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in comparative perspective**

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**PARTY, POPE, AND POLITICS?
THE ELECTION OF GERMAN CONSTITUTIONAL COURT JUSTICES
IN COMPARATIVE PERSPECTIVE**

By Uwe Kischel*

Abstract

The election of Justices to the German Federal Constitutional Court has been described as "less democratic than the papal election". Like most exaggerations, this description contains a kernel of truth. Elections to the Constitutional Court are an oddity in the German legal system since their main characteristics are not clearly determined by a set of legal norms, but rather by layer upon layer of rules of decreasingly binding force, with the most informal usages having achieved the greatest influence. This complex system has attracted intensive criticism: It is heavily influenced, even determined by political parties, shrouded in secrecy, and removed from effective parliamentary control in spite of clear constitutional provisions to the contrary. Thus, a host of alternatives have been developed, some of which look to the U.S. approach of selecting Supreme Court Justices for guidance. However, a simplistic look at the German system from a U.S. perspective, let alone a straight legal transfer, would ignore the specific adaptation of the German solution to the German political as well as jurisprudential context, which differs from the American one in many respects. The constitutional status and practical importance of German political parties, the German preoccupation with the neutrality and the non-political character of a constitutional court, as well as a more formalistic approach to law in general - all rally in favor of a selection process that follows traditional German lines.

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The election of Justices to the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) has been described as "less democratic than the papal election"¹. Like most exaggerations, this description contains a kernel of truth. Elections to the Constitutional Court are an oddity in the German legal system since their main characteristics are not clearly determined by a set of legal norms, but rather by layer upon layer of rules of decreasingly binding force, with the most informal usages having achieved the greatest influence. This complex system has attracted intensive criticism: It is heavily influenced, even determined by political parties, shrouded in secrecy, and removed from effective parliamentary control in spite of clear constitutional provisions to the contrary. Thus, a host of alternatives have been developed, some of which look to the U.S. approach of selecting Supreme Court Justices for guidance. However, a simplistic look at the German system from a U.S. perspective, let alone a straight legal transfer, would ignore the specific adaptation of the German solution to the German political as well as jurisprudential context, which differs from the American one in many respects. The constitutional status and practical importance of German political parties, the German preoccupation with the neutrality and the non-political character of a constitutional court, as well as a more formalistic approach to law in general - all rally in favor of a selection process that follows traditional German lines.

A. The election process: norms and reality

I. The first and second layer: constitutional and statutory law

The first remarkable oddity of the selection process is a clear divergence of statutory law from constitutional law: While art. 94 para. 1 of the German Constitution (Grundgesetz, GG) clearly provides that the two chambers of the German legislature, Bundestag and Bundesrat,² each vote for half of the Justices on the Constitutional Court, the law on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz, BVerfGG) has handed

¹ Cf. *Neumann, Volker*: Undemokratischer als die Papstkür?, Frankfurter Rundschau, Nov. 22, 1999, p. 10.

² While for practical and comparative purposes, the Bundesrat is a second chamber of parliament, this is technically a misnomer, since only the Bundestag is considered to be parliament, while the Bundesrat as the representation of the Länder is not, cf. BVerfGE 37, 363 (380); critically *Herzog, Roman*: Stellung des Bundesrats im demokratischen Bundesstaat, in: Isensee, Josef; Kirchhof, Paul: Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. 3, 3rd ed. 2005, § 57 marginal note 30 with further references.

the responsibilities of the Bundestag over to a mere parliamentary committee. The 12 members of this committee are elected proportionally by the Bundestag so that they reflect its political composition. They cannot, however, be removed from office during the four-year election period, they are independent in their decisions and sworn to secrecy. What is more, their decisions, reached by a 2/3-majority, are final. Parliament does not have to endorse their decisions, cannot overturn them, and does not even have a symbolic role to play: Whoever is elected by the committee, *is* a Justice at the Constitutional Court.³

The BVerfGG adds several other statutory aspects. Firstly, to support the election process, the minister of Justice keeps lists of all eligible judges of federal courts of last instance (called federal judges) and of all other persons that have been proposed. These lists are, however, not binding.⁴ Secondly, if Bundestag or Bundesrat do not manage to elect a Justice within two month, the BVerfG itself will be asked to propose three candidates, which all Justices will have chosen by a complex set of votes.⁵ Thirdly, the statute differentiates between two different types of Justices: former federal judges and other fully trained jurists. While the Constitution only requires both groups to be present on the Constitutional Court, the BVerfGG requires a minimum⁶ of three of the eight Justices in each of the Court's two senates to be former federal judges.⁷

³ On the details of its election and procedure cf. *Kischel, Uwe*: Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter, in: Isensee, Josef; Kirchhof, Paul: Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. 3, 3rd ed. 2005, § 69 marginal notes 7ff.; *Klein, Franz*, in: Maunz, Theodor; Schmidt – Bleibtreu, Bruno: Bundesverfassungsgerichtsgesetz, Kommentar, loose-leaf, § 6 marginal notes 5ff.

⁴ Cf. § 8 BVerfGG; critically on the lack of binding character *Geiger, Willi*: Über den Umgang mit dem Recht bei der Besetzung des Bundesverfassungsgerichts, EuGRZ 1983, 397 (398); the lists are not public, cf. information of the Federal Ministry of Justice to this author on March 9, 2004.

⁵ Cf. § 7 BVerfGG; in detail *Kischel* (n. 3), § 69 marginal notes 13ff.

⁶ The actual number has sometimes been higher, cf. on the statistics *Ley, Richard*: Die Wahl der Mitglieder des Bundesverfassungsgerichts, ZParl 1991, 420 (443ff.).

⁷ Cf. art. 94 para. 1 phrase 1 GG, § 2 para. 3 BVerfGG. The provision that federal judges should have served in that capacity for at least 3 years is only partially binding; for an example of an election that disregarded this provision cf. *Frank, Henning*: Die Mitwirkung des BVerfG an den Richterwahlen, in: Zeidler, Joachim (ed.), Festschrift Hans Joachim Faller, 1984, 37 (45f.).

II. The third layer: Party affiliation

1. The scheme

Neither the constitution nor statutory law, however, appropriately reflect the election process. Most of all, they ignore the dominance of party politics: The 2/3-majority statutorily required for election has effectively prohibited the simple majority in parliament - i.e. the majority that supports, at any given time, the federal chancellor - from simply pushing through its favorite candidates. Very much unlike the United States, a compromise of the two major parties (the Social Democrats and the Christian Democrats) is, therefore, necessary for every single election. To avoid major political battles and debates each time a new Justice must be found, the political parties have agreed on a scheme that has determined the entire procedure for decades:⁸ In each of the two senates of the Constitutional Court, the eight posts for Justices are equally divided between Social Democrats and Christian Democrats, i.e. these parties have the right to propose "their" respective Justices. Three of the four posts will be filled with party members, the fourth with a "neutral" person. In addition, the two major parties have each given one of the six posts reserved for actual party members over to the two minor German parties, the Liberals and the Greens.⁹ As a result, every single Justice (and any specialized observer) knows which party has chosen any given Justice and whether that Justice is a party member or "neutral". Indeed, this classification is fixed to each post, so that the successor of, e.g., a neutral Social Democrat will always be another neutral Social Democrat etc. This is, surprisingly, a higher degree of formalization than that achieved for the - statutory - provisions on former federal judges, where the post is *not* fixed, so that the post of a former federal judge can be filled with a non-judge as long as the total number of former federal judges on a senate does not fall below three.¹⁰

⁸ Cf. on this scheme *Böckenförde, Ernst-Wolfgang: Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation*, NJW 1999, 9 (16 n. 31); *Lamprecht, Rolf: Parteisoldaten(innen) in Robe*, NJW 1999, 2011 (2011f.); on the historical development *Frank* (n. 7), 163ff. and *Kröger, Klaus: Richterwahl*, in: Starck, Christian (ed.): *Bundesverfassungsgericht und Grundgesetz*, vol. 1, 1976, 96ff.

