

# Lords of Democracy: What the German Constitutional Court (in the Hessen Election Review Case) and the U.S. Supreme Court (in Bush vs. Gore) Are Telling Us About the State of Democracy

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## A. Introduction

[1] On February 8, 2001, the Second Senate of the Federal Constitutional Court (FCC) issued its judgment in the abstract judicial review proceedings of the *Wahlprüfung* (election review) provisions of the constitution and related laws of the Bundesland (Federal State) Hessen. *German Law Journal* reported on the oral arguments in the case in issue No. 05/2000, 15 December 2000.

[2] This report describes the FCC's recent ruling and then makes a short comparison between the FCC's ruling and the U.S. Supreme Court's recent, notorious election review decision in the U.S. Presidential election (Bush v. Gore, 531 U.S. 98 (2000)).

## B. The FCC's *Wahlprüfung* (Election Review) Decision

### 1) Background and Relevant Law

[3] On February 7, 1999, the Federal State Hessen held elections for the state parliament. The Christian Democratic Union (CDU) won fifty of the 110 seats, the Social Democratic Party of Germany trailed in the poll with 46 seats. The minor parties, Greens and Free Democrats, won eight and six seats respectively. The CDU established a governing coalition with the Free Democrats and Roland Koch, the CDU candidate, took the position of State Premier (Governor). An initial challenge to the validity of the election was unsuccessful. A second challenge to the validity of the election was initiated after it was revealed that the CDU had made use of illegal campaign funds, especially in light of the close margin of the CDU's victory. This second challenge to the validity of the election gave rise to a request to the Federal Constitutional Court (chiefly from the CDU-led Government in Hessen) for an abstract judicial review of the procedures provided by the Hessen constitution for reviewing the validity of an election.

[4] Unlike the U.S. Supreme Court, which requires an actual case in controversy in order to have jurisdiction over a matter, the FCC may, in the abstract, review a federal or state law for its constitutional compatibility. (Art. 93 of the Basic Law). Such review may be initiated by, as in the Hessen election review case, the request of a state government. The purpose of such review is not to vindicate the position of any party to the action, rather it is to simply and objectively „declare what the constitution means.“ (Donald Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany*, p. 13).

[5] Article 78 of the constitution of the federal state Hessen provides the procedures, standards and mechanisms for the review and invalidation of a state election. The broad terms of the constitutional provision are more specifically outlined in the accompanying *Wahlprüfungsgesetze* (Election Review Law). Article 78 establishes the following procedures and standards: (1) The validity of an election is to be reviewed by a *Wahlprüfungsgericht* („Election Review Court“), which is to be established by the state parliament; (2) An election is invalid in the event that it is influenced by irregularities or actions that qualify as criminal or violative of the *guten Sitten* (good faith/common decency); and (3) The Election Review Court consists of the two highest ranking judges of the state and three members of parliament. The CDU-led state government of Hessen sought the FCC's abstract review of the second and third of these provisions. The application to the FCC also sought abstract review of Sections 1,2 and 17 of the Election Review Law (which accompanies and more specifically defines the broad terms of Article 78). Section 1 of the Election Review Law establishes that the „Election Review Court“ consists of, along with three members of parliament, the President of the state Administrative Court and the President of the state Supreme Court. Section 2 of the Election Review Law outlines the standards for selecting the parliamentarians who will sit on the Election Review Court. Section 17 of the Election Review Law makes the written judgments of the Election Review Court immediately enforceable.

[6] Hessen's CDU-led state government argued in its application to the FCC that the Hessen election review procedures described above conflicted with the: (1) federal constitutional guarantee of the rule of law (Article 19.4 of the Basic Law – „Should any person's rights be violated by public authority, he may have recourse to the courts.“); (2) the separation of state power between legislative, executive and judicial bodies (Article 20.2 of the Basic Law – „All authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.“); and (3) the federal constitutional guarantee of judicial

independence (Article 97 of the Basic Law – „Judges shall be independent and subject only to the law.\"). The application focused especially on the ambiguity/imprecision of the *guten Sitten* (good faith/common decency) standard for finding an election invalid and the „mixed\" nature of the „Election Review Court\" (consisting as it does of judges and members of parliament).

## 2) *The Decision*

### a) *Defining the guten Sitten (good faith/common decency)*

[7] The FCC first addressed the challenge to the standard to be applied by the „Election Review Court,\" pursuant to Article 78.2 of the Hessen constitution, when judging the validity of an election: An election is invalid, according to the state constitutional provision, if it was influenced by a violation of the *guten Sitten*\" (good faith/common decency). The FCC found that the standard was constitutional, but crafted a strict definition for the concept *guten Sitten*\" (good faith/common decency) that will make its application rare and difficult.

