

# THE MARCH 3, 2009 DECISION BY THE CONSTITUTIONAL COURT OF GERMANY

## I. RELEVANT BACKGROUND AND SIMILARITIES

### **Two Democratic, Constitutional Republics, With Extraordinarily Similar Constitutions, Socio-Political And Socio-Economic Systems**

Germany is a country in Central Europe. With 81.8 million inhabitants, it is the most populous member state of the European Union. The capital and largest city is Berlin. Germany is a member of the United Nations, NATO, the G8, the G20, and the OECD. It is a major power with the world's fourth largest economy by nominal GDP and the fifth largest by purchasing power parity. It is the second largest exporter and third largest importer of goods. In absolute terms, Germany allocates the third biggest annual development aid budget in the world, while its military expenditure ranked seventh. The country has developed a very high standard of living and a comprehensive system of social security. It holds a key position in European affairs and maintains a multitude of close partnerships on a global level. Germany is recognized as a scientific and technological leader in several fields.

Similar to the United States of America, Germany is a federal republic of (sixteen) states, and is based on representative democracy. The political system of Germany is laid out in a constitution, the *Grundgesetz* (the “Basic Law”), which became effective on May 23, 1949, with the signature of the United States, soon after the December 10, 1948 passage of the Universal Declaration of Human Rights by the United Nations. The German Constitution has remained in effect with minor amendments after 1990's German reunification. A copy of the German Constitution is annexed hereto as Appendix B.

The Chancellor is the head of the executive branch of the government, and federal

legislative power is vested in the *Bundestag* (the parliament of Germany) and the *Bundesrat* (the representative body of the states). The People vote to elect their representatives. Similar to the United States of America, there is a multi-party system in Germany dominated by two parties [the Christian Democratic Union and the Social Democratic Party of Germany].

Similar to the judicial branch of the United States of America, the judiciary of Germany is independent of the executive and the legislature.

Similar to the Constitution for the United States of America, the German Constitution is the Supreme Law of the land, in that it overrides ordinary 'statute law' passed by the legislature.

Similar to the Constitution for the United States of America, the German Constitution emphasizes and guarantees the protection of individual liberty in an extensive catalogue of human rights and also divides powers both between the federal and state levels and between the legislative, executive, and judicial branches.

The *Bundestag* is the lower unicameral house of the parliament of Germany, established by the German Constitution of 1949. Together with the *Bundesrat*, the *Bundestag* is the legislative branch of the German political system.

Article 20 subsection 3 of the German Constitution stipulates that all three branches of the state—legislative, executive and judicial—are bound directly by the Constitution. As a result, the German courts can rule acts of any branch unconstitutional, whether for formal violations (exceeding powers or violating procedures) or for material conflicts (when the civil rights prescribed in the Constitution are not respected).

Similar to the United States, the organization of German courts is traditionally strong, and almost all state actions are subject to judicial review.

Similar to the U.S., Germany has a powerful Constitutional Court in addition to the so-called "ordinary" judicial branch that handles civil and criminal cases in state and federal courts.

The powers of the Federal Constitutional Court are defined in article 93 of the German Constitution. The Constitutional Court has several strictly defined procedures in which cases may be brought before it.

The German Constitution stipulates that any person may file a complaint to the Constitutional Court when his or her constitutional rights, especially human rights, have been violated by the state and when he or she has exhausted all stages of appeal in the regular court system (See Appendix B, German Constitution, Article 93 (1) 4a.). Such actions can include laws passed by the legislative branch, court decisions, or acts of the administration.

Violations of election laws may be brought before the German Constitutional Court by a political institution or any involved voter (referred to as "Federal Election Scrutiny" cases).

## **II. SIMILAR FACTS AND LEGAL ARGUMENTS: STANDING TO SUE IN GERMANY, BUT NOT IN AMERICA?**

### **Key Paragraphical Holdings Of The March 3, 2009 Decision By The Constitutional Court Of Germany, Juxtaposed With The Virtually Identical Facts and Arguments By Plaintiffs in *Schulz and Liggett v. State of New York, et al.*, Case 07-943.**

(paragraphs excerpted from the German decision are in **bold text**)

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Schulz and Liggett have argued that the Help America Voting Act does not ensure compliance with the constitutional principle of the public nature of elections.

**"The Ordinance on the Deployment of Voting Machines in Elections to the German Bundestag and of the Members of the European Parliament from the Federal Republic of Germany ... is not compatible with Article 38 in conjunction with**

**Article 20.1 and 20.2 of the Basic Law insofar as it does not ensure monitoring that complies with the constitutional principle of the public nature of elections.”** German Constitutional Court Decision, Paragraph 1.

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Roughly 4.6 million persons eligible to vote in New York State [36%] cast their votes in the election of 2010 to the 112th Congress via computer-controlled voting machines.

**“Roughly two million persons eligible to vote in Brandenburg, Hesse, North Rhine-Westphalia, Rhineland-Palatinate and Saxony-Anhalt [40%] cast their votes in the elections to the 16th German *Bundestag* via computer-controlled voting machines....”** German Constitutional Court Decision, Paragraph 3.

