

# On the Constitutionality of a *Hauptausschuss* (Main Committee) in the German *Bundestag*

By Pierre Thielbörger\* & Tobias Ackermann\*\*

## A. Introduction<sup>1</sup>

Since the end of 2013, Germany has been governed by a “grand coalition” of the biggest parties—Chancellor Angela Merkel’s Christian Democratic Union (CDU), together with its Bavarian sister, the Christian Social Union (CSU), and the Social Democratic Party (SPD). While one can generally call the hitherto work of the current government quite productive (regardless of any qualitative assessment), the first few months of the 18th legislature period painted a different picture: due to tough and slowly progressing negotiations over a new government,<sup>2</sup> the German Parliament was paralyzed for a considerable time.<sup>3</sup> After the election of 22 September 2013,<sup>4</sup> in which Ms. Merkel’s CDU missed an absolute majority, the constitutive session of the *Bundestag* took place on 22 October 2013,<sup>5</sup> which was the last possible date within the thirty-day deadline as set out by Art. 39(2) of the *Grundgesetz* (German Basic Law). The new government, however, was elected not before

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\* Professor of German Public Law and International Law, Law Faculty and Institute for the Law of Peace and Armed Conflict, Ruhr University Bochum.

\*\* Research Associate at the Institute for the Law of Peace and Armed Conflict, Ruhr University Bochum.

<sup>1</sup> This article draws in part on ideas also expressed in Pierre Thielbörger & Tobias Ackermann, *Großer Ausschuss oder Großer Ausschluss? Zur Verfassungsmäßigkeit eines Hauptausschusses im Deutschen Bundestag*, 7 ZEITSCHRIFT FÜR DAS JURISTISCHE STUDIUM 497, 497–504 (2014).

<sup>2</sup> See, e.g., Veit Medick & Severin Weiland, *Große Koalition: Jetzt Wird Endlich Regiert*, SPIEGEL ONLINE (Dec. 15, 2013), <http://www.spiegel.de/politik/deutschland/die-grosse-koalition-steht-merkel-ernennt-unions-minister-a-939191.html>; *Those Uppity Social Democrats: Germany’s Coalition Negotiations*, THE ECONOMIST, Nov. 23, 2013.

<sup>3</sup> See, e.g., Ulrike Heidenreich, *Stillstand im Bundestag: Abgeordnete im Wartestand*, SÜDDEUTSCHE ZEITUNG ONLINE (Dec. 7, 2013), <http://sz.de/1.1838022>.

<sup>4</sup> FEDERAL RETURNING OFFICER, FINAL RESULT OF THE ELECTIONS TO THE 18TH GERMAN BUNDESTAG (2013), [http://www.bundeswahlleiter.de/en/bundestagswahlen/BTW\\_BUND\\_13/ergebnisse](http://www.bundeswahlleiter.de/en/bundestagswahlen/BTW_BUND_13/ergebnisse) (detailing the final results of the election). See also Frank Decker, *Follow-up to the Grand Coalition: The German Party System Before and After the 2013 Federal Election*, 32 GERMAN POL. & SOC’Y 19 (2014) (describing the election results); Thorsten Faas, *The German Federal Election of 2013: Merkel’s Triumph, the Disappearance of the Liberal Party, and Yet Another Grand Coalition*, 38 WEST EUR. POL. 238 (2015) (same).

<sup>5</sup> See DEUTSCHER BUNDESTAG: PLENARPROTOKOLL [BT] 18/1 (Ger.), <http://dipbt.bundestag.de/doc/btp/18/18001.pdf>.

17 December 2013. In between, the new *Bundestag* could not effectively begin to work as the interplay with the government is an important part of the Parliament's work. Urgent business had to be left untouched. In order to end this deadlock, the factions of CDU/CSU and SPD took a unique step: they established a so-called "Main Committee" (*Hauptausschuss*), which was intended to serve as a preliminary body dealing with the most urgent tasks until a new government would finally be formed.<sup>6</sup>

Even though the Main Committee was—with the establishment of the permanent committees of the *Bundestag*—*ipso facto* dissolved in January of 2014,<sup>7</sup> and the new government does "business as usual" now, the Main Committee and its legality need in-depth scrutiny. Not only could it be used as a role model for solving future problems in the context of difficult government formations; (pre-)governmental action must be reviewed critically all the more in times of a large majority government. Together, CDU/CSU and SPD form a majority of 504 out of 631 Members of the *Bundestag*, leaving only 20 percent of the seats for the two opposition parties (Alliance '90/The Greens and The Left).<sup>8</sup>

The Main Committee's overall forty-seven members were comprised of thirty-seven members of the three (future) governing parties while only ten members belonged to the parliamentary opposition.<sup>9</sup> The involvement of only a few oppositional Members of the *Bundestag* was, however, not the only problematic feature of the committee. It replaced all other normally existing committees of the *Bundestag* until a decision on a new government was reached, thereby combining different political branches and parliamentary powers. The creation of the Main Committee was thus controversial from the very beginning. While, naturally, members of the (soon to-be) governing parties declared it an "excellent, comprehensive and practicable solution,"<sup>10</sup> politicians of the opposition and commentators saw a blatant violation of the Constitution.<sup>11</sup>

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<sup>6</sup> DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 18/101 (Ger.), <http://dip21.bundestag.de/dip21/btd/18/001/1800101.pdf>.

<sup>7</sup> Compare Antrag der Fraktionen CDU/CSU, SPD, die Linke, und Bündnis/die Grünen, Dec. 19, 2013, DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 18/211 (moving to establish the permanent committees of the *Bundestag* of all factions the Main Committee, which was *ipso facto*, pursuant to the motion of its appointment, dissolved), with Antrag der Fraktionen der CDU/CSU und SPD, Nov. 27, 2013, DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 18/101 ("By constituting the permanent committees . . . the Main Committee is dissolved." (translation of the authors)).

<sup>8</sup> See FEDERAL RETURNING OFFICER, *supra* note 4.

<sup>9</sup> See DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 18/101, *supra* note 6.

<sup>10</sup> Press Release, Parliamentary Secretary of the CDU/CSU Faction Michael Grosse-Brömer, Bundestag setzt Hauptausschuss ein (Nov. 20, 2013), <http://www.cdusu.de/presse/pressemitteilungen/bundestag-setzt-hauptausschuss-ein>.

<sup>11</sup> See, e.g., Press Release, Parliamentary Secretary for the Left Faction Petra Sitte, Der Bundestag muss endlich arbeiten (Nov. 20, 2013), <http://www.linksfraktion.de/pressemitteilungen/bundestag-muss-endlich-arbeiten/>. See also Heribert Prantl, *Pläne von SPD und Union: Unbehagen am Super-Ausschuss*, SÜDDEUTSCHE ZEITUNG ONLINE.