[8] After tracing the history of the phrase *guten Sitten*\" in the context of election review laws (in the constitutional monarchy of the German Empire of 1871, the Weimar Constitution of 1919 and as it constituted a reaction against the Nazi's manipulation of elections and democracy in the 1946 Hessen constitution) and the jurisprudence of state and federal courts, the Court concluded that: „ . . . an impermissible influence on an election, resulting from an election error or mistake, exists only if the influence on the formation of the voter's intent constituted a violation of the fundamental freedom or equality of the election.\" The FCC found especially troubling institutional or organized attempts to influence the formation of the voter's intent, especially state interference. An action is violative of the *guten Sitten* (good faith/common decency), the FCC finally determined, if: (1) the state to a more than acceptable degree supports a specific party and thereby affects the formation of the voter's intent; (2) a private third party, a party or an individual candidate use force or pressure to affect the formation of the voter's intent; or (3) some other force, which is so strong that it could only be avoided with the help of the courts or police, is brought to bear on the formation of the voter's intent.

[9] Significant for the comparative analysis with the U.S. Supreme Court's *Bush v. Gore* decision was the FCC's repeated emphasis on the centrality of the *will*\" or *intent*\" of the voter to the definition of the standard to be applied for the invalidation of an election.

[10] Because the case before the FCC proceeded in the abstract, the Court was not required to apply this new standard to the facts of the disputed Hessen state election, though the allegations of the use of illegal campaign funds seems to fall well short of the FCC's standard.

### b) *\"Election Review Court\" as a mixed entity*

[11] Second, the FCC addressed the challenge to the mixed nature of the *\"Election Review Court*\" (consisting of judges and members of parliament). The FCC firmly asserted the constitutional requirement that, pursuant to Article 92 of the Basic Law, judicial power be entrusted to independent judges. The FCC then defined *\"judicial power*\" as the power to enter a final, binding decision regarding legal issues. The FCC found the mixed nature of the *\"Election Review Court*\" to have roots in Germany's Weimar Constitution which sought to broadly disperse the merits of representative democracy throughout state power, including the courts, rather than allowing one branch of government to insulate itself from the will of the people. This impulse was quite strong in the review and potential invalidation of elections, where the democratic process itself was at stake.

[12] Without directly striking-down the *\"Election Review Court*,\" the FCC concluded that its mixed nature (consisting of judges and members of parliament), and the resulting lack of neutrality and judicial independence, rendered it something less than a *\"court*\" in the constitutional sense. In fact, the FCC denied the application's direct challenge to the *\"Election Review Court*\" and its mixed membership. Instead, the FCC accomplished its critique of the *\"Election Review Court*\" by granting the application's challenge (finding a constitutional violation) to Section 17 of the Election Review Law, thereby stripping the *\"Election Review Court*\" of the central element of the FCC's definition of judicial power: the final and binding effect of its decisions. Section 17 of the Election Review Law provided for the immediate enforcement of the *\"Election Review Court's*\" decisions. The FCC concluded that, pursuant to Article 92 of the Basic Law, *\"a decision with such legal consequences in an election review process may not be reached by a mixed institution like the 'Election Review Court.'\"* The FCC found unconstitutional the *\"Election Review Court's*\" authority to enter a non-reviewable decision, especially where the institution was intended to resolve disputed legal claims. Such expressions of state authority, the FCC emphasized, belong to the province of the Article 92 judiciary.

[13] In striking Section 17 of the Election Review Law the FCC required that the Hessen State Supreme Court, with its constitutionally guaranteed (as an Article 92 judicial institution) neutrality and independence, have the opportunity

to review the decisions of the "Election Review Court." To this end, the FCC reformulated Section 17 of the Election Review Law, making the decisions of the "Election Review Court" enforceable after 30 days and not, as had been the case, immediately.

[14] With a view towards the comparison of the FCC's decision with the U.S. Supreme Court's *Bush v. Gore* decision, it is important to note that in its analysis of the constitutionality of the "Election Review Court," the FCC placed the judicial branch above the legislative branch as the best and final arbiter of the validity of an election. It is also significant that the FCC asserted itself and the Basic Law's federal constitutional standards into a matter of state constitutional law.

