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**«The role of constitutional courts to ensure  
democratic elections»**

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**Scrutiny of elections under the German Basic Law  
and the role of the Federal Constitutional Court**

**REPORT BY**

**Mr Martin STEINKÜHLER  
Clerk of the Federal Constitutional Court  
Germany**

## **I. The German electoral system**

Article 20 of the Basic Law – the German constitution – states that the Federal Republic of Germany is a democratic federal state, that all state authority is derived from the people and that it shall be exercised by the people through elections and other votes. According to Article 38 subsection 1 sentence 1 of the Basic Law, members of the German Bundestag – the federal parliament – shall be elected in general, direct, free, equal and secret elections.

The Basic Law itself does not stipulate a specific electoral system, but entrusts it in Article 38 subsection 3 to the legislator to regulate the details. Therefore, both a majority vote system and a system of proportional representation would be in accordance with the constitution. For the elections to the Bundestag (only those are the subject of the following explanations), the federal legislator has opted for a combination of both – a so-called "system of personalised proportional representation" – that combines proportional representation with elements of the majority vote. In the German electoral system, each person entitled to vote has two votes. With the first vote, he decides who of the candidates in his electoral district will be directly elected to parliament. The second vote is cast for a list of candidates nominated by a political party. The two votes can be cast for different political parties; this is the so-called vote splitting. The proportion of the second votes decides about the composition of the parliament, that is, it determines which political party gets how many seats. All directly elected members of parliament get a seat; the seats that due to the results of the second votes remain for each political party are then manned with the candidates from the party lists, according to their sequence on the list.

## **II. Scrutiny and guarantee of democratic elections by the German Federal Constitutional Court**

The Federal Constitutional Court is competent both for the scrutiny of the whole election procedure and for verifying whether the elections took place in an environment that answers all democratic requirements of fairness. The court therefore is of enormous importance with regard to supervising whether the electoral principles are followed and for the guarantee of democratic elections.

However, one has to differentiate with regard to the time of verification – and therefore with regard to the effects of the scrutiny for ongoing elections. One of the main ideas of the German electoral law is that due to the size of the country and the number of people entitled to vote – nowadays more than 61 million people – it is necessary that the electoral procedure itself can only be scrutinized after the elections took place. Otherwise there would be a great danger that already the multitude of court cases that can be expected, no matter whether they are well-founded, would make it impossible to carry out the elections.

Decisions and measures that refer directly to upcoming or ongoing elections may therefore, according to Article 49 of the Federal Electoral Act, only be challenged at a court by way of the scrutiny procedure, and therefore only after the elections took place. That includes for instance the determination of polling districts, the entry of a citizen in a voters' register, the acceptance of nominations by the Electoral Committee or the establishment of the election results.

Other incidents, which are not decisions and measures in the above mentioned sense, but which may nevertheless have an influence on the elections, can also be contested by way of the scrutiny procedure. Under certain circumstances, they can also be supervised by a court – by an administrative court or, as the final instance, by the Federal Constitutional Court – before the elections are over. Cases like that are, for instance, those which

concern the prohibition of a demonstration of a political party or the refusal by a municipality to place a municipal hall at a political party's disposal for an electoral rally.

### **III. Scrutiny of elections before the Federal Constitutional Court**

The scrutiny procedure in Germany is divided. Art. 41 subsection 1 of the Basic Law states that first of all, the scrutiny of elections shall be the responsibility of the Bundestag. Only against the decision of the Bundestag, complaints may be lodged with the Federal Constitutional Court (Art. 41 subsection 2 of the Basic Law).

It might sound strange that the parliament itself decides about the legality of the elections, as a judge in his own cause. But that has historical reasons. So far, the Bundestag has never declared any election null and void. Nevertheless, in some decisions, it has pointed out that certain provisions of the Federal Electoral Act were violated, in order to prevent the authorities from repeating the mistake during the next elections.

The Bundestag does not scrutinize the elections *ex officio*, but only upon application. Every person entitled to vote can contest the elections within two months after the Election Day. The decision of the Bundestag is prepared by a parliamentary committee, which holds public hearings, unless the contestation is obviously inadmissible or clearly unfounded.

According to Article 48 of the Federal Constitutional Court Act, the person whose objection has been rejected by the Bundestag may afterwards lodge a complaint against the Bundestag's decision with the Federal Constitutional Court within two months of the challenged decision. Another admissibility condition is that the complaint must be supported by at least one hundred persons entitled to vote. A complaint before the Federal Constitutional Court may also be lodged by a parliamentary party or a minority in the Bundestag comprising at least one tenth of the statutory number of deputies and the deputy whose seat is disputed.

Not only does the complaint have to be lodged before the time limit, but the complainant must also state and specify the reasons until this date. This will enable the Federal Constitutional Court to decide about the legality of an election as soon as possible. The court then reviews whether during the election the legal provisions the complainant claims to have been violated were applied correctly. It also scrutinizes whether the legal provisions themselves are in accordance with the constitution. To the extent to which the court declares the elections null and void, the members of parliament concerned lose their seats. If the election as a whole is declared null and void, the newly elected parliament is dissolved. In that case, new elections have to be held. However, concerning federal elections, that has never happened in the history of the Federal Republic of Germany to date.