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Schulz and Liggett have argued, and Discovery has shown, that the electronic voting machines used by Schulz (Dominion) and Liggett (ES&S) in the 2010 elections in Warren and New York Counties in New York State, and to be used in all elections in the future, are controlled via a microprocessor and a software program. The votes cast are stored on an electronic storage medium and are counted electronically by the voting machine at the end of the voting day. After the electronic ascertainment of the results, the results are printed out via a printer that is integrated into the voting machine. The software program which controls the registration of the ballot and the ascertainment of the results is to be found on electronic storage modules. The votes cast at the voting machine – including the linkages (first vote and connected second vote) – are stored on a removable cassette-like storage. The data of the voting slips, the attribution of the individual ballots to the electoral proposals, as well as the date of the election and the polling station, are stored on the vote storage module.

**“These voting machines are controlled via a microprocessor and a software program. The votes cast are exclusively stored on an electronic storage medium and are counted electronically by the voting machine at the end of the election day. After the electronic ascertainment of the results, the voting machine shows the total votes cast for the respective electoral proposals; the results can be printed out via a**

printer that is integrated into the voting machine. The software program which controls the registration of the ballot and the ascertainment of the results is to be found on two electronic storage modules (so-called EPROMs; EPROM = Erasable Programmable Read-Only-Memory) which are installed in the device under a screwed-on cover and are secured by two seals applied by the manufacturer. The votes cast at the voting machine – including the linkages (first vote and connected second vote) – are stored on a removable cassette-like storage medium – the so-called vote storage module, also referred to as “electronic ballot box” (see Schönau, *Elektronische Demokratie*, 2007, p. 53). The data of the voting slips, the attribution of the individual keys to the electoral proposals, as well as the date of the election and the polling station, are also stored on the vote storage module.” German Constitutional Court Decision, Paragraph 4.

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Schulz and Liggett have argued, in effect, that the federal government of the United States and the government of New York State have adopted laws and regulations that are (in error) governing the design, testing and approval of the Dominion and ES&S electronic voting machines used in 2010 elections in New York State and to be used in future elections.

Appendix E attached herewith is a copy of the principal federal law, Public Law 107-252, passed by the 107<sup>th</sup> Congress of the United States on October 29, 2002, titled Help America Vote Act (HAVA), and Chapter 181 of the Laws of New York, which became law on July 12, 2005, titled “Election Reform and Modernization Act of 2005”, and its 2007 amendment is the principal New York State Law. Note: These laws are similar in nature and type to those adopted in Germany (below) that were found by the Constitutional Court of Germany to be governing the deployment of voting systems, in error, because they too fail to ensure voting systems selected for deployment would satisfy the constitutional principle of the public nature of elections.

**“§ 35 of the Federal Electoral Act applied to the elections to the 16th German Bundestag... read as follows:**

**§ 35 Voting with voting machines**

- (1) Voting machines may be used in place of voting slips and ballot boxes to make it easier to cast and count the votes.**
- (2) Voting machines within the meaning of subsection 1 must guarantee that the ballot remains secret. Their type must be authorised for use in elections to the German Bundestag officially for individual elections or generally. The Federal**

Ministry of the Interior shall decide on authorisation on request by the manufacturer of the voting machine. The use of an officially authorised voting machine shall require approval by the Federal Ministry of the Interior. Approval may be issued for individual elections or in general terms.

(3) The Federal Ministry of the Interior is herewith empowered to hand down by means of a legal ordinance which shall not require the consent of the *Bundesrat* more detailed provisions regarding

1. the preconditions for the official approval of the type of voting machine, as well as for the withdrawal and revocation of approval,
  2. the procedure for the official approval of the type,
  3. the procedure for the examination of a voting machine for construction corresponding to the officially approved type,
  4. the public testing of a voting machine prior to its use,
  5. the procedure for the official authorisation of the use, as well as for the withdrawal and revocation of the authorisation,
  6. the particularities related to the elections caused by the use of voting machines.
- German Constitutional Court Decision, Paragraphs 15-28.

“The provisions of the Federal Voting Machine Ordinance of 3 September 1975 (Federal Law Gazette I p. 2459), which were most recently amended by ordinance of 20 April 1999 (Federal Law Gazette I p. 749), relevant to the proceedings at hand, relate to the approval of voting machines and their deployment in elections. The voting machines require a type approval and a use authorisation (see § 1 of the Federal Voting Machine Ordinance). According to § 2.2 sentence 1 of the Federal Voting Machine Ordinance, the type approval may be granted if the voting machine corresponds to the Guidelines for the Construction of Voting Machines (*Richtlinien für die Bauart von Wahlgeräten*) according to Annex 1 to the Federal Voting Machine Ordinance. These guidelines regulate in particular the technical requirements to be made on the voting machines, and contain detailed stipulations for the identification, technical structure and functioning of the voting machines. Statements are made in this context on the portrayal of the electoral proposals, on operation and operability, on the ballot, on the storage of votes and on the creation of backups. The examination of the compliance of the voting machine with the above guidelines is a matter for the *Physikalisch-Technische Bundesanstalt*.” German Constitutional Court Decision, Paragraph 29.

