

The election of the German Federal Constitutional Court's judges – A lack of democracy?

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I. How to appoint the judges of a constitutional court?

How would you appoint a constitutional court's judges? Especially if it's a constitutional court as powerful as the German Federal Constitutional Court. The constitutional court can overrule the laws made by the parliament. Of course other constitutional organs can bring a case before the court. But what makes the court so powerful is that every citizen can claim an infringement of his fundamental rights. This gives the Federal Constitutional Court the possibility to examine practically every law on whether it meets the requirements of the constitution.

Therefore it is almost logical that because of the importance of the Federal Constitutional Court's position in the German constitutional system, the appointment of the judges is based on two of the very fundamental principles of the German constitution: Federalism and democracy.¹⁾ According to article 94 section 1 of the Basic Law, one half of the 16 judges are elected by the Bundesrat. The Bundesrat, the Federal Council, represents the German Länder, the German states, in the federal legislative process. It consists of representatives of the Länder's governments. So half of the judges of the Constitutional Court are elected by the institution that secures the influence of the Länder on a federal level. This is an expression of the principle of federalism. The other half of the judges are – as article 94 section 1 of the Basic Law stipulates – elected by the Federal Parliament, the Bundestag. As the Bundestag is considered as the constitution's main democratic organ, its part of the Federal Constitutional Court's judges' election stands for the principle of democracy.

After this first glance at the appointment of the German Federal Constitutional Court's judges, you might ask: what's the lack of democracy, why do I raise the question in the title of my presentation? To entertain this question we have to take a closer look at the details of the election.

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1) *Hömig*, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, BVerfGG, § 5 [3]; *Kröger*, in: Festschrift 25 Jahre BVerfG, vol. 1, 1976, p. 76 (79); *Starck*, in: Festschrift 50 Jahre BVerfG, 2001, p. 1 (31).

II. The election of the German Federal Constitutional Court's judges in detail

As the German Basic Law only states that half of the judges are to be elected by the Bundesrat and the other half by the Bundestag, the details of the electoral procedure are provided by the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz).²⁾ Although there is a law governing the procedure of the election, it's important to know that there are informal elements which might be even more relevant for the procedure. So to start off with, I will describe the formal part of the election as it is provided by the Federal Constitutional Court Act. Secondly, I will explain the informal procedure of the election.

1. Formal procedure

The Federal Constitutional Court has two senates which consist of 8 judges each.

The Bundesrat elects the judges in plenum and in public session. Article 7 of the Federal Constitutional Court Act provides that a candidate needs a two-thirds majority to be elected. The Bundesrat consists of 69 members. The most populated Länder, like Bavaria, assign 6 representatives while the less populated have at least three representatives. Therefore it's clear, that the electoral procedure is designed for compromise.³⁾ Otherwise you won't get a two-thirds majority.

The Bundestag elects the other half of the judges. This procedure is more complicated than the Bundesrat's: As article 6 of the Federal Constitutional Court Act provides, the judges aren't elected directly by the Bundestag's plenum. Instead, a special election committee is elected by the Bundestag. This committee consists of 12 members of the Bundestag. In the committee, the parties of the Bundestag are represented proportionally to their seats in parliament. The judges are elected by the committee. That means in fact that the committee acts for the whole Bundestag.

The Federal Constitutional Court Act provides that a judge is elected by the committee if he receives 8 votes. So – as in the Bundesrat's election – a two-thirds majority is needed. The electoral procedure in the committee is not open to the public and the members of the committee are obliged by law to maintain confidentiality.⁴⁾

The most important requirement for the election is that three of the judges of each senate have to be chosen from the judges of one of the five federal supreme courts. According to the practice, the Bundestag's committee elects two judges from the supreme courts' judges and two other judges per senate, while the Bundesrat elects two supreme court judges and two other judges per senate.⁵⁾ Those other judges have to be qualified to be

2) For the electoral procedure see also *Landfried*, in: Malleon & Russel, *Appointing judges in an age of judicial power*, 2006, p. 196 (200 seq.).