⁹ No political party has given a seat to the so-called Left Party, the successor of the socialist party ruling the former GDR. The two posts for members of smaller parties seem, in practice, to have become independent of the question with whom the respective small party cooperates politically at any given moment, cf. for a period of doubt *Bornhöft, Petra; Hipp, Dietmar: Kungelei in Karlsruhe*, *Der Spiegel* No. 10, 2006, p. 35.

¹⁰ Cf. *Erhard, Benno: Über allzu schnelle Kritik an Verfassungsorganen bei der Wahl von Bundesverfassungsrichtern*, EuGRZ 1983, 473 (474ff.); BVerfGE 65, 152 (155ff.).

More generally, the specific group of former federal judges, although provided for in constitutional and statutory law, has never received any specific attention, while party affiliation, although informal, has acquired quite an importance.

2. Practical effectiveness

The system of party affiliation mostly runs smoothly. One party's proposal is regularly accepted by the other. For so-called neutral candidates, it is even usual to seek the full consent of the other party, while for party members, objections would only reluctantly be raised.¹¹ One recent example of a failed compromise was the election of Horst Dreier, a highly respected professor of constitutional law and member of the Social Democrats. He was proposed by the Social Democrats, but firmly rejected by the Christian Democrats, who publicly announced their dislike for his opinion on the protection of embryos in biological research and completely rejected his somewhat relaxed position on the admissibility of torture in cases of extreme hardship.¹² The Dreier affair, however, is generally considered to be an extreme case. The informal rules on party affiliation of Justices have, over the years, proven to be remarkably stable and effective. Even when a particular election was highly debated, the basic principles have never been called into question. Thus, for instance, when Horst Dreier was not elected, it was undisputed that the Social Democrats had retained the right to propose an alternative candidate.¹³ What is more, there was not even a debate about the Social Democrats retaliating in kind.

The informal system of party affiliation has even managed to practically override not only the official, but irrelevant lists of possible candidates kept by the minister of Justice, but also the constitutional differentiation between Justices elected by the two legislative chambers: The party agreement on candidates is completely independent of the body that is formally called to vote. This becomes particularly evident when package deals are struck, where parties agree, in advance, on several positions to be filled in the near future. In fact, even in legal discussions, elections by the *Bundesrat* do not gain

¹¹ Cf. *Böckenförde* (n. 8), 16 n. 31.

¹² Cf. *Averesch, Sigrid*: Richterstreit und Richterwahl - Der Bundesrat wählt Johannes Masing zum neuen Bundesverfassungsrichter, *Berliner Zeitung*, Feb. 16, 2008; *Stengel, Eckhard*: SPD zieht ihren Kandidaten für Karlsruhe zurück, in: *Stuttgarter Zeitung*, April 18, 2008.

¹³ Cf. e.g. *Averesch* (n. 12), *Schmale, Holger*: Union: SPD soll neuen Richter vorschlagen – Erster Kandidat abgelehnt, *Berliner Zeitung*, April 4, 2008, p. 5.

much attention, the entire discussion being centered on the *Bundestag* and its committee.

3. Potential influence of the Constitutional Court itself

The only potential player left, besides political parties, is the Constitutional Court itself. Its own propositions are, of course, not binding, but they *can* prove to be a powerful tool.¹⁴ How powerful depends mostly on the general political climate and the attitude of the other players. While, in the past, there have been periods of pronounced reluctance on the part of the Constitutional Court, in later times the Court's proposals were accepted by a legislature that sometimes even announced, in advance, its willingness to do so.¹⁵ This was followed by a time of great self-confidence, which culminated in 1981. In that year, parliament first refused to ask the Court's opinion for two months, and then went on to inform the Court that its proposal would not be considered since the parties had managed to agree on a candidate in the meantime. The Court ignored the not-so-subtle hints and submitted an independent proposal. This bold move proved to be highly successful. Not only did the election committee postpone the election when it received the proposal, but it finally elected one of the Court's candidates - a person who had not been favored by the political parties.¹⁶

After this incident, however, the political parties became more careful,¹⁷ but so did the Court itself which, since the end of the 1980's, does not publish or provide any information on the content or even existence of its proposals.¹⁸ It is clear, however, that proposals have become rare.¹⁹ The Constitutional Court's own proposals have, thus, proven to be an instrument of great potential, which at need could be reanimated in the future. The Court's proposals may thus be a counterweight against party influence, but

¹⁴ Contra *Geiger* (n. 4), 398; *Kröger* (n. 8), 89f.

¹⁵ Details in *Frank* (n. 7), 40ff.

¹⁶ Cf. *Lamprecht, Rolf*: Kungelei hinter den Kulissen, DRiZ 1986, 314; *Frank* (n. 7), 46f.

¹⁷ Cf. *Erhard* (n. 10), 474.

¹⁸ Letter of the Director of the Federal Constitutional Court to the author (March 3, 2004) (on file with the author); telephone interview with the Director (March 3, 2004).

¹⁹ *Ibid.*; *Kischel* (n. 3), § 69 marginal note 19; when the election of Horst Dreier (cf. *supra* at n. 12) failed, the Social Democrats hastily searched for another candidate in order to avoid reaching the time limit after which a proposal by the Constitutional Court would have to be asked for, cf. *Schmale* (n. 13), 5; indeed, Andreas Voßkuhle, also a professor of constitutional law, was elected on April 25, 2008, cf. *Köhler, Ute*: Der Kapitän geht schon wieder von Bord, *Stuttgarter Zeitung*, April 26, 2008.

they do not question the general *modus vivendi*, i.e. the system of party affiliation. Even in the heated incident of 1981, the Court has not tried to depart from the system and only proposed candidates that were members of the Social Democrats.²⁰

III. The fourth layer: Knowing the right people

But even this informal, if well known and effective system is not the end of the matter. The real decision about who will become a Justice is not taken in parliament, as the constitution provides; neither is it taken in the parliamentary committee as provided by statute; nor is it taken in a more or less open debate within the political parties or even among the party leadership. Even members of parliament often do not know how the decision in favor or against certain persons was taken or who exactly stood a chance. Rather, the decisions are taken in very small circles. There seem to exist informal working groups into which the parliamentary party groups, the so-called factions, send their representatives and about which hardly anything is known.²¹ More importantly, a very small number of party members prepares decisions.²² Much factual power is concentrated in two individuals representing the two major political parties. These chairpersons are charged with finding the right candidate on a long-term basis, and function as the main contact for the respective other party when it comes to finding a consensus, sometimes, it seems, with the support of other high-ranking party officials.²³ Opinions differ on the amount of power held by the chairpersons. It seems however plausible, from a political point of view, that they lead the negotiations rather than make the decision completely by themselves²⁴ - although the difference between the two can be difficult to determine and much will depend on the standing and personality of the respective individual. Their identity is not widely known, but can be discerned by

²⁰ Cf. *Lamprecht* (n. 16), 314.

²¹ Cf. BT-Drucks. 13/2088 of July 27, 1995, p. 3.