“The use of approved-type voting machines requires authorisation prior to each election (§ 4.1 sentence 1 of the Federal Voting Machine Ordinance). Only those voting machines may be used which, once the election date has been set, have been examined by the manufacturer or the local authority using the operating manuals and maintenance regulations and with regard to which it has been ascertained that they are functional (§ 7.1 sentence 1 of the Federal Voting Machine Ordinance). In the constituencies in which voting machines are used, the local authority is to familiarise the head of the returning committee and his or her deputies with the voting machines prior to the elections and to familiarise them with their operation (§ 7.3 of the Federal Voting Machine Ordinance). Prior to the commencement of the election act, the local authority assigns the devices to the head of the returning committee with the necessary operating manuals and the declaration of the manufacturer according to § 2.6 of the Federal Voting Machine Ordinance that the device is constructed identically to the tested, approved type sample (see § 8 of the

**Federal Voting Machine Ordinance). Prior to the commencement of the ballot, the returning committee must ascertain amongst other things that the counting and storage devices are set to zero or have been erased (§ 10.1 no. 3 of the Federal Voting Machine Ordinance) and must close the voting machine needed (§ 10.2 of the Federal Voting Machine Ordinance). Prior to reading the displays of the votes counted by a voting machine, the number of the ballot records in the voter list is to be added to the number of election slips taken in and compared with the number of votes displayed (§ 13 of the Federal Voting Machine Ordinance). Deviations are to be noted and explained in the election record (§ 13 sentence 3 of the Federal Voting Machine Ordinance). If the total of the counter results displayed does not tally with the number of the total votes cast as displayed, the returning committee must show the difference and note it in the election record (§ 14.5 of the Federal Voting Machine Ordinance). The head of the returning committee, the local authority and the district returning officer must ensure on completing the tasks of the returning committee and returning the voting machines that the voting machines used or the vote storage devices removed from them and the election record with the Annexes are not made available to unauthorised parties until the *Land* (state) returning officer has revoked the blocking and sealing of the voting machines and of the vote storage devices (see § 16.2 and § 17.3 of the Federal Voting Machine Ordinance).” German Constitutional Court Decision, Paragraph 30.**

**“The Federal Ministry of the Interior issued type approvals for the voting machines used in the elections to the 16th German *Bundestag*. On 15 August 2005, it announced the authorisation of the use of computer-controlled voting machines made by Nedap in the elections to the 16th German *Bundestag* with details on hardware versions, storage module types and software versions (Federal Gazette (*Bundesanzeiger*) no. 158 of 23 August 2005, pp. 12747-12748). Invoking company secrets of Nedap, the Ministry however refused to make available to the interested public documents which Nedap had provided to the *Physikalisch-Technische Bundesanstalt* for the examination of the samples, or test reports of the *Physikalisch-Technische Bundesanstalt*.” German Constitutional Court Decision, Paragraph 31.**

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In New York State, the counties of Warren and New York made the decision to acquire and use the Dominion and ES&S machines respectively. In addition to the federal mandates in HAVA, including Section 301.(a)(3)(A) of HAVA (“The voting system shall be accessible for individuals with disabilities....”), the Commissioners, commercial vendors and the County Election officials have stated as reasons for the acquisition and deployment of the (constitutionally repugnant) electronic voting machines: more rapid calculation of the results, estimated cost savings, the virtual impossibility of inadvertently casting invalid votes, virtual

impossibility of unintended errors in counting, easier recruitment of election assistants because less time is needed to ascertain the election result and easier management of complex ballots.

**“The decision as to whether voting machines are acquired, and in which constituencies they are used, is a matter for the towns and local authorities. As a reason for the acquisition and the deployment of voting machines, in addition to the more rapid calculation of the election result and to the anticipated cost savings, it is stated that it is virtually impossible to inadvertently cast invalid votes; cases of doubt as to the validity of individual votes because of ambiguous markings on the voting slip and unintended errors in counting the votes are said to be virtually ruled out (see Schreiber, *Handbuch des Wahlrechts zum Deutschen Bundestag*, 7th ed. 2002, § 35, marginal no. 2). The recruitment of voluntary election assistants is also said to be made much easier because less time is needed to ascertain the election result (see Schönau, *Elektronische Demokratie*, 2007, p. 50). These advantages are said to be evident in particular in local elections, which in many *Länder* (states) were said to have been made more complex because of possibilities of cumulative voting and voting for candidates from different party lists.”** German Constitutional Court Decision, Paragraph 32.

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Schulz and Liggett’s principal argument right along has been that the mechanical lever and electronic voting systems violate the public nature of elections in our democratic, constitutional Republic by counting votes in secret, and requiring Plaintiffs to have a special expert knowledge to even KNOW how their votes are counted, to say nothing of the valid security questions surrounding such voting systems. Schulz and Liggett have argued that to be consistent with the constitutional principle of the public nature of elections, ALL essential steps in the voting process must be subject to public examination; it must be possible for the Schulz and Liggett to check the essential steps in the election act and in the ascertainment of the results, reliably and without special expert knowledge (unless other constitutional interests justify an exception, and there are none). While it can be argued that HAVA facilitated the deployment of unconstitutional computer-controlled voting machines in New York State, HAVA, itself, is not unconstitutional as written. The Voting System consisting of paper ballots, hand marked and



hand counted (with a ballot marking system available and accessible for individuals with disabilities), as called for by Plaintiffs in their complaint, is fully compliant with HAVA.

**“With their complaints requesting the scrutiny of an election, both complainants target the Federal Electoral Act and the Federal Voting Machine Ordinance insofar as they facilitate the deployment of computer-controlled voting machines...The deployment of computer-controlled voting machines was said to have violated the principle of the public nature of elections and the principle of the official nature of elections....”** German Constitutional Court Decision, Paragraphs 33, 34.

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Schulz and Liggett’s complaint arose from HAVA and the NY State Election Reform and Modernization Act “allowing” the use of voting machines without ensuring effective monitoring of the election act (the recording and counting of the vote) and effective subsequent monitoring of the ascertainment of the result, in violation of the principle of the public nature of elections under Article I, Sections 2 and 4, and under the Seventeenth Amendment of the Constitution for the United States of America. In addition to that argument, there is a second mutually exclusive argument being made by Schulz and Liggett; the continued use of the specific lever and computer-controlled voting machines (Dominion and ES&S) in Warren and New York counties is not compatible with the principle of the public nature of elections.