3) *Klein*, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *BVerfGG*, § 6 [2].

4) *Ruppert*, in: Umbach/Clemens/Dollinger, *BVerfGG*, 2nd edition 2005, § 6 [17].

5) *Ley*, *ZParl* 1991, p. 420 (428).

judges, even if they currently do not serve as such. This means that they need to have completed the two state examinations in law or to be a professor of law at a German university.

2. Informal procedure

Let's have a look at the informal part of the electoral procedure. As I already mentioned, you need a two-thirds majority in both of the electoral bodies. You might know that the German political system is quite stable: We have two big political parties: The conservative Christian Democratic Union and the Social Democratic Party. But nevertheless, neither of these two parties has ever had a two-thirds majority in the Bundestag, even when participating in a coalition with a smaller party. Therefore, it was clear that a compromise between these two big parties was necessary to elect a Federal Constitutional Court judge.

They solved the problem in an interesting way: In the 1970s, the Christian Democratic Union and the Social Democratic Party made a gentlemen's agreement that lasts until today: Each party is allowed to select four of the judges of the Federal Constitutional Court per senate. In fact, the agreement works in a way that for "its" four posts, the respective party can propose a candidate and the other party has only the right to veto. It's said that three of the judges per senate chosen by one of the political parties can be members of that party while at least one of the judges should be a more neutral person.⁶⁾ But according to the gentlemen's agreement, the neutral candidates are also proposed by one of the two big parties. The big parties sometimes give the right to choose one of "their" judges to a smaller party, for example if they are in a coalition with that party in the Bundestag.

It's important to know that the gentlemen's agreement covers the electoral procedure in the Bundesrat and the Bundestag's committee.⁷⁾ So in the end you can say that practically each of the sixteen judges' posts belongs to one of the two big political parties. To fulfill the gentlemen's agreement, there are informal working groups to coordinate the selection of a candidate and prepare the decisions. In general, the candidates presented to the Bundestag's committee and the Bundesrat are elected unanimously without any discussion.

III. Democratic insufficiency?

After this insight into the details of the Federal Constitutional Court's election, it might be clearer that there could be democratic insufficiency in the procedure. I want to talk about two aspects.

6) *Majer*, in: Umbach/Clemens, BVerfGG, 1st edition 1992, § 6 [31]; *Frank*, in: Festschrift Zeidler, 1987, p. 163 (169 seq).

7) *Gusy*, in: Schneider/Zeh (ed.), Parlamentsrecht und Parlamentspraxis in der BRD, 1989, § 60 [16]; *Kischel*, in: Isensee/Kirchhof (ed.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. 3, 3rd edition 2005, § 69 [24].

First, the election of the Bundestag's judges by a committee and not the plenum of the parliament. Second, the lack of transparency in combination with the informal part of the procedure.

1. Election by committee

The transfer of the decision about the Federal Constitutional Court's judges to a committee raises the question whether this is constitutional. Because Article 94 section 1 of the German Basic Law states that half of the judges have to be elected by the Bundestag, isn't it unconstitutional that a parliamentary committee is making the decision? You can say that the debate on this question in the judicial literature is as old as article 6 of the Federal Constitutional Court Act.⁸⁾ There are many authors who declare the decision by the committee unconstitutional.⁹⁾ I don't want to bother you with the details of the defenders' and critics' sophisticated discussion.¹⁰⁾ I only want to name the main arguments. The defenders seem to classify the election by the committee as a form of constitutional customary law.¹¹⁾ Because it has been practiced for over sixty years, its constitutionality is accepted. On the other hand the critics argue that the wording of article 94 section 1 of the Basic Law is clear: the judges are to be elected by the Bundestag. Besides, the importance of the Federal Constitutional Court requires an adequate democratic legitimation.¹²⁾ Therefore the plenum has to decide. In such an important question, it cannot be replaced by a committee. In my opinion this sounds far more convincing. Therefore the election by a committee is not only unconstitutional. It also shows a lack of democratic legitimation regarding this part of the judges' election.