²² Names are mentioned in *Klein, Hans-Hugo: Verfassungsrichterwahlen: Praxis und Kritik*, in: Merten, Detlef (ed.): *Verfassungsgerichtsbarkeit in Deutschland und Österreich*, 2008, 72.

²³ Cf. e.g. *Rath, Christian: Folter nicht ganz ausgeschlossen*, *taz*, Jan. 14, 2008 (in the case of the original decision in favor of Horst Dreier the Federal Minister of Justice, Brigitte Zypries, the Social Democratic Whip Peter Struck, and the mayor of Bremen, Jens Böhrnsen); on chairpersons for the Bundesrat cf. *Fromme, Friedrich Karl: Verfassungsrichterwahl*, *NJW* 2000, 2977 (2978); *Kerscher, Helmut: Selbst die Papstwahl ist demokratischer*, *SZ*, Dec. 5, 1998; on the role of the prime ministers of the German Länder cf. *Klein* (n. 22), 73; *Bornhöft/Hipp* (n. 9), 35.

²⁴ Cf. the forceful remarks by *Klein* (n. 22), 73; for the contrary view cf. *Kröger* (n. 8), 92f.

interested persons.²⁵ It is not, however, known how these chairpersons are selected or if there even exists any determinable selection procedure.

A recent change might have changed the power structure somewhat in favor of the parliamentary committee: Since the beginning of 2010, the committee has informally started to resort to a purely internal and therefore unpublished hearing of the final candidate that has been proposed by the respective party. Such a meeting can, for instance, forestall possible public criticism of the candidate by other parties if all members of the committee are satisfied that the candidate would be suitable.

B. Reform proposals

Many reforms to this arcane election procedure have been unsuccessfully proposed over the years.²⁶ They tend to concern three aspects which, again and again, find their way into the discussion: a possible public hearing, a change in the bodies charged with the election, and the voting procedure.

The idea of a public hearing finds its inspiration in the U.S. procedure for electing Supreme Court Justices: Possible candidates appear before an election body and publicly answer questions. This is, in the first place, meant to render the entire process of decisionmaking more transparent, but also to assure that objective aspects - in particular the individual's legal qualifications - dominate.²⁷ Some authors insist, however, that some limited questions of a more personal nature could be adequate, since such aspects do, in fact, influence the decision.²⁸ The informal hearing before the election committee introduced in 2010 is not the object of this or any other discussion in

²⁵ Names mentioned e.g. in *Detjen, Stephan*: Kur-Kartell oder: Kungeln für Karlsruhe, ZRP 2001, 93 (93); *Lamprecht, Rolf*: Bis zur Verachtung, NJW 1995, 2531 (2532); *Fromme* (n. 23), 2978.

²⁶ For an overview cf. *Höfling, Wolfram*; *Roth, Thomas*: Ungesetzliche Bundesverfassungsrichter?, DÖV 1997, 66 (67 n. 4); *Trautwein, Thomas*, Bestellung und Ablehnung von Bundesverfassungsrichtern, 1994, 18 n. 1; on older proposals cf. *Billing, Werner*: Das Problem der Richterwahl zum BVerfG, 1969, 229 n. 1; on the controversial discussions during the drafting of the BVerfGG cf. *Koch, Sybille*: Die Wahl der Richter des BVerfG, ZRP 1996, 41 (42) with further citations.

²⁷ *Lamprecht* (n. 25), 2353; *Preuß, Ulrich K.*: Die Wahl der Mitglieder des BVerfG als verfassungsrechtliches und -politisches Problem, ZRP 1988, 389 (394f.); *Kröger* (n. 8), 99; cf. also *Kau, Marcel*: United States Supreme Court und Bundesverfassungsgericht, 2007, 211ff.; Several bills have been proposed by the Green Party to change the procedure correspondingly, cf. BT-Drucks. 11/73 of March 20, 1987; BT-Drucks. 12/5375 of July 5, 1993; BT-Drucks. 13/1626 of June 2, 1995; BT-Drucks. 13/2088, of July 27, 1995; BT-Drucks. 16/9927 of July 3, 2008; note that these proposals have not been made while the Green Party was part of the parliamentary majority.

²⁸ *Preuß* (n. 27), 395.

the literature due to its completely secret character: Not only could it not fulfill any of the objectives commonly associated with a public (sic!) hearing, but its very existence is generally ignored by scholars and the general public alike.

As far as the bodies electing the Justices are concerned, there have been several proposals to eliminate the election committee in favor of a direct vote of the Bundestag.²⁹ Others would like to abandon the differentiation between Bundestag and Bundesrat and let all Justices be elected by the Bundestag with the consent of the Bundesrat.³⁰ Another idea, advanced in different forms, is that of an official advisory committee charged with finding suitable candidates, often meant to be composed of independent experts.³¹ Some even want to give the German Federal President a more or less important role in the process in order to lend a more neutral aspect to it.³²

Finally, several minor proposals have been made to change the voting procedure, the most surprising of which is probably to choose Justices exclusively by drawing lots among all federal judges,³³ an idea that is similar to some forms of filling public offices sometimes practiced in antiquity.³⁴ Others authors have suggested to reduce the election to a simple yes or no on the one candidate selected in advance by a special committee,³⁵ or to require the proposal for any candidate to provide reasons.³⁶ The one aspect of the election procedure that, by the way, German experts would generally like to keep unchanged is the required two-thirds majority.³⁷

²⁹ Cf. in particular the bills proposed by the Green Party *supra* at n. 27.

³⁰ *Kröger* (n. 8), 98f.

³¹ Cf. *Häußler, Richard*: Der Konflikt zwischen BVerfG und politischer Führung, 1994, 44ff., 188ff.; *Billing* (n. 26), 301ff., 307ff.; *Kröger* (n. 8), 99; *Thoma, Richard*: Rechtsgutachten betreffend die Stellung des Bundesverfassungsgerichts vom 15. März 1953, *JöR* 1957, 161, (188).

³² Cf. *Thoma* (n. 31), 188; *Stern, Klaus*: Gedanken zum Wahlverfahren für Bundesverfassungsrichter, in: *Gedächtnisschrift für Karl Wilhelm Geck*, 1989, 885 (894); *Hopfau, Axel*: Kein Präsentationsrecht bei Verfassungsrichterverwahlen, *ZRP* 1994, 89 (90).

³³ *Bettermann, Karl-August*: Die Aufgabe: Fachgericht für Verfassungsrecht, *FAZ*, Dec. 20, 1996, p. 13.

³⁴ On these historical examples cf. *Classen, Claus Dieter*: Wahl contra Leistung? Zu Wahlbeamten und Richterwahlen, *JZ* 2002, 1009 (1013); *Bleicken, Jochen*: Die athenische Demokratie, 1991, 187, 218ff., 266.

³⁵ Cf. *Preuß* (n. 27), 394; contra *Billing* (n. 26), 308f.

³⁶ Cf. *Billing* (n. 26), 308, 313ff.; *Stern* (n. 32), 895; *Kröger* (n. 8), 99.

³⁷ For an exception cf. the bill proposed by the Green Party in BT-Drucks. 16/9927 of July 3, 2008 calling for a 3/4-majority of the votes cast (not of all members of the Bundestag); on the historical reasons for abandoning the 3/4-majority in 1956 cf. *Geck, Wilhelm Karl*: Wahl und Amtsrecht der Bundesverfassungsrichter, 1986, 25ff.; on a very early and very unsuccessful proposal to adopt a simple majority cf. *Häußler* (n. 31), 179ff.