**“The complaints requesting the scrutiny of an election are well-founded insofar as they complain about the Federal Voting Machines Ordinance permitting the use of computer-controlled voting machines without ensuring effective monitoring of the election act and effective subsequent monitoring of the ascertainment of the result. In this respect, there is a violation of the principle of the public nature of elections under Article 38 of the Basic Law in conjunction with Article 20.1 and 20.2 of the Basic Law. The use of Nedap’s computer-controlled voting machines was also not compatible with the principle of the public nature of elections.”** German Constitutional Court Decision, Paragraph 92.

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As Schulz and Liggett have argued, this case against the Commissioners is not principally about the construction characteristics of mechanical and electronic vote counting systems in general, or of the machines in use or scheduled to be used in Warren and New York County, and this case is not principally about the adequacy of the government's official monitoring of those machines, or the public nature of the testing and certification of the machines, or whether the source code of the electronic voting machines has been made available to the public.

**“It can remain open whether the constructive characteristics of the voting machines, and hence also the type approvals and the use authorisation, were compatible with the requirements contained in the Federal Voting Machine Ordinance, and in particular in the Guidelines for the Construction of Voting Machines, and with the principles of electoral law under Article 38.1 sentence 1 of the Basic Law. The same applies as to the complaints that the voting machines used had not been subject to adequate official monitoring, that the examination of the samples by the *Physikalisch-Technische Bundesanstalt* and that the type approval procedure had not taken place in public, as well as that the examination reports and documents of the *Physikalisch-Technische Bundesanstalt*, and the source code of the voting machine software, had not been made available to the public.”** German Constitutional Court Decision, Paragraph 93

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In the context of a complaint claiming violations of voting rights, this U.S. District Court, as an Article III Court, has to determine compliance with the Constitution by the Commissioners as the competent election officials in New York State.

**“In the context of a complaint requesting the scrutiny of an election according to § 13 no. 3 and § 48 of the Federal Constitutional Court Act, the Federal Constitutional Court has not only to guarantee compliance by the competent election bodies and the German *Bundestag* with the provisions of federal election law, but also to review whether the provisions of the Federal Electoral Act comply with the requirements of the constitution (see BVerfGE 16, 130 (135-136); BVerfG, judgment of the Second Senate of 3 July 2008 – 2 BvC 1/07, 7/07 –, *Neue Zeitschrift für Verwaltungsrecht* 2008, p. 991 (992)). This examination also covers the validity of legal ordinances.”** German Constitutional Court Decision, Paragraph 105.

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The deployment of the Dominion, ES&S and any other computer-controlled voting machine is to be reviewed by this Article III Court against the standard of the public nature of elections (Article I, Section 2 and 3 and the Seventeenth Amendment of the Constitution for the United States of America).

**“The deployment of computer-controlled voting machines is in particular to be reviewed against the standard of the public nature of elections (Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law).”** German Constitutional Court Decision, Paragraph 106.

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Schulz and Liggett have argued that the public nature of elections is a fundamental precondition for democratic political will-formation. It ensures the correctness and verifiability of the election events, and hence creates a major precondition for the well-founded trust of the citizen in the correct operation of the elections. The state form of congressional democracy, in which the rule of the people is mediated by elections, in other words is not directly exercised, demands that the act of transferring state responsibility to congressmen and Presidents is subject to special public monitoring. The fundamentally required public nature of the election procedure covers the electoral proposal (primaries and ballot preparation) procedure, the election act (broken regarding the ballot by the secret nature of elections) and the ascertainment of the election result.

The basis for public elections is formed by the fundamental constitutional options for democracy, the republic and the rule of law (Article I, Sections 2 and 4 and the Seventeenth Amendment to the Constitution for the United States of America).

In a representative democracy, the elections of the people’s representation constitute the fundamental act of legitimization. The ballot in the elections to the United States Congress and

the President forms the major element of the process of will-forming from the people to the State bodies, and hence at the same time constitutes the basis for political integration. Compliance with the election principles applicable to this, and confidence in compliance with them, therefore, constitute preconditions for a viable democracy. Only by the possibility of monitoring whether the elections comply with the constitutional election principles is it possible to ensure that the delegation of State power to the people's representatives (which forms the first and most important part of the uninterrupted legitimization chain of the people to the bodies and office-holders entrusted with State tasks), does not suffer from a shortcoming. The democratic legitimacy of the elections demands that the election events be controllable so that manipulation can be ruled out or corrected and unjustified suspicion can be refuted. This is the only way to facilitate the well-founded trust of the sovereign in the correct formation of the representative body. The obligation incumbent on the legislature and on the executive to ensure that the election procedure is designed constitutionally and is implemented properly is not sufficient by itself to impart the necessary legitimacy. Only if the electorate can reliably convince itself of the lawfulness of the transfer act, if the elections are therefore implemented "before the eyes of the public" is it possible to guarantee the trust of the sovereign in Congress and the Presidency being composed in a manner corresponding to the will of the voters, necessary for the functioning of democracy and the democratic legitimacy of state decisions.

In a Republic, elections are a matter for the entire people and a joint concern of all citizens. Consequently, the monitoring of the election procedure must also be a matter for and a task of the citizen. Each citizen must be able to comprehend and verify the central steps in the elections reliably and without any special prior technical knowledge.