### 3) Post-Script to the FCC's Decision

[15] On February 24, 2001, just two weeks after the FCC entered its decision in the abstract judicial review proceedings concerned with the Hessen election review procedures, the Hessen "Election Review Court" entered its judgment in the challenge to the validity of the CDU's 1999 state election victory. Applying the FCC's definition of the *guten Sitten* (good faith/common decency) standard, the "Election Review Court" ruled that the CDU's use of illegal funds, while regrettable, could not be said to have constituted the high degree of coercion or force required. In its judgment, the "Election Review Court" complained that the FCC's decision had severely handicapped the "Election Review Court's" ability and authority to review the challenge to the 1999 election.

### C. Election Review and the State of Democracy

[16] A comparison of the FCC's *Election Review Case* and the U.S. Supreme Court's decision in *Bush v. Gore* is appropriate, if only because the two decisions involve nearly concurrent challenges to the validity of elections in two of the world's most respected and well-established democracies. Do they reveal, more than the pervasiveness and universality of electoral corruption, a subtle shift away from the populist, representative democratic experience they so stridently seek to promote across the world, whether in free Serbian elections that unseat Slobodan Milosovic or independence referendums in East Timor? One possible reading of the two decisions is that, in the place of the direct voice of the people or their elected representatives, the Courts substituted themselves as the final arbiter of democracy.

[17] Both the FCC and the U.S. Supreme Court strongly emphasized that central to their consideration of the cases was the desire to discern, promote and protect the will of the people, especially as it is uniquely (even preeminently) expressed through the act of voting. The FCC, in defining the *guten Sitten* (good faith/common decency) standard, expressed concern that nothing less than the free and equal formation of the will and intent of the voters was at stake. Similarly, the U.S. Supreme Court was confronted, in part, with the task of determining the constitutionality of Florida's standard for reviewing an election, that is, to determine the "intent of the voters." What principle of democracy should be more clear: an election should be an expression of the voters' will. In representative democracies like Germany and the U.S., this principle has two primary forms of expression. First, through the direct act of voting that came under such scrutiny in the two cases. Second, through the acts of the elected representatives who are responsible, through the election process, to express the will of the people.

[18] Both Courts, however, intervened to decide the disputed elections and in so doing thwarted local proceedings designed to keep the review of elections as close as possible to the voters themselves, by placing such reviews in the hands of the people's elected representatives. The Hessen and Florida procedures incorporated elected representatives in the election review process in different ways. In Hessen, the will of the people was to be decided by an "Election Review Court" partially (and primarily) consisting of directly elected members of the state parliament. The FCC went so far as to acknowledge the significant historical justification for such a model. In Florida, directly elected officials, especially including judges from every level of the Florida court system, were charged with the responsibility of deterring the intent of the voters. Nothing could be more purely democratic, short of posing the validity of an election as a question in a popular referendum or ordering a new election, than to entrust such procedures to directly elected officials.

[19] But both courts found it necessary, while extolling the virtues and primacy of the will of the people, to take the election review process (and thereby, the election decision as well) out of the hands of the people's directly elected representatives and officials. To its credit, the FCC openly addressed this glaring contradiction, at least implicitly, in its explication of the importance of the fundamental safeguards secured by the doctrine of separation of powers, including an independent judiciary. The FCC explained that the separation of powers requires that decisions of law having enforceable weight must be taken by neutral and independent judges. It cannot be said, however, that the FCC expressed any reservations with respect to asserting itself (and the judiciary generally) into the election review process, demanding instead that Hessen's State Supreme Court have the final say in election review matters and not the state's "Election Review Court" with its members of parliament as sitting members. The U.S. Supreme Court's

majority opinion in *Bush v. Gore*, on the other hand, avoided the contradiction and brashly pressed ahead with its intervention in the Florida election review process until the opinion's second to the last paragraph in which the majority, almost as a second thought noted:

"None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere."

The majority's silence on the matter only pressed the dissenting writers to highlight the contradiction. As Justice Stevens famously concluded in his dissent:

"Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law."

[20] It is, perhaps, alarming that two cases from two highly respected courts should raise the question whether an imbalance now exists among the separated powers in favor of the judiciary. There can be no dispute that the Hessen state election and the U.S. Presidential election were decided by the courts only after the power to review (and thereby decide) the elections had been taken out of the hands of the people's directly elected representatives and officials. The implication being that the Courts know the will of the people better than the representatives elected to express it. Is that the will of the people.

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*For more information:*

English language version of the Basic Law on-line: [www.uni-wuerzburg.de/law](http://www.uni-wuerzburg.de/law)

FCC Decision online (German): <http://www.bundesverfassungsgericht.de>