But the whole debate is now rather theoretical because the Federal Constitutional Court itself had to decide on this question last year.¹³⁾ The claimant in a constitutional complaint case rejected four of the judges of the competent senate because they were elected by the Bundestag's committee and not by the plenum. The Federal Constitutional Court decided that the electoral procedure was constitutional and article 6 of the Federal Constitutional Court Act was compatible with article 94 section 1 of the Basic Law.¹⁴⁾ You could say that this result is not very surprising given the fact that the four judges elected by the committee took part in the decision.¹⁵⁾ It's kind of unthinkable that they would have declared their own

8) See the expert opinion of Professor *Thoma* in the 1950s printed in *JbdÖR* 6 (1957), p. 161 (188).

9) See the list in *Wiefelspütz*, *DÖV* 2012, p. 962 seq.

10) For a summary of the debate see *Ruppert*, in: *Umbach/Clemens/Dollinger*, *BVerfGG*, 2nd edition 2005, § 6 [10].

11) *Klein*, in: *Maunz/Schmidt-Bleibtreu/Klein/Bethge*, *BVerfGG*, § 6 [4]; *Stern*, in: *Gedächtnisschrift Geck*, 1989, p. 885 (889).

12) *Kasten*, *DÖV* 1985, p. 222 (226); *Pieper*, *Verfassungsrichterwahlen*, 1998, p. 32; *Preuß*, *ZRP* 1988, p. 389 (390).

13) *BVerfGE* 131, 230.

14) *BVerfGE* 131, 230 (234 seq.).

15) See *BVerfGE* 131, 230 (233). The senate concluded that he couldn't decide properly if he excluded half of the judges.

election unlawful – and thereby lose their office.¹⁶⁾ Interestingly Professor Voßkuhle, the president of the Federal Constitutional Court who chairs the deciding second senate, had previously written an important commentary on the Basic Law stating that the election by committee was clearly unconstitutional.¹⁷⁾ But as the Federal Constitutional Court's decision doesn't tell if it was taken unanimously, you can't say whether he changed his mind in his new position as a judge – at least he himself was elected by the Bundesrat.

Anyhow, the argument of the Federal Constitutional Court is noteworthy. In its opinion, article 94 section 1 of the Basic Law doesn't provide an absolute prohibition to transfer the judges' electoral power to a committee.¹⁸⁾ But each transfer of decision to a committee touches every parliament member's constitutionally guaranteed right of participation, because he can't take part in that decision anymore.¹⁹⁾ Therefore the transfer is prohibited because it infringes the right of participation if the decision by the committee isn't compatible with the principle of proportionality.²⁰⁾ That means you need a constitutionally legitimate reason which is as important as the right of participation. The Federal Constitutional Court holds that the aim of the election's transfer to a committee is to keep the confidentiality of the procedure.²¹⁾ It supposes that there is a relationship between the election's confidentiality and the trust placed on the judges' independence. So in the end the transfer to the committee serves the Federal Constitutional Court's functionality. In my opinion, this is a hypothesis more than a proven fact.²²⁾ The Federal Constitutional Court also doesn't seem to be very confident about its own argument because it determines that the legislator would be free to design the electoral procedure in another way.²³⁾ But if you take the principle of proportionality seriously, an infringement of the parliament member's right to participate is not necessary if there's a less encroaching means to achieve the law's aim.²⁴⁾

However, as the Federal Constitutional Court has declared the transfer of the judges' election to a parliament's committee constitutional, criticism on a lack of democracy in that part of the procedure – although it might be well-founded – remains on a theoretical level.

So it seems to be even more important that the actual electoral procedure creates an appropriate level of democratic legitimation. To find this out, we should turn towards the other aspect of the procedure which could show democratic insufficiency.

16) *Wieland*, in: Dreier (ed.), GG, vol. 3, 2nd edition 2008, Art. 94 [14].

17) *Voßkuhle*, in: v. Mangoldt/Klein/Starck, GG, vol. 3, 6th edition 2010, Art. 94 [10].