C. Criticizing the election process

I. Dominant role of political parties

1. *The easy critique*

It is easy to condemn the influence of political parties. Not only is party influence in general suspect to many - not only "ordinary"³⁸ - people. What is more, specifically in the judicial context, party influence may be seen as politicizing a judicature that must base its decisions solely on legal and not on political arguments. Additionally, parties might be tempted, in selecting a candidate, to place more emphasis on party affiliation than on expertise in the field of constitutional law.³⁹

2. *The constitutional importance of political parties*

The dominant role of German political parties in general has often and in many respects been criticized.⁴⁰ Parties are often regarded as too influential, especially when it comes to filling administrative and governmental positions. Politically, their role may, indeed, be regarded with some skepticism. From a constitutional law point of view, however, parties play an important, valuable, and legitimate role in our parliamentary democracy. The Grundgesetz is not based on an idealized view of the people as a harmonic whole, forming a unitary will which is then brought to bear through parliamentary representation. Such an idea of identity between the ruler and the ruled

³⁸ Cf. e.g. the critique by *Arnim, Hans Herbert von*: *Staat ohne Diener - Was schert die Politiker das Wohl des Volkes?*, 3rd ed. 1993, passim; or the famous speech by the former German president *Weizsäcker, Richard von*: *Krise und Chance unserer Parteiendemokratie*, reprinted in: *Aus Politik und Zeitgeschichte*, No. 42 (1982), 4 (party influence having spread "like a grease mark" (*fettfleckartig*) across all state institutions, the state having fallen prey to political parties).

³⁹ Cf. etwa *Gusy, Christoph*: *Das Parlament als Wahlorgan, Gesetzgeber, und Prozesspartei im Verhältnis zum BVerfG*, in: *Schneider, Hans-Peter; Zeh, Wolfgang* (eds.): *Parlamentsrecht und Parlamentspraxis in der Bundesrepublik Deutschland*, 1989, § 60 marginal note 19; *Geck, Wilhelm Karl*: *Wahl und Status der Bundesverfassungsrichter*, in: *Isensee, Josef; Kirchhof, Paul*: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 2, 1998 (1987), § 55 marginal note 17.

⁴⁰ For an overview of the main aspects cf. e.g. *Huber, Peter M.*: *Der Parteienstaat als Kern des politischen Systems - Wie tragfähig ist das Grundgesetz?*, *JZ* 1994, 689 (692ff.); *Vitzthum, Wolfgang Graf*: *Probleme der Parteiendemokratie*, in: *Zur Lage der parlamentarischen Demokratie. Symposium zum 60. Geburtstag von Peter Badura*, 1995, 71 (71ff.); cf. also e.g. *Ossenbühl, Fritz*: *Aktuelle Probleme der Gewaltenteilung*, in: *Schröder, Meinhard* (ed.): *Freiheit, Verantwortung, Kompetenz: Ausgewählte Abhandlungen*, 1994, 213 (216); *Arnim, Hans Herbert von*: *Der Staat als Beute - Wie Politiker in eigener Sache Gesetze machen*, 1991, 335ff.

would only provide (and has provided) a perfect platform for anti-democrats,⁴¹ since democracy in the real world could never live up to such expectations and would only appear to be a cynical mockery of real representation.⁴² The Grundgesetz, on the other hand, accepts that there are many diverse and often irreconcilable views within society, and that political parties serve to aggregate and integrate these views as far as possible. This is the background of art. 21 para. 1 phrase 1 GG stipulating that "Political parties shall participate in the formation of the political will of the people." There is, thus, no contradiction between a "party democracy" and a "real" democracy; rather, party democracy is a necessary aspect of a parliamentary system.⁴³ Although parties should, thus, not be viewed with general distrust, there are constitutional limits to their role. These limits are particularly narrow in the judicial branch, due to the constitutional guarantee of judicial independence (art. 97 GG).⁴⁴ This, however, does not hold true in the specific case of the Constitutional Court as art. 94 para. 1 phrase 2 GG expressly provides for the election of Justices by the legislature, thus inevitably⁴⁵ giving vast influence to political parties.⁴⁶

Accepting an important role for political parties in the selection process does not, however, necessarily imply that the Justices themselves will be selected according to party affiliation. Rather, one could imagine parties relying mostly or exclusively on

⁴¹ In particular *Schmitt, Carl: Verfassungslehre*, 1928, 234f., 219; cf. already *Schmitt, Carl: Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, 1923, 15; for a critique cf. *Hofmann, Hasso: Legitimität gegen Legalität - Der Weg der politischen Philosophie Carl Schmitts*, 3rd ed. 1995, 147ff.; *Hesse, Konrad: Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. (reprint), 1999, marginal note 131; *Herzog, Roman*, in: Maunz, Theodor; Dürig, Günter: Grundgesetz Kommentar, loose-leaf until 2005, art. 20 part II marginal note 20; *Dreier, Horst* in: Dreier, Horst: Grundgesetz, Kommentar, 3 volumes. 1996ff., art. 20 (Demokratie) marginal note 69; *Kischel, Uwe: Parteienstaat und demokratische Stabilität*, in: Manssen, Gerrit (ed.): *Die Finanzierung von politischen Parteien in Europa*, 2008, 167 (168f.); defense of Schmitt in *Böckenförde, Ernst-Wolfgang: Demokratie als Verfassungsprinzip*, in: Isensee, Josef; Kirchhof, Paul: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 2, 3rd ed. 2004, § 24, marginal notes 49f.

⁴² Such "real representation" could not be a direct democracy, *Schmitt* (n. 41), 245f., but might well be a dictatorship which, according to Schmitt, is not the opposite of democracy *Schmitt* (n. 41), 17;

⁴³ Cf. also BVerfGE 1, 208 (224) (noting - in 1952 - that any democracy today is by necessity a party state); cf. *Kischel* (n. 41), 168ff.

⁴⁴ Cf. *Klein, Hans H.*, in: Maunz, Theodor; Dürig, Günter: Grundgesetz Kommentar, loose-leaf, art. 21 marginal note 208; *Streinz, Rudolf*, in: v. Mangoldt, Herrmann; Klein, Friedrich; Starck, Christian: *Kommentar zum Grundgesetz*, vol. 2, 6th ed. 2010, art. 21 para. 1 marginal notes 94f.; *Henke, Wilhelm*, in: *Bonner Kommentar zum Grundgesetz*, loose-leaf, art. 21 marginal notes 181ff.

⁴⁵ Cf. e.g. BVerfGE 20, 56 (101).

⁴⁶ On the impossibility of de-politicizing the election cf. *Roellecke, Gerd: Zum Problem einer Reform der Verfassungsgerichtsbarkeit*, JZ 2001, 115 (116); *Gusy* (n. 39), § 60 marginal note 16.

individual legal qualification. It would be wrong, however, to suppose that the current system ignores quality. Quite on the contrary, nobody has ever seriously doubted that the persons elected to be Justices *are* highly qualified. This is even assured by the current system, since any candidate with high political, but only minor legal qualifications would be a very easy target for the opposing political party. The only lamentable result of the current system is, therefore, that many highly qualified individuals will never be taken into consideration because they have never come to the attention of any party.