This article focuses on these two aforementioned aspects of this unique committee in German parliamentary history: Never before had one single committee replaced all other committees, and never before had only a handful of Members of the *Bundestag* been involved in the Parliament's decision-making process through committees. This article prefaces the legal assessment with an evaluation of the significance of the *Bundestag's* committees in general and the practice regarding their establishment.<sup>12</sup> The article then turns to the constitutional issues of the Main Committee and scrutinize, first, whether installing one single committee violates a constitutional guarantee of so-called mandatory committees (*Pflichtausschüsse*);<sup>13</sup> and second, whether the rights of the individual Members of the *Bundestag* were violated.<sup>14</sup> This article concludes the assessment of this committee *sui generis* with an outlook on its legal and political significance and address the political context in which it was appointed. Ultimately, this article serves to consider the question whether the Main Committee should be considered a 'good practice' in times of unclear parliamentary majorities or whether it should rather remain a unique practice in German parliamentary history.<sup>15</sup>

## B. Significance of Committees and Practice of the *Bundestag*

Ever since there was a German *Bundestag*, committees have routinely been part of parliamentary practice.<sup>16</sup> They are said to be—apart from the parliamentary groups, the factions (*Fraktionen*)—the most important subdivisions of the *Bundestag*.<sup>17</sup> Each committee consists of a certain number of Members of the *Bundestag* and is appointed

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(Nov. 21, 2013), <http://sz.de/1.1823772>; Press Release, *supra* note 10; Heribert Prantl, *Hauptausschuss im Bundestag: Berufsverbot für 584 Abgeordnete*, SÜDDEUTSCHE ZEITUNG (Dec. 5, 2013), <http://sz.de/1.1835946> (critical comments); Monika Pilath, *Bundestag setzt umstrittenen Hauptausschuss ein*, ZEIT ONLINE (Nov. 28, 2013), <http://www.zeit.de/politik/deutschland/2013-11/bundestag-hauptausschuss-einsetzung>.

<sup>12</sup> See *infra*, Part B.

<sup>13</sup> See *infra*, Part C.I.

<sup>14</sup> See *infra*, Part C.II.

<sup>15</sup> See *infra*, Part D.

<sup>16</sup> See PETER SCHINDLER, DATENHANDBUCH ZUR GESCHICHTE DES DEUTSCHEN BUNDESTAGES 1949-1999, 2022, 2034-41 (2d ed. 1999) (providing an overview and then a list of all the committees during the first legislature period from 1949 to 1953, and specifically providing that in the first election period of the German Bundestag, a total of 40 permanent committees already existed).

<sup>17</sup> Siegfried Magiera, *Art. 40*, in GRUNDGESETZ: KOMMENTAR para. 15 (Michael Sachs, ed., 6th ed. 2011); THOMAS SCHWERIN, DER DEUTSCHE BUNDESTAG ALS GESCHÄFTSORDNUNGSGEBER: REICHWEITE, FORM UND FUNKTION DES SELBSTORGANISATIONRECHTS NACH ART. 40 ABS. 1 S. 2 GG, 156 (1998).

and assigned its work directly by the Parliament.<sup>18</sup> There are, in general, three different types of committees:<sup>19</sup> Special committees deal with specific questions on a temporary basis; committees of inquiry scrutinize certain public interest issues, such as the recent and prominent case of alleged spying activities of the NSA in Germany;<sup>20</sup> and, finally, permanent committees are assigned to a specific policy field for the duration of the full legislative period in order to prepare the *Bundestag*'s deliberations on these matters. Having been created as a temporary body not only dealing with a specific issue, but with almost all policy fields, the Main Committee may be considered a special committee *sui generis*.

The practical need for committees is premised upon the enormous workload of the *Bundestag* as well as upon the advantages of discussing certain matters in smaller groups—rather than in the whole plenum—with Members having more specialized expertise and without much media attention or pressure.<sup>21</sup> Without this work relief, the plenum could easily be overburdened.<sup>22</sup> As a result, most of the legislative work is done in permanent committees—their political significance in the decision-making processes of the *Bundestag* could hardly be overestimated. Accordingly, the *Bundesverfassungsgericht* (Federal Constitutional Court) emphasized that the committees' composition must reflect that of the whole *Bundestag*.<sup>23</sup> The committees are microcosms of the plenum.<sup>24</sup>

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<sup>18</sup> ZIVILPROZESSORDNUNG (CODE OF CIVIL PROCEDURE) [ZPO], rules 57, 62(1), <https://www.btg-bestellservice.de/pdf/80060000.pdf>.

<sup>19</sup> See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I (Ger.), art. 44; DEUTSCHER BUNDESTAG, RULES OF PROCEDURE OF THE GERMAN BUNDESTAG AND RULES OF PROCEDURE OF THE MEDIATION COMMITTEE, rule 54 (2014) [hereinafter Bundestag Rules of Procedure], <https://www.btg-bestellservice.de/pdf/80060000.pdf>.

<sup>20</sup> See Marcel Fürstenau, *German Parliament to Inquire into NSA*, DEUTSCHE WELLE (Mar. 20, 2014), <http://dw.de/p/1BTJg>.

<sup>21</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 1/91, 84 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 304, para. 100 (July 16, 1991); Max-Emanuel Geis, *Parlamentsausschüsse*, in 3 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, 853, 854 at para. 1 (Josef Isensee & Paul Kirchhof eds., 2005); Hans H. Klein, *Art. 40*, in GRUNDGESETZ-KOMMENTAR para. 127 (Theodor Maunz & Günter Dürig eds., 2013); Magiera, *supra* note 17, at para. 17; SIEGFRIED MAGIERA, PARLAMENT UND STAATSLIETUNG IN DER VERFASSUNGSORDNUNG DES GRUNDGESETZES 137 (1979); SCHWERIN, *supra* note 17, 162.

<sup>22</sup> Magiera, *supra* note 17, at para. 15; HARTMUT MAURER, STAATSRECHT I: GRUNDLAGEN, VERFASSUNGSORGANE, STAATSFUNKTIONEN § 13, at para. 102 (6th ed., 2012).

<sup>23</sup> BVerfG, Case No. 2 BvE 1/91 at para. 100; Magiera, *supra* note 17, at para. 17.

<sup>24</sup> This also explains the composition of the Main Committee (thirty-seven members of the government parties and ten of the opposition parties) as it reflects the composition of the current *Bundestag* (504 versus 127).

In permanent committees of the *Bundestag*, legislative projects are not only prepared.<sup>25</sup> Often they are dealt with so extensively that they can almost be considered finalized before they even reach the plenary meeting, making the plenum's approval or denial of the respective legislative initiative, rightly or wrongly, a mere matter of form rather than one of political discourse.<sup>26</sup> Due to their prominent role in the *Bundestag*'s main tasks of legislating and monitoring the government,<sup>27</sup> the committees must altogether be considered as auxiliary organs (*Hilfsorgane*) of the *Bundestag*,<sup>28</sup> fulfilling crucial purposes in the German Parliament.

It is a code of practice that the number and composition of the permanent committees correspond to the number and composition of the federal ministries.<sup>29</sup> This practice enables a precise control of legislative projects of the respective ministries by specialized Members of the *Bundestag*.<sup>30</sup> Against this background, the factions of CDU/CSU and SPD argued that without an agreement on a new government and consequently on the distribution and structure of the new ministries forming permanent committees was simply not possible.<sup>31</sup> Instead, a previously unknown Main Committee was formed, substituting all other permanent committees under the participation of only a few Members. The question is, however, whether establishing this new committee was just an unusual step within the discretion of the *Bundestag* or a breach of the *Grundgesetz*.

### C. Constitutionality of the Main Committee

The establishment of the Main Committee raises two major concerns: The first one is the replacement of all permanent committees, even though the *Grundgesetz* explicitly

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<sup>25</sup> See Bundestag Rules of Procedure, *supra* note 19, rule 54(1) ("The Bundestag shall set up permanent committees for the preparation of its deliberations."); *id.* rule 62(1) ("... bodies responsible for preparing the decisions of the Bundestag ...").