The public nature of the elections is also anchored in the principle of the rule of law. The public nature of the State's exercise of power, which is based on the rule of law, serves its transparency and controllability. It is contingent on the citizen being able to perceive acts of the State bodies. This also applies as to the activities of the election bodies.

The principle of the public nature of elections requires that all essential steps in the elections are subject to public examination unless other constitutional interests justify an exception. Particular significance attaches here to the monitoring of the counts, the voting act at the polling place and the tabulation or ascertainment of the election result.

An election procedure in which the voter cannot reliably comprehend whether his or her vote is accurately recorded and included in the ascertainment of the election result, and how the total votes cast are assigned and counted, excludes central elements of the election procedure from public monitoring, and hence does not comply with the constitutional requirements of Article I, Sections 2 and 4 and the Seventeenth Amendment.

Finally, the requirements as to the fully transparent examination of election events by the citizen-voter, apply to the implementation of Congressional and Presidential elections regardless of the responsibility of the state bodies which have a constitutional structure.

**“The public nature of elections is a fundamental precondition for democratic political will-formation. It ensures the correctness and verifiability of the election events, and hence creates a major precondition for the well-founded trust of the citizen in the correct operation of the elections. The state form of parliamentary democracy, in which the rule of the people is mediated by elections, in other words is not directly exercised, demands that the act of transferring state responsibility to parliamentarians is subject to special public monitoring. The fundamentally required public nature of the election procedure covers the electoral proposal procedure, the election act (broken regarding the ballot by the secret nature of elections) and the ascertainment of the election result (see BVerfG, judgment of the Second Senate of 3 July 2008 – 2 BvC 1/07, 7/07 –, *Neue Zeitschrift für Verwaltungsrecht* 2008, p. 991 (992) with further references).”** German Constitutional Court Decision, Paragraph 107.

**“a) The basis for public elections is formed by the fundamental constitutional options for democracy, the republic and the rule of law (Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law). German Constitutional Court Decision, Paragraph 108**

**“aa) In a representative democracy, the elections of the people’s representation constitute the fundamental act of legitimisation. The ballot in the elections to the German *Bundestag* forms the major element of the process of will-forming from the people to the state bodies, and hence at the same time constitutes the basis for political integration. Compliance with the election principles applicable to this, and confidence in compliance with them, hence constitute preconditions for a viable democracy. Only by the possibility of monitoring whether the elections comply with the constitutional election principles is it possible to ensure that the delegation of state power to the people’s representation, which forms the first and most important part of the uninterrupted legitimisation chain of the people to the bodies and office-holders entrusted with state tasks, does not suffer from a shortcoming. The democratic legitimacy of the elections demands that the election events be controllable so that manipulation can be ruled out or corrected and unjustified suspicion can be refuted. This is the only way to facilitate the well-founded trust of the sovereign in the correct formation of the representative body. The obligation incumbent on the legislature and on the executive to ensure that the election procedure is designed constitutionally and is implemented properly is not sufficient by itself to impart the necessary legitimacy. Only if the electorate can reliably convince itself of the lawfulness of the transfer act, if the elections are therefore implemented “before the eyes of the public” (see Schreiber, *Handbuch des Wahlrechts zum Deutschen Bundestag*, 7th ed. 2002, § 31 marginal no. 2) is it possible to guarantee the trust of the sovereign in Parliament being composed in a manner corresponding to the will of the voters that is necessary for the functioning of democracy and the democratic legitimacy of state decisions (see North Rhine/Westphalia Constitutional Court (*Verfassungsgerichtshof Nordrhein-Westfalen* – NRW VerfGH), judgment of 19 March 1991 – VerfGH 10/90 –, *Neue Zeitschrift für Verwaltungsrecht* 1991, p. 1175 (1179); Hanßmann, *Möglichkeiten und Grenzen von Internetwahlen*, 2004, p. 184). Para. 109**

**“bb) In a republic, elections are a matter for the entire people and a joint concern of all citizens. Consequently, the monitoring of the election procedure must also be a matter for and a task of the citizen. Each citizen must be able to comprehend and verify the central steps in the elections reliably and without any special prior technical knowledge. German Constitutional Court Decision, Paragraph 110.**

**“cc) The public nature of the elections is also anchored in the principle of the rule of law. The public nature of the state’s exercise of power, which is based on the rule of law, serves its transparency and controllability. It is contingent on the citizen being able to perceive acts of the state bodies. This also applies as to the activities of the election bodies. German Constitutional Court Decision, Paragraph 111.**

**b) The principle of the public nature of elections requires that all essential steps in the elections are subject to public examinability unless other constitutional interests justify an exception. Particular significance attaches here to the monitoring of the**

**election act and to the ascertainment of the election result.** German Constitutional Court Decision, Paragraph 112.

**An election procedure in which the voter cannot reliably comprehend whether his or her vote is unfalsifiably recorded and included in the ascertainment of the election result, and how the total votes cast are assigned and counted, excludes central elements of the election procedure from public monitoring, and hence does not comply with the constitutional requirements.** German Constitutional Court Decision, Paragraph 113.

c) **Despite the considerable value attaching to the constitutional principle of the public nature of elections, it does not ensue from this principle that all acts in connection with the ascertainment of the election result must take place with the involvement of the public so that a well-founded trust in the correctness of the elections can be created. For instance, activities of the district returning officer with which according to § 76.1 of the Federal Electoral Code the – public – ascertainment of the election result is prepared by the district election committee are not constitutionally obliged to be subject to the principle of the direct public nature of elections (see BVerfG, judgment of the Second Senate of 3 July 2008 – 2 BvC 1/07, 7/07 –, *Neue Zeitschrift für Verwaltungsrecht* 2008, p. 991 (992)).**

d) **The requirements as to the examinability of the election events apply to the implementation of parliamentary elections regardless of the responsibility of the state bodies which have a constitutional structure (see BVerfGE 20, 56 (113); 41, 399 (414); Seifert, *Bundeswahlrecht*, 3rd ed. 1976, p. 130)."** German Constitutional Court Decision, Paragraph 115.