18) BVerfGE 131, 230 (234 seq.).

19) BVerfGE 131, 230 (235 seq.).

20) BVerfGE 131, 230 (235).

21) BVerfGE 131, 230 (235 seq.).

22) See also *Wiefelspütz*, DÖV 2012, p. 969.

23) BVerfGE 131, 230 (236).

24) Also skeptical about the decision *Sachs*, JuS 2013, p. 2285 (2286); *Schnelle*, NVwZ 2012, p. 1597 seq.

2. Lack of transparency and informal procedure

As I already mentioned, the election in the committee is not open to the public and the members of the committee are obliged to maintain confidentiality. This means that the whole electoral procedure is secret. Although the Bundesrat elects its judges in public session, in general there is no discussion about the candidates because the decision is prepared by a – non-public – working group.

Besides, the actual decision on the judges to be elected is taken outside of the formal election bodies.²⁵⁾ As the gentlemen's agreement between the two big parties works in a way that one party suggests the candidate and the other party can only accept or veto, there is no real discussion between the parties.²⁶⁾ Therefore in the end, the decision about a judge is left to a few persons within a political party.²⁷⁾ Of course this procedure is not public. At the most, the media reports on rumors, especially in the few cases in which a candidate is not accepted and the suggesting party has to choose another one.

So you see that the whole electoral procedure works like a real black box. But what's the problem with this procedure?

I don't think that it's the involvement and decision-making power of the political parties.²⁸⁾ Although the influence of the political parties on the appointment of the Federal Constitutional Court's judges is often criticized, a representative democracy without political parties doesn't work. So if you want a democratic legitimation of the judges by the Bundestag's election you have to cope with the political parties' involvement in the selection.²⁹⁾

In my opinion the real problem with the procedure is the combination of a nontransparent electoral procedure with an informal practice.³⁰⁾ This leads to the impression that the appointment of the judges is the result of secret backroom politics.³¹⁾

It's obvious that the lack of transparency hinders the democratic legitimation of the judges' election.³²⁾ Democracy needs transparency.³³⁾

25) *Kröger*, in: Festschrift 25 Jahre BVerfG, vol. 1, 1976, p.76 (92 seq.); *Majer*, in: Umbach/Clemens, BVerfGG, 1st edition 1992, § 6 [45].

26) *Geck*, Wahl und Amtsrecht der Bundesverfassungsrichter, 1989, p. 31 seq.; *Fromme*, NJW 2000, p. 2977 (2978).

27) *Majer*, in: Umbach/Clemens, BVerfGG, 1st edition 1992, § 6 [45]; *Wiefelspütz*, DÖV 2012, p. 961.

28) *Preuß*, ZRP 1988, p. 389 (392).

29) *Bettermann*, in: Festschrift Zweigert, 1981, p. 723 (724); *Kröger*, in: Festschrift 25 Jahre BVerfG, vol. 1, 1976, p. 76 (100).

30) *Trautwein*, Bestellung und Ablehnung von Bundesverfassungsrichtern, 1994, p. 47; *Wieland*, in: Dreier (ed.), GG, vol. 3, 2nd edition 2008, Art. 94 [15].

31) *Kischel*, in: Isensee/Kirchhof (ed.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. 3, 3rd edition 2005, § 69 [26]: The whole procedure aims for the highest degree of intransparency; *Gusy*, in: Schneider/Zeh (ed.), Parlamentsrecht und Parlamentspraxis in der BRD, 1989, § 60 [17].

32) *Wieland*, in: Dreier (ed.), GG, vol. 3, 2nd edition 2008, Art. 94 [15].

33) *Geiger*, EuGRZ 1983, p. 397; *Landfried*, in: v. Ooyen (ed.), Das Bundesverfassungsgericht im politischen System, 2006, p. 229 (231); ZRP 2012, p. 191.