<sup>26</sup> Lars Brocker, *Art. 40*, in BECK'SCHER ONLINE-KOMMENTAR ZUM GRUNDGESETZ para. 17 (Volker Epping & Christian Hillgruber eds., 2014); Geis, *supra* note 21, 854; Wolfgang Zeh, *Gliederung und Organe des Bundestages*, in 3 HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND 769, 793 at para. 39 (Josef Isensee & Paul Kirchhof eds., 2005).

<sup>27</sup> See GRUNDGESETZ, art. 43(1); Bundestag Rules of Procedure, *supra* note 19, rule 68 (describing the committees' right to require the presence of any member of the government).

<sup>28</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1178/86, 2 BvR 1179/86, 2 BvR 1191/86, 77 BVERFGE 1, para. 99 (Oct. 1, 1987).

<sup>29</sup> Zeh, *supra* note 26, 794 para. 41.

<sup>30</sup> *Id.*

<sup>31</sup> See DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 18/54 (moving to appoint the committees of the faction of The Left, although the motion was defeated); DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 18/102, <http://dip21.bundestag.de/dip21/btd/18/001/1800102.pdf>.

premises *prima facie* the existence of at least some of the permanent committees. The second one is the fact that only forty-seven of 641 Members of the *Bundestag* participated in the Main Committee although it might have played a crucial role in the parliamentary decision-making processes. This raises concerns regarding the equality of Members as well the question whether Members can fulfill their constitutional mandate while being excluded from the Main Committee. This article thus assesses whether either the *Bundestag* itself or its individual Members were legally violated through the establishment of the Main Committee. The article focuses on each of these issues in turn.

### *I. Violation of a Constitutional Guarantee of Existence*

At first glance, one would consider the establishment of the Main Committee as easily falling within the organizational autonomy of the *Bundestag*. The Parliament is competent to adopt rules of its own procedure as granted by sentence 2 of Art. 40(1) of the *Grundgesetz*. The creation or non-creation of committees generally falls within the Parliament's power to freely determine its inner organization.<sup>32</sup> Thus, creating new forms of inner organization like a Main Committee is not *prima facie* illegal.<sup>33</sup> In certain circumstances, the creation of new forms of inner organization might even be necessary.

However, the *Bundestag's* autonomy is not absolute and, naturally, the Parliament must exercise its competence in accordance with the Constitution.<sup>34</sup> In this way, multiple provisions of the Constitution may have a restricting effect on the *Bundestag's* discretion in this respect.

#### *1. A Constitutional Guarantee of Existence*

Art. 42(3), 43, and 46(1) of the *Grundgesetz* mention "committees" in the plural form. This could indicate that the Constitution presupposes the existence of *several* committees instead of only one. However, these vague references to the "*Bundestag* and its committees" as such are hardly strong enough to impose an obligation on the *Bundestag*.<sup>35</sup> In fact, as the parliamentary autonomy is key to ensure the effective realization of the

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<sup>32</sup> See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 8/11, 130 BVERFGE 318 (Feb. 28, 2012); HANS-ACHIM ROLL, GESCHÄFTSORDNUNG DES DEUTSCHEN BUNDESTAGES: KOMMENTAR § 54 para. 1 (2001). See also SCHWERIN, *supra* note 17, at 22; Brocker, *supra* note 26, para. 4.

<sup>33</sup> See Michael Fuchs, *Zur Verfassungsmäßigkeit des Hauptausschusses des Deutschen Bundestages*, DEUTSCHES VERWALTUNGSBLATT 886, 888 (2014).

<sup>34</sup> Klein, *supra* note 21, para. 73; SCHWERIN, *supra* note 17, 29; MAURER, *supra* note 22, § 13 para. 91.

<sup>35</sup> See Wilfried Berg, *Art. 45a*, in KOMMENTAR ZUM BONNER GRUNDGESETZ para. 21 (Rudolf Dolzer, Klaus Vogel & Karin Graßhof eds., 1986); HANS-HERMANN KASTEN, AUSSCHUßORGANISATION UND AUSSCHUßRÜCKRUF: EIN BEITRAG ZUM FREIEN MANDAT IN DEN PARLAMENTEN UND KOMMUNALEN VERTRETUNGSKÖRPERSCHAFTEN DER BUNDESREPUBLIK DEUTSCHLAND 35 (1983).

functions and duties of the *Bundestag*, restrictions to it must only be construed restrictively in order to give the Parliament air to breathe, i.e. to adapt to changing circumstances and realities.<sup>36</sup>

That being said, the same is not necessarily true with regard to provisions of the *Grundgesetz* naming certain committees explicitly. These committees were replaced by the Main Committee for several months: the tasks and powers of the Committee on the European Union,<sup>37</sup> the Committee on Foreign Affairs,<sup>38</sup> the Committee on Defense,<sup>39</sup> and the Petitions Committee<sup>40</sup> were all simultaneously taken over by the Main Committee. The question thus remains whether the explicit mentioning of these four committees indicates that their appointment is mandatory and, if so, whether temporarily replacing them by one Main Committee is consistent with this constitutional requirement.

The first part of the question can be answered quite easily with a look at the wording of the respective provisions. The first sentence of Art. 45, 45a(1), and 45c(1) of the *Grundgesetz* congruently state that the *Bundestag* “shall appoint” (“*bestellt*”) the four aforementioned committees. In contrast, sentences two and three of Art. 45 of the *Grundgesetz*, for example, use the word “can” (“*kann*”) in the context of granting power to the Committee on the European Union. While the use of “*kann*” indicates a certain amount of discretion (including the choice to not do something at all), the German indicative mode (“*bestellt*”) implies that the question whether or not to appoint the respective committee is outside of the *Bundestag*’s margin of discretion. This view is supported by the historic will of the constitutional legislator. According to the preparatory works, the appointment of the Petitions Committee, for example, was expressly considered “mandatory” (“*zwingend*”),<sup>41</sup> and the Committee on the European Union was to be “institutionally anchored” (“*institutionell verankert*”) in addition to the committees named in Art. 45a and 45c of the *Grundgesetz*.<sup>42</sup> As a result, all four committees are equally ranked as mandatory committees (*Pflichtausschüsse*). Art. 45, 45a, and 45c of the *Grundgesetz* must, indeed, be

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<sup>36</sup> See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvH 3/91, 102 BVERFGE 224, 240 (July 21, 2000); Berg, *supra* note 35, para. 21; MAURER, *supra* note 22, § 13 para. 87; Rupert Scholz, *Art. 45a, in GRUNDGESETZ-KOMMENTAR* para. 2 (Theodor Maunz & Günter Dürig eds., 2013).

<sup>37</sup> GRUNDGESETZ, art. 45.

<sup>38</sup> GRUNDGESETZ, art. 45a(1).

<sup>39</sup> *Id.*

<sup>40</sup> GRUNDGESETZ, art. 45c.

<sup>41</sup> DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] VI/973, 2 (translation of the authors), <http://dipbt.bundestag.de/doc/btd/06/009/0600973.pdf>.

<sup>42</sup> DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 12/3896, 21 (translation of the authors), <http://dipbt.bundestag.de/doc/btd/12/038/1203896.pdf>.

understood as legally binding obligations of the *Bundestag* to appoint them.<sup>43</sup> In this regard, the Parliament has no discretion.