This is because not every incorrect application of legal provisions by the authorities results in the invalidity of the elections. The Federal Constitutional Court has always held so far that the scrutiny procedure does not protect individual rights of the citizens, but only serves to guarantee of the parliament's legal composition. Therefore, only those infringements of legal provisions that either had or could have had an impact on the composition of the parliament, that is, on the concrete allocation of seats in parliament can result in an election being declared null and void by the Federal Constitutional Court.

For instance, as a result of this, the unlawful denial of a single person's entry in the voters' register will, as a general rule, never result in an election being declared null and void, since a single vote rarely has the ability to influence the result of an election. However, the

concerned person may bring a declaratory action before the administrative courts establishing that for future elections, he or she has to be registered in the electoral register.

Decisions of the Federal Constitutional Court therefore only have an impact on the present elections in cases in which the scrutiny procedure is successful and leads to at least a partial re-allocation of mandates. If an infringement of an electoral provision occurred, but did not influence the results of the election, the establishment of the unlawfulness of the election is only of importance for future elections with regard to the fact that the legal issue in dispute has been decided and the authorities are obliged to avoid future infringements.

#### **IV. Examination of incidents connected with the elections**

The precondition of democratic elections is not only that the electoral procedure itself is carried out in a lawful manner. In addition, democratic elections require that not only the people entitled to vote, but also the candidates can participate in the elections on an equal basis and that all political parties have the opportunity to promote their political programs.

Decisions and measures that do not directly refer to upcoming or ongoing elections do not fall within the limitation of Article 49 of the Federal Electoral Act. They can therefore be subject of judicial review even before the elections are held. Therefore, for instance, a political party whose demonstration was prohibited or which was hindered from using a municipal hall for an electoral rally may immediately bring an action before the administrative courts and – if the courts dismiss the case – lodge a constitutional complaint with the Federal Constitutional Court.

The Basic Law acknowledges the importance of political parties for the democratic system. They are protected by the constitution such a the way that according to Article 21 subsection 2 of the Basic Law, only the Federal Constitutional Court can declare a political party unconstitutional and ban it. As long as that has not happened, the so-called party privilege, which is entrenched in Article 21 subsection 1 of the Basic Law prevents all public authorities from hampering the political activities of the party. In addition, political parties may refer to the principle of equal opportunities in elections that the Federal Constitutional Court has derived from Articles 21 and 38 of the Basic Law.

Since there is often a need for an immediate judicial decision in the above-mentioned cases, the parties may also seek legal protection in the form of preliminary injunctions. In the past, the Federal Constitutional Court often had to decide cases like that and often, for example, abolished prohibitions of political demonstrations.

As another example, the leading candidate of a political party may – by lodging a constitutional complaint – ask the Federal Constitutional Court to scrutinize whether he has a right to take part in a TV debate to which only candidates of other political parties have been invited. A political party may also have reviewed the refusal of a TV station to broadcast an advertisement of the party, at first by the administrative courts, in the final instance by the Federal Constitutional Court.

Finally, a political party (in an *Organstreit* proceeding, that is, in a dispute between constitutional organs – with regard to the principle of equal opportunities in elections) as well as a candidate (by way of a constitutional complaint referring to Article 38 of the Basic Law) as well as each person entitled to vote (by way of the scrutiny procedure) may have reviewed by the Federal Constitutional Court whether the Federal Government abused its public relations measures to promote the parties in power by the use of public funds. The Federal Constitutional Court has held in several decisions that during election campaigns,

the government must reduce its public relations measures the more the closer the election day is.

## **V. Guarantee of democratic nomination**

Whether elections can be regarded as democratic also depends on whether the nomination of party candidates followed democratic rules. The German Federal Electoral Act stipulates that necessity in Article 21 subsection 3 and Article 27 subsection 5. The electoral committee shall reject constituency nominations and party lists if they do not meet the requirements of democratic nominations. If the committee does not reject the nominations and lists, by way of the scrutiny procedure an action can be brought claiming that the nomination of candidates was not democratic. In one case, the Hamburg Constitutional Court declared the 1993 state election null and void because of that.

## **VI. Conclusion**

During the more than 50 years since its establishment, the Federal Constitutional Court has contributed significantly to the guarantee of democratic elections and has efficiently enforced the democratic principles through many decisions. The court can be described as an important guardian of political democracy which has expanded the rights of voters and furthered equality of opportunities among competing political parties.

Therefore, it is less the content of the court's decisions that was recently criticized but the length of the scrutiny procedure both at the Bundestag and also at the Federal Constitutional Court which sometimes results in scrutiny procedures being decided only a long time after the beginning of the parliamentary term. At present, scrutiny procedures dealing with the election of the 15<sup>th</sup> Bundestag are still pending before the court, though due to the dissolution of the parliament last year the term of the 15<sup>th</sup> Bundestag has already ended, and the 16<sup>th</sup> Bundestag assembled one year ago already. Also the election of the 16<sup>th</sup> Bundestag was contested, but the parliament has not yet decided about the contestations.