IV. Need to reform?

So I want to conclude my presentation with the question whether a reform of the election of the Federal Constitutional Court's judges is necessary. I do not believe this to be a question of constitutionality. The confidentiality of the election in the Bundestag's committee was approved by the Federal Constitutional Court. It determined that it was required to protect the court's functionality.³⁴⁾ The informal procedure also cannot be declared unlawful. It's rather a political question whether to make the electoral process more transparent and therefore more democratic.

Before you consider changing the procedure you have to admit: It seems to work well. Firstly, the quality of the decisions is remarkable.³⁵⁾ Obviously the parties don't assign poorly qualified candidates. Secondly, the reputation of the Federal Constitutional Court in the German public and abroad is very high.³⁶⁾ The electoral process doesn't seem to affect the court's reputation.

The most important reason why the current electoral practice works so well is surely the necessity of a two-thirds majority in the election bodies.³⁷⁾ So purely political candidates who might not be sufficiently qualified are vetoed by the other party.³⁸⁾ But it's not clear why the process' lack of transparency should contribute to the functionality of the Federal Constitutional Court. On the contrary, it provides less democratic control of the informal procedure.³⁹⁾

That's why I think that more transparency regarding the judges' electoral process wouldn't be a threat for the Federal Constitutional Court.⁴⁰⁾ Some suggest that at least a public hearing of the candidates in the committee could be implemented.⁴¹⁾ Others criticize that a public hearing would politicize the process even more.⁴²⁾ In my opinion, this argument

34) BVerfGE 131, 230 (236).

35) *Kischel*, in: Isensee/Kirchhof (ed.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 3, 3rd edition 2005, § 69 [36].

36) *Landfried*, in: v. Ooyen (ed.), *Das Bundesverfassungsgericht im politischen System*, 2006, p. 229 (232 seq.); *Wiefelspütz*, *DÖV* 2012, p. 961.

37) *Klein*, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *BVerfGG*, § 6 [2].

38) *Kranenpohl*, *ZSE* 2011, p. 78 (82 seq.).

39) *Pieper*, *Verfassungsrichterwahlen*, 1998, p. 29.

40) *Landfried*, *ZRP* 2012, p. 191. Also criticizing the lack of transparency *Wieland*, in: Dreier (ed.), *GG*, vol. 3, 2nd edition 2008, Art. 94 [14].

41) *Kröger*, in: *Festschrift 25 Jahre BVerfG*, vol. 1, 1976, p. 76 (99); *Landfried*, in: v. Ooyen (ed.), *Das Bundesverfassungsgericht im politischen System*, p. 229 (241); *Landfried*, in: Malleon & Russel, *Appointing judges in an age of judicial power*, 2006, p. 196 (207 seq.); *Preuß*, *ZRP* 1988, p. 389 (394 seq.); *Limbach*, in: *Festschrift Herzog*, 2009, p. 273 (277 seq.); *Majer*, in: Umbach/Clemens, *BVerfGG*, 1st edition 1992, § 6 [48 seq.]; v. *Eichborn*, *Die Bestimmungen über die Wahl der Bundesverfassungsrichter als Verfassungsproblem*, 1969, p. 41 seq.

42) *Kischel*, in: Isensee/Kirchhof (ed.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 3, 3rd edition 2005, § 69 [44 seq.]; *Klein*, *Festschrift Stern*, 1997, p. 1135 (1153); *Kranenpohl*, *ZSE* 2011, p. 78 (97); *Ruppert*, in: Umbach/Clemens/Dollinger, *BVerfGG*, 2nd edition 2005, § 6 [9]; *Scholz*, *ZRP* 2012, p. 191. Also rather skeptical *Vofßkuhle*, in: v. Mangoldt/Klein/Starck, *GG*, vol. 3, 6th edition 2010, Art. 94 [15].

rather reflects the fear of revealing to the public that the judges' election certainly is a political issue. The current electoral procedure of the Federal Constitutional Court's judges therefore helps perpetuate the myth of the unpolitical judge⁴³⁾ but from a democratic point of view, it's not the best solution.

43) This expression is used by the former President of the Federal Constitutional Court *Jutta Limbach*, in: *Festschrift Herzog*, 2009, p. 273 (275).