 (3) The threshold is also reasonable. The Federal Constitutional Court as the State Constitutional Court for Schleswig-Holstein held a threshold of 7.5% to be unreasonable and a threshold of 5% to be reasonable

(cf. Federal Constitutional Court, judgment dated 5 April 1952 - 2 BvH 1/52 -, BVerfGE volume 1, page 208 et seqq., Juris, marginal note 152 et seqq.)

and also took this view in respect of the German Bundestag

(cf. Federal Constitutional Court, judgment dated 10 April 1997, loc. cit., Juris, marginal note 54).

The Court hearing this case adheres to this view at present. The Federal Constitutional Court already indicated the need to evaluate the threshold in the respective political situation, when it argued !hat there must have been "very particular, compelling grounds for justifying an increase in the threshold above the common German rate of 5%"

(cf. Federal Constitutional Court, judgment dated 5 April 1952, loc. cit., Juris, marginal note 153).

110 The legislator is therefore obligated to consider the political reality and, while taking account of the legal and factual circumstances, review the conditions and grounds for maintaining the existing 5% threshold not expressly enshrined in the constitution; the legislator where necessary change a provision of electoral law affecting electoral equality if the justification for said law under constitutional law is called into question as a result of new developments, such as by a change in the stipulated factual or legal bases or as a result of the fact !hat the prediction made when the law was enacted with regard to its effects has turned out to be mistaken

(Federal Constitutional Court, judgments dated 9 November 2011 - 2 BvC 4/10 inter alia -, BVerfGE volume 129, page 300 et seqq., Juris, marginal note 90 and dated 25 July 2012 - 2 BvE 9/11 inter alia -,

BVerfGE volume 131, page 316 et seqq., Juris, marginal note 64 with further references).

The Parliament of Schleswig-Holstein is presently complying with the review obligation at the legislative initiative of the PIRATES to abolish the 5% threshold (cf. Schleswig-Holstein Parliament printed paper 18/385), although as part of the reform of municipal electoral law in 2008 it had still deliberately left the 5% threshold untouched for Parliament of Schleswig-Holstein elections (see Schleswig-Holstein Parliament printed paper 16/1879, plenary minutes 16/79 of 27 February 2008, page 5736 et seqq.).

111 Since electoral law and the political process are interrelated, the need and reasonableness of a threshold cannot be empirically examined by simply using political science or mathematics. The results of past elections do not allow a prediction to be made with any certainty about the result of future elections. The applicable electoral law impacts the election results and electoral behaviour in return. To this extent the decision about maintaining a threshold remains a judgmental predictive decision.

112 dd) The same applies to the interpretation of Schleswig-Holstein constitutional law in consideration of Article 3 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, BGBl. 1956 II page 1880), which guarantees the right to free elections, and of Article 25 of the International Covenant on Civil and Political Rights (BGBl. II 1973 page 1534), which grants the right to vote and to be elected without any distinctions at elections which shall be by equal suffrage. According to Federal Constitutional Court case-law, the human rights conventions apply with the status of simple federal law. They must be taken into consideration when interpreting national law (including the fundamental rights and constitutional guarantees) as aids to interpretation. The decisions of the European Court of Human Rights must be taken into particular consideration here

(cf. Federal Constitutional Court, decision dated 14 October 2004 - 2 BvR 1481/04 -, BVerfGE volume 111, page 307 et seqq., Juris, marginal notes 30, 38).

113 The European Court of Human Rights has in several decisions accorded national electoral legislation a broad degree of latitude and has, for example, held thresholds of 10% in Turkey, 6% in Spain and 5% in Latvia to be compatible with Article 3 of the Protocol No. 1 to the ECHR

(cf. European Court of Human Rights, judgment dated 8 July 2008 - 10226/03 -, Yumak and Sadak vs Turkey-, NVwZ-RR 2010, page 81 et seqq.; European Court of Human Rights, decision dated 7 June 2001 - 56618/00 -, Federaci6n Nacionalista Canaria vs Spain, Reports of Judgments and Decisions 2001-VI, page 433, 443; European Court of Human Rights, decision dated 29 November 2007 - 10547/07 inter alia -, Partija "Jaunie Demokrati" and Partija "Musu Zeme vs Latvia, http://www.hudoc.echr.coe.int., under "EN DROIT" A.2 b).

In any event no stricter standards for justifying thresholds were used here than are used under German constitutional law.

114 2. The exemption of the parties of the Danish minority from the 5% threshold (Section 3 (1) Sentence 2 LWahlG) does not contravene Article 2a of the Constitution of Schleswig-Holstein in conjunction with Article 3 (3) Sentence 1 Basic Law. Regardless of whether Article 3 (3) Sentence 1 Basic Law applies in connection with Parliament of Schleswig-Holstein elections, or whether in contrast electoral equality is a *lex specialis*

(cf. Becker, *Die wahlrechtliche Privilegierung von Parteien der dänischen Minderheit in Schleswig-Holstein <§ 3 Abs. 1 Satz 2 LWahlG>, Gesetzliche Voraussetzungen und verfassungsrechtliche Rechtfertigung* (Favouring parties of the Danish minority in Schleswig-Holstein under electoral law <Section 3 (1) Sentence 2 LWahlG>, Statutory preconditions und constitutional law justification), Dänischenhagen 2013, page 43),

the law is not relevant based on the very facts. According to Article 3 (3) Sentence 1 Basic Law, no person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. Belonging to a minority in the present context, however,

derives neither from the parentage or origin of a person, nor from that person's political views but solely from their free choice to identify with the minority

> (cf. Riedinger, in: Caspar/Ewer/Nolte/Waack <Editors>, *Verfassung des Landes Schleswig-Holstein* (Constitution of Schleswig-Holstein), 2006, Article 5 marginal note 10).

The latter is not a prohibited criterion for differentiation within the meaning of Article 3 (3) Sentence 1 Basic Law.

115 3. Section 3 (1) Sentence 2 LWahlG as a reverse exception from the restriction of taking account of all votes in the allocation of mandates does indeed impact the electoral equality, when characterised as equality of the success ratios *(Erfolgswertgleichheit),* and the equal opportunity of the parties (a). The provision is, however, justified due to compelling reasons (b).

116 a) The second vote of electors who elect a party of the Danish minority which ultimately does not reach the threshold has a better result than a vote which has been cast for another party which also fails to reach the threshold. The second vote cast for a party of the Danish minority is in every case taken into account if the party wins so many votes that it can be allocated a mandate in the distribution of seats. The second vote of these electors is treated in the same way as the votes which are cast for the parties which surpass the threshold.

117 The principles described above under C.I1.1.c) (marginal note 84 et seqq.) of differentiations being allowed where there are grounds which are justified by the constitution shall also apply to a reverse exception, i.e. an exception from an admissible quorum. The context of the threshold and its justification must be taken into account in verifying whether the reverse exception is admissible.

118 The Federal Constitutional Court decided concerning the Schleswig-Holstein rule that the legislator is free to make exceptions to an admissible quorum if a sufficient reason is given for it

(Federal Constitutional Court, judgment dated 11 August 1954 - 2 BvK 2/54 -, BVerfGE volume 4, page 31 et seqq., Juris, marginal note 37).

Within the scope of the quorum it is up to the legislator as to how far it exhausts the option to differentiale

(Federal Constitutional Court, judgment dated 10 April 1997 - 2 BvC 3/96 -, BVerfGE volume 95, page 408 et seqq., Juris, marginal note 47 et seqq.).

119 The concrete political situation must be considered here, including the existence of national minorities and their regional distribution

(Federal Constitutional Court, judgments dated 5 April 1952 - 2 BvH 1/52 -, BVerfGE volume 1, page 208 et seqq., Juris, marginal note 146, 158 and dated 23 January 1957 - 2 BvE 2/56 -, BVerfGE volume 6, page 84 et seqq., Juris, marginal note 34).

120 Even in other contexts the Federal Constitutional Court has demanded or approved exceptions from a threshold that applies without differentiation to the electoral territory. For example, in the first German-wide election after reunification it required the legislator to take account of the fact that special circumstances may allow a quorum to become inadmissible. Rules by means of which the legislator adheres to a threshold but mitigates its effects must in turn be compatible with the constitution and meet the principles of electoral equality

(Federal Constitutional Court, judgment dated 29 September 1990 - 2 BvE 1/90 inter alia -, BVerfGE volume 82, page 322 et seqq., headnote 2b).

121 The basic mandate clause in the election to the German Bundestag, according to which a party participates in the equalisation mechanism even if it has won a direct mandate in three constituencies (Section 6 (3) Sentence 1 BWahlG = Section 6 (6) Sentence 1 BWahlG, old version), was deemed by the Federal Constitutional Court to be an admissible exception to the quorum. A corresponding rule (to acquire a direct mandate) is also contained in Schleswig-Holstein electoral law in Section 3 (1) Sentence 1 LWahlG. The Federal

Constitutional Court argued !hat access to the seat distribution process may also be made dependent on several alternative thresholds, provided no higher blocking effect is produced as a result than is produced by a 5% threshold. An additional access option partially removes the violation of electoral equality caused by a threshold and diminishes its intensity. The further differentiation results in a new inequality and therefore in turn requires grounds for justification. The fact !hat the intensity of the threshold is diminished can, however, be taken into account here

> (Federal Constitutional Court, judgment dated 10 April 1997 - 2 BvC 3/96 -, BVerfGE volume 95, page 408 et seqq., Juris, marginal note 45 et seq.).

122 Taking this into account, there are at least no higher requirements for the justification of exceptions to the threshold than for the justification of the threshold itself, but, instead, the exception can contribute to bolstering justification of the threshold itself by mitigating effects of the threshold which jeopardise the integrating function of the election or other constitutional values

> (cf. with regard to mitigation of the effects of the 5% threshold at national level: Federal Constitutional Court, judgment dated 29 September 1990, Juris, marginal note 68 et seqq.).

123 In addition, the reverse exception is in any event justified for the parties of the Danish minority because of compelling grounds which are enshrined in the Constitution of Schleswig-Holstein.

124 b) The rule in favour of parties of the Danish minority (currently the SSW) is justified by the obligation of the *Land* to protect political participation of the national Danish minority according to Article 5 (2) of the Constitution of Schleswig-Holstein (aa-bb) and does not infringe the principle of proportionality (cc).

125 aa) Article 5 (2) Sentence 1 of the Constitution of Schleswig-Holstein makes political participation of national minorities subject to the protection of the *Land,* the municipalities and municipal associations. The national Danish minority and the Frisian ethnic group are expressly afforded the protection of political participation to which they are already entitled under Article 5 (2) Sentence 1 of the Constitution of Schleswig-Holstein, by Article 5 (2) Sentence 2 of the Constitution of Schleswig-Holstein as "entitlement to protection" and also as "entitlement to support".

126 The political participation of the national Danish minority is a supreme constitutional freedom, the protection and support of which is made the responsibility of the *Land.* It is in this regard suitable to balance out the considerations justifying the threshold and the entitlement of competing parties to be treated equally and to be recognised as a sufficient and compelling ground for a reverse exception. Whether, moreover, Article 5 (2) Sentence 2 of the Constitution of Schleswig-Holstein is only a provision under objective law defining constitutional principles (*Staatszielbestimmung)*

(see, for example, Riedinger, in: Caspar/Ewer/ Nolte/Waack <Editors>, *Verfassung des Landes Schleswig-Holstein* (Constitution of Schleswig-Holstein), 2006, Article 5 marginal note 19; Wuttke, *Verfassungsrecht* (Constitutional law), in: Schmalz/Ewer/von Mutius/Schmidt-Jortzig, Staats- und Verwaltungsrecht für Schleswig-Holstein (State and Administrative Law for Schleswig-Holstein), 2002, marginal note 28),

or whether the wording ("entitlement") also shows that the group or individuals have a personal right

> (see Köster, *Der Minderheitenschutz nach der schleswig-holsteinischen Landesverfassung* (Protection of minorities under the Schleswig-Holstein Constitution), Bredstedt 2009, page 156 et seqq. with further references),

can be left open here.

127 "Compelling" grounds as defined in electoral law are not just grounds which result in mathematically inevitable uncertainties but also differentiations which are constitutionally mandatory or necessary because there is a conflict with fundamental rights or other electoral law principles, or those which are otherwise justified by the constitution and are of such a weight !hat they can balance electoral equality, such as, for instance, the standard size of 69 members of parliament which was formerly stipulated in the Schleswig-Holstein Constitution

> (judgment dated 30 August 2010 - LVerfG 1/10 -, marginal note 143, LVerfGE volume 21, page 434 et seqq. = SchiHA 2010, page 276 et seqq. = NordÖR 2010, page 401 et seqq. = JZ 2011, page 254 et seqq., Juris, marginal note 150).

128 The intent and purpose of Article 5 (2) Sentence 2 of the Constitution of Schleswig-Holstein is to enshrine in constitutional law the participation and integration of the Danish minority in accordance with the tried and tested electoral law concept prevailing in 1990, when Article 5 (2) of the Constitution of Schleswig-Holstein was created. The rule in Section 3 (1) Sentence 2 LWahlG which has already applied since 1955 has resulted in the SSW being represented since then in all legislative periods in the Parliament of Schleswig-Holstein.

129 Both these rules, initially in simple electoral law and subsequently also in constitutional law, were a response to the fact that political participation of the minority was impeded or impossible because of the threshold, for in the Parliament of Schleswig-Holstein elections of 12 September 1954 the SSW had neither surpassed the 5% threshold nor won a direct mandate

> (see announcement of the *Land* Returning Officer concerning the final result of the elections to the Parliament of Schleswig-Holstein on 12 September 1954 of 23 September 1954, ABI No. 40 page 398, 401 et seq.).

130 The documentation on Article 5 (2) of the Constitution of Schleswig-Holstein shows that the protection provision stipulated in Article 5 (2) Sentence 1 in

favour of cultural autonomy and in favour of political participation was intended to be explicitly stipulated specifically for the Danish minority and the Frisian ethnic group and that a principle of providing support was also to be established for both these groups. It was to reflect the desire under constitutional policy to take account of the historical circumstances and the factual situation in the federal state.

> (report and recommendation of the special committee advising on the final report of the "Constitutional and Parliamentary Reform" commission of inquiry dated 28 November 1989, Schleswig-Holstein Parliament printed paper 12/620 (new), page 34).

131 The minutes of the "Constitutional and Parliamentary Reform" special committee show !hat there was initially some thought about including in the Constitution the exemplion from the 5% threshold for parties of the Danish minority but ultimately this idea was abandoned because the threshold itself is not enshrined in the Conslitution (see Special Committee for Constitutional and Parliamentary Reform (SoAVP) 12/6 dated 21 April 1989, page 19). However, protection and support of the political participation of the minority were explicitly incorporated (see SoAVP 12/11 dated 2 June 1989, page 10).

132 The purpose of effectively integrating the Danish minority into the state people can justify electoral equality being affected, for the nature of the election as an integrative process in political decision-making is ensured if the electoral law rules enable politically significant movements in the electorate to be represented in parliament

> (cf. Pieroth, *Der Begriff der Partei der dänischen Minderheit und die Verfassungsmäßigkeit ihrer Privilegierung im Schleswig-Holsteinischen Landeswahlrecht* (The term "Party of the Danish minority" and the constitutionality of its being favoured in Schleswig-Holstein electoral law), Parliament of Schleswig-Holstein printed document 15/634, page 35 with reference to Federal Constitutional Court, judgment dated 10 April 1997, - 2 BvC 3/96 -, BVerfGE volume 95, page 408 et seqq., Juris, marginal note 55).

133 Thus the Federal Constitutional Court considered the special electoral law rule to be justified because it allows the national minority to have their specific concerns represented in the rostrum of parliament if it just wins the number of votes required for a mandate

> (cf. Federal Constitutional Court, judgment dated 23 January 1957 - 2 BvE 2/56 -, BVerfGE volume 6, page 84 et seqq., Juris, marginal note 34).

134 bb) This understanding of Article 5 (2) of the Constitution of Schleswig-Holstein is strengthened by the involvement of Schleswig-Holstein in the obligations of the Federal Republic of Germany. Article 5 (2) of the Constitution of Schleswig-Holstein must be interpreted in the light of the international law commitments of the German government through the Bonn-Copenhagen Declarations of 29 March 1955 and in the light of the Framework Convention of the European Council of 1 February 1995 for the Protection of National Minorities (BGBl 1997 II page 1406 et seqq. hereafter: Framework Convention). For the *Land* of Schleswig-Holstein is a federal state of the Federal Republic of Germany (Article 1 of the Constitution of Schleswig-Holstein) which is bound by the principle of federal loyalty. Federal loyalty means that in the German federal republic the entire constitutional law relationship between the state as a whole and federal states, as weil as the constitutional law relationship between the federal states, is controlled by the unwritten constitutional principle of the mutual obligation of the nation and the federal states *(Laender)* to behave in a way that is beneficial for the country as a whole

> (cf. Federal Constitutional Court, judgment dated 28 February 1961 - 2 BvG 1/60 inter alia -, BVerfGE volume 12, page 205 et seqq., Juris, marginal note 173).

135 The content of the Bonn-Copenhagen Declarations according to the simultaneous announcement of the results of the German-Danish discussions by the Federal Foreign Office is that the threshold must not become an impediment to the political participation of the minority (cf. *Bundesanzeiger* No. 63 dated 31 March 1955, page 4).

136 The Bonn-Copenhagen Declarations are not international contracts but unilateral declarations of intent issued by !wo governments

> (cf. Kühn, *Privilegierung nationaler Minderheiten im Wahlrecht der Bundesrepublik Deutschland und Schleswig-Holsteins* (Favouring of national minorities in the electoral law of the Federal Republic of Germany and Schleswig-Holstein), Frankfurt am Main 1991, page 284),

which fall under the foreign relations of the German government. Such declarations can develop binding effect if they have been made publicly and with binding intent

> (see International Court of Justice <New Zealand vs. France>, I.C.J. Reports 1974, page 457,472 et seq.).

This kind of binding effect must be assumed according to the wording of the declarations, especially since both governments when they made them invoked their obligations under international law arising from the requirement of the protection of minorities under Article 14 ECHR (BGB! 1952 II page 690). The *Land* Schleswig-Holstein was indirectly involved in them and based on the principle of federal loyalty continues to be bound by them.

137 The legislator at national level integrated the content of the Bonn-Copenhagen Declarations into the applicable obligations and has continuously adhered to them. The exception from the threshold !hat had existed since the Federal Electoral Act of 1953 for parties of national minorities, which had been introduced in Southern Schleswig due to foreign policy considerations in connection with the Danish minority

> (cf. Schreiber, *Bundeswahlgesetz, Kommentar* (Federal Electoral Ac!, Commentary), 8th edition 2008, Section 6 marginal note 47),

has existed since then unchanged and was most recently retained in the version of the Federal Electoral Ac! of 3 May 2013 (BGB! 1page 1082) in Section 6 (3) Sentence 2 BWahlG.

138 The Federal Government too continues to feel bound by the Bonn-Copenhagen Declarations. The Bonn Declaration of 29 March 1955 and the Kiel Declaration of 26 September 1949 were explicitly referred to in 1997 in the memorandum of the Federal Government on the Framework Convention of the European Council of 1 February 1995 for the Protection of National Minorities (see Bundestag printed paper 13/6912, page 21 et seqq.).

139 According to Article 4 (2) of the Framework Convention, the contracting parties undertook to take appropriate measures where necessary to advance, in all areas of economic, social, political and cultural life, complete and actual equality between the members of a national minority and the members of the majority and in this respect to take due account of the special conditions of the members of national minorities. The Framework Convention as an international agreement is a legally binding instrument

> (cf. Klebes, *Europäische Grundrechte Zeitschrift* (EuGRZ) 1995, page 262,264),

which applies directly as federal law

> (cf. *Achter Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen* (Eighth report of the Federal Government concerning its human rights policy in foreign relations and in other policy areas) of 16 July 2008, Bundestag printed paper 16/10037, page 79 et seq.).

140 According to Article 1 of the Framework Convention and its recitals, the protection of national minorities forms an integral part of the international protection of human rights. The Framework Convention, just like the Convention for the Protection of Human Rights and Fundamental Freedoms, must be taken into account in interpreting national law, including national conslitutional law (see above under C.I1.1.d>dd> <marginal note 112>).

141 The Framework Convention was entered into in view of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto. To this extent the Framework Convention must also be referred to in interpreting Article 3 of the Protocol No. 1 to the ECHR (BGBl 1956 II page 1879), which guarantees the right to free elections. Since the German government and the Danish government already put the Bonn-Copenhagen Declarations in the context of the obligation contained in Article 14 ECHR not to discriminate against national minorities, to this extent they also considered the matter at the level of human rights.

142 The European Court of Human Rights, in a recent decision concerning Romanian electoral law, revealed no reservations about taking account of national minorities in electoral law and argued that this is practiced in several European countries

(cf. European Court of Human Rights, judgment dated 2 March 2010 - 78039/01 -, Grosaru vs. Rumania, at www.echr.coe.inUhudoc).

143 Even if the principles set forth in the Convention are not directly applicable laws but directions for the signatory states about how to act (see Article 19 of the Framework Convention), they do however confirm that protection of minorities is not limited to granting formal equality but includes measures aimed at equalising and promoting

(see in similar respects Constitutional Court of the *Land* Brandenburg, judgment dated 18 June 1998 - 27/97 -, LVerfGE volume 8, page 97 et seqq., Juris, marginal note 120).

Article 5 (1) Sentence 1 and in particular Sentence 2 of the Constitution of Schleswig-Holstein are in line with this these directions.

144 An example of implementation of the obligations under the Framework Convention and adherence to the Bonn-Copenhagen Declarations is provided

by the response of the Federal Government of 14 February 2008 to a small inquiry *(Kleine Anfrage)* concerning the financial assistance for the *Bund Deutscher Nordschleswiger.* In the response the Federal Government stated inter alia with reference to Article 4 (2) of the Framework Convention that the financial support of the German ethnic group in Northern Schleswig/ Denmark was based on the Bonn-Copenhagen Declarations (see Bundestag printed paper 16/8093, page 2).

145 In the current legislative period the Federal Government has again expressly subscribed to the Bonn-Copenhagen Declarations (Minister of State in the Federal Foreign Office Pieper on 7 July 2010, Bundestag plenary minutes 17/54, page 5537 et seq.).

146 cc) The rule in Section 3 (1) Sentence 2 LWahlG is also proportionate.

147 In addition to verifying whether the differentiating rule is geared to a goal which the legislator is permitted to follow in designing the electoral law, the Court verifies merely whether the rule is likely to achieve this goal, does not go beyond what is necessary and is reasonable; for it is as a general principle the task of the legislator to balance out goals which are legitimate under constitutional law such as concerns for the functionality of parliament, the desire for extensive integrating representation and the imperatives of electoral equality and of equal opportunity of the political parties

> (cf. Federal Constitutional Court, judgment dated 10 April 1997 - 2 BvC 3/96 -, BVerfGE volume 95, page 408 et seqq., Juris, marginal note 49 with further references).

148 Which rule must be used to fulfil the constitutional task must be assessed by the legislator. The legislator also has the duty to observe the impact of the rule, whether in the context of the electoral law regulations and the actual circumstances it is likely to fulfil its purpose, and whether at the same time other principles of electoral law are not unreasonably impaired (see above C.I1.1.c> <marginal note 86 et seqq.> accordingly regarding the threshold). Given the latitude the legislator has to make an assessment and the overall system of the electoral law to be selected by him, the Court cannot instead make its own assessment of a more appropriate Solution, but must only check to see if either the political participation of the minority is no langer adequately protected or if the rule used for this is disproportionate to the harm done to other electoral law principles.

149 (1) The rule is likely to fulfil the desired purpose. Since it came into existence it has ensured the political participation of the Danish minority.

150 (2) It is also necessary. No other equally suitable means is evident in the given electoral law system. The present rule enshrines the principle contained in Article 3 and 10 of the Constitution of Schleswig-Holstein of equality of the success ratios *(Erfolgswertgleichheit)* in proportional representation and only quashes the limitation of this by means of the threshold which is not provided for in the Constitution. The rule ensures that the parties of the minority can even where their footprint is limited regionally and in terms of personnel, promote their views and to also transpose stronger consent for their policy into corresponding mandates without the need to get above the 5% threshold. This possibility would be restricted if the exemption would be limited to only one mandate. This kind of limitation would not protect and advance the political participation of the minority to the same extent as the present rule where the number of the members of parliament depends on the support received in the elections.

151 The restriction to one mandale would also limit the representation of a party of the minority in collaborative parliamentary work, particularly in the Parliament of Schleswig-Holstein committees. The possibility of exerting influence on government formation, legislation and budget and constituency work would be less. In addition, a party might, where there is a much reduced chance of winning a second or third mandate, address the electors of the minority less weil since there might be a lack of personnel !hat is balanced, for example, according to political movements within the minority, regions or genders, but would be obliged to be represented by one person. Limiting the exception to one mandate would no longer fulfil the concept underlying present electoral law of the protection and support of political participation of the minority. The Court cannot accordingly consider it to be an equally suitable "less radical measure" for the protection and support of the political participation of the minority. Whether and in what form this kind of different electoral law would fulfil the constitutional requirement of Article 5 (2) of the Conslitution of Schleswig-Holstein was not a matter for decision here.

152 Nor would limiting the exception from the 5% threshold to the traditional settlement areas of the minority be an equally suitable means of doing justice to a minority position !hat is oriented to the *Land* as a whole. Since the Parliament of Schleswig-Holstein is intended for the entire territory of the *Land* and is responsible to this extent, the presence of a minority of Danish origin in Southern Schleswig is a crucial connecting factor for the *Land* legislator's decision to include all parts of the *Land* in the special rule concerning in the election to the Parliament of Schleswig-Holstein

> (see also Federal Constitutional Court, decision dated 14 February 2005 - 2 BvI 1/05 - as obiter dictum, SchlHA 2005, page 128 et seqq. = NVwZ 2005, page 568 et seqq. = NordÖR 2005, page 106 et seqq. = decisions of the Chambers of the Federal Constitutional Court *(Kammerentscheidungen des Bundesverfassungsgerichts* - BverfGK) 5, page 96 et seqq., Juris, marginal note 40).

153 If one wished to restrict an exception from the threshold for parties of the Danish minority to the northern part of the federal state, one would require another electoral system

> (cf. Federal Constitutional Court, decision dated 14 February 2005, loc. eil., Juris, marginal note 41; Pieroth, *Der Begriff der Partei der dänischen Minderheit und die Verfassungsmäßigkeit ihrer Privilegierung im Schleswig-Holsteinischen Landeswahlrecht* (The term "Party of the Danish minority" and the constitutionality of their being favoured in Schleswig-Holstein electoral law), Parliament of Schleswig-Holstein printed document 15/634, page 39),

the introduction of which would be the sole responsibility of the legislator. Moreover, even in national electoral law the exemption from the 5% threshold for parties of national minorities is not limited to their traditional settlement area (see Section 6 (3) Sentence 2 BWahlG).

154 (3) Section 3 (1) Sentence 2 LWahlG is also reasonable in relation to the impaired equality of the success ratios *(Erfolgswertgleichheit)* of other small parties in comparison to the parties of the Danish minority. While grounds of constitutional status under Article 5 (2) of the Constitution of Schleswig-Holstein are an argument in favour of the exemption of the minority parties, the other small parties are subject to the legitimate restriction by the threshold, but as parties which are active (potentially) at *Land* and national level and are oriented to the society of the German majority, have the same opportunity in each case to surpass this threshold.

155 The special rule might stop being reasonable if a party of the Danish minority as a result of rules in the electoral law or changes in the political reality no longer had a disadvantage which would have to be evened out.

156 The fact !hat the SSW in recent decades was able to increase its share of the vote in elections to the Parliament of Schleswig-Holstein and the fact !hat

potentially some of the votes cast for it came from people who do not have allegiance or do not have firm allegiance to the Danish minority is not an argument against the applicable rule being reasonable. So far, the SSW has since 1955 always remained below 5% of the votes *Land-wide.* With voting behaviour becoming generally more volatile the electorate may become more willing to cast a vote for a party of the Danish minority. This changes nothing as regards restriction with regard to region and personnel in comparison to other parties.

157 Debate continues about whether the electability of the SSW throughout the whole *Land* which has necessarily occurred as a result of the two-vote electoral law impacts the reasonableness of the applicable rule. The disadvantage that existed due to the one-vote electoral law prior to 1997 as a minority party which could be elected only in the constituencies in its area of activity no langer exists in the same way. The opportunities which have arisen as a result of the list which is electable *Land-wide* have mitigated this disadvantage but not eliminated it completely. The SSW as a party of the Danish minority continues, according to its statutes, party organisation, participation in municipal politics and constituency candidates, to be represented only in Southern Schleswig and Heligoland. The SSW nominates candidates directly only in eleven of 35 constituencies, in eight of these it wins more than 5% of the second votes. Most of its second votes are won by it in this area

> (cf. announcement of the *Land* Returning Officer dated 18 May 2012, ABl No. 23 page 499 et seqq., overviews 3 and 4).

158 To the extent that the two-vote electoral law is regarded as a problem for a rule that is as considerate as possible concerning the protection of minorities in electoral law, it must also be noted that while it is true that despite the associated risk of overhang- and equalising mandates the two-vote electoral law is a legitimate way of designing electoral law, the two-vote electoral law, unlike the protection of minorities, has no constitutional status. Given the significance of minority protection in the Schleswig-Holstein Constitution, this consequence

of the two-vote electoral law must be accepted as lang as such an electoral law exists.

159 A change in the political reality which might trigger a change in assessment would occur if a party of the Danish minority through its internal interrelationship with movements firmly rooted in the majority society both regionally and politically could even out the disadvantage under the threshold in such a way that an electoral law rule was no langer needed. This would be possible if a party of the Danish minority, in addition to having its regional and political roots in the minority, had similar roots in the majority and were addressing it, for example by developing a party organisation that goes beyond the minority and by nominating corresponding candidates in the constituencies of the entire *Land.*

111.

160 The proceedings shall not be subject to costs (Section 33 (1) LVerfGG). Expenses shall not be reimbursed (cf. Section 33 (4) LVerfGG). No decision applies concerning enforcement (Section 34 LVerfGG).

IV.

161 The judgment was issued by 4 votes to 3 with regard to the operative provisions and the grounds in C.11.3., and unanimously with regard to the rest.

Flor Schmalz Brack Brüning

Hillmann Thomsen Welti

Anonymisation updated on: 16 September 2013

Dissenting opinion of Justices Brock, Brüning and Hillmann

pursuant to Section 28 (2) Sentence 2 LVerfGG[1]

concerning the judgment of the State Constitutional Court dated 13 September 2013

- LVerfG 9/12 -

1 We cannot join the decision with regard to the operative provisions and with regard to the grounds to the extent that the exemption of the parties of the Danish minority from the 5% threshold (Section 3 (1) Sentence 2 Schleswig-Holstein Electoral Act *(Landeswahlgesetz* - LWahlG)) is deemed to be justified under constitutional law. The Court rightly acknowledges that the minority privilege for the SSW as a reverse exception from the 5% clause must be measured by the same standards as the threshold clause itself. In the Court's case-law the importance of electoral equality to parliamentary democracy is particularly emphasised. In applying these standards, in our opinion, however, the conclusion must be reached that completely exempting the SSW from the threshold for ensuring political participation of the Danish minority in the Parliament of Schleswig-Holstein goes beyond what is required to achieve this goal and adversely impacts electoral equality to an unreasonable extent.

2 The principle of electoral equality safeguards the equality of citizens that is required by the principle of democracy and must be understood nowadays as meaning strict, formal equality

[1] Translator's note: LVerfGG stands for *Landesvet1assungsgerichtsgesetz* = Act concerning the Schleswig◆Holstein State Constitutional Court.

(judgment dated 30 August 2010 - LVerfG 1/10 -, marginal note 91, State Constitutional Court decisions (LVerfGE) volume 21, page 434 *et* seqq. = *Schleswig-Holsteinische Anzeigen* (SchlHA) 2010, page 276 et seqq. = *Zeitschrift für Öffentliches Recht in Norddeutschland* (NordÖR) 2010, page 401 et seqq. = *JuristenZeitung* (JZ) 2011, page 254 et seqq., Juris, marginal note 96).

3 Not least by Article 10 (2) Sentence 2 of the Constitution of Schleswig-Holstein, the principle of electoral equality under Art. 3 (1) Constitution of Schleswig-Holstein is preserved and reinforced and the legislator in configuring the electoral system is firmly bound by the constitution to the extent that the legislator must satisfy electoral equality "to the best of its ability"

(judgment dated 30 August 2010 - LVerfG 1/10 -, marginal note 124, loc. cit., Juris, marginal note 129).

4 It is true that the criterion of equality of the success ratios *(Erfolgswertgleichheit)* developed from electoral equality contains no absolute prohibition against differentiating but it does not leave the legislator much latitude in organising the respective election system. Electoral equality is strictly formal in nature; it is not open to "flexible" interpretation

(judgment dated 30 August 2010 - LVerfG 1/10 -, marginal note 125, loc. cit., Juris, marginal note 130).

5 Within this narrow leeway it is, as a general principle, the responsibility of the legislator to balance the imperative of electoral equality with other goals which are legitimate under constitutional law. Differentiations in equality of the success ratios are, however, only permitted if there are compelling grounds for them

(judgment dated 30 August 2010 - LVerfG 1/10 -, marginal note 142, loc. cit., Juris, marginal note 148).

6 Differentiations which are constitutionally mandatory or necessary because there is a conflict with fundamental rights or other electoral law principles, or differentiations which are otherwise legitimate under the constitution and are of

such a weight that they can balance electoral equality are "compelling"

> Uudgment dated 30 August 2010 - LVerfG 1/10 -, marginal note 143, loc. eil., Juris, marginal note 150).

7 Such differentiating rules must be likely and necessary to achieve their purposes. The degree to which they are still admissible also depends on how intensely they encroach on electoral law. In assessing and evaluating differentiating electoral law provisions the legislator must be guided by political reality

> Uudgment dated 30 August 2010 - LVerfG 1/10 -, marginal note 144, loc. eil., Juris, marginal note 151).

8 Measured by this, the 5% threshold provided in Section 3 (1) Sentence 1 LWahlG is justified; reference can be made in this regard to the applicable grounds under the decision.

9 The same standards apply to the exclusion in Section 3 (1) Sentence 2 LWahlG for the very reason that it results in turn in further unequal treatment in the relationship of the parties of the Danish minority to other - small - parties which do not reach the 5% quorum. Exempting the SSW from the threshold therefore also requires a compelling ground legitimised by the constitution, must be likely to achieve the goal being pursued, must not exceed what is necessary to achieve this goal and must be reasonable. It should be borne in mind here that the legislator through the disputed exemption from the threshold mitigates its effects (unlike in the case of a basic mandate clause or a regionalised 5% threshold) only for certain minority parties, but not for all parties equally.