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As Schulz and Liggett have argued, Article I, Sections 2 and 4 and the Seventeenth Amendment of the Constitution empowers and obliges Congress and the NY legislature to determine the details of the structure of election law (in particular the voting system and procedure) and compliance with the principles of election law. The design of the technical aspects of the election events also falls within the regulatory mandate under the Constitution, including the decision on deployment of voting machines and the determination of the more detailed preconditions for their deployment.

**“It is primarily a matter for the legislature to regulate how the retraceability of the essential steps in the election procedure is ensured. Article 38.3 of the Basic Law empowers and obliges the legislature to determine the details of the structure of electoral law (in particular the election system and the election procedure) and**

compliance with the principles of electoral law (see Magiera, in: Sachs, *GG*, 5th ed. 2009, *Art. 38*, marginal nos. 106 et seq. and 113 et seq.). The design of the technical aspects of the election events also falls within the regulatory mandate under Article 38.3 of the Basic Law (see Morlok, in: Dreier, *GG*, Vol. 2, 2nd ed. 2006, *Art. 38*, marginal no. 127), and hence the decision on deployment of voting machines and the determination of the more detailed preconditions for their deployment. Details may be regulated by means of a legal ordinance on the basis of a statutory authorisation (see Magiera, in: Sachs, *GG*, 5th ed. 2009, *Art. 38*, marginal no. 114).”

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Schulz and Liggett have argued, in effect, that while Congress and the State Legislature are entitled to broad latitude when lending concrete shape to the principles of election law within which they must decide whether and to what degree deviations from individual principles of election law are justified in the interest of the uniformity of the entire election system and to ensure the state policy goals which they pursue, the Court checks whether the federal and state legislatures have remained within the boundaries of the latitude granted to them by the Constitution, or whether they have violated a valid constitutional election principle by overstepping these boundaries. It is not a matter for the Court to determine whether or not the Congress or the State Legislature have found solutions which are expedient or desired in terms of legal policy within the latitude to which they are entitled.

**“The legislature is entitled to broad latitude when lending concrete shape to the principles of electoral law within which it must decide whether and to what degree deviations from individual principles of electoral law are justified in the interest of the uniformity of the entire election system and to ensure the state policy goals which they pursue (see BVerfGE 3, 19 (24-25); 59, 119 (124); 95, 335 (349)). The Federal Constitutional Court only reviews whether the legislature has remained within the boundaries of the latitude granted to it by the Basic Law, or whether it has violated a valid constitutional election principle by overstepping these boundaries. It is not a matter for the Court to find whether the legislature has found solutions which are expedient or desired in terms of legal policy within the latitude to which it is entitled (see BVerfGE 59, 119 (125)).”** German Constitutional Court Decision, Paragraph 117.

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Schulz and Liggett's principle argument has been that when voting, it must be possible to check the integrity of the essential steps in the election act and in the ascertainment of the results reliably and without special expert knowledge.

**“When electronic voting machines are deployed, it must be possible to check the essential steps in the election act and in the ascertainment of the results reliably and without special expert knowledge.”** German Constitutional Court Decision, Paragraph 119.

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The necessity of such monitoring emerges principally from the public nature of elections, but also in part from the susceptibility to manipulation of electronic voting machines and their amenability to error. In these, the acceptance of the voters' votes and the calculation of the election result is based on a calculation act which cannot be examined from outside or by persons without special computer knowledge. For instance, errors in the voting machine software are hence difficult to recognize. Over and above this, such errors can affect not only one individual election computer, but all the devices used. While manipulations or election falsifications are virtually impossible in classical elections with voting slips under the conditions of the valid provisions, including the provisions on the public nature of elections – or at least are only possible with considerable effort and with a very high risk of discovery which has a preventive impact – a major impact may in principle be achieved with relatively little effort by encroachments on electronically controlled voting machines. Manipulations of individual voting machines can already influence not only individual voters' votes, but all votes cast with the aid of this device. The scope of the election errors which are caused by accidental alteration, criminal tampering and malfunctions of a single software program affecting multiple devices is even wider. The major scope of the effect of possible errors in the voting machines or targeted

election falsifications requires special precautions to be taken in order to comply with the principle of the public nature of elections.

The voter himself or herself must be able to verify – also without a more detailed knowledge of computers – whether his or her vote as cast is recorded truthfully as a basis for counting or – if the votes are initially counted with technical support – at least as a basis for an automatic, full, mandatory, publicly funded, manual re-count, before any ballots are removed from public view. It is not sufficient if he or she must rely on the hidden functionality of the system without the possibility of personal inspection. It is hence inadequate if he or she is initially informed by an electronic display or computer generated “receipt” that his or her ballot has been accurately registered. This does not facilitate sufficient monitoring by the voter.