Scholars commonly derive from this constitutional directive a guarantee of existence of the committees covering not only the mere institutional existence—institutional guarantee—but also the guarantee of the committees' respective key competences—guarantee of competences.<sup>44</sup> This means that, for example, the two<sup>45</sup> committees of Art. 45a(1) of the *Grundgesetz* on foreign affairs and on defense must not be merged into one single “Committee on Foreign Affairs and Defense”—the institutional guarantee—and that the respective competences and duties must not be transferred to another committee—the guarantee of competences.<sup>46</sup> The same must be true with regard to the other committees as all mandatory committees share an identical legal status. The existence of such guarantees is, again, directly supported by the preparatory works on the insertion of the Committee on the European Union in the Constitution: the constitutional legislator chose to use the then “vacant” Art. 45 of the *Grundgesetz* in order to emphasize the new committee's importance and independence from other committees, especially from the Committee on Foreign Affairs.<sup>47</sup> This way, EU policies were separated from general foreign policies in order to make interdepartmental work possible<sup>48</sup>—a decision by the constitutional legislator that proved wise given the EU's ever growing importance.

The independent status of the committees is further confirmed by Art. 115a of the *Grundgesetz*.<sup>49</sup> The Constitution knows only a single case in which the plenum may be

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<sup>43</sup> See, e.g., Lars Brocker, *Art. 45c*, in BECK'SCHER ONLINE-KOMMENTAR ZUM GRUNDGESETZ para. 1 (Volker Epping & Christian Hillgruber eds., 2014) (detailing the prevailing opinion); Ingolf Pernice, *Art. 45*, in GRUNDGESETZ KOMMENTAR para. 5 (Horst Dreier ed., 2nd ed. 2006); ROLL, *supra* note 32, § 54 para. 2; Rupert Scholz, *Art. 23*, in GRUNDGESETZ-KOMMENTAR PARA. 155 (Theodor Maunz & Günter Dürig eds., 2013); cf. DEUTSCHER BUNDESTAG, FUNCTION AND RESPONSIBILITIES, [http://www.bundestag.de/htdocs\\_e/bundestag/committees/function.html](http://www.bundestag.de/htdocs_e/bundestag/committees/function.html) (“The Bundestag does not have a completely free hand when setting up these bodies, since some committees are provided for by the Grundgesetz . . .”).

<sup>44</sup> See Berg, *supra* note 35, para. 117; Lars Brocker, *Art. 45a*, in BECK'SCHER ONLINE-KOMMENTAR ZUM GRUNDGESETZ para. 1 (Volker Epping & Christian Hillgruber eds., 2014); Geis, *supra* note 21, 857; Siegfried Magiera, *Art. 45a*, in GRUNDGESETZ-KOMMENTAR para. 3 (Michael Sachs, ed., 6th ed. 2011); Scholz, *supra* note 36, para. 12.

<sup>45</sup> See DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 2/2150, 3, <http://dipbt.bundestag.de/doc/btd/02/021/0202150.pdf>.

<sup>46</sup> Berg, *supra* note 35, para. 117 (providing further references); Geis, *supra* note 21, at 857; Werner Heun, *Art. 45a*, in GRUNDGESETZ KOMMENTAR para. 3 (Horst Dreier ed., 2nd ed. 2006); Magiera, *supra* note 44, para. 3; Scholz, *supra* note 36, para. 12.

<sup>47</sup> DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 12/6000, 24, <http://dipbt.bundestag.de/doc/btd/12/060/1206000.pdf>.

<sup>48</sup> See Pernice, *supra* note 43, para. 12.

<sup>49</sup> See Jörn Axel Kämmerer, *Deutschland auf dem Weg zur “Lame Duck Democracy”?—Eine kleine Systemkritik*, 33 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 29, 31 (2014).

condensed into a small committee: the case of state defense. Only in such an exceptional situation and under further narrow conditions, a Joint Committee<sup>50</sup> consisting of Members of the *Bundestag* and the *Bundesrat*—the legislative body which represents the sixteen federal states—may act in the place of the *Bundestag*.<sup>51</sup> The fact that only in this one truly exceptional case a smaller committee was given permission to act on behalf of the *Bundestag* indicates that other cases should not be allowed. Even if one allowed for room for an (unwritten) analogy, such analogy would nevertheless be not applicable here: although it may be a difficult task, forming a new government is, in no way an exceptional situation that would be in any way comparable to the case of state defense.<sup>52</sup>

Amalgamating all four committees to one single, Main Committee thus—in principle—constitutes a violation of the constitutional guarantees, both institutionally as well as regarding the competences, under Art. 45, 45a, and 45c of the *Grundgesetz*.

## 2. No Considerations of Expediency

It is another question, however, whether this finding is—without further ado—applicable to the Main Committee. Having in mind the purposes of the committees—making parliamentary work more efficient by preparing decisions of the plenum and facilitating the exchange of opinions between specialized Members of the *Bundestag*<sup>53</sup>—one could argue that these goals were perfectly well met by their substitution and that the Main Committee thus constitutes an appropriate alternative to the four mandatory committees. The argument would go that, as long as the purpose behind the constitutional guarantee was met, the strict adherence to the establishment of the guaranteed institutions could be dispensable.

Such an approach, however, would be fundamentally wrong. It would erroneously allow the *Bundestag* a margin of discretion over the question of whether the mandatory committees are appointed or not. As has been shown, Art. 45, 45a, and 45c of the *Grundgesetz* explicitly limit the *Bundestag's* organizational freedom in this respect. The Parliament neither has the choice whether to appoint the four mandatory committees, nor does it have the choice to replace them with a different institution (an *aliud* like the Main Committee). This is independent of the question whether this *aliud* would serve the purpose of the constitutional guarantee equally well (or for a short amount of time even better). It is the character of a guarantee to prevent the guaranteed institution from being

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<sup>50</sup> GRUNDGESETZ, art. 53a.

<sup>51</sup> GRUNDGESETZ, art. 115a(5).

<sup>52</sup> See Kämmerer, *supra* note 49, 31.

<sup>53</sup> See *supra*, Part B.

abolished or replaced by another institution for whatever reason. Considerations of expediency—whether one finds them convincing in the case of the Main Committee or not—thus cannot refute the finding that the replacement of the mandatory committees was in violation of the Constitution.

### 3. A Need for an Actual and Permanent Existential Threat?

Nevertheless, doubts may arise as to whether the circumstances in question actually reach the threshold of violating the constitutional guarantees. This presupposes the idea that a violation requires a certain intensity of an infringement. The Main Committee only existed for a foreseeable period of time and was—from the very beginning—appointed under the premise that it would be dissolved after the appointment of the usual permanent committees. To make a similar point in reverse, the non-existence of the mandatory committees was *ab initio* of a preliminary nature.

The question thus is whether Art. 45, 45a, and 45c of the *Grundgesetz* guarantee the permanent existence of the committees at all times, which would mean that even a temporary non-existence of these committees would violate the *Grundgesetz*. This relates to the question of the time period in which the *Bundestag* must appoint its committees.