3. Party affiliation and ideological balancing

These considerations apart, the whole idea of a purely legal qualification is misguided.⁴⁷ It presupposes that the answer to any legal question will, in most cases, be determined according to objective criteria, to a correct application of the law. However, and in spite of the high degree of formalism prevalent in German law and among German lawyers,⁴⁸ it is accepted that the application of legal norms to facts is not a purely logical procedure,⁴⁹ but influenced by legally filtered value judgments.⁵⁰ This is especially true in constitutional law, due to the exceedingly open language used in the text of the constitution.⁵¹ Since the personal values of Justices are a factor in the Court's decisionmaking,⁵² it is important to achieve a balanced composition of the Court with respect to such values. Here, the Justice's party preferences provide good guidance. In

⁴⁷ Same result now in *Klein* (n. 22), 76.

⁴⁸ Most German lawyer would swiftly subscribe to the view that law is an accumulation of norms that should be ordered in the most logical way possible, and which are applied in a specifically normative way - the very attitude that sociological jurisprudence set out to fight and to replace by the idea of law as social engineering, cf. on this basic goal of sociological jurisprudence *Rheinstein, Max: The case method of legal education: The first one hundred years*, in: Leser, Hans G. (ed.): *Max Rheinstein Gesammelte Schriften*, vol. 1, 1979, 321 (326).

⁴⁹ *Alexy, Robert: Theorie der juristischen Argumentation*, 1983, 17.

⁵⁰ Cf. e.g. *Pawlowski, Hans-Martin: Methodenlehre für Juristen*, 3rd ed. 1999, 69ff.; on the legal filtering *Kischel, Uwe: Die Begründung*, 2003, 12ff.

⁵¹ Cf. for basic rights the seminal work of *Böckenförde, Ernst-Wolfgang: Grundrechtstheorie und Grundrechtsinterpretation*, in: Böckenförde, Ernst-Wolfgang: *Staat, Verfassung, Demokratie*, 1992, 115 (115ff.); *Böckenförde, Ernst-Wolfgang: Die Methoden der Verfassungsinterpretation - Bestandsaufnahme und Kritik*, in: *ibid.*, 53 (53ff., especially 86ff.).

⁵² This was already recognized by the framers of the Grundgesetz, cf. *Thoma* (n. 31), 171.

other words, party affiliation is not important as such, but as an expression of the general outlook a Justice takes on the world.⁵³

In this sense, the alternative solution of selecting truly neutral judges without any party affiliation makes a promise it cannot keep: No "neutral" Justices will be free from value judgments or a personal outlook on the world - but those will be more difficult to determine, a balanced composition of the Court thus more difficult to achieve. The proportional selection of Justices by party affiliation is thus not the illness, but rather the most reliable cure - even if the medicine may well appear somewhat bitter.

What is more, neither the most disputed judgments by the German Constitutional Court nor their average decisions have ever been seriously criticized as being the expression of the Justices' political affiliations.⁵⁴ On the contrary, there have often been notable (and noted) cases of Justices who seriously thwarted any political expectations their sponsoring party might have had.

The German reliance on party affiliation is, thus, one of the main reasons for the high degree of stability that continues to characterize the German Constitutional Court as well as its jurisprudence. The ensuing interdependence between stability of the Court and stability of the German party system could be regarded as a cause of concern, since the party system has been undergoing increasing pressure, recently: The importance of the two traditionally dominating parties, the Christian Democrats and the Social Democrats is waning, the Liberals are in danger of disappearing, the Green Party is still growing and endangering the traditional place of the Social Democrats, the so-called Left Party has established itself and the so-called Pirates have just started to seriously board the political scene, with political observers asking whether the Pirates are the new Greens. What will become of these developments is unknown. The system of party affiliation for Justices has, however, shown to be resilient in the past. It has accommodated the rise of the Green Party as well as the possibility that the Liberal party is not always needed to find a majority in parliament to elect the chancellor. It has also *not* reacted to the continuing existence and importance of the successor party of the former socialist party

⁵³ Similar result in *Roellecke* (n. 46), 115f.; now also in *Klein* (n.22), 76; *Kau* (n. 27), 209f.; contra *Geck* (n. 39), § 55 marginal note 20, n. 28 (differentiating between balancing and party proportionality).

⁵⁴ Cf. e.g. *Kischel* (n. 3), § 69 marginal notes 23, 81; *Zypries, Brigitte*: The Basic Law at 60 - Politics and the Federal Constitutional Court, German Law Journal 11 (2010), 87 (96).

ruling the GDR, causing very little, if any debate. If future changes in the German political landscape should establish themselves permanently, it is therefore likely that the election system will respond - slowly, but effectively.

II. Lack of publicity

For the current lack of transparency in the selection process,⁵⁵ there seems to be a simple solution: adopting a public hearing of candidates modeled on the U.S. example. Instead of a clandestine procedure, all candidates could present themselves and be asked questions by members of parliament, thus establishing a high degree of publicity and enabling all citizens to form their own opinion. Internal party circles would lose a lot of influence. And even Kant's transcendental formula of public law could be fulfilled: "All actions concerning the rights of other persons which are not, in their maxim, compatible with publicity, are unlawful."⁵⁶

1. *The United States as a deterrent example*

The problem with such a proposal is not the potential benefit of a public hearing, but its reality as exemplified by the U.S. example. A general inquiry into the publications, former decisions, legal as well as ethical opinions of the candidates, even putting their personality and integrity to the test, is an approach that hardly any German jurist would like to see transferred home. Extreme examples like the events surrounding the nomination of Robert Bork or Clarence Thomas add to the general dislike. The description of the Clarence Thomas hearings as the battlefield of a veritable political war⁵⁷ reveals exactly what German jurists would want to avoid at all costs.⁵⁸

⁵⁵ The lack of transparency may, however, be regarded as the simple result of a lack of interest and knowledge on the part of media representatives, cf. *Klein* (n. 22), 74.

⁵⁶ *Kant, Immanuel: Zum ewigen Frieden*, 1795, in: *Kant's Werke*, vol. 8, 1923 (new print), 1969 (reprint), 343 (381) (translation by this author).

⁵⁷ Cf. *Manoloff, Richard D.*: The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for our Time, 54 *Ohio St. L.J.* 1087, 1095 (1993); to add a further example, the failed Harriet Miers nomination was similarly described as "a very tough, very nasty process", cf. *Toner, Robin; Kirkpatrick, David D.; Kornblum, Anne E.*: Steady erosion in support undercut nomination, *The New York Times*, Oct. 28, 2005.

⁵⁸ For the German dislike of the U.S. example cf. e.g. *Lamprecht* (n. 25), 2533; *Preuß* (n. 27), 394f.; *Trautwein* (n. 26), 36f.; *Majer, Diemut*, in: *Umbach, Dieter C.; Clemens, Thomas: Bundesverfassungsgerichtsgesetz*, 1992, § 6 marginal note 80; *Ruppert, Stefan*, in: *Umbach, Dieter C.; Clemens, Thomas; Dollinger, Franz-Wilhelm: Bundesverfassungsgerichtsgesetz*, 2nd ed. 2005, § 6 marginal

To achieve a more restricted and civilized hearing, several, often conflicting ways are proposed to limit the range of admissible questions.⁵⁹ For instance, some would ban question on family or sexual orientation but not on political or religious convictions,⁶⁰ other would like to admit only questions on professional CV, membership in certain political or ideological groups, and public offices held.⁶¹ Some comparative studies additionally argue that the excesses known in the United States would not necessarily transfer to Germany, since the U.S. confirmation hearings are part of a struggle between president and Senate, a struggle that could not occur in Germany due to the need for a 2/3-majority.⁶²

2. Inadequacy of public hearings in the German context

There is, indeed, a possibility that selection hearings in Germany could be held in an objective and professional atmosphere, just like in former times a positive attitude towards the candidate used to prevail in the United States.⁶³ Such a scenario would, however, be quite unlikely. While there is, indeed, no struggle between executive and legislature, due to the German parliamentary system, there is the struggle between political parties. It would be unrealistic to expect parties to show a degree of self-restraint so high that they would voluntarily forego the chance to ask unacceptable questions that would, however, guarantee media coverage, thus raising their profile with potential voters. This would be especially true in times of political turmoil, in case of debated candidates, and for the smaller parties which would in all likelihood have a chance of posing their questions as well. What is more, the different positions taken even now in the literature on the admissibility of certain questions, e.g. on general

notes 9, 26; Zätzsch, Jörg: Richterliche Unabhängigkeit und Richterauswahl in den USA und Deutschland, 2000, 147ff.; for the dislike of any inherent attempt to discredit candidates with allegedly unsuitable values cf. e.g. Zypries (n. 54), 97.