**“The necessity of such monitoring emerges not lastly from the susceptibility to manipulation of electronic voting machines and their amenability to error. In these, the acceptance of the voters’ votes and the calculation of the election result is based on a calculation act which cannot be examined from outside or by persons without special computer knowledge. Errors in the voting machine software are hence difficult to recognise. Over and above this, such errors can affect not only one individual election computer, but all the devices used. Whilst manipulations or election falsifications are virtually impossible in classical elections with voting slips under the conditions of the valid provisions, including the provisions on the public nature of elections – or at least are only possible with considerable effort and with a very high risk of discovery which has a preventive impact – a major impact may in principle be achieved with relatively little effort by encroachments on electronically controlled voting machines. Manipulations of individual voting machines can already influence not only individual voters’ votes, but all votes cast with the aid of this device. The scope of the election errors which are caused by alterations and malfunctions of a single software program affecting multiple devices is even wider. The major scope of the effect of possible errors in the voting machines or targeted election falsifications requires special precautions to be taken in order to comply with the principle of the public nature of elections.”** German Constitutional Court Decision, Paragraph 120.

**aa) The voter himself or herself must be able to verify – also without a more detailed knowledge of computers – whether his or her vote as cast is recorded truthfully as a basis for counting or – if the votes are initially counted with technical support – at least as a basis for a subsequent re-count. It is not sufficient if he or she must rely on the functionality of the system without the possibility of personal inspection. It is hence inadequate if he or she is exclusively informed by an electronic display that**

**his or her ballot has been registered. This does not facilitate sufficient monitoring by the voter. Equal viability must also apply to the election bodies and to interested citizens.”** German Constitutional Court Decision, Paragraph 121.

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Whether there are technical possibilities which create trust on the part of the electorate in the correctness of the proceedings in ascertaining the election result based on verifiability, and which, therefore, comply with the principle of the public nature of elections, need not be decided here.

**“Whether there are technical possibilities which create trust on the part of the electorate in the correctness of the proceedings in ascertaining the election result based on verifiability, and which hence comply with the principle of the public nature of elections, need not be decided here.”** German Constitutional Court Decision, Paragraph 124.

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Restrictions on possibilities for Schulz and Liggett to monitor the election events cannot be compensated for by sample machines and devices prior to their deployment being subjected to certification and verification testing by an official institution as to their compliance with certain security requirements and their proper technical performance.

**“Restrictions on possibilities for citizens to monitor the election events cannot be compensated for by sample devices in the context of the type approval procedure or in the selection of the voting machines specifically used in the elections prior to their deployment being subjected to verification by an official institution as to their compliance with certain security requirements and their proper technical performance. The monitoring of the essential steps in the election promotes well-founded trust in the correctness of the election certainly in the necessary manner that the citizen himself or herself can reliably verify the election event.”** German Constitutional Court Decision, Paragraph 125.

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For this reason, a comprehensive set of other technical and organizational security measures (e.g. monitoring and safekeeping of the voting machines, comparability of the devices used with an officially checked sample at any time, criminal liability in respect of election falsifications and locally organized elections) is also not suited by itself to compensate for a lack of monitoring and controllability of the essential steps in the election procedure by the citizen.

**“For this reason, a comprehensive bundle of other technical and organisational security measures (e.g. monitoring and safekeeping of the voting machines, comparability of the devices used with an officially checked sample at any time, criminal liability in respect of election falsifications and local organisation of the elections) is also not suited by itself to compensate for a lack of controllability of the essential steps in the election procedure by the citizen.”** German Constitutional Court Decision, Paragraph 126.

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Accordingly, neither participation by the interested public in procedures of the examination or approval of voting machines, nor a publication of examination reports or construction characteristics (including the source code of the software with computer-controlled voting machines) makes a major contribution towards ensuring the constitutionally required level of controllability and verifiability of the election events. Technical examinations and official approval procedures, which in any case can only be expertly evaluated by interested specialists or technicians, relate to a stage in the proceedings which is far in advance of the ballot. The participation of the public in order to achieve the required reliable monitoring of the election events is, therefore, likely to require other additional precautions.

**“Accordingly, neither participation by the interested public in procedures of the examination or approval of voting machines, nor a publication of examination reports or construction characteristics (including the source code of the software with computer-controlled voting machines) makes a major contribution towards ensuring the constitutionally required level of controllability and verifiability of the election events. Technical examinations and official approval procedures, which in any case can only be expertly evaluated by interested specialists, relate to a stage in**

**the proceedings which is far in advance of the ballot. The participation of the public in order to achieve the required reliable monitoring of the election events is hence likely to require other additional precautions.”** German Constitutional Court Decision, Paragraph 127.

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When deploying computer-controlled voting machines, no contrary constitutional principles are recognizable which are able to justify a broad restriction of the public nature of elections and hence the controllability of the election act and the ascertainment of the results.

**“The legislature can permit exceptions to the principle of the public nature of elections to a restricted degree in order to bring other constitutional interests to fruition, in particular the written principles of electoral law from Article 38.1 sentence 1 of the Basic Law. For instance, restrictions of public monitoring of the ballot with postal voting (§ 36 of the Federal Electoral Act) can be justified with the aim of achieving as comprehensive participation in the elections as possible, thereby complying with the principle of generality of elections (see BVerfGE 21, 200 (205); 59, 119 (125)). When deploying computer-controlled voting machines, however, no contrary constitutional principles are recognisable which are able to justify a broad restriction of the public nature of elections and hence the controllability of the election act and the ascertainment of the results.”** German Constitutional Court Decision, Paragraph 128.