The present scenario lies arguably in a grey area. Approaching the question from one extreme—not appointing the committees for the time of a whole election period of four years—would certainly be a clear violation of the Constitution. Approaching it from the other extreme, a certain period of non-existence is inherent in the constitutional principle of the *Bundestag's* discontinuity. The first plenary session of a new Parliament is the earliest point in time for the committees' re-appointment.<sup>54</sup>

This point had been passed by three months when the committees were finally constituted on 15 January 2014 during the *Bundestag's* seventh session. This suggests, at first glance, that the appointment of the mandatory committees occurred too late. One could argue, however, for another result by assigning significant discretion to the *Bundestag* regarding the date of appointing the committees. The importance of parliamentary autonomy may support such an approach. However, if this were to be assumed, the *Bundestag* would be allowed discretion “through the back-door” over establishing committees or not. It would be a slippery slope to allow the *Bundestag* not abolish, but to suspend committees that the Constitution requires. Additionally, the explicit organizational requirement given by the *Grundgesetz* must not degenerate into mere guidelines. The guarantee for the mandatory

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<sup>54</sup> See Bodo Pieroth, Art. 45, in *GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR* para. 1 (Hans D. Jarass & Bodo Pieroth eds., 2012); but see Norman Koschmieder, *Verfassungsrechtliche Bedenken gegen die Einsetzung eines “Hauptausschusses” im Bundestag*, 33 *NVwZ* 852, 854 (2014) (arguing that, due to their institutional guarantee, the mandatory committees exist latently, even between two election periods).

committees is a legally-binding and clear rule that must be complied with by Parliament. The preliminary character of the Main Committee does not change this result: even though there was arguably no threat to the committees' long-term existence, the question of whether or not to appoint the committees is, even for a limited amount of time, not at the discretion of the Parliament. It is a clear constitutional provision that does not allow for modification.

#### 4. Conclusion

Neither considerations of expediency nor the short time of the non-existence of the mandatory committees are able to justify the breach of the *Grundgesetz*. By not appointing the four mandatory committees and by transferring their competences to the Main Committee instead, the guarantees set out by Art. 45, 45a, and 45c of the *Grundgesetz* were violated.<sup>55</sup>

#### II. Violation of the Members' Rights

It has been shown, that the work of and in the committees is of utmost importance not only for the *Bundestag* itself, but also for its Members. By appointing only one single committee instead of a variety of committees, only 47 of 631 Members of the *Bundestag* had a chance of participating in the committees' decision-making processes. Thereby, sentence two of Art. 38(1) of the *Grundgesetz* may have been violated. Under German law, a violation of sentence two of Art. 38(1) of the *Grundgesetz*, just like a violation of a basic right,<sup>56</sup> must be assessed in a three step examination. After the scope of a right is identified, the infringement of this right must be shown, before in a third step the possible justification of such infringement is analyzed.<sup>57</sup>

##### 1. Scope of Protection Granted by Sentence Two of Art. 38(1) of the *Grundgesetz*

Members of the *Bundestag* hold—by virtue of their status as “representatives of the whole people”<sup>58</sup>—certain rights that ensure the effective exercise of their mandate.<sup>59</sup> Such rights are, for example, the rights to be present at meetings, to speak, to vote, and to get access

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<sup>55</sup> See Fuchs, *supra* note 33, at 892; Koschmieder, *supra* note 54, at 853. Both come, with partly different arguments, to the same conclusion.

<sup>56</sup> GRUNDGESETZ, arts. 1–19.

<sup>57</sup> See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 6/08, 2 BvR 2436/10, 134 BVERFGE 141 (Sep. 17, 2013), for the correspondent approach of the *Bundesverfassungsgericht*.

<sup>58</sup> GRUNDGESETZ, art. 38(1).

<sup>59</sup> Hans H. Klein, *Art. 38*, in GRUNDGESETZ-KOMMENTAR para. 204 (Theodor Maunz & Günter Dürig eds., 2013).

to information.<sup>60</sup> However, if a significant part of the work is not done in the plenum, but in the committees,<sup>61</sup> Members must have the right to participate in those committees too.<sup>62</sup> It is here, in the committees, where a single Member of the *Bundestag* may have his or her own political opinion heard in the process of parliamentary decision-making.<sup>63</sup> Though the single Member is not entitled to participate in a particular committee of his or her choosing,<sup>64</sup> the German constitutional court, the *Bundesverfassungsgericht*, has confirmed that he or she must have the chance to participate in the work of at least one committee.<sup>65</sup> In the case at hand, the ability of those Members of the *Bundestag* who were not members of the Main Committee to participate in the parliamentary work was *prima facie* at stake. Out of the 631 Members, 584 were not given the right to participate in the one and only committee existent at the time.

## 2. *Interference in Sentence Two of Art. 38(1) of the Grundgesetz*

Another question is whether the creation of the Main Committee constitutes an interference with the excluded Members' rights, especially when considering the short duration of the Main Committee's existence and the relatively small amount of work performed. The Main Committee limited its area of work to the most essential and urgent tasks. In some way, there was arguably no relevant exclusion of Members, as the committee took on only a small amount of work over from the plenum. On the one hand, where there is (almost) no work being done, one can hardly speak of excluding others from that work. This certainly had to do with the fact that the main political task of these three months was perceived to be to negotiate a coalition agreement rather than taking parliamentary decisions. On the other hand, over 90 percent of the Members of the *Bundestag* had no effective possibility to exercise their rights to participate in the legislative process in any committee for a period of three months;<sup>66</sup> their parliamentary

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<sup>60</sup> *Id.*, at paras. 230–235; Herrmann Butzer, *Art. 38*, in BECK'SCHER ONLINE-KOMMENTAR ZUM GRUNDGESETZ paras. 108–119 (Volker Epping & Christian Hillgruber eds., 2014).

<sup>61</sup> MAURER, *supra* note 22.

<sup>62</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 705/75, 44 BVERFGE 308, 319 (May 10, 1977); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 1/88, 80 BVERFGE 188, 224 (June 13, 1989).

<sup>63</sup> *See id.*

<sup>64</sup> Peter Badura, *Die Stellung des Abgeordneten*, in PARLAMENTSRECHT UND PARLAMENTSPRAXIS 489, 507 para. 57 (Hans-Peter Schneider & Wolfgang Zeh eds., 1989).

<sup>65</sup> BVerfG, Case No. 2 BvE 1/88, 80 BVERFGE at 224; Bundestag Rules of Procedure, *supra* note 19, rule 57(1) (“[e]very Member of the Bundestag shall in principle serve on a committee.”)

<sup>66</sup> *See* Heidenreich, *supra* note 3.

work was limited to a shadowy existence in the plenum where the real decision were not made.

An interference with the Members' rights lies therefore not so much in the exclusion from the (manageable and temporary) work of the Main Committee, but rather in the exclusion of Members from work in those (permanent) committees, which usually existed and began their work at the beginning of a new *Bundestag*. This exclusion is by no means a trifling matter, which becomes clear when looking at the last election period from 2009 to 2013. For example, until the winter break of 2009 (the year of previous national election before 2013), the Committee for Education, Research, and Technology Assessment and the Committee for Foreign Affairs, for instance, had already met three and six times, respectively, discussing important topics like the recognition of foreign professional qualifications<sup>67</sup> or making a decision on the continuance of the German participation in the so-called International Security Assistance Force (ISAF) mission.<sup>68</sup> Bearing this in mind, refusing most of the Members of the *Bundestag* the full range of their rights must be qualified as a considerable interference with their rights, even if that limitation was temporary and the Main Committee only dealt with important and urgent issues.

### 3. *Constitutional Justification?*

A justification for such interference is only possible by virtue of other interests protected by the Constitution. In this light, the *Bundesverfassungsgericht* decided, for instance, that the exclusion of an independent Member (not affiliated to any party faction in Parliament) from all committees would only comply with the *Grundgesetz* if grave reasons to protect the efficiency of Parliament demanded it.<sup>69</sup> Considerations stemming from the sphere of party politics had to be excluded as they had no constitutional rank.