⁵⁹ On the U.S. discussion of questions that should or should not be asked during a hearing cf. e.g. Eisgruber, Christopher L.: The next justice - Repairing the Supreme Court appointments process, 2007, 164ff.; Davis, Richard, Electing justice - Fixing the Supreme Court Nomination Process, 2005, 160ff.

⁶⁰ Cf. Preuß (n. 27), 395.

⁶¹ Cf. Trautwein (n. 26), 40.

⁶² Cf. Preuß (n. 27), 394f.; Majer (n. 58), § 6 marginal note 49; similarly Ruppert (n. 58), § 6 marginal note 26.

⁶³ Cf. Ross, William G.: The Supreme Court Appointment Process: A Search for a Synthesis, 57 Alb. L. Rev. 993, 994-5. (1994); a recent example of a respectful hearing was the nomination of Sonia Sotomayor, cf. Justice Sotomayor, The New York Times, Aug. 7, 2009.

political views, reveal that the limits of the necessary self restraint are rather open to discussion, anyway. Too limited a catalogue of admissible questions would even turn the hearing into a sham since nothing valuable could be gained from them.⁶⁴ As far as legal qualifications go, it is more than doubtful that they could be determined by any public hearing in parliament, at all. If, however, questions on obvious facts on the record make little sense, and legal qualifications can hardly be determined, the only questions that remain are those on personal and political opinions - exactly the ones that most experts want to exclude. In other words, hearings might lead to more transparency, but at the cost of politicizing and ideologizing the selection process even more.

What is more, the German hearing would not be a confirmation hearing for one candidate, as in the United States, but a selection hearing among several. There would, thus, be a strong competitive aspect between the candidates as well as between the groups that sponsor them. This would lead to two additional dangers: First, a number of highly qualified candidates might refuse to participate. This would be all the more understandable since - unlike in the United States⁶⁵ - there would always and inevitably be one or more losers who would be hard put to later remove that stain. Under the current German system, there are often only few persons who know, or could at least imagine, who had originally been considered for the post but not made it. Second, public hearings would always favor candidates who have an aptitude for public appearances and who know how to handle a crowd as well as the press. The Constitutional Court might well need such persons, as well. But it would be an enormous waste of potential if excellent lawyers would stand no chance simply because their public appearances are less stimulating, witty, and charming.

III. Delegation to a parliamentary committee

One of the most often criticized aspects of the election process is the delegation of decisionmaking to a mere parliamentary committee. Indeed, this delegation is

⁶⁴ Cf. the remarks by *Zätzsch* (n. 58), 151; cf. also *Zypries* (n. 54), 97.

⁶⁵ In the U.S. the candidate will fail in approx. 20% of all cases, cf. *Manoloff* (n. 57), 1088; for a literary treatment of negative personal affects of a failure in the United States cf. *Carter, Stephen L.: The Emperor of Ocean Park*, 2002.

unconstitutional - but not for the obvious reasons and although it constitutes good policy.

1. Not the best, but the best possible way

In a nutshell,⁶⁶ the committee solution might not be the best solution imaginable, but it is the best possible one. It allows parties to discuss potential candidates in a small and professional circle where all may speak openly, regardless of election campaigns or representation in the media. Such an open debate could not, under German conditions, be achieved in parliament. If the committee were to be abandoned, the real decision would in all likelihood be transferred to even more informal groups, with parliament only adding its consent. The current election committee, opaque as it may be, adds at least some element of control and predictability.

2. Constitutional problems and their solution

From a legal point of view, art. 94 para. 1 phrase 2 GG grants the power to elect Justices to the Bundestag itself and does not mention any delegation to an election committee. This contrasts vividly with art. 95 para. 2 GG which, for other federal judges, explicitly calls for the creation of such a committee.⁶⁷ This may, on the one hand, be interpreted as an exclusion of any delegation where the election of Justices is concerned. On the other hand, such a result would imply that the election must be a direct and not an indirect one - a requirement that the Grundgesetz usually makes expressly (cf. art. 28 para. 1 phrase 2, 38 para. 1 phrase 1 GG), which is clearly not the case here. Consequently, arguments based on the wording and the systematic structure of the constitution - which might seem formalistic, simplistic or simply irrelevant to some American eyes but are considered important in German law⁶⁸ - do not lead to any clear result.

⁶⁶ For a more detailed discussion of the political and constitutional aspects cf. *Kischel* (n. 3), § 69 marginal notes 48ff.

⁶⁷ For the different arguments here cf. the summaries by *Koch* (n. 26), 42f.; *Gusy* (n. 39), § 60 marginal note 12; *Eichborn, Johann-Freidrich von: Die Bestimmungen über die Wahl der Bundesverfassungsrichter als Verfassungsproblem*, 1969, 12ff.

⁶⁸ Although German lawyers could not easily be considered followers of Hans Kelsen, the remarks by *Freeman, M.D.A.: Lloyd's Introduction to jurisprudence*, 8th ed. 2008, 997 are revealing: "The

Neither can the current election committee be considered unconstitutional because it is itself only elected by parliament and not directly by the people, thus lacking the necessary degree of democratic legitimation.⁶⁹ The Grundgesetz does not require such a direct democratic legitimation. In fact, the election committee's legitimation is no less direct than that of the *Bundesrat*, an election body expressly mentioned in the Grundgesetz. This *Bundesrat* is not directly legitimized by the people⁷⁰ since it represents the governments of the *Länder*, which are themselves elected by *Länder* parliaments.

The real constitutional problem simply is the right of any member of parliament to vote on all issues, art. 38 para. 1 phrase 2 GG. While the work of parliamentary committees does not, in general, infringe upon that right, this result is based on the assumption that parliamentary committees may well prepare decisions and thus gain enormous factual influence, but that the final decision will be taken by parliament itself.⁷¹ Therefore, just as parliament could not constitutionally delegate the final vote on a statute to a parliamentary committee, it cannot delegate the final election of Constitutional Court Justices. The remedy for this unconstitutionality would, however, be quite simple: The entire procedure could remain unchanged, with only a final yes or no vote of the Bundestag added to the decision of the committee, a vote that would not even require any prior debate. The German Constitutional Court, in its very first decision on this topic in June 2012, has decided to follow this line of thought insofar as it treats the lack of influence of all members of parliament in the election process as the main problem. Its conclusion, however, is different.⁷² Not surprisingly, the Court has declared its own election to be constitutional. In essence, it has found a value of sufficient constitutional weight to justify the infringement of art 38 para. 1 phrase 2 GG:

Kelsenite, therefore, concentrates on his norms, the realist on his facts of society, each regarding the other's activity patronisingly as a peripheral study on the fringe of his own central sphere."