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Where the deployment of computer-controlled voting machines aims to rule out inadvertent incorrect markings on voting slips, unwanted invalid ballots, unintentional counting errors or incorrect interpretations of the voters’ intention when votes are counted, does not justify by itself abandoning the principle of the public nature of elections and the requirement that Schulz and Ligget be able to know, reliably, that their votes are being accurately counted.

**“Where the deployment of computer-controlled voting machines aims to rule out inadvertent incorrect markings on voting slips, unwanted invalid ballots, unintentional counting errors or incorrect interpretations of the voters’ intention when votes are counted (see Schreiber, *Handbuch des Wahlrechts zum Deutschen Bundestag*, 7th ed. 2002, § 35, marginal no. 2) which repeatedly occur in classical elections with voting slips, this serves the interest of the implementation of the**

equality of elections under Article 38.1 sentence 1 of the Basic Law. What weight attaches to this purpose can however be left open. It certainly does not justify by itself forgoing any type of verifiability of the election act. Unintentional counting errors or incorrect interpretations of the voters' intention can also be ruled out by voting machines if supplementary monitoring by the voter, the election bodies or the public is made possible in addition to electronic recording and counting of the votes. Corresponding monitoring is for instance possible with electronic voting machines which record the votes not only in electronic form in the voting machine, but at the same time in a form which is independent of this (see II. 3. a) bb above). Apart from this, user errors – such as pushing the “invalid” key presuming that this made it possible to correct an erroneous entry – cannot be ruled out in the voting machines approved for the elections to the 16th German *Bundestag*.” German Constitutional Court Decision, Paragraph. 129.

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There is no “conflict of interest” between the principle of secret elections and the principle of the public nature of elections which might justify a broad restriction of the principle of counting one’s vote in public and tabulating all votes in public..

“The principle of the secrecy of elections certainly does not constitute a counter constitutional principle which can be used as a basis for a broad restriction of the controllability of the election act and of the ascertainment of the results. There is no “conflict of interest” between the principle of secret elections and the principle of the public nature of elections which might justify such restrictions (*Bundestag* document 16/3600, Annex 1, p. 20).” German Constitutional Court Decision, Paragraph 130.

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The impact of the principle of the private vote is not to restrict the principle of public counts. It does not justify a restriction of public monitoring in the casting of the – previously secretly marked – vote carrier or in the ascertainment of the results. This follows from the fact that the principle of the private vote does not oppose additional precautions enabling the voter to monitor whether his or her vote is recorded in an unfalsified manner as a basis for any subsequent re-count.

“The principle of secret elections guarantees that the voter alone is aware of the content of his or her election decision, and obliges the legislature to take the necessary steps to protect the election secret (see H.H. Klein, in: Maunz/Dürig, *GG*, Art. 38, marginal no. 110 [March 2007]; Pieroth, *Juristische Schulung – JuS* 1991, p. 89 (91)). The secrecy of elections constitutes the most important institutional protection of the freedom of elections (see BVerfGE 99, 1 (13)). In historic terms, secret elections may have been a caesura in the public nature of the election procedure because they renounced the open ballot in order to protect the freedom of election (see Breidenbach/Blankenagel, *Rechtliche Probleme von Internetwahlen*, Berlin 2000, pp. 34-35). Under the regime of the Basic Law, which explicitly prescribes elections as secret in order to protect their freedom, however, the principle of the public nature of elections from the outset does not apply to the act of the ballot. If the public nature of the elections is not ruled out in order to enable the ballot to be cast unobserved, the election procedure is subject to the principle of the public nature of elections (see H.H. Klein, in: Maunz/Dürig, *GG*, Art. 38, marginal no. 113 [March 2007]; Seifert, *Bundeswahlrecht*, 3rd ed. 1976, Art. 38, marginal no. 35). Accordingly, the impact of the principle of secrecy of elections is not to restrict the principle of the public nature of elections for the ballot act. It also does not justify a restriction of public monitoring in the casting of the – previously secretly marked – vote carrier or in the ascertainment of the results. This already follows from the fact that it does not oppose additional precautions enabling the voter to monitor whether his or her vote is recorded in an unfalsified manner as a basis for a subsequent re-count.” German Constitutional Court Decision, Paragraph 131.

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Schulz and Liggett have argued that there is no constitutional requirement for the election result to be available shortly after closing the polling stations, and as federal elections in New Hampshire and across Canada have proven, the preliminary official final result of the elections can as a rule be submitted in a matter of hours, without the deployment of voting machines. The interest in rapidly clarifying the composition of the Congress or the Presidency is not a constitutional interest that justifies the imposition of restrictions on the public nature of the election event.

“Finally, the goal of being able to form a viable people’s representation in a short period does not constitute a restriction of the principle of the public nature of elections in the deployment of computer-controlled voting machines. The clarification of the correct composition of the people’s representation within a suitable period is one aspect which can be taken into account when shaping the election procedure and the election scrutiny procedure (see BVerfGE 85, 148 (159)). The matter of the assembly of a new *Bundestag* in good time (see Article 39.2 of the

Basic Law) is however not endangered by sufficient precautions being taken to ensure public elections. There is no constitutional requirement for the election result to be available shortly after closing the polling stations. What is more, the past *Bundestag* elections have shown that the preliminary official final result of the elections can as a rule be submitted in a matter of hours, even without the deployment of voting machines. The interest in rapidly clarifying the composition of the German *Bundestag* is therefore not a constitutional interest that is suited to impose restrictions on the public nature of the election event.” German Constitutional Court Decision, Paragraph 132.