The governing factions of CDU/CSU and SPD indeed partially argued that the efficiency of the Parliament demanded the establishment of a Main Committee. Only with such an over-arching committee, so the argument went,<sup>70</sup> was it possible to make urgent decisions in all important policy areas: ensuring a properly working Parliament was of the utmost importance for the state and is demanded by the Constitution, namely by the principle of

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<sup>67</sup> For more information, see the agenda of the committee's 16 December 2009 session. DEUTSCHER BUNDESTAG: Drucksachen und Protokolle [BT] 17/108 (Ger.), [http://webarchiv.bundestag.de/archive/2013/1212/bundestag/ausschuesse17/a18/tagesordnungen/archiv/to\\_003.pdf](http://webarchiv.bundestag.de/archive/2013/1212/bundestag/ausschuesse17/a18/tagesordnungen/archiv/to_003.pdf).

<sup>68</sup> DEUTSCHER BUNDESTAG: BESCHLUSSEMPFEHLUNG UND BERICHT DES AUSWÄRTIGEN AUSSCHUSSES [BT] 17/111 (Ger.), <http://dipbt.bundestag.de/doc/btd/17/001/1700111.pdf>.

<sup>69</sup> BVerfG, Case No. 2 BvE 1/88, 80 BVERFGE at 188, para. 113.

<sup>70</sup> See Pilath, *supra* note 11.

democracy.<sup>71</sup> Further, it is argued that the Main Committee was *inter alia* installed to deal with petitions that had remained unprocessed since the end of the previous election period—contrary to the right of petition of Art. 17 of the *Grundgesetz*. Following this logic, grave grounds that are mirrored in the Constitution—the principle of democracy and the right to have one’s petitions addressed—justified the establishment of the Main Committee.

This logic is tempting, but has an essential flaw: It compares the situation of appointing a Main Committee as a counter-factual with the situation of appointing no committee at all. Regardless, the relevant situation which has to serve as the counter-factual here is the normal scenario with regard to committees, namely that of the appointment of multiple committees shortly after an election.<sup>72</sup> The governing factions argue why *one* committee is politically and legally more desirable than *none*: a logic that is certainly cogent. This logic, however, misses the core of the constitutional problem at hand. It might be correct that in a scenario without any committees all 631 Members (and not “just” 584) would be excluded from the important committee work. However, in a scenario with the usual number of committees being established, the interference with the Members’ rights would have been avoided altogether. The argument brought forward by the governing factions,<sup>73</sup> therefore, is unfit to justify the interference with the rights of the Members of the *Bundestag*.

If one wanted to employ efficiency arguments at all, one would need to argue that the temporary existence of only one committee is more practicable than the temporary existence of multiple committees. This argument is somewhat convincing given the time-consuming expense of first establishing and then dissolving or restructuring committees. Saving resources of the *Bundestag* as part of ensuring its efficiency is certainly a legitimate purpose.

Serving a legitimate purpose, however, is not enough to justify an interference with a constitutional right. The well-established constitutional principle of proportionality

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<sup>71</sup> See GRUNDGESETZ, art. 20(2); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 4/95, 96 BVERFGE 264, 278 (Sept. 17, 1997); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 3/02, 112 BVERFGE 118, 133 (Dec. 8, 2004).

<sup>72</sup> See, e.g., DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 17/17, <http://dip21.bundestag.de/dip21/btd/17/000/1700017.pdf> (showing how, during the 17th legislature period, all factions moved to appoint all permanent committees only a few days after the constitutive session of the *Bundestag* of 27 October 2009); see also DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 17/1, <http://dip21.bundestag.de/dip21/btp/17/17001.pdf>.

<sup>73</sup> See *supra* note 11.

(*Verhältnismäßigkeit*), derived from the rule-of-law principle,<sup>74</sup> requires an interference to be *suitable* (*geeignet*), *necessary* (*erforderlich*) and *reasonable* (*angemessen*).<sup>75</sup> This three-step proportionality test serves the protection of, first and foremost, basic rights of the individual. Restrictions of personal freedoms that are not appropriate and well-balanced are unlawful.<sup>76</sup> Beyond basic rights, the principle of proportionality is also directly applicable to the Members' rights under sentence two of Art. 38(1) of the *Grundgesetz*, as it is part of the rule-of-law principle and as such, it is directly applicable to the constitutional relationship between the *Bundestag* and its Members.<sup>77</sup>

The deferred appointment of all committees may be considered suitable to save resources and time. Restructuring already-established committees at a later date in order to adapt them to the new distribution of ministries may be time-consuming and costly. To establish a Main Committee instead thus contributed indeed in some ways to the well-functioning of the *Bundestag* as it saved the expenditure of resources, both personal and financial.

Although the establishment of a Main Committee was suitable, it is doubtful whether it was necessary. An interference with a right is only necessary if there is no less intensive but equally suitable way to achieve the purpose pursued by the interference.<sup>78</sup> Typical cases of "unnecessary" measures would include permanent measures rather than temporary ones or the taking of steps without previous warning or consultation.

As a possible milder means in the case at hand, the committees could have temporarily adopted the structure of those in the 17th election period being adapted only if necessary at a later point in time. The chairpersons as well as other members of the committees could have been appointed on a temporary basis and, if necessary, replaced by other

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<sup>74</sup> On the development of proportionality in Germany, see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U.TORONTO L.J. 383, 384–387 (2007).

<sup>75</sup> On the German proportionality test (in comparison to the Canadian proportionality test), see *id.*, at 387–388.

<sup>76</sup> See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 513/65, 19 BVERFGE 342, 348 (Dec. 15, 1965); see also, Yutaka Arai-Takahashi, *Proportionality—a German Approach*, 19 AMICUS CURIAE 11 (1999).

<sup>77</sup> See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 6/08, 2 BvR 2436/10, 134 BVERFGE 141 (Sep. 17, 2013); Bernd Grzeszick, *Art. 20*, in GRUNDGESETZ-KOMMENTAR paras. 107–08 (Theodor Maunz & Günter Dürig eds., 2013); ANDREAS HEUSCH, *DER GRUNDSATZ DER VERHÄLTNISSMÄßIGKEIT IM STAATSORGANISATIONRECHT* (2003).

<sup>78</sup> See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 52/66, 1 BvR 665/66, 1 BvR 667/66, 1 BvR 754/66, 30 BVERFGE 292, 316 (Mar. 16, 1971).

Members later.<sup>79</sup> Such a preliminary election (with later confirmation or replacement) would not have been particularly time-consuming or complicated. The *Bundestag's* Rules of Procedure certainly do not bar a provisional status of committees.<sup>80</sup> Furthermore, the practice of structuring the permanent committees congruent to the distribution of the ministries may be practical and traditional, but it is not in any way constitutionally mandatory. It is rather a decision previously informally agreed on by the parties; it was not a matter that the fathers and mothers of the *Grundgesetz* considered to be indispensable for the functioning of democracy.