⁶⁹ On the German theory of democratic legitimation and its forms cf. the summary in BVerfGE 93, 37 (66f.); for further remarks and citations cf. *Kischel* (n. 50), 107f. with further references; with specific reference to the election of judges cf. *Böckenförde, Ernst-Wolfgang: Verfassungsfragen der Richterwahl, 1998, 71ff.*

⁷⁰ Cf. e.g. *Bauer, Hartmut*: in: Dreier, Horst: Grundgesetz Kommentar, 3 volumes, 1996ff., art. 50 marginal note 18 with further references.

⁷¹ Cf. BVerfGE 80, 188 (221f., 225, 230); 44, 308 (317); on the very limited exceptions cf. BVerfG, Judgment of Feb. 28, 2012, 2 BvE 8/11, marginal notes 115 - 130, 141 - 148.

⁷² Cf. BVerfG, Judgment of June 19, 2012, 2 BvC 2/10, marginal notes 9ff.

the desire to keep the election process confidential, thus strengthening confidence and trust in the Court and its independence, bolstering its ability to function.⁷³ This decision is remarkable in two respects: Firstly, it relies on a justification for the factual disempowerment of members of parliament which has, until now, been used only rarely and very reluctantly, e.g. in the context of intelligence service finances or more recently concerning urgent measures to solve the European debt crisis.⁷⁴ Secondly, the Constitutional Court itself seems to accept the opinion that the public might be disenchanted by the Court if it actually knew how and why individual judges are selected.

D. A question of legal culture: Constitutional courts as political or legal actors

I. Two ideal-typical positions

The evaluation of the entire election procedure depends, in final analysis, on the question whether constitutional courts are regarded more as a political or as a legal actor. If, on the one hand, constitutional courts should function primarily as political decisionmakers for which the text of the constitution as well as legal doctrine offer little guidance, their democratic legitimation through the constitution itself as an expression of the people's will would be negligible. Therefore, Justices would need to gain their democratic legitimation by an election procedure similar to that for other high governmental posts, i.e. directly by parliament,⁷⁵ with a need for public discussion of all possible candidates, including public scrutiny of their political and ethical positions as well as their personality. Moreover, it would seem more or less natural in such a political context that questions of party affiliation play an important role.⁷⁶

If, on the other hand, the Constitutional Court is seen as simply another part of the judicial branch and is thus - in spite of the obviously political nature of some of its cases and the impossibility to exclude value judgments - bound to decide cases based

⁷³ *ibid.*, marginal note 13.

⁷⁴ Cf. BVerfGE 70, 324 (358f.); BVerfG, Judgment of Feb. 28, 2012, 2 BvE 8/11, marginal notes 102ff.

⁷⁵ Proposing a direct vote by the U.S. people *Davis* (n. 59), 170ff.

⁷⁶ For such a tendency cf. e.g. *Preuß* (n. 27), 389ff. (mentioning a quasi-parliamentarian, leading function of the Court, *ibid.*, p. 391).

solely on legal norms,⁷⁷ than it will have a much more extended democratic legitimation through the text of the constitution itself. A direct election of Justices by parliament will seem less important, especially insofar as other judges are - like in Germany⁷⁸ - not directly elected, either. What is more, the necessity of a balanced, multi-partisan composition of the Court will only be accepted for pragmatic reasons, i.e. to guarantee that decisions will be guided, as much as possible, by legal reasons alone and to guarantee a balancing of basic political values and attitudes which have an undeniable influence in constitutional decisionmaking.

II. Determination of results by cultural attitudes

Clearly, this paper is based on the latter, non-political position. The important point, however, is not so much whether this point of view is the correct or better one, but rather the insight that there is no and cannot be any global answer when determining the character of constitutional courts. There simply is no abstract institution called "constitutional court" that could be defined as more political or more legal. Rather, each existing constitutional court in the world is as political or as legal as its practice reveals and as is accepted in its respective legal culture. In other words, what might be true for the U.S. Supreme Court must by no means have any bearing on the German Constitutional Court, and vice versa. In this sense, it is revealing that the few voices in Germany that will not readily accept the Constitutional Court to be normatively bound and guided by the constitution as a binding legal instrument, but would rather view constitutional jurisdiction as a political process,⁷⁹ will frequently refer to U.S. sources or follow U.S. lines of thought. Indeed, the text of the constitution as well as the legal theories developed by the courts and by legal literature (what is usually called legal doctrine in civil law countries) have much less controlling force for future decisions in the United States than in Germany. German law, including constitutional law, is much

⁷⁷ For this view and its problematic aspects cf. *Böckenförde* (n. 8), 11f.; cf. also *Böckenförde, Ernst-Wolfgang: Die Eigenart des Staatsrechts und der Staatsrechtswissenschaft*, in: *Böckenförde, Ernst-Wolfgang: Staat, Verfassung, Demokratie*, 1992, 11 (15f.).

⁷⁸ For an overview cf. *Zätzsch* (n. 58), 47ff.

⁷⁹ Cf. e.g. *Halter, Ulrich: Demokratische Verantwortlichkeit und Verfassungsgerichtsbarkeit*, *Der Staat* 36 (1996), 551 (551ff.); *Halter, Ulrich: Verfassungsgerichtsbarkeit, Demokratie und Misstrauen*, 1998, 73ff.

more formalistic⁸⁰ (in the U.S. sense of the word) in that it is mostly accepted that there is an inherent and important difference between law and politics, and that law is not necessarily what the judges say it is.⁸¹ German Justices in particular often underline the importance of the text of the constitution as well as the relevant legal doctrine for their decisions. Justice Grimm, for instance, who is far from embracing any overly mechanical and positivistic view of law, has mentioned that text, doctrine and the methods of interpretation will "break those extra-legal convictions and understandings from which no Justice is free".⁸² Similarly, Justice Böckenförde, who is well known for his analysis of the multiple and open-ended methods of constitutional interpretation,⁸³ has insisted that, nevertheless, constitutional controversies remain legal controversies which are to be decided solely on legal grounds.⁸⁴

III. Self-fulfilling prophecy

In sum, constitutional jurisprudence is political if the Justices believe in the political character of their office and act accordingly. If, by contrast, they believe in the legal character of their office, it *is* legal. This does not, however, lead to a simple and one-sided empirical determination. Rather, there is a dialectic relationship in which not only empirical reality determines theory, but also theory influences empirical reality: If the opinion that constitutional courts are political bodies gained the upper hand in Germany, this opinion would slowly start to determine reality through the mutual influence of public opinion,⁸⁵ constitutional scholarship⁸⁶ and the Constitutional Court

⁸⁰ *Kischel, Uwe*: Delegation of legislative power to agencies, 46 Adm. L. Rev. 213, 249 (1994).

⁸¹ On the division between law and politics as the key formalist conviction cf. *Sargentich, Thomas O.*: The Delegation debate and competing ideals of the administrative process, 36 Am. U. L. Rev. 419, 424f. (1987); for a more complex analysis of formalism see *Summers, Robert S.*: Instrumentalism and American legal theory, 1982, 137ff.

⁸² *Grimm, Dieter*: Politikdistanz als Voraussetzung von Politikkontrolle, Über die Unabhängigkeit des Verfassungsrichters im Parteienstaat, EuGRZ 2000, 1 (2), who also notes, *ibid.*, that anybody trying to fill the margin of appreciation inherent in interpretation with political arguments would be ignored.