10 The Danish minority is entitled under Article 5 (2) Sentence 2 of the Constitution of Schleswig-Holstein to protection and support. The political participation of this national minority is also covered by this in conjunction with Sentence 1. Whether

one can deduce from this (also taking account of international obligations of the Federal Republic) an entitlement to political representation which the Electoral Act does not grant to all minorities referred to in this regulation does not need to be decided. For in any case the protection of minorities that is hereby enshrined in constitutional law can be a sufficient ground for justifying a differentiation and the associated encroachment on electoral equality. In this regard reference can be made to the applicable grounds of the decision.

11 Completely exempting the parties of the Danish minority, namely the SSW, from the 5% threshold is, however, not justified by minority protection as entitlement to political representation, since in this respect just as suitable but less radical methods are available. The provision in Section 3 (1) Sentence 2 LWahlG is in any case disproportionale.

12 The more extensive an exclusion is, the strenger the associated unequal treatment is in relation to other small parties. Complete reverse exception of the parties of the Danish minority from the threshold is therefore a more serious encroachment on equality of result than a partial exemption, for instance by limiting the exemption to one mandate. Ensuring political representation is achieved just with one mandate. The argument that limiting the exemption to one mandate would not protect and support the political participation of the minority equally and would perhaps lead to a lesser degree of participation in the committees does not hold water. The protection of minorities as a legitimate ground for encroaching on electoral equality is only compelling to the extent that representation of the minority is ensured in the first place, i.e. that it is given a political voice. Even if there is only one seat, however, the national minority is given this parliamentary voice. If support among the electorate becomes greater, on the one hand the basic mandate clause kicks in with the subsequent balancing out mechanism and on the other hand (quite independently) the balancing out mechanism kicks in when the quorum is reached. Moreover, integration of the minority into the society of the state is in any case not

something that is promoted more strongly by having more members of parliament in the Parliament of Schleswig-Holstein.

13 The legislative content of the Constitution of Schleswig-Holstein, in this case Article 5 (2) Constitution of Schleswig-Holstein, is so open that no reliable conclusions can be made from it about the concrete form of the electoral law. If the constitutional legislator had intended to favour under electoral law certain individual national minorities he could have made a corresponding provision in the constitution of the state. He did not do this; instead he guarantees "the political participation of national minorities and ethnic groups" generally. One cannot infer from this a constitutionally enshrined goal of ensuring that participation in the political decision-making process in the state is as extensive as possible. Only the legislator of the simple Electoral Act exempted just the parties of the Danish minority from the threshold. Here the applicable electoral law itself proves that it is not designed to achieve the greatest possible representation on grounds of minority protection, for protection and support of the political participation of the Danish minority can completely peter out without more ado. If, namely, the number of votes required for a mandate is not achieved the party of the Danish minority is not even represented in the Parliament of Schleswig-Holstein.

14 Regardless of this, a regionalised threshold for parties of the Danish minority could also be considered. A connecting factor in favouring the SSW is a fact which is not related to the electoral process and which also has a geographical dimension in the form of the ancestral lands in Southern Schleswig. It is not just a matter therefore of a general reverse exception from the threshold. Granting a special exemption to certain parties, in this case the SSW, results instead in new inequalities of treatment in relation to other smaller parties. These must be limited to the absolute minimum. In this respect it would not seem to be contrary to the system if the legislator endeavoured to use the characteristic unrelated to

the electoral process not only in a way that grants a preference but also in a limiting way.

15 Even if one were to agree with the Court and regard the SSW's complete exemption from the threshold as necessary, it would not be reasonable since it results in overcompensation.

16 It is true that electoral success can be credited to a party of the Danish minority just as weil as a general political mandate which is used or participation in the government of the state. All these are consequences of participation in elections and representation in the Parliament of Schleswig-Holstein. The acceptance of subsidiary or *sui generis* parliamentary mandates is prohibited with regard to Article 11 Constitution of Schleswig-Holstein. In this case, however, the important thing is the preliminary question of the scope of the representation in parliament on grounds of minority protection. The applicable electoral law provides for a general threshold. The legislator then breaches the system he established when he does not maintain the compelling ground for the 5% threshold but gives it up more than is necessary for the purpose of protecting national minorities. From a national and party-political standpoint, even a minority party impedes the formation of a government and majority in Parliament.

17 The Danish minority numbers around 50,000 persons according to information of the Federal Ministry of the Interior and the *Land* government

> (Brochure *"Nationale Minderheiten- und Regionalsprachen in Deutschland"* (National Minorities, Minority and Regional Languages in Germany), Federal Ministry of the Interior <editor>, November 2012, page 12 and http://www.schleswig-holstein.de/ Portal/DE/Landleute/Minderheiten/Daenisch/ daenisch_node.html; downloaded on 1 August 2013).

There must consequently be an assumption that there is currently a relevant Danish minority. Therefore it is not necessary to decide, as affiliation with the Danish minority is defined under constitutional law and in simple statute in detail, in particular whether merely identifying with that minority is sufficient for this.

18 The SSW received 61,025 second votes and thus 4.6% of all valid second votes, including a significant proportion in territories outside the traditional territory of the Danish minority

> (announcement of the *Land* Returning Officer dated 18 May 2012, ABl No. 23 page 499 et seqq., overview 4).

Although gathering data on how many of these electors were members of the Danish minority is prohibited, the assumption must be that not all members of the Danish minority are eligible to vote and not all members of the minority will probably have elected the SSW. Against this background, the numbers and the regional distribution indicate that the SSW must have had considerable support from electors who do not belong to the minority. This political reality must not be ignored by the Court in its assessment of the proportionality of an encroachment on electoral equality on the grounds of minority protection.

19 If one allocates to the SSW all seats arising mathematically from the result of its second vote, then it benefits to a large extent from its general political success, which does not derive from its minority status. The deepening of the encroachment on electoral equality, particularly vis à vis other small parties, that is associated herewith (i.e. with the allocation of further seats in excess of a "seat for the national minority") in the case of an election result below 5% cannot, subject to other instruments such as for instance a regionalised threshold, be justified by minority protection. The integrative power of elections in the political decision-making process of the people requires effective parliamentary representation of the political factions who are significant according to the vote of the electorate. To the extent that access to parliament is

made easier for a national minority, the relationship of the minority who are eligible to vote with the electorate as a whole must not be ignored here.

20 The mandatory electability of the parties of the Danish minority, namely the SSW, throughout the entire state is indeed an (ancillary) consequence of the change in the electoral law caused by the introduction of the second vote. Allowing this system to be chosen is, however, not the end of the matter. Instead the legislator is obligated according to the Federal Constitutional Court case-law,

> to examine the electoral law provision affecting electoral equality and equal opportunities and, where necessary, to amend it if the constitutional law justification of this provision is called into question by new developments, for example by a change in the actual or normative bases stipulated by the legislator or as a result of the fact that the prediction about its effects made when the provision was enacted turned out to be erroneous (...). For thresholds in proportional representation, this means that the compatibility of a threshold with the principle of electoral equality and equal opportunities of the political parties cannot be assessed abstractly once and for all. An electoral law provision can be justified with regard to a representative body at one point in time (...) (but) not at another time (...). A threshold that is considered to be permissible one time must therefore not be deemed to be constitutionally unobjectionable forever. Instead, a different assessment under constitutional law can arise if circumstances change materially. If in this regard the legislator discovers that circumstances have changed he must take these into account. Only the current circumstances are relevant to the question of whether the threshold should be retained any longer (...)
>
> (Federal Constitutional Court, judgment dated 9 November 2011 - 2 BvC 4/10 inter alia -, Federal Constitutional Court decisions (BVerfGE) volume 129, page 300 et seqq., Juris, marginal note 90).

21 The legislator has not fulfilled this review and examination obligation. The overcompensation arising as a consequence of the introduction of the second vote is not (no longer) covered by the goal of minority protection. Support from electors who cannot be said to belong to the Danish minority (which, however, there is, as documented in particular by SSW's election result outside Southern Schleswig) is due to general political reasons and is thereby subject to the general threshold. Only the affiliation with the national minority justifies the

unequal treatment of the SSW in the balancing mechanism compared to parties with a small number of votes and parties that do not focus on local issues. At the same time connecting the party to a specific group of electors limits the admissibility of unequal treatment under electoral law. The electoral legislator is prevented, apart from where there are compelling grounds, to arrange for parties to enter parliament.

22 The rule in Section 3 (1) Sentence 2 LWahlG in its current version therefore contravenes Article 3 (1) Constitution of Schleswig-Holstein. Since the majority of the Court holds that the rule is compatible with the Constitution of Schleswig-Holstein, no decision is needed in this case as to what the legal consequence of the contravention would be.

23 Similarly, no decision is needed here regarding the question addressed in the oral hearing as to whether the "seat for the national minority" should always be allocated to the SSW, i.e. even if the party fails to achieve the second vote result which is necessary for a mandate. That decision is first and foremost one for the legislator.

Brock Brüning Hillmann

Judgment of the Schleswig-Holstein Constitutional Court dated 13 September 2013 - LVerfG 9/12 -

Headnotes:

1. A party is a party of the Danish minority if it stems from the minority and it is currently staffed by the minority and its programme is shaped by it. This must be verified anew for each election to the Parliament of Schleswig-Holstein. The South Schleswig Voters' Committee (*Südschleswigscher Wählerverband*, SSW) was a party of the Danish minority in the elections for the 18th Schleswig-Holstein Parliament.

2. Differentiations in the electoral equality, for instance, through the 5% threshold or a reverse exception therefrom, require a special, objectively legitimated, "compelling" reason to be justified. The same standards apply to the equal opportunities of the parties (following the judgment dated 30 August 2010 - LVerfG 1/10 -, marginal note 142 with further references concerning the jurisdiction of the Federal Constitutional Court (BVerfG), State Constitutional Court decisions (LVerfGE) volume 21, page 434 et seqq. = *Schleswig-Holsteinische Anzeigen* (SchlHA) 2010, page 276 et seqq. = *Zeitschrift für Öffentliches Recht in Norddeutschland* (NordÖR) 2010, page 401 et seqq. = *JuristenZeitung* (JZ) 2011, page 254 et seqq., Juris, marginal note 148 et seqq.).

3. There are at least no higher requirements for the justification of exemptions from the threshold than there are for justification of the threshold itself. The exception can instead help to ensure that the threshold itself is legitimated by mitigating the threshold's effects which jeopardise the integrative function of the election or other constitutional values.

4. The electoral legislator merely has a small amount of latitude. The Schleswig-Holstein State Constitutional Court, while taking account of the actual circumstances, only examines whether the legislator has, in his balancing of interests and the underlying prediction, adhered to the constitutional limits, but not whether the legislator has found the solution that is most appropriate or particularly desirable from a judicial policy point of view (following the judgments of the Federal Constitutional Court dated 11 August 1954 - 2 BvK 2/54 -, Federal Constitutional Court decisions (BVerfGE) volume 4, page 31 et seqq., Juris, marginal note 36 and 25 July 2012 - 2 BvE 9/11 inter alia -, BVerfGE volume 131, page 316 et seqq. Juris, marginal note 63, established case-law).

5. The 5% threshold stipulated under simple statute does not infringe the equality of elections and equal opportunities of the parties. It is legitimated by the purpose of ensuring the proper functioning of the Schleswig-Holstein Parliament and the integrative role of the parties and does not violate the principle of proportionality.

6. In fact, the exemption of the parties of the Danish minority in Section 3 (1) Sentence 2 of the Schleswig-Holstein Electoral Law (*Landeswahlgesetz* - LWahlG) as a reverse exception from the 5% threshold does affect the voter equality in its form of equality of the success ratios (*Erfolgswertgleichheit*) and equal opportunities of the parties. However, the provision is legitimated by the Land's obligation to protect the political participation of the national Danish minority in accordance with Article 5 (2) of the Schleswig-Holstein Constitution and does not violate the principle of proportionality.