It is even more doubtful whether the establishment of the Main Committee was reasonable. Reasonability (or proportionality in the strict sense) means that the measure in question must not be disproportionate to its objective. The reasonability test thus requires a cost-benefit analysis between the encroached right interests and the public interests in the course of an administrative measure.<sup>81</sup>

On the one hand, the interest of saving resources—and ultimately the Parliament's efficiency—as well as the legitimate and necessary margin of assessment of the *Bundestag* with regard to its inner organization, stand in favor of the establishment of a Main Committee. Certainly these are important considerations that the *Bundestag* took into account when deciding in favor of the establishment of a Main Committee. On the other hand, the first-time appointment of a Main Committee carries significant inherent dangers. First, if we accept such a Main Committee, the step to a “super committee”—a committee in which just a few Members arrange important decisions among each other and de facto disregard the plenary—is not far away. Following Martin Morlok, one could even draw a historical parallel here to the former German Democratic Republic and recall the danger of creating a “politburo” within the *Bundestag*.<sup>82</sup> Again, the establishment of a temporary committee must be considered a slippery slope—a potential first step for a permanent institution of that kind.

Second, without picturing this worst-case scenario, the privileges that only a few Members of Parliament receive by being part of the Main Committee are incompatible with the

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<sup>79</sup> See Koschmieder, *supra* note 54, at 855 (arguing that restructuring existing committees could be done quickly and easily).

<sup>80</sup> See *Bundestag Rules of Procedure*, *supra* note 19, rules 57–58; see also Scholz, *supra* note 36, para. 12.

<sup>81</sup> Arai-Takahashi, *supra* note 76, at 12; Grimm, *supra* note 74, at 387.

<sup>82</sup> See Interview by Silvia Angel with Martin Morlok (Nov. 28, 2013), [http://www.deutschlandfunk.de/rechtswissenschaftler-bundestags-hauptausschuss-ist-eine.694.de.html?dram:article\\_id=270403](http://www.deutschlandfunk.de/rechtswissenschaftler-bundestags-hauptausschuss-ist-eine.694.de.html?dram:article_id=270403) (concluding that the appointment of the Main Committee only just complies with the *Grundgesetz*).

principle of equality of all Members.<sup>83</sup> The *Bundesverfassungsgericht* emphasized previously that the *Bundestag* has to fulfill its representation function “as a whole. . . through the participation of all Members . . . , not through just a few Members, a group of Members or the parliamentary majority” and concluded that generally “equal powers of all Members of the Parliament to participate” must exist.<sup>84</sup> This must certainly be considered a very important decision of Germany’s constitutional court with regard to the legal situations of individual Members of the *Bundestag*. Equality of Members is one of the cornerstones of Germany’s parliamentary system—and the empowerment of a small committee above other committees (in this case even by establishing no other but this one committee) or the according disempowerment of the plenary must be considered a blatant violation of this principle of equality.

Third, in times of an (oversized) grand coalition, the opposition parties run a certain danger of becoming marginalized.<sup>85</sup> The negative effects of a Main Committee on the opposition—which already loses certain constitutional rights due to its unusually small size<sup>86</sup>—are disproportionately high. The large factions, for instance, are able to send a team of Members covering all branches of politics to the Main Committee, which seems almost impossible for the small opposition factions to compete with given that they could send only five Members each.<sup>87</sup>

Lastly, in a time when a new government is not yet formed, the other constitutional organs must be able to work even more effectively and fulfill their functions properly. When the federal ministries find themselves in a period of transition between two election periods—as they were during the phase of the coalition negotiation—the multiple parliamentary committees must be considered as particularly important in their political role. In many ways, the maintenance of diversity in committees may be even more important in this period than in the time when a new government is formed. To suspend the usual committees exactly during this time of governmental transition, is all the more dramatic and would need further justification than the reasons presented by the governing parties.

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<sup>83</sup> See Kämmerer, *supra* note 49.

<sup>84</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 8/11, 2012 NVwZ 495, 496, para. 102 (Feb. 28, 2012) (translation of the authors).

<sup>85</sup> See Prantl, *supra* note 11.

<sup>86</sup> See Kyrill-Alexander Schwarz, *Unkontrollierbare Regierung—die Rechte der Opposition bei der Bildung einer Großen Koalition im Deutschen Bundestag*, 46 ZEITSCHRIFT FÜR RECHTSPOLITIK 226 (2013); Kämmerer, *supra* note 49; Pascale Cancik, *Wirkungsmöglichkeiten parlamentarischer Opposition im Falle einer qualifizierten Großen Koalition: Anforderungen des Grundgesetzes*, 33 NVwZ 18 (2014).

<sup>87</sup> See DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] 18/101, *supra* note 6.

#### 4. Conclusion

Appointing one single Main Committee instead of establishing multiple permanent committees interfered with the rights of the Members of the *Bundestag*. This interference was neither justified by, nor consistent with, the *Grundgesetz*.<sup>88</sup>

#### D. Outlook

The motivation of the CDU/CSU and SPD factions for appointing a Main Committee instead of multiple committees might be politically understandable, in particular when arguing with the saved amount of time and resources. Adapting and restructuring temporary working committees might have been quite an effort. However, democracy is sometimes time-consuming and even inconvenient. Often constitutional rights and principles must be guaranteed without first conducting a cost-benefit analysis.

This article's legal assessment has pointed out a twofold breach of the German Constitution. First, the Main Committee negated the guaranteed existence of the committees of Art. 45, 45a, and 45c of the *Grundgesetz*. Guarantees of existences are very rare in the *Grundgesetz*.<sup>89</sup> They were found absolutely necessary by the constitutional legislator for significant and important reasons, *inter alia* for ensuring the effective exercise of the *Bundestag's* rights with regard to the European Union.<sup>90</sup> There is no room for questioning these rare constitutional guarantees, even if a guaranteed institution is only temporarily put in abeyance and later on established. It lies in the nature of a constitutional guarantee that it is beyond the discretion of the Parliament when and under which condition an institution is called to life or put to sleep: those institutions must be in place—without further ado and without room for democratic deliberation.

Second, the rights of the individual Members of the *Bundestag* were also violated. If rights of the smallest unit in a democratic Parliament are at stake, the whole democratic system is as well. Only if a single Member of the Parliament is able to effectively and freely exercise their rights and fulfill their duties can parliamentary democracy as a whole meaningfully exist and function. This has been confirmed by the *Bundesverfassungsgericht* on countless occasions. Every limitation of those rights must be justified on grave grounds

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<sup>88</sup> See Koschmieder, *supra* note 54, at 855 (arriving at the same conclusion).

<sup>89</sup> *E.g.*, GRUNDGESETZ, arts. 28(2), 95(1) (providing the guarantees of the municipalities and of the supreme federal courts). See Veith Mehde, *Art. 28(2)*, in GRUNDGESETZ-KOMMENTAR para. 40 (Theodor Maunz & Günter Dürig eds., 2013); Monika Jachmann, *Art. 95*, in GRUNDGESETZ-KOMMENTAR para. 74 (Theodor Maunz & Günter Dürig eds., 2013).

<sup>90</sup> See GRUNDGESETZ, art. 23(2)–(3); Wolff Heintschel von Heinegg, *Art. 45*, in BECK'SCHER ONLINE-KOMMENTAR ZUM GRUNDGESETZ para. 1 (Volker Epping & Christian Hillgruber eds., 2014).

equally indispensable for the functioning of a democratic society and the political system. Such grounds do not exist in the present case: neither have they been presented by the governing parties nor could they be found elsewhere in the Constitution.