⁸³ Cf. *Böckenförde, Ernst Wolfgang*: Grundrechte als Grundsatznormen - Zur gegenwärtigen Lage der Grundrechtsdogmatik, in: Böckenförde, Ernst Wolfgang: Staat, Verfassung, Demokratie, 1991, 159 (185f.)

⁸⁴ *Böckenförde* (n. 8), 11f.; cf. similarly *Justice Klein* (n. 22), 66f..

⁸⁵ *Geck* (n. 39), § 55 marginal note 18 notes a connection between the public's ignorance of the reality of the election and the high reputation of the Court.

itself. If such a development is not considered desirable - a position very much shared by this author - the current German system of electing Constitutional Court Justices gains the additional advantage of supporting the present, non-political self-image of Justices. If the system were changed, if the candidates were made part of an open political inquiry and struggle, and if the necessity of a politically balanced composition of the court were continuously and publicly debated and questioned, Justices and the Constitutional Court would inevitably be seen from a more political point of view, which - as a self-fulfilling prophesy - would likely change the Court itself.⁸⁷ That the German Constitutional Court and its decisions are non-political may be considered a myth; but it is a beneficial myth which needs to be tended to remain effective in reality.

E. A personal note on method

The present paper intends to present to a non-German audience an important aspect of German constitutional scholarship which, at the same time, can serve as an example for the practical influence of comparative law.⁸⁸ Although the methods used are implicit in the paper, some of the reactions to a draft version of this paper⁸⁹ have revealed that a non-German audience, particularly if it is influenced by legal thinking prevalent in much of today's U.S. academia, might be better served by stating methods explicitly. This, in itself, is an exercise in comparative law, for which an insight into the differing legal and jurisprudential backgrounds is often more important than the apparent differences or similarities in black-letter legal rules.⁹⁰

⁸⁶ Cf. *Oppermann, Thomas*: Das Bundesverfassungsgericht und die Staatsrechtslehre, in: Festschrift 50 Jahre BVerfG, vol. 1, 2001, 421 (421ff.); the practical importance and influence of legal literature on the courts is much more pronounced in Germany than in the United States.

⁸⁷ Similar doubts now in *Zypries* (n. 54), 97.

⁸⁸ In this way, the paper tries to follow the original concept of the workshop held by Armin von Bogdandy, Christoph Schönberger and Joseph H. Weiler on "The changing landscape of German constitutionalism" which took place at NYU on April 22nd/23rd, 2012, and for which it was designed.

⁸⁹ The author wishes to thank, in particular, Ran Hirschl, Joseph H.H. Weiler, Armin von Bogdandy, Richard H. Pildes, and Russel A. Miller.

⁹⁰ On the many dangers of ignoring these backgrounds cf. *Kischel, Uwe*: Vorsicht, Rechtsvergleichung!, ZVglRWiss 104 (2005), 10 (10ff.).

Firstly, the paper is, and is intended to be, in many ways an example of traditional mainstream German scholarship.⁹¹ While, for instance, aspects of social science or law and economics do play a certain role in German legal literature, they have never managed to pervade German legal scholarship as a whole, and even less influenced the application of law by courts. German law has remained what most U.S. (but no German) lawyers would call formalistic,⁹² much in accordance with the mainstream in many European countries and very much in contrast to the United States. To try and understand German law without accepting its basically "formalistic" character would be a vain and futile effort. This might be deplored, and is deplored by a minority in Germany, but it does have many advantages, not the least among which are the continuing dialogue and mutual influence between legal literature and legal practice that is characteristic for German law, and the strong belief among German legal academics and practitioners that legal scholarship proudly stands on its own, that it might borrow from and cooperate with other (social) sciences, but is in no way dependent on their methods or goals. Consequently, this paper does not try to incorporate social science or political science theory, for instance by exploring the reasons for the stability of the German party system, or the relationship between the dominance of a single political force and the political independence of the judiciary. Nor does it, for instance, try to model possible systems for the appointment of Justices in general, thus placing the German example in a larger framework of social science theory. Such interdisciplinary endeavors would, of course, be perfectly worthwhile, but they would not represent the widely accepted mainstream of German constitutional law scholarship. To complete the picture, it might be useful to point out that the analysis of factual and informal, non-normative aspects in this paper, while not completely unusual in Germany for the specific topic of the election of Justices, does already go somewhat beyond what would be considered mainstream for most other topics of constitutional law.

⁹¹ A minor aspect is the reluctance of this author to use the personal pronoun "I" in a legal text, cf. on this German peculiarity *Kischel, Uwe: Legal cultures – legal languages*, in: Olsen, Frances; Lorz, Alexander; Stein, Dieter (Hrsg.): *Translation issues in language and law*, 2009, 7, part D.I.

⁹² Cf. on this formalistic aspects already supra Fn. 48, 68, 80 and accompanying text.

Secondly, while this paper by no means intends to be a full-fledged comparative study, it reveals the practical importance of comparative law scholarship. Simply put, the most widely discussed proposition for change in the election of German Constitutional Court Justices, the introduction of a public hearing, is based on the U.S. example, thus adding an inherently comparative aspect to the discussion. It is only comparative law, however, and the emphasis it puts on integrating *all* legal and extra-legal aspects - the very essence of functionalism⁹³ - that allows to correctly understand and place the U.S. experience in relation to German law: the differences between parliamentary and presidential systems; the different influence of political parties; the more competitive aspect of the proposed German hearing; the ever-important difference in legal culture between Germany and the United States, in particular the classification of Constitutional Courts as legal or political actors - all such aspects must be weighed and considered to establish what can be learned from the U.S. example. In this sense, this paper is a practical application of the lessons taught by functional comparative law in the context of national law.

⁹³ On this integration of all legal and extra-legal aspects required by functional comparative law cf. *Kischel* (n. 90), 16ff.

F. Summary

In the German system for the election of Constitutional Court Justices, rules with the lowest degree of legal normativity often play the most important practical role. Indeed, the relevant constitutional norms are close to misleading. Statutory norms are closer to real life, but still overshadowed by a longstanding, informal agreement between the major political parties on a system of party affiliation. The actual determination of individual candidates, finally, is widely influenced by a very limited number of high-ranking party members without any official calling (A). Reform proposals for this much criticized system mostly concern a possible public hearing modeled on the U.S. example, a change in the bodies charged with the election, and the voting procedure (B). A closer analysis of the critique reveals, however, that it is largely unfounded: The influence of party affiliation simplifies and assures an ideological balance within the Court that is necessary for its proper neutral functioning (C.I.) The idea of a more transparent selection process with public hearings would most likely politicize and ideologize the selection process even more and, in the German environment, exclude a great number of good candidates from the process (C.II.). The delegation of the election to a parliamentary committee to the exclusion of parliament itself is a sound policy decision, albeit an unconstitutional one since it divests members of parliament of their right to vote. However, a simple parliamentary yes or no vote at the end of an otherwise unchanged procedure could easily remedy this problem (C.III.). The entire evaluation of the election procedure hinges on the qualification of constitutional courts as more political or more legal bodies. While this paper prefers the legal point of view for the German Constitutional Court, such a determination can never be done in the abstract, but will differ from one constitutional court to the other. The influence between empirical reality and the legal/political qualification of the respective court is, however, a mutual one in which the prevailing - or changing - theoretical attitude may become a self-fulfilling prophecy (D). The German system for the election of Constitutional Court Justices deserves full and continuing support.