This article's analysis has been based on the positive assumption that the governing parties had the benefit of Parliament in mind when appointing the Main Committee. The governing parties were given the benefit of the doubt—and even in this interpretation they were found constitutionally wanting. However, another interpretation of the motives and interests of the governing parties is also quite possible: that party interests were put before the interests of the single Member of the *Bundestag*, the Parliament as a whole, and, in consequence, the interest of democracy altogether.<sup>91</sup> Tactics may certainly play an important role in political decision-making, but they must not dominate constitutional politics at the cost of constitutional rights and principles. The Main Committee, thus, leaves a bitter aftertaste of a misuse of majority powers. The conclusion on it must therefore be that it was the first committee of its kind and, hopefully, the last.

Such misuse, or—to phrase it more cautiously—such careless use of power may be all the more tempting, when the governing parties' or party's majority is overwhelming. As of 2015, Germany, Austria, and the Netherlands<sup>92</sup> are governed by grand coalitions formed by the two biggest parties in the respective democratic systems.<sup>93</sup> Other countries, such as Slovakia, Spain, and Malta, are governed by one-party governments, albeit their electoral system may usually suggest coalition governments.<sup>94</sup> Consequently, the opposition is in a rather weak position in these countries. A particularly striking example amongst these states is Austria, where since 1987—with the exception of 2000 to 2007—it was always the two big parties of the moderate left and moderate right—Social Democratic Party of Austria (SPÖ) and Austrian People's Party (ÖVP)—that formed the government.<sup>95</sup> Recent successes of younger parties in Austria, such as the Austrian Greens and the new founded NEOS—The New Austria, give at least some reason to believe this might change in the

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<sup>91</sup> See Koschmieder, *supra* note 54, at 852–53.

<sup>92</sup> Although the term is usually not used in the context of the Netherlands, the government consists of the two largest parties—the Peoples' Party for Freedom and Democracy (VVD) and the Labour Party (PvdA).

<sup>93</sup> See *The Governments of the EU Member States*, VOTEWATCH EUROPE, <http://www.votewatch.eu/en/governments-overview.html> (last visited Feb. 17, 2015).

<sup>94</sup> See *id.*

<sup>95</sup> For a list of Austrian Cabinets since 1945, see *Australian Chancellors and Cabinets Since 1945*, BUNDESKANZLERAMT: ÖSTERREICH, <http://www.austria.gv.at/site/5957/default.aspx> (last visited Feb. 17, 2015).

future.<sup>96</sup> For now, however, Austria has been caught in a deadlock between left and right for almost 30 years.<sup>97</sup> Other, albeit much more extreme, examples are Hungary and Russia. In Hungary, the Fidesz-Christian Democratic People's Party (KDNP) rules with a two-thirds majority and was thus able to amend and replace the Constitution. The new Constitution of 2011 was heavily criticized for giving too much power to the KDNP and undermining democratic principles.<sup>98</sup> In Russia, a genuine opposition is almost non-existent due to systematic exclusion and marginalization by President Vladimir Putin's United Russia.<sup>99</sup> Certainly, the situation in Hungary and Russia is in many ways not comparable with that in other countries with a grand coalition or a one-party government. The case of Hungary emphasizes, however, that even within states of the European Union, there are tendencies to suppress and marginalize the opposition and its rights. Of course, one must not automatically equalize a large majority government with the suppression of the opposition. Indeed, the German opposition factions in the *Bundestag* still have various control methods at their disposal.<sup>100</sup> And those rights were—similar to the case of Austria's grand coalition<sup>101</sup>— even strengthened by amending the *Bundestag's* Rules of Procedure in

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<sup>96</sup> Alison Smale, *Smaller Parties Gain in Austrian National Elections*, N.Y. TIMES, Sept. 29, 2013; Sylvia Kritzinger & Eva Zeglovits, *Although Austria's Grand Coalition Will Continue, the Dominance of the Country's Two Major Parties May Be Nearing Its End*, EUROPP: EUR. POL. & POL'Y BLOG (Oct. 7, 2013), <http://bit.ly/17JGpbT>.

<sup>97</sup> On the political situation in Austria, see Imma Palme, *Did the ÖVP Lose, or Did the SPÖ Win the 2006 National Parliamentary Election?*, 16 THE CHANGING AUSTRIAN VOTER: CONTEMPORARY AUSTRIAN STUDIES 186, 190–181 (2008); see also AREND LJPHART, THINKING ABOUT DEMOCRACY: POWER SHARING AND MAJORITY RULE IN THEORY AND PRACTICE 36 (2008).

<sup>98</sup> See, e.g., Resolution on the Situation of Fundamental Rights: Standards and Practices in Hungary, EUR. PARL. Doc. P7\_TA(2013)0315 (2013), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0315+0+DOC+PDF+V0//EN>; *Hungary Defies Critics Over Change to Constitution*, BBC NEWS (Mar. 11, 2013, 1:40 PM), <http://www.bbc.com/news/world-europe-21740743>; Cas Mudde, *The 2014 Hungarian Parliamentary Elections, or How to Craft a Constitutional Majority*, WASH. POST, Apr. 14, 2014.

<sup>99</sup> Sabine Fischer, *After Russia's Parliamentary Elections: Emerging Fissures*, EU INST. FOR SECURITY STUD. (Dec. 9, 2011), <http://www.iss.europa.eu/de/publikationen/detail/article/after-russias-parliamentary-elections-emerging-fissures/>.

<sup>100</sup> See Schwarz, *supra* note 86, at 228; Cancik, *supra* note 86, at 18. For a comprehensive look at minority rights in the *Bundestag*, see Benedikt Beckermann & Daniel Weidemann, *K(l)eine Opposition ohne Rechte? Parlamentarische Minderheitenrechte im Schatten der Fünfprozenthürde*, 53 DER STAAT 313–29 (2014).

<sup>101</sup> See Rudy Andeweg, Lieven De Winter & Wolfgang Müller, *Parliamentary Opposition in Post-Consociational Democracies: Austria, Belgium and the Netherlands*, in PARLIAMENTARY OPPOSITION IN OLD AND NEW DEMOCRACIES 58, 77 (Ludger Helms ed., 2009).

April 2014<sup>102</sup> as a reaction to fears of an uncontrolled government uttered by oppositional politicians and commentators alike.<sup>103</sup> However, in times when those methods are limited<sup>104</sup>—because the opposition cannot, for example, meet the quorum needed to initiate proceedings before the *Bundesverfassungsgericht*—it is all the more important for the government to comply with constitutional requirements. The Main Committee's illegality thus was a bad starting point for the newly elected German government in 2013. If similar examples were to follow in other European countries, Europe must watch out in order to not lose its reputation as an upholder of the rule of law and a stronghold of political pluralism.

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<sup>102</sup> See DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 18/997 (Ger.), <http://dip21.bundestag.de/dip21/btd/18/009/1800997.pdf>. On the amendment, see *Bundestag stärkt Kontrollmöglichkeiten der Opposition*, SÜDDEUTSCHE ZEITUNG (Apr. 3, 2014, 6:41 PM), <http://sz.de/1.1929129>.

<sup>103</sup> E.g., Philip Oltermann, *Germany's Grand Coalition Could Undermine Democracy, Says Leftwinger*, GUARDIAN (Sept. 27, 2013, 11:30AM), <http://www.theguardian.com/world/2013/sep/27/angela-merkel-grand-coalition-germany>.

<sup>104</sup> See Isabel Winnwa, *The German Grand Coalition: Governing Without Opposition?*, NOUVELLE EUROPE (Jan. 3, 2014), <http://www.nouvelle-europe.eu/node/1